

COUNTY 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 supporting affirmation and memorandum, the accusatory instrument and all the proceedings heretofore and herein, the undersigned will move this Court before the Honorable James C. Hudson, 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 make an affirmative representation as to whether to date it has used a regularly empanelled Suffolk County grand jury in this case;
2. An order precluding the Special Prosecutor from making any additional use of a regularly empanelled Suffolk County grand jury in this matter;
3. An order precluding the Special Prosecutor from making direct or derivative use of any evidence that has been presented to a regularly empanelled Suffolk County grand jury in this matter;

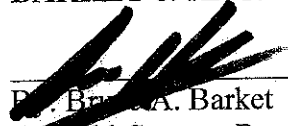
4. An order requiring the Special Prosecutor to make a detailed affirmative representation regarding the purpose for which it has used any grand jury considering evidence related to this matter; and

5. Such and further relief as this Court deems just and proper.

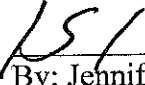
Pursuant to CPLR §2214(b), Answering Affidavits, if any, are requested to be served upon the undersigned at least seven (7) days before the return date of the motion.

Dated: Garden City, New York  
April 29, 2008


**BARKET & ANGELI, P.C.**

  
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*Attorneys for Defendant Martin H. Tankleff*

To: BENJAMIN E. ROSENBERG  
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COUNTY 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.

### **INTRODUCTION**

The Special Prosecutor in this case has stated in correspondence with the Court that it is presently using a grand jury in this matter. As set forth below, this motion raises issues related to both the composition of that grand jury and the purpose for which it is being used.

### **Background**

In 1990, defendant Martin H. Tankleff was convicted of two counts of murder in the second degree, for the murders of his parents, Seymour and Arlene Tankleff. In October 2003, Mr. Tankleff moved, pursuant to CPL §§ 440.10(g) and (h), to vacate the judgments of

conviction against him on grounds of newly discovered evidence and actual innocence. During those proceedings, Mr. Tankleff also moved to disqualify the Office of the Suffolk County District Attorney, based on several conflicts of interest that arose as a result of Mr. Spota's prior attorney-client relationships from his time in private practice.<sup>1</sup>

After a lengthy evidentiary hearing, the County Court denied Mr. Tankleff's motions. On December 18, 2007, the Appellate Division unanimously reversed the County Court and vacated Mr. Tankleff's convictions. The Appellate Division remanded the case to the County Court.

On December 29, 2007, the *New York Times* reported that the New York State Investigation Commission had initiated an inquiry into the manner in which Suffolk County law enforcement handled the Tankleff case. Just four days later, on January 2, 2008, the Suffolk County District Attorney announced that he would not re-try the case against Mr. Tankleff, and that he would ask the Governor of New York to appoint a special prosecutor to reinvestigate the crimes. The Governor did so, by Executive Order dated January 11, 2008, appointing the Attorney General as Special Prosecutor in this matter. Since then, the Special Prosecutor has undertaken its own investigation of this case, which has included the use of a grand jury. Mr.

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<sup>1</sup> While in private practice, District Attorney Spota represented James McCready, who was the lead detective on the original Tankleff murder investigation. Mr. Spota represented Mr. McCready when McCready was tried for assault and robbery in 1991. Mr. Spota also represented Mr. McCready before the New York State Investigation Commission ("SIC"), when, in the late 1980s, the SIC was investigating the widespread corruption in and abuse of power by Suffolk County law enforcement. The SIC's report ultimately detailed, among other things, "perjury by James McCready" in a homicide trial that preceded the Tankleff case. At the § 440 hearing in this matter, testimony demonstrated that Mr. McCready may have also perjured himself in crucial testimony at Mr. Tankleff's trial. Moreover, Mr. Spota's former law firm separately represented both Jerry Steuerman and his son Todd Steuerman in criminal cases. Both of these individuals have been implicated in the Tankleff murders by evidence adduced at the § 440 hearing. Indeed, the representation by Mr. Spota's law firm of Todd Steuerman related directly to the facts adduced as the § 440 hearing. *See* Affirmation and Memorandum in Support of Motion to Disqualify District Attorney Thomas J. Spota and the Office of the District Attorney and to Appoint a Special Prosecutor at 1-7 (Aug. 6, 2004); Reply Memorandum in Support of Motion to Disqualify District Attorney Thomas J. Spota and the Office of the District Attorney and to Appoint a Special Prosecutor at 1-16 (Aug. 25, 2004); Supplemental Reply Memorandum in Support of Motion to Disqualify District Attorney Thomas J. Spota and the Office of the District Attorney and to Appoint a Special Prosecutor at 1-3 (Aug. 31, 2004); Motion for Reconsideration of Motion to Disqualify District Attorney Thomas J. Spota and the Office of the District Attorney and to Appoint a Special Prosecutor at 1-4 (Sept. 30, 2004).

Tankleff remains under indictment.

### **Composition of the Grand Jury**

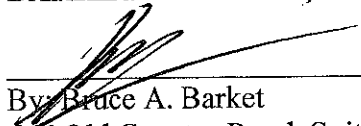
To date, the Special Prosecutor has declined to provide defense counsel with any information regarding the composition of the grand jury. Specifically, the Special Prosecutor has declined to reveal whether the grand jury was empanelled specially for this case, or whether it is a regularly empanelled Suffolk County grand jury. If it is the latter, the Office of the Suffolk County District Attorney is regularly appearing before the same grand jury being used in this matter. Given the myriad and obvious conflicts of interest within the District Attorney's Office — implicitly recognized by the District Attorney himself in seeking the appointment of a special prosecutor — there is no way to ensure that a grand jury before which the Office of the Suffolk County District Attorney is regularly appearing is not being influenced by that Office. The integrity of the grand jury process requires that the grand jury investigating this case not be tainted by the conflicted Office of the Suffolk County District Attorney.

### **Purpose of the Grand Jury**

In addition, the Special Prosecutor's use of *any* grand jury in this matter, whether a regular grand jury or a special grand jury, cannot be for the purpose of preparing the pending indictment against Mr. Tankleff for a trial against him. Mr. Tankleff therefore requests that the Court order the Special Prosecutor to make a detailed affirmative representation regarding the purpose of any grand jury that is considering evidence related to this matter, to ensure that the grand jury's sole or dominant purpose is not to develop evidence against Mr. Tankleff for use at a trial against him.

Respectfully Submitted,

**BARRET & ANGELI, P.C.**

  
By: Bruce A. Barret

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COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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**PEOPLE OF THE STATE OF NEW YORK**

- against -

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

**MARTIN H. TANKLEFF,**

Defendant.

-----X

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANT'S MOTION FOR A SPECIAL GRAND JURY AND  
FOR THE PRECLUSION OF EVIDENCE**

*Attorneys for Defendant Martin H. Tankleff*

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## ARGUMENT

**I. BECAUSE THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE PROCEEDINGS OF A REGULARLY EMPANELLED GRAND JURY CONSIDERING EVIDENCE IN THIS MATTER WOULD BE TAINTED, THE SPECIAL PROSECUTOR SHOULD BE PERMITTED TO USE ONLY A SPECIAL GRAND JURY IN ITS INVESTIGATION**

As set forth, *supra*, this matter presents many obvious conflicts of interest within the District Attorney's Office, including the fact that the Office is presently under investigation by the SIC for its handling of this case. The District Attorney himself by his actions has implicitly recognized the seriousness of these conflicts in requesting that the Governor appoint a special prosecutor in this case. Given conflicts of this magnitude, there is a substantial likelihood that the proceedings of a regularly empanelled Suffolk County grand jury considering evidence in this matter would be tainted by the grand jury's daily interaction with members of the District Attorney's Office. Inevitably, if the grand jury is a regularly empanelled one in Suffolk County, the individuals on that grand jury will come into contact with individuals from the Suffolk County police and prosecutor's office — both informally and formally. If the special prosecutor is doing a thorough job, the grand jury will consider evidence that the criminal justice process in Suffolk County was infirm. For instance, there is evidence of a pre-existing relationship between Suffolk County law enforcement and Jerry Steuerman, one of the people implicated by the evidence adduced at the § 440 hearing in this matter. The grand jury's ability to weigh that fact is potentially skewed by regular contact with Suffolk County law enforcement.

Courts cannot endorse grand jury proceedings where there is even potential for prejudice; actual prejudice need not be demonstrated. Indeed, where the circumstances are such that it is impossible to know whether irregularities within a grand jury's proceedings have actually



prejudiced an accused, courts routinely dismiss indictments based on the mere risk of prejudice. See, e.g., People v. Huston, 88 N.Y.2d 400, 406, 409-10 (1996) (dismissing indictment where the prosecutor conveyed, both directly and indirectly, his belief in the defendant's guilt, and "where irregularities in presenting the case to the Grand Jury rise to the level of impairing those proceedings and creating *the risk of prejudice*") (emphasis added); People v. Sayavong, 83 N.Y.2d 702, 711-12 (dismissing indictment where grand jury irregularities caused a "*possibility* of prejudice" to the defendant) (emphasis in original); see also State v. Barnhart, 211 W. Va. 155, 159 (2002) (holding that an indictment should have been dismissed where a member of the grand jury that indicted the defendant was a police officer who played a role in the investigation of the crime, given the possibility that the other grand jurors might have been influenced by the officer's presence, even though the police officer did not vote on the indictment); State v. Bowman, 423 N.E.2d 605, 608-09 (Ind. 1981) (upholding dismissal of indictment, where two police officers were present during grand jury proceedings, and holding that the circumstances raised "the specter of proceedings wherein the witnesses' testimony and jury's role and consideration of evidence is not completely free from partial influences, however subtle.").

This is especially so where a prosecutor's conflict of interest could have prejudiced the defendant. See People v. Zimmer, 51 N.Y.2d 390, 394-95 (1980) (holding that dismissal of an indictment was appropriate where a prosecutor's conflict of interest undermined any presumption of impartiality — even when it was impossible to establish whether the conflict worked to actually disadvantage the defendant); People v. Baker, 99 A.D.2d 656, 656 (N.Y. App. Div. 1984) (granting defendant's motion to dismiss the indictment against him, where the prosecutor was related to a corroborating witness was and a friend of the complaining witnesses, and holding that "[w]hether actual prejudice has been established is immaterial."). Likewise,

even where an unauthorized person with a “manifest stake or interest in the outcome of the proceeding” is present during grand jury proceedings, the inquiry remains whether there was a possibility of prejudice to the defendant — not whether there was actual prejudice. Sayavong, 83 N.Y.2d at 709.

Under the circumstances presented in this case, Mr. Tankleff requests that the Court order the Special Prosecutor to disclose whether the grand jury considering evidence in this matter is a special grand jury, or whether it is a regularly empanelled Suffolk County grand jury. If the latter, Mr. Tankleff further requests that the Court order the Special Prosecutor immediately to cease its use of the regular grand jury in this matter, and that the Court preclude the Special Prosecutor from making any direct or derivative use of any evidence that has been presented to a regularly empanelled grand jury in this matter.

**II. THE COURT SHOULD OBTAIN FROM THE SPECIAL PROSECUTOR DETAILED REPRESENTATIONS REGARDING THE PURPOSE FOR WHICH ANY GRAND JURY IS BEING USED IN THIS MATTER**

Regardless of the type of grand jury being used, there are limitations on how the grand jury may be used by the Special Prosecutor in this case. While the Special Prosecutor is new to this case, this is not a new case. The Special Prosecutor may not treat this matter as it would a pre-indictment investigation. There is, and has been for almost two decades, a pending indictment against Mr. Tankleff. It is black letter law that a prosecutor may not use a grand jury post-indictment to develop evidence for use at a potential trial of the defendant.

A grand jury can conduct additional, post-indictment investigation only if the “sole” or “dominant” purpose of the investigation is *not* to prepare the pending indictment for trial. See, e.g., In the Matter of Hynes v. Lerner, 44 N.Y.2d 329, 333-34 (N.Y. 1978) (“[O]nce an

indictment is issued, a Grand Jury subpoena duces tecum may not be used for the sole or dominant purpose of preparing the pending indictment for trial.”); People v. Doe, 445 N.Y.S.2d 768, 773 (N.Y. App. Div. 1981) (holding that a grand jury subpoena should be quashed if improperly issued for the “sole” or “dominant” purpose of preparing an indictment for trial); People v. Heller, 472 N.Y.S.2d 824, 829 (N.Y. Sup. Ct., Kings Co., 1984) (“There is no question that the People may not use the grand jury for the purpose of securing additional, post-indictment, evidence to be used against the defendant at trial.”); Dellwood Foods, Inc. v. Abrams, 439 N.Y.S.2d 1008, 1010, 1012 (N.Y. Sup. Ct., Bronx Co., 1981) (“There can be no doubt that the issuance of post-indictment [grand jury] subpoenas, whose sole or dominant purpose is to gather evidence for a pending trial is an abuse of process.”).

Here, Mr. Tankleff is entitled to some assurance that the grand jury is being used for a permissible purpose. Mr. Tankleff is not seeking the identities of the grand jury’s witnesses, or the substance of their testimony. He simply desires confirmation that the grand jury is being used properly. Thus, he respectfully requests that the Court order the Special Prosecutor to provide — in open court or, if the Court deems necessary, *ex parte* to the Court *in camera* — a detailed affirmative representation as to how it is using a grand jury in this matter. In the Matter of Hynes v. Lerner, 44 N.Y.2d at 334 (in determining whether the grand jury’s sole or dominant purpose is preparing the pending indictment for trial, the court is “justified in relying on the written and oral representation” of the prosecutor). The representations should include “reasons why the [evidence] sought would be relevant to a legitimate Grand Jury investigation.” Id.; see also Dellwood Foods, Inc., 439 N.Y.S.2d at 1013 (“To make this determination, this court, after having read the grand jury minutes, took an in-camera offer of proof from the Attorney General, wherein the purpose of these subpoenas was examined.”).

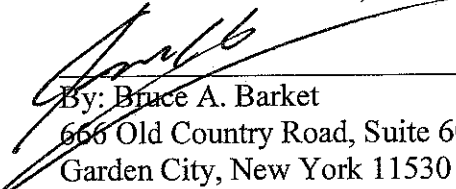
Requiring such representations in this case are necessary so that the Court can determine that the grand jury's sole or dominant purpose is not to attempt to develop evidence against Mr. Tankleff. Rather, the Court must ensure that the grand jury is being used for legitimate purposes such as developing evidence against those persons who were implicated at the § 440 hearing as having been involved in the Tankleff murders: Jerry Steuerman, Todd Steuerman, Joe Creedon, Peter Kent, and Glenn Harris.

**CONCLUSION**

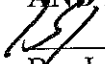
For the reasons stated herein, defendant Martin H. Tankleff respectfully requests that the Court order the Special Prosecutor to make an affirmative representation as to whether the grand jury considering evidence related to this matter is a special grand jury or a regularly empanelled Suffolk County grand jury. If the latter, Mr. Tankleff also requests that the Court order the Special Prosecutor immediately to cease use of the regular grand jury, and preclude the Special Prosecutor from making direct or derivative use of any evidence presented to the regular grand jury in this matter. Mr. Tankleff also requests that the Court order the Special Prosecutor to make a detailed representation to the Court with respect to the purposes for which it is using a grand jury in this matter.

Respectfully submitted,


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Dated: Garden City, New York  
April 29, 2008

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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**PEOPLE OF THE STATE OF NEW YORK**

- against -

Indictment Nos.: 1535-88/1290-88

**MARTIN H. TANKLEFF,**

Defendant.

-----X

**[PROPOSED] ORDER**

Upon consideration of defendant Martin H. Tankleff's Motion for a special grand jury and for the preclusion of evidence, 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 make an affirmative representation as to whether to date it has used a regularly empanelled Suffolk County grand jury in this case; and it is further

**ORDERED** that the Special Prosecutor is precluded from making any additional use of a regularly empanelled Suffolk County grand jury in this matter; and it is further

**ORDERED** that the Special Prosecutor is precluded from making direct or derivative use of any evidence that has been presented to a regularly empanelled Suffolk County grand jury in this matter; and it is further

**ORDERED** that the Special Prosecutor make forthwith a detailed affirmative representation regarding the purposes for which it has used any grand jury considering evidence related to this matter.

\_\_\_\_\_  
The Honorable James C. Hudson  
County Court Judge