**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION: SECOND DEPARTMENT**

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

**Respondent**

**-against-**

Suffolk County
Indictment Nos.
1290/88 & 1535/88

**MARTIN TANKLEFF,**

**Defendant-Appellant.**

---X

## NOTICE OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT

PLEASE TAKE NOTICE, that upon the annexed affirmation of Barry C. Scheck and the attached Brief for Innocence Project and Innocence Network *Amici Curiae* in Support of Defendant-Appellant, the undersigned will move this Court, on January 19, 2007, at the Appellate Division Courthouse, 45 Monroe Place, Brooklyn, New York, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order

a. Granting The Innocence Project, Inc., and the Innocence Network leave to jointly file an *Amici Curiae* brief in support of Defendant-Appellant.

b. Granting any such other and further relief as this Court may deem just.

Dated: New York, New York
December 6, 2006

Barry C. Scheck
Olga Akselrod
The Innocence Project, Inc.
100 Fifth Avenue, 3rd Floor
New York, NY 10011
(212) 364-5348

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**AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT**

Barry C. Scheck, an attorney duly admitted to practice law in the courts of the State of New York, affirms under penalty of perjury that the following statements are true, except those made on information and belief, which he believes to be true:

1. I am Co-Founder and Co-Director of The Innocence Project, Inc. ("the Project"). The Project is a member organization of the Innocence Network ("the Network"). I am also a criminal defense and civil rights litigator, advocate for the wrongfully convicted and expert authority on DNA evidence.

2. I make this affirmation in support of the Motion for Leave to File *Amici Curiae* Brief submitted by the Project and the Network, referred to collectively herein as "Prospective *Amici*".

3. True and correct copies of the County Court's denial of Defendant-Appellant's motion pursuant to C.P.L. Section 440.10 and Defendant-Appellant's Notice of Appeal are attached hereto at Tabs A and B, respectively.

**Interests of Prospective *Amici***

4. The Project is a nonprofit organization founded at and affiliated with the Benjamin N. Cardozo School of Law in New York, New York. The Project provides *pro bono* legal assistance to persons whose claims of innocence can be conclusively proven through post-conviction DNA testing.

5. The Project pioneered the post-conviction DNA litigation model that has to date exonerated 21 innocent persons in New York and 187 persons nationwide, and served as counsel or provided critical assistance in a majority of these cases. The Project's Litigation Department currently has a caseload of over 200 post-conviction DNA matters from around the nation, including 29 in the State of New York.

6. The Network is an association of 36 member organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners

whose actual innocence may be established by post-conviction evidence.[1] The Network currently represents hundreds of prisoners with innocence claims throughout the country.

**Issues to be Addressed**

7. In its brief, a courtesy copy of which is attached hereto at Tab C, Prospective *Amici* will urge this Court to reverse the County Court's denial of Defendant-Appellant's motion pursuant to C.P.L. Section 440.10 on the basis of new expert evidence showing that his confession was false and coerced. Specifically, Prospective *Amici* will discuss how the County Court's ruling contravened widely accepted research on false confessions and ignored the impact that the expert testimony would likely have on a fair minded jury at a new trial.

[1] The Network's members include: Arizona Justice Project; Association in Defense of the Wrongly Convicted; Barbara C. Salken Criminal Justice Clinic; California & Hawaii Innocence Project; Center on Wrongful Convictions; Cooley Innocence Project; Downstate Illinois Innocence Project; Florida Innocence Initiative; Georgia Innocence Project; Griffith University Innocence Project; I.U. School of Law Clinic, Wrongful Conviction Component; Idaho Innocence Project; Innocence Institute at Point Park University; Innocence Project New Orleans; Innocence Project Northwest Clinic; Innocence Project of Minnesota; Iowa/Nebraska Innocence Project; Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project; Maryland Office of the Public Defender Innocence Project; Medill Innocence Project; Mid-Atlantic Innocence Project; Midwestern Innocence Project; New England Innocence Project; North Carolina Center on Actual Innocence; Northern Arizona Justice Project; Northern California Innocence Project; Office of the Public Defender, State of Delaware; Rocky Mountain Innocence Project; Second Look Program; Texas Center for Actual Innocence; Texas Innocence Network; The Innocence Project, Inc.; The University of Leeds Innocence Project; University of Melbourne Innocence Project; Wesleyan Innocence Project; and Wisconsin Innocence Project.

8. Given the pervasiveness of coerced and false confessions and the devastating consequences such confessions have on our justice system, Prospective *Amici* will also write to encourage the Appellate Division to adopt a rule, as courts have in several other jurisdictions, that where there is an unexcused failure to electronically record a custodial interrogation, the resulting confessions are inadmissible or in the alternative the jury must be instructed that such confessions are inherently more unreliable. Electronic recording of interrogations creates an objective record that allows judges and juries to make more accurate determinations as to whether a particular suspect confessed and whether the confession was voluntary and reliable.

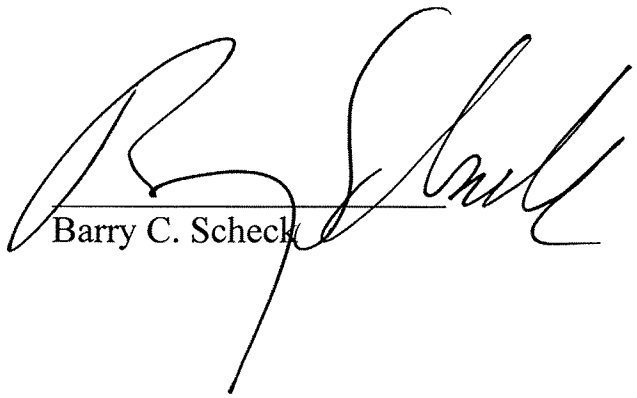
9. Prospective *Amici* will also address the County Court's erroneous denial of Defendant-Appellant's motion for post-conviction DNA testing on fingernail scrapings from one of the victims. DNA testing has the potential to provide undisputed scientific evidence in support of a convicted person's claim of innocence. Although this error is being appealed in a separate proceeding, the County Court's denial of Defendant-Appellant's DNA motion casts significant doubt on whether the County Court fulfilled its duty to carefully consider the evidence presented during the 440.10 proceedings.

10. Prospective *Amici* will aid the Court by drawing upon their extensive experience litigating post-conviction exoneration cases throughout the

nation; their considerable familiarity with the phenomenon of false confessions; and their significant history of calling for a variety of reforms in criminal investigations and cases, including mandatory electronic recording of interrogations and the need for experts to educate jurors in the area of police interrogations and false confessions. Prospective *Amici*'s body of experience is reflected not only in reported decisions, but also in unpublished orders and relief that was granted in other cases, many of which involved facts and legal claims highly analogous to that of Defendant-Appellant.

WHEREFORE, Barry C. Scheck respectfully requests that this Court issue an order granting a Motion for Leave to File *Amici Curiae* Brief.

Dated: New York, New York
December 6, 2006



Barry C. Scheck

COUNTY COURT OF SUFFOLK COUNTY
TRIAL TERM, PART 6 SUFFOLK COUNTY

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| THE PEOPLE OF THE STATE OF NEW YORK, | |
| | BRASLOW, J. C. C. |
| VS | DATE: March 17, 2006 |
| MARTIN H. TANKLEFF, | COURT CASE NO.: 1535-88<br>1290-88 |
| Defendant, | |

| | |
|---|---|
| THOMAS SPOTA, ESQ.<br>SUFFOLK COUNTY DISTRICT ATTORNEY<br>By: Leonard Lato, Esq.<br>Criminal Courts Building<br>Center Drive South<br>Riverhead, New York 11901 | BRUCE A. BARKET, ESQ.<br>ATTORNEY FOR THE DEFENDANT<br>666 Old Country Road<br>Suite 100<br>Garden City, NY 11530 |

The defendant served and filed a motion pursuant to CPL 440 seeking the vacatur of his judgment of conviction based upon a free standing claim of actual innocence, or in the alternative for a new trial. Both requests are based upon a claim of newly discovered evidence. This court granted the motion with the consent of the District Attorney to the extent that a hearing was ordered. The hearing was held and the parties were given the opportunity to submit post hearing memoranda. Prior to completing the submission of the post hearing memoranda, the defendant moved to reopen the hearing based upon the affidavit of Joseph John Guarascio, in which he asserted that his father, Joeseph Creedon, told him that he participated in the murders of Seymour and Arlene Tankleff. The application was granted and the court heard the testimony of Joseph John Guarascio. The court has received and considered all post hearing memoranda, and additional memoranda submitted upon the completion of Joseph John Guarascio's testimony. The following constitutes the court's decision.

During the early morning hours of September 7, 1988 the defendant's parents, Arlene and Seymour Tankleff were brutally

attacked in their Belle Terre home. Arlene was struck about the head with a blunt object and her throat was slit. She died of those wounds that morning. Seymour received similar wounds but managed to survive until he died as a result of those injuries on October 6, 1988. The defendant was initially indicted for the second degree murder of his mother Arlene and for the attempted murder and first degree assault of his father Seymour. The charges against the defendant as they pertained to his father were then elevated by a succeeding indictment to the second degree murder of Seymour Tankleff after his death. The defendant was ultimately convicted by a jury of the second degree murders of Seymour and Arlene Tankleff, and was sentenced to two consecutive twenty-five years to life terms of imprisonment which he is currently serving.

MOTION FOR A NEW TRIAL

Other than the confession given to Suffolk County Detectives by the defendant a few hours after the attacks in which the defendant admitted to the assaults upon his parents, the defendant has insisted that he is innocent and that the likely murderers were his father's business partner, Jerry Steuerman, and some other persons hired by Jerry Steuerman to murder the Tankleffs. The defendant's theory arises from the fact that his father and Jerry Steuerman were business partners and that Jerry Steuerman owed the defendant's father a substantial sum of money. Jerry Steuerman was not making the payments that he was obligated to make pursuant to their agreements and Seymour Tankleff was getting aggravated by Jerry Steuerman's recalcitrance. To make matters worse, Seymour Tankleff learned that Jerry Steuerman had purchased a race horse for $30,000 while ignoring the debts owed him. Because of this, Seymour Tankleff was threatening to enforce payment of the debts, and were he to be successful, it may have resulted in Seymour gaining control of some of Jerry Steuerman's business interests. The defendant contends that Jerry Steuerman was adamant that Seymour was overreaching and that he would do anything to avoid losing his businesses to Seymour Tankleff. According to the defendant this is what led Jerry Steuerman to the desperate end of arranging for the murders of Seymour and Arlene Tankleff; to avoid paying the debts owed to Seymour Tankleff and to avoid losing his businesses to him.

To support his contention the defendant moved this court based upon two sworn statements, one by Karlene Kovacs dated 1994, and

another by Glenn Harris dated August 29, 2003. These two sworn statements, together with what he had known at the time of the trial, and what he learned thereafter, apparently led the defendant to locate the numerous other witnesses he called at the hearing.

There are several reasons why the defendant's motion for a new trial should be denied. Among them are the defendant's failure to exercise due diligence in making the motion, that testimony the defendant wants admitted at a new trial is inadmissible hearsay, that expert testimony pertaining to the confession would not change the outcome of the trial, and that the defendant has not introduced any evidence which would prove that the pipe which the defendant claims is the murder weapon has any connection with these crimes.

**A. DUE DILIGENCE**

The court will first address the People's assertion that the defendant has failed to exercise due diligence in moving for this hearing.

CPL §440.10 provides in pertinent part:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
>
> * * *
>
> (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with *due diligence* after the discovery of such alleged new evidence... [Emphasis added.]

The Court in People v. Nixon, 21 N.Y.2d 338 held:

> In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are

factors to consider in determining how valid the assertions are; albeit, if they are made out, justice requires that they be explored in a hearing (cf. People v. Chait, 7 A D 2d 399, 401, affd. 6 N Y 2d 855)

The People contend that the defendant failed to exercise due diligence in moving for a new trial since he had the Kovacs statement since 1994. The defendant has not adequately explained why he sat with the Kovacs statement for nearly nine years. In fact, Jay Salpeter, the defendant's investigator did concede at the hearing that an investigator could have developed that lead at that time and located Glenn Harris. The defendant could have fully investigated the assertions made by Kovacs in 1994 which very well could have led him to uncover the same witnesses he was able to produce in 2005. The Kovacs statement directly implicates Creedon and a Steuerman. Indeed, the defendant apparently had information about an alleged conversation between Jerry Steuerman and Joseph Creedon since the trial. (See decision of J. Tisch dated October 4, 1990.) Since the defendant was accusing *Jerry* Steuerman since the date of the murders and had information about an alleged conversation between him and Creedon, it is bewildering why the defendant did not move in 1994 based upon this, but instead waited until he had the sworn statement of Glenn Harris, nine years later.

Accordingly, the defendant's motion for a new trial is denied since the defendant failed to exercise due diligence in moving for a new trial based upon the newly discovered evidence, that being the sworn statement of Karlene Kovacs which the defendant had since 1994. See People v. Stuart, 123 A.D.2d 46.

**B. HEARSAY**

In addition to the affidavits of Karlene Kovacs and Glenn Harris the defendant has introduced what he has characterized as newly discovered evidence which consisted mainly of the testimony from a cavalcade of nefarious scoundrels paraded before this court by him. Most of these witnesses were persons with extensive criminal histories that included illegal drug use and sales, burglary, robbery, assault and other similar crimes. Some of these individuals claimed that Joseph Creedon admitted to them that he participated in the murder of the Tankleffs, which testimony is hearsay.

In People v. Salemi, 309 N.Y. 208 the Court held:

The test thus enunciated was long ago approved in this court, and

since followed - viz.: that " Newly-discovered evidence in order to be sufficient must fulfill all the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence."

The newly discovered evidence must be evidence admissible at trial (People v Boyette, 201 A.D.2d 490, 491, 607 N.Y.S.2d 402 [1994]; People v Dabbs, 154 Misc. 2d 671, 674, 587 N.Y.S.2d 90 [1991]; see also People v Fields, 66 N.Y.2d 876, 877, 498 N.Y.S.2d 759, 489 N.E.2d 728 [1985]).

Hearsay has been defined as "a statement made out of court, that is, not made in the course of the trial in which it is offered, [and which] is offered for the truth of the fact asserted in it." Prince, Richardson on Evidence §8-101. See People v. Huertas, 75 N.Y.2d 487.

Generally, hearsay is not admissible as evidence (People v. Caviness, 38 N.Y.2d 227) since there is no opportunity to cross-examine the declarant and it usually consists of a statement not made under oath, although an affidavit can be hearsay, Sadowsky v. Chat Noir, Inc., 64 A.D.2d 697. The purpose of the exclusion is to assure that the adversary is given the opportunity to confront and cross-examine the witness who allegedly made the statement and to eliminate unreliable testimony.

Hearsay is admissible as evidence only under ceratin exceptions and only if found to be reliable. People v. Brensic, 70 N.Y.2d 9. One of those exceptions is the declaration against the declarant's penal interest.

The statements purportedly made by Joseph Creedon to certain individuals in which he allegedly admitted that he was involved in the murders of the Tankleffs would be declarations against Creedon's penal interest.

For a declaration against one's penal interest to be admitted into evidence as an exception to the hearsay rule the Court in People v. Settles, 46 N.Y.2d 154 enunciated four elements, all of which must be satisfied:

[F]irst, the declarant must be unavailable as a witness at trial; second, when the statement was made the declarant must be aware that it was adverse to his penal interest; third, the declarant

> must have competent knowledge of the facts underlying the statement; and, fourth, and most important, supporting circumstances independent of the statement itself must be present to attest to its trustworthiness and reliability (see People v Harding, 37 NY2d 130, 135 [concurring opn]; Richardson, Evidence [10th ed -- Prince],§ 257; Fisch, New York Evidence [2d ed], § 892).

This should be balanced against People v. Darrisaw, 206 A.D.2d 661 in which the court held:

> Although the mandates of due process further restrict the circumstances under which a statement endangering the maker's penal interest may be used against a criminal defendant (see, People v Maerling, 46 NY2d 289, 298), in a case where, as here, the statement is exculpatory as to defendant, a less exacting standard applies (see, People v Smith, 195 AD2d 112, 125).

In reaching the following conclusions, the court has balanced the reliability of the witnesses who testified that Creedon uttered the incriminatory statements against his own penal interest, against the defendant's argument that he is entitled to a new trial as a result of these assertions because a less stringent standard should apply (see Darrisaw, *supra*), and that the defendant would be denied due process were they not to be admitted at a new trial.

The defendant fails to satisfy the first element of the holding in Settles, *supra*, in that Creedon testified at the hearing and denied any involvement in the murders, and this court has no reason to believe that he would not be available to testify at a new trial. Secondly, many of the witnesses who testified that they heard Creedon admit to committing these murders were shown to be unreliable, incredible, contradictory, and possibly motivated to harm Creedon by having him convicted of these murders.

This includes his son who this court believes was motivated by his mother who was both physically and emotionally abused by Joseph Creedon while they lived together. The abuse caused her to run and hide from him with their son. Additionally, it appears that Joseph Creedon failed in his financial obligations to them. Accordingly, the court finds the testimony of Joseph John Guarascio to be incredible and unreliable and due to the motivations of his mother.

The testimony of Karlene Kovacs also lacks credibility and reliability. She contradicted the statements contained in the affidavit by her testimony at the hearing. In her affidavit she stated that she went to her friend John Guarascio's sister's house. At the time, John Guarascio's sister Terri Covias lived with Joseph Creedon.

Kovacs states in her affidavit that while she and Creedon were in the bedroom of that house smoking a "joint," Creedon told her that he was involved in the Tankleff murders. The affidavit also states that Terri Covias and Creedon were married.

Kovacs testified at the hearing that she and Creedon went through the bedroom and then outdoors to smoke the "joint." She admitted she knew that Creedon and Terri Covias were not married at the time she signed the affidavit, but she testified that she read and signed the affidavit anyway. It also appears that Kovacs had a cocaine abuse problem at that time, and entered a rehabilitation program in November of the year that statement was purportedly made to her by Creedon.

Additionally, it appears that Kovacs embellished her testimony at the hearing to include the assertion that Creedon got rid of clothes he was wearing which was not included in her affidaivit.

Robert Gottlieb, the attorney who represented the defendant at the trial and for a time thereafter, interviewed Kovacs and prepared her affidavit. He testified at the hearing that he did not add anything to the affidavit that Kovacs did not tell him, and that the affidavit is complete as to what she did say to him.

Apparently, Kovacs also has developed a biased interest in the outcome of this matter. She has become a member of the defendant's website, has chatted on the internet about this matter, and has stated that she can not wait to give the defendant a hug.

Accordingly, this court finds that the statements made by Creedon to Kovacs would not be admissible at a new trial since Kovacs lacks reliability and credibility.

There was testimony Joseph Graydon that there was an attempt by Creedon to commit the murder of Seymour Tankleff in the summer of 1988 at the Strathmore Bagel shop. However, Graydon testified that the shop was closed and Seymour Tankleff was not there, so Creedon and his accomplice Joseph Graydon chose to throw a garbage pail through a glass door of a greeting card shop in the same shopping center and then steal from it. Records of the Suffolk County Police Department and the testimony of the store manager do not corroborate the assertion. Instead it appears that burglary occurred in November of that year, after the Tankleffs were murdered.

Graydon also testified that Creedon subsequently admitted to him in 1992 or 1993 that he killed a couple of people. This admission purportedly was made while they were having an argument over who had the right to sell drugs at a particular bar.

The court finds this testimony to be unreliable since it appears that the burglary of the card store did not happen when Graydon testified that it did, and that Graydon's testimony is tainted as the admission was supposedly made while he was arguing with Creedon over which one of them could sell drugs at a particular location.

The defendant claims that Brain Scott Glass was offered the job of hurting or killing the Tankleffs but did not want the job and passed it on to Creedon, and that the defendant expected him to testify to that. However, Glass testified that he was offered help by the defense in defending a robbery charge and that is why he told them that he would testify that he passed the job of killing the Tankleffs on to Creedon. The defendant asserted that Glass was offered favorable treatment on the robbery charge by the District Attorney and so changed his testimony to favor the People. The court finds that Glass' testimony, even were he to now testify in favor of the defendant would not be worthy of belief.

Billy Ram testified that on the night before the murders, Creedon said "he was going to rough up some Jew in the bagel business." Ram refused to help him with the job. Ram also testified that Creedon told him that he murdered the Tankleffs. However, Billy Ram has been involved in criminal activity since at least the time of the Tankleff murders. Moreover, subsequent to testifying at this hearing, Ram was involved in a shoot out with members of the Hillsborough County Sheriff's Department in Florida after having committed several armed robberies. He was wounded by deputies in the shootout and he is currently awaiting sentence.

Additionally Peter Kent, who testified on behalf of the People, testified that Billy Ram told him he received $10,000 from Salpeter, that he was set up to receive $50,000 and that the car they were in was rented for him by Salpeter. Defendant denies that anyone was paid above out of pocket expenses and lost wages.

In any event, this court finds that Billy Ram's testimony is not worthy of belief. He is clearly an individual who has always put his personal interests above society's which is demonstrated by his lengthy and violent criminal activity which continues to this day, and this court does not believe that he would do anything like testifying in favor of this defendant out of some underlying need to see justice done.

Gaetano Foti also testified that Creedon told him that Tankleff didn't do it, that Creedon was there and that he killed the Tankleffs. However, on cross-examination Foti testified that Creedon may have only said that Tankleff didn't do it and that he knows that because he was there.

It thus appears that Foti's testimony is equivocal and not reliable.

Accordingly, the declarations purportedly made by Creedon against his penal interest would not be admissible at trial since he is available to testify, and this court finds these witnesses to whom these statements were purportedly made to be incredible and unreliable. People v. Buie, 86 N.Y.2d 501. Even using the less stringent standard of Darrisaw, the court still finds that due to the lack of credibility of these witnesses, the purported statements against Creedon's penal interest would not be admissible at a new trial.

Glenn Harris, the individual who allegedly drove Creedon and Peter Kent, the other alleged killer to the Tankleff home on the night of the murders, was unavailable to testify because he invoked his fifth amendment right against self incrimination when he was called to testify at the hearing. People v. Stultz, 2 N.Y.3d 277. The defendant sought immunity for Glen Harris which the People refused the grant. This court refused to grant defendant's application to compel the People to grant Harris immunity.

The court in People v. Darrisaw, 206 A.D.2d 661 went on to hold:

> Moreover, where the statement forms a critical part of the defense, due process concerns may tip the scales in favor of admission (see, Chambers v Mississippi, 410 US 284, 302). Given the foregoing, the prosecutor's refusal to grant Maiola immunity, though not per se improper (see, People v Owens, 63 NY2d 824; People v Finkle, 192 AD2d 783, 787, lv denied 82 NY2d 753), bears profoundly on the correctness of County Court's ruling not to permit introduction of Maiola's statement.

The defendant argues that the Court in People v Robinson (89 N.Y.2d 648, 679 N.E.2d 1055, 657 N.Y.S.2d 575 [1997]) held:

> [T]hat the trial court erred in excluding grand jury testimony of an unavailable witness. Evidence of this type, we held, must be admitted when it is material, exculpatory and has sufficient indicia of reliability.

However, for this court to permit the introduction of the Harris affidavit into evidence, the court must find that it is worthy of belief. See People v. Stultz, 2 N.Y.3d 277.

There was substantial evidence that Harris is mentally unstable and equivocal, often recanting his statements. Additionally there was

evidence that Harris sought details of the crime from Salpeter, the defendant's investigator, which would indicate that he probably had nothing to do with committing the crimes. Moreover, evidence was provided at the hearing which indicated that he wanted to incriminate Peter Kent because Peter Kent had an affair with his wife. This court finds that the affidavit provided by Harris would not be admissible at trial since it lacks trustworthiness and reliability, and even were he to testify at a new trial, it would appear his testimony would lack any credibility. People v. Bedi, 299 A.D.2d 556 and cf. People v. Cabot, 294 A.D.2d 444.

Father Lemmert, is the prison chaplain who has dealt with Glen Harris while Harris was incarcerated and apparently has discussed this matter with him. Being a prison chaplain is probably one of the most difficult callings a member of the clergy can undertake, and this court has the highest regard for Father Lemmert. The court believes the testimony of Father Lemmert as to what he heard Harris tell him, however, it is Harris who is not worthy of belief for the reasons fully discussed above. Since what Father Lemmert heard Harris tell him is unreliable hearsay, it would not be admissible as evidence at a trial.

There was also testimony by Neil Fischer, a disinterested and well meaning individual who apparently had the best of intentions in testifying at this hearing. However, this court also finds the testimony of Neil Fischer to be unreliable. Mr. Fischer testified that while he had his head in a cabinet that he was installing in one of Jerry Steuerman's bagel stores, he overheard Jerry Steuerman having an argument with someone wherein Steuerman was complaining about the bagel ovens that were provided by that person, and that Steuerman said in anger that he had already killed two people. This statement was overheard by Fischer while he had his head in a cabinet and he was probably not paying close attention to what was being said. The statement was taken out of context, may have been made facetiously since the defendant has been accusing Steuerman of the murders ever since they were committed. Additionally, there has been no showing that Jerry Steuerman would be unavailable to testify at a new trial. To the contrary, Jerry Steuerman did testify at the trial. Accordingly, this statement would not be admissible as an exception to the hearsay rule as a declaration against his penal interest since there was no showing that Jerry Steuerman is not available to testify and the testimony is unreliable.

Bruce Demps testified that he was told twice by Todd Steuerman, Jerry Steuerman's son, that defendant did not kill his parents and that Todd's father hired some one to kill them. This is pure hearsay and would not be admissible at trial.

It is also noted that some of the witnesses called by the People such as Peter Kent and Robert Mineo had some of the same credibility problems that some of the defendant's witnesses had due to their past criminal records and drug use. Additionally, Peter Kent has a personal stake in this case since he is one of the individuals the defendant claims accompanied Creedon into the Tankleff home. However the burden of proof is not on the People in this proceeding but rather is on the defendant to demonstrate that he is entitled to a new trial based upon the evidence he claims is newly discovered, and which would result in a different verdict if presented to a jury, which is where the defendant falls short.

The defendant also argues that some of these statements made by Harris and Creedon fall into the exception of a then existing state of mind. However this court believes that the crux of the statements made by Creedon and Harris is that they admit their involvement in the crimes. The state of mind exception should not be used to prove past facts contained in them. People v. Reynoso, 73 N.Y.2d 816.

Accordingly, the forgoing testimony proffered by the defendant would not be not admissible at trial since it is inadmissible hearsay.

**C. THE CONFESSION**

The defendant contends that his conviction was the result of his unsigned confession, which he claims is false, being admitted into evidence. He asserts that the confession was obtained through the use of police interrogation tactics which have become associated with false confessions. To support this, he seeks to have Richard J. Ofshe testify as an expert witness on false confessions at his trial. The defendant contends that the information which would be provided to the jury at a new trial constitutes new evidence since the research into this area did not exist at the time of his trial.

Mr. Ofshe testified at the hearing and it is his conclusion that the interrogation tactics used by the detectives in this case are consistent with other cases in which false confessions have been obtained.

These aspects have been the subject of the court's decision in People v. Kogut, 2005 NY Slip Op 25409. In that case Dr. Ofshe testified along with Dr. Kassin and other experts in analyzing the confession of Kogut. After reviewing testimony from Kogut's Huntley hearing and the prior trial, Dr. Kassin concluded that Kogut's confession was involuntary. The court found that:

> Dr. Kassin relied primarily on the length of the interrogation, 15 plus hours to produce the written statement, as well as the

evidence that Mr. Kogut was deprived of food and sleep, was prevented from speaking with his girlfriend, may have been under the influence of alcohol and/or drugs, was confronted with persistent denials of his claim of innocence, and may have been misled as to the results of the lie-detector test.

That court then went on to compare Dr. Ofshe's testimony with Dr. Kassin's and found:

The work of Dr. Ofshe is more in the nature of descriptive psychology. Dr. Ofshe has conducted case studies of actual interrogations by reviewing transcripts, videotapes, and audiotapes and interviewing people who were the subject of custodial interrogations. Through these various methods, Dr. Ofshe has studied over 300 police interrogations. Dr. Ofshe has attempted to develop a model of interrogation technique which he considers to be a form of "extreme influence." In this regard, Dr. Ofshe's analysis parallels in large measure that of Dr. Kassin.

In the instant matter, Dr. Ofshe has performed the function that Dr. Kassin performed, as well as providing the background of his own research and studies. Based upon his review of the defendant's pre-trial hearings and trial, coupled with his research, he concluded that the defendant's confession is consistent with a false confession. It is this expert testimony that the defendant wishes to present to the jury at a new trial, and which he contends would change the outcome of his case.

The court does not believe that in this case, given the facts and circumstances surrounding the defendant's confession, that a different outcome would result. There was no conduct by the detectives that would have rendered the defendant's confession false.

Unlike the defendant in People v. Kogut, 2005 NY Slip Op 25409, the interview of the defendant in this case only lasted a few hours. There was no indication that he was denied any basic necessities, or that he was under the influence of drugs or alcohol. He was however tricked into confessing when Detective McCready pretended to receive a telephone call from the hospital where defendant's father was, and told the defendant his father had accused him of attacking him. It was this lie that induced the defendant to confess.

However offensive this may seem, this tactic has been deemed acceptable time and again, and the least likely to result in a false confession.

In United States v. Rodgers, 186 F. Supp. 2d 971 the court held:

The third tactic was the detective's lie that defendant's fingerprints were found on the contraband; according to the

detective this statement precipitated defendant's confession. However, according to the Seventh Circuit, "a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary." Holland, 963 F.2d at 1051. Defendant had been questioned before and the circumstances of this interrogation were relatively benign. Defendant was not browbeaten with repeated assurance of his guilt by multiple officers. Thus, the lie was unlikely to produce an unreliable confession. See Lucero, 133 F.3d at 1311 (holding that an officer's lie that defendant's fingerprints were found at the scene did not without more render confession involuntary); Ledbetter, 35 F.3d at 1070 (same).

Accordingly, this court finds that the proposed testimony of Richard J. Ofshe would not result in a different jury verdict.

**D. THE PIPE**

At the hearing the defendant introduced a pipe into evidence claiming that it was the actual murder weapon used to bludgeon the victims. The claim is based on a statement provided by Glenn Harris that he, along with Creedon and Kent drove to an empty lot and Creedon tossed the pipe into that lot. The pipe, according to the defendant had been in that lot since the morning of the murders, undetected by anyone including the person who lived in a house on the adjacent lot, until it was found last year by the defendant's investigator.

The pipe was submitted by the defendant to a laboratory for the purpose of having it examined for any physical evidence which would connect it to the murders. Nothing was found. The defendant argues that this was consistent with the fact that the pipe lay in a field exposed to the elements for seventeen years which would have dissolved any evidence which would have been on the pipe.

The People sent an investigator to that lot after the pipe was found. The People's investigator found other pipes of the same type of varying lengths on the lot.

This court finds that the pipe has no probative value.

In addition to the foregoing, the defendant also called Leonard Lubrano, the owner of a pizzeria as a witness. Mr. Lubrano appeared to be a very honest individual and was a very credible witness.

Mr. Lubrano testified that he recalled that during the 1970's and 1980's, when he owned a wholesale bakery business , he would go to Jerry Steuerman's bagel shop on a daily basis to purchase bagels for resale as part of his regular business routine. Lubrano testified that he recalls seeing Detective McCready at the bagel shop conversing with Jerry Steuerman during that time. The defendant contends that

this testimony directly affected the credibility of Detective McCready since at trial he denied knowing Jerry Steuerman before the murders of the Tankleffs.

This issue was raised by the defendant in a prior motion for a new trial in 1990 in which the defendant presented the court with an affidavit of a high school student. That student claimed in her affidavit that Detective McCready admitted to an auditorium full of students that he knew Jerry Steuerman for years and that he was beyond suspicion. Judge Tisch in his decision dated October 4, 1990 held that "such evidence could not have been introduced at trial to impeach the credibility of Detective McCready since it would have been collateral to the issues."

The testimony of Leonard Lubrano, another witness who would testify that there was some kind of prior relationship between Jerry Steuerman and Detective McCready does not change the ruling of Judge Tisch in this case. This testimony would therefore not be admissible at a new trial.

Accordingly, the court finds that the bulk of the evidence which the defendant seeks to have presented at a new trial would be inadmissible, and that what is left would be insufficient for a jury to render a different verdict.

Therefore, defendant's motion for a new trial is denied.

## CLAIM OF ACTUAL INNOCENCE

In People v. Cole, 1 Misc. 3d 531 the courts for the first time in this state recognized that a free standing claim of actual innocence can be considered as part of a motion pursuant to CPL §40.10 (1)(h). The basis of this finding is that it would be violative the New York State Constitution to keep an innocent person incarcerated.

## A. DUE DILIGENCE

While this court would deny the defendant's motion for a new trial because he failed to exercise due diligence since he had the Kovacs affidavit for nine years, this court does not deny this branch of defendant's motion for that reason. The basis of a motion to set aside a guilty verdict upon a claim of actual innocence does not lend itself to any claim of failing to exercise due diligence when it comes to newly discovered evidence, since it would be abhorrent to the New York State Constitution to keep someone in prison who is actually innocent merely because he foolishly failed to exercise due diligence in proving his innocence. People v. Cole, 1 Misc. 3d 531.

## B. STANDARD OF PROOF

That being said, the court in Cole sought to determine what standard of proof a defendant must meet, when that defendant had already been convicted beyond a reasonable doubt. That court held:

> Balancing the public and private interests involved and considering that the defendant has had the opportunity to prove his innocence, the court finds that a movant making a free-standing claim of innocence must establish 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. [Emphasis added.]
>
> In this respect, a court conducting a hearing on a claim of innocence should admit into evidence any reliable evidence whether in admissible form or not (see Bousley, 523 U.S. at 623-624; Schlup, 513 U.S. at 327-328; Herrera, 506 U.S. at 443 [Blackmun, J., dissenting, joined by Stevens and Souter, JJ.]). This is so because the focus is on factual innocence and not on whether the government can prove the defendant's guilt beyond a reasonable doubt.

This standard is different from defendant's motion for a new trial, since the evidence which the court would consider on a motion for a new trial would be evidence which would be admissible at a new trial which is not the case for a claim of actual innocence.

According to the decision in Cole, any reliable evidence should be considered by the court, including hearsay.

With this in mind, the court liberally allowed the defendant to introduce whatever evidence he had, admissible at trial or not, to determine whether the defendant could prove, by reliable clear and convincing evidence as held in Cole that he was actually innocent.

Clear and convincing evidence has been defined in Richardson, Evidence [11th ed., Prince],§3-205 as follows:

> Between "a fair preponderance of the evidence" and "proof beyond a reasonable doubt" is an intermediate standard of proof by "clear and convincing evidence." See Addington v Texas, 441 US 418, 423-424.
>
> The party bearing the burden of establishing a fact by clear and convincing evidence must "satisfy [the trier of fact] that the evidence makes it highly probable that what he claims is what actually happened." 1 NY PJI2d (Supp), P. J. I. 1:64; Home Insurance v Karantonis, 156 AD2d 844, 550 NYS2d 77; Solomon v

State, 146 AD2d 439, 541 NYS2d 384. The Court of Appeals has recognized the applicability of the standard in civil cases when the "denial of personal or liberty rights" is at issue, see Matter of Cappoccia, 59 NY2d 549, 553, 466 NYS2d 268; or when "particularly important personal interests are at stake." Matter of Storar, 52 NY2d 363, 379, 438 NYS2d 266, cert den 454 US 858. As the following examples show, a variety of policy imperatives dictate adoption of the higher standard of probability reflected by the term "clear and convincing" evidence. See also Grogan v Garner, 498 US 279; Herman & McLean v Huddleston, 459 US 375; People v Geraci, 85 NY2d 359, 367, 625 NYS2d 469.

The defendant has painted a picture of Jerry Steuerman as being a tough and callous businessman who had various business interests including those which included Seymour. The defendant argues that Jerry Steuerman had the Tankleffs murdered to avoid paying the debts he owed Seymour Tankleff and to avoid losing his businesses to them. As evidence of Jerry Steuerman's consciousness of guilt the defendant points to Jerry Steuerman's sudden disappearance shortly after the murders, when Jerry Steuerman went to California and attempted to change his physical appearance and identity.

The defendant attempted to establish that Jerry Steuerman hired Creedon to murder the Tankleffs, that Creedon brought Kent with him and had Harris drive them to the Tankleff home. The defendant introduced several statements purportedly made by Creedon to a number of witnesses that he was involved in the murders. As discussed above, most of the testimony essential to defendant's theory of the case that the defendant presented to the court was inadmissable hearsay from witnesses whose credibility and reliability was very questionable. Although this standard of proof of clear and convincing evidence is not the most difficult as is required of the People in proving the defendant's guilt beyond a reasonable doubt, it is more than a mere preponderance of the evidence. The reason that this court and the court in Cole holds the defendant to this level of proof is that the defendant's guilt has already been proven beyond a reasonable doubt, and especially as in this case, to a jury who had the opportunity to view the testimony and demeanor of the witnesses at trial which was held a relatively short time after the commission of these crimes. It is the court's opinion that the sanctity of a jury verdict is not to be disturbed unless the evidence in a free standing claim of actual innocence is substantial, solid, unwavering, credible and reliable, which is not what was presented by the defendant.

The witnesses presented by the defendant have come forward seventeen years after the crimes were committed. Many of the events they testified to occurred after the murders, many years ago which is affected by the haze of fading memories. Additionally, as shown above many of the assertions by defendant's witness that Creedon admitted to committing the murders to them may have been motivated by their bias towards Creedon, such as his son who was raised by his mother who was

both physically and emotionally abused by him.

Additionally, other witnesses were shown to be of the same ilk as Creedon, that is that they had extensive criminal records consisting of drug use and dealing, robbery, assault and other similar crimes, and after considering their testimony as discussed above, the court finds them not worthy of belief.

Creedon and his cohorts are certainly capable of using physical force to intimidate and to rob, and it does appear from the record that the robberies and acts of intimidation committed by these thugs were primarily against other drug dealers who would not complain to the police. These individuals were mainly interested in either obtaining drugs or money to buy more drugs.

In this case, nothing appeared to be stolen from the house. This court finds it hard to believe that characters such as Creedon and Kent would not have looked for something to steal from the Tankleff home. It does not seem likely that Creedon would have committed these murders, along with Kent and Harris for $25,000 and then not steal from the Tankleffs.[1]

Moreover, this court finds it incredible that Creedon and Kent would have left a potential witness behind by not also murdering the defendant.

The evidence of Jerry Steuerman's sudden disappearance after the murders which supposedly supported the theory that Jerry Steuerman was responsible for the murders was advanced by the defendant at his trial. Jerry Steuerman was examined at length by the defendant's attorney at the trial and he apparently failed to convince the jury that Jerry Steuerman could have been responsible for the murders to the extent that it did not leave the jury with reasonable doubt that the defendant was not the murderer. Instead, Jerry Steuerman testified at the trial that he was under a lot of pressure because his cash flow was not what it used to be, his wife died the year before, his son was under investigation for a variety of crimes, and the defendant was accusing him for the murders of his parents. The cumulative effect of these events caused Steuerman to think that he and those he was close to would be better off if he just disappeared. This would appear to be what the jury believed.

---

[1] It is noted that Joseph John Guarscio testified that his father Joseph Creedon told him that he paid Det. McCready $100,000.00 to "keep his name out of it", meaning associating Creedon with the Tankleff murders. This flies in the face of any profit motive in this purported killing for hire, since Creedon would have taken a loss of at least $75,000.

This stands in contrast to the People's theory which is what the jury believed, that is that the defendant murdered his parents. Initially, let the court point out that regardless of how many times the defendant insists that his conviction was based almost entirely on a false confession, that it is not the case. According to the trial testimony, the defendant's contradictory and confusing accounts of what he did that morning, together with his behavior in the presence of police officers at the scene, and during the initial investigation lacked the level of emotion they believed he should have had apparently made the detectives suspicious of the defendant. The testimony at the trial revealed a young man from an upper middle class family, about to start his senior year of high school, suddenly confronted with the brutal murder of his mother, and a similar attack on his father who was clinging to life, all of which occurred while he was supposed to be asleep.

Although the testimony at trial showed that the defendant was upset and agitated that morning, the combination of emotions which one would think he should have been displaying, such as overwhelming grief, fear, panic, bewilderment, did not appear to be present. Instead he immediately set about trying to steer the detectives to Jerry Steuerman as being responsible for the attacks. Indeed, he shouted out to a friend passing in a car who asked what happened, either that someone killed his parents and "molested" me or "missed" me. He was concerned about calling a friend that he was supposed to accompany to school. He became wide eyed and stunned when he learned that his father was still alive. This court believes that the evidence of defendant's response to the murders the morning of the crimes played a significant part in the jury's deliberations, in addition to his conflicting and confusing accounts to the police of what he did that morning .

Additionally, the defendant claims that many of the witnesses who have testified against Creedon have done so out of a compelling need to do what is right, that is to free the defendant and to have Creedon convicted of these crimes. The court does not believe for one instant that individuals such as Billy Ram, who after having testified in this court went to Florida and committed several armed robberies which led to a shootout with law enforcement officials, have a burning desire to do the right thing. This is also true with Brian Scott Glass, Glen Harris and Joseph Graydon. These witnesses have spent their lives placing their individual wants and desires ahead of society, and are not the type of person who would come forward out of a need to clear their consciences in a matter such as this.

The bulk of the main testimony presented by the defendant at the hearing, as indicated above, was hearsay which is inherently unreliable, and any evidence which had some reliability failed to establish clearly and convincingly that the defendant is actually

innocent.

This case has been reviewed extensively by every state appellate court and federal court having jurisdiction, all of whom have declined to upset the jury's verdict. After thoroughly reviewing this matter, this court reaches the same conclusion that the jury reached seventeen years ago and every state appellate court and federal court that has reviewed the case, and that is that Martin Tankleff is guilty of murdering his parents.

Accordingly, this court finds that the defendant has failed to demonstrate by clear and convincing evidence that he is actually innocent.

The defendant has made a multitude of motions during these proceedings which this court has found lacking in merit, as are the numerous remaining arguments in support of this motion.

It is therefore the decision and order of this court that the defendant's motion be and hereby is denied in its entirety.

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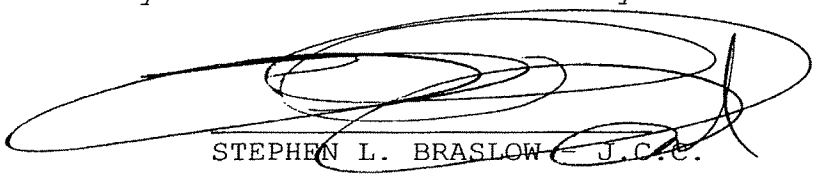

STEPHEN L. BRASLOW J.C.C.

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| People v Tankleff, Martin |
| --- |
| Motion No: 2006-03617 |
| Slip Opinion No: 2006 NYSlipOp 69369 |
| Decided on May 25, 2006 |
| Appellate Division, Second Department, Motion Decision |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This motion is uncorrected and is not subject to publication in the Official Reports. |

Supreme Court of the State of New York

Appellate Division : Second Judicial Department

M39864

K/sl

REINALDO E. RIVERA, J.

2006-03617

The People, etc., respondent,

v Martin Tankleff, appellant.

(Ind. Nos. 1290-88, 1535-88)

DECISION, ORDER AND CERTIFICATE GRANTING LEAVE TO APPEAL ON MOTION

Application by the defendant pursuant to CPL 450.15 and 460.15 for a certificate granting leave to appeal to this court from an order of the County Court, Suffolk County, dated March 17, 2006, which has been referred to me for determination.

Upon the papers filed in support of the application and the papers filed in opposition thereto, it is

ORDERED that the application is granted; the defendant is granted leave to appeal from the order of the County Court, Suffolk County, dated March 17, 2006, made in this case; and it is further,

CERTIFIED that said order involves questions of law or fact which ought to be reviewed by the Appellate Division, Second Department; and it is further,

ORDERED that the papers which accompanied this application are deemed to be a timely notice of

appeal from said order.

REINALDO E. RIVERA

Associate Justice

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MARTIN TANKLEFF,

Defendant-Appellant.

NOTICE OF MOTION FOR LEAVE TO APPEAL FROM ORDER DENYING C.P.L. § 440.10 MOTION

Suffolk County
Indictment Nos.
1290/88 & 1535/88

PLEASE TAKE NOTICE, that upon the annexed affirmation of Bruce A. Barket, the attached memorandum of law, the exhibits herein, and all prior proceedings below, the undersigned will move this Court, at a term for motions to be held on May 5, 2006, at the Appellate Division Courthouse, 45 Monroe Place, Brooklyn, New York, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order and certificate pursuant to C.P.L. §§ 460.15 and 460.15 and 22 N.Y.C.R.R. §§ 670.7, 670.12(a), (b):

a. Granting appellant leave to appeal to this Court from an order of the County Court, Suffolk County (Braslow, J.), dated March 17, 2006, and received by counsel of record on or about March 20, 2006, denying appellant's motion pursuant to C.P.L. § 440.10 for an order vacating his judgment of conviction and sentence under Suffolk County Indictment Number 1290/88, rendered on October 23, 1990 (Tisch, J.), and from an order of the County Court, Suffolk County (Braslow, J.), dated March 17, 2006, denying appellant's motion to disqualify the Office of the Suffolk County District Attorney; and

b. Enlarging the time to perfect the appeal until 120 days after the decision is made; and

c. Granting appellant such other and further relief as this Court may deem just.

PLEASE FURTHER NOTICE that, pursuant to 22 N.Y.C.R.R. § 670.12(b)(3), answering papers, if any, must be filed and served within fifteen (15) days of service hereof.

Dated: New York, New York
April 17, 2006

Yours,

By: Scott J. Splittgerber

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**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION: SECOND DEPARTMENT**

---X

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

**Respondent**

**-against-**

Suffolk County
Indictment Nos.
1290/88 & 1535/88

**MARTIN TANKLEFF,**

**Defendant-Appellant.**

---X

# BRIEF FOR INNOCENCE PROJECT AND INNOCENCE NETWORK *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

**Barry C. Scheck**
**Olga Akselrod**
**The Innocence Project, Inc.**
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**New York, NY 10011**
**(212) 364-5348**

**Keith Findley**
**On Behalf of the Innocence Network**

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## INTEREST OF *AMICI CURIAE*

The Innocence Project, Inc. ("the Project"), is a nonprofit legal clinic and resource center created by Barry C. Scheck and Peter J. Neufeld. Founded at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing of evidence can yield conclusive proof of innocence. The Project pioneered the post-conviction DNA litigation model that has to date exonerated 187 innocent persons, and served as counsel or provided critical assistance in a majority of these cases.

The Innocence Network ("Network") is an association of thirty-six member organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners whose actual innocence may be established by post-conviction evidence.[1] The Network currently represents hundreds of prisoners with innocence claims throughout the country.

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[1] The Network's members include: Arizona Justice Project; Association in Defense of the Wrongly Convicted; Barbara C. Salken Criminal Justice Clinic; California & Hawaii Innocence Project; Center on Wrongful Convictions; Cooley Innocence Project; Downstate Illinois Innocence Project; Florida Innocence Initiative; Georgia Innocence Project; Griffith University Innocence Project; I.U. School of Law Clinic, Wrongful Conviction Component; Idaho Innocence Project; Innocence Institute at Point Park University; Innocence Project New Orleans; Innocence Project Northwest Clinic; Innocence Project of Minnesota; Iowa/Nebraska Innocence Project; Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project; Maryland Office of the Public Defender Innocence Project; Medill Innocence Project; Mid-Atlantic Innocence Project; Midwestern Innocence Project; New England Innocence Project; North Carolina Center on Actual Innocence; Northern Arizona Justice Project; Northern California Innocence Project; Office of the Public Defender, State of Delaware; Rocky Mountain Innocence Project; Second Look Program; Texas Center for Actual Innocence; Texas Innocence Network; The Innocence Project, Inc.; The University of Leeds Innocence Project; University of Melbourne Innocence Project; Wesleyan Innocence Project; and Wisconsin Innocence Project.

The advent of forensic DNA testing and the use of such testing to review criminal convictions have provided scientific proof that our system convicts innocent people, and that wrongful convictions are not isolated or rare events. Although there are untold numbers of cases in which people have been wrongfully convicted but there is no DNA evidence that can scientifically prove their innocence, DNA testing has opened a window into wrongful convictions so that we may study the causes of this injustice and recommend practices to minimize the chance of its occurrence. In particular, the work of *Amici* has helped to expose the problem of false confessions as a major source of wrongful convictions. *Amici* have been directly involved in many of these exonerations, including that of Doug Warney, a man who spent twelve years in New York prisons for a murder he confessed to but did not commit. Our extensive experience in false confession cases has led us to call for a variety of reforms in criminal cases, including mandatory electronic recording of interrogations and the need for experts to educate jurors in the area of police interrogations and false confessions.

*Amici* have a particularly strong interest in cases where, as here, post-conviction courts fail to allow post-conviction DNA testing or fail to come to terms with the proven phenomenon of false confessions, allowing convictions to stand based solely on coerced and uncorroborated confessions even in the face of powerful exculpatory evidence.

## STATEMENT OF THE CASE

It is unfathomable for most people, including jurors, to imagine confessing to a crime that they did not commit. For this reason alone, juries will often convict a defendant based solely on a confession, even where, as here, the confession was given under coercive conditions and the content of the confession fails to match key, undisputable forensic evidence from the crime. Indeed, false confessions have emerged as one of the leading causes of wrongful convictions. To date, there have been 187 wrongly convicted Americans exonerated by DNA evidence, and of the first 130, approximately 27% were convicted based upon false confessions. *See, e.g.,* Innocence Project, *Causes and Remedies of Wrongful Convictions*, at http://www.innocenceproject.org. Of those who have been wrongfully convicted of murder, the percentage of false confessors is even higher: of the first 37 DNA exonerations in the U.S. in murder cases, two-thirds involved confessions. *See* Welsh S. White, *Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979, 984 (2003) (citing Innocence Project case review).

Given the overwhelming impact that confessions have on a jury's verdict coupled with the difficulty for most jurors to comprehend the existence of false confessions – let alone to recognize when one has occurred – testimony from an expert on false confessions can greatly reduce the likelihood that a jury will convict an innocent person. Here, the County Court was presented during post-

conviction proceedings with the analysis of a leading expert on false confessions, Dr. Richard Ofshe, who reviewed Marty Tankleff's confession and the circumstances under which it was made and concluded that the confession was "both unreliable and involuntary." Ofshe Affidavit, attached as Exhibit E (Exhibit 6) to Affirmation in Support of Motion for Leave to Appeal Order Denying C.P.L. § 440.10 Motion (hereinafter "Ofshe Aff. at ¶ __") at ¶ 49. In particular, the expert found that Marty Tankleff – a 17-year-old who was interrogated while under extreme emotional trauma from having just found his parents viciously and fatally stabbed – was subjected to police tactics that are routinely found in false confession cases. *Id.* at ¶ 19. Moreover, Dr. Ofshe concluded that, since the substance of Marty's confession contradicted several key pieces of physical evidence, the use of such tactics coerced Marty into falsely confessing to his parents' murder. *Id.* at ¶ 20.

Especially under the circumstances here – where Marty's conviction was based solely on his confession; where unrefuted forensic evidence presented at trial contradicted his confession; where it took the jury a full week to reach a verdict; and where an array of new evidence demonstrates that the murders were actually committed by two career criminals on behalf of Jerry Steuerman, Seymour Tankleff's business partner – the showing below created a reasonable probability that a fair-minded jury at a new trial, informed through the expert testimony of Dr.

Ofshe, would reach a different verdict. Yet the County Court ruled otherwise, erroneously holding that a different outcome would not result through the testimony of Dr. Ofshe because "[t]here was no conduct by the detectives that would have rendered the defendant's confession false." County Court Order, Mar. 17, 2006 (hereinafter "Order at __") at 12.

*Amici* urge this Court to reverse the County Court's ruling, which was contrary to the weight of the relevant scientific evidence and wholly ignored the likely impact of the new expert evidence. Allowing the conviction of Marty Tankleff to stand, based on nothing more than an uncorroborated and coerced confession that is flatly contradicted by compelling existing and new evidence, makes a mockery of our system of justice. We also write to encourage the Appellate Division to adopt a rule, as have courts in other states, that where there is an unexcused failure to electronically record a custodial interrogation, the resulting confessions are inadmissible or in the alternative the jury must be instructed that such confessions are inherently unreliable. The adoption of either of these rules would ensure that a clear record is made of the circumstances leading up to a confession and would greatly reduce the use of overly coercive tactics.

*Amici* will also address the County Court's erroneous denial of Marty Tankleff's motion for DNA testing on fingernail scrapings from Mrs. Tankleff and the broad concerns it raises about the Court's objectivity. Given that DNA has the

potential to scientifically and objectively corroborate the wealth of evidence in this case showing Marty Tankleff's innocence, the County Court's decision to summarily deny DNA testing is a disturbing indication that the County Court did not wish to learn the truth in this case. The County Court's findings should therefore be accorded little, if any, weight by this Court.

## STATEMENT OF FACTS

We incorporate by reference the statement of facts and procedural history set forth in Mr. Tankleff's brief.

## ARGUMENT

### I. The County Court Erroneously Found that Expert Testimony Regarding Mr. Tankleff's False Confession Would Not Change the Outcome at a New Trial

In holding that the detectives' conduct during Marty Tankleff's interrogation would not have rendered his confession false and that the expert testimony regarding his confession would therefore have no impact on a jury's verdict, the County Court ignored widely accepted research on false confessions and the clear impact that the expert testimony would have in this case. Given the County Court's ruling with respect to DNA testing, *see infra* Section III, this dismissive treatment of the expert testimony comes as no surprise. Without question, however, there is a reasonable probability that a jury informed through the Ofshe testimony would at minimum find that the prosecution failed to meet its burden to

prove Marty Tankleff's confession voluntary beyond a reasonable doubt, and likewise would find, even if the confession was deemed voluntary, that the confession was unreliable.

Expert testimony regarding Mr. Tankleff's confession and the circumstances under which it was made would be relevant to the jury's deliberations in two ways. First, New York remains one of the few jurisdictions in the nation that – separate and apart from any pre-trial consideration of whether the confession was illegally obtained as a matter of law – affirmatively requires the People to establish beyond a reasonable doubt at trial that a defendant's confession was voluntary, and bars a jury from considering the confession in its deliberations if that burden is not met. *See* New York CPL § 710.70; *see also People v. Huntley*, 15 N.Y.2d 72, 78 (1965); *People v. Murray*, 130 A.D.2d 773, 775 (2d Dept. 1987); *People v. Perretti*, 278 A.D.2d 597, 598 (3d Dept. 2000). The requirement serves as a safeguard for cases where, even if a confession was deemed admissible, a jury would still have ample reason to doubt its voluntariness. Indeed, the Second Circuit's holding that Marty Tankleff's confession was "barely" admissible, *Tankleff v. Senkowski*, 135 F.3d 235, 245 (2d. Cir. 1998), shows that this safeguard is particularly crucial in this case. Second, even if Marty's confession were deemed voluntary, the jury would nevertheless have to determine whether the confession was reliable and the relative weight the confession would deserve.

The expert testimony presented at the 440.10 hearing contained two crucial conclusions regarding Marty Tankleff's confession, both of which would have been highly relevant to a jury's determination of voluntariness and reliability: (1) the police who interrogated Marty Tankleff used coercive tactics that commonly lead to false confessions, and (2) the contradictions between Marty Tankleff's confession and the undisputed forensic evidence show that the use of these tactics coerced Marty Tankleff into falsely confessing to his parents' murder. *See* Ofshe Aff. at ¶¶ 19-20, 49.

Dr. Ofshe pointed to several key aspects of the police interrogation of Marty Tankleff that are "known to be sufficient to secure an involuntary and unreliable statement." *Id.* at ¶ 23. Marty Tankleff, who was only 17 years old at the time of his interrogation, was isolated from all family and friends and interrogated alone, without counsel. *Id.* at ¶¶ 24-27. He was aggressively questioned in a small, windowless room for hours. *Id.* at ¶ 28. Officers pressured Marty Tankleff to answer questions even when he had no personal knowledge and suggested proper answers, responding with disbelief to Marty's exculpatory statements and with agreement to any inculpatory statements. *Id.* at ¶¶ 21, 29. Interrogators also repeatedly lied to Mr. Tankleff, falsely stating that police had discovered a clump of Marty's hair on his mother's body and that a "humidity" test proved that Marty had, contrary to his statements, showered that morning. *Id.* at ¶¶ 33-34. Marty

finally "confessed" after police lied to him again, telling him that his father had identified him as the assailant. *Id.* at ¶¶ 30-31.

Moreover, Dr. Ofshe found that Marty could not have given a voluntary and reliable confession because his version of events simply did not fit the physical evidence. *Id.* at ¶¶ 35-38. For example, Marty stated in his confession that he used a dumbbell and watermelon knife to murder his parents, but both items did not have even a drop of blood or any other biological material on them. *Id.* at ¶ 39. Moreover, the confession stated that Marty washed himself and the murder weapons in the shower, but police searched the shower and likewise found no hair, blood or other biological material. *Id.* at ¶ 42. The condition of Mrs. Tankleff's body and the wounds to Mr. Tankleff also indicated a far earlier time of death than that described in the confession narrative. *Id.* at ¶ 43. These and numerous other discrepancies between Marty's confession and the unrefuted physical evidence concerned precisely the kind of central matters that are commonly out of sync when a person confesses to a crime that they did not commit and of which they lack personal knowledge. *Id.* at ¶ 38.

Mr. Tankleff easily met the standard for relief requiring that, in light of the new evidence, there is a probability that "the verdict would have been more favorable to the defendant." N.Y. CPL § 440.10(1)(g). Armed with an understanding of the coercive police tactics used in this case, no fair minded jury

could have concluded beyond a reasonable doubt that Marty Tankleff's confession was voluntary. Moreover, even if the jury found – contrary to the weight of the evidence – that the People met its burden of proof regarding voluntariness, the expert evidence would unquestionably make a jury highly skeptical of the reliability of Marty's confession. Given the lack of other inculpatory evidence presented at trial, and the new evidence that the crime was actually committed by someone else, there is a reasonable probability that the exclusion of the confession or its devaluation in the jury's estimation would lead to acquittal. In short, the unrebutted expert testimony is sufficient newly discovered evidence to mandate the conviction be vacated under CPL Section 440.10(1)(g).

Inexplicably, even though the People did not present contrary expert testimony and the County Court did not contest Dr. Ofshe's qualifications or methods, the County Court rejected the substance of Dr. Ofshe's testimony and held that it would not change the verdict because "[t]here was no conduct by the detectives that would have rendered the defendant's confession false." Order at 12. The County Court solely addressed the officers' lie to Marty that his father identified him as the assailant, rejecting Dr. Ofshe's conclusion regarding the coercive impact of such a tactic on the basis of a single citation to a Wisconsin

District Court opinion that actually confirms the dangers of police trickery.[2] Moreover, the County Court wholly ignored the many other circumstances and police tactics in this case – Marty's young age and emotional state; the conduct of his interrogation in isolation from family, friends, or legal counsel; the police's consistent expression of disbelief at his proclamations of innocence and their positive reinforcement when he made inculpatory statements – that can and do lead to false confessions and did so in this case.

The County Court's holding is simply inconsistent with widely accepted research on false confessions. The tactics of isolating suspects, pressuring suspects to answer questions even where they do not know the answers, and positively reinforcing inculpatory statements while expressing disbelief at exculpatory statements, are all tactics which create a feeling of hopelessness and inevitability and elicit a confession. *See, e.g.*, Drizin & Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C.L.Rev. 891 (2004) (hereinafter "Drizin & Leo") at 910-11; Kassin & Gudjonsson, *The Psychology of Confession Evidence: A Review of the Literature and Issues*, Psych. Sci. in the Publ. Int., 5 (2004) (hereinafter "Kassin & Gudjonsson") at 42-43. Moreover, confronting a suspect with

[2] Indeed, the case cited by the County Court, *United States v. Rodgers*, 186 F.Supp.2d 971, 977 (E.D.Wis. 2002), actually held that "lies about evidence can sometimes lead to unreliable confessions. Repeated false statements designed to induce a suspect to believe that the evidence against him is overwhelming and that his conviction is a foregone conclusion may cause him to confess because he believes continued resistance is futile." (internal quotation marks omitted). The *Rodgers* court went on to state that the coercive effect of police trickery "is further compounded if the suspect is young and impressionable." *Id.* at 978.

seemingly incontrovertible evidence of guilt is considered one of the most effective techniques to make a suspect feel that continued proclamations of innocence are fruitless and that there is no choice but to confess. Drizin & Leo at 913-14. While these techniques can be powerful methods to obtain confessions from the guilty, they are likewise "powerful enough to elicit confessions from the innocent." *Id.* at 916. Indeed, presenting a suspect with false evidence of guilt can have such a coercive effect that, as happened here, a person may falsely confess because they have been erroneously convinced that they may have actually committed the crime. *Id.*

Furthermore, the County Court wholly ignored Marty Tankleff's young age, a factor that makes the officers' use of coercive tactics all the more problematic. The existing body of social science research indicates that juveniles are far more susceptible to coercive interrogation tactics and are more likely to confess falsely. *See e.g.*, Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, Am. Psych. (May-June 2006) (hereinafter "Owen-Kostelnik") at 286, 291; Drizin & Leo at 917, 941-42; Kassin & Gudjonsson at 52; Redlich, A.D., & Goodman, G.S., *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, Law and Hum. Behav. 27, 141-56. A recent study analyzing 125 proven false confession cases, the largest collection of cases ever assessed in a single study, found that juveniles

accounted for a staggering one-third of false confessions in the sample, with the vast majority accounted for by persons in Marty's age group of 15-17. *See* Drizin & Leo at 941. This finding is explained by a range of research which reveals that adolescents have difficulty understanding lexical language, including legal terminology; have a higher susceptibility to negative feedback; present differences in decision-making; present behaviors more often than adults that are considered "deceptive" by interrogators; and have more negative responses than adults to situational risk factors such as stress, the presence of authority figures, physical custody and isolation, and confrontation. *See e.g.*, Owen-Kostelnik at 292-95. It is therefore no surprise that the tactics used in this case, which would even place an adult at risk of falsely confessing, led 17-year-old Marty Tankleff to confess to a brutal crime that he did not commit.

In fact, in the short span of time that *Amici* have been providing post-conviction representation to the wrongfully convicted, we have seen numerous cases in which innocent persons were convicted as a result of false confessions obtained through the same kinds of tactics that police employed on Marty Tankleff. These examples teach us that, regardless of whether a case involves DNA evidence that can scientifically prove innocence, cases with the markers of a false confession must be closely examined.

For example, New York City's infamous "Central Park Jogger" case is a vivid illustration of the particular susceptibility of juveniles to falsely confessing. When a 28-year-old jogger was brutally raped in Central Park in 1989, the police secured the confessions and convictions of five teenagers, ranging in age from 14 to 16 years old. Police used a host of tactics to obtain these confessions, including calling the teens liars, telling each teen that they were implicated by the others, and lying about inculpatory fingerprint evidence on the victim's jogging shorts. In 2002, however, convicted rapist Matias Reyes confessed to the rape of the Central Park jogger. When DNA testing corroborated Reyes' confession, the convictions of the five men were overturned. *See* Stevenson Swanson, *Convictions in '89 Jogger Rape Wrong, NYC Says*, Chic. Trib., Dec. 6, 2002, at 1; ABC News, *House of Cards: Experts Say Interrogation Techniques Can Encourage False Confessions*, Sept. 26, 2002; Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. Times, Dec. 20, 2002.

Just last month, Jeffrey Deskovic of Westchester County was exonerated after spending 16 years in prison for the murder of 15-year-old Angela Correa. Jeffrey was just 16 years old when police interrogated him for six hours and obtained his false confession. Even though DNA testing at the time of trial showed semen recovered from the victim did not come from Jeffrey, he was nevertheless convicted based solely on his confession. Jeffrey was proven innocent after the

profile from the semen was run through the DNA databank and there was a cold hit to a convicted murderer, who subsequently confessed to Angela's murder and has now been charged with the crime. *See* Jonathan Bandler, *Convict Charged in Old Peekskill Slaying*, Journal News, Nov. 16, 2006.

The case of Peter Reilly, remarkably similar to the instant case, provides yet another example of the impact that coercive interrogation techniques can have on juveniles. Like Marty Tankleff, the 18-year-old high school senior was interrogated for hours after just having experienced the shock of finding his mother fatally beaten and stabbed in their home. Using the same kind of coercive tactics police used on Marty – lying about evidence of guilt and aggressively dismissing claims of innocence – police eventually got Peter to mistakenly believe that he may have unknowingly killed his mother and secured his confession. Although there was no other evidence of Peter's guilt, a jury convicted him of killing his mother based entirely on his confession. An appellate court later overturned the conviction and ordered a new trial on the basis of new fingerprint evidence pointing to another assailant, and the prosecution dropped all of the charges. *See* CNN News Sunday, May 22, 2005.

Numerous persons have also been exonerated pre-trial notwithstanding false confessions. For example, 16-year-old Allen Jacob Chesnet was arrested and charged with murder and held in custody for several weeks. The sole evidence

against Allen was a confession that police obtained after telling Allen that evidence conclusively placed him at the scene. They used a tactic strikingly similar to the staged call from the hospital used in Marty's interrogation, faking a call from a forensic lab through which Allen was led to believe that blood discovered at the crime scene matched his DNA. Nevertheless, authorities did not release Allen from custody and drop the charges until another man – whose fingerprints and DNA were found at the scene – confessed. *See* Drizin & Leo at 944-45, 966-67.

Finally, there is highly troubling evidence that the Suffolk County Police Department and, in particular, Detective James McCready – a lead detective involved in obtaining Marty Tankleff's alleged confession – has a history of inappropriate police conduct. In April of 1989, the State of New York Commission of Investigation (SIC) issued a report, "An Investigation of the Suffolk County District Attorney's Office and Police Department" (hereinafter "SIC Report"), which was triggered by allegations from Judge Stewart Namm and a series of troubling cases involving improper interrogation tactics employed by Suffolk police. Most troubling, the SIC found that Detective McCready gave false testimony in *People v. Diaz*, Index. No. 1102-84, a rape/murder case tried in 1985.[3]

[3] In particular, the SIC found that Detective McCready gave false testimony regarding his interviews of three railroad workers who placed the defendant near the scene of the murder close to the day of its occurrence. "In his police report McCready wrote that the railroad workers recognized Diaz from pictures in the newspaper. In his report McCready made no mention of any mug shots or identification procedures, and at trial McCready initially testified that the railroad workers recognized Diaz from pictures in the newspaper. However, after it was

SIC Report at 31. The SIC also found that "at least five witnesses for the People in the *Diaz* case had presented incredible, false, or perjurious testimony." *Id.* at 32.

The devastating findings of the SIC are especially troubling in the context of the Tankleff case. Improper police tactics which lead to a disproportionate number of false confessions tend to be concentrated in certain police departments during discrete eras. In these departments (sometimes referred to as "rotten boroughs"[4]), improper interrogation tactics and false testimony to conceal them become operating procedures and continue unchecked until a high-profile exposé results in outside scrutiny, reform, and/or a change of leadership. This unfortunate tendency occurs most often in homicide cases because homicides often can be cleared only

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demonstrated by the defense that there had not been any pictures of Diaz in the newspaper at the time of the McCready interviews, McCready changed his testimony and, contrary to his police report, said he actually had shown mug shots of Diaz to the railroad workers." *Id.* at 38-39 (citations omitted).

[4] Some of these "rotten boroughs" where false confessions have clustered include: (1) the Pulaski County Sheriff's Office (Little Rock, Arkansas) in the mid-1980s, as exposed in the Barry Lee Fairchild case. *See* Ofshe & Leo, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Crim. 429, 466-68 (1998); (2) Maricopa County, Arizona in the 1990s, which experienced at least five documented false confessions in murder cases. *See id.* at 445-46; (3) Chicago, Illinois, whose police interrogation scandals over the past two decades are well-documented in John Conroy's Extraordinary Acts, Ordinary People (2001), particularly the "Burge" confessions, and which was quite literally a precinct known for behavior that was tantamount to torture during interrogations. *See also* Drizin & Leo at 933-43; (4) the Travis County (Austin, Texas) Homicide Division, led by the notorious Detective Hector Palenco, coerced confessions throughout the 1980s, including, most famously, the false confession to rape and murder by Christopher Ochoa; (5) the Broward County, Florida Sheriff's Office had a series of false confessions in the 1980s including Jerry Frank Townsend (confessed and falsely pled guilty to eight murders), Frank Lee Smith, and Timothy Brown; and (6) the Detroit, Michigan Homicide Division in the 1980s, which obtained false confessions to murder from Eddie Joe Lloyd and David Payton and just recently entered into a consent decree with the Department of Justice to end its unconstitutional practice of arresting witnesses in homicides for purpose of interrogation.

through confessions, creating enormous pressure on detectives in the interrogation process. *See, e.g.*, Barbara Gelb, *On the Track of Murder: Behind the Scenes with a Homicide Commando Squad* (Morrow, 1975 ed.); Drizin & Leo at 946. Since the homicide squad of the Suffolk County Police Department was singled out by the SIC in such a devastating report for improper interrogation practices and false testimony, it is wholly unsurprising that this Suffolk County case involves a coerced and untrue confession.

In sum, given the recent wave of exonerations of persons wrongfully convicted based on coerced and false confessions, the widely accepted scientific research confirming Dr. Ofshe's conclusions, and Suffolk County's troubling history of interrogation practices, it is clear that the County Court erred in its summary dismissal of Marty's claims. Particularly in light of the County Court's inexplicable refusal to grant DNA testing in this case, *see infra* Section III, the County Court's dismissive treatment of the false confessions evidence is an indication that it simply did not engage in the proper factual weighing that is required of a post-conviction court.

We therefore strongly urge this Court to reverse the denial of Marty Tankleff's motion pursuant to CPL Section 440.10.

## II. This Court Should Adopt a Rule that Where Police Fail to Electronically Record an Interrogation, the Confession is Inadmissible or the Trial Court Must Issue a Cautionary Jury Instruction

Given the pervasiveness of coerced and false confessions and the deleterious impact such confessions have on our system of justice, *Amici* urge this Court to take a step that will dramatically reduce the prevalence of convictions based on false confessions: the adoption of a rule that requires law enforcement to electronically record all custodial interrogations. Electronic recording is widely recognized as a key procedure for preventing convictions based on false confessions. This Court should follow the path taken by courts in other states and create a rule, applicable to courts within this Court's jurisdiction, that where police fail to electronically record interrogations, any confessions resulting from those interrogations are inadmissible. In the alternative, this Court should require a jury instruction that confessions obtained through interrogations that were not recorded should be assessed with greater suspicion.

A recording requirement would drastically reduce the likelihood that false confessions would make it into the courtroom unchecked. By creating an objective record of the interrogation, electronic recordings will enable judges and juries to make far more accurate determinations of whether a particular suspect confessed, whether the suspect's confession was voluntary, and whether the confession was true or false. Had officers recorded the interrogation of Marty Tankleff, the trial court and the jury would have been able to see for themselves not only what the officers said or did, but the effect that each word and action had on Marty's

demeanor and the content of his statements. Since the interrogation was not recorded, however, the only evidence of what occurred behind closed doors are the officers' and Marty's recollections, leading to a "swearing contest" that, as most frequently occurs, was resolved in favor of the officers.[5]

The case of Douglas Warney, who was exonerated this year after spending twelve years in prison based on a false confession, provides a good example of how videorecording could have prevented an injustice. Warney was convicted, in large part, due to a detective's testimony that Warney's confession contained details of the crime that "only the true perpetrator could have known." These details, including the fact that the victim was cooking a chicken at the time he was stabbed to death and that the victim was wearing a red-striped night shirt, gave Mr. Warney's confession credibility and undercut his claims at trial that the confession was unreliable. However DNA testing has now identified Eldred Johnson, a man with a history of violent assaults, as the perpetrator of the crime, and Mr. Warney has finally been released. *See* Innocence Project,

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[5] Crucial determinations of voluntariness and reliability should not have to be made based solely upon recollections that can be faulty or biased. Indeed, psychological research has long shown that human memory is not an accurate source of objective information, as people have a natural tendency to twist information to make a story more coherent and plausible or unconsciously modify the information to conform it to their own expectations. *See* G.W. A. & L. Postman, *The Psychology of Rumor* 83, 101 (1947). Moreover, the tendency of judges and juries to credit the word of an officer over a suspect is particularly troubling in this context since studies show that people conducting interviews often have difficulty recalling specific questions they asked and answers that were given. *See* Amye R. Warren & Cara E. Woodall, *The Reliability of Hearsay Testimony: How Well Do Interviewers Recall Their Interviews with Children?*, 5 Psychol. Pub. Pol'y & L. 355, 360-66 (1999).

http://www.innocenceproject.org/case/display_profile.php?id=180. If Johnson is the killer, how then did Warney know these details of the murder? The answer is either that the detective's memory of the confession narrative was wrong or that he deliberately or unconsciously suggested these facts to Warney, who adopted them in his confession. Regardless of whether the detective's actions were deliberate or unintentional, one simple fact remains: had the court been able to view an electronic recording of Warney's interrogation, the mystery of how Warney came to know these facts would have been solved.

Several state courts have already acted to remedy the problems of unrecorded interrogations in their jurisdictions. Recognizing the dangers of relying on a confession obtained through an unrecorded interrogation and the need for accurate and objective information upon which confessions could be assessed, these courts have exercised their supervisory powers to require trial courts to exclude confessions emerging from unrecorded interrogations, *see, e.g., In re Jerrell, C.J.,* 283 Wis. 2d 145, 166-73 (Wis. 2005) (confessions of juveniles not admissible where police fail to record interrogation); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (same, as to any person's confession); *State v. Cook,* 179 N.J. 533, 562 (N.J. 2004) (appointing committee to investigate possible recording requirement) and *Supreme Court of New Jersey Administrative Determination* (hereinafter "New Jersery Det."), at 7, available at

http://www.judiciary.state.nj.us/notices/reports/recordation.pdf (adopting committee recommendation that trial courts will consider failure to record in determining admissibility); *see also Stephan v. State*, 711 P.2d 1156, 1160-65 (Alaska 1985) (excluding confessions where interrogation was not recorded, but basing decision on due process clause), or to instruct juries on the implications of the failure to record the interrogation. *See Com. v. DiGiambattista*, 442 Mass. 423, 447-48 (Mass. 2004) (instruction advises jurors that "because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care"); *New Jersey Det.*, at 12 (adopting instruction advising jurors that where there is a failure to record, they should assess confessions with "great caution and care" and are permitted "to conclude that the State has failed to prove that a statement was in fact given").

This Court, too, should mandate recording of custodial interrogations. The Appellate Division has supervisory power to fashion rules ensuring fairness in the judicial process. *See People v. Dyla*, 142 A.D.2d 423, 442 (2d Dept. 1988) (in case involving warrantless arrest for parole violation, holding that suppression of defendant's statement was not warranted "as a matter of our supervisory power over the trial courts"); *People v. Adessa*, 640 N.Y.S.2d 895, 898 (2d Dept. 1996) (in case involving prosecutor's conduct before grand jury, court explicitly

acknowledged "the inherent supervisory role of the court in preventing and correcting abuses"); *People v. Isaacson*, 56 A.D.2d 220, 231-32 (4th Dept. 1977) (3-2 decision) (Cardamone, J., dissenting) ("After reviewing the instant record, we are convinced that the police conduct is 'sufficiently offensive' to compel this court to impose a bar to the conviction as an exercise of its supervisory powers.").

As the facts of this case so clearly illuminate, convictions based on false confessions are a real and pervasive phenomenon, calling for this Court to act to insure the fair administration of justice by requiring electronic recording of all custodial interrogations. This Court has a duty to supervise and protect the integrity of courts within its jurisdiction, which is destroyed if a conviction is based on a coerced or false confession. The Court should therefore hold that where, as here, there is an unexcused failure to record an interrogation, a defendant's confession is inadmissible. Such exclusion of unreliable evidence is not only within the ambit of judicial power, *see, e.g., People v. Shedrick,* 66 N.Y.2d 1015, 1018 (1985) (polygraph evidence inadmissible due to unreliability), but is in line with the rationale underlying many basic rules of evidence. *See e.g.*, 5 Weinstein's Federal Evidence § 802.02[3] (2006) ("The hearsay rule seeks to eliminate the danger that evidence will lack reliability because faults in the perception, memory, or narration of the declarant will not be exposed.").

Alternatively, if this Court is not prepared to prescribe a blanket rule of exclusion, it should hold that when the prosecution introduces a confession from an unrecorded interrogation, judges must issue a cautionary instruction. Judicial prescription of jury instructions regarding trial evidence is an immemorial practice in New York and all U.S. courts. *See, e.g.*, *People v. Leon*, 509 N.Y.S.2d 4, 6 (1st Dept. 1986).

At minimum, the court should take this opportunity to encourage law enforcement officials to videotape the entirety of a suspect's interrogation and warn that a failure to do so will be frowned upon by the court and may necessitate imposition of a requirement in future cases.

Finally, if the Court does adopt either of the remedies for the use of unrecorded confessions, this Court should weigh the impact that such a rule would have on the outcome of Marty's case at a new trial. At his new trial, Marty Tankleff would be entitled to have the evidence of his confession excluded from evidence or, in the alternative, would be entitled to a jury instruction warning jurors that confessions that are the result of interrogations that are not electronically recorded must be viewed with great caution. The application of either rule, by itself, raises a reasonable probability that the outcome of Marty Tankleff's trial would be different, thus entitling him to a new trial pursuant to 440.10.

## III. The County Court Erroneously Refused to Permit DNA Testing Which Could Prove Marty Tankleff's Innocence and Identify the True Perpetrators

The County Court grievously erred by denying Mr. Tankleff's motion to conduct post-conviction DNA testing on biological evidence taken from the scene of the crime. Although this error is being appealed through a separate proceeding, and Mr. Tankleff has already – even without the benefit of DNA testing – presented sufficient evidence of his innocence to warrant an order to vacate his conviction, the County Court's denial of Mr. Tankleff's DNA motion casts serious doubt upon the extent to which the County Court fulfilled its duty to carefully consider and weigh the evidence presented during the 440.10 proceedings.

Indeed, DNA testing has the potential to provide undisputed scientific evidence in support of a convicted person's claim of innocence. In the words of former Attorney General John Ashcroft, DNA testing is "nothing less than the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent." Naftali Bendavid, *U.S. Targets DNA Backlog-Agency To Spend $30 million To Aid State Crime Labs*, Chi. Trib., Aug. 2, 2001, at 10. Many of the persons who have been exonerated over the years through the work of *Amici* would still be languishing in prison today if the courts that reviewed their cases had denied DNA testing as the County Court did below.

In this case, Mr. Tankleff sought testing pursuant to C.P.L. § 440.30 (1-a), at his own expense, on fingernail scrapings taken from his mother. These scrapings could well contain DNA, deposited during the course of the grisly pre-mortem struggle, from the individual(s) who bludgeoned Mr. Tankleff's parents to death.[6] DNA testing of the fingernail scrapings could have provided powerful scientific proof confirming the existing evidence of Mr. Tankleff's innocence in three ways: (1) by identifying foreign DNA under Mrs. Tankleff's fingernails which matches the DNA of Joseph Creedon or Peter Kent, the men whom numerous witnesses have testified were the murderers; (2) obtaining a complete Short Tandem Repeat DNA profile from foreign DNA that, in turn, yields a "hit" on a convicted offender through the state or federal DNA databanks, or matches a DNA profile from an unsolved crime committed after Marty's incarceration; or (3) obtaining a DNA profile from foreign DNA in the fingernail scrapings that conclusively excludes Marty Tankleff.

Although DNA testing in this case thus provided the Court with the possibility of conclusively reaching the truth about who killed the Tankleffs,

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[6] A number of recent studies evidence the probative value of fingernail scrapings in homicide and/or sexual assault cases, concluding that foreign DNA under a person's nails is extremely unlikely to be the result of casual contact and is deposited mainly through consensual sexual activity or violent, close-range struggles. *See e.g.*, Henderson et al., *Prevalence of Foreign DNA Under Fingernails*, Instit. of Envtl. Sci. and Res.; Lai et al., *An Evaluation of the Routine DNA Analysis of Fingernail Debris in Forensic Casework*, Instit. of Envtl. Sci. and Res. (2004); Fernandez-Rodriguez et al., *Genetic Analysis of Fingernail Debris; Application to Forensic Casework*, Intern. Cong. Series 1239, 921 (2003).

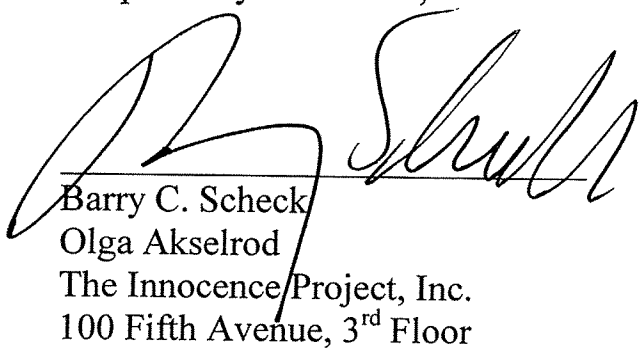
tellingly, the Court simply denied testing of the fingernail scrapings without substantive explanation on the ground that the testing was not specifically requested in 2000 when Marty Tankleff conducted testing on other evidence (the results of which proved inconclusive). *See* Court DNA Order, Mar. 17, 2006, at 2.

While testing on the fingernail scrapings may likewise prove to be inconclusive (due to degradation or because only the victim's own DNA is found in the scrapings), the court's decision runs counter to longstanding construction of this state's post-conviction DNA testing statute which provides a clear path to obtain testing where, as here, there is *potential* for it to provide new evidence in support of a convicted person's claim of innocence. *See, e.g., People v. Hayes*, 726 N.Y.S.2d 891, 891 (4th Dept. 2001) (ordering DNA testing under CPL 440.30(1-a) on fingernail scrapings from victim of a homicide on ground that exclusionary DNA results would, as a matter of law, create a reasonable probability of a different result). More fundamentally, it is also squarely contrary to recent interpretations of that statute by the Court of Appeals, which held that there is no time limit or "due diligence requirement" on filing motions for post-conviction DNA testing under Section 440.30(1-a). *People v. Pitts & Barnwell*, 4 N.Y.3d 303, 310-11 (2005).

DNA testing could objectively and conclusively confirm the veracity of the numerous witnesses who came forward and testified below that Creedon and Kent

were the real killers, hired to carry out the "hit" by Jerry Steuerman. The fact that the County Court failed to allow such potentially dispositive testing to proceed, while simultaneously taking pains to attack the credibility of witnesses in its denial of the 440.10 motion, *see* Order at 4, is a troubling sign that the County Court, for whatever reason, became more fixated on justifications to deny relief than ways to find the truth. In a case such as this, where there is particularly strong evidence of innocence and dismissive and neglectful treatment of that evidence by the County Court, the Appellate Division is wholly justified in according lesser weight to the lower court's factual determinations.

Respectfully Submitted,



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## CERTIFICATE OF COMPLIANCE
**Pursuant to 22 NYCRR § 670.10.3(f)**

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman
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## CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2007, a copy of the foregoing Notice of Motion for Leave to File *Amicus Curiae* Brief in Support of Defendant-Appellant Martin Tankleff, Affirmation in Support of Motion for Leave to File *Amicus Curiae* Brief in Support of Defendant-Appellant Martin Tankleff and the exhibits attached thereto were served upon:

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by depositing true copies thereof, enclosed in a wrapper properly addressed as shown above, into the custody of an overnight service (by Federal Express) for overnight delivery, prior to the latest time designated by that service for overnight delivery.

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*Attorney for Defendant Martin H. Tankleff*