

**COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

**Indictment Numbers
1290-88 & 1535-88**

Respondent,

- against -

MARTIN H. TANKLEFF,

Defendant.

-----X

**REPORT OF THE PEOPLE'S INVESTIGATION OF THE
DEFENDANT'S CLAIM THAT "NEW EVIDENTIARY
MATERIALS" ESTABLISH HIS "ACTUAL INNOCENCE"**

(CORRECTED COPY)

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PRELIMINARY STATEMENT

In 1990, a jury convicted Martin H. Tankleff of the 1988 murders of his parents, Arlene and Seymour Tankleff. The judge who presided at the trial sentenced him to two consecutive, 25-years-to-life prison terms. In turn, the New York appellate courts affirmed the convictions and the sentences, the federal courts denied his petition for habeas corpus, and the New York appellate courts denied his motions to reargue his state appeals. Seventeen years old at the time of the murders, Tankleff will be ineligible for parole until 2040.

After the jury verdicts and prior to sentencing, Tankleff attempted “to portray [himself] as the victim of the great “Frame Up,” making “[a]llegations [] run[ning] the gamut from police collusion to jury tampering by the prosecutor” and engaging in “character assassination of the Presiding Judge.” In short, he “s[ought] to attribute []his conviction to every possible hypothesis but his guilt.” *See People v. Tankleff*, Memorandum Ordering Hearing on Tankleff’s Jury-Misconduct Motion, at 2-3 (County Court Suffolk County Oct. 4, 1990) (People’s Exh. 1). The County Court denied his motion. *See People v. Tankleff*, Memorandum Denying Tankleff’s Jury-Misconduct Motion, at 8 (County Court Suffolk County Nov. 21, 1990) (People’s Exh. 1). Thereafter, in the period spanning from when he filed his first state appeal until shortly after the

federal courts denied his habeas petition, Tankleff filed four C.P.L. § 440 motions to vacate his conviction, all to no avail. Undaunted, on October 2, 2003, he filed his fifth C.P.L. § 440 motion to vacate his conviction, claiming that he can prove “his actual innocence” based on “new evidentiary materials which quite plainly establish that two other young men actually murdered [his] parents while [he] . . . was sound asleep in his bed.” (Def.’s Mem. at 1).

Because prosecutors should endeavor not to win but to seek justice and the truth, Thomas J. Spota, the Suffolk County District Attorney, promised that his office would investigate the veracity of Tankleff’s claims. As the media have accurately reported, “To make sure [that] the investigation [would be] as independent as possible,” Mr. Spota assigned the investigation to me, a recent hire and “a former federal prosecutor with no prior ties to the district attorney’s office.” *See, e.g.,* R. Topping & A. Smith, *New Evidence in 1988 Slayings*, N.Y. *Newsday*, Oct. 2, 2003.

After I commenced my investigation, Tankleff’s attorneys asked Mr. Spota to recuse himself. The attorneys stated that they had made the request because, in 1993, Mr. Spota, then in private practice, represented one of the homicide detectives who had testified at Tankleff’s 1990 trial. *See* R. Topping, *Tankleff Team Cites Conflict*, N.Y. *Newsday*, Oct. 23, 2003. Mr. Spota declined to recuse himself, and Tankleff’s attorneys did not make a disqualification motion. Nevertheless, to insure my independence, Mr. Spota erected within his office an attorney’s version of a “Chinese Wall” so that neither he nor anyone else from the office would attempt to influence me during my investigation.

As set forth below, Tankleff’s motion is meritless, and he is not entitled to a hearing, because *thus far* he has neither demonstrated “his actual innocence” nor presented “new evidentiary materials [that] quite plainly establish that two other young men actually murdered [his] parents.” I emphasize *thus far* because the three month-period that I have had in which to

conduct my investigation has been insufficient. Tankleff's attorneys, given their position that Tankleff is innocent, are understandably anxious to resolve this matter. But *they* began their investigation at least 20 months ago when, at their request, a polygrapher administered a polygraph examination to one of the two persons upon whom their motion principally rests. (*See* Def.'s Mem. Exh. 1). Indeed, the need for alacrity is ironic given that the attorneys contend that, in 1988, homicide detectives focused immediately upon Tankleff instead of conducting a thorough investigation into a person who, according to Tankleff's current attorneys and all of his prior attorneys, should have been the detectives' prime suspect. (*See* Def.'s Mem. at 14-16).

INVESTIGATIVE FINDINGS

Two law enforcement officers, Special Investigator Walter Warkenthien and Detective Investigator Robert Flood, assisted me in my investigation. Warkenthien, a retired Suffolk County detective, and Flood, a retired Southampton Town detective, joined the district attorney's office after the people of Suffolk County elected Mr. Spota in November 2001.

The investigators and I interviewed 26 persons and attempted to interview others who declined to speak with us or who could not be located. The results of those interviews and all other evidence relevant to my investigation are set forth below.

Karlene Kovacs

In an affidavit dated August 10, 1994, (Def.'s Exh. 1), Karlene Kovacs informed Robert Gottlieb, Tankleff's trial counsel, that Joseph Creedon had told her that he was involved in the Tankleff murders.¹ In her affidavit, Kovacs stated in relevant part :

¹ Gottlieb gave the affidavit to the District Attorney's Office under then-District Attorney James M. Catterson Jr., but claims that "There is no way in hell they pursued it to the extent warranted." R. Topping, *New Evidence in 1988 Slayings*, N.Y. *Newsday*, Oct. 2, 2003.

3. After the Tankleff murders on a subsequent Easter Sunday I was with John Guarascio He and I went to his sister[] [Terry]’s house in Medford or Farmingville Terry was married to Joe [Creedon]. . . . John warned me about Joe, telling me that he was deeply involved in pot and [] was a trouble maker.

4. While at the house we went into a bedroom and smoked a joint. While there, Joe told me, in essence, that he was involved in the Tankleff murders in some way. I recall him saying something about hiding behind trees and bushes at the Tankleff house during the time of the murders and that he was with a Steuerman. He did not give the first name of the Steuerman he was with. After the murders he described how they had to make a quick dash to avoid being caught. It was dark outside at that time and he described how his adrenalin was flowing and that he was afraid about being caught and therefore had to get out of town

(*Id.* ¶¶ 3-4).

Prior to April 22, 2002, private investigator Jay Salpeter, a member of the Tankleff defense, contacted Joel M. Reicherter, a polygraph examiner. According to Reicherter, Salpeter asked Reicherter “to administer a polygraph examination to [] Kovacs concerning her claim that [] Creedon told her on Easter Sunday in the early 1990’s that he and an accomplice were responsible for the murders of Mr. and Mrs. Tankleff” (Def.’s Exh. 1, at 1).

According to Reicherter, he met with Kovacs on April 22, 2002, at which time he conducted a “pre test interview” and administered a polygraph examination. According to Reicherter, during the interview Kovacs stated:

On Easter Sunday in the early 1990’s [] Kovacs[,] with her then boyfriend, John[,] were visiting with his mother for the day. Also visiting w[ere] his sister Theresa and her live in boyfriend, Joe Creedon. Shortly before dinner, Joe, John and Karlene were conversing out doors while smoking marijuana. During the conversation, Joe informed Karlene briefly about his role in the murder of Mr. and Mrs. Tankleff.

(*Id.*)

Reicherter's examination consisted of three questions. First, "Did Joe Creedon tell you he and a Steuerman were hiding in the bushes on the Tankleff property on the night of the murders?" Second, "Did Joe Creedon tell you they were full of blood and had to get rid of their clothes the night of the murders?" Third, "Did Joe Creedon tell you he was scared and his adrenaline was flowing and had to get out of there (Tankleff property)?" Kovacs answered "Yes" to each question. Reicherter opined that she had answered the questions truthfully. (*Id.* at 2).

On October 1, 2003, Warkenthien and Flood interviewed Kovacs. According to Warkenthien, Kovacs stated that Creedon had made the statements while she, Creedon and Guarascio were smoking a joint in the bedroom and that she had remained silent about Creedon's statements until private investigator William Novarra talked about the Tankleff case in her presence, which compelled her to tell Novarra of Creedon's statements. (A 1-2).²

On October 30, 2003, Warkenthien and I interviewed Kovacs. When asked what happened on that Easter Sunday in the early 1990's, Kovacs told us that she couldn't remember much except that she had played with the kids, that John's mother and sister had prepared dinner and that Joe had made a statement. With respect to the statement, she stated that she, John and Joe had gone outside and smoked one joint, at which time Joe stated that he and Steuerman had gone to the Tankleff house and hid in the bushes, that Joe had run away and was out of breath and that he was covered in blood and had to get rid of his clothes. She stated that Joe had not mentioned the Steuerman he was with, but she had assumed that it was the son (Todd), whom she knew to be involved with drugs. (A 3-4). She stated that she did not come forward with this information until years later because she was scared. (A 5).

² Numbers in parentheses preceded by "A" refer to pages in the People's attached appendix.

We informed Kovacs that we were obligated to ask her about some inconsistencies between her statement and the prior statements that she had given to Gottlieb and Reicherter.

We knew from our investigation that the “Joe” to whom Kovacs was referring was Joseph Creedon. We asked her how she knew Creedon, and she answered that the one and only time that she had met him was on that Easter Sunday when she and John Guarascio, whom she was seeing at the time, went to John’s sister’s house in Selden or Terryville. (A 3).

We asked her on which Easter Sunday Creedon had admitted his involvement in the Tankleff murders, and Kovacs answered that it was on Easter Sunday in 1991, which was more specific than she had been with Gottlieb or with Reicherter. In her 1994 affidavit to Gottlieb, she stated on an Easter Sunday “subsequent” to the murders, and Reicherter reported that in her 2002 statement to him she had stated on an “Easter Sunday in the early 1990’s.” When asked how, in 2003, she could be more specific than on those earlier dates, she stated that she had spoken with Creedon on the Easter Sunday before she had checked herself into drug “rehab.” She stated that she used to have a cocaine problem and that she had hit “rock bottom” in 1992, when she checked herself into rehab for 30 days. She stated that she has not used drugs since. (A 5).

When asked if she had ever stated that she and John had gone to John’s *mother’s* house for Easter as opposed to John’s *sister’s* house, she stated that she had not. When showed Reicherter’s report, in which Reicherter wrote that Kovacs had told him that she and John had visited with John’s *mother*, she stated that the visit was a family gathering and that John’s mother was there. When asked if it appeared from the report that she had stated that she and John had gone to John’s *mother’s* house and not John’s *sister’s* house, she agreed that it appeared so, but that she had not said that to Reicherter. As to the inconsistency regarding whether the house was located “in Medford or Farmingville” or in “Selden or Terryville,”

Kovacs stated that it was either Medford, Selden or Farmingville, and that if she had said “Terryville” she had misspoken by combining the name of John’s sister, Terry, with “ville.” (A 4).

When asked if she, John and Joe had smoked the joint in the bedroom, she stated “No,” she was “100% sure” that they had smoked it outside. When confronted with her 1994 affidavit, which reads, “[W]e went into a *bedroom* and smoked a joint” (emphasis added), she stated that she thinks that they went *through* a bedroom to get outside.³ When asked if it appeared from her affidavit that they had smoked the joint in a bedroom and not outside, she stated that although it appeared that way, she was sure that they had smoked the joint outside. She also stated that she did not know why her affidavit reads, “Terry was married to Joe.” She stated that Terry and Joe were seeing each other, but were not married. (A 4).

When asked if she were sure that Joe had spoken of being covered in blood and getting rid of his clothes, she stated that she was sure. When confronted with her 1994 affidavit, in which she did not mention anything about Joe being covered in blood or getting rid of his clothes, she stated that she could not explain why her affidavit omitted this information. When asked whether someone from Gottlieb’s office had typed the affidavit for her review and signature, she agreed that this is what happened. When asked if she had mentioned the blood and clothes to Gottlieb or to Gottlieb’s investigator, she stated that she had. When informed that, assuming Gottlieb or his investigator had been competent, they would have considered the blood and the discarding of the clothes to be important and included it in the affidavit, she agreed and did not understand why these things had been omitted. (A 4-5).

³ According to Warkenthien, Kovacs told him that they had smoked the joint in the bedroom. *See supra* p. 5.

John Guarascio

On September 7, 1994, Novarra, acting on Gottlieb's behalf, delivered to the Suffolk County District Attorney's Office, under then-District Attorney James M. Catterson Jr., a copy of Kovacs's affidavit. The district attorney's office assigned Detective Investigator Thomas McDermott to investigate Kovacs's claims. (A 7).

According to a report that McDermott prepared, on September 21, 1994, McDermott interviewed John Guarascio, who stated that he did not recall anyone, including Creedon, making a statement concerning the Tankleff murders. (A 7).

October 1, 2003, Warkenthien and Flood interviewed Guarascio, who stated that all that he remembered was that Creedon, a person whom he feared, whom he did not trust and whom he knew to be into drugs, said something like, "They were hanging out smoking in the bushes watching guys play cards." According to Warkenthien, Guarascio stated that he had no idea what Creedon was talking about. (A 9).

At Warkenthien's request, Guarascio prepared an affidavit. The affidavit states in relevant part:

Sometime about ten years ago, I'm not sure of the year, I went with my girl friend Karlene Kovacs to my sister[']s house someplace in Selden[,] New York. . . . When we arrived at the house there was Joe Creedon, a friend of Joe's, I don't know his name[,] and my sister Theresa. About an hour later [] Karlene, Joe and the guy . . . and myself went into Theresa & Joe's bedroom to smoke a joint. After a few minutes Joe took a rifle out of his closet and started talking to us. I heard him say they were hanging out smoking in the bushes watching guys play cards. . . . I did not know what Joe was talking about. . . .

(A 11).

Theresa Guarascio

Warkenthien and Flood have not interviewed or located Theresa Guarascio. McDermott, however, interviewed her on October 13, 1994. According to McDermott, Guarascio stated that she no longer had “[any] use” for Creedon and had “an order of protection filed against [him].” According to McDermott, Guarascio stated, however, that she had never heard Creedon make any statement regarding the Tankleff murders but “vaguely recall[ed]” that Creedon once stated that he had heard that “Steuerman (the father) wanted Tankleff’s tongue cut out.” (A 7).

Robert Trotta and Confidential Source 1

On October 16, 2003, Robert Trotta, a Suffolk County detective, informed me that Creedon was known as “Joey Guns” because Creedon had a history of using firearms to rob drug dealers. Trotta stated, however, that Creedon was “little” and did not beat or stab people and that Creedon’s violent acts were limited to Creedon’s drug involvement. Nevertheless, Trotta told me that, according to one of his reliable sources [hereafter Confidential Source 1 or CS-1], Creedon had said something to CS-1 about the Tankleff murders.

In Trotta’s presence, I interviewed CS-1. CS-1 stated that, in 1993, he spoke with Creedon, whom CS-1 referred to as “Joey Guns” or “Guns,” at the Gallery Pub in Farmingville. According to CS-1, Guns used to carry a rifle and, together with [Frank] Flammia,⁴ robbed a lot of drug dealers in Selden and Centereach. According to CS-1, at one point CS-1 referred to the Tankleff murders and said, in substance, that it was a shame about the kid, meaning Marty Tankleff. According to CS-1, Guns responded, in substance, that “the kid didn’t do it. I was there.” CS-1 stated that, at a later date, Guns, while high on crack, had repeated the above.

⁴ Flammia was shot and killed in or about August 1999.

CS-1 also stated that Guns once got shot and that, according to Guns, Trotta was the one who had shot him. I informed CS-1 that it was not Trotta but Todd Steuerman who had shot Guns. CS-1 replied that “the kid” Steuerman and Guns were involved together in the drug business, that Steuerman was afraid of Guns, that Steuerman did not shoot Guns and that Trotta also did not shoot Guns. CS-1 stated that he thinks that a Pagan may have shot Guns because the Pagan “Foot” hated Guns and Flammia.

I asked CS-1 about “Foot.” CS-1 stated that “Foot” liked CS-1. CS-1 also stated that on numerous occasions in 1997, he observed the FBI surveilling “Foot.”

Following the interview, Trotta and I discussed CS-1’s reliability. Trotta stated that although CS-1 had used a lot of cocaine over the years, he considered CS-1 to be reliable.

On December 7, 2003, Trotta informed me that CS-1’s information about Creedon was nothing new. According to Trotta, in the mid 1990’s, a lot of drug dealers who got arrested in Suffolk County were saying that there was a rumor that Creedon had killed the Tankleffs. According to Trotta, most of the dealers stated that they did not believe the rumor and that Creedon was spreading it to enhance his violent reputation with drug dealers.

Gregory Hagarty

Gregory Hagarty is a Special Agent with the FBI, and from 1997 through 1999 he was one of two FBI agents in charge of the Federal Government’s investigation and prosecution of the Pagans Outlaw Motorcycle Club. On October 28, 2003, and on December 11, 2003, Hagarty informed me that, contrary to CS-1’s claim, the FBI *rarely* surveilled “Foot,” whose real name is Michael DeSena. According to Hagarty:

[A detective] did one or two morning surveillances just before the [arrests] to ensure that Foot’s work pattern did not cause him to leave before [his] arrest. Other than when Foot was with numerous other Pagans, i.e., at runs, parties, . . . he was not under

surveillance. He was very inactive on day to day matters[,] and we focused on “Conan” (Keith Richter). In short, Foot was not under constant (or sporadic for that matter) surveillance.

Confidential Source 2

On December 4, 2003, an attorney informed me that he had an incarcerated client [hereafter CS-2] who was cooperating with another prosecutor’s office. The attorney informed me that CS-2 had read about the renewed interest in the Tankleff murders and was willing to provide me with some information.

Because of time constraints and CS-2’s incarceration, neither Warkenthien, Flood nor I met with CS-2. Instead, at my request, the attorney asked CS-2 a number of questions and provided me with CS-2’s answers.

On December 9, 2003, the attorney informed me that, according to CS-2, CS-2 has known Creedon, or “Joey Guns,” for more than 20 years, that Guns was an “enforcer,” that Guns had a relationship with “a bagel guy” (presumably Todd Steurman) that went bad and that Guns had told CS-2 things about the Tankleff murders. According to the attorney, CS-2 stated that although Guns had never admitted any involvement in the Tankleff murders, Guns had said certain things – which CS-2 could not remember – that led CS-2 to believe that Guns had been involved.

Glenn Harris

Glenn Harris has a long criminal history, including three convictions for burglary. Currently incarcerated on a parole violation, Harris has violated the conditions of his parole five times in the past five years.

Prior to June 25, 2002, one of the law firms representing Tankleff contacted Reicherter. According to Reicherter, the firm asked Reicherter “to administer a polygraph examination to

Mr. Glenn Harris who is incarcerated at Clinton Correctional Facility.”⁵ In his report, (Def.’s Exh. 2), Reicherter stated:

The purpose of the polygraph examination was to assess the veracity of Mr. Harris’ claim that he drove Peter Kent and Joseph Creedon to the Tankleff residence on September 7, 1988.

I was accompanied by . . . Mr. Jay Salpeter, who had extensive knowledge of Mr. Harris’ relationship to Mr. [Peter] Kent and Mr. Creedon and details of Mr. Harris’ whereabouts on the evening of September 7, 1988.⁶

(*Id.* at 1).

In his pretest interview, Reicherter noted that Harris “is afflicted with bipolar disease but is under prescribed medication and medical supervision.” Reicherter stated:

According to Mr. Harris, he and Mr. Creedon[,] while at Mr. Creedon[’s] residence[,] were using illegal drugs on September 7, 1988. During the evening Mr. Creedon asked Mr. Harris for a ride to a certain location so he could get some money. Mr. Harris agreed at about the time Mr. Kent arrived from his residence several houses away from Mr. Creedon’s house.

Mr. Harris insisted he did not know the exact location or destination until they arrived at the Tankleff residence. Upon arrival, Mr. Harris said that Mr. Kent and Mr. Creedon exited the car . . . and approached the house on the left side. Approximately [] 15 to twenty minutes later the two men returned to the car leaving the house from the right side. Mr. Harris then drove the car with his passengers back to Mr. Creedon’s house.

Upon arrival both Mr. Kent and Mr. Creedon went to their respective houses. Mr. Harris decided to sleep in his car near Mr. Kent’s house.

At about day break, Mr. Harris said he approached the Kent residence where he observed Mr. Kent burning a pair of blue jeans and a black hooded sweatshirt on the side of the house.

⁵ On June 25, 2002, Tankleff was also incarcerated at Clinton.

⁶ If Reicherter’s statement that, on the date of the polygraph, “Salpeter [already] had extensive knowledge of Mr. Harris’ relationship to Mr. [Peter] Kent and Mr. Creedon and details of Mr. Harris’ whereabouts on the evening of September 7, 1988,” then Salpeter and the defense learned of Harris long before June 25, 2002.

Later that morning Mr. Harris claimed he heard for the first time, on the radio, that Mr. and Mrs. Tankleff were stabbed and bludgeoned. He suspected that Mr. Kent and Mr. Creedon were the killers.

(Id. at 1-2.)

Reicherter administered two examinations, each of which consisted of three questions. In the first examination, Reicherter asked: First, “Did you drive Kent and Creedon to the Tankleff residence the night they were killed?” Second, “Did you see Kent burn his jeans and a black hooded sweat shirt at his house after the Tankleff stabbings?” Third, “Did you see gloves in Creedon’s left pocket when he got out of your car at the Tankleff property?” According to Reicherter, Harris answered “Yes” to each question. Based on the results of the examination, Reicherter opined that Harris had answered each question truthfully. *(Id. at 2-3).*

In the second examination, Reicherter asked: First, “Did you know before you arrived at the Tankleff house that Steuerman⁷ wanted the Tankleff[s] killed?” Second, “When you were driving Kent and Creedon to the Tankleff house, did you know they were going to kill the Tankleffs?” Third, “When you, Kent and Creedon left the Tankleff [h]ouse that night, did you know then [that] the Tankleffs had been stabbed?” According to Reicherter, Harris answered “No” to each question. Based on the results of the examination (which Reicherter appears to have designed to exculpate Harris), Reicherter opined that Harris had answered each question truthfully. *(Id. at 3).*

On August 29, 2003, Harris met with Salpeter and provided Salpeter with an affidavit. (Def.’s Exhibit 2). In the affidavit, the body of which appears to be in Salpeter’s handwriting, Harris stated:

⁷ In his August 29, 2003, affidavit to Salpeter, Harris omits any reference to “Steuerman,” and Tankleff has not submitted any other materials showing that Harris has ever implicated Todd or Jerry Steuerman.

. . . [I]n early September 1988 . . . I ran into Peter Kent and Joseph Creedon at Billy Ram[']s house. While there we were using crack. The party ended I don't recall what time – Creedon says that he knows where there is a safe – myself, Creedon and Kent went to a house in Bel[le Terr]e where Creedon directed me to – It was a gated community – Creedon directed me to the house – I parked my car on the street where Creedon told me to stop. Creedon and Kent got out of the car and walked towards the house on the grass. At this time I lost sight of them towards the rear of the house – Anywhere from 10 min[ute]s [] to half of an hour they came running to the car – Creedon opened the front door[,] flipped the seat back and Peter went into the back – I saw Joey having gloves in the left hand pocket of his wind breaker – Joey said “let[']s go” – They were both nervous and Peter was winded – I drove away and left the same way I entered – Joey said take me to my mother[']s – which was [in] the same vicinity where Kent lived, about three houses away from each other. . . . Creedon said he had to take care of something and walked towards his mother[']s house – At this time Kent also said he had to do something and went to a house – I got into the back seat of my car to rest – I couldn't sleep and sat up and I s[aw] Peter move [to] the side of the house – he looked suspicious so I got out of my car and walked over and noticed that he was burning his clothes on the ground – I noticed jeans and a sweatshirt smoldering . . . – I asked him what happened?, what are you doing and he said never mind – I just walked away from him and went back to my car – At that time I realized that something more than a burglary occurred – I went back to my car and wanted to get some rest – I couldn't sleep so I turned the radio on – It was then that I heard that something happened to an elderly couple in Bel[le Terr]e – I put two and two together that I might have been involved with something that happened in Bel[le Terr]e – I was on parole at the time and was afraid to go to the police – This bothered me for a long time and when (Jay Salpeter) contacted me it gave me the opportunity to tell the truth.

(Id. at 1-3).

On October 6, 2003, Warkenthien and Flood interviewed Harris, who was now at the Sing Sing Correctional Facility. Warkenthien and Flood asked Harris about the contents of the affidavit that Harris had given to Salpeter. Warkenthien and Flood did not show Harris a copy of Harris's affidavit.

According to Warkenthien:

Harris stated that he doesn't remember when the murder happened, that he thinks it occurred around the 2nd or 3rd of September, 1988. He stated that he was at a party at Billy Ram's house in Selden and that Creedon came over to him and asked him to take a ride, that he knew a house with a safe. Harris stated that he agreed to take Creedon. They went outside the house and Creedon told him he wanted to pick up Kent around the corner. Harris stated that he is a Burglary/Safe man, that was his MO and that was why he agreed to go along with Creedon and Kent. Harris stated that he knew where Belle Terre was because his mother would take him there when he was a kid; that his mother would drive into Belle Terre, drive past the guard shack, go all the way down a winding road to the end at the bluffs. He further advised that on the night he drove Creedon and Kent to Belle Terre, he didn't see a guard sitting in the shack as he turned into Belle Terre. He said that he drove his car all the way to the end of the road the same way his mother did when he was a kid. When they got to the bluffs at the end of the road he stopped the car and parked on the road because there was no[] other place to park the car. When Creedon and Kent got out of the car he slouched down in the seat so no one could see him. He was worried about the constable being on patrol. He figured it was so dark out that no one would see him. It was so dark out he didn't see any houses in the area, and had no idea in which direction Creedon and Kent went. No longer than ten minutes passed when Creedon and Kent returned to the car.

(A 12-13).

(In November 2003, Warkenthien and Flood drove to Belle Terre and determined (1) that there are no streetlights in Belle Terre, and (2) that the distance between the bluffs and the former Tankleff residence is six-tenths of a mile).

According to Warkenthien, Harris also stated:

Both Creedon and Kent were out of breath when they got in [the car] and Creedon said, "Let's get out of here." No one said anything on the ride back to Selden. . . . Harris thinks they got back to Selden after midnight, around 3:00 AM. . . . Creedon and Kent got out of the car and left. There was no discussion about anything from Belle Terre to Selden. Harris stated that he was tired and decided to sleep in the car, but after two hours of being unable to

sleep he decided to turn on the radio. Between five and six AM, he heard on the news that two people had been murdered in Belle Terre. At the time he put two and two together that Creedon and Kent had done it. He further advised that he has never talked to Creedon or Kent about what happened that night in Belle Terre. The only time the words Belle Terre were ever mentioned was when Creedon and Harris were doing a burglary at the Strathmore Bagel store. When Harris got a look at the size of the safe, he called Creedon an asshole. Creedon pointed his finger at him and stated, "Remember what happened in Belle Terre."

...

I advised [] Harris that the affidavit he gave Jay Salpeter five weeks ago was different from what he had told us today.

[] Harris stated that maybe he should get a lawyer before we continue. . . .

Prior to exiting [the room], I turned to Harris and told him that when a non-participant is killed during the commission of a felony everyone involved in the felony is guilty. I also told him that if the statement he had given to Salpeter was true, he might be changing places with Marty. Glenn leaned back in his chair and looked stunned at what he had just heard, and did not respond.

(A 13).

At my request, the Suffolk County Sheriff transported Harris to the Suffolk County jail. Harris arrived on October 22, 2003, and, on that day, Warkenthien, Flood and I attempted to interview him. Harris told us about some personal matters, such as his need for counseling because he has difficulty in managing his anger, and stated that he has violated the terms of his parole five times in the past four years.

I told Harris that I wanted to speak with him about the matters that he had discussed with Warkenthien and Flood, but advised him that he had the right to remain silent and the right to an attorney. Harris stated that he wanted to see a lawyer before speaking with us. We did not question Harris, and the Court appointed attorney Karl E. Bonheim to represent him.

On October 31, 2003, the Suffolk County Sheriff reported that, earlier that day, Harris (1) assaulted another inmate, (2) threatened a nurse, (3) threw chairs, and (4) in response to an officer's direction to get off the floor, stated, "Fuck you, get me up." The officers used force to move Harris, and they placed him in a detention cell. According to one officer, "Harris continued to be loud and abusive, threatening to 'get anyone who came near him'" and "flooded out [the] cell by shoving his shoe down the toilet." (A 14-21).

After a judge had appointed Bonheim, attorney Dominic A. Barbara notified me that Harris might retain him. Harris ultimately did not retain Barbara. Instead, on November 5, 2003, attorney Richard J. Barbuto wrote the Court that "[he] will be [substituting as counsel for] Harris." Barbuto faxed me a copy of the letter on November 6, 2003.

On or about December 2, 2003, I called Barbuto's office and spoke with Barbuto. I explained that, because my report was due on December 8, 2003, I needed to know by December 5 whether Harris would agree to meet with me or agree to testify should the Court order a hearing. Barbuto informed me that he intended to see Harris on "Friday" (December 5).

On December 8, the Court granted my request for an adjournment until December 12. Later that day, at about 4 p.m., I called Barbuto's office, but a representative from his office stated that he had left for the day. I left a message asking that he return my call on Harris.

Because by late morning on December 9 Barbuto had not returned my call, I called his office a second time, but this time an office representative stated that he was out of the office. I left a message asking that he return my call on Harris. Because by late afternoon he still had not returned my call, I called his office a third time, but this time an office representative told me that he was in a meeting.

On the morning of December 10, I called Barbuto's office a fourth time. This time I reached him. I asked him whether Harris would meet with me or testify should the Court order a hearing. Barbuto told me that he intended to meet with Harris on the morning of December 11 and would let me know.

A 4:24 p.m. on December 11, 2003, Barbuto faxed me a letter stating:

As you know, I represent Mr. Glenn Harris, a critical witness in the investigation of the murders of Seymour and Martin Tankleff.

...

I have spoken with Mr. Harris on a number of occasions, the latest being on the morning of December 11, 2003, and I now advise you that he is willing to be debriefed by your office provided that he is granted transactional immunity with respect to the Tankleff murders and any surrounding events.⁸

As you are aware, Mr. Harris has not asked for any benefit with respect to his time in jail nor has he made requests of any other kind. Given that fact as well as the implications thereof and in the interests of justice, I should think that the Office of the District Attorney would make every effort to further investigate the circumstances surrounding the events in question.

(A 23-24) (emphasis in original).

Dan Harris

On October 21, 2003, Suffolk County Assistant District Attorney Patricia Brosco received a telephone call from a man who identified himself as Dan Harris, a brother of Glenn Harris. According to Brosco, Dan Harris stated

that the statement his brother gave was coerced by the defense attorneys. That they befriended him in jail for the last 13-15 years and he was contacted by a P.I. and defense attorneys. That they befriended his brother, visiting him in jail, and that they obtained a

⁸ "Transactional immunity" protects a witness from prosecution for the offense or offenses involved. It is broader in scope than "use immunity," which protects the witness only against the prosecution's use of his or her immunized testimony in a prosecution of the witness.

coerced statement from him. . . . [Dan] Harris [stated] that he was looking for immunity for his brother. . . .

(A 25).

Confidential Source 3

On November 5, 2003, a Suffolk County jail inmate [hereafter CS-3] told Flood and later Warkenthien that on November 3, 2003, in the jail law library,

Harris asked [CS-3] if he had heard what was going on about the Tankleff case. When [CS-3] said he had, Harris started to laugh and then stated, “The funny thing is I made the whole thing up.”

(A 26).

CS-3 “agreed to wear a wire,” and Warkenthien advised CS-3 that Warkenthien was interested in finding out what Harris meant when Harris said, “The funny thing is I made the whole thing up.”

On November 5, 2003, inside the jail, Harris and CS-3 engaged in a recorded conversation.⁹ Although the quality of the recording is poor, the following relevant excerpts are audible:

CS-3: How did you even get wrapped in all this?

Harris: A chick.

CS-3: Who, Lisa?

Harris: Lisa and a chick Karlene Kovacs.

⁹ Tankleff lacks standing to raise an issue relating to Harris’s right to counsel with respect to Harris’s jailhouse conversations with a confidential source. *See, e.g., People v. Velez*, 155 A.D.2d 708, 708, 548 N.Y.S.2d 272, 273 (2d Dep’t 1989). In any event, the conversations did not violate Harris’s right to counsel: Harris’s custody status was unrelated to, and there were no charges pending against him for, the Tankleff murders, *see, e.g., People v. Steward*, 88 N.Y.2d 496, 502, 646 N.Y.S.2d 974, 977 (1996), and his request for counsel relating to his purported involvement in the 15-year-old murders was not “so closely related transactionally, or in space or time, that questioning on the unrepresented matter (the perjury) would all but inevitably elicit incriminating responses” regarding the matter (the murders) as to which counsel had been requested, *see People v. Cohen*, 90 N.Y.2d 632, 638-39, 665 N.Y.S.2d 30, 33-34 (1997).

CS-3: I thought he was, Tom (inaudible) was telling me that you, ya know.

Harris: I told him the truth, I told him the fuckin truth.

CS-3: So it's all bullshit, right?

Harris: Nah.

CS-3: So that shit can blow up in your face, can't it?

Harris: I hope not, I, I don't talk unless I shoot a fuckin deal, you know what I mean? I'd rather wish this thing to just go away, I don't wanna fuckin, ya know, it's a double edge sword because one guy's getting out that got 50 years, you know what I mean, let the court decide.

CS-3: Because of you.

Harris: Right.

CS-3: But, there's no way that they can figure out that it's all bullshit, even after you give your testimony, you know what I'm sayin, to get him out.

Harris: It's not bullshit, it's the truth. . . . I mean uh, uh, it's the truth, how would you, it's not really bullshit, it's the truth.

CS-3: Yeah, but according to what the paper says.

Harris: Yeah. What'd the papers say?

CS-3: You don't read, get (inaudible) News, read, the Newsday?

Harris: Nah, tell me.

CS-3: It said that you told them uh, everything like uh, you drove (inaudible) out of your car (inaudible) sweaty (inaudible) and that you told them to burn their clothes and all that other shit too.

Harris: That's true.

...

Harris: I never met him (Marty Tankleff) before in my life, I never, I never.

...

Harris: Alright listen, my part is what I attested to. And that's it.

...

Harris: That, that jerk-off (Stephen) Manolis¹⁰ is up my fuckin (inaudible)

...

CS-3: He's gonna beat the shit, right? He's gonna get a mistrial, right?

Harris: To be honest I think the kid[Manolis is] innocent.

CS-3: Oh, you know.

Harris: I think it was the other kid, I mean he's got, it's for the court to decide what. . .

CS-3: So you know, I'm tryin to figure the whole thing, I'm tryin to put it together like, cause I'm only, we only get to read whatever's in the Newsday, ya know what I'm sayin? Nobody knows, and says by this guy (Tankleff) getting out, then who goes in, in his place?

Harris: Two other individuals.

(inaudible)

Harris: Not me, that's for sure.

...

Harris: (inaudible) two scumbags that told me to give them a ride, this is how it went down, between me and you.

CS-3: Yeah.

Harris: I was hangin out with Michael Sinclair.

CS-3: Yeah.

¹⁰ On the date of Harris's recorded conversation with CS-3, the incarcerated Manolis was on trial in Suffolk County for the murder of Kristin Scarabelli. The trial ended in a hung jury on November 25, 2003.

Harris: Michael Sinclair took me to a fuckin house in Selden where a bunch of dudes were getting high.

...

Harris: We ran into Joey Creedon. Joey Guns.

CS-3: Yeah.

Harris: Right. Joey Guns asks me, Can you gimme a ride? I'm like, sure, where to? He tells me up in Belle Terre, I'm like fuck, I'll give ya a ride, I was like, Belle Terre, it can mean two things, either a drug deal or a fuckin burglary, right? He's like first we gotta stop over my mother's. We stopped over by his mother's, we picked up some other kid, Peter Kent. You know Peter Kent?

CS-3: No.

Harris: We picked up Peter Kent.

CS-3: I don't know Joey, uh, Joey uh Creedon, I just know he's from the same . . .

Harris: He's a piece of shit.

...

Harris: So, we picked up the third individual, (inaudible) up into Belle Terre, he tells me to stay out in the car, I'm thinking fuckin either a burglary's goin down or a drug deal.

CS-3: Right.

Harris: You know what I mean, the two guys go in the house, they come out, go, get out of here, go, go, go. I'm like, what the fuck? Ya know, I get outta there, I'm drivin a fuckin totally illegal 1971 Grand Prix, right?

CS-3: Right.

Harris: Totally illegal up in fuckin uh, Belle Terre.

CS-3: Belle Terre? What's up there?

Harris: I know the place like the back of my hand because I've been up there 20 times either to go to the beach¹¹ and have a fire and drink beer.

CS-3: (inaudible)

Harris: To, to canvass the neighborhood, ya know.

...

Harris: Right, so I'm like, damn this, this shit (inaudible) ya know. So on the way out, I'm like fuckin paranoid motherfucker, we get all the way back to Selden, what's his name says stop, lemme out here, ya know. So I'm like . . .

...

Harris: I mean everything that the paper said (inaudible) what I attested to is true, you know what I mean? If I can't make a connection between those two dudes and the supposedly innocent dude, I don't know if that kid is innocent, ya know what I mean? I'd like to believe that he is, ya know what I mean, but I, I, can't, I can't make.

CS-3: So (inaudible) all of a sudden you just come out and tell this shit now, ya know what I'm sayin? That's what I was trying to figure out reading the paper, I was like, I can't figure this guy out.

Harris: They, they came to me, ya know what I mean, they, they came to me. I'm not looking for a get out of jail free card.

...

Harris: They're askin me to help prove this kid's innocence. I can't do that.

CS-3: You can't do that?

Harris: I can't say that he's guilty and it was . . .

CS-3: The DA's office asked you (inaudible).

Harris: No, the private investigators and the defense attorneys.

¹¹ There is no beach in Belle Terre.

CS-3: Right.

Harris: You know what I mean? I, I can't go that far because I don't know nothing, what I don't know I don't know.

CS-3: Right.

Harris: If that kid's fuckin innocent bro he deserves to get loose. This dude Manolis.

CS-3: Yeah.

Harris: The kid (Manolis) is innocent, he shouldn't even be in fucking jail.

CS-3: How do you know that? I mean, you were there?

Harris: No, ah, I wasn't there, but look at the other, ya got the one suspect comin by and sayin yo, I did it, right here, I'm the one.

CS-3: No, sayin I *may* have done it, I may have had, I may have had involvement in it.

Harris: Now, what about the other dude that threatened the rape? I think this (Manolis) kid's innocent, serious, ya know, I mean I'm not a judge.

CS-3: Yeah, I know, I know, I hear what you're sayin.

(inaudible)

CS-3: I thought they was fucked rounding up Martin Tankleff in the first place, reading about it, I was only a kid then.

Harris: The kid caught a raw deal, bro.

In late November 2003, CS-3 told Warkenthien that CS-3 no longer wanted to cooperate.

Glen Wubker

Glen Wubker is a deputy sheriff investigator at the Suffolk County jail. According to Wubker, during the Manolis trial Harris told Wubker that Harris wanted a lock of Manolis's hair so that after Manolis got convicted, Harris could sell the hair on ebay. (A 27).

Confidential Source 4

On November 6, 2003, Warkenthien received a telephone call regarding Harris from an inmate at the Suffolk County Jail. On November 7, 2003, Warkenthien met with the inmate [hereafter CS-4]. According to Warkenthien,

[CS-4] stated that he was in the [l]aw [l]ibrary [] and saw Harris talking with a guy named [CS-3] Harris approached CS-4, and asked him if he heard what was going on with the Tankleff case. CS-4 told Harris that he had, and Harris told CS-4 that he (Harris) fabricated the whole thing. Harris also told CS-4 that he (Harris) knew that Marty killed his [m]other and [f]ather[,] [but] [t]hat he (Harris) wanted to help Marty Tankleff[] because he felt that Marty Tankleff had served enough time for the murders, and he wanted to help Marty get out of jail. Harris also told CS-4 that he is concerned about being charged with perjury if he came forward and told the truth, that he made the whole thing up. Harris told CS-4 that he is looking for immunity before he tells anyone what he did; he just doesn't know who[m] to trust at this time.

(A 28).

On November 18, 2003, in a recorded conversation inside the jail, CS-4 and Harris stated the following:

CS-4: Is the statement (affidavit) true or is it not true?

Harris: It can be taken however they wanna take it. They can go and I could say anything, you know that, you know what I mean?

. . .

Harris: . . . I can say anything, it's a matter of them to prove it, you know what I mean? The burden of proof is on them (inaudible).

...

CS-4: But if you sign a statement and you say in your statement, your statement is false (inaudible)

Harris: They're gonna lie. They're gonna say, you know what? This kid is either nuts or he's telling the truth. If I signed an affidavit, they can't even prosecute me for perjury because it wasn't on the phone.

...

Harris: I'm only wanting immunity towards the perjury charge, you're sayin'?

...

Harris: My thinking was that possibly innocent dude doin' someone else's time.

CS-4: He was innocent?

Harris: Yeah, possibly innocent.

CS-4: Did you know the truth though, you know what happened?

Harris: I don't know if he knew them other kids. That kid Tankleff? . . .

...

Harris: I don't know the kid (Tankleff), that's the point I'm trying to make. These two kids (Creedon and Kent) that I hung out and I took up there, I don't know if they had connections with this kid (Tankleff).

CS-4: Are you on medication bro?

Harris: Nah.

CS-4: You're not on medication?

Harris: Nah.

...

CS-4: You on medication, bro?

Harris: Yeah.

...

CS-4: Well, why, why don't you just tell the truth? Why aren't you telling the truth? What the fuck are you doin, playin with fire with them? You see, you're relyin on people, bro.

Harris: Because it's the only chance that this kid has to get a fuckin' fair and just and, un, unbiased opinion of the facts of this case. He got railroaded.

...

CS-4: So why don't you just come out and tell the truth? The statement you wrote is the truth?

Harris: Nah.

CS-4: This one they brought you down on, is it the truth?

Harris: Nah. Uh, uh.

...

Harris: Okay, now, I took them up there, not knowing what was gonna' happen and realized after it happened, that something else happened, because they came out to the car, they were fuckin' nervous, they had fuckin' blood on their pants. I thought maybe a beatin' happened, you know what I mean? Maybe a fuckin' drug dealer.

...

Harris: No, did I know, did I know that somebody was gonna' get killed? No.

CS-4: But you knew what they were doin' there, right?

Harris: Right, right.

CS-4: What they were goin' there for?

Harris: It was a drug deal. It was a drug deal or, or the kid's gonna' go and pick up money.

CS-4: Which kid?

Harris: (inaudible) I suppose that, I suppose that it was either a drug deal or a burglary, or a robbery (inaudible).

CS-4: They told you it was a drug deal?

Harris: No, he said, take me somewhere to go pick up money.

...

Harris: So, I give him a ride up there.

CS-4: Right.

Harris: They come out fifteen, twenty minutes later all fuckin' fucked up.

CS-4: All of them?

Harris: Two guys, two guys, Kent and Creedon.

CS-4: Well, what about, where's the kid (Tankleff)?

Harris: I don't know, I never knew him, I never knew that kid prior to (inaudible).

CS-4: Alright.

Harris: I never knew that kid or care about him, ya' know?

CS-4: Okay, go ahead, go ahead.

Harris: Them two come out to the car, drive, drive. I'm like, what the fuck, what happened?

CS-4: Right.

Harris: Man, I gotta get outta here, the cops are gonna arrest me.

CS-4: Right.

Harris: I get outta Belle Terre, I get all the way back to fuckin Selden.

CS-4: Right.

Harris: I'm hanging out in Selden, I'm like what the fuck happened? Creden tells me stop here, jumps outta the car, says I gotta go somewhere. He runs over towards his mother's house, Peter says, yo, let me out at my mother's.

CS-4: Right.

Harris: I let him out, I parked my car on the little fuckin side road near Newfield High School. I'm sittin there, and I'm like, what the fuck happened here, ya know? I'm like, what the fuck's goin on? I'm thinking that they got money or they took somebody else's drugs.

...

Harris: . . . [S]o I'm fuckin sittin [in] the car parked out, the sun's coming up, I see fuckin smoke coming from the back of the house, ya know? So I'm like, damn, what the fuck? And I run over there and I see a pile of clothes on fire, ya know? I'm like, damn, man, what the fuck happened? He said just don't, forget about it, forget about it, just get outta here, ya know? So I go back to my car, I had nowhere to go, I was fuckin smoking, I was fuckin goin from one place to another, ya know, I was like damn, the sun's comin up. I fuckin wound up home back at my mother's house, ya know? I fuckin forgot about it.

...

Harris: Okay, now . . . time passes.

...

Harris: . . . [M]e and him (Creden) went on a little run.

CS-4: Uh huh.

Harris: I was like, do you know where we can get some money, ya know?

CS-4: Yeah.

Harris: He was like I know where a safe is.

CS-4: Okay.

Harris: I was like, where? He was, like, Strathmore Bagels, I was like, how do you know there's a safe there, ya know? He was like because I've been in the office before, but (inaudible).

CS-4: Anyway.

Harris: I was like let's go, right? I get there, me and him, in my car, I get in through the roof, I get into Strathmore Bagels.

CS-4: Right.

Harris: I get into the office, I go into the office, there's a safe about fuckin four feet by six feet.

CS-4: Does this have anything to do with this fuckin statement you wrote?

Harris: Yes it does.

CS-4: Go ahead, go ahead.

Harris: Because the owner of the bagel store . . .

CS-4: Strathmore Bagels . . .

Harris: Right, Jerry Steuerman.

CS-4: Who is?

Harris: He was there that night.

CS-4: In the house where the shit went down?

Harris: Right. When the killings took place.

CS-4: How, how'd you know that?

Harris: I didn't.

. . .

CS-4: You come to find out?

Harris: Right.

CS-4: Okay.

Harris: Later on. Now I'm putting two and two together.

CS-4: Alright, so go ahead.

Harris: I'm doin my own math on the case.

CS-4: Alright.

Harris: That night we're doin the burglary, Creedon tells me I get all hostile in there because that safe was supposed to be this big.

CS-4: So he told you what happened in the fuckin house?

Harris: No. He says, I started getting hostile towards Creedon, ya know?

CS-4: Right.

Harris: I was getting ready to beat the shit out of him (inaudible).

CS-4: Right.

Harris: So, uh, I says, Hey Joe, you remember what happened that night in Belle Terre? He was like, that didn't happen to you, you know what I mean? Don't fuck with me, ya know, so I'm like on, like, whoa, I'm taken aback, I'm like wow, I was like fuckin this kid, this dude is nuts, he's crazier than me.

CS-4: Okay.

Harris: So, no money

CS-4: Right.

Harris: We just fuckin tried to do a burglary.

CS-4: Right.

Harris: It was a failed burglary.

. . .

Harris: So now I get busted and fuckin from, from what he alluded to, knowing that I was up there that night, right? Knowing that I was in Belle Terre that night, right? Knowing what he alluded to in the bagel store, and finding out along the line.

CS-4: Right.

Harris: I, I knew, I didn't think it was coincidental, ya know what I mean? It was too much of a fuckin coincidence.

CS-4: It was planned?

Harris: Yeah, ya know what I mean?

CS-4: Who the fuck planned it?

Harris: Joey, obviously.

CS-4: How the fuck did the kid (Tankleff) get involved?

Harris: It was his parents.

CS-4: So the kid knew it was Joey?

Harris: I don't know that, that's how I can't (inaudible).

CS-4: So why, so why would you tell me that you fuckin, when you came down here the first time, I'm like, you, you, you remember you told me, I'm sure you do remember, you told me.

Harris: Because I know.

CS-4: You told me it was (inaudible) Belle Terre doing all this fuckin time, fuck that, I want to set the kid free.

Harris: Cause I don't know, cause I don't know well who the fuck did it.

CS-4: What'd you tell me?

Harris: Now, here's. that's exactly what I told you, I don't know if he was responsible in any way, shape or form. I don't know if he knew Joey, ya know what I mean?

CS-4: But, what'd you write in this fucking statement?

Harris: I said fuckin, I took them up to Belle Terre. I signed the statement August 9th in the (inaudible) room at Sing Sing Corrections Facility. Prior to that, I gave a deposition¹² at Clinton Correctional Facility sometime in March (inaudible).

CS-4: Sayin what? What is it?

...

Harris: . . . [T]hat on September 8th, 1988, I drove Peter Kent and Joseph Creedon up into Belle Terre to do a burglary or, or to go pick up money, that's, that's it, right? It was just general, it wasn't specifics.

CS-4: Alright.

Harris: What they want is specifics and details so they can corroborate it, you know what I mean? Uh, I said, exactly everything I told you. Upon leaving, I noticed the blood on their pants, they seemed winded and nervous, they appeared fuckin like something.

CS-4: Lemme ask you a question. If you already signed a statement, what part of the statement is false?

Harris: Nothin, none, none of it, you know where my dilemma comes in.

CS-4: Where does the fabrication come in?

Harris: There was none. . . . (inaudible).

CS-4: (inaudible) I lost ya now.

Harris: My dilemma okay, my, my, my nervousness and my fear and my worry is about coming forth, right, not knowing, does it matter if this kid was down with it? No, that should not be my concern, right, am I freeing a possibly guilty man, you know, what is he gonna attest to?

...

CS-4: What's the truth?

¹² Tankleff's motion papers do not refer to a deposition. I do not know whether Harris gave one.

...

Harris: What they already signed the statement that I took them kids (Creedon and Kent) to go do this, and you know what they told me? It might be in your best interest if you want immunity, they went as far as to hint for me to tell a lie, they said it might be in your best interest to admit complicity in the crime, that you went up there. They said if you want immunity from this, you have to acknowledge that when you took them for a ride, that you were going to commit a murder, but then I'd be implicating myself in a fuckin, you know what I'm sayin, I did, I would have to sacrifice myself to get immunity to prove the plot, and I'd be sellin out then, ya know what I mean, I don't, (inaudible) I don't wanna fuckin send two guys (Creedon and Kent) to jail to sacrifice one guy (Tankleff), ya know what I mean?

...

Harris: That's the truth. I didn't know what they fuckin duped me into takin them up there, ya know what I mean, they didn't tell me, I don't know if they had it premeditated, you know what I mean []?

CS-4: So you're sayin this, you're saying this kid (Creedon) told you that um, yo, you want, you don't want to happen . . .

Harris: This is two months after, this is two months after, so they know what they did.

...

CS-4: . . . I'm not saying that he's threatening you or nothing, what I'm saying is that if, if he's telling you, yo, what you want to what to happen to you?

Harris: Right. . .

CS-4: What happened to these people?

Harris: Right.

CS-4: . . . [T]hen, obviously he knew what the fuck was goin on.

Harris: Yeah.

CS-4: He knew what happened there, without a doubt.

Harris: Without a doubt, but you know what? Why, they asked me.

CS-4: So why didn't you put that in your statement?

Harris: It, that was preliminary, it was only a cursory statement, ya know what I mean? I had attested that to the investigator, and he didn't take that as nothing, the only way they took the affidavit, that affidavit is good as this paper right here, ya know what I mean? They can throw that out the day that, in the garbage.

CS-4: So what are you scared of?

Harris: Nothing. I'm scared of the District Attorney trying to say that you know what? We think that you were down with the fuckin crime and . . .

. . .

Harris: You know why I'm hedging. I'm hedging because I'm trying to fuckin implicate myself the least possible way.

. . .

CS-4: . . . [L]emme ask you a question. How the fuck (inaudible) the kid (Tangleff) (inaudible). How the fuck would they set him free . . . [W]hat the fuck did you say in the statement that could set him free?

Harris: That he wasn't, he, he, okay, it was either a conspiracy between these two guys and Marty, which I can't, I can't give them anything about because I never met Marty, they never mentioned the name.

CS-4: Alright, but what in there could set this kid free?

Harris: He didn't do it.

CS-4: That's a lie.

Harris: That Marty didn't do it?

CS-4: You said that in the statement?

Harris: I don't, I don't know, I never met him. Creedon . . .

...

CS-4: . . . [W]hy would you come down here and tell me that yo, I could set this kid free?

Harris: Because they charged him with killing his parents.

CS-4: But if you don't know the kid and you don't know whether he had something to do with it . . .

Harris: Right.

CS-4: How, why the fuck would they set him free?

Harris: Whether, okay, he's either doing someone else's time or it was a conspiracy between them three who murdered these people (inaudible) for the money.

CS-4: Do you know he . . .

Harris: No. But I know what he said to me, and I know that the owner of Bagels Your Way was the secondary suspect because the night before they had a high stakes poker game for four hundred grand cash, and he was the last, the last one to leave the house that night the people were killed.

...

CS-4: . . . [I]f they asked you to sign a statement right now, and they tell you they're gonna give you immunity, and you're not gonna implicate yourself, what would you write in your statement? What the fuck is the truth?

Harris: I would say what I already, the affidavit that I already gave, that I told them.

...

CS-4: I don't understand.

Harris: . . . My attorney Barbuto's coming up to see me tomorrow, right? . . . I know that I was up there that night it happened, I know that he got in the car next to me with the fuckin blood. Did I ever question, I said in my mind, damn, what happened? I didn't have to think, I knew, and then when I heard it on the news and the radio the next day, I knew for sure, not too many people get killed

up in Belle Terre, you know what I mean. Especially when I was there that night, I put two and two together, you know what I mean?

CS-4: Both of them came out with blood on their pants?

Harris: I didn't see Kent, but I seen Joey because he was sitting in the front seat next to me, and then when Peter got out of the back seat of he car, he fuckin bent down and grabbed like an 18-inch-long pipe out of the back seat.

CS-4: So what, the people were beaten?

Harris: Yeah, they were bludgeoned and stabbed.

CS-4: So you had the fuckin murder weapon in your car and everything?

Harris: Yeah, he took it, he took it, he took the murder weapon out, what he did with it, I never asked him, Hey Peter, I don't, at that point . . .

. . .

Harris: . . . Why I didn't come forward then, because I was just as guilty as them, at that point.

CS-4: You are just as guilty as them?

Harris: Now I am, now.

. . .

CS-4: So why don't you just tell the truth? Why don't you, bro?

Harris: (inaudible). That's why I'm hedging. If I don't get immunity, I'm not swearing to nothing, they gotta guarantee me immunity, you know what I mean? They want these other two dudes (Creedon and Kent), which was the motivation for the fuckin these people getting killed, ya know, I can say I didn't know, no matter what.

. . .

Harris: . . . I wasn't down with the premeditation.

...

Harris: . . . [I]f I come to them and say I know what happened, they're gonna say, Did you know prior to that?

...

Harris: I didn't see them enter the house.

Peter Kent

Kent has a criminal record dating back to 1986. He has been convicted of, among other crimes, attempted possession of a controlled substance, attempted robbery and robbery. He is awaiting trial on charges of grand larceny and resisting arrest.

On October 7, 2003, Warkenthien, Flood and I interviewed Kent. Fighting tears, Kent stated that he did not kill anyone and that he has never been to Belle Terre. He stated that he and Harris have a drug problem and they had committed a lot of burglaries together over the years, but that they had never hurt anyone or even encountered anyone during any of the burglaries. Kent said that he and Harris had never committed a burglary with Creedon. (A 29).

Kent stated that he has no idea why Harris was involving himself and others in the Tankleff murders. Kent stated, however, that some years ago, when he, Harris and Creedon were incarcerated in the same prison, Harris falsely told other inmates that Kent was cooperating against Creedon when it was Harris who was cooperating. (A 29).

Kent stated that although Creedon was capable of committing a murder, Kent was not, nor was Harris. (A 29).

Joseph Creedon

Joseph Creedon has a long criminal record. He has been convicted of, among other crimes, attempted assault and rape.

In an April 23, 1989, affidavit filed with the Suffolk County Police Department, Creedon stated that Todd Steuerman, who had recently shot Creedon, was a drug dealer who advised Creedon to talk “to Todd’s father about cutting Marty Tankleff’s tongue out of his mouth.” (A 30).

In a June 2, 1989, affidavit filed with the Suffolk County District Attorney’s Office, Creedon stated that the above conversation with Steuerman had occurred “around April 10, 1989,” and that Creedon had “had no conversations with Jerry Steuerman concerning Marty Tankleff. In fact I’ve never personally spoken to Jerry Steuerman. I’ve also had no [] conversations [after April 10] with Todd Steuerman concerning Marty Tankleff and his father.” (A 33).

The Tankleff trial concluded on June 28, 1990. *See People v. Tankleff*, Memorandum Denying Tankleff’s Jury-Misconduct Motion, at 8 (County Court Suffolk County Nov. 21, 1990) (People’s Exh. 1). In an affidavit dated September 17, 1990, Creedon informed Gottlieb that, with respect to the affidavit that Creedon had given to the District Attorney’s Office on June 2, 1989, “It became clear to [Creedon] that [the ADA with whom Creedon had spoken] did not believe what [Creedon] had said concerning Todd Steuerman. [The ADA] clearly was attempting to have me back off my statement.” In the 1990 affidavit Creedon also stated that “[a]fter Todd Steuerman was arrested for shooting me, I called Jerry Steuerman to let him know I would not accept \$10,000 to drop charges and [that Jerry] went so far as to say, “You’re fucking with the wrong people.” (Def.’s Exh. 15 ¶¶ 3-4).

On September 21, 1994, McDermott interviewed Creedon. According to McDermott, Creedon stated that he did not know the Tankleffs, that he was never on their property and that he did not know any Steuerman except Todd. According to McDermott, Creedon stated that

Todd had stated that Todd's father would have paid a lot of money to have someone "cut Marty Tankleff's tongue out of his mouth." (A 7-8).

On November 20, 2003, Warkenthien and I interviewed Creedon in the presence of his attorney, Anthony M. LaPinta. Based on that interview, LaPinta and Creedon prepared an affidavit, which Creedon signed on December 4, 2003. In his affidavit, Creedon states:

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

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

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

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

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

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

(A 35-36).

Jerome Martino

On December 8, 1992, Jerome Martino, an inmate at the Auburn Correctional Facility, wrote a letter to John Collins, the Assistant District Attorney who had prosecuted Tankleff. In his letter Martino referred to notes, bearing the heading "June 26-July 11th 1990," that Martino contended reflected the substance of the conversations he had had with Tankleff shortly after Tankleff was convicted and remanded on June 28, 1990. According to Martino's notes:

[Tankleff] told me that he is in a better position now than before the trial. He knows that his confession is going out the window by the Appellate Division. He knows that Collins (D.A.) has said that he was not going to trial if he lost the [H]untley [suppression] hearing. There will be nothing to prove [] I did it.

He knows everything the D.A. has & can correct his defense accordingly. No physical evidence.

The stupid detectives never looked inside of any gas tanks at all. That is where he put gloves in gas because he knew that gas eats up rubber gloves very nicely.

The second time he repeated to me about the gloves, he said they were in a gas can. Because of his confession the detectives never looked in his garage.

He told me that because of his family he will get a new trial just like Claus Von [Bu]low, with the same pieces of key evidence withheld from the jury upon retrial.

He said he has family & attorneys totally sandbagged (fooled) into thinking he was victimized by hard nosed detectives playing nice guy, bad guy. He only has to go into his little boy bag. He smiled.

He feels bad about his father but not his mother because she was a real bitch. She watched everything he fucking did. She did not even want him to get la[id].

When he hits the street & collects his money he is going to get away from his family because they are to[o] clingy for him. He wants to go on to the life he deserves. Fun, sun & women.

That the judge was a jerk for not letting the S.[I].C. report into evidence but [] it will go into his appeal.

...

He wished he knew the ropes because th[e]n he would never have went for the fucking drunk cop lying to him.

He never applied any pressure to speak of to his father[']s wounds at all but used that as his defense.

...

He told me that his whore sister only wants his money so she can run away from her husband & kids with her boyfriend.

(A 41-43).

On June 5, 1990, the Crime Laboratory of the Suffolk County Division of Medical-Legal Investigations & Forensic Sciences obtained samples of four types of gloves and submerged the samples in gasoline for 35 days. The samples remained intact. (A 44).

In early December 2003, Warkenthien, in attempting to locate Martino, discovered that, on December 2, 2000, Martino died of natural causes.

Brian France

Brian France is a career criminal. He was convicted of, among other crimes, burglary and rape in 1981, grand larceny in 1985 and murder in 1988. On the murder, he is serving a New York State prison term of 18 years to life. He will be eligible for parole in or about October 2005.

On October 3, 2003, the New York Times reported that at a news conference held on October 2, 2003, Tankleff's defense team claimed that it had located a new witness exonerating Tankleff in the murders of his parents. See B. Lambert, *Convict was in Same Prison as New Witness in Killings*, The New York Times, October 3, 2003.

France read the article and, on October 6, 2003, wrote a letter to Mr. Spota. France wrote that, in 1996, he was housed in a correctional facility with Tankleff, who by now had been convicted and sentenced and had exhausted his State appeals. France claimed in his letter that he "came to know Marty," "the inmate clerk in the [] law library" who assisted France in a legal matter. According to France, when he told Marty how a detective had tricked France into confessing, Marty responded, "I know exactly what you mean. When the cop told me my old man regained consciousness and told them I did it, I knew I was fucked – so I told them everything." France also wrote that he told Marty, "You know why I killed []. I got paid for it. But why did you kill your parents?" According to the letter, Marty answered, "I just got tired of all the bullshit." (A 45-47).

Warkenthien and I interviewed France. I informed France that, with respect to his parole hearing, which will be held in or about August 2005, I intended to inform the parole board of his cooperation but would not make a recommendation. I also informed him that I did not know whether his cooperation would influence the board and that he should not expect that it would.

Based on France's answers to our questions, I prepared an affidavit -- based primarily on the contents of his letter -- for his review and signature. He reviewed and signed it on December 2, 2003. (A 49-50).

Bruce Demps

On March 15, 1997, while housed at the Clinton Correctional Facility, Bruce Demps provided an affidavit to the Washington, D.C., law firm of Miller, Cassidy, Larocca & Lewin. (Def.'s Exh. 17). In his affidavit, Demps states that in 1990, he and Todd Steuerman were inmates at Clinton. According to Demps:

b) Todd Steuerman explained that Martin Tankleff[']s parents were murdered and Martin Tankleff had no involvement and was wrongly accused, charged and convicted for these crimes.

c) Todd Steuerman explicitly told me that he knew for a fact that Martin Tankleff had not committed these crimes and that a Hell's Angels friend of his father[']s had indeed committed these crimes.

(*Id.* ¶¶ 6(b) – 6(c)).

Warkenthien and Flood have been unable to locate Demps.

Jerard Steuerman

Jerard or “Jerry” Steuerman testified at Tankleff’s trial. It was Tankleff’s defense that Steuerman, not Tankleff, had killed Tankleff’s parents, and “[t]he Court afforded [Tankleff] the opportunity to introduce an abundance of evidence that Jerry Steuerman committed the [murders].” *See People v. Tankleff*, Memorandum Denying Tankleff’s First C.P.L. § 440 Motion, at 5 (County Court Suffolk County Oct. 28, 1992) (People’s Exh. 2).

On November 20, 2003, Warkenthien and I had a telephone conversation with Jerard Steuerman, who was at his home in Florida. I told Steuerman that even though he had testified at the Tankleff trial, I had some questions for him. I asked him why, about 10 days after the attack on Arlene and Seymour Tankleff, he fled to California, explaining to him that his behavior was consistent with a consciousness of guilt. He answered that he was distraught over his wife’s death, Arlene’s murder and Seymour’s assault (Seymour was not expected to live), and the poor

state of his business. He stated that he went to California to “start over” with a new identity. When asked why he fled New York under circumstances that suggested that he had been kidnapped or killed, he stated that if people believed he had died, no one would try to look for him. He stated, however, that his girlfriend (whom he would later marry) knew where he was and that the police located him by installing a trap on her telephone. (A 51).

I asked him how much money he had withdrawn from an account that he had held jointly with Seymour Tankleff, and he answered, “10,000.” He stated that because the account was a joint account he had every right to make the withdrawal. (A 51).

He also stated that he did not profit from the Tankleffs’ death, as the debt he owed Seymour Tankleff passed to the Tankleffs’ estate. He stated that the estate had passed to Seymour’s daughter and that he had repaid the debt by deeding to her the bakery that Steuerman had opened with a loan from Seymour. According to Steuerman, the bakery was worth about \$400,000. (A 51).

Steuerman stated that Seymour was a tough businessman and that, as a result, a lot of people did not like him. He stated that on a personal level, however, he had a good relationship with Seymour, Arlene and Marty, and that the five of them – Steuerman, Steuerman’s first wife, Arlene, Seymour and Marty – often went to dinner. Steuerman stated that Marty got along well with Arlene, but that Arlene was overprotective and that Marty was a “momma’s boy.” Steuerman stated that Marty got along less well with Seymour, who was a “tough father.” Steuerman also stated that Marty was spoiled and liked expensive things and wanted a nicer car, “a sports car.” (A 51).

With respect to Demps’s accusation that Steuerman may have hired a member of the Hells Angels to commit the murders, Steuerman denied the accusation. (A 51).

Todd Steuerman

On November 19, 2003, Warkenthien and I had a telephone conversation with Todd Steuerman, Jerard Steuerman's son, while Steuerman was at or near his home in Haganan, New York. Steuerman denied that he and Creedon had ever done anything illegal together and denied that he had ever asked Creedon to do anything to Marty. (A 52).

Steuerman admitted that he knew Marty because he and Marty had worked at Steuerman's father's bagel store, where Marty baked chocolate chip cookies. Steuerman stated that Marty was spoiled and resented that he had to make cookies while having a father who was a millionaire. (A 52).

I asked Steuerman about his father's disappearance in September 1988, and he stated that his father had left without telling him. I asked him if he had ever discussed the Tankleff case with his father, and he said "No." When I advised him that that was hard to believe given that Marty had accused his father of the murder, Todd replied that no one in his house had spoken about anything important since he was five years old. (A 52).

With respect to Demps's contention that Todd Steuerman had admitted to Demps "that Martin Tankleff[']s parents were murdered and Martin Tankleff had no involvement and was wrongly accused, charged and convicted for these crimes," Steuerman denied having said this to Demps. Steuerman also denied Demps's contention that "Todd Steuerman explicitly told [Demps] that he knew for a fact that Martin Tankleff had not committed these crimes and that a Hell's Angels friend of his father[']s had indeed committed these crimes." Steuerman stated he did not know what Demps was talking about and that Marty had killed his parents. (A 52).

Gordon Dick

On October 9, 2003, Warkenthien, Flood and I met with Gordon Dick. Dick stated that he had been a friend of the Tankleffs for many years, dating back to when the Tankleffs had adopted Marty. (A 53).

Dick stated that Seymour Tankleff was nice on a personal level but ruthless in business, and that, contrary to what the newspapers had reported during the trial, Marty's motive to kill his parents had nothing to do with the old Lincoln that Marty was driving. Dick stated that Marty didn't care about the Lincoln, but may have been upset about a fancy pink truck that Seymour sold after Marty had damaged it in an accident. (A 54).

Dick stated that Seymour and Arlene had a rocky marriage and that Arlene had walked out on Seymour several times. According to Dick, Seymour admitted that the only way he could get Arlene back at times was to do something for Marty. For instance, according to Dick, Seymour admitted that Arlene had been pressing Seymour to leave the marital home to Marty and that, on one occasion when Arlene had left Seymour, the only way Seymour got Arlene to return was to change the will by cutting out Seymour's daughter, Shari, and by leaving the house to Marty. (A 54).

Ronald Rother

In or about 2001, Jerry Palace of Court TV interviewed Ronald Rother, who at the time of the Tankleff trial was married to Shari Rother, Martin Tankleff's stepsister. I have reviewed a videotape of the televised portion of the interview. During the interview, Rother stated that after the murders and after Tankleff was released on bail, Tankleff came to live with Rother and their children. According to Rother, one night Rother told Tankleff that, if Tankleff "did it," he would

get Tankleff help and asked, "Did you do this?" According to Rother, Tankleff "just wouldn't answer me."

On October 27, 2003, Warkenthien and I interviewed Rother. He stated that he has known Marty since Marty was adopted and always had a good relationship with Marty. Rother stated that Rother had also gotten along well with Arlene and Seymour Tankleff. He mentioned, however, that he was once in the gym business with Seymour and found Seymour to be a tough businessman. (A 55).

Rother stated that Marty had a pink truck – a "hot rod" type – which Marty flipped on the beach, and in response Seymour took the truck away. Rother stated that at one time Seymour had let Marty use a boat but later took the boat away. Rother also stated that Marty regularly used the family gym. Rother stated that, a few months before the murders, he suspected that Marty was taking steroids because Marty was starting "to get big." (A 55).

Rother stated that the day before the murders, Seymour and Marty visited the Rother. According to Rother, Seymour stated that in the past Marty had had his way with his mother, but that now Seymour would be in charge of Marty. According to Rother, Seymour stated that he was not going to let Marty go to college in Florida so that Marty could hang out with his friends. (A 55).

According to Rother, on the morning of the murders, Marty telephoned the Rother and told Rother, "Both my parents have been killed." According to Rother, he went to the Tankleff house, where he observed medics tending to Seymour, who had a very bad head wound. According to Rother, he went outside and spoke with Marty. According to Rother, although Rother was "breaking down," Marty was "very calm." According to Rother, Rother had seen

Marty more upset over other things and “could hardly believe how Marty was acting.” (A 55-56).

According to Rother, at first he believed in Marty’s innocence, and when Marty was released on bail, at first Marty lived with the Rother. According to Rother, however, Marty quickly became “a different person,” “acting like he was celebrity, telling girls who came over to see him that he was going to buy them cars [and] that he was getting a [Ferrari] Testarossa.” According to Rother, he finally asked Marty if Marty had killed his parents and advised Marty that if he did, Rother would get Marty help. According to Rother, Marty replied, “I need help.” According to Rother, because of that statement and Marty’s failure to state that he did *not* do it, Rother concluded that Marty did it. According to Rother, he told Marty that he no longer wanted Marty in his house. Marty moved in with cousin Ronald Falbee shortly thereafter. (A 56).

Rother informed me that, prior to the murders, he had been to the Tankleff house many times when Marty was sleeping and that (contrary to Marty’s trial testimony) Marty never slept with his door closed. Rother also stated that Marty could not have used the telephone in the gym/office to call “911.” According to Rother, when he arrived at the Tankleff home on the morning of the attacks, he observed that the coiled phone cord, which was about 12 feet long, (1) was so tangled that the last person who used it could not have raised the receiver more than a couple of feet, and (2) that the blood on the phone cord was limited to the exterior of the coils, meaning that the cord had not been stretched. (A 56).

Rother stated that in 1993, he briefly went into business with James McCready, one of two homicide detectives who at the Tankleff trial testified that Tankleff had confessed. Rother stated that his business relationship with McCready had nothing to do with Tankleff’s trial, which had concluded about three years earlier. (A 56).

Jessica Rother

On October 27, 2003, after speaking with Ronald Rother, Warkenthien and I interviewed Jessica Rother, the daughter of Ronald Rother and his then-wife Shari Rother. Jessica stated that the night before the murders, Marty and her grandfather Seymour came over to her house. According to Jessica, "Seymour was fighting with Marty about traveling or something like that." (A 57).

According to Jessica, while Marty was living with her family following his release on bail, Marty "never showed any emotion about what happened to his parents," even though during the years prior to the murders, "Marty would show rage when he was upset with someone or some thing." (A 57).

According to Jessica, during the time that Marty was living at her home, "Marty never said that he didn't kill his parents." (A 57).

Shari Mistretia

Shari Mistretia is the daughter of Seymour Tankleff, the stepdaughter of Arlene Tankleff and the stepsister of Marty Tankleff. On the date of the murders, she was married to Ronald Rother. She later divorced Ronald Rother and married Peter Mistretia.

In or about 2001, Jerry Palace of Court TV interviewed Mistretia. I have reviewed a videotape of the televised portion of the interview. During the interview, Mistretia stated that the day before the murders, her father and Marty came to her house. According to Mistretia, her father and Marty were upset. According to Mistretia, her father talked about problems that he was having with Marty, stating that he would not send Marty away to college and that he would not leave the house to Marty.

On October 27, 2003, after meeting with Jessica Rother, Warkenthien and I met with Mistretia. Mistretia stated that she did not get along with Arlene, her stepmother. She stated that some of this had to do with Seymour's will. According to Mistretia, Arlene was pressing her father (Seymour) to cut Mistretia out of the will and that her father once asked Mistretia whether it would be okay if he were to leave Mistretia's share to her children instead of to her. Mistretia stated that she had told her father that it would not be okay. (A 58).

According to Mistretia, her father did not want to adopt Marty and confided to Mistretia, "Now I'm buying [Arlene] a kid, a house in Belle Terre and jewelry." Mistretia stated that when he was little, Marty spent a lot of time in day care because there were no children living in the neighborhood for him to play with. (A 58).

According to Mistretia, on "more than one occasion" she observed Marty and Arlene "stroking" each other in an improper way. In response, I asked her if she thought that Marty and Arlene had had a sexual relationship. Mistretia stated, "No, it wasn't like that," it was just that they touched each other in a manner that was not normal between a mother and her teenage son. (A 58).

When asked about whether Marty and her father had ever argued about a truck, Mistretia stated that Marty "was shooting his mouth off at school" that he had done something wrong with his truck and that he and his father "had a fight over it." (A 58).

According to Mistretia, "Two weeks prior to the murders, Marty and Seymour had many arguments over [Marty's] working at the bagel store, going away to college. Seymour told Marty he was going to Nassau Community College. The argument [went] on for the full two weeks." (A 58).

According to Mistretia, in the afternoon preceding the murders, her father and Marty stopped over her house. According to Mistretia, once in the house, her father “was very loud, arguing with Marty.” According to Mistretia, “my father was saying things like Marty is going on 18 years old, Arlene has had him long enough. I’m taking over and he is not getting the house or the business, and he is not going to school in Florida.” Mistretia stated that her father told her that he was going to change his will. (A 58).

According to Mistretia, on the morning of the murders, Marty called her and said that he needed Mistretia to come over because something had “happened to my parents.” (A 58).

Mistretia stated that she sent Ron over to see Marty and that later she and Ron went to the hospital, where an ambulance had taken Seymour. According to Mistretia, she recalls someone saying that Marty was being held for questioning and that

while at Stony Brook hospital[,] she received a phone call from Marty Tankleff. Marty stated to Shari, “I told them I did it.” I asked why. Marty said, “They made me tell them.”

(A 58). I asked Mistretia if she understood Marty’s statement, “I told them I did it” to mean that Marty was complaining that the detectives had coerced him into making the statement. Mistretia answered “No,” that Marty had said it as if the detectives had caught him “with his hand in the cookie jar.” I asked her that, if she thought Marty had not been coerced into confessing, why did she believe that Marty was innocent and permit him to live with her, and she answered that, notwithstanding the confession, she did not believe that Marty could have done it. (A 58).

According to Mistretia, Marty lived with her for about a month after he was released on bail. According to Mistretia, while Marty was free on bail, she and Marty went to the Tankleff house and into Marty’s room, where Marty told her that between the time he went to bed and the time that he found his parents in the morning, he woke up once at 4 and again at 4:30, and a third

time when his alarm clock went off when it was time to go to school. According to Mistretia, his statement scared her because Marty had previously stated that he had gotten up only once during the night. (A 59).

According to Mistretia, while Marty was living with her, “Marty never showed any emotion about his mom or dad.” Mistretia stated that when she talked with Marty about the will, Marty stated, “It’s all mine now.” She also stated that high school girls were stopping by to see Marty and that Marty was telling them how much money he would be inheriting and that he would buy them cars.

Mistretia stated that her father had a Masonic ring that Mistretia wanted left to her. According to Mistretia, Arlene had pressed Seymour into leaving the ring to Marty in Seymour’s will. According to Mistretia, when she objected, her father worked it out with Arlene so that Marty would hold the ring while Seymour were alive but that Seymour would change his will so that, upon his death, the ring would pass to Mistretia. Thus, according to Mistretia, after Seymour died but before Marty was released on bail, she went to the Tankleff house and retrieved the ring. According to Mistretia, however, after Marty was released on bail and living with her, she received a letter from Marty’s civil attorney. According to Mistretia, in the letter the attorney accused her of being in possession of stolen property, namely the ring, and demanded its immediate return. According to Mistretia, she showed the letter to Marty and demanded, “What the fuck is this?” According to Mistretia, Marty responded, “Speak to my attorney.”

According to Mistretia, shortly thereafter, she told Marty to leave.

Mistretia stated that, after Marty moved out of her house, she maintained contact with Gottlieb about Marty’s defense. According to Mistretia, one day Gottlieb told her that, with

respect to a polygraph test that Marty had taken, the test had not gone so well and would have to be redone.

Robert Gottlieb

On December 2, 2003, I spoke with Gottlieb and asked him whether he would speak with me about some post-trial matters. Gottlieb stated that he would let me know.

On December 3, 2003, Gottlieb told me that it would be inappropriate for him to speak with me.

Ronald Falbee, Carol Falbee, Marcella Alt Falbee, Autumn Tankleff-Assness and Howard Assness

On November 19, 2003, Mr. Spota received a letter from Ronald B. Falbee, Martin Tankleff's cousin and former legal guardian. Falbee wrote, "We would like to get an understanding of what action is being taken to investigate the new evidence presented to you months ago. You are undoubtedly aware that we believe, and always have, that the wrong man is incarcerated We would appreciate a chance to meet with you"

By letter dated November 24, 2003, Mr. Spota declined Falbee's request. Mr. Spota wrote:

The attorneys for Martin Tankleff . . . have [] informed the Court and me that they may make a motion to disqualify my office from responding to the new-trial motion and from investigating the matters presented in their motion. . . . To assuage their concerns and to insure that the investigation is independent, the investigation is being directed by ADA Leonard Lato I deem it unwise to jeopardize Mr. Lato's independence by meeting with you.

. . . Please contact [Lato] if you would like to meet with him.

On December 2, 2003, I received from Falbee a letter requesting a meeting. On December 5, 2003, Warkenthien and I met with Falbee and four other representatives of the

Tankleff family and Falbee family: Ronald Falbee's wife, Carol Falbee, his mother, Marcella Alt Falbee, Seymour Tankleff's niece, Autumn Tankleff-Assness, and her husband, Howard Assness.

The families' representatives admitted that Arlene and Seymour had had some marital difficulties, but that the difficulties had been resolved years before the murders. They added that the marital difficulties were unrelated to Marty and that Arlene had never used Marty to extract concessions from Seymour.

According to Ronald Falbee, Shari and Arlene disliked each other and that, as a result, Shari and Seymour had a "rocky" relationship; according to Marcella Alt Falbee, Shari was jealous of Arlene.

According to Marcella Alt Falbee, she visited with the Tankleffs many times during the summer preceding the murders and had "a ball" there. Nevertheless, she stated that during one visit, Seymour was very upset, and that when Marcella asked Arlene what was wrong with Seymour, Arlene stated that Jerry Steuerman had pulled Seymour over a counter at the bagel store and threatened to cut Seymour's throat. According to Marcella, Arlene thereafter wrote on a piece of paper that she and Seymour were afraid of Steuerman.

Ronald Falbee admitted that Shari, Shari's then-husband Ron (Rother) and Marty used to have a good relationship and that Marty asked to live with the Rotheres when he was released on bail. According to Falbee and the families' other representatives, however, Shari's ulterior motive – money – was the reason that she later turned on Marty. Indeed, according to Falbee, who was the executor of the Tankleff estate, at the hospital on the morning of the attacks Shari was asking him about the will even though Seymour was still alive, and that, on several occasions while Marty was living with Shari, Marty told Falbee that every day Shari kept asking

Marty about the will. According to Marcella Alt Falbee, after the murders Shari took all of Arlene's valuables.

(On December 11, 2003, Shari Mistretia told me that she did not say anything at the hospital about the will and that she never took any of Arlene's valuables. Indeed, she stated that during the administration of the Tankleff estate, with Ronald Falbee (the estate's executor) "sitting there," she *bought* some of Arlene's jewelry. According to Mistretia, the other family members are fabricating things in retaliation for Mistretia's having become convinced that Marty is guilty.)

According to Ronald Falbee, Marty stayed with Shari until Shari called Falbee and said that it wasn't "going to work" with Marty. According to Falbee, Marty came to live with Falbee and Falbee's family and that Marty stayed with him and his family until Marty was convicted and remanded.

I asked Falbee if he had ever discussed the case with Marty and offered to get Marty help if Marty had committed the murders. Falbee stated "Yes," he did make the offer, but that Marty had always professed his innocence and that Falbee had always believed him. Falbee stated that in the year that Marty lived with Falbee and Falbee's family, Falbee never had any trouble with Marty.

Each of the families' representatives stated that Marty is innocent. Autumn Tankleff-Assness stated that Seymour had told her father that he adored Marty and that Marty was Seymour's "life." Ronald Falbee stated that whenever the men went fishing, Seymour always insisted that Marty join them even though none of the other adults took their children.

Most of the families' representatives, as well as other family members, have submitted affidavits, (*see* Def.'s Exh. 18), in which they contend that Marty is innocent. In the affidavits,

the family members also contend that Jerry Steuerman is responsible for the murders. For instance, in her affidavit, Autumn Tankleff-Assness states that she knows that “Marty is innocent,” (¶ 3), and that through her father she “had heard . . . that Marty’s parents were physically afraid of Steuerman,” (¶ 16). Similarly, Marcella Alt Falbee states in her affidavit that when she stayed with the Tankleffs in July and August of 1988, she “felt some tension in the house due to the arguments with Gerard “Jerry” Steuerman and the anger Arlene and Seymour felt over the bagel stores, the horses that they all owned together.” (*Id.* ¶ 10. *But see id.* ¶ 18) (Alt-Falbee stating “Arlene and Seymour never expressed fear of Steuerman to us. It was just anger and frustration”).

Other Evidence

On September 26, 2001, at the request of Jennifer O’Connor of the law firm Baker Botts, Reicherter administered a polygraph examination to Tankleff. With respect to the pretest interview that he had conducted, Reicherter wrote:

Mr. Tankleff informed me he got out of bed at approximately 5:45 am on 7 September, looked into his parents bed room but saw no one. He then proceeded down the corridor to this father’s office/gym where he found his father slumped in the desk chair unconscious and bleeding. Immediately upon the discovery of is father, he called 911 and was given emergency first-aid instructions. After administering first-aid as directed by 911 personnel, he looked for his mother who he found dead on the floor in the master bed room.

(Def.’s Exh. 3, at 1-2).

Reicherter asked Tankleff three questions. First, “Did you put gloves on your hands in the early morning hours on the day your parents were attacked?” Second, “Are you the person who hit your mother on the head the night she was beaten and stabbed?” Third, “When you found your mother on the bedroom floor, was that the first time you saw her since you went to

bed that night?” (*Id.* at 2). According to Reicherter, Tankleff answered “No” to questions one and two and “Yes” to question three. Reicherter opined that Tankleff answered each question truthfully. (*Id.* at 3).¹³

Many other individuals have contended that Tankleff is innocent or, at the very least, that he was wrongly convicted. *See, e.g.*, Affidavit of Associate Professor Richard A. Leo ¶ 9 (Def.’s Exh. 5) (opining that Tankleff’s confession was “almost certainly false”); Affidavit of Professor Richard J. Ofshe ¶ 49 (Def.’s Exh. 7) (opining that Tankleff’s confession was “unreliable and involuntary”); *Marty Tankleff, In Search for the Truth, A Shocking Revelation into the Tankleff Murders and the Wrongful Conviction of Martin Tankleff*, <http://www.angelfire.com/wy/tankleff> (contending that Tankleff is innocent and that prosecutors had overwhelming evidence of Jerry Steuerman’s guilt); M. McClure, *Convicted of Killing His Parents Even Though He Tried to Save His Father’s Life!*, www.justicedenied.org/martin.htm (contending that “despite evidence to the contrary, prosecutors built a motive for Marty’s guilt”). *But see* Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, *Harvard Journal of Law and Public Policy* (Spring 1999) (disputing Professor Leo’s claim that Tankleff’s confession was inconsistent with the physical evidence), *reprinted at* <http://www.prodeathpenalty.com/guilt.htm>.

FACTUAL FINDINGS

Joseph Creedon

I find that, beginning on or about Easter Sunday 1991 and continuing for years after, Joseph Creedon stated to several persons that he had something to do with the Tankleff murders. Although Creedon denied to Warkenthien and me that he had made the statements, too many persons unconnected with one another have reported that he did. Although each of those

¹³ Reicherter failed to ask Tankleff questions about Seymour Tankleff.

persons, except perhaps John Guarascio, are career criminals or have a history of drug abuse, so does Creedon, and his denials are not credible.

Although I find that Creedon made inculpatory statements to Kovacs, to John Guarascio, to CS-1 and to CS-2, I find that he provided specifics only on the date when he was with Kovacs and Guarascio. With respect to the substance of his statements, I find that, as John Guarascio told Warkenthien, while Guarascio, Kovacs and Creedon were smoking a joint in the bedroom, Creedon, while handling a rifle, stated that he and at least one other person “were hanging out smoking in the bushes watching guys play cards,” an apparent reference to the card game that Seymour Tankleff was hosting, and that Jerry Steuerman was attending, prior to the murders.

I do not credit the bulk of Kovacs’s version of events. For instance, her statement to Warkenthien and me that Creedon admitted to her that he was covered in blood and had to get rid of his clothes is not credible (1) because Guarascio mentioned no such specifics in his affidavit, (2) because in her 1994 affidavit and in her 2003 statement to Warkenthien she stated that Creedon had made the statements in the *bedroom*, yet to Reicherter and to me she stated that Creedon had made the statements *outside*, and (3) because Kovacs omitted specifics about the blood and clothes in her 1994 affidavit to Gottlieb. Although Kovacs told me that she *did* tell Gottlieb of these specifics, no attorney who took the trouble to prepare the affidavit would have omitted such details if he had been aware of them. Kovacs’s memory in 2003 is not better than it was in 1994, and she did not tell Gottlieb about the blood and the clothes.

I find that, notwithstanding that Creedon *stated* to others that he was involved in the Tankleff murders, his statements to them are not credible and that he made the statements to enhance his violent reputation. First, Creedon, or “Joey Guns,” although a career criminal, used firearms, not knives or blunt instruments, to facilitate his crimes. Second, there is no

independent evidence demonstrating that Creedon committed any crimes in Belle Terre or threatened or assaulted persons other than drug dealers. Third, other than his boasts and Glenn Harris's unquestionably false statements, there is no evidence whatsoever to connect Creedon to the murders or to the Tankleffs. Fourth, and perhaps most important, prior to the Tankleff trial Creedon voluntarily approached the police and the Suffolk County District Attorney's Office, and after the trial approached Gottlieb, to say that Todd Steuerman was a drug dealer who wanted Creedon to "talk to Todd's father (Jerry) about cutting Marty Tankleff's tongue out of his mouth." I find that if Creedon had participated in the murders, he would not have voluntarily attempted to implicate persons such as the Steuermans who, in turn, could have attempted to implicate him.

Glenn Harris

No rational factfinder would believe a word that Harris has uttered. Harris told Reicherter that he drove Creedon and Kent to the Tankleff residence and observed Creedon and Kent "approach[] the house on the left side," yet he told Warkenthien and Flood that he parked by "the bluffs," which was six-tenths of a mile from the Tankleff residence, and that "he had no idea in which direction Creedon and Kent went." Harris also told Warkenthien and Flood that Creedon had told Harris that they were going to get "a safe" in Belle Terre and that Harris went along because Harris "[wa]s a Burglary/Safe man," but that he waited in the car as opposed to going to the house that supposedly contained the safe. Harris told Reicherter that Creedon and Kent had been away from the car for "15 to twenty minutes," but Harris told Warkenthien and Flood that Creedon and Kent had been gone "[n]o longer than ten minutes"; if Harris indeed had parked at the bluffs, Creedon and Kent could not have gone to the Tankleff house, committed the murders and returned in 10, 15 or even 20 minutes.

Harris's versions are so inconsistent that he cannot keep to his story even when speaking with the Tankleff defense, which may explain why it took the defense over a year to obtain an affidavit from him. For instance, he told Reicherter that he was *with Creedon at Creedon's residence when Kent arrived*, but in his affidavit to Salpeter he stated that he "*ran into Peter Kent and Joseph Creedon at Billy Ram[']s house.*" Harris gave a third version to CS-3, stating that "Michael Sinclair took [him] to a fuckin house in Selden" where he "ran into Joey Creedon," after which they drove by Creedon's mother's house, where they "picked up . . . Peter Kent."

Harris also told Warkenthien that, on the morning of the attacks, "[b]etween five and six AM, he heard on the news that two people had been murdered in Belle Terre." This cannot be true, because the police did not even respond to the Tankleff residence until about 6:15 p.m., and Seymour Tankleff did not die but lingered in a coma for about a month.

Harris also told Warkenthien that, when Harris and Creedon later did a burglary, Harris "called Creedon an asshole" and that in response Creedon warned Harris, "Remember what happened in Belle Terre." Yet to CS-4 Harris stated that it was *Harris* who had uttered, "Remember what happened [] in Belle Terre."

Although, according to CS-3 and CS-4, Harris admitted to them that he had fabricated "the whole thing," in his recorded conversations with CS-3 and CS-4 Harris stated that he had not fabricated anything but, rather, had minimized his role in the offense. Yet when CS-3 asked Harris if Harris had stated in his affidavit that he had told Creedon and Kent to burn their clothes, Harris answered, "That's true," even though in his affidavit he had stated that the only thing he knew about burning clothes came about when Kent went to "the side of the house – he looked suspicious so I got out of my car and walked over and noticed that he was burning his clothes on the ground . . . I asked him what happened?, what are you doing and he said never mind."

Harris's statements, although incredible, may not be the product of a conscious intent to deceive. Harris stated to Reicherter that Harris is bipolar and requires medication, yet he told CS-4 that he was *not* taking medication and, minutes later, that he *was* taking medication. Harris, who violates parole once a year, threatens nurses and talks about obtaining a lock of hair from an accused murderer to sell on ebay, may be suffering from a mental disease or defect that renders him incapable of differentiating between reality and fantasy. Whatever reasons Harris may have for saying the things that he says, he is not credible.

ARGUMENT

Tankleff is not entitled to a new trial or even a hearing because the evidence that he has presented, even if true, (1) is not "newly discovered," and (2) does not establish his "actual innocence."

1. "Newly Discovered" Evidence

Tankleff is not entitled to a new trial or to a hearing based on "newly discovered" evidence because he has not demonstrated why he waited until October 2003 to make his motion when he was aware of Kovacs's statement in 1994 and Harris's statement no later than, and probably well before, June 2002.

The power to vacate a judgment upon the ground of newly discovered evidence and grant a new trial rests within this Court's discretion. *See People v. Crimmons*, 38 N.Y.2d 407, 415, 381 N.Y.S.2d 1, 7 (1975). The question whether to hold a hearing on such a motion is also discretionary, *id.* at 416, 381 N.Y.S.2d at 8, and "[t]o grant such a hearing where the [C]ourt is able to reach its conclusion on the papers alone would serve no end of justice but would only protract futile litigation," *id.* at 417, 381 N.Y.S.2d at 8.

For evidence to be considered "newly discovered," Tankleff must show that he

could not have [] produced [the evidence] at the trial even with due diligence on his part and [that the evidence] is of such character as to create the probability that had such evidence been received at the trial the verdict would have been more favorable to [him]; *provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.*

C.P.L. § 440.10(g) (emphasis added). A defendant who fails to make a new-trial motion within one year after the discovery of alleged new evidence has not exercised due diligence. *See People v. Stewart*, 123 A.D.2d 46, 54, 509 N.Y.S.2d 824, 829 (2d Dep’t 1986) (finding no error in County Court’s determination that defendants’ newly discovered evidence motion made more than one year after discovery of purported new evidence had not been made with due diligence); *People v. Huggins*, 144 Misc.2d 49, 51, 541 N.Y.S.2d 1016, 1019 (Sup. Ct. N.Y. County 1989) (holding that newly discovered evidence motion made 20 months after discovery of alleged new evidence did not satisfy statute’s due diligence requirement). Moreover, even if a defendant exercises due diligence, the newly discovered evidence must be admissible at trial. *See People v. Boyette*, 201 A.D.2d 490, 491, 607 N.Y.S.2d 402, 403-04 (2d Dep’t 1994).

a. Tankleff’s Lack of Due Diligence

Tankleff became aware of Creedon’s possible connection to Jerry Steuerman and Todd Steuerman prior to or during the trial. *See People v. Tankleff*, Memorandum Denying First C.P.L. § 440 Motion, at 7 (County Court Suffolk County Oct. 28, 1992) (People’s Exh. 2) (finding that Gottlieb had cross-examined Jerry Steuerman about whether Steuerman had “told [Creedon,] who was having a dispute with [Todd Steuerman,] ‘You’re dealing with the wrong person. I can have you dead.’”).

At Salpeter’s request, Reicherter polygraphed Harris in June 2002. (Def.’s Mem. at 23; Def.’s Exh. 2, at 1). Yet Tankleff does not show why his investigator did not find Harris, a Creedon associate, prior to or during the trial. Moreover, Tankleff was aware of Harris in (and

probably before) June 2002, and he was aware of Kovacs in August 1994. He does not show why, with the exercise of due diligence, he waited to make his current new-trial motion until October 2003. Under *Stewart* and *Huggins*, Tankleff has failed to exercise due diligence.

b. The New Evidence Would be Inadmissible at Trial

Through his attorney, Harris has informed me that he will not meet with me (or presumably testify) unless, prior to any such meeting, the District Attorney's Office grants him transactional immunity. No competent prosecutor would grant Harris transactional immunity, and the District Attorney's Office of Suffolk County shall not do so. Thus, it appears that Harris will not testify at a hearing or at any Tankleff retrial.

If Harris declines to testify, he will be "unavailable," and his statements to others, to be admissible at trial, would have to qualify as declarations against penal interest.

Hearsay evidence is admissible as a declaration against penal interest only if four prerequisites are met: (1) the declarant must be unavailable to give testimony, whether by reason of absence from the jurisdiction, refusal to testify on constitutional grounds or death; (2) the declarant must have been aware at the time of its making that the statement was contrary to his penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability.

People v. Thomas, 68 N.Y.2d 194, 197, 507 N.Y.S.2d 973, 975 (1986) (citing Fed. R. Evid. 804(b)(3)). "[W]ithin practical limitations, only the portion of the statement *opposed* to declarant's interest should be admitted." *Id.* at 198, 507 N.Y.S.2d at 975 (emphasis added). Moreover, "[t]he most important inquiry [is] whether circumstances independent of the hearsay declaration itself are present which fairly tend to support the assertions made and thereby assure their trustworthiness and reliability." *Id.* at 200, 507 N.Y.S.2d at 976-77. The circumstances

include the declarant's motivation -- e.g., whether the statement was designed to exculpate a loved one or inculcate an enemy.

Important also is the declarant's personality -- e.g., whether he suffers psychological or emotional instability or whether he is a chronic or pathological liar. Additionally, the declarant's spontaneity or hesitancy, promptness or tardiness in making the statement may shed light on its authenticity. Likewise, the internal consistency and coherence of the declaration, or its lack thereof, may reflect on its bona fides. Most critical in some cases, is the availability of supporting evidence -- that is, some proof, independent of the declaration itself, which tends to confirm the truth of the facts asserted therein. Regardless of how self-incriminatory a particular declaration against penal interest might be, all or any of the foregoing may affect its reliability.

People v. Shortridge, 65 N.Y.2d 309, 313, 491 N.Y.S.2d 298, 300 (1985).

Harris's declarations implicating Creedon and Kent would be inadmissible at trial because the portions of the declarations implicating *Creedon and Kent* were not against *Harris's* penal interest. Moreover, it is questionable whether Harris's declarations were knowingly made against even *his* penal interest; based on the questions that Reicherter asked Harris and Harris's stunned reaction to Warkenthien's comment that if the statement Harris had given to Salpeter were true Harris "might be changing places with Marty," it appears that Harris believed that he was implicating himself only in a burglary, the statute of limitation for which had long since expired.

Moreover, Harris's declarations lack the requisite degree of trustworthiness because: (1) Harris possesses a motive to implicate Creedon, a person whom Harris referred to as "a piece of shit," (2) Harris may be bipolar and may not be taking needed medication, (3) Harris has repeatedly given inconsistent versions of events, (4) Harris waited until 2002 to disclose an event that he contends occurred in 1988, and (5) other than the portion of Kovacs's statement implicating Creedon, there is no evidence corroborating any of Harris's details.

As for *Creedon's* declarations to Kovacs and others, these declarations would be inadmissible at trial because Creedon is available to testify. Thus, as set forth in *Thomas*,

Tankleff cannot satisfy the first prerequisite – unavailability – that he must meet before offering Creedon’s statements to Kovacs and others as declarations against penal interest. Moreover, Kovacs, the only witness who contends that Creedon provided details of his involvement in the murders, has presented an unreliable version of events because (1) she was smoking a joint and in need of drug “rehab” at the time Creedon made the declarations, (2) she did not come forward until 1994 even though she claims that she learned of the declarations in 1991, (3) she has given inconsistent versions of events, and (4) other than the portion of Harris’s statement implicating Creedon, there is no evidence confirming any of Kovacs’s details: Kovacs implicates Creedon and Todd *or* Jerry Steuerman, Harris implicates Creedon and Kent, and Demps implicates Jerry Steuerman and a Hell’s Angel.

2. Tankleff Has Not Demonstrated That He Is “Actually Innocent”

Creedon’s and Harris’s statements, *even if true* (and they are not true), do not establish Tankleff’s actual innocence. At best, the statements demonstrate only that others *in addition* to Tankleff may have committed the murders. They do not demonstrate that Tankleff *did not* commit the murders. Indeed, even Harris recognized this dilemma in the following exchange with CS-4:

Harris: They’re (the defense) askin me to help prove this kid’s innocence. I can’t do that. . . . [He’s] possibly innocent. . . . I don’t know if he knew them other kids (Creedon and Kent). . . . I don’t know if he was responsible in any way, shape or form, I don’t know if he knew Joey (Creedon)

CS-4: But [] you don’t know the kid and you don’t know whether he had something to do with it[?]

Harris: Right.

Thus, this is not a case such in which “postconviction DNA testing of evidence can yield conclusive proof of innocence.” *The Innocence Project*, <http://www.innocenceproject.org>. Nor

is it even a case in which the “movant[,] making a free-standing claim of innocence[, has] establish[ed] by clear and convincing evidence (considering the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty.” *People v. Cole*, 765 N.Y.S.2d 477, 486 (Sup. Ct. Kings County 2003). *See Missouri ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543, 548 (Sup. Ct. Mo. 2003). Although Tankleff relies on *Amrine* for his contention that “in order to obtain relief[] [he] need not prove his actual innocence []or [] demonstrate that the evidence adduced at trial was insufficient,” (Def.’s Mem. at 26), his reliance is misplaced. The court in *Amrine* held that a “petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death [only] upon a clear and convincing showing of actual innocence.” *Amrine*, 102 S.W.3d at 548.

Tankleff ignores *Cole’s* and *Amrine’s* “clear and convincing” proof requirement and contends that he is entitled to a hearing ““because he has produced new evidence to raise doubt about his guilt.”” (Def.’s Mem. at 27) (quoting *Amrine v. Bowersox*, 128 F.3d 1222, 1229 (8th Cir. 1997) (en banc)). The defendant Amrine, however, “was convicted solely on the testimony of three fellow inmates, each of whom [] recanted their trial testimony.”¹⁴ *Missouri ex rel. Amrine v. Roper*, 102 S.W.3d at 548-49. Absent the inmates’ trial testimony, there was “no evidence implicating Amrine in [the] murder.” *Amrine v. Bowersox*, 128 F.3d at 1229. In contrast, at Tankleff’s trial, two homicide detectives testified that Tankleff had confessed. When Tankleff testified, he admitted that he had confessed. Although Tankleff has recanted his confession, the detectives have not recanted their testimony.

CONCLUSION

Judge Thomas C. Platt, of the United States District Court for the Eastern District of New York, stated in his memorandum and order denying Tankleff’s habeas petition:

With the benefit of “Monday morning quarterbacking” and able lawyers associated with experienced, large law firms, it is not difficult for any criminal defendant in a “high profile” case to magnify the significance and “importance” of one or more “close calls” in pre-trial and trial proceedings and make respectable arguments as to their constitutional validity in a habeas corpus (post jury trial) proceeding which might find acceptability in arenas removed from reality but not otherwise.

(Def.’s Exh. 12, at 1).

Tankleff’s attorneys have magnified the significance and importance of the evidence that they have presented, but only “in arenas removed from reality” could such evidence establish that Tankleff is “actually innocent.” On September 7, 1988, inside the Belle Terre residence of Seymour, Arlene and Martin Tankleff, someone murdered Arlene and mortally wounded Seymour, yet no one injured Martin, who contends that he slept through the brutality inflicted upon his parents. There was no evidence of a break-in, or of the removal of valuables from the home. The crime scene was not of a burglary or of a robbery gone bad, or of a contract killing. It was a scene of rage. Although perhaps one day Tankleff may present “newly discovered evidence” of his “actual innocence,” he has failed to do so today.

Dated: Hauppauge, New York
December 17, 2003

Respectfully submitted,

THOMAS J. SPOTA
District Attorney

By: _____
Leonard Lato
Assistant District Attorney
(Of Counsel)

¹⁴ Tankleff erroneously claims that, in *Amrine*, “not all of the trial witnesses recanted.” (Def.’s Mem. at 27).

APPENDIX