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

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PEOPLE OF THE STATE OF NEW YORK

- against –

Docket Nos. 2006-03617

Suffolk County

Indictment

Nos. 1290/88 & 1535/88

MARTIN H. TANKLEFF,

Defendant-Appellant.

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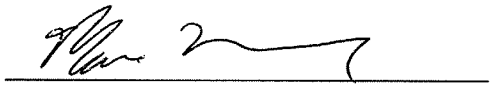
**NOTICE OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT MARTIN TANKLEFF**

PLEASE TAKE NOTICE, that upon the annexed affidavit of Marc Howard and the attached Brief for *Amicus Curiae* Martin Tankleff's Classmates in Support of Defendant-Appellant Martin Tankleff, 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 Martin Tankleff's Classmates leave to file an *Amicus Curiae* brief in support of Defendant-Appellant Martin Tankleff; and

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

Dated: Washington, D.C.
December 29, 2006



Marc Howard
Associate Professor
Department of Government
Georgetown University
ICC 681
Washington, DC 20057-1034
(202) 687-5029

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PEOPLE OF THE STATE OF NEW YORK

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**AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT MARTIN TANKLEFF**

Marc Howard hereby 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 a former classmate of Martin Tankleff. I am also an Associate Professor in the Department of Government at Georgetown University.
2. I make this affidavit in support of the Motion for Leave to File *Amicus Curiae* Brief submitted by Martin Tankleff's Classmates.
3. True and correct copies of the County Court's denial of Defendant-Appellant's motion pursuant to C.P.L. § 440.10 and Defendant-Appellant's Notice of Appeal are attached hereto at Tabs A and B, respectively.

**Interests of Martin Tankleff's Classmates**

4. Martin Tankleff's Classmates are made up of 54 individuals, all of whom are former high school classmates of Martin Tankleff and were in the Class of 1989 at the Earl L. Vandermeulen High School in Port Jefferson, NY.
5. Some of Martin Tankleff's Classmates were close friends of Marty's, others were just acquaintances, and still others knew him only in passing.
6. Yet all of Martin Tankleff's Classmates grew up in the same local community as Marty, and we share a lasting memory of the shocking events that took place on the first day of our senior year of high school, along with a deep concern for the judicial process that has unfolded since then.

**Interests to be Addressed**

7. In its brief, a courtesy copy of which is attached hereto at Tab C, Martin Tankleff's Classmates will urge this Court to reverse the County Court's denial of Defendant-Appellant's motion pursuant to C.P.L. § 440.10 on the basis of newly discovered evidence demonstrating his innocence. Specifically, we come before this Court to take issue with an important statement made by the Honorable Stephen L. Braslow in his Order denying the C.P.L. §440 Motion, with regard to the "People's theory" at the original trial, and the "evidence" associated with it.

8. We write in order to add a perspective on Port Jefferson and Suffolk County—the area in which we grew up—and to explain how this connects to Marty's case and our belief that he deserves a new trial. Moreover, those of us who knew Marty well can provide an additional perspective that helps to account for the behavior that the police detectives and Judge Braslow found so incriminating. What happened to Marty could have happened to any one of us. Regardless of how well we knew Marty, it was a very powerful and traumatic experience to have a classmate's parents get brutally murdered and then to have our classmate be convicted and sentenced to 50 years to life for the crime.

9. We are Marty's Classmates, and our names are as follows:

Adam Allen
Erin (Madden) Barrett
Michael (Soper) Barrett
John Bayer
Natalie (Adler) Brett
Cory S. Breines
Robert Burkhardt
Victoria (Gabriele) Carroll
Vanessa Celentano
Krista (DeMaria) Conte
Michelle Cotton
Ana Cragnolino
Ernesto Cragnolino
Matthew Davey
Amy (Bazerman) Delaney
Jonna (Cerbone) DeVito
Brian Diamond
Kim Dixon

Melanie (Kagan) Esparza
Stacey Farber
Timothy Gavigan
Eric Gilliland
Liron Gitig
Gary D. Gudzik
Shalini Gujavarty
Dara (Schaeffer) Hillman
Robert Hoff
Marc Howard
Jennifer (Verrine) Iacobelli
David Jamison
Mitchell Kolker
Lisa Kotliar
Carena (Colden) Lowenthal
Tim Mayer
Philip Meoli
Angela (Bucchignano) Mile
Jackie (McAvey) Miller
Denise Moore
William Newton
Caitlin (McGowan) Northrop
Lisa Olleo
Lynda (Gagliano) Panaro
Juliann (Santilli) Reynolds
Joanie Rinaldi
Jennifer (Azzara-Rubin) Rotunno
Michael D. Sandusky
Jason Snyder
Dean Spanos
Bentley Strockbine
Paul Tripodes
Margaret (Foster) Versantvoort
Barbara (Bernard) Williamson
Jeff Yalden
April (Browning) Young

WHEREFORE, Marc Howard respectfully requests that this Court issue an order granting Martin Tankleff's Classmates' Motion for Leave to File *Amicus Curiae* Brief.

Dated: Washington, D.C.
December 29, 2006

Marc Howard
Associate Professor
Department of Government
Georgetown University
ICC 681
Washington, DC 20057-1034
(202) 687-5029

State of: District of Columbia
County of: _____

The foregoing instrument was acknowledged before me, December 29, 2006 by Marc Howard.

KATHLEEN O. CULBERTSON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires July 31, 2007

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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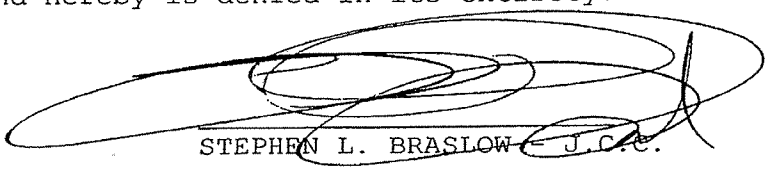


STEPHEN L. BRASLOW J.C.C.

B

| **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

*Attorneys for Defendant Martin Tankleff*


Jennifer M. O'Connor
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6110

Stephen L. Braga
Courtney Gilligan
Sheila Kadagathur
BAKER BOTTS LLP
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Bruce Barket
666 Old Country Road
Garden City, N.Y. 11530
(516) 745-0101

Barry J. Pollack
COLLIER SHANNON SCOTT PLLC
Washington Harbor, Suite 400
3050 K St., N.W.
Washington, D.C. 20007-5108
(202) 342-8472


*Of Counsel*


Warren Feldman
Scott J. Splittgerber
CLIFFORD CHANCE US LLP
31 West 52nd Street
New York, New York 10019
(212) 878-8000

Mark F. Pomerantz
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

TO: Motion Clerk
Supreme Court of the State of New York,
Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

Honorable Thomas J. Spota
District Attorney, Suffolk County
200 Center Drive
Riverhead, NY 11901-3388

Martin Tankleff
DIN 90T3844
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

C

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

----------X

PEOPLE OF THE STATE OF NEW YORK

- against -

Docket Nos. 2006-03617

Suffolk County

Indictment

Nos. 1290/88 & 1535/88

MARTIN H. TANKLEFF,

Defendant-Appellant.

----------X

**BRIEF FOR *AMICUS CURIAE* MARTIN TANKLEFF'S CLASSMATES IN SUPPORT OF DEFENDANT-APPELLANT MARTIN TANKLEFF**

Marc Howard
Associate Professor
Department of Government
Georgetown University
ICC 681
Washington, DC 20057-1034
(202) 687-5029

## INTEREST OF *AMICI CURIAE*

*Amici* are former high school classmates of Martin ("Marty") Tankleff, all of whom were in the Class of 1989 at the Earl L. Vandermeulen High School in Port Jefferson, NY. Some of us were close friends of Marty's, others were just acquaintances, and still others knew him only in passing. Yet we all grew up in the same local community as Marty, and we share a lasting memory of the shocking events that took place on the first day of our senior year of high school, along with a deep concern for the judicial process that has unfolded since then.

We come before this Court to take issue with an important statement made by the Honorable Stephen L. Braslow in his Order denying the C.P.L. §440 Motion, with regard to the "People's theory" at the original trial, and the "evidence" associated with it. The relevant statement is worth quoting at length:

> 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 [sic]. 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. (Order of Hon. Stephen L. Braslow Denying §440 Motion, dated 3/17/2006, at 18)

This statement is revealing in a number of different respects. In general, it shows that Judge Braslow fully accepts the logic and arguments that Suffolk County prosecutors made back in 1988, without even the slightest consideration of either the new knowledge we have today about the preponderance of false confessions in homicide cases (particularly those involving juvenile defendants), or the vast number of unconnected witnesses who have implicated the same set of people in the Tankleff murders. The statement also indicates that Judge Braslow

holds a view of Suffolk County law enforcement that is very similar to the way many naïve and idealistic Suffolk residents—including ourselves—thought of their police system two decades ago.

In this brief, we would like to add a perspective on Port Jefferson and Suffolk County—the area in which we grew up—and to explain how this connects to Marty's case and our belief that he deserves a new trial.

Port Jefferson (which includes the incorporated village of Belle Terre, where Marty lived) was a very safe and trusting place in the 1980s. People often left their cars and houses unlocked, even petty crimes were quite rare, and most residents had few encounters with the police. The prevailing assumption was that police officers were honest and to be taken at their word.

But we now know that at the same time—and unbeknownst to most Port Jefferson residents back then—the Suffolk County homicide bureau was among the most aggressive and corrupt in the nation. In fact, the confession rate in homicide cases in Suffolk County in the 1980s was 94%, nearly double the national average of 48%. The particular methods used to obtain confessions has been questioned and condemned by numerous experts, particularly after the release of a major report in 1989 (the year after the Tankleff murders) by the New York State Investigation Commission (SIC) entitled "An Investigation of the Suffolk County District Attorney's Office and Police Department." The SIC report, which

was based on an investigation that began in 1986, found "misconduct and mismanagement in homicide investigations and prosecutions," an "over-reliance on confessions," and it referred to the County's confession rate as "an astonishingly high figure compared to other jurisdictions, so high, in fact, that in and of itself it provokes skepticism regarding Suffolk County's use of confessions and oral admissions." Moreover, the report specifically found that Detective K. James McCready, the lead investigator who elicited Marty's "confession," had committed perjury on another murder case prior to 1988.

It would have been very difficult for most Port Jefferson residents to be aware of this more sinister side of the Suffolk County Police Department, since the media coverage of the Tankleff murders was extraordinarily biased in favor of the prosecution. For example, the main news article about the murders in *Newsday*, the leading daily newspaper on Long Island, simply repeated the theories of prosecutors, with little context or opportunity for rebuttal. It began as follows:

> A Belle Terre youth cut his parents' throats and bludgeoned them with a barbell because they had spoiled his summer and would not let him stay home alone when they took a planned cruise and vacation in Florida, prosecutors said yesterday.
>
> "It was a temper tantrum that turned into violence," said Assistant District Attorney Edward Jablonski, chief of the Suffolk County homicide bureau. "He's a boy that had everything in life and thought he deserved more," he said. (Shirley E. Perlman , "Deadly

> Temper Tantrum? Prosecutors: anger led to son's attack; he pleads not guilty," September 9, 1988)

The article goes on to provide numerous quotations from the prosecutors, including bald statements of "fact" about the murder weapons being a watermelon knife and a barbell—both of which were later proven to be completely untrue (not even microscopic traces of blood were found on either).

In contrast, we believe that our own high school newspaper, *The Purple Parrot*, did a better job in covering the story. Here was the lead editorial from the September 1988 issue:

> The local coverage of the incident surrounding ELVHS senior Marty Tankleff is troublesome for journalists and readers.
>
> By quoting prosecutors throughout their articles, the press made it appear that Marty's guilt was undeniable. Indeed, "Newsday" went so far as to quote the prosecutors in the headlines. This is intolerable, especially now that it seems many more factors have come into the case (see article, page 1).
>
> Yes, the press does have a responsibility to report the facts, but the statements of prosecutors are hardly facts! In a country that has lived on the presumption of "innocent until proven guilty," we would hope that the press would take more seriously its journalistic responsibility.
>
> Just because Suffolk County convicts over 90% of accused criminals, it doesn't mean that 100% are guilty. Especially not in a case that has proved to be so complex.
>
> We the editors of "The Purple Parrot" believe in "innocent until proven guilty." We are far from

> convinced of Marty's guilt, and therefore presume him innocent. We welcome him back to school, and wish him luck.

In short, we think that Judge Braslow would have been better-served by reading a high school newspaper than simply accepting as fact the words of a police department—and a particularly dishonorable homicide detective—that was known to commit "perjury, subornation of perjury, intimidation of witnesses, spoliation of evidence, [and] abuse of subpoena power" (Judge Stuart Namm, SIC Report).

We would now like to turn more closely to the excerpt from Judge Braslow's ruling quoted above. Its intention is to show that Marty's defense has been misleading in stating that "his conviction was based almost entirely on a false confession," and it goes on to discuss the "evidence" that also led to his conviction. But what is the additional "evidence" that has persuaded Judge Braslow of Marty's guilt to the extent that he believes it over the testimony of the nearly two dozen witnesses who implicated Jerry Steuerman, Joseph Creedon, and Peter Kent over the course of the §440 hearing? A closer look at Judge Braslow's own words show that it is entirely based on speculation, conjecture, and a pseudo-psychological understanding of what "should" have been Marty's "level of emotion."

Judge Braslow acknowledges that Marty was "upset and agitated that morning," which is an understatement given the recording on the 911 call, in which Marty is heard screaming and calling for an ambulance. But then he claims that

Marty was showing insufficient levels of "overwhelming grief, fear, panic, bewilderment." This is a well-rehearsed argument made by the prosecution in its attempt to portray Marty as a cold-hearted killer. It was repeated over and over during the trial and in the media, as jurors and readers were told that Marty's reaction wasn't "normal," therefore indicating somehow that he is a murderer. But who is to say what a "normal" reaction "should" be when a 17-year-old finds his parents brutally attacked and murdered? Surely it doesn't take a Ph.D. in psychology to appreciate that different people have different reactions, that some people go into shock, that others act "strangely" in various ways, and that children and adolescents in particular will become very impressionable in the presence of the police. To reduce the additional "evidence" aside from the "confession"—which, we should note, has been portrayed as a textbook case of a false confession by every expert to have reviewed this case, since none of the physical evidence from the crime scene matches the narrative of the "confession"—to a vague expectation about the appropriate "combination of emotions" is very misguided, if not downright pernicious.

Moreover, those of us who knew Marty well can provide an additional perspective that helps to account for the behavior that the police detectives and Judge Braslow found so incriminating. Marty was always a very calm person. Of course, he had passions and beliefs like anyone else does, but he usually kept a

very even keel, even in the face of upsetting information. He was not someone who was prone to expressive outbursts, of either sadness or joy. More important, perhaps, is the fact that Marty was very impressionable and was always seeking to receive approval from authority figures. In a nutshell, he was a naïve kid who had a relatively weak sense of himself and who wanted to please and impress others. It is therefore not hard for us to believe that Marty would be highly susceptible to the kind of tactics that were used in the interrogation, which Professors Richard Ofshe, Steven Drizin, and other experts have stated are very likely to lead to false confessions, particularly from juveniles.

This information is not necessarily new, and in fact Marty's family members have been stating this for years. But it was not brought up at the original trial, and almost none of Marty's family members (and none of us) were asked to testify by Marty's trial lawyer—even though it is quite likely that these points would have influenced the jury, by at least neutralizing the arguments about "emotion" that prosecutors emphasized so vehemently (and which Judge Braslow seems to accept at face value).

These arguments have been made elsewhere in the defense filings, but what is relevant here is that we—as fellow 17-year-old residents of Suffolk County in 1988—had no knowledge of the true state of affairs in our police system. We would have been very naïve and trusting of the police, just as Marty was. Whether

we too would have succumbed to the coercive tactics, deception, and unrelenting pressure to yield a "confession" is of course an individual matter that is ultimately unknowable (though the false confessions experts say it would be quite likely). But we do know that Marty was very impressionable, and that he would have been particularly vulnerable to the kinds of interrogation techniques that are known to produce false confessions—especially one that begins with "Could I have blacked out and done this?"

It has often occurred to many of us that what happened to Marty could have happened to any one of us. Regardless of how well we knew Marty, it was a very powerful and traumatic experience to have a classmate's parents get brutally murdered and then to have our classmate be convicted and sentenced to 50 years to life for the crime. Despite Judge Braslow's complete acceptance of the statements of police and prosecutors, we have learned over the last 18 years that the modus operandi of the Suffolk County Police Department was often inappropriate, if not outright criminal. And despite Judge Braslow's attempts to repeat the tiresome arguments about Marty's "emotions" and willfully to ignore the vast amount of research that shows the susceptibility of young and impressionable kids to false confessions, we believe that Marty's "emotions" and "confession" provide absolutely no indication of his guilt.

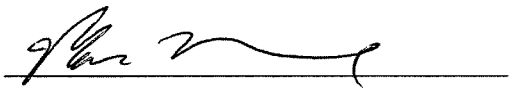
We are therefore respectfully requesting that the Court agree to grant a new trial—one based on evidence and not pseudo-psychological conjecture, one that also includes witnesses who can testify to Marty's character and "emotions," one that puts aside loyalties within the Suffolk County police and law enforcement system, and one that allows for a full and open consideration of the many new aspects of this case. Having served half of his life in prison for a crime that he did not commit, Marty Tankleff—our classmate—deserves this opportunity from our justice system.

We are Marty's classmates, and our names are as follows:

Adam Allen
Erin (Madden) Barrett
Michael (Soper) Barrett
John Bayer
Natalie (Adler) Brett
Cory S. Breines
Robert Burkhardt
Victoria (Gabriele) Carroll
Vanessa Celentano
Krista (DeMaria) Conte
Michelle Cotton
Ana Cragnolino
Ernesto Cragnolino
Matthew Davey
Amy (Bazerman) Delaney
Jonna (Cerbone) DeVito
Brian Diamond
Kim Dixon
Melanie (Kagan) Esparza
Stacey Farber
Timothy Gavigan
Eric Gilliland

Liron Gitig
Gary D. Gudzik
Shalini Gujavarty
Dara (Schaeffer) Hillman
Robert Hoff
Marc Howard
Jennifer (Verrine) Iacobelli
David Jamison
Mitchell Kolker
Lisa Kotliar
Carena (Colden) Lowenthal
Tim Mayer
Philip Meoli
Angela (Bucchignano) Mile
Jackie (McAvey) Miller
Denise Moore
William Newton
Caitlin (McGowan) Northrop
Lisa Olleo
Lynda (Gagliano) Panaro
Juliann (Santilli) Reynolds
Joanie Rinaldi
Jennifer (Azzara-Rubin) Rotunno
Michael D. Sandusky
Jason Snyder
Dean Spanos
Bentley Strockbine
Paul Tripodes
Margaret (Foster) Versantvoort
Barbara (Bernard) Williamson
Jeff Yalden
April (Browning) Young

Respectively submitted,



Marc Howard
Associate Professor
Department of Government
Georgetown University
ICC 681
Washington, DC 20057-1034
(202) 687-5029

## CERTIFICATE OF COMPLIANCE

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

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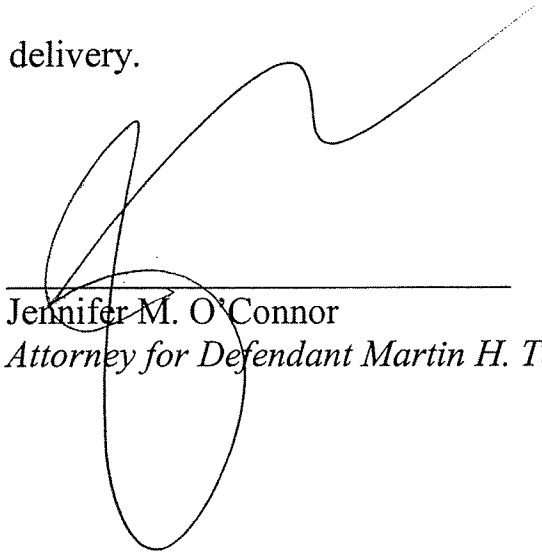
This brief contains 2,527 words, excluding the parts of the brief exempted by 22 NYCRR § 670.10.3(a)(3).

## 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:

Thomas J. Spota
District Attorney of Suffolk County
Leonard Lato
Assistant District Attorney
200 Center Drive
Riverhead, New York 11901-3388
(631) 852-2500

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.



Jennifer M. O'Connor
*Attorney for Defendant Martin H. Tankleff*