

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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**PEOPLE OF THE STATE OF NEW YORK**

- against -

**NOTICE OF MOTION**  
Indictment Nos.: 1535-88/1290-88

**MARTIN H. TANKLEFF,**

Defendant.

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**PLEASE TAKE NOTICE** that upon the accompanying affirmation of counsel, the accusatory instrument, and all the proceedings heretofore and herein, the undersigned will move this Court before the Honorable Robert W. Doyle, at the Suffolk County Courthouse located at 210 Center Drive, P.O. Box 9007, Riverhead, New York 11901, on the 29th day of May, or as soon thereafter as counsel can be heard, for:

1. An order requiring the Special Prosecutor to provide immediately to defense counsel all exculpatory material, that is any evidence tending to favor the defense, currently in the Special Prosecutor's possession, custody or control;
2. An order requiring the Special Prosecutor, no later than 14 days from the date of the Court's Order, to review any and all files currently in the Special Prosecutor's possession, custody, or control, or which can otherwise be obtained by the Special Prosecutor, and requiring the Special Prosecutor to produce promptly to defense counsel all exculpatory material, that is any evidence tending to favor the defense, discovered therein and to continue thereafter to make prompt disclosures to the defense as new exculpatory material is discovered; and
3. Such and further relief as this Court deems just and proper.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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**PEOPLE OF THE STATE OF NEW YORK**

- against -

**SUPPORTING AFFIRMATION**  
Indictment Nos.: 1535-88/1290-88

**MARTIN H. TANKLEFF,**

Defendant.

-----X

BRUCE A. BARKET, an attorney admitted to practice law in the Courts of the State of New York, affirms the following, under the penalties of perjury:

I am a partner in the law firm of BARKET & ANGELI, and one of the attorneys for the defendant, MARTIN H. TANKLEFF, in the above-captioned action, and I am fully familiar with the facts and circumstances of the within action by review of the file maintained by our office, independent case investigation, conversations with investigators and first-hand conversations with witnesses and other persons with relevant knowledge of the facts. I submit this Affirmation in support of the defendant's motion to compel the production of exculpatory material.

**INTRODUCTION**

For the past three months, the state Attorney General's office, by appointment as Special Prosecutor, has been investigating the 1988 murders of Seymour and Arlene Tankleff — crimes for which defendant Martin H. Tankleff remains indicted. By this point, we believe that the Special Prosecutor has reviewed all of the Suffolk County files that are relevant to its investigation. As is any prosecutor, the Special Prosecutor is obligated, both legally and ethically, to seek out and disclose promptly to the defense all exculpatory material. Such

disclosures must be made on a rolling basis, as the information comes into the Special Prosecutor's possession, custody, or control. Yet, to date, the defense has received no disclosures, despite repeated requests for such information.

Defense counsel believes that the Office of the Suffolk County District Attorney had in its possession evidence tending to favor the defense in this matter, which it never disclosed to the defense. That information should have been provided to the New York Attorney General upon his appointment as Special Prosecutor.

We base our belief on several examples of instances where the Suffolk County District Attorney received exculpatory information but did not disclose it. For example, in October 2007, Tankleff investigator Jay Salpeter interviewed witnesses Tina Molloy and Dennis Piacente. See Affirmation of Bruce A. Barket in Support of Motion for a New Trial at 2-3. (Nov. 1, 2007). During that interview, Ms. Molloy stated that Joseph Creedon had admitted to her his involvement in the Tankleff murders. Id. She also stated that she had previously voluntarily brought the information to the attention of Suffolk County Assistant District Attorney, Leonard Lato. Id. In fact, in August 2007, Ms. Molloy met with Mr. Lato and investigator Walter Warkenthein; Mr. Piacente was present during that meeting. Id. The Suffolk County District Attorney's Office never brought this information to the attention of defense counsel; instead Ms. Molloy contacted Mr. Salpeter with the evidence. Id. at 4. In subsequent news accounts, Mr. Lato stated that his meeting with Ms. Molloy and Mr. Piacente was recorded. To date, those tapes have not been produced to defense counsel. Had the witnesses not contacted the defense directly we may never have learned of their existence. Without the tapes, we may not be able to fully develop their exculpatory information.

In addition, the defense has learned that a sheriff's informant also spoke with Mr. Lato

about this case and provided exculpatory information. Counsel told the Special Prosecutor of this, and requested that it search for the information. To date, we have not received a reply from the Special Prosecutor. Counsel does not know the identities of the sheriff or of the informant, making it all the more important that this information be disclosed — so that the defense can properly investigate this lead.

Mr. Tankleff respectfully requests that the Court order the Special Prosecutor to provide immediately to defense counsel any exculpatory material currently in the Special Prosecutor's possession, custody or control. Mr. Tankleff also requests that the Court order the Special Prosecutor, within 14 days, affirmatively to review any and all files to which the Special Prosecutor has access, and to produce promptly to defense counsel all exculpatory material discovered therein. The Special Prosecutor should also be ordered to produce thereafter all additional exculpatory material of which the Special Prosecutor becomes aware promptly to the defense.

### ARGUMENT

Under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, the Special Prosecutor has a continuing affirmative duty to disclose to the defense all evidence in its possession, custody or control, which is favorable to the defendant, material to either guilt or punishment, or affects the credibility of prosecution witnesses. Brady, 373 U.S. at 87; People v. Vilaridi, 76 N.Y.2d 67, 76-77 (1990); People v. Cwikla, 46 N.Y.2d 434, 441 (1979). Encompassed in this duty is the Special Prosecutor's obligation actively to seek out exculpatory material. Kyles v. Whitley, 514 U.S. 419, 437 (1995); People v. Wright, 86 N.Y.2d 591, 598 (1995). Indeed, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." Kyles, 514 U.S. at 419.

Importantly, once the Special Prosecutor has learned of favorable evidence, it must promptly disclose such evidence to the defense. See, e.g., People v. Grant, 2007 N.Y. Misc. LEXIS 5343 at \*17-19 (N.Y. County Ct., Essex Co., Aug. 1, 2007) (ordering that the prosecution “*expeditiously disclose* to the defendant any [*Brady*] information *upon actually or constructively coming into its possession or knowledge*,” and warning that “[f]ailure to so comply may result in sanctions including but not limited to prohibition of the introduction of certain evidence or the calling of certain witnesses, and/or the reversal of conviction”) (emphasis added); People v. Hunter, 480 N.Y.S. 2d 1006, 1009 (N.Y. Sup. Ct., New York Co., 1984) (holding that *Brady* material “ought to be disclosed *at the earliest possible opportunity*,” and stating that “justice cannot be done if the prosecutor in withholding evidence, even for a brief period, casts himself in the role of an architect of a proceeding that does not comport with minimal standards of justice.”) (emphasis added); see also United States v. Perez, 2001 U.S. Dist. LEXIS 6886 at \*29-30 (S.D.N.Y. May 25, 2001) (“*Brady* material *should be disclosed as the Government gains possession of it*.”) (emphasis added).

In addition to its legal obligations under *Brady*, the Special Prosecutor has a corresponding ethical duty to disclose promptly any favorable information. See A.B.A. Standards for Crim. Justice: Prosecution & Defense Function 3-3.11(a) (3d ed. 1993) (finding that prosecutors are ethically obligated to make “timely disclosure to the defense, *at the earliest feasible opportunity*, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”) (emphasis added); N.Y. Disciplinary R. 7-103 (“A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor or other

government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.”); N.Y. Prof. Standard EC 7-13 (“With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to the prosecutor, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”).

These duties include disclosure of information — at the earliest possible opportunity — bearing not only on theories of defense, but also on trial strategy. See, e.g., People v. Jackson, 168 Misc. 2d 182, 185-86 (N.Y. Sup. Ct., Bronx Co., 1995) (holding that the prosecutor should disclose to the defense “*at the earliest possible moment*” not only evidence that supports the defendant’s trial theory, but also evidence that would bear on trial strategy) (emphasis added); People v. Bottom, 76 Misc. 2d 525, 528-29 (N.Y. Sup. Ct., New York Co., 1974) (holding that evidence favorable to the defense “should be made available *at the earliest possible opportunity*,” including “favorable evidence which would obviously have significant bearing on the conduct or preparation of the defense,” and specifically “*all evidence probative of a theory that a different individual was the killer*. . . . If this evidence or these details exist they belong to the defense.”) (emphasis added).

Notably, the duty to disclose is not limited to evidence that would necessarily change the outcome of the case. The Special Prosecutor must disclose not only material exculpatory evidence, but *any* evidence tending to favor the defense. The standard, pretrial, is not whether the result of the proceeding might ultimately be different if *Brady* material is withheld. This would permit the prosecution to “withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of the

trial.” United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005). Indeed, “[t]he prosecution should not be privileged to decide for the defendant what is useful.” Bottom, 76 Misc. 2d at 528-

29. The prosecution

cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the [prosecution] must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed — with the benefit of hindsight — as affecting the outcome of the trial. The question before trial is not whether the [prosecution] thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed.

Safavian, 233 F.R.D. at 16.


### CONCLUSION

For the reasons stated herein, defendant Martin H. Tankleff respectfully requests that the Court order the Special Prosecutor immediately to provide to defense counsel all exculpatory material currently in the Special Prosecutor’s possession, custody or control. He also requests that the Court order the Special Prosecutor, within 14 days, affirmatively to review any and all files to which the Special Prosecutor has access and to produce promptly to defense counsel all exculpatory material discovered therein, and thereafter to make prompt disclosure of additional exculpatory materials as he comes into its possession, custody or control.

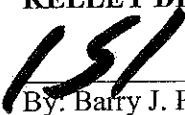


Respectfully submitted,


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*ATTORNEYS FOR DEFENDANT MARTIN H. TANKLEFF*

Dated: Garden City, New York  
April 29, 2008

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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**PEOPLE OF THE STATE OF NEW YORK,**

Plaintiff,

- against -

Indictment Nos.: 1535-88/1290-88

**MARTIN H. TANKLEFF,**

Defendant.

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**[PROPOSED] ORDER**

Upon consideration of defendant Martin H. Tankleff's Motion to Compel the Production of Exculpatory Material, any opposition thereto, and the entire record herein, on this \_\_\_\_\_ day of \_\_\_\_\_, 2008, it is by the Court hereby

**ORDERED** that the defendant's motion is **GRANTED**; and it is further

**ORDERED** that the Special Prosecutor immediately provide to defense counsel all exculpatory material, that is any evidence tending to favor the defense, currently in the Special Prosecutor's possession, custody or control; and it is further

**ORDERED** that the Special Prosecutor, no later than 14 days from the date of the Court's Order, review any and all files currently in the Special Prosecutor's possession, custody, or control, or which can otherwise be obtained by the Special Prosecutor, and produce promptly to defense counsel all exculpatory material, that is any evidence tending to favor the defense, discovered therein; and it is further

**ORDERED** that the Special Prosecutor's duties are on-going and that following the 14-day period, as additional exculpatory material, that is any evidence tending to favor the defense,

comes into the possession, custody or control of the Special Prosecutor, he must promptly disclose that material to the defense.

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The Honorable Robert W. Doyle  
Supreme Court Judge