

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

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

**Plaintiff,**

**- against -**

**SUPPORTING  
AFFIRMATION &  
MEMORANDUM**

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

**MARTIN H. TANKLEFF,**

**Defendant.**

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**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANT'S MOTION TO VACATE HIS CONVICTION  
PURSUANT TO C.P.L. 440.10(1)(g)**

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

I am one of the attorneys for the Defendant, MARTIN H. TANKLEFF, in the above captioned action and I am fully familiar with the facts and circumstances of the within action. The facts contained herein are true and based on personal knowledge or upon information and belief. The source of the information is a review of the file maintained by our office, independent case investigation, conversations with investigators and first hand conversations with witnesses and other persons with relevant knowledge of the facts. I submit this Affirmation and Memorandum to supplement the present motion.

#### INTRODUCTION

Piece by piece the case against Martin Tankleff continues to crumble. From the undisputed perjury by lead Detective McCready regarding his longstanding relationship to lead suspect Jerry Steuerman, to the testimony of false confession expert Richard Ofshe, it has become increasingly clear that there is insufficient evidence to justify Marty's continued incarceration. Brick by brick the case against the actual murders--Creedon, Kent, and Steuerman--continues to be built. From the initial admission by Glenn Harris, an accomplice to murders, and the corroboration by William Ram and others, to Creedon's multiple admissions, Graydon's testimony concerning his and Creedon's prior attempt on Seymour Tankleff's life, and James Moore's revelation of Kent's admissions, it has become increasingly evident that Joseph Creedon and his cohorts murdered Marty's parents. Marty Tankleff is thus an innocent man serving a sentence for crimes he did not commit.

In this latest motion to vacate Marty's wrongful convictions we, yet again, add to that body of evidence proof that Peter Kent's alibi, that he was with Daniel Raymond buying and using drugs,

was false. Peter Kent lied to the court when he claimed to have been with Mr. Raymond on the night the Tankleffs were murdered. Further, Kent has again admitted his involvement in the crime and further implicated Joseph Creedon and Jerry Steuerman. In addition, a witness has come forward who states that Glenn Harris spoke to him about knowing of an innocent man in jail for murder (obviously Marty) years before Jay Salpeter tried to contact Mr. Harris.

As this Court may recall, Peter Kent was called to testify by prosecutor Leonard Lato. Kent offered an alibi, which he put together with the help of Walter Warkenthein (Kent's hearing testimony at page 368, herein after "H.T. at page \_\_\_.") and specifically named Danny Raymond as an alibi witness. (H.T. at 352, 353 and 358). We have located Daniel Raymond and he has provided an affidavit (attached as Exhibit "A") establishing that Kent's alibi was a lie and detailing how Kent concocted the alibi and attempted to recruit Raymond into falsely supporting it.

In addition, the prosecution went to great lengths to argue that Marty Tankleff or members of his defense team somehow improperly elicited Glenn Harris's account of September 7, 1988. (People's post-hearing memo at page 213-219). Recently a new witness, Patrick Touhey, contacted the defense and provided a statement establishing that in 1996 -- years before Glenn Harris was incarcerated with Marty Tankleff -- Harris revealed to Touhey that he knew of an innocent man who was in jail for murder and asked Touhey's advise about what he should do. (See, Touhey Statement attached as Exhibit "B").

## NEW EVIDENCE

### Daniel Raymond

On August 22, 2006, Daniel Raymond was interviewed and gave a sworn statement completely rebutting Peter Kent's alibi. Mr. Raymond categorically states: "That testimony [Kent's claim to have been with Raymond in New York City during the hours of the Tankleff murders] is false. Peter Kent was not with me on September 7, 1988 between the hours of 12:00 a.m. and 6:00 a.m." (Raymond ¶ 2). Raymond describes how he had last seen Kent several days before September 7<sup>th</sup> and then met up with him again at approximately 6:30 p.m. on the 7<sup>th</sup> – some 12 to 15 hours after Marty's parents were murdered. Raymond went on to say that he "cannot account for Peter Kent's whereabouts at the time of the murder of the Tankleffs." (Raymond ¶ 5).

Subsequently to seeing Kent the evening of September 7, 1988, Raymond and Kent were arrested for several robberies they committed together. While in Suffolk County Jail for those offenses, Kent told Raymond that he was concerned that Harris, who was also incarcerated in Suffolk, was "going to turn state's evidence against me." He then asked Raymond to kill Harris. At that time, Harris was on the same tier of the jail as Raymond. In response, Raymond agreed, but only assaulted Harris and denies that he ever intended to kill Harris. (Raymond ¶ 6). By this time, Harris had already implicated Kent in a burglary (or burglaries). (H.T. at 314). In retaliation, Kent gave a statement against Harris. Similarly, Raymond also had given statements that implicated Kent in robberies. (H.T. @ 313-314).

When Kent asked Raymond to kill Harris, Kent did not specify the crime(s) he feared Harris would disclose. They could not have been, however, the burglaries in which Harris had implicated Kent. It would not make sense for Kent to ask one person (Raymond) who implicated him in a

robbery to kill another (Harris) just because he had implicated him in a burglary. Further, at this point in time, it was known that Harris had already implicated Kent in the burglaries, so the robberies could not be the undisclosed crime at issue that was causing Kent great concern for the future that Harris was “going to” ... “turn state’s evidence.”

In the fall of 2003, after Harris had given a statement to the defense but before he had an opportunity to testify, Harris was confronted by Kent at the Suffolk County Jail, where the two were being held<sup>1</sup>. At that time, Kent threatened Harris. (H.T. at 332). In a meeting between Kent and Raymond in 2004, Kent told Raymond that Harris is a “dead man,” that Harris would disappear, “...and there won’t be a body this time.” (Raymond ¶ 11). This threat is similar to the threat that Joseph Guarascio reported Joe Creedon having made. Guarascio stated that Creedon showed him handcuffs, leg shackles and a pistol and said they were for Harris if he testified. (See Guarascio affidavit ¶ 9 and Guarascio’s testimony at page 18).

The threats directed at Harris by either Kent or Creedon have spanned the 18 years since the murder of the Tankleffs. According to Raymond, the first known threat was made by Kent shortly after the murders took place. It seems that both Creedon and Kent were worried about Harris, who has a well-documented propensity to talk and write about his criminal conduct. (see, Harris’ letters and the numerous statements he gave to the police).

Raymond informs us that prior to July of 2004 he had not seen Kent since approximately

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<sup>1</sup>Kent was detained on an unrelated criminal charge. Harris, however, was supposed to be serving a sentence for a parole violation in a state prison. He was removed from a state prison by the Suffolk District Attorney’s Office and brought to the Suffolk County Jail. At that facility, he was involved in an altercation with a corrections officer, improperly tape recorded by agents of the prosecutor while represented by counsel, and threatened by Kent.

1990. (Raymond ¶ 7). Then in July of 2004<sup>2</sup>, Kent went to visit Raymond at the state prison where Raymond was serving a sentence for a Grand Larceny conviction. Raymond reports that Kent was very nervous and appeared physically ill. At this meeting, which lasted several hours, Kent solicited Raymond's help in concocting an alibi for the night the Tankleffs were murdered. After going over the false alibi several times, Kent came to believe that Raymond would lie for him. Kent then told Raymond that he was happy that Raymond was going to help because "there are serious people (he named Joe Creedon and Jerry Steuerman) involved with this" and "they are watching your family." (Raymond ¶ 9). Kent then went on to describe Raymond's family, naming the number of his children and the town where they lived with his wife. Significantly, Raymond did not have a family when he last saw Kent in 1990. In fact, his first child was not born until 1993.<sup>3</sup> Kent and/or the "serious people" to whom he referred apparently took steps to learn the of existence and the

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<sup>2</sup>This is the time period when post trial hearing was taking place. Kent was ultimately called as a witness by the prosecution in December of 2004.

<sup>3</sup>This court may recall that the defense received a similar threat earlier this year. A witness reported that Creedon had taken steps to learn "where Barket lives with his family." (See, Barket affirmation dated February 1, 2006, at footnote 5). The prosecutor mocked this threat and went so far as to imply that it was not made. Regardless of the prosecution's purported disbelief, this Court should take note of the number of threats made by Kent and Creedon. The Court should also recall that at least four witnesses (two people who worked at Steuerman's Bagel store at about the time of the murders, a close friend of Joe Creedon and an informant for the FBI) have provided information but refused out of fear of Creedon to testify. One witness, Foti, a government informant, did testify but only after the Court agreed to keep his identity and residence confidential. Apparently, the people who know Kent and Creedon take their threats seriously.

residence of Raymond's family. The only purpose of such activity is to use the information to, if necessary, threaten or coerce Raymond into committing perjury in order to support the false alibi. During the course of this conversation, Kent repeatedly told Raymond how dangerous Creedon is.<sup>4</sup>

After being released from prison, Mr. Raymond decided not to help Kent. In the fall of 2004, he reports that he was interviewed by the DA's office, which attempted to persuade him to support Kent's alibi. After Raymond repeatedly told the prosecution that he could not verify Kent's alibi, Leonard Lato asked him about his parole. This inquiry, in and of itself, may not appear relevant, yet its importance is clear when it is placed in context. It is curious that Raymond's parole status was brought up at the point in time in which it was clear that other attempts at getting Raymond to corroborate Kent's alibi had failed. Raymond indicated that he took the question to be a threat. He also indicated, as have other witnesses, that he did not trust law enforcement personal to protect him from Kent and the "serious people" who had located his family. (Raymond ¶ 13).

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<sup>4</sup>This is similar to what Kent told the prosecutor during an interview in the fall of 2003.

Raymond explained that eventually Mr. Lato gave up trying to convince him to testify and appeared to settle for Raymond agreeing not to testify for the defense. Mr. Lato suggested that if Raymond could not recall the events, he would not be called as a witness. Raymond quickly took this opportunity to extract himself from a situation that, on the one hand had called on him to perjure himself to help a murderer, and on the other hand called upon him to cross a law enforcement community with enormous influence over his parole status and, thereby, his freedom.<sup>5</sup> We now know, however, that Raymond does recall the events of September 7, 1988. Likewise, we now know that Kent lied to this Court when he claimed to have been with Raymond that evening. We also know that now, having finished his parole and been discharged from state monitoring, Raymond is willing to testify for the defense and against Kent.

The prosecution never reported to the Court or the defense their conversation with Daniel Raymond. The lead investigator for the prosecution did, however, help Kent construct what we now know is a false alibi by researching Kent's arrest record and providing that information to Kent.

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<sup>5</sup>Of course this is only the most recent example of the prosecution's attempts at intimidating or wrongly inducing a witness in the Marty Tankleff case. The known list of witness who have made similar complaints are: (1) Glenn Harris (told he would trade places with Marty Tankleff if he testified, was secretly recorded while in jail, denied use immunity and subjected to Kent's threats); (2) Glass (was told he would do 25 years if he testified for the defense and was released without any bail after agreeing to recant his exculpatory statement); (3) Foti (was outed as a government informant after testifying for the defense); and (4) Ram (was offered a deal on his Florida sentence in exchange for falsely implicating the defense in bribery allegations).

## **Patrick Touhey**

The prosecutor has attempted to portray Glenn Harris as a liar and alleged that Harris was persuaded by a member of the defense -- or perhaps by Marty Tankleff himself -- to provide a statement implicating Creedon and Kent in the murder of Marty's parents. We have already provided evidence to rebut this accusation -- including unrebutted polygraph evidence showing Harris' truthfulness as well as multiple witnesses corroborating Harris' account. A new witness, Patrick Touhey, further undermines the prosecution's charge of fabrication.

As early as 1996, Glenn Harris spoke with Patrick Touhey. Touhey recently recounted this conversation to the defense in a statement. (See, Exhibit "B"). According to Mr. Touhey, in 1996, Harris disclosed that he knew of someone in jail for murder who was innocent and asked for Touhey's advice. Although Harris did not name Marty Tankleff, he expressed knowledge about an innocent man in prison for a murder he did not commit. This statement, made years before Harris was contacted by Salpeter or confined in the same prison as Marty Tankleff, further undercuts the prosecution's insinuation that Harris' account of Creedon's and Kent's murder of the Tankleffs was somehow manufactured by the defense.

Harris' distress over an innocent person's imprisonment, which he expressed to Raymond in 1996, is consistent with Harris' conduct since he first met with Salpeter. Harris has remained consistently and persistently troubled that Marty, an innocent man, is in prison. Harris has sought a way to help while balancing his own interest in not "taking Marty's place." We know that Harris has made multiple statements similar to this to his wife, his mother, a priest, and a nun. This statement, like the statement Ram made to his mother and girlfriend, is significant because it predates any contact by the defense and thus completely rebuts allegations that Harris was "induced" by the

defense to make a false statement. The plain truth is that Harris, like Ram or any of the other new witnesses, was not induced by the defense to provide exculpatory evidence on Marty Tankleff's behalf. Harris and Ram merely testified to the events they observed, heard, and, in some cases, participated in.

## ARGUMENT

Marty's new evidence supports two claims of relief. The first is a claim of actual innocence brought under the federal and state constitutions.<sup>6</sup> A showing of actual innocence warrants relief because the imprisonment of an actually innocent person violates the fundamental guarantee of fairness embodied in due process, and also constitutes cruel and unusual punishment. See People v. Cole, 1 Misc. 3d 531, 765 N.Y.S.2d 477 (Sup. Ct. 2003) (holding that the imprisonment of an actually innocent person violates the New York State Constitution);<sup>7</sup> cf. Herrera v. Collins, 506 U.S. 390 (1993).<sup>8</sup> A defendant must establish "by clear and convincing evidence (considering the trial

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<sup>6</sup>This claim is made under C.P.L. § 440.10(1)(h), which provides, as a ground for vacating a judgment, that "[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States," and Judiciary Law § 2-b[3], which permits the Court to devise new processes where fairness so requires, and thus provides an alternative mechanism for the Court to remedy the injustice of a wrongful conviction.

<sup>7</sup>See also People v. Washington, 665 N.E.2d 1330 (Ill. 1995) (recognizing freestanding claim of actual innocence); Miller v. Commissioner of Corr., 700 A.2d 1108 (Conn. 1997) (same); In re Clark, 855 P.2d 729 (Cal. 1993) (same); see also State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003).

<sup>8</sup>In Herrera v. Collins, 506 U.S. 390, 417 (1993), the Court assumed that a persuasive showing of actual innocence would warrant relief, but held that the defendant had not made such a showing. A majority of the Justices agreed that a defendant who demonstrates his actual innocence would be entitled to a remedy under the Federal Constitution. See Id. at 419 (O'Connor, J., concurring, joined by Kennedy, J.); Id. at 442 (Blackmun, J., dissenting, joined by Stevens and Souter, J.J.); see also House v. Bell, 126 S. Ct. 2064, 2087 (2006); Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); Rochin v. California, 342 U.S. 165, 172 (1952) (due process prohibits government conduct that "shocks the conscience"). Thus, this Court may grant relief based on actual innocence under the Federal Constitution. See, e.g., Ex Parte Elizondo, 947 S.W.2d 202, 210 (Tex. Crim. App. 1996) (granting relief under the Federal Constitution to a non-capital prisoner based on his clear and convincing showing of actual innocence).

and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the [defendant] was found guilty.” Cole, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486. In making this determination, a court must consider all reliable evidence, “whether in admissible form or not.” Id.

The second claim for relief is based on New York Criminal Procedure Law section 440.10(1)(g), which provides that a defendant may move the court in which his judgment of conviction was reached to vacate that judgment on the ground that:

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. CPL § 440.10 (1)(g).

In addition, the section provides that a defendant must make such a motion “with due diligence after the discovery of such alleged new evidence.” CPL § 440.10 (1)(g).<sup>9</sup>

In People v. Salemi, our high Court held that in order to establish a successful claim for a new trial based on newly discovered evidence, a defendant must prove that the new material meets all the following requirements: “it must be such as will probably change the result if a new trial is granted; must have been discovered since the trial; must be such as could have not been discovered

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<sup>9</sup>In considering new evidence in support of either an actual innocence or new trial claim, a court’s analysis should be guided by two fundamental principles. First, the court must consider the new evidence in its totality, and in connection with the original trial evidence. See, e.g., Cole, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486; Wong, 11 A.D.3d at 726, 784 N.Y.S.2d at 161 (examining totality of new and original evidence in granting a new trial); see also Amrine v. Bowersox, 128 F.3d 1222, 1230 (8th Cir. 1997) (en banc) (“When determining the impact of evidence unavailable at trial, a court must make its final decision based on the likely *cumulative effect* of the new evidence had it been presented at trial.”) (emphasis added).

Second, a court must evaluate the evidence from the perspective of a “reasonable juror.” Cole, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486. As the U.S. Supreme Court recognized in an analogous context, such a “reasonable, properly instructed juro[r]” must be presumed to “consider fairly all of the evidence presented” and to “conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt.” Schlup v. Delano, 513 U.S. 298, 329 (1995).

before the trial by the exercise of due diligence; must be material to the issue; must not be cumulative to the former issue; and, must not be merely impeaching or contradicting the former evidence.” See People v. Salemi, 309 N.Y.2d 208, 215-216 (1955); People v. Burton, 2005 WL 1639191 (N.Y. Sup. Ct. July 11, 2005); People v. Caba, 2004 WL 2612880 \*10 (N.Y. Sup. Nov. 16, 2004); People v. Wise, 752 N.Y.S.2d 837, 841 (N.Y. Sup. Ct. Dec. 19, 2002); People v. Mazred, 613 N.Y.S.2d 826, 830 (N.Y. Co. Crim. Ct. 1993). As one court reasoned, these requirements “can be condensed into three basic questions: (1) could an exercise of due diligence have led to discovery of the evidence before trial? (2) is the evidence material, not cumulative and not merely impeaching of former evidence? and (3) would the evidence probably have changed the verdict at trial?” People v. Mazred, 613 N.Y.S.2d at 830.

More succinctly, the determination of newly discovered evidence “requires an examination of two aspects.” People v. Wise, 752 N.Y.S.2d 837 at 842. The first aspect is the conduct of the defendant - could he have discovered the evidence at the time of trial, and did he move pursuant to 440 with due diligence once the evidence was discovered. Id. The second aspect deals with the nature of the evidence - is it of such character that would have changed the result had it been present at trial, and is it more than simply cumulative or impeaching. Id.

Notably, where newly discovered evidence goes to the heart of the defendant’s trial defense, it cannot be viewed as collateral or cumulative. People v. Santos, 306 A.D.2d 197, 198 (1<sup>st</sup> Dept. 2003). The court in Santos further noted that the goal in determining newly discovered evidence should not “only involve a procedural nicety, but beyond that ... [it should] touch the very essence of a trial’s truth finding goal; namely, to accord an accused a full and fair opportunity to present highly relevant evidence in his or her defense.” Id. at 198-199.

