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

----------X

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

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Following a controversial and highly publicized trial in 1990, then-teenager Martin Tankleff was convicted of murdering his parents, Seymour and Arlene Tankleff. As a result, for the past thirteen years, Martin has been incarcerated in a New York state correctional facility. But Martin Tankleff did not kill his parents. He is an innocent man serving a sentence for crimes he did not commit. Since the moment of his convictions, Martin has been relentless in pursuing any and all means of proving his actual innocence of these horrible crimes. He is now able to do so.

Accompanying this memorandum are new evidentiary materials which quite plainly establish that two other young men actually murdered Martin's parents while Martin – as he testified at trial – was sound asleep in his bed. This new evidence includes a statement by one of the murderers (Joseph Creedon) to a third-party witness (Karlene Kovacs) directly indicating his complicity in these crimes. See Exhibit 1 (Affidavit of Karlene Kovacs). Creedon told Ms. Kovacs that he and another individual "hid[] in the bushes on the Tankleff property the night of

the murders," and that afterward "they were full of blood and had to get rid of their clothes." Exhibit 1. Creedon also told Ms. Kovacs "how they had to make a quick dash to avoid being caught" that night, and how subsequently "he was afraid about being caught and therefore had to get out of town." Id.

The new evidence also includes corroboration of Creedon's incriminating statement by the statements of another third-party witness (Glenn Harris), who was the unwitting getaway car driver for Creedon and his accomplice from the Tankleff home on the night of the murders. See Exhibit 2 (Glenn Harris). Harris says that he drove another individual "and Creedon to the Tankleff residence the night [the Tankleffs] were killed." Exhibit 2. The two passengers then went around the Tankleffs' home into the backyard. See id. "Approximately, fifteen to twenty minutes later, the two men returned to the car," one of them carrying gloves, and Harris drove them away. Id. At dawn the next morning, Harris observed the other individual who had been with Creedon "burning [the] pair of blue jeans and black hooded sweatshirt" he had on the night before. Id.

Because of the obvious importance of the foregoing statements, we asked Ms. Kovacs and Mr. Harris if they would be willing to submit to polygraph examinations concerning their statements. They each agreed to do so, and were accordingly independently examined. The truthfulness of each of these witnesses' statements was verified by their polygraph examinations. See Exhibit 1 (Polygraph Report for Karlene Kovacs); Exhibit 2 (Polygraph Report For Glenn Harris).[1]

[1] These polygraph examinations were conducted by one of the leading authorities in the field, Joel M. Reicherter. Mr. Reicherter is Professor Emeritus at SUNY Farmingdale in Human Anatomy, Physiology and Polygraph, and for the past seven years he has been an adjunct faculty member at the United States Department of Defense Polygraph Institute. Professor Reicherter is a certified polygraph examiner, a member of the American Polygraph Association and the Human Anatomy and Physiology Society. A complete copy of Professor Reicherter's Curriculum Vitae is Exhibit 4 to this memorandum.

Even beyond scientific verification by polygraph, however, the two sets of statements by Ms. Kovacs and Mr. Harris – made by independent witnesses at different points in time – also verify and corroborate each other by virtue of their interlocking factual detail. For example, Ms. Kovacs quotes Creedon as saying that he and his accomplice hid in the bushes at the Tankleff home that night, while Mr. Harris reports observing Creedon and his accomplice go into the backyard at the Tankleff home. Similarly, Ms. Kovacs quotes Creedon as saying that they were full of blood and had to get rid of their clothes after the murders, while Mr. Harris reports seeing Creedon's accomplice burning the clothes he had on that night. What is equally striking, though, is the manner in which these two statements match up with a critical piece of evidence from the police investigation of the Tankleff murders: a crime scene diagram identifying the presence of mud stains inside the Tankleff home by an unlocked door that led from the backyard into the home. See Exhibit 16. If Martin Tankleff committed these murders from the inside of his home as the prosecution alleged, then there would be no occasion for mud stains through an unlocked door from the backyard. But if Creedon and his accomplice committed these murders after hiding in the bushes in the backyard and entering the home through that door, then there certainly would be the occasion for such mud stains to be created. And mud stains there were!

Yet if Martin Tankleff is actually innocent of murdering his parents – a fact significantly verified as well by Martin's own polygraph examination (see Exhibit 3) – then how one might ask did he come to be convicted of his parents' murders? Unfortunately, wrongful convictions are becoming less and less aberrational as many cases of falsely accused individuals come to light. In Martin's case, his erroneous convictions regrettably flowed directly from two separate and substantial violations of his constitutional rights. First, the prosecution violated

Martin's state constitutional rights by using against him at trial statements that the police obtained from him in patent violation of New York law – a violation the United States Court of Appeals for the Second Circuit recognized but was technically barred from redressing. Second, and unfortunately, Martin's own defense counsel also violated his constitutional rights by failing to provide Martin with effective assistance of counsel on an essential issue at trial.

As a result, this Court now has before it two convictions that are both factually and legally unsustainable. Martin Tankleff is actually innocent of murdering his parents, and his flawed convictions for those crimes were secured through unconstitutional means. Redress for this state of affairs must be provided to Martin now, before he wastes any more of his formative years wrongfully imprisoned.

FACTUAL AND PROCEDURAL BACKGROUND

A. Martin Discovers His Parents

On September 7, 1988, on what was to have been the first day of his senior year of high school in suburban Belle Terre, Long Island, Martin Tankleff, who had just turned seventeen, awoke around six a.m. Seeing lights on in his father's study, where three hours earlier his father had hosted a poker game, Martin entered the study. There, he discovered his father bloodied and unconscious, the victim of a vicious stabbing. Seymour Tankleff was wearing the same clothes he had on at the poker game, which had broken up around 3:00 a.m.[2] The last poker player to leave the Tankleff house that night was Seymour's business partner, Jerry Steuerman.

[2] All references to the Huntley hearing transcript and the trial transcript and are cited herein as "H.H. at __" or "Tr. at ___." Copies of the pertinent portions of the Huntley Hearing and trial transcript pages are reproduced at Exhibit 7 to this memorandum.

Martin immediately called "911." H.H. at 15-19. As he awaited the arrival of the ambulance and the police, Martin attempted to render first aid to his father in accordance with the "911" operator's instructions. H.H. at 15-19 and Tr. at 4115-4124. He then explored the rest of his home and found the body of his mother, Arlene Tankleff, in her bedroom. She had been fatally stabbed. Tr. at 4119-4120.

B. The Police Immediately Suspect Martin Tankleff

When the police arrived at the scene, they almost immediately focused their suspicion on Martin. Ten days earlier, Martin had undergone nose surgery, which left his face discolored and his eyes reddened. H.H at 55. Tr. at 4407-4409. As a result, one could easily mistakenly conclude he had just been in a fight. Although Martin immediately volunteered to the officers that he believed his father's business partner, Jerry Steuerman, committed the crime, this allegation ironically only served to reinforce the officers' suspicion of Martin himself.

Within minutes of the police's first arrival at the scene, at approximately 6:37 a.m., Officer Aki led Martin to his police car, and placed him in the front seat of the car. Martin asked Aki whether he could return to the house to wash off his father's blood, which he had gotten on him when he attempted to render first aid to his father. Tr. at 4129. Aki denied Martin's request, telling him he could not re-enter the house.

At 7:39 a.m., Detective McCready arrived at the scene. Tr. at 3432-3436. Detective McCready walked through the house. He then came outside, introduced himself to Martin, and asked Martin to wait for him in his police car. Detective McCready began questioning Martin immediately thereafter, at approximately 7:55 a.m. Tr. at 3436.

C. Martin Tankleff Is Repeatedly Interrogated At Length

Detective McCready asked Martin what he had done the evening before and what had happened that morning. Martin described going to the shopping mall with several friends

the evening before. H.H. at 11-14. After he returned home, he ate dinner, showered and went to bed. H.H. at 13-14. Martin said that he set his alarm for 5:35 a.m. and arose at 6:10 a.m. that morning. He noticed that lights were on in the house. He looked into his parents' bedroom, where no lights were on, and did not see anyone. H.H. at 16-22. He then went to his father's office, where he found his father in a chair at his desk, gravely injured. He immediately called "911." H.H. at 17. After calling "911," he got a pillow and a clean towel. He placed his father on the floor, elevated his father's feet and placed the towel on his father's neck wound. H.H. at 17-19. Martin then went through the house looking for his mother. When he reached his parents' bedroom, he saw his mother's body on the floor next to the bed. He telephoned his half-sister, Shari Rother, to tell her what had happened. H.H. at 20-22. Martin told Detective McCready that he believed Steuerman was responsible because he and his father had been fighting over money. Tr. at 11-12.

Following his interrogation of Martin, Detective McCready went back into the Tankleff residence and further examined the crime scene. At approximately 8:10 a.m., Sergeant Doyle arrived on the scene and briefly inspected the house. H.H. at 38-41 and Tr. at 31. Detective McCready introduced Sergeant Doyle to Martin and asked Martin to explain to Sergeant Doyle what he had done the previous evening and that morning. Thus, for the second time that morning, Martin relayed those events to a police officer.

At 8:15 a.m., Detective Rein arrived at the scene. H.H. 38-41. Detective Rein joined Martin and Sergeant Doyle at Detective McCready's car. Martin was asked to repeat his story for a third time, this time for Detective Rein's benefit. Martin stayed at the car while Detective Rein met with Detective McCready and Sergeant Doyle. H.H. at 38 and 40.

Based on the officers' suspicions about what they believed to be inconsistencies in Martin's repeated telling of the events of that morning and the prior evening, they decided to ask him to accompany them to the police station for further questioning. Tr. at 2994. The "inconsistencies" consisted of the following: Martin did not appear to have blood on his clothes, one retelling of his story had him awakening six minutes earlier than another retelling, there was a discrepancy between the times he said he had showered the evening before; and he said he could not see his mother when he first looked in the master bedroom, while the detectives could easily see her body when looking into the room from the doorway.[3] Detectives McCready and Rein conceded that they considered Martin to be a suspect by 8:35 a.m. that morning. H.H. at 39; Tr. at 2993-2994.

D. The Police Take Their Young Suspect To The Station

Detective McCready "requested" Martin to accompany him to police headquarters so that Detective McCready could obtain further background information, purportedly about his father's business relationship with Steuerman. H.H. at 39-41. Detective McCready did not inform Martin that he was not required to go with him.

When Martin's surviving family members later became alarmed that Martin had not yet appeared at the hospital, they asked an officer at the hospital to locate Martin. The officer reached Detective McCready by pager and reported back to the family members that Martin was going to police headquarters to tell the police about his father's relationship with Jerry Steuerman and would be taken to the hospital when the police were finished. While both Martin and his family members were thus led to believe that the police wanted to question

[3] Martin initially looked into the room prior to 6:11 a.m., when he called "911." Sunrise that morning did not occur until 6:25 a.m. Tr. at 3517. Obviously, it was much brighter in the room when the detectives arrived than it had been when Martin initially looked into it. Further, Martin was not wearing his glasses when he looked into his parents' bedroom, nor - like the detectives - was he looking for a body on the floor.

Martin to learn about Seymour's relationship with Jerry Steuerman, in fact Sergeant Doyle conceded that his intention was always to have the detectives interrogate Martin about the attacks. Alone with Martin in the police car en route to the station, Detective McCready further questioned Martin about his discovery of his mother's body, the "911" call and Jerry Steuerman.

E. Increasingly Hostile Questioning Continues At The Station

At the police station, Martin was questioned further -- this time by Detectives Rein and McCready. Starting at 9:40 a.m., the questioning proceeded without interruption for more than two hours. Tr. at 3468-3472. The interrogation took place in a ten-by-ten windowless room with the door closed. Detective McCready, who was approximately 6' tall and weighed 225 pounds, sat at the desk, with Martin in front of him. Rein, who was 6'2" tall and weighed about 190 pounds, sat next to Martin, who was 5'8" tall and tipped the scales at 150 pounds. Martin was not informed of his Miranda rights.

While the detectives began the interrogation with small talk, they rapidly became hostile and accusatory. Tr. at 4150-4155. Detective McCready challenged Martin for not shedding a single tear over the attack. When Martin noted that he had cried before the police arrived, Detective Rein countered that such a short period of grief was improper. H.H.. at 81-82 and Tr. at 2866-2867.

Obviously displeased with Martin's rendition of the events, the detectives had Martin again go over the events that he had already described three times to different detectives at the crime scene. But this time, the detectives challenged his statements about the morning's events. They challenged the time that he said he got up and got dressed that morning. They challenged his inability to see his mother when he initially looked into his parents' bedroom. They challenged why there was no blood on his clothes if he had rendered first aid to his father.

Shortly after 11:00 a.m., Martin was asked to demonstrate how he had attempted to render first aid to his father. As Martin was demonstrating, with Detective Rein playing the role of a smaller Seymour Tankleff, Detective McCready noticed a spot of blood on Martin's shoulder. H.H. at 91; Tr. 3475. Detective McCready pulled Martin's sweatshirt aside and pointed to the blood. H.H. at 91; and Tr. at 3475. Both Detectives McCready and Rein expressed disbelief that Martin could have rendered assistance as he described without getting blood on his shorts or sweatshirt. Tr. at 3478-3479. Detective McCready told Martin his story was "ridiculous." Tr. at 2876-2877. Rein termed it "absurd" and "unbelievable" and told Martin that he did not believe him. Tr. at 2876.

Martin – who was barely seventeen, who had hours earlier found his parents' bodies, who had been isolated from his remaining family members, who had not eaten all day and who had been questioned repeatedly at the crime scene and again at the police station -- was plainly open to the detectives' suggestive, leading questions. While Martin believed he was wearing his sweatshirt when he assisted his father, Detective McCready suggested that because there was no blood visible on the sweatshirt, Martin must not have been wearing the sweatshirt when he provided his father first aid. Martin readily adopted Detective McCready's suggestion. Detective McCready next suggested that maybe Martin was wearing a towel, and Martin accepted that suggestion. Detective McCready then attacked Martin, suggesting that Martin was responsible for the extent of Seymour's injuries because he failed to properly apply pressure to those wounds with the towel. [4]

[4] Thus, after himself originating the idea that Martin was wearing a towel, Detective McCready then attacked Martin for failing to use that towel to render first aid to his father. Id.

F. Detective McCready's Hoax Induces A "Confession"

Ultimately, at approximately 11:45 a.m., Detective McCready left the room purporting to be on the telephone. H.H. at 110-113; and Tr. at 2885-2887; 3485-3486. While Detective McCready was out of the room on the telephone, Detective Rein placed both of his hands on Martin's knees and told Martin that he "couldn't accept" Martin's explanations for the lack of blood on his clothing. Tr. at 2886; 3245-3246. When Detective McCready returned, he falsely reported that he had been on the phone with the hospital and that Martin's father had come out of his coma and had positively identified Martin as his attacker. H.H. at 112-113; and Tr. at 2887; 3485-3486; 3819-3820. As Detective McCready relayed this information to Martin, he leaned over and pointed at him.

The traumatized youngster, who had already been subjected to repeated questioning at the scene, was now directly accused of murdering his own mother and gravely injuring his father by detectives who had been questioning him all day and for the last two hours at the police station. Further, he was told that his own father was an eyewitness implicating him in the bloody assaults. Still, no Miranda warnings were furnished.[5]

Yet, even faced with the devastating information that his father had reportedly said that Martin was the one who had attacked his father and murdered his mother, Martin still maintained his innocence, even offering to submit to a lie detector test. H.H. at 114; and Tr. at 3823. The detectives refused to administer such a test, however, and continued to seek a

[5] In relaying the events that occurred during the interrogation, we cite Detective McCready's testimony and use Detective McCready's version of events, giving the government the benefit of every contested fact at trial. Detective McCready acknowledged the "ruse" he played to induce the confession, the false assertion that Seymour Tankleff was conscious and had identified Martin Tankleff as the attacker. Detective McCready's version of other aspects of what happened during the interrogation are highly suspect. Detective McCready was cited by the State of New York Commission of Investigation for having given false perjurious testimony in a 1987 Suffolk County murder trial in which he was the lead investigative officer. See Exhibit 8 at 38.

confession from Martin based on the fiction that his father had identified him as the attacker. H.H. at 114; and Tr. at 3487. Detective Rein, dropping the last veneer of subtlety masking the detectives' accusations, then asked Martin if his father was conscious when Martin "beat and stabbed" him. Martin still had been given no Miranda warnings, despite the fact that the detectives were now explicitly accusing him of murder and claiming his own father was an eyewitness.

Martin, having been told that his own father said he committed the attacks and it being apparent that the detectives believed him to be the attacker, then asked if it were possible that he could have attacked his parents, but had "blacked out" and had no memory of it. H.H. at 115-116; and Tr. at 2287-2292 and 4156. The detectives prodded him further and encouraged this line of thinking. Soon, Martin indicated that "[i]t's starting to come to me." H.H. at 115-116; and Tr. at 2887-2889; 3487-3488. Only then at 11:54 a.m., for the first time, did the detectives provide Miranda warnings. H.H. at 117; and Tr. at 2888-2889 and 3488.

With no break whatsoever in the interrogation, the detectives then elicited a tale from Martin about how he supposedly killed his mother and attacked his father. The detectives "assisted" Martin by providing information they had gleaned from the crime scene.[6] Martin explained that he decided the previous day he would awaken early and murder his parents. When he awoke, he went into their bedroom, naked, with a dumbbell from a set of weights in his room. Martin, at 150 pounds, supposedly expected to overpower his mother and father, who weighed 190 pounds and 250 pounds, respectively, and kill them both with a dumbbell.

[6] Attempting to create a motive for the murders, the detective elicited a series of grievances that Martin had against his parents, such as their unwillingness to buy him a new sports car, instead providing him with a late-model Lincoln. Attempting to create a motive for the murders, the detective elicited a series of grievances that Martin had against his parents, such as their unwillingness to buy him a new sports car, instead providing him with a late-model Lincoln.

Fortuitously, only his mother was in the room. He hit her on the head repeatedly with the dumbbell. Apparently not managing to kill her this way, he then went to the kitchen and took a knife that the detectives had observed on the counter, returned to the bedroom, and stabbed his mother. He next went through the length of the house and found his father in the study where he had been playing poker the evening before. Martin proceeded to beat and stab his father. He then went to the bathroom by his bedroom far from the study, without leaving any trail of blood, showered, washed off the knife and dumbbell, returned them to their respective locations, and called "911," purporting to have just found his wounded father. At 1:22 p.m., Martin's tale to the detectives ended when an attorney representing Martin at the behest of his remaining family members telephoned the police station and insisted that no further questioning of Martin occur. Tr. at 2910-2911; 3364-3366. [7]

G. The "Confession" Is Not Supported By The Physical Evidence

Later that afternoon, Martin spoke over the phone to his half-sister, Shari Rother. At trial, Detective Rein testified that he overheard this phone conversation by standing close to Martin, who was in custody at the time. Tr. at 4694-4695. At the suppression hearing, Ms. Rother testified that Martin told her that he had confessed because "they [the police] made me." Martin has adamantly maintained his innocence from the time his "confession" was extracted from him to this day.

Significantly, none of the Government's forensic testing could corroborate Martin's fantastic story to the detectives. Despite a three-day search of the crime scene, both inside the Tankleff residence and on its grounds, involving teams from Homicide, the Crime Laboratory, the Identification Section, the K-9 Unit and the Crime Scene Unit, no meaningful

[7] None of Martin's interrogation was transcribed, or recorded (despite the routine availability of recording equipment at the time) nor did he sign a statement.

physical evidence was unearthed to corroborate Martin's "confession." Tr. at 1369-1376. All knives in the kitchen (and those found elsewhere in the house) and the dumbbells in Martin's room were disassembled and tested for the presence of even the most minute quantity of blood or human tissue. Each tested negative. Tr. at 2237-2238.

Although Martin "confessed" to using a dumbbell, the physician who treated Seymour upon his arrival at the hospital, Dr. Tyson, testified that he believed that the wounds were most likely inflicted by a hammer. Tr. at 4347-4348; and 4351. The forensic pathologist who testified at trial also conceded that the wounds were consistent with having been inflicted by a hammer. No hammer with any traces of blood was found anywhere on the grounds of the Tankleff residence. Tr. at 2229-2230.

Martin's shower was searched exhaustively for blood, human tissue, or hairs or fibers belonging to his parents, including removing and analyzing the trap from the shower drain. All tests proved negative. Tr. at 2218-2224. The towels in his bathroom likewise exhibited no signs of blood. No drops of blood were found on the floor between the parents' bedroom, the study or Martin's bathroom. Tr. at 1762-1769; and 1792.

No blood identified as belonging to Martin was found in either room where the bodies were located, despite Government forensics testimony that Arlene Tankleff put up a significant struggle against her attacker. Likewise no hair or fiber evidence from Martin was found in either room. Tr. at 1932-1937; 1944-1964; 2045 and 2109. While Martin was recovering at the time from nose surgery that had resulted in some bleeding, the police observed no cuts or other evidence of a struggle on Martin. Scrapings of his fingernails produced no evidence of a struggle. Tr. at 2212-2213. Scrapings of Arlene's fingernails produced no sign of Martin's skin.

Contrary to Martin's "confession" that he murdered Arlene and then murdered Seymour, Seymour's blood was found in the master bedroom where Arlene's body was found, thereby indicating a different order of attack. A blood stain on the fitted sheets on the bed was consistent with Seymour's blood, and inconsistent with Arlene's or Martin's blood, as was a blood stain found on the wall of the master bedroom. Tr. 2176-2177. Bloody glove prints were found in the parents' bedroom and by the light switch in Martin's bedroom. Tr. at 2460-2476. But Martin never mentioned gloves in his statement to the detectives, and none were ever found that matched the bloody glove prints on the walls of the house.[8]

H. The Police Fail To Investigate The Prime Suspect

Because the police had obtained their "confession" from Martin on the very day of the murders, they never pursued any other leads or suspects in their investigation of the Tankleff murders. While Jerry Steuerman had been identified as a potential suspect on the morning the bodies were discovered, the police never considered him a suspect and never truly investigated his potential involvement. The police ignored Steuerman as a possible suspect even though each of the other participants at the poker game at the Tankleff residence the evening before the murders stated that the game broke up around 3:00 a.m., just three hours before Martin discovered his parents' bodies, and that they each left the Tankleff home before Steuerman did. Tr. at 634; 710-713. [9] Indeed, poker player Joseph Cecere testified that when he

[8] The mystery of the missing gloves was recently solved when Glenn Harris swore that one of the two men who actually murdered the Tankleffs, Joe Creedon, carried gloves back to the getaway car after the murders. See Ex. 2.

[9] Evidence at trial suggested that the assaults occurred at about 3:00 a.m.. Ethel Curley, the emergency technician who responded to the "911" call and was the first of the medical personnel to examine Arlene, testified the blood on Arlene's head, her forearm and on her nightgown was dry. Tr. at 471-472. Likewise, a technician assisting Seymour described a large golf ball size clump of blood falling from Seymour's body that was so coagulated that it made a loud noise when it hit the floor. Tr. at 487-488. The dried blood present on both bodies pointed to a time of death inconsistent with Martin's "confession" that he killed his parents minutes before calling "911" at 6:00 a.m. Rather, it suggests a time of death hours earlier, when Steuerman (the last poker player to leave) was the only other person in the Tankleff home.

left, Steuerman, who moments before had been engaged in a serious and private conversation with Seymour Tankleff, waved him ahead even though Steuerman's car was parked behind his. Tr. at 710-713.

Moreover, one week after the attacks, while Martin's father was still alive, Jerry Steuerman engaged in behavior so bizarre that -- in and of itself - - it should have 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*. Tr. 1190-1194 and 1142-1145. Steuerman was subsequently found living under an alias in California, having shaved his beard and changed his hair weave. [10]

At the time that the Tankleffs were attacked, Jerry Steuerman owed Seymour Tankleff a substantial sum of money. He had been paying his debt through weekly cash payments, brought to the weekly poker games, but at the time of the murders he was experiencing serious financial difficulties that were affecting his ability to pay this debt. Tr. at 888-894. [11] Throughout the months preceding the attacks, Steuerman's relationship with Seymour had deteriorated and they had numerous arguments over their respective business ventures. For example, Jerry Steuerman had wanted to enter into a new business with his son, but Seymour insisted that he could only do so with Seymour's participation. Tr. at 823-824; 894-

[10] Suffolk County authorities tracked down Jerry Steuerman not because his behavior had changed his status into that of a suspect in the Tankleff murders, but because he was wanted as a witness against Martin. In fact, Steuerman returned only after being assured by Suffolk County detectives that he was not a suspect in the Tankleff murders. Tr. at 1210-1211.

[11] Mike McClure, an attorney in California, testified that Seymour had talked to him that summer about his business relationship with Jerry Steuerman. Seymour told him that Jerry Steuerman had recently attempted to get out from under his weekly obligation to pay Seymour and that Seymour had insisted that Jerry Steuerman make the payments and that he bring them to the weekly poker games. Seymour had pointedly told Jerry Steuerman not to "fuck with" him. Tr. at 4625. After Seymour's death, Jerry Steuerman immediately stopped making the payments to his estate. Tr. at 888; 951-957.

896. As Jerry Steuerman testified, Seymour seemed to think that he not only owned half of the partnership, but half of Steuerman. Tr. at 998.

I. The Government Failed to Disclose Key Exculpatory Information

Unbeknownst to defense counsel, Jerry Steuerman had a history of employing violence to resolve business disputes. When Steuerman first started in the bagel business, he hired members of Hell's Angels to inflict violence on members of a union who were picketing his store. While the lead detective in the Tankleff case apparently was aware of this episode, the Government failed to provide this information to the defense as Brady material. Therefore, at the time of the trial, the defense, whose theory was that the police had not conducted a thorough investigation and that Jerry Steuerman was a more likely murder suspect than Martin, did not know this critical piece of information about Jerry Steuerman's past – and could not cross-examine Steuerman concerning it.

In addition, the Government's forensics experts identified mysterious hairs on Arlene Tankleff's body, particularly in her hand, that were rootless and did not match Martin's hair. Tr. at; 2006; 2025-2029 and 2045. Likewise, rootless hair was found on Seymour Tankleff's person that was inconsistent with Martin's hair. Tr. at 2049-2052. Jerry Steuerman had a hair weave made from rootless human hair. Tr. at 2087-2088. [12]

None of this information -- Steuerman's strong motive for murdering the Tankleffs, his opportunity to do so, the weakness of his alibi, the unexplained rootless hairs at the crime scene and his inexplicable disappearance following the assaults -- caused the police to consider Jerry Steuerman a suspect or to revisit their initial conclusion as to Martin's guilt. Nor

[12] Because Jerry Steuerman had his hair weave "serviced" while he was hiding out under a false identity in California, the hair in the hair weave had been replaced and was no longer the same when he returned. Tr. at 2087-2088. The police had thus lost their opportunity to obtain a sample of Steuerman's hair as it had been on the date of the attacks.

was their faith in their case against Martin shaken as the results of the Government's forensics testing repeatedly failed to corroborate Martin's tale, which was based on the detectives own suggestions from what they witnessed in their initial visit to the crime scene. In short, the police had closed the case with their "confession," and that was that.

J. The Government Misleads Jurors About The "Confession"

During a high profile thirteen-week trial, the jury heard extensive testimony about Martin's "confession." Prior to trial, Martin moved to suppress the statements he made to the detectives. He argued, *inter alia*, that the detectives violated his Miranda rights in obtaining the statements. The trial judge denied the motion, ruling that Martin was not in custody until the very moment the detectives furnished the Miranda warnings. Opinion, May 5, 1989, Judge Tisch (copy attached as Ex. 9).

In summation, the prosecutor improperly commented on the defense's failure to call Ms. Rother to corroborate Martin's version of his telephone call with her on the day he was arrested, which was in conflict with Detective Rein's version of what he overheard about that call. Ms. Rother testified at the suppression hearing that Martin said to her in that telephone call that he told the police that he "did this" because "they made me," whereas Detective Rein testified that in that telephone call he overheard Martin repeat his "confession" to Ms. Rother. Thus, the prosecutor falsely argued to the jury that Martin had reiterated a confession, hours after the coercive interrogation concluded, despite knowing that Ms. Rother's sworn testimony fully corroborated Martin's version - not Detective Rein's version - of that call. Martin actually told her, as he testified at trial, that he confessed only because the detectives "made" him.

K. The Verdict

Following a full week of deliberations, the jury acquitted Martin of intentionally murdering his mother, but convicted him of killing his mother with depraved indifference to

human life and intentionally killing his father. Martin was sentenced to fifty years to life imprisonment, a sentence he has been serving since 1990.

L. Two Members Of Appellate Panel Vote To Reverse

On December 27, 1993, a sharply-divided panel of the Supreme Court, Appellate Division, Second Department, affirmed the convictions by a vote of 3-2. See People v. Tankleff, 606 N.Y.S.2d 707 (1993). The majority held that Martin was not entitled to Miranda warnings earlier than he received them, finding that he was not in custody before that point in time. The dissenters found that the confession was obtained in violation of Miranda, because even assuming arguendo that Martin was not in custody from the moment he first arrived at the station house, "it must be concluded that once Detective McCready falsely advised the teenaged defendant that his father had identified him as the assailant, no reasonable, innocent, person who found himself identified as the perpetrator in this manner would have believed that he was free to leave." Id. at 712. The dissent concluded that: "In view of the absence of any other evidence connecting the defendant to the murders, except for the confession which he disavowed at the trial, the indictments should be dismissed." Id.

M. State High Court Affirms Without Analysis

The New York Court of Appeals affirmed the divided Appellate Division in a perfunctory one-page opinion. People v. Tankleff, 622 N.Y.S.2d 503 (1994). On the Miranda issue, the Court of Appeals concluded: "in view of our limited power to review mixed questions of law and fact, there is no basis for us to overturn the lower court's decision not to suppress the defendant's confession." Id.

N. Habeas Petition Denied By District Court

Martin sought collateral review of the state court convictions in the United States District Court for the Eastern District of New York, pursuant to 28 U.S.C. § 2254. The District

Court, without holding a single hearing or oral argument in the case, denied the petition. See Memorandum and Order, February 28, 1997, Judge Platt, Ex.12. Nonetheless, the District Court certified for review by the United States Court of Appeals for the Second Circuit each of the issues raised before the District Court. See Memorandum and Order CV 96-0507, January 29, 1998, Judge Platt, Ex. 11.

O. Unanimous Panel of Second Circuit Finds Miranda Violation

Martin Tankleff appealed the denial of his federal habeas petition to the United States Court of Appeals for the Second Circuit. Finding no dispute that Martin Tankleff was subjected to questioning from 6:17 a.m. to 11:54 a.m. before he was finally given Miranda warnings, a unanimous panel of the Second Circuit characterized the ultimate legal issue as whether or not Martin was in custody at any point prior to 11:54 a.m. See Tankleff v. Senkowski, 135 F.3d 235, 243 (2d Cir. 1998). Contrary to the findings of the state trial and appellate courts, the Second Circuit concluded that Martin Tankleff plainly was in custody prior to 11:54 a.m. Id. at 244. The court concluded: "Tankleff should, therefore, have been advised of his rights as required by *Miranda* much earlier than he was, and all of the inculpatory statements he made before receiving the warnings should have been suppressed." Id.

Nonetheless, the Second Circuit held that it could not grant Martin any federal remedy as a result of the Miranda violation. Because Martin received belated Miranda warnings at 11:54 a.m., the Second Circuit followed Oregon v. Elstad, 470 U.S. 298 (1985), and examined "whether the circumstances surrounding Martin Tankleff's 'first' unwarned confession were so coercive as to prevent him from making a subsequent knowing and voluntary waiver of his rights, thereby requiring the suppression of his 'second,' warned confession." 135 F.3d at 244. The Second Circuit concluded: "The issue is a close one. But, based on all of the circumstances, we conclude that, under Elstad, the interrogation that took place before the reading of the

Miranda warnings barely did not entail that degree of coercion that would irredeemably taint Tankleff's 'second,' Mirandized confession." Id. at 245 (emphasis added). Finding the post-warnings statements "barely" admissible, the Second Circuit concluded that it was therefore harmless error to admit the pre-warnings confession.

However, the unanimous panel of the Second Circuit then also recognized that, under New York law, all of Martin's statements should have been ruled inadmissible. Noting that the state courts never reached this issue, because they erroneously concluded Martin Tankleff was not in custody prior to his receipt of Miranda warnings, the Second Circuit indicated that under New York law, the belated provision of the warnings could not cure the Miranda violation without a pronounced break in the interrogation. Because there was no such "pronounced break" in Martin's interrogation, under New York law, all of Martin's statements should therefore have been suppressed. See id. at 246 (citing People v. Bethea, 502 N.Y.S.2d 713, 714, (1986); People v. Chapple, 378 N.Y.S.2d 682 (1975)). Although, the Second Circuit could not offer relief for this apparent violation of New York state law, id., the Court suggested that the New York courts should provide such relief. Id.

P. New York Appellate Courts Deny Motions to Reargue Appeal

After the Second Circuit's decision, Martin asked both the Second Department of the Appellate Division of the Supreme Court of New York and the New York Court of Appeals to permit him to reargue his state appeals in light of the Second Circuit's finding on the "custody" issue. Presumably because the Court of Appeals had previously ruled that the appellate courts had "limited power" to examine the mixed question of law and fact of whether or not Martin was in custody, 622 N.Y.S.2d at 504, both appellate courts denied the request for reargument without comment. People v. Tankleff, Order Denying Motion No. 1022 (N.Y. Sept. 14, 1999); Decision and Order on Motions Nos. 90-08937, 90-08938 (N.Y. Sup. Ct. App. Div.

2d Dept., February 16, 1999). No trial court however, which appears to be the only court with authority to re-open the question of whether or not Martin was in custody before he received Miranda warnings, has previously been presented with an opportunity to re-examine this issue under New York law in light of the Second Circuit's decision.

Q. Evidence Not Pursued Subsequent to the Trial

Following the trial of Martin Tankleff, in the early 1990s, a critical witness, Karlene Kovacs, came forward. Ms. Kovacs informed Robert Gottlieb, Martin Tankleff's trial counsel, that she had information relevant to the Tankleff murders. She told Gottlieb that, following Martin's trial, she and her friend, John Guarascio, went to the home of Guarascio's sister, Theresa ("Terri"), for dinner. Terri's boyfriend Joseph Creedon, who was an associate of Todd Steuerman (Jerry Steuerman's son), was there for dinner as well. While Terri was preparing dinner, Creedon and Ms. Kovacs were speaking and the subject of the Tankleff murders arose. Creedon told Kovacs that he and a Steuerman (he did not specify whether he was speaking of Todd Steuerman or Jerry Steuerman) were involved in the Tankleff murders. He stated that they hid in the bushes by the Tankleff home and that the murders were quite bloody. Ms. Kovacs executed an affidavit outlining her conversation with Creedon. See Exhibit 1.

This lead cried out for investigation because in 1990 Creedon had signed an affidavit indicating that Todd Steuerman had told him that Todd's father, Jerry, wanted to hire Creedon to cut out Martin Tankleff's tongue because Martin was still blaming Jerry Steuerman for his parents' murders. See Exhibit 15. After Creedon turned down this assignment to silence Martin, Todd Steuerman shot Creedon in the arm. Jerry Steuerman then subsequently offered Creedon $10,000 to refuse to testify against Todd Steuerman regarding the shooting.

Thus, Todd Steuerman and Creedon had a relationship such that Jerry Steuerman sought to use Todd to hire Creedon to perform acts of violence for him. If Martin Tankleff's

theory that Jerry Steuerman was behind the murder of his parents was correct, Todd Steuerman and Creedon were likely candidates to have been involved in carrying out the murders at Jerry's request. In light of the nature of this relationship between Todd Steuerman and Creedon, the fact that Creedon admitted that he was involved in the Tankleff murders with someone named Steuerman was extraordinary new evidence. Mr. Gottlieb provided this new evidence to the Suffolk County District Attorney's Office and urged it to conduct a thorough investigation. Despite being handed a blockbuster new lead in a sensational case, the Suffolk County District Attorney's Office never effectively used this lead to develop additional evidence.

R. The Evidence is Finally Investigated

In 2002, an investigator working for Martin Tankleff attempted to pursue the information provided by Karlene Kovacs. The investigator learned from public arrest records that, after he had been shot by Todd Steuerman, Creedon attempted to burglarize a Strathmore Bagel Store with Glenn Harris. [13] Glenn Harris was incarcerated in 2002 on an unrelated offense. The Tankleff investigator proceeded to interview Glenn Harris. Harris told the investigator that some time prior to burglarizing the Strathmore Bagel Shop with Creedon (the burglary took place in December 1989), he drove Creedon and Peter Kent to a home in Belle Terre (ostensibly to rob it) and watched them go to the back of the house. Harris sat in the car while Creedon and Kent entered the home . They remained in the home for between ten and thirty minutes. They then "came running to the car" and were "nervous" and "winded" and demanded Harris drive off at once. Ex. 2. Creedon was carrying gloves in his jacket pocket at the time. Harris then drove Creedon and Kent back from the home in Belle Terre, dropping them off at approximately 5:00 a.m. near the homes of both Creedon's mother and Kent. After resting in his car, Harris

[13] This was one of the bagel stores that Jerry Steuerman had owned in partnership with Seymour Tankleff.

observed Kent burning his jeans and sweatshirt and began to suspect that something more serious than a robbery had occurred. Harris then heard on his car radio the initial reports of the attacks at the Tankleff home in Belle Terre.

When combined with the Kovacs information, the Glenn Harris statements represent compelling new evidence, none of which was available at the time of the trial of Martin Tankleff. At trial, Martin's theory of defense was that Jerry Steuerman was at his home at 3:00 a.m. with a significant financial motive to want to murder the Tankleffs. Creedon, an associate of Todd Steuerman, has admitted to Karlene Kovacs that he and "a Steuerman" were responsible for the murders. [14] Glenn Harris now admits he drove Creedon and another individual to the Tankleff residence the night the Tankleffs were murdered, where Steuerman – the last non-family member in the house that night – would have been able to let them in to commit these horrible crimes. He further indicates that these men spent up to thirty minutes in the house, rushed out of it demanding to leave immediately, that one was carrying gloves and that the other burned his clothes shortly thereafter.

Creedon's statements to Kovacs that he was hiding in the bushes outside the Tankleffs' residence matches the physical evidence from the crime scene. The morning after the murders the detectives at the scene determined that a sliding glass door to the study where Jerry Steuerman, Seymour Tankleff and others had just concluded their poker game was unlocked. Further, the detectives' drawings of that room indicate that mud was found in the study near the sliding glass doorway, evidencing that someone had entered through the unlocked sliding glass door, see Exhibit 16, perhaps after hiding in the bushes outside the door until the appropriate

[14] This information must be analyzed in conjunction with an admission made by Todd Steuerman, following Martin Tankleff's trial, that he knew for a fact that Martin Tankleff did not murder his parents. Todd Steuerman told fellow inmate Bruce Demps that friends of his father (Jerry Steuerman) were responsible for the Tankleff murders. See Exhibit 17 at 6c (Affidavit Of Bruce Demps).

moment for entry arrived. If this occurred, they would have encountered and attempted to kill Seymour Tankleff first in the study, and then moved through the house to the bedroom to kill Arlene Tankleff. [15] This sequence would be consistent with the physical evidence that Seymour Tankleff's blood was found in the bedroom, suggesting that - contrary to Martin's "confession" - Seymour Tankleff was attacked before Arlene.

S. This Extraordinary New Evidence is Tested Through Expert Polygraphs

In an effort to corroborate this extraordinary new evidence, the Tankleff investigator arranged for Karlene Kovacs, Glenn Harris and Martin Tankleff each to be polygraphed. The results of these polygraphs verify the validity of the new evidence. Karlene Kovacs passed a polygraph confirming Creedon's admission to her regarding his participation in the Tankleff murders. Glenn Harris passed a polygraph proving that he drove Creedon and another individual to the Tankleff residence on the night the Tankleffs were murdered. Finally, Martin Tankleff passed a polygraph verifying that he had no involvement in his parents' murders. The polygrapher's reports are Exhibits 1, 2 & 3 to this memorandum.

ARGUMENT

Based on the extraordinary facts set forth above, Martin Tankleff's convictions must be vacated because: 1) new evidence demonstrates that he is actually innocent of his parents' murders; and 2) his thirteen – year old convictions to the contrary were only obtained through two separate violations of his constitutional rights. As the United States Supreme Court has emphasized, courts must "yield to the imperative of correcting a fundamentally unjust incarceration." Engle v. Isaac, 456 U.S. 107, 135 (1982). That "imperative" now demands that Martin Tankleff's convictions be vacated and that he be released from prison immediately.

[15] Arlene Tankleff owned a 25% interest in the Strathmore Bagel Store chain, thus giving Jerry Steuerman a motive to kill her as well as Seymour Tankleff.

I. COMPELLING NEW FACTUAL EVIDENCE DEMONSTRATES THAT MARTIN TANKLEFF IS ACTUALLY INNOCENT AND HAS BEEN WRONGFULLY INCARCERATED FOR OVER THIRTEEN YEARS

As Justice Leventhal recently held in People v. Valance Cole (Supreme Court, Criminal Term, Misc. Part, September 20, 2002), the New York State Constitution prohibits the incarceration of a person who is actually innocent. The court stated:

> The court will consider the defendant's current claim as also being made under C.P.L 440.10(l)(h). The claim does not require the defendant to prove all six Salemi criteria. 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 . . . Under this claim, the defendant is free to submit any evidence of innocence, including those previously barred from consideration under the "newly discovered" evidence section of this decision.

People v. Valance Cole, Exhibit 19 at 6; [16] see also Schulp v. Delo, 513 U.S. 298, 314-15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (actually innocent inmates with meritorious constitutional

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[16] Additional relief for an "actually innocent" defendant can be granted under Judiciary Law § 2-b(3), which authorizes courts to "devise and make new process and forms of proceedings necessary to carry into effect the powers and jurisdiction possessed by it." Section 2-b[3] thus permits the Court to devise new processes to carry out its functions where fairness so requires. See People v. Thompson, 678 N.Y.S.2d 845, 851 (N.Y. Sup. 1998); People v. Ricardo B., 73 N.Y. 2d 228, 232 (1989).

However, to the extent that this Court were to hold that a freestanding claim of actual innocence may not be brought under New York law, the evidence presented in this Memorandum must still be considered by the Court as "newly discovered evidence" under C.P.L. §440.10(1)(g). The Court of Appeals has set forth a six-part test for such newly discovered evidence. People v. Salemi, 309 N.Y. 208 (1955): 1) it will probably change the result if a new trial is granted; 2) it must have been discovered since trial; 3) it could not have been discovered before trial through due diligence; 4) it must be material to the issue; 5) it must not be cumulative; and 6) it must not be merely impeaching. Whether the criteria have been met rests in the almost unlimited discretion of the court. People v. Baxley, 84 N.Y.2d 208, 212 (1994); People v. Crimmins, 38 N.Y.2d 407, 415 (1975). In determining whether or not the newly discovered evidence would probably change the result, the new evidence must be considered along with previously presented exculpatory evidence. People v. Valance Cole, Exhibit 19 at 3.

Creedon's admission to participating in the Tankleff murders and Glenn Harris' statements corroborating that admission easily meet the Salemi criteria. The evidence at trial was far from overwhelming. It consisted almost entirely of Martin's "confession." Surely, the result at trial would probably have been different had the jury also heard of Creedon's confession, corroborated by Harris. Neither Creedon nor Harris had made their statements prior to trial. These statements were not reasonably discoverable and they are plainly material and not merely impeaching. Further, while false confessions experts were available at the time of trial, it was at the time a relatively new science that had not been developed sufficiently that such testimony would likely have been admissible. Such testimony qualifies as new evidence and in the context of this case, meets the *Salemi* factors. If, however, the court were to determine that, because some such testimony was available at the time of trial, it could have been discovered

claims must have an opportunity to be heard); Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). As the Supreme Court has recognized: "the central purpose of any system of criminal justice is to convict the guilty and free the innocent." Herrera, 506 U.S. at 390, 398 (1996) (emphasis added). Accord, People v. Washington, 171 Ill.2d 475, 665 N.E.2d 1330; Miller v. Comm'r of Corr., 242 Conn. 745, 700 A.2d 1108 (1997); In re Clark, 5 Cal. 4th 750, 855 P.2d 729 (1993); Ex Parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996). See State ex rel. Amrine v. Roper, 102 S.W. 3d 541 (Mo. 2003). [17]

In order to obtain relief, Tankleff need not prove his actual innocence nor need he demonstrate that the evidence adduced at trial was insufficient to support the jury verdicts against him. See Amrine, 102 S.W. 3d at 548 ("If habeas relief were conditioned on a finding that no rational juror could convict the petitioner after introduction of new the evidence, it would be impossible to obtain relief because exculpatory evidence cannot outweigh inculpatory evidence under that standard."). Rather, he need only present reliable evidence not presented at trial that supports his claim of actual innocence. If the petitioner has presented new evidence that raises doubt about his guilt, the trial court must make a factual determination whether it is more likely than not that a reasonable jury, presented with the totality of the evidence, would have voted to convict.

For example, in Amrine v. Bowersox, 128 F.3d 1222 (8th Cir. 1997) (*en banc*), the federal habeas proceeding that preceded the state habeas action in State ex rel. Amrine v. Roper, the petitioner presented the trial court with affidavits from several trial witnesses

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through due diligence and would have been admissible, the failure to obtain such evidence in a case where the "confession" was the Government's primary piece of evidence, would constitute ineffective assistance of counsel, and must still be considered by this Court as such. See Argument III, *infra*.

[17] In the alternative, this Court should hold a hearing to adduce any additional evidence that would aid it in fairly resolving this matter.

recanting their trial testimony. This evidence was not presented in a timely manner. Further, not all of the trial witnesses recanted. If the remaining witnesses were believed, there would still, even without the testimony of the recanted witnesses, have been sufficient evidence to convict. Nonetheless, the *en banc* Eighth Circuit Court of Appeals determined that the petitioner was entitled to an evidentiary hearing at which he could present the new evidence. ("A petitioner's showing of innocence is not insufficient just because the trial record may contain sufficient evidence to support the jury verdict. When determining the impact of evidence unavailable at trial, a court must make its final decision based on the likely cumulative effect of the new evidence had it been presented at trial.") Id. at 1230 "In deciding whether a petitioner has made the necessary showing of innocence, [the trial court] must make its own determination of whether the 'probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial' is sufficient to warrant consideration of the otherwise barred claims." Id. at 1227.

Martin Tankleff, like the petitioner in Amrine, "has consistently maintained his innocence and has produced new evidence to raise doubt about his guilt." Id. Accordingly, at a minimum, Tankleff is entitled to an evidentiary hearing at which the "court is called upon to consider all of the evidence, including any new evidence, and make a probabilistic determination of what a reasonable, properly instructed, juror would do." Id. at 1230. Like the state court in subsequent proceedings in Amrine, this Court is free to - - and indeed must - - consider all of the evidence in its entirety, in this state habeas proceeding. Amrine v. Roper, 102 S.W. 3d at 548 ("the evidence supporting the conviction must be assessed in light of all the evidence now available").

A. New Fact Witnesses Indicate That Others Murdered Seymour and Arlene Tankleff

Creedon's admission that he hid in the bushes beside the Tankleff home and entered the home from the exterior to commit the murders, and Glenn Harris' testimony that he drove Creedon and Peter Kent to the Tankleff residence on the night of the murders and then watched them go around to the back of the house, is consistent with a crime scene diagram drawn contemporaneously by the homicide detectives. That diagram indicated mud stains inside the home near the unlocked door from the backyard to Seymour Tankleff's office, where he was attacked. This indicates that perpetrator(s) entered the room from the exterior of the home, not from the interior of the home as Martin Tankleff would have done.

Martin Tankleff has submitted to a polygraph examination from a highly respected polygrapher. The results of that polygraph corroborate Martin's denial of his involvement in his parents' deaths. The sworn testimony of Karlene Kovacs, a woman with absolutely no motive to fabricate, establishes that Creedon has already admitted his participation in the Tankleff murders. Ms. Kovac's testimony has also been confirmed by the results of a polygraph examination. [18] In addition, Glenn Harris has stated that he drove Creedon and Peter Kent to the Tankleff residence the night of the murders, saw them run out, nervous and winded, one carrying gloves, and saw the other burn his clothing shortly thereafter. Mr. Harris' credibility has also been verified by a polygraph examination. [19]

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[18] New York courts have repeatedly recognized the admissibility of polygraph results in post-conviction proceedings. See People v. Osorio, 436 N.Y.S.2d 598 (Sup. Ct. 1981); People v. Vernon, 89 Misc. 2d 472, 391 N.Y.S. 2d 959 (Sup. Ct. 1977). The admissibility of polygraph examinations in general has also taken on new life after the Supreme Court's landmark decision in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589 (1993). See, e.g., United States v. Galbreath, 908 F. Supp. 877, 878-895 (D.N.M. 1995); United States v. Crumby, 895 F. Supp. 1354, 1358-1361 (D. Ariz. 1995).

[19] In addition, a large number of relatives of the victims have provided sworn testimony, from their first-hand knowledge, the prosecution's alleged motive for the crimes – that Martin felt mistreated by his parents and was angry with them – was simply not true. See Exhibit 18. Unfortunately, the jury never got to hear this testimony.

Jerry Steuerman had ample financial motive to have the Tankleffs murdered. Todd Steuerman, Glenn Harris and Joseph Creedon, unlike Martin Tankleff, had extensive criminal records. Todd Steuerman tried to hire Creedon on his father's behalf to cut out Martin Tankleff's tongue. If Jerry Steuerman wanted to murder the Tankleffs, it is likely that he would have solicited his son Todd to assist him in this endeavor as well, and to have his son again seek to find others willing and able to participate.

Jerry Steuerman's flight after the attacks, his faking his own death and his efforts to change his name and appearance all indicate guilty knowledge on his part. When combined with Steuerman's son's statement that Martin Tankleff was not involved in the murders, Creedon's admission that he was involved, and Harris' admission that he drove Creedon to the scene the night of the murders, there is overwhelming evidence that someone other than Martin Tankleff was behind the attacks on his parents. When considered in conjunction with Martin Tankleff's lack of motive and a proper understanding from an expert of why a young and vulnerable Martin Tankleff would have falsely confessed in response to a coercive interrogation, no reasonable fact-finder considering all of the facts now available could find Martin Tankleff guilty of these crimes. Under any standard of review, a rational fact-finder considering all of the evidence must conclude that Martin Tankleff did not commit the murders for which he has been convicted and imprisoned for thirteen years.

B. New Expert Witnesses Indicate That Martin Tankleff's "Confession" Was False

At the very outset of Martin Tankleff's trial, the prosecution aptly posited the key question that the jury was likely to focus on in this case: could a "deceptive tactic" of police interrogation be "such that it would cause a non-guilty person to then admit his guilt in crimes so horrible as these?" Tr. 34-35 (DA Collins Opening Statement). The uninformed human

response to that question is naturally "no." But since the time of the Tankleff trial, a considerable science of expert analysis has developed to test the reliability of various interrogation techniques. Numerous experts who have studied these issues have now concluded that certain interrogation techniques result in unreliable confessions and that it is not uncommon when these techniques are employed, as they were in Martin Tankleff's case, for them to result in a suspect providing a false confession, even when the suspect has no involvement whatsoever in the offense.

Exhibit 5 to this Memorandum is the affidavit of Professor Richard A. Leo, a noted expert on interrogation techniques and false confessions. Professor Leo has qualified as an expert 69 times and testified in state, military and federal courts in sixteen states. Exhibit 5 at 3. After thoroughly reviewing the record in this case, Professor Leo offers his expert opinion that Martin Tankleff's "confession" was "inconsistent with the facts elicited in this case, unreliable, and almost certainly false." Id. at 19. Professor Leo is of the opinion that had the jury in Martin Tankleff's trial heard from a false confession expert, the outcome of the trial could have been different, because, in his experience, juries do not intuitively understand why an individual would falsely confess and therefore, without hearing expert testimony, will conclude that the defendant would not have done so. Id. at 18.

Nor is Professor Leo alone in his conclusions about this case. Exhibit 6 to this Memorandum is the Declaration of Professor Richard Ofshe, another well-recognized interrogation techniques and false confessions expert. After familiarizing himself with the record in this case, Professor Ofshe has opined as follows: "Based upon [my] review, it is my opinion . . . that Mr. Tankleff's admission and post-admission narrative of the crime were involuntarily made and not based upon Mr. Tankleff's personal knowledge of the crime." Exhibit 6 at 2. At

bottom, according to Professor Ofshe, "Mr. Tankleff's narrative, whether voluntary or coerced, is unreliable." Id. at 18 (emphasis added).

As the testimony of both of these false confessions experts demonstrates, the only reason that Martin Tankleff "confessed" to these horrible crimes is that he was the victim of wholly unreliable interrogation techniques. [20] "Expert opinion is proper when it would help clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." De Long v. Erie County, 60 N.Y.2d 296, 307 (1983); People v. Jones, 210 A.D.2d 904, 620 N.Y.S.2d 656 (4th Dep't 1994), aff'd, 85 N.Y.2d 998 (1995); see also, People v. Cronin, 60 N.Y.2d 430, 432 (1983); Prince, Richardson on Evidence § 7-301 (Farrell, 11th Ed.). That is certainly the situation here.

In Martin Tankleff's case, there can be no question that an expert in the field of interrogation techniques would have aided the jury in its determination of the factual issues. After all, Martin Tankleff's defense against his "confession" was that the detectives "made" him

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[20] At the time of Martin Tankleff's trial, courts had only begun to acknowledge the field of false confessions as a subject for possible expert testimony. See J. Agar, "The Admissibility of False Confession expert Testimony," 1999 Army Law 26 at 32. It has really just been in the past decade, however, that the courts have readily acknowledged the admissibility of such testimony, (and its importance), in a case in which the government relies heavily on the defendant's confession. 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. Dist. Ct. App. 2002) (Dr. Ofshe's testimony would have assisted jury); Washington v. Miller, 1997 Was. App. LEXIS 960 (Wash. Ct. App. 1997) (reversing conviction based on exclusion of Professor Ofshe's testimony: "stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant 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) aff'd, 165 F. 3d 1095 (7th Cir. 1999) aff'd, 165 F.3d 1095 (7th Cir. 1999) ("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 knows 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 WL 879723 at * 5-6 * 14-15 (S.D.N.Y. Dec. 16, 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) aff'd, 165 F.3d 1095 (7th Cir. 1999) ("Dr. Ofshe testified that a common misperception among the public is that once a person confesses to his guilt, he must be guilty. Dr. Ofshe's expert testimony challenges this perception based on systematic observation of data to which the jury is not privy."); see also, People v. Philips, 692 N.Y.S. 2d 915, 918 (Sup. Ct. 1999) (expert testimony as to voluntariness of confession was sufficiently scientific and useful to jury to meet Frye standard).

say things that were false. Unfortunately, at the time of Martin's trial, courts had not yet begun to readily admit expert testimony in this field of false confessions. Accordingly, no such expert was called to testify. [21] But two false confessions/interrogation techniques experts have now opined that the circumstances of Martin Tankleff's interrogation resulted in an unreliable confession. See Exhibits 5 & 6. That expert testimony certainly must be considered now, in any present analysis of whether Martin Tankleff is actually innocent of these crimes or not, because – as the two dissenters in the Appellate Division properly recognized – there is a complete "absence of any other evidence connecting the defendant to the murders." See p. 18, supra.

The conclusions of Professors Leo and Ofshe that the Suffolk County detectives obtained an unreliable confession from Martin Tankleff are also amply buttressed by a contemporaneous New York State public investigative report. In 1989, following years of

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[21] Martin Tankleff's trial counsel did present the jury with the testimony of a psychiatric expert, Herbert Speigel (see Tr. at 4253, et seq.) regarding Martin's psychological state at the time of the interrogation and his individual susceptibility to suggestion. But this was only one piece of the puzzle. It wholly failed to address the expert analysis of "interrogation techniques" and the counterintuitive, but commonly observed, phenomenon of suspects providing false confessions. This phenomenon occurs not because of the psychological state of the person being interrogated, but because of the inherent unreliability of the interrogation techniques themselves. It is this crucial new expert testimony that must be considered by this Court.

In the alternative, if the court were to find that such testimony would have been admissible at the time of Martin's trial, then it would plainly have constituted ineffective assistance of counsel not to obtain and introduce such testimony. As the A.B.A. Standards note: The quality of the representation at trial. . .may be excellent and yet unhelpful to the defendant if the defense requires the assistance of a psychiatrist or handwriting expert and no such services are made available. A.B.A. Standards Relating To Providing Defense Services, 5-1.4 (3d ed. 1992); accord, Reilly v. Berry, 250 N.Y. 456, 461 (1929) (Cardozo, J.); United States v. Sanchez, 912 F.2d 18, 22 (2d Cir. 1990). Numerous cases illustrate the point that, where the government's case at trial relies heavily on a particular piece of evidence, competent counsel must at least investigate the possibility of challenging that evidence with expert testimony and that the failure to do so constitutes ineffective assistance of counsel. See Phoenix v. Matesanz, 189 F.3d 20 (1st Cir. 1999); United States v. Tarricone, 996 F.2d 1414 (2d Cir. 1993); Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984); Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981). Where, as in this case, there is a glaring inconsistency between the physical evidence and the allegations against the defendant:

> a reasonably professional attorney would not have sat on his hands, confident that his client would be acquitted. He would have consulted and been prepared to call an expert to drive this disparity home.

Pavel v. Hollins, 261 F.3d 210, 224-25 (2d Cir. 2001).

recurring public criticism of misconduct by members of the Suffolk County Police Department, the State of New York Commission of Investigation conducted an extensive investigation of that law enforcement agency. The Commission's Report, which is reproduced as Exhibit 8 to this memorandum, found that the Suffolk County Police Department "engaged in and permitted improper practices," (p. 21), and "that 94 percent of Suffolk homicide prosecutions involved confessions or oral admissions." (p. 55). The Commission concluded that this was "an astonishingly high figure compared to other jurisdictions, so high, in fact, that in and of itself it provokes skepticism regarding Suffolk County's use of confessions and oral admissions." (Id.) (Emphasis added). [22]

Last, but not least, the conclusions of expert witnesses Leo and Ofshe are also directly supported by Martin Tankleff's own polygraph examination, confirming the truthfulness of his own repeated statements that he did not murder his parents. Martin's confession was – and is – unreliable. The truth is to the contrary. Martin Tankleff is actually innocent of these horrible crimes, and his convictions of them should now be vacated.

II. TANKLEFF'S CONVICTIONS AT TRIAL WERE OBTAINED THROUGH MULTIPLE VIOLATIONS OF HIS STATE CONSTITUTIONAL RIGHTS

Thirteen years ago, Martin Tankleff was convicted of murdering his parents on the basis of the jury's acceptance of two damning evidentiary propositions: 1) that he had "confessed" to the crimes; and 2) that he had no family relative witnesses "who had regular contact with the Tankleffs" to counter the prosecution's theory that these crimes were motivated by a problematic relationship between Martin and his parents. Yet the facts enabling each of

[22] This Court can and should take judicial notice of the Commission's Report, a public document prepared by a state investigative body. See Mack v. South Bay Bee Distributors, Inc., 798 F. 2d 1279, 1282 (9th Cir. 1986), Austracan (U.S.A.) v. Neptune Orient Lines, 612 F. Supp. 578, 584-85 (S.D.N.Y. 1985). For example, in Quartararo, 715 F. Supp. at 466, Judge Korman took judicial notice of the Report and discussed its findings in some detail in concluding there that the Suffolk County Police "deliberately violated the Constitution of the United States and the laws of the State of New York to obtain a confession."

these fundamental propositions to come before the jury were the plain product of two separate and independent violations of Martin's constitutional rights. Thus, as set forth below, Martin's "confession" was obtained by Suffolk County detectives in patent violation of his state constitutional rights and the absence of supportive family relative witnesses for Martin at trial was caused by his own counsel's failure to provide him with constitutionally effective representation.

A. The "Confession" Used To Convict Tankleff At Trial Was Tainted By A Blatant State Miranda Violation

This case presents a unique situation. The United States Court of Appeals for the Second Circuit has already conducted a thorough factual examination of the record surrounding Martin Tankleff's confession and has determined that 1) he was interrogated while in custody in violation of Miranda v. Arizona, 384 U.S. 436 (1966); and 2) his rights under the New York State Constitution were apparently violated because the police did an "end run" around Miranda by interrogating him aggressively up until he made incriminating statements and then slipping in Miranda warnings at the last minute while continuing the interrogation without a break. C.P.L. §440.10 permits the Court to vacate a judgment where it "was obtained in violation of a right of the defendant under the constitution of this state" or where "[m]aterial evidence adduced by the people at a trial . . . was procured in violation of the defendant's rights under the constitution of this state." C.P.L. § 440.10(1)(d)(h). If ever there were a case that cried out for this Court's exercise of its power under C.P.L. Section 440.10, it is this one.

1. Martin Tankleff's State Miranda Rights Were Violated.

Martin Tankleff's conviction was obtained in violation of the mandate of the N.Y. State Constitution, Article I, § 6, that "[n]o person . . .shall . . . be compelled in any criminal case

to be a witness against himself." [23] Specifically, the trial court erroneously admitted two "confessions" -- one given following hours of custodial interrogation in the absence of Miranda warnings and the other given as part of a "continuous chain of events" whereby police aggressively interrogated Martin, in custody, until he offered an initial confession, then issued Miranda warnings and immediately continued questioning him, without a break in the interrogation, so as to elicit the second confession, all in violation of the New York State Constitution as set forth in People v. Chapple, 38 N.Y.2d 112, 378 (1975).

As the Second Circuit recognized, Chapple clearly provides that "[w]arnings, to be effective . . . must precede the subjection of a defendant to questioning. Later is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning." 38 N.Y.2d at 115. Thus, the Chapple rule provides that under New York Constitutional law, statements that precede Miranda warnings must be suppressed, as well as statements that follow warnings, where there has not been a pronounced break in the interrogation. The New York courts have concluded that the New York constitutional prohibition against self-incrimination "would have little deterrent effect if the police know that they can, as part of a continuous chain of events, question a suspect in custody without warning,

[23] Martin Tankleff continues to maintain that his federal constitutional rights were also violated when his unwarned statements were admitted at his trial. See Miranda v. Arizona, 384 U.S. 436 (1966); Dickerson v. United States, 530 U.S. 428 (2000) cert. denied, 535 U.S. 1106 (2002). Although the Second Circuit ruled that Martin's federal constitutional right against forced self-incrimination was not violated based on the rule set forth in Oregon v. Elstad, 470 U.S. 298 (1985), that holding conflicts with the rulings in at least four other federal circuits, United States v. Carter, 884 F.2d 368 (8th Cir. 1989), United States v. Byram, 145 F.3d 405 (1st Cir. 1998), United States v. Gale, 952 F.2d 1412 (D.C. Cir. 1992), United States v. McCurdy, 40 F.3d 1111 (10th Cir. 1994), and is currently on review in three separate cases that the United States Supreme Court has agreed to consider this term. See Fellers v. United States, 123 S.Ct. 1480 (2003); United States v. Patane, 123 S.Ct. 1788 (2003); Missouri v. Seibert, 123 S.Ct. 209 (2003).

provided that they only thereafter question him or her again after warnings have been given." People v. Bethea, 67 N.Y.2d 364, 366 (1986).

Under Chapple and Bethea, this Court must find that Martin's convictions were obtained in violation of his state constitutional rights if: 1) he was interrogated while in custody before police issued Miranda warnings, and 2) the interrogation continued, uninterrupted following the issuance of warnings. Because both of these elements are satisfied here -- indeed, because the police here did precisely what the Bethea court was expressly attempting to prohibit -- this Court should, in the just exercise of its discretion, reverse Martin Tankleff's convictions pursuant to C.P.L. § 440.10.

2. Martin Was Interrogated In Custody Well Before Police Issued Warnings.

It is hornbook law that statements obtained from a defendant as a result of custodial interrogation may not be admitted into evidence unless the suspect has first been apprised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and Article I, § 6 of the New York State Constitution. There is no dispute that on September 7, 1988, Martin Tankleff was subjected to hours of interrogation following the brutal attack on his parents. Nor is there any dispute that no Miranda warnings were given to Martin until 11:54 a.m., more than five hours after police first arrived at the Tankleff residence and more than two hours after the police had transported him to the station house where he was subjected to continuous questioning. Thus, the critical question is whether Martin was "in custody" at any point, prior to 11:54 a.m. on September 7th.

The definition of "custody" under the New York State Constitution is identical to the federal definition of that term, and New York courts rely interchangeably on state and federal cases regarding "custody" issues. For example, in its 1993 opinion in Martin's case, the

Appellate Division defined "custody" as "whether an ordinary person, innocent of any crime, would, in the defendant's position, think he was free to leave." People v. Tankleff, 606 N.Y.S.2d at 709 (App. Div. 2d Dept. 1993). This standard is the same as that applied in Martin's case by the Second Circuit: "how a reasonable man in the suspect's situation would have understood his situation" and whether he would "have felt he [] was not at liberty to terminate the interrogation and leave." Tankleff v. Senkowski, 135 F.3d at 235, 243 (2d Cir. 1998). [24]

As a result, the detailed analysis of this issue by the Second Circuit is an unimpeachable roadmap for this Court to follow. The following are the "relevant facts -- as determined by the state court and recounted in the testimony of various police officers," according to the Second Circuit:

> Police arrived at the Tankleff residence in a wealthy section of Belle Terre, New York, at 6:17 a.m. on September 7, 1988, in response to Martin Tankleff's 911 phone call. They found seventeen-year-old Tankleff outside the house, shouting that someone had murdered his parents. . . .
>
> Shortly after the police arrived, one officer instructed Tankleff and his brother-in-law, Ronald Rother, to leave the house and go to separate police cars so that they wouldn't "contaminate each other's story." At 6:37 a.m., Tankleff went outside and sat in the front seat of a police car. Starting at around 7:40 a.m., a series of homicide detectives interviewed Tankleff near the police cars. At no time during these interviews was Tankleff given the warnings required by Miranda v. Arizona[]. The detectives discussed what Tankleff had told each of them and, noting some inconsistencies in his accounts of the events of that morning, decided to take him to

[24] The perfect congruity between these standards is not surprising because the entire area of law was federally generated. In prior proceedings in this case, the District Attorney's office proved this point by repeatedly citing federal authority in their briefs on this issue. Not surprisingly, therefore, the Appellate Division in its 1993 opinion in this case also relied directly on federal case law in its custody analysis. See Tankleff, 199 A.D.2d at 553 (quoting Oregon v. Mathiason, 429 U.S. 492, 496 (1977) and citing Illinois v. Perkins, 496 U.S. 292 (1990). See also People v. Yukl, 25 N.Y.2d 585 (1969). Accord, People v. Diaz, 84 N.Y.2d 839, 840 (1994); People v. Ramirez, 243 A.D.2d 734, 735 663 N.Y.S. 2d 855 (2d Dep't 1997). People v. Perez, 291 A.D.2d 326, 738 N.Y.S.2d 331, 332 (1st Dep't. 2002); People v. Marino, 246 A.D.2d 491, 491 667 N.Y.S. 2d 253 (1st Dep't 1998); People v. Ripic, 182 A.D.2d 226, 587 N.Y.S.2d 776, 779-80 (3d Dep't. 1992); People v. Young, 113 A.D.2d 852, 493 N.Y.S.2d 516, 518 (2d Dep't. 1985); People v. Torres, 97 A.D.2d 802, 468 N.Y.S.2d 546, 549 (2d Dep't. 1983); People v. Austin, 438 N.Y.S.2d 908, 911-15 (Sup. Ct. 1981); People v. Tinneny, 417 N.Y.S.2d 840, 847 (N.Y. Sup. 1979).

police headquarters for further questioning. At this point, the police concede, they considered Tankleff a suspect. At 8:40 a.m., Tankleff agreed to go with Detective McCready to the police station. Detective McCready questioned him further during the forty-minute drive. At 9:40 a.m., Detectives McCready and Rein took Tankleff to a ten-foot by ten- foot, windowless room where he was interviewed continuously for the next two hours.

The defense has characterized this interview as "increasingly hostile." The government disputes this interpretation, but acknowledges that Tankleff was questioned in detail about inconsistencies in his story and that the detectives openly expressed their disbelief with his version of the morning's events. At one point, they asked him to demonstrate how he performed first aid on his father. Detective McCready then leaned forward and said that he found Tankleff's account "ridiculous and unbelievably absurd." The government asserts that while the detectives "at times raised and lowered their voices as they related inconsistencies in [Tankleff's] account to [them], and indeed quickened the pace of the interview at approximately 11:30 to 11:40 a.m., they never yelled at or somehow 'browbeat' " Tankleff. At approximately 11:45 a.m., Detective McCready left the interview room and faked receiving a telephone call. On the phone, he spoke in a voice loud enough to be overheard by Rein, who was still in the interview room with Tankleff, and presumably was overheard by Tankleff as well. After a few minutes, Detective McCready hung up the phone and returned to the interview room. He said that he had just spoken with a detective at the hospital and that the doctors had pumped Seymour Tankleff full of adrenaline, that he had come out of the coma, and that he had accused his son, Martin. This story was not true. Seymour remained in a coma until his death a few weeks later, never awakening and never accusing his son of the crime.

Tankleff continued to deny having committed the crime, saying that his father might have said that because Tankleff was the last person he saw before falling unconscious. Rein asked if Seymour was conscious when Tankleff "beat and stabbed him." Tankleff then offered to take a lie detector test, which the police refused to administer. Rein asked, "Martin, what should we do to a person that did this to your parents?" Tankleff responded, "Whoever did this to them needs psychiatric help." At this point, Tankleff said, "Could I have blacked out and done it?" and asked whether he could have been "possessed." The detectives encouraged him to say more, and Tankleff uttered, "[I]t's coming to me."

> Only then, at around 11:54 a.m., did Detective James Detective McCready stop the questioning and, for the first time, give Tankleff the *Miranda* warnings. Tankleff waived his rights, and the interrogation continued. . . .

Id. at 240 -241 (emphasis added).

The Second Circuit then examined these facts and unequivocally concluded, as a matter of law, that Martin was "in custody at the time" he first "confessed." 135 F.3d at 246. In the Second Circuit's view, Martin was subjected to custodial interrogation for a material period of time; he then made inculpatory statements constituting a "first" confession; he then received Miranda warnings; and he finally provided a "second" confession. See id. at 244-46. In making these findings, the Second Circuit carefully analyzed what happened to Mr. Tankleff after he arrived at the police station at 9:20 a.m.:

> Based on the totality of the circumstances, we believe that Tankleff was in custody and hold that he was entitled to *Miranda* warnings at some point prior to 11:54 a.m., when he was finally advised of his rights. For the last two hours, he had been subjected to increasingly hostile questioning at the police station, during which the detectives had accused him of showing insufficient grief, had said that his story was "ridiculous" and "absurd," and had added that they simply "would not accept" his explanations. Finally, at 11:45 a.m. they told him that his father had woken up from a coma and accused him of the attack. If not before, then certainly by this point in the interrogation no reasonable person in Tankleff's position would have felt free to leave.

Id. at 244. The People sought no further review of this ruling by the Second Circuit.

If this Court takes a full look at the custody issue in this case, it cannot help but agree with the Second Circuit that Martin Tankleff was interrogated while in custody without Miranda warnings. The Court must then complete the Miranda analysis in order to determine whether Martin's post-warning statements were tainted by his pre-warning interrogation and were thereby inadmissible at trial. No state court has yet completed this analysis under Chapple,

38 N.Y.2d at 112. [25] As the Second Circuit clearly suggested, such an analysis would lead inescapably to the reversal of Martin's convictions under Chapple and its progeny. When a defendant has been interrogated in custody without Miranda warnings in New York, courts must suppress post-warning statements "unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning." Id. at 115; see also Bethea, 67 N.Y.2d at 367-68. In this case, there is no dispute that there was no such "break in the interrogation," as both parties recognized before the Second Circuit.

The facts of this case vividly illustrate the concerns underlying the suppression rules in New York. There was no break between the pre-warning and post-warning "confessions." As a result, under Chapple, the post-warning "confession" was tainted, and both "confessions" should have been suppressed. Because the "confessions" were the centerpiece of the People's prosecution of Martin, their suppression would reverse the outcome of this case. Accordingly, Martin Tankleff is entitled to a new trial at which his statements may not be used against him.

3. The Second Circuit's Decision Materially Altered the Law on the Custody Question in this Case But No New York Court Has Examined the Custody Issue In Light of this New Law.

The Second Circuit's opinion materially changed the law of "custody" in this case by adding a new and persuasive legal precedent that reached an opposite conclusion from the state courts on the critical question, identical under federal and state law, whether Martin was in custody at the time of his initial confession. The Second Circuit recognized the extraordinary

[25] Because the Appellate Division erroneously found that Mr. Tankleff was not in custody at any point, it never examined whether Mr. Tankleff's post-warning statements were tainted by the pre-warning interrogation. Because the Court of Appeals found it had "limited power to review" the Appellate Division's holding that Mr. Tankleff was never in custody, it also never analyzed the taint of the pre-warning interrogation.

circumstances caused by its "custody" finding, and all but directly asked the New York State courts to reexamine this issue. Sua sponte, the Second Circuit analyzed the impact of its "custody" holding on the validity of Mr. Tankleff's convictions under state law — even though that issue had not been briefed or raised in oral argument by either party. Thus, the Second Circuit wrote:

> There remains one loose end with respect to Tankleff's *Miranda* claims. We note that the state courts did not distinguish between Tankleff's 'first' and 'second' confessions. They presumably did this in part because they -- incorrectly under *federal* law – held that Tankleff was not in custody when he made his 'first' confession. But they, perhaps, also failed to distinguish between the confessions because the New York Court of Appeals has declined on state constitutional grounds to follow the rule of Oregon v. Elstad. See People v. Bethea, 67 N.Y. 2d 364, 502 N.Y.S. 2d 713, 714, 493 N.E.2d 937, 938 (1986) (per curiam) ("We conclude that the mandate of N.Y. Constitution, article I, § 6 that '[n]o person . . . shall . . . be compelled in any criminal case to be a witness against himself' would have little deterrent effect if the police know that they can as part of a continuous chain of events question a suspect in custody without warning, provided only they thereafter question him or her again after warnings have been given.") (alteration in original). Thus, under New York law the rule with respect to *Miranda* warnings remains that '[l]ater is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning.' People v. Chapple, 38 N.Y. 2d 112, 378 N.Y.S.2d 682, 685-86, 341 N.E. 2d 243-245-246 (1975); Bethea, 502 N.Y.S.2d at 714, 493 N.E. 2d 937 ("The rule of the Chapple case, therefore, continues as a matter of State constitutional law, to govern the admissibility of statements obtained as a result of continuous custodial interrogation.")
>
> It might appear – given the state court holdings rejecting Elstad and given our decision that Tankleff was in custody, thereby making his 'first' confession inadmissible under *Miranda* – that we should also deem his second confession to be excludable. But *we* can only grant habeas relief based on violations of *federal* rights, *see* 28 U.S.C. § 2254(d)(1). Thus, it is not for us to say whether Tankleff might or might not have any claim based on state constitutional law as a result of our holding that Tankleff was, under *Miranda* and its federal progeny, in custody at the time of

> his 'first' confession. We note that the validity of such a claim would seem to turn on whether the definition of 'custody' under the New York constitution tracks the definition of that term under the federal constitution.

135 F.3d at 246-47 (emphasis in the original). It is nothing short of astonishing that a federal court of appeals would voluntarily go to such lengths to consider the state constitutional implications of its "custody" decision. All that remains is for this Court to conduct, on C.P.L. §440.10 review, the final step in the analysis laid out by the Second Circuit: namely, whether the definition of "custody" under the New York constitution tracks the definition of that term under the federal constitution. As discussed above, the answer to that question is plain -- the definitions of custody are identical under state and federal law, and, accordingly, Martin Tankleff's state constitutional rights were violated.

Nor is there any jurisprudential impediment to this Court's re-examination of this issue. The prior state court rulings were all made without the benefit of the new law made by the Second Circuit several years later and, hence, may legitimately be revisited in light of this new precedent. Section 440.10 expressly gives this Court permission to reexamine issues decided by state appellate courts where there has been a "retroactively effective change in the law controlling such issue." C.P.L.§ 440.10(2)(a), (3)(b). A contrary decision by a federal appellate court on habeas review that examines the very same facts and the very same legal issue as that decided earlier by state appellate courts is plainly a "change in the law controlling such issue" because there can be no dispute that had the Second Circuit opinion in Martin Tankleff's case existed at the time the Appellate Division considered his case, the Appellate Division would have given great weight to it because it involved the same facts and legal questions.

For example, in a similar case, the Appellate Division affirmed the conviction of Harry Ip despite his appeal that his federal Sixth Amendment rights had been violated. See People v. Kan, 164 A.D.2d 771, 559 N.Y.S. 2d 717 (1st Dep't 1990), aff'd on other grounds, 78 N.Y.2d 54 (1991). Ip then filed a habeas petition. On that petition, the United States District Court overturned Ip's conviction on Sixth Amendment grounds and was summarily affirmed by the Second Circuit. See id. at 771. When Ip's co-defendant, Kin Kan, directly appealed her own conviction on the same grounds, the Appellate Division held that, even though it had found no Sixth Amendment violation on the same facts in Ip's case, it could not ignore that the federal courts had reached an opposite conclusion based on the very same facts. Id. Accordingly, by a 2-1 vote, the Appellate Division reversed Kan's convictions and ordered a new trial. See id., aff'd, 78 N.Y.2d at 59-60. Although the federal courts' holding in Ip's case was not "binding" in Kan's case, it was nonetheless a change in the body of law that controlled the facts and issues of the case.

In another relevant example, when the Second Circuit held that one co-defendant's confessions had been inadmissible, the Court of Appeals granted reargument to the other co-defendant, even though the Second Circuit decision was not "binding" on the latter case. See People v. Bonino, 1 N.Y.2d 752, 753 (1956). The Court of Appeals reasoned that "in the interest of justice," the second co-defendant deserved a new trial from which the inadmissible evidence was excluded. [26] Id.; accord People v. Burd, 22 N.Y.2d 653, 654 (1968) (new trial ordered upon reargument where defendant, who had made legally voluntary confession, was further implicated by co-defendant's inadmissible testimony). Thus, New York courts frequently rely on federal authority to provide the law governing a particular issue even where New York

[26] C.P.L. § 440.10 (3)(c) permits a court to vacate a judgment "in the interests of justice and for good cause shown."

state authority provides similar precedent. See, e.g., People v. Bilsky, 95 N.Y.2d 172 (2000) (relying on both federal and state law where both federal and state constitutional rights were at issue); People v. Stephen J.B., 23 298 N.Y.S.2d 489, 611, 613-616, 492-95 (1969) (relying on state and United States Supreme Court and Second Circuit cases on Miranda issues); People v. Obieke, 712 N.Y.S.2d 919, 923 (Sup. Ct 2000) (relying on United States Supreme Court and Seventh Circuit precedent on New York state constitutional issue); In re Travis S., 685 N.Y.S.2d 886, 890-91 (Fam. Ct. 1999) (relying on federal and state authority for definition of " custodial interrogation"). [27]

Finally, Judiciary Law § 2-b[3] also gives this Court authority to examine the custody issue in Martin Tankleff's case in order to appropriately take into account the Second Circuit's opinion. Section 2-b[3] permits the Court to devise new processes to carry out its functions where fairness so requires. See People v. Thompson, 678 N.Y.S.2d 845, 851 (Sup. Ct. 1998); People v. Ricardo B., 73 N.Y.2d 228, 232-33, 538 N.Y.S.2d 796, 798 (N.Y. 1989). Here, a federal appellate court has gone out of its way to explain the state constitutional implications of its holding and to practically beg that the state courts examine the constitutionality of Martin Tankleff's conviction. Although Martin Tankleff sought action by both the Appellate Division and the Court of Appeals to permit reargument of his appeals in light of the Second Circuit opinion, both declined. Presumably the Appellate Division declined because the issue had

[27] Where federal questions are presented, New York courts often - and appropriately - give great weight to related federal court rulings. See, e.g., People v. Martin, 294 N.Y. 61, 73 (1945) (giving "due and great respect" to the federal court construction of federal law); New York Rapid Transit Corp. v. City of New York, 275 N.Y. 258, 265 (1937), aff'd, 303 U.S. 573 (1938) (federal court decisions are "entitled to great weight"); People v. Kan, 164 A.D.2d 771, 773 (1st Dep't 1990) (determination of federal courts on federal constitutional question is "entitled to great weight") (dissent, J. Kupferman); Brenen v. Dahlstrom Metallic Door Co., 189 A.D. 685, 688, 178 N.Y.S. 846, 848 (1st Dep't 1919) (New York courts defer to federal courts construing federal statute); Washington v. Hoke, 544 N.Y.S.2d 942 (Sup. Ct. 1989) (New York Supreme Court is bound by federal court where federal question is presented). This is particularly true where the federal precedent is from the United States Court of Appeals. See, e.g., People v. Cook, 372 N.Y.S.2d 10, 11 (Sup. Ct. 1975); Schneck v. Lewis, 201 N.Y.S.2d 282, 286 (Sup. Ct. 1923). But see Alvez v. American Export Lines, Inc., 46 N.Y.2d 634 (1979) aff'd, 446 U.S. 274 (1980).

already been reviewed by the Court of Appeals, and presumably the Court of Appeals declined because it has limited power to review mixed questions of law and fact. That leaves only the trial court to conduct the necessary review of the custody issue. If there were any question regarding whether C.P.L. § 440.10 provided the authority for this Court to do so, then Section 2-b[3] provides alternative authority, to prevent the otherwise perverse outcome where no state court ever reviews and implements the Second Circuit's opinion.

B. Defense Counsel Rendered Ineffective Assistance At Trial Leading To The Jury's Decision To Convict Tankleff

It is axiomatic that criminal defendants in this country have the right to effective assistance of counsel. See e.g., Powell v. Alabama, 287 U.S. 45 (1932); Glasser v. United States, 315 U.S. 60 (1942); McMann v. Richardson, 397 U.S. 759 (1970). The constitutional right to counsel "so fundamental to our form of justice, is the right to effective assistance of counsel, meaning the reasonably competent services of an attorney devoted to the clients best interests." People v. Ortiz, 76 N.Y.2d 652, 655-56; See also, People v. Aiken, 45 N.Y.2d 394, 398-399 (1978). To have effective representation by counsel does not just mean someone with a law degree, or someone who puts arguments forward. People v. Bennett, 29 N.Y.2d 462, 466 (1972). Rather, it means someone who ensures proper preparation of the case for pre-trial and trial proceedings. See, People v. Droz, 39 N.Y.2d 457, 462 (1976); People v. LaBree, 34 N.Y.2d 257, 259 (1974); People v. Van Wie, 238 A.D.2d 876, 877, 661 N.Y.S.2d 112, 113 (4th Dep't 1997); People v. Babi-Ali, 179 A.D.2d 725, 728-29, 578 N.Y.S.2d 633, 635-36 (2d Dep't 1992); see also, People v. Bennett, 29 N.Y.2d at 466 (right to counsel includes right to have counsel conduct appropriate investigation).

In Strickland v. Washington, 466 U.S. at 668, 694 (1984), the Supreme Court established the federal test for determining whether an accused received effective assistance of

counsel. A defendant must show that his attorney's conduct fell outside the wide range of "professionally competent assistance" and that there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, supra; DeLuca v. Lord, 77 F.3d 578, 584 (2d Cir. 1996).

The New York Court of Appeals has "developed a somewhat different test for ineffective assistance of counsel under article I, § 6 of the New York Constitution from that employed by the United States Supreme Court in applying the Sixth Amendment." People v. Claudio, 83 N.Y.2d 76, 79 (1993) (comparing People v. Baldi, 54 N.Y.2d 137, 147 (1981) with Strickland v. Washington, supra at 687). See also, People v. Adams, 53 N.Y.2d 241 (1981); People v. Riley, 70 N.Y.2d 523 (1987). The New York state right to counsel is "broader than its federal counterpart," People v. Claudio, supra, (Titone, J., concurring), because the New York Constitution affirmatively requires that "the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation..." People v. Rivera, 71 N.Y.2d at 705, 708 (1988) (quoting People v. Baldi, 54 N.Y.2d at 146-47). To prevail on a claim of ineffective assistance of counsel under the New York Constitution, the defendant must merely "demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue 'colorable' claims." People v. Garcia, 75 N.Y.2d 973, 974 (1990); See also, People v. Vilardi, 76 N.Y.2d 67, 74 (1990); Rivera, 71 N.Y.2d at 709 (1988).

In the case at bar, there can be no question that counsel made several serious errors that severely affected the outcome of the case and denied defendant due process of law. As explained by the American Bar Association in its "Standards for Criminal Justice":

> Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. . . . The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial investigation and preparation may . . . be grounds for finding ineffective assistance of counsel.

ABA Standards for Criminal Justice, Standard § 4-4.1, Commentary ("Duty To Investigate") (3d ed. 1993). Here, defense counsel failed to fulfill this basic obligation, and consequently failed at trial to submit important, available evidence on an issue crucial to Martin Tankleff's defense: the lack of any credible motive for the murders. Under the circumstances at bar, counsel's actions and inactions with respect to this aspect of Martin Tankleff's representation constituted ineffective assistance of counsel under both the Strickland two-prong test and the "meaningful representation" standard of the New York Court of Appeals. [28]

1. Trial Counsel Failed To Call Sufficient Family Member Witnesses To Negate Martin's Alleged Motive to Murder His Parents

From the very outset of the trial, the prosecution recognized that it would have to convince the jurors that Martin Tankleff had a "motive" for committing such horrible crimes. As District Attorney Collins explained, in his opening statement: "Although the law does not require proof of motive in a criminal case in order to establish proof beyond a reasonable doubt, there's

[28] "Where a single, substantial error by counsel. . .seriously compromises a Defendant's right to a fair trial, it will qualify as ineffective representation." People v. Hobot, 84 N.Y.2d 1021, 1022 (1995). Even "the best" of attorneys can make such an error, see Martinez-Macias v. Collins, 810 F.Supp. 782, 790 (W.D. Tex. 1991) (finding that "one of the best attorneys in El Paso" was ineffective), with respect to a "discreet" portion of a lengthy trial. See Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999).

always the question in any rational right thinking person's mind 'why' [because] [m]urder is, by society's definition, an irrational act." Tr. 22. In this case, the prosecution suggested that Martin Tankleff had such a troubled relationship with his parents that he had the motive to brutally murder them.

As important as it was for the prosecution to endeavor to establish such a motive for these murders, of course, it was equally important for the defense to endeavor to defuse this motive theory. While Tankleff's trial counsel developed some minimal evidence through the testimony of a handful of family members that Martin had a close relationship with his parents, there were many other members of the Tankleff family who were prepared to testify that Martin Tankleff had a loving relationship with his parents and, accordingly had no motive to attack them. See Exhibit 18. This testimony would have been especially powerful because these individuals were not just relatives of the defendant, who might have a motive to protect him, but were also relatives of the victims. As individuals who had their relatives brutally murdered, they had more incentive than anyone to discover the identity of the murderers. But based on their first-hand intimate knowledge of Martin Tankleff's relationship with his parents, they did not then – and do not now - believe he was the actual murderer.

It has been held in People v. Maldonado, 278 A.D.2d 513 (2d Dept. 2000) that:

> [w]hile a court should not second-guess whether a course chosen by the defendant's trial counsel was the best strategy, or even a good one (see, People v. Ghee, 153 A.D.2d 954, it is hard to perceive any trial strategy which would justify counsel's failure to interview and/or call witnesses who had exculpatory information which tended to exonerate the defendant and substantiate his defense (*see*, People v. Rojas, 213 A.D. 2d 56; People v. Baba-Ali, 179 A.D. 2d 725, 729; People v. Daley, 172 A.D. 2d 619, 568.

Id. at 514-515. Thus the failure to contact a potentially favorable witness (People v. Droz, 39

N.Y.2d 457 (1976) or to interview an available witness (People v. Sullivan, 209 A.D.2d 558 (2d Dep't. 1994) has been found to result in ineffective assistance of counsel. Federal courts also recognize that there can be constitutional ineffectiveness where the failure to call even a single witness is involved. See DeLuca v. Lord, 858 F. Supp. 1330 (S.D.N.Y. 1994), 77 F.3d 578 (2d Cir. 1996); Dorsey v. Kelly, 112 F.3d 50 (2d Cir.1997), *aff'd*, 164 F.3d 617 (2d Cir. 1998) (unpublished); Sparman v. Edwards, 26 F. Supp.2d 450 (E.D.N.Y. 1997), *aff'd* 154 F.3d 51 (2d Cir. 1998). [29]

Here, numerous family members have come forward and indicated that they were ready, willing and able to testify for the defense on this crucial issue at trial. [30] Yet trial counsel failed to adequately investigate and develop such evidence through these family members. These witnesses would have not only contradicted the People's claim that Martin had a motive to kill his parents, but they would also have provided the jury with critical information regarding Martin's home life and the loving relationship he had with his parents. Especially in this case, it was crucial to Martin's defense that the jury hear these family member witnesses in order to properly evaluate the case.

By failing to present the testimony of these witnesses, however, the picture of Martin presented to the jury was wholly one-sided. Martin stood accused of heinous crimes, patricide and matricide. For the jury to be denied the testimony of family members who could present a true picture of Martin and his healthy and loving relationship with his parents deprived

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[29] *See also*, Collier v. Turpin, 155 F.3d 1277, 1291-1294 (11th Cir. 1998); Hess v. Mazurkiewicz, 135 F.3d 905, 909-910 (3d Cir. 1998); Caro v. Calderon, 165 F.3d 1223, 1226-28 (9th Cir. 1999), cert. denied, 536 U.S. 951 (2002); Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1984).

[30] Accompanying this memorandum at Exhibit 18 are affidavits from the following family members: Autumn Tankleff-Asnes (1st cousin); Harold Alt Grandfather (Arlene's Father); Marianne McClure (Aunt); Norman Tankleff (Uncle - Seymour's brother); Ruth Tankleff (Aunt); Jennifer Joy Johnson (cousin); Ronald Falbee (cousin); Jay Adair Falbee Piccirillo (cousin); Marcella Alt Falbee (Aunt); Susanne Falbee (cousin) and Carolyn Falbee (cousin).

Martin of any opportunity to rebut the prosecution's charges against him. The failure even to interview or to prepare these salient witnesses for trial testimony supports the inescapable conclusion that an extremely significant departure from acceptable representational standards occurred. *E.g.*, People v. Barry Smith, 169 Misc.2d 581, 643 N.Y.S.20 315 (Sup. Ct. 1996), *aff'd*, 237 A.D.2d 388 (2d Dep't 1997); People v. Wilson, 133 A.D.2d 179 (2d Dep't 1987); People v. Park, 229 A.D.2d 598 (2d Dep't 1996); People v. Norfleet, 267 A.D.2d 881 (3d Dep't 1999).

2. Trial Counsel Failed To Keep Promises Made During His Opening Statement Concerning Family Member Witnesses

Trial counsel's critical error in failing to call the family member witnesses identified above was compounded by the fact that trial counsel had promised the jury in his opening statement that he would call them. If the jurors had heard from these witnesses as they had been led to believe that they would, their view of Martin Tankleff and his relationship with his parents would have been profoundly altered to Martin's unquestionable advantage, and more than sufficient to raise a reasonable doubt. But the failure to call such witnesses to prove facts as promised during counsel's opening statement, by contrast, broke trust with the jury and destroyed counsel's credibility with those jurors. [31]

In the context of this vigorously contested high profile case, where the defendant had no prior criminal record or any involvement in the criminal justice system, the fulfillment of promises made by defense counsel in his opening statement to call witnesses who would undermine the prosecution's theory of a motive for this crime was critical to Martin's defense. In his opening statement, counsel made unconditional promises to the jury that his proof would

[31] Moreover, it reflects a misplaced belief that an advocate's summation can fill the evidentiary void. This failure alone is sufficient to support a finding of ineffective assistance of counsel. *see People v. Pichardo, ___ Misc.2d ___*, NYLJ, 3/7/2000 at 26 col. 5.

show: a) Martin loved and respected his parents; b) how friends and family members would testify as to Martin's loving relationship with his parents; and c) the motives that were set forth by the prosecution were without foundation. Yet counsel then failed to deliver on these promises, which fell outside the range of effective assistance. See Ouber v. Guarino, 293 F.3d 19 (1st Cir. 2002). [32]

Counsel's opening statement provides the initial opportunity for counsel to address the jury concerning the nature and manner of proof to be elicited. This presentation creates an understanding like a "verbal contract" between the fact-finders and the advocates with respect to the proof. Any lack of candor perceived by jurors with respect to this contract can have a dramatic impact upon counsel's potential effectiveness. [33] From that point forward, any sense that what was promised has not materialized raises a negative inference due to a lack of follow through on promises made by the defense to the jury. "[L]ittle is more damaging than to fail to produce important evidence that has been promised in an opening." Anderson v. Butler, 858 F.2d 16, 17 (1st Cir. 1988) (finding ineffectiveness based on an unkept promise made in opening statement to deliver two key witnesses); accord, Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990); Stouffer v. Reynolds, 168 F.3d 1155, 1163-64 (10th Cir. 1999). For " [i]f counsel fails to deliver on a promise that [a witness] **will** testify, a danger arises that the jury may presume that the [witness] is unwilling to testify under the pressure of cross-examination under

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[32] In New York, and other jurisdictions, a defendant has the right, but not the obligation, to make an opening statement (C.P.L. § 260.30[4]). Although not evidence, counsel's statements during an opening (see e.g., People v. Kurtz, 51 N.Y.2d 380, 384 (1980), may falsely lead the jury into a series of misbeliefs about what was going to be proven to them. The opening clearly, and at a minimum, sets the "testimonial tone" for the proof which the jury anticipates during the evidentiary phase, and raises expectations. See Rubinowitz and Torgan, "The Opening Statement", N.Y.L.J. (10/24/00).

[33] As legendary trial lawyer Edward Bennett Williams said, "whatever you say in your opening statement, you had better be prepared to prove." An Interview With Edward Bennett Williams, Litigation Magazine (ABA 1986).

oath or that the defense is otherwise flawed." Commonwealth v. Duran, 435 Mass 97, 109, 755 N.E. 20 260, 270-71 (2001); see also, People v. Shawn Brown, ___ Misc2d ___, NYLJ, 8/21/98, at 21 (relief granted based on the failure to call a promised witness, "This single substantial error [failure to call promised witness] by counsel so seriously compromised the defendant's right to a fair trial, that it qualifies as ineffective representation and mandates the vacatur of the judgment of conviction.") *Id*. (citations omitted)

Unfortunately, the prejudice to Martin Tankleff's case was not limited to his own counsel's failure to deliver on promises made in his opening statement. Here, the prejudice from the unkept promises was exacerbated in closing argument as well by the Prosecutor's devastating use of the effective trial tactic of exploiting the unfulfilled promises of his opponent by asserting that: the promises were not kept, the witnesses were not called, the evidence was not presented, the truth was not told. Thus, the Prosecutor argued:

- The defendant and the defense in the opening statement promised to deliver you certain things. I submit that they have not done that. And you can consider that in light of the fact that they elected to put on the testimony. (Tr. 4888)
- You were promised by the defense in their opening statement that you would hear from family and friends as regards to the loving relationship between the defendant and his parents. Lets take a look at who did testify. With all due respect to the McClure family, their testimony can be summed up in four words, ten days in July, ten days in July, ten days in July...(Tr. 4888-89)
- Where was the testimony from the family that lives here? (Tr. 4893)
- Where were the family members that saw and talked to the defendant that day? Where were Uncle Norm and Aunt Ruth? (Tr. 4893)
- Where was the favorite Aunt Marcella from Nassau County? Where were Ron and Carol and their children, Carol and Susan with whom the defendant now lives? (Tr. 4893-94)
- Where were these folks who had regular contact with the Tankleffs and with the defendant? Why did we have to sing three verses of ten days in July. Maybe all was not so well. (Tr. 4894-4895)

Significantly, the very relatives whose absence sounded so damning in the prosecutor's closing have all submitted affidavits indicating that they were available and willing to testify at trial on Martin's behalf. See Exhibit 18, Affidavits of Norman Tankleff ("Uncle Norm"), Ruth Tankleff ("Aunt Ruth"), Marcella Alt Falbee ("favorite Aunt Marcella"), Ronald Falbee ("Ron"), Carolyn Falbee ("Carol"), and Susanne Falbee ("Susan"). [34] And, as their affidavits reveal, all of these witnesses had nothing but favorable testimony to give for Martin on the absence of the alleged motive for these crimes. For example, Norman Tankleff, Seymour Tankleff's brother, has stated that Martin and his parents "had a good healthy and loving relationship." See Exhibit 18 (Norman Tankleff Affidavit at 6). Norman Tankleff spent substantial time with Martin and his parents in 1988, the very year of the murder of his brother and sister-in-law, and states that "during these times, there was never any signs of discord or hatred between Martin and his parents. Everyone got along quite well in a loving and caring manner." Id. at 9. While this testimony would undoubtedly have aided the jury, Norman Tankleff states that Martin Tankleff's trial counsel never spoke with him about testifying at the trial. Id. at 13.

After the prosecutor's devastating closing argument, however, Martin Tankleff's jurors were thus left to infer that the reason these witnesses were not called was because the witnesses would not testify favorably to Martin. We know, from the accompanying family member affidavits, that such an inference was absolutely false. But the jurors were left with it nonetheless, because of counsel's failure to present these witnesses, and its effect on the outcome

[34] The prosecutor also cited Shari Rother as a missing family witness in his closing. Ms. Rother, who testified on Martin's behalf at the Huntley Hearing, began cooperating with the government after learning she had a financial incentive to see Martin convicted. The Second Circuit ruled that it was improper and bad faith on the part of the prosecutor to invoke Shari Rother as a missing witness in his summation. See Tankleff v. Senkowski, 135 F. 3d at 252.

of this trial cannot be overstated. As the Anderson Court stated, in language directly applicable to this case:

> we might have no quarrel with counsel's decision to call, or not to call, [the witnesses] as a strategic decision, had that matter stood alone . . . but counsel's choice was not made in that parameter. The choice was made in the posture of the jurors having heard, only the day before, that [the witnesses would testify] . . . and now they would not do so - surely a speaking silence. We cannot accept the approach that we should consider each matter separately – weighing counsel's choice on the [witnesses] as if there had been no opening. There was thrown into the scales the heavy inference the jurors would draw from the non-appearance of the [witnesses]. In those circumstances it was a very bad decision, or, if it was still wise because of the collateral evidence, it was inexcusable to have given the matter so little thought at the outset as to have made the opening promise.

858 F.2d at 18; accord, Harris v. Reed, 894 F.2d 871, 878-879 (7th Cir. 1990).

In a case such as this, where a young man is accused of taking the lives of his parents for money, it was critical to the defense that an accurate and complete picture of Martin be presented to the jury. Only those who really knew Martin, i.e., his family and friends, who lived with him, observed his interactions with his mother and father, who socialized with him, who discussed matters with him, could have provided the necessary accurate, nuanced and fair description of who he is and of his character. [35] These witnesses were available and willing to testify on Martin's behalf, but they were not called. Defense counsel's performance, "viewed in

[35] As jury experts have recognized, the testimony of family members: "can provide crucial first-hand factual input by providing a context for understanding the defendant's actions. Especially valuable in this sense is the family historian, the individual who can tell the stories, both good and bad, that help the jurors picture what life was like for the defendant." Sunby, the Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony, 83 Va. L. Rev. 1109, 1156, (1997). Particularly where, as here, there is evidence of brutal violence, and the prosecution endeavors to dehumanize the defendant: "it may be extremely important and come as something of a surprise to the jury that the defendant has people who care enough about him to be there on his behalf. Such testimony may present the first sliver of insight that there is good in the defendant." Id. at 1153; see also Kwan Fai Mak v. Blodgett, 754 F. Supp. 1490, 1501 (W.D. Wash. 1991) (failure to consider putting on evidence of family members in a capital case was ineffective assistance).

totality and as of the time of representation," (People v. Benevento, 91 N.Y.2d 708, 712 (1988)), cannot be viewed as reasonable strategy under the circumstances.

Defense counsel promised, dramatically and unequivocally, in his opening statement that he would present significant and relevant testimony which would essentially exculpate the defendant from the crimes with which he was charged. Counsel promised that he would present witnesses who would testify with respect to how Martin grew up in Belle Terre, how Martin respected his parents and how he had a loving relationship with them. This, counsel said he would do, and clearly he failed to do so. Surely if these promises are not commitments, in effect, a kind of contract, that the defendant would "prove" certain facts, then what are they? Defense counsel's opening statement led the jury down a road of deception. He told them that he would "prove" relevant and material facts, which he never proved. This failure gave the prosecution an advantage which proved critical and devastating to the defense. This failure to fulfill the promises to call these readily available witnesses unquestionably prejudiced Martin Tankleff so as to deny him the effective assistance of counsel.

CONCLUSION

These days it seems that one can pick up any metropolitan newspaper, or can turn on any major television network and find an almost daily report of wrongfully convicted individuals being released from prison (or worse, death row). The correction of such past mistakes is one of the laudable constitutional hallmarks of our criminal justice system. As Judge Learned Hand once wrote, "our [criminal justice] procedure has always been haunted by the ghost of an innocent man convicted." United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). This case presents an opportunity for the Court to rid the system of just such a ghost. Martin Tankleff is innocent of the crimes for which he was been convicted. It is time, indeed way past time, to set him free.

Martin Tankleff was inappropriately interrogated, coerced into making an untrue confession, and then charged and convicted of very heinous crimes. He has been incarcerated wrongfully for thirteen of the prime years of his young life. This Court has a very clear opportunity, in the circumstances, to correct an obvious and tragic injustice, to vacate this innocent young man's conviction, and to permit, for the first time, an honest, impartial, and professional investigation of the real facts pertaining to the murders of his beloved parents. The actual perpetrators, and their accomplices, must be brought to justice, and Martin Tankleff must be set free.[36]

Respectfully submitted,

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[36] Martin Tankleff, and his undersigned counsel, would all like to recognize the substantial amounts of time and effort that legal secretary Meg Griffin put into making this pleading possible.