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

_____X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

-against-

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

MARTIN TANKLEFF,

Defendant-Appellant.

_____X

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

PLEASE TAKE NOTICE, that upon the annexed affirmation of Alison Flaum and the attached Brief for Exonerated False Confessors *Amici Curiae* in Support of Defendant-Appellant, the undersigned will move this Court, at Jan. 19, 2007, at the Appellate Division Courthouse, 45 Monroe Place, Brooklyn, New York, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order

a. Granting the Exonerated False Confessors leave to file an *Amici Curiae* brief in support of Defendant-Appellant.

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

Dated: Chicago, Illinois
December 12, 2006

Alison Flaum
Counsel for the Amici

Alison R. Flaum, Registration No. 2836856
Northwestern University School of Law
Center on Wrongful Convictions
357 East Chicago Avenue
Chicago, IL 60611

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

———————————————————X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

-against-

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

MARTIN TANKLEFF,

Defendant-Appellant.

———————————————————X

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

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

1. I am a visiting Assistant Clinical Professor of Law at Northwestern University School of Law, Bluhm Legal Clinic, Center on Wrongful Convictions. Dedicated to identifying and rectifying serious miscarriages of justice, the Center on Wrongful Convictions has a three-fold mission. First, the Center directly represents clients with claims of actual innocence.

Second, the Center researches and catalogues systemic problems relating to the criminal justice system in the hope of raising public awareness regarding the prevalence and causes of wrongful convictions. Third, the Center relies on its research and its casework to push for reforms and best practices that will reduce the risk of wrongful convictions. The Center has focused much of its research agenda on the subject of false confessions and has been one of the leading advocates for electronic recording of police interrogations and other reforms aimed at preventing wrongful convictions based on false confessions both in Illinois and around the nation. *See e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.CAR. L. REV. 891 (Mar. 2004); Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations* (Summer 2004) available online at http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/CustodialInterrogations.htm

2. I make this affirmation in support of the Motion for Leave to File *Amici Curiae* Brief submitted on behalf of exonerated persons who had falsely confessed to crimes they did not commit, referred to collectively herein as "Prospective *Amici*".

Interests of Prospective *Amici*

3. Prospective *Amici* are persons who falsely confessed or made false incriminating statements to law enforcement after being interrogated. Based on these statements, Prospective *Amici* were charged with or convicted of perpetrating violent crimes. Before they were exonerated, many Prospective *Amici* spent years in prison for the crimes they had falsely confessed to.
4. Prospective *Amici* are living proof that the tactics used by the police during the Defendant-Appellant's interrogation can persuade an innocent person to confess to violent crimes. In particular, four *Amici* were subjected to interrogation tactics very similar to those used during the Defendant-Appellant's interrogation. As a result, all four *Amici* confessed to or made inculpatory admissions to violent crimes they never committed.

Issues to be Addressed

5. In its brief, Prospective *Amici* will urge this Court to reverse the County Court's denial of Defendant-Appellant's motion pursuant to C.P.L. Section 440.10 in light of new research on false confessions as well as their personal experiences with false confessions. In particular, Prospective *Amici* will argue that the County Court's finding that the detectives in this case engaged in "no conduct that would have rendered the defendant's confession false" is

belied by recent research and Prospective *Amici*'s personal experiences. County Court Order, Mar. 17, 2006, at 12.

6. Since the Defendant-Appellant's conviction, much has been learned about the phenomenon of false confessions. False evidence ploys, such as those used during the Defendant-Appellant's interrogation, are powerful tools in extracting what are called "coerced persuaded false confessions." Prospective *Amici* will inform the Court of the three-stage process used by law enforcement to extract coerced persuaded false confessions. Moreover, Prospective *Amici* will show that the record in this case strongly suggests that the Defendant-Appellant's confession resulted from such a three-stage process.

7. Finally, Prospective *Amici* will present their personal stories of how they falsely confessed to crimes they did not commit. Notably, four Prospective *Amici*—Peter Reilly, Beverly Monroe, Gary Gauger, and Michael Crowe—gave coerced persuaded false confessions after being subjected to interrogations that are strikingly similar to the Defendant-Appellant's.

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

Dated: Chicago, Illinois
December 12, 2006

Alison Flaum
Counsel for the Amici

Alison R. Flaum, Registration No. 2836856
Northwestern University School of Law
Center on Wrongful Convictions
357 East Chicago Avenue
Chicago, IL 60611

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

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
	1290-88
Defendant,	

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

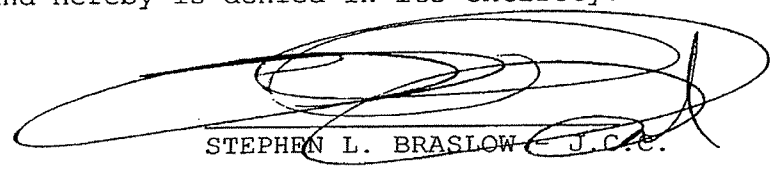
This case has been reviewed extensively by every state appellate court and federal court having jurisdiction, all of whom have declined to upset the jury's verdict. After thoroughly reviewing this matter, this court reaches the same conclusion that the jury reached seventeen years ago and every state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

ENTER,



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

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

-against-

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

MARTIN TANKLEFF,

Defendant-Appellant.

---X

BRIEF FOR EXONERATED FALSE CONFESSORS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

Alison Flaum Registration No. 2836856
Center on Wrongful Convictions
Bluhm Legal Clinic
Northwestern University School of Law
357 East Chicago Avenue, MC 395
Chicago, IL 60611
(312) 503-8576

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE*

Amici are persons who falsely confessed or made false incriminating statements to police after being interrogated. Based on these statements, *Amici*, like Mr. Tankleff, were charged with or convicted of violent crimes. The cases of four of the *Amici,* in particular, are highlighted in this brief. These four -- Peter Reilly, Gary Gauger, Beverly Monroe, and Michael Crowe (hereinafter "The *Four Amici*")-- were interrogated under similar circumstances to Mr. Tankleff and like Mr. Tankleff were charged with or convicted of killing loved ones.[1] Peter Reilly confessed to killing his mother; Gary Gauger gave police a hypothetical account of how he might have killed his mother and father; Beverly Monroe admitted to being present when her lover of 13 years committed suicide; and Michael Crowe, confessed to killing his twelve-year-old sister.

Amici come before this Court to take issue with two statements made by the Honorable Stephen L. Braslow in his Order denying Mr. Tankleff's C.P.L. §440.10 Motion (hereinafter "440 Motion"): 1) that "none of the conduct engaged in by the detectives [in the Tankleff case] would have rendered a false confession;" and 2) that false evidence ploys like those used by Detective McCready in the Tankleff

[1] Space limitations prevent counsel from telling the stories of all the *Amici.* The stories of the other exoneree-amici can be found at www.innocenceproject.org and in the attached Appendix.

case are the "least likely" kinds of tactics to lead to false confessions. Order of Hon. Stephen L. Braslow Denying §440 Motion dated 3/17/2006, at 11, 12. *Amici* are living proof that the very tactics used by Detective McCready and the other officers who interrogated Mr. Tankleff -- including false evidence ploys -- can persuade an innocent suspect to confess to or make inculpatory admissions to a violent crime. The *Four Amici's* stories, in particular, demonstrate that the specific tactics used on Mr. Tankleff are a recipe for a particular type of false confession – the coerced internalized or coerced persuaded false confession.[2]

INTRODUCTION AND STATEMENT OF THE CASE

Since Mr. Tankleff was charged with his parents' murders in September of 1988, the entire landscape of the criminal justice system has changed. By far, the most significant development that has occurred has been the advent of forensic DNA testing and the application of this new technology to criminal investigation.

---

[2] Professors Richard Ofshe and Richard Leo, after reviewing actual cases of false confessions, argued that the term "coerced internalized false confessions," which had earlier been used in the literature, was a misnomer. Internalization, they argued, requires a belief that is stable over time. The beliefs of the false confessors they studied were highly unstable and shortlived; nearly all the suspects recanted their beliefs that they were guilty as soon as they were outside of their interrogators' control. As a result, they renamed the "coerced internalized false confession" as the "coerced persuaded false confession." Gisli H. Gudjonnson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK at 202-205 (2003). Because the confessions of Mr. Tankleff and the *Four Amici* were recanted almost immediately, I will use the term "coerced persuaded false confessions" when referring to their confessions.

Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C.L. Rev. 891, 904 (March 2004) (hereinafter "Drizin & Leo"). DNA technology has established the fact of wrongful arrest or conviction in scores of cases, including many wrongful convictions based on false confessions.

To date, according to data collected and analyzed by the Innocence Project of Benjamin N. Cardozo Law School, 188 wrongly convicted people have been exonerated by DNA evidence. Of the first 130 of those, nearly 27% were convicted on the basis of false confessions. *See e.g.* The Innocence Project, *Causes and Remedies of Wrongful Convictions*, at http://www.innocenceproject.org. Of those exonerated by DNA who have been wrongfully convicted of murders, the percentage of false confessors is even higher. Of the first 110 DNA exonerations in the United States, thirty five involved the crime of murder. Of these thirty five, nearly two thirds had been convicted at least partly based on incriminating statements or confessions made during interrogations. *See* Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV.979, 984 (2003) (citing Innocence Project case review).

In September of 1988, however, DNA testing had yet to exonerate a single wrongfully convicted person. By 1990, when Mr. Tankleff was convicted at trial, the scorecard was not much better: DNA evidence had only exonerated three men, of whom only David Vasquez had confessed falsely. Even by 1993, when this court came within one vote of reversing Mr. Tankleff's conviction and ordering a new trial, *see People v. Tankleff,* 199 A.D.2d 550, 660 N.Y.S.2d 707 (N.Y.A.D. 2d Dept. 1993), DNA had exonerated just fourteen men, only two of whom had falsely confessed – David Vasquez and Steven Linscott. *See e.g.* The Innocence Project, *Case Profiles, Browse Chronological Listing,* at U*ses and Remedies of Wrongful Convictions*, at http://www.innocenceproject.org.

Since 1988, a parallel revolution occurring in the social sciences has enhanced understanding of the causes and consequences of wrongful convictions. In 1988, social scientific study of police-induced false confessions was in its relative infancy. In particular, little was known or written about the coerced persuaded false confession. Today, however, there is an abundance of scholarship on these issues, scholarship which calls into question the reliability of Mr. Tankleff's confession and the soundness of the court decisions that have to date denied him a new trial. *Amici* write to urge this Court to reevaluate Mr. Tankleff's

confession in light of these new scientific advances. In particular, *Amici* argue that the lower court's finding that detectives engaged in "no conduct that would have rendered the defendant's confession false" is belied by both this new psychosocial research and their own personal stories.

ARGUMENT

I. The Lower Court's Finding That the Detectives FEngaged in "No Conduct That Would Have Rendered the Defendant's Confession False" is Belied by Developments in the Study of False Confessions, Particularly the Study of Coerced Persuaded False Confessions, That Have Occurred Since Mr. Tankleff's Confession.

A. The Role of False Evidence Ploys in Coerced Persuaded False Confessions

The modern era of psychological research on false confessions did not begin until 1985 – just a few years before Mr. Tankleff's arrest – with the publication of Saul Kassin and Lawrence Wrightman's influential book chapter "Confession Evidence." *See* G. D. Lassiter & Jennifer J. Ratcliff, *Exposing Coercive Influences in the Criminal Justice System* in INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 1, 4 (G. D. Lassiter ed. 2004).

Since then, academic articles and books have drawn upon empirical data, observations of police interrogations, and case studies to identify both the coercive

techniques that are common to false confessions and the characteristics of individuals most vulnerable to those techniques. *See e.g.* Gisli H. Gudjonnson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 631-662 (2003) (hereinafter "Gudjonsson") (citing nearly 800 articles in areas relating to false confessions and police interrogations); Saul M. Kassin & Gisli Gudjonnson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. IN THE PUB. INT. 35-59 (Nov. 2004); Lassiter and Ratcliff, *supra*, at 4.

Contrary to Judge Braslow's finding that false evidence ploys are among the "least likely" to result in a false confession, study after study and case after case have shown exactly the opposite – that the presentation of false evidence to a suspect is among the *most common* tactics that lead to false confessions. *See e.g.*, Saul Kassin & K. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125-28 (1996) (evaluating effect of presentation of false evidence in laboratory experiment Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action,* 74 DEN. L. REV. 979 (1997)(hereinafter "Ofshe & Leo")(highlighting the use of false evidence ploys in actual police interrogations and false confessions).

The presentation of false evidence to a suspect is one step of a multi-step process that interrogators are trained to employ when manipulating a suspect to confess to a crime. Miriam Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORD. URB. L. J. 791 (March 2006)(surveying widely used police interrogation manuals that counsel the use of deception). According to Professors Ofshe & Leo, however, "confront[ing] the suspect with seemingly objective and incontrovertible evidence of his guilt, whether or not any actually exists" is the single "most effective technique." Drizin & Leo, *supra,* at 914-915 (March 2004).

Research has also shown that false evidence ploys are an absolutely essential step in producing coerced persuaded false confessions. As Professor Ofshe has argued, the production of false persuaded confessions requires that the interrogator convince the suspect of two things: 1) that there is incontrovertible proof that the suspect committed the crime, even though the suspect has no memory of doing so; and 2) that there is a good reason why the suspect has no memory of having committed the crime. *See* Gudjonsson, *supra*, at 199.

There are three stages in the evolution of most persuaded false confessions. The first stage, which is common to coerced compliant confessions as well,

involves tactics designed to cause the suspect to question his belief in his innocence. This is accomplished by interrupting the suspect's denials, refusing to accept the suspect's claims of innocence, accusing the suspect of the crime, and telling the suspect that the evidence against him is overwhelming, even if no such evidence exists. The innocent suspect thinks his interrogators are mistaken and tries to convince them of his innocence. When these attempts prove futile, the suspect becomes confused -- he cannot reconcile his knowledge, based on his memory, that he is innocent with the interrogator's unshaken belief, based on the evidence, that he is guilty. Ofshe & Leo, *supra*, at 1000.

The second stage requires the interrogator to provide a plausible reason for the suspect's lack of memory. In their case studies of false confessions, Professors Ofshe and Leo have found that interrogators at this point routinely suggest or affirm a suspect's mounting sense that the suspect experienced an alcohol or drug-induced blackout, a multiple personality disorder, a temporary amnesia, post-traumatic stress disorder, or that the suspect "blocked out" the memories. *Id.* at 1000.

Now that the suspect's belief in his own innocence has been shaken and the suspect has accepted an explanation for his lack of memory, the process enters the

third and final stage. The interrogator must get the suspect to provide a detailed "post-admission narrative" of how the crime occurred. This is where the innocent suspect struggles the most. No matter how hard he searches his mind for images of the crime, he cannot come up with accurate and detailed memories. Instead, the suspect makes up these details, parrots back details that police may have leaked to him during the interrogation, or tries to infer how the crime may have occurred from interrogators' suggestions. Usually, the persuaded false confessor's narrative is filled with errors. The suspect uses language that is hypothetical or speculative ("I must have done this" or "I probably did this"), a reflection of his uncertain belief state. In most cases, persuaded false confessors recant their confessions as soon as they are outside of the interrogation environment. Ofshe & Leo, *supra*, at 1000.

B. Because Detective McCready and His Colleagues Did Not Electronically Record Mr. Tankleff's Interrogation, it is Impossible Now to Accurately and Completely Reconstruct What Occurred in the Hours of Interrogation Before Mr. Tankleff Confessed; the Record Does, However, Provide Strong Support for the Fact That Mr. Tankleff Gave His Interrogators a Coerced Persuaded False Confession

According to the Second Circuit's opinion in *Tankleff v. Senkowski,* 135 F3d 235, 240-241 (2d Cir. 1998), for approximately two hours, from 9:40 a.m. until

11:30 a.m., Detectives McCready and Rein refused to accept Mr. Tankleff's account of the events which led him to discover his parents' bodies, calling his version of how he performed first aid on his father "ridiculous and absurd" and challenging what they perceived to be inconsistencies in his statements. Detective McCready then turned up the heat on Mr. Tankleff, using an elaborate false evidence ploy to undermine Mr. Tankleff's confidence in his own innocence and in his own memory:

> At approximately 11:45 a.m., Detective McCready left the interview room and faked receiving a telephone call. On the phone, he spoke in a voice loud enough to be overhead by Rein, who was still in the interview room with Tankleff and presumably overheard by Tankleff as well. After a few minutes, Detective McCready hung up the phone and returned to the interview room. He said that he had just spoken with a detective at the hospital and that the doctors had pumped Seymour Tankleff full of adrenaline, that he had come out of a coma, and that he accused his son, Martin.

Id. at 241. Detective McCready also used other false evidence ploys with Mr. Tankleff, telling him that his hair was found in his mother's hand and that police had done a humidity test (no such test existed) to prove that Mr. Tankleff had lied when he claimed that he had not showered on the morning of the killings. Ofshe Affidavit, attached as Exhibit E (Exhibit 6) to Affirmation in Support of Motion

for Leave to Appeal Order Denying C.P.L. §440.10 Motion (hereinafter "Ofshe Aff." at ¶ 33-34.)

Though wearied by these tactics, Mr. Tankleff continued for some time to deny any role in the crime, but, as the Second Circuit described, Mr. Tankleff began to question his own memory:

> Tankleff then offered to take a lie detector test, which the police refused to administer. Rein asked, "Martin, what should we do to a person that did this to your parents?" Tankleff responded, "Whoever did this to them needs psychiatric help." At this point, Tankleff said "Could I have blacked out and done it?" and asked whether he could have been "possessed." The detectives encouraged him to say more, and Tankleff uttered, "[I]t's coming to me."

Id.

In the final stage of the interrogation, the detectives persuaded Mr. Tankleff to give them a detailed confession to killing his parents. The failure to record this process makes it impossible to know how many of the details in the unsigned confession written by police came from Mr. Tankleff and how many were suggested to him by the detectives. One thing is certain, however – police could not corroborate any of the facts contained in Mr. Tankleff's bizarre story of entering his parent's room while naked, beating his mother with a barbell then stabbing her to death, and then walking the length of the house to beat and stab his

father, before showering and washing off the knife and the barbell. Not a shred of physical evidence – including extensive testing done on the barbells, the knives, the trap from the shower drains, the towels, or the white carpet on the floor between his parents' bedrooms – linked Mr. Tankleff to the crime. Nor did the confession lead police to any other evidence. Although bloody glove prints in the Tankleffs' bedroom and on a light switch suggested that the killer or killers wore gloves, Mr. Tankleff failed to mention gloves in his confession and no gloves were ever found. Morever, Seymour Tankleff's blood was found on the bed and walls of Arlene Tankleff's room, indicating that Mr. Tankleff's account of having killed his mother first was also wrong. This lack of a "fit" between the "post-admission narrative" and the objectively knowable evidence of the crime is one of the telltale signs of a false confession and strongly suggests that the script of Mr. Tankleff's confession was not the product of his personal knowledge. Ofshe Aff. at ¶37-48.

In sum, since 1993, when this Court last visited Mr. Tankleff's case, much has been learned about the phenomenon of false confessions. Scores of wrongful arrests and convictions based on false confessions have been exposed, *see* Drizin & Leo, *supra* (documenting and analyzing 125 proven false confessions, most of which occurred post-1993), and numerous books and hundreds of peer-reviewed

articles on the subject have been published. In denying Mr. Tankleff's 440 Motion, Judge Braslow either dismissed, ignored, or misapplied this body of research. This Court should not make the same mistake. Therefore, *Amici* strongly urge this Court to reverse the denial of Mr. Tankleff's 440 Motion.

II. The Lower Court's Finding That the Detectives Engaged in "No Conduct That Would Have Rendered the Defendant's Confession False" is Belied by the Personal Stories of *Amici,* Each of Whom Confessed Under Strikingly Similar Circumstances to Mr. Tankleff.

Statistics about the numbers of DNA exonerations based on false confessions and discussion of advances in the understandings of false confessions based on social science research tell only part of the story of why *Amici* believe that this Court must take seriously Mr. Tankleff's claim that his confession was false. *Amici* ask this Court to consider their personal stories in deciding whether to grant Mr. Tankleff a new trial. These stories appear below in chronological order:

A. *Peter Reilly*

On September 28, 1973, Barbara Gibbons was murdered in the home she shared with her eighteen-year old son, Peter Reilly. Peter returned from a meeting at a local church and discovered his mother on the floor, practically naked and covered in blood. Believing that he heard faint sounds of breathing from his

mother, Reilly called the Madow family, who were members of the local volunteer ambulance squad. Then he called a doctor and the hospital. The hospital in turn contacted the State Police, who arrived just after 10 p.m. *Reilly v. State,* 32 Conn. Supp. 349, 355 A. 2d 324, 327 (Conn. Super. 1976). Almost immediately, authorities focused exclusively on Reilly as a suspect in his mother's murder, in part because they believed he did not react with enough emotion to his mother's death.[3] *Id.* at 328.

Just before 11:00 p.m., still on the scene, Reilly waived his *Miranda* rights and gave a statement about his whereabouts that evening and his discovery of his mother's body. Shortly before 2:00 a.m., Reilly was transported to the local state police barracks for further questioning. Donald S. Connery, GUILTY UNTIL PROVEN INNOCENT (1976), at 39. Interrogators kept Reilly awake until about 8:30 the next morning, questioning him over and over again about his activities on the day and evening of the murder, the whereabouts of his relatives and family members, and his relationship with his mother. *Id.* at 49-50.

---

[3] Professor Saul Kassin, in an affidavit filed in connection with this appeal, states that Detective McCready focused almost immediately on Mr. Tankleff as a suspect in his parents' murders because of Mr. Tankleff's apparent lack of emotionality. Affidavit in Support of Appeal (hereinafter Kassin Aff. at ¶ 12).

After Reilly slept for a few hours, he was taken to state police headquarters in Hartford for a polygraph test. During the pre-test interview, the examiner told Reilly for the first time that his mother's legs were broken and asked him to speculate how they might have been broken. He was told by the examiner that the polygraph machine "reads his brain" and that the test was infallible. *Id.* at 60. After the test was administered, Reilly was informed that he had failed.

News that he failed the test caused Reilly to begin to doubt both his innocence and his memory. Reilly continued to insist that he had no memory of committing the crime, but the repeated references to the polygraph results began to take their toll. At one point, Reilly suggested that perhaps his mind was "blocking it out"; at another point, he asked; "Could it be that I totally put this out of my memory?," a suggestion immediately affirmed by his interrogator. *See* Joan Barthel, A DEATH IN CANAAN, at 65-66. (1976). Right before he began to confess, Reilly told the interrogator that "something's coming" and then said "somewhere in my head a straight razor sticks in." *Id.* at 72.

Throughout the interrogation, the police officers provided motives and scenarios to Reilly, suggesting perhaps he was merely defending himself when his mother "flew off the handle" and attacked him, *id.*. at 69, or that his mother's

constant nagging caused him to lose control. *Id.*. at 71. They tried to get him to agree to a story that more closely fit the crime facts, pushing him to admit that he washed off his mother's body after killing her, *id.*., and that he could have used a knife instead of a straight razor. *Id.*. at 83. Near the end of his ordeal, Reilly told one of his interrogators that he was "pretty sure" he had used a straight razor but "it's almost like in a dream." As the interrogator led him through the post-admission narrative, Reilly interrupted the interrogator and said "Everything that I've been saying, it's almost like I've been making it up. I'm not sure about it." *Id.* at 108.

Eventually, Reilly admitted to slashing at his mother's throat and jumping up and down to break her legs. Investigators reduced Reilly's speculations to a one-page confession that Reilly signed. Based solely on the confession, in April 1974, a jury convicted Reilly of first degree manslaughter and a judge sentenced him to an indeterminate prison term of six to sixteen years.

In 1976, Reilly's new defense team filed a motion for a new trial, listing newly discovered evidence and evidence the prosecution had suppressed that supported Reilly's claims of innocence. New fingerprint evidence also pointed to another suspect as the culprit. *See* Connery, at 297. After a hearing on Reilly's

motion for a new trial, the judge granted a new trial, referring to Reilly's conviction as "a grave injustice" and stating that a new trial would "more than likely" result in an acquittal. *Reilly,* 355 A.2d at 340. Prosecutors chose not to retry Reilly and all charges against him were officially dropped.

B. *Beverly Monroe*

On the morning of March 5, 1992, Roger de La Burde's body was found by Beverly Monroe, his girlfriend of nearly 13 years, and his groundskeeper, Joe Hairfield. Burde had been killed by a single gunshot to the head fired at close range from his own handgun. The local authorities treated Burde's death as a suicide but Virginia State Police Agent David Riley had other ideas. He suspected foul play and focused quickly on Beverly Monroe as the chief suspect. *Monroe v. Angelone,* 323 F.3d 286, 291 (4th Cir. 2003); Innocence Commission for Virginia, *Investigation Report for Beverly Anne Monroe,* January 22, 2004, at 1-3, at www.icva.us (hereinafter "ICVA Report").

In March of 1992, Beverly Monroe was fifty-four years old. She held a masters degree in organic chemistry, and she had been employed for more than ten years in the patent department of Philip Morris. She was, by all accounts, a calm,

gentle, and kind person, and she had an impeccable reputation as an honest and law-abiding citizen. She was no match for Agent Riley, who had developed a detailed and elaborate interview plan to manipulate Monroe into incriminating herself by admitting that she was present when Burde killed himself. *See* John Taylor, THE COUNT AND THE CONFESSION (2002) at 68-70; ICVA Report at 5.

On the morning of March 26, 1992, Ms. Monroe met Agent Riley at Burde's home for their first interview. During this interview, Riley told Monroe that some of her memories were incorrect and asked her to come back to the police station for additional interviewing. Riley's attacks on her memories were unsettling to Monroe, who always took pride in the fact that she was a detail person with an excellent memory. *See* Lola Vollen & Dave Eggers, SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED (2005) at 210-211; ICVA Report at 5.

Ms. Monroe agreed to accompany Riley back to the police station for a polygraph examination. A different officer administered the test, which was recorded without Monroe's knowledge. Afterwards, Riley entered the room, told Monroe she had failed the test, and explained that the only reason for the results was that she must have been present when Burde died. Riley moved his seat close

to her, held her hands, sympathized with her, and insisted she would feel better only after she recovered her "subconscious" memory. He told her repeatedly that she had been present with Burde when he killed himself but must have blocked out the memory because the event was so painful. Monroe fended off these suggestions for over an hour, insisting that she could not remember being there. Riley then told her that he had seen these effects of trauma many times and that it had even happened to him – that he had suppressed witnessing his father's suicide. This lie was the breaking point for Ms. Monroe. According to Riley and two police officers and secretaries who took turns viewing the interrogation through a two way mirror, Monroe agreed that she had, in fact, been present at Burde's death.[4] *Monroe,* 323 F.3d at 302; ICVA Report, at 5-6.

Riley next called Monroe on the morning of June 3, 1992, arranging to meet her at a Civil War park in the Richmond area. His goal at this meeting was to get Monroe to sign a written statement confessing to Burde's murder. He confronted her with a list of incriminating evidence he claimed proved her guilt and informed

[4] Agent Riley "inadvertently" forgot to turn the tape recorder on while he questioned Monroe and turned it on only after she had "confessed." In an interview that lasted well over two hours, only the final seventeen minutes are captured on tape. Taylor at 71. Ms. Monroe disputes the fact that she ever agreed to being present at Burde's death, which is corroborated by the taped portion of the interview in which insists that she still has no memory of what Riley is telling her. Vollen & Eggers at 214; ICVA Report at 6.

her that the prosecutor planned to charge her with first degree murder. *Monroe,* 323 F.3d at 303; ICVA Report at 7-8. Riley told her that if she confessed, the prosecutor would agree to a charge of second degree murder. *Id.* at 302 n.24, Taylor, *supra,* at 110. When Monroe insisted she did not harm Burde, Riley returned to the theory that she had been present when Burde committed suicide and wrote a vague, hypothetical statement to that effect. *Id.* at 221; ICVA Report at 7-8. After nearly two hours in Riley's car, Riley, according to Monroe, escalated his threats, telling her that if she did not admit she was with Burde, he would arrest her anyway, alert the newspapers, and drag her and her whole family "through the mud." Vollen & Eggers at 221; ICVA Report at 7-8. Monroe ultimately signed Riley's written statement indicating she had been present when Burde killed himself. *Monroe,* 323 F.3d at 303; ICVA Report at 8.

On November 2, 1992, a jury convicted Monroe of first-degree murder and use of a firearm in the commission of a felony, crimes for which she was later sentenced to a total of twenty-two years in prison. *Monroe,* 323 F.3d at 303. After her state court appeals were unsuccessful, Monroe finally prevailed in federal court. In April 2002, the United States District Court for the Eastern District of Virginia granted Monroe a writ of habeas corpus and released her from prison. In

his opinion, Senior U.S. District Judge Richard Williams wrote that Monroe's case was a "monument to prosecutorial indiscretions and mishandling." No. 3: 98CV254 (Memorandum Opinion, E.D.Va., March 28, 2002 and April 5, 2002); Vollen at 238. In March 2003, the United States Court of Appeals for the Fourth Circuit upheld the reversal of Monroe's murder conviction, finding that the state had suppressed "a wealth of exculpatory evidence," including evidence supporting the fact that Burde committed suicide and disputing the testimony of the prosecution's witnesses. Calling the case against Monroe "somewhat thin and entirely circumstantial," *Monroe,* 323 F.3d at 302, the court held that "[i]n these circumstances, it is impossible to say that Beverly Monroe received a fair trial, or that we should be confident she is guilty of first-degree murder." Prosecutors decided not to retry Ms. Monroe and eventually dropped all charges against her.

C. *Gary Gauger*

At approximately 11:30 a.m. on April 8, 1993, 40 year-old Gary Gauger called 911 to report that he had just found his father, Morris Gauger, dead on their 200 acre farm near Richmond, Illinois and that his mother, Ruth Gauger, was missing. Paramedics and McHenry County sheriffs' deputies arrived at the farm

shortly thereafter and, at approximately 1:40 p.m., Mrs. Gauger's body was also located. After they found the body of Ruth Gauger, sheriffs detained Gary Gauger inside a squad car for two and one-half hours until 4:00 p.m., when they drove him to the sheriffs' department for questioning. Over the next 18 hours, Gauger would be interrogated by three sheriffs' deputies and a polygrapher. Gauger's marathon interrogation was not recorded. Vollen & Eggers at 81-114.

During the first eight hours of interrogation, detectives questioned Gauger about his parents' routines and habits, his and their activities on the days leading up to their murder, and various aspects of his life; Gauger was fully cooperative. When he grew tired of the same questions, and asked if he could go home, Gauger was told he could not. Exhausted and anxious to leave, Gauger agreed to take a polygraph exam, which the investigators eagerly arranged. *Id.* at 90.

During the exam, Gauger was informed for the first time that his parents' throats had been cut. He was then told that he had failed the test. The news floored him. The interrogating detectives then used a number of other false evidence ploys, telling Gauger that they had a stack of evidence against him, that they had found bloody clothes in his bedroom, bloody sheets and the murder weapon, and a bloody knife in his pocket. *Id.* at 93. When Gauger denied that he killed his parents, the

detectives kept accusing him and repeating the evidence they claimed to have against him, at one point even throwing pictures of his parents' dead bodies in front of him. *Id.* at 95. Gauger disputed the detectives' claims throughout the night, but they convinced him that they were not lying about the evidence by telling him that they would not be willing to jeopardize their careers. *Id.* at 93.

By this point, Gauger had become both confused and physically exhausted, but his requests to go to sleep were denied. Gauger was asked to construct a hypothethical scenario of how he could have killed his parents in order to jog his memory. As he later explained, Gauger agreed to this because, "I'm thinking, if I killed my parents, I wanted to know about it." *Id.* at 95. Gauger searched his memories for details of how he might have killed his parents, but kept coming up blank. He tried to imagine doing it and pieced together an account of sneaking up behind each parent and slashing their throats, relying, in part, on information he had learned from the photos he had been shown. As he described how he would have caught his mother and laid her down gently to prevent her from getting hurt, Gauger began to sob uncontrollably. *Id.* at 96. For the first time, he began to wonder if he had killed his parents, yet he still had no memory of it. Gauger asked one of the

her that the prosecutor planned to charge her with first degree murder. *Monroe,* 323 F.3d at 303; ICVA Report at 7-8. Riley told her that if she confessed, the prosecutor would agree to a charge of second degree murder. *Id.* at 302 n.24, Taylor, *supra,* at 110. When Monroe insisted she did not harm Burde, Riley returned to the theory that she had been present when Burde committed suicide and wrote a vague, hypothetical statement to that effect. *Id.* at 221; ICVA Report at 7-8. After nearly two hours in Riley's car, Riley, according to Monroe, escalated his threats, telling her that if she did not admit she was with Burde, he would arrest her anyway, alert the newspapers, and drag her and her whole family "through the mud." Vollen & Eggers at 221; ICVA Report at 7-8. Monroe ultimately signed Riley's written statement indicating she had been present when Burde killed himself. *Monroe,* 323 F.3d at 303; ICVA Report at 8.

On November 2, 1992, a jury convicted Monroe of first-degree murder and use of a firearm in the commission of a felony, crimes for which she was later sentenced to a total of twenty-two years in prison. *Monroe,* 323 F.3d at 303. After her state court appeals were unsuccessful, Monroe finally prevailed in federal court. In April 2002, the United States District Court for the Eastern District of Virginia granted Monroe a writ of habeas corpus and released her from prison. In

his opinion, Senior U.S. District Judge Richard Williams wrote that Monroe's case was a "monument to prosecutorial indiscretions and mishandling." No. 3: 98CV254 (Memorandum Opinion, E.D.Va., March 28, 2002 and April 5, 2002); Vollen at 238. In March 2003, the United States Court of Appeals for the Fourth Circuit upheld the reversal of Monroe's murder conviction, finding that the state had suppressed "a wealth of exculpatory evidence," including evidence supporting the fact that Burde committed suicide and disputing the testimony of the prosecution's witnesses. Calling the case against Monroe "somewhat thin and entirely circumstantial," *Monroe,* 323 F.3d at 302, the court held that "[i]n these circumstances, it is impossible to say that Beverly Monroe received a fair trial, or that we should be confident she is guilty of first-degree murder." Prosecutors decided not to retry Ms. Monroe and eventually dropped all charges against her.

C. *Gary Gauger*

At approximately 11:30 a.m. on April 8, 1993, 40 year-old Gary Gauger called 911 to report that he had just found his father, Morris Gauger, dead on their 200 acre farm near Richmond, Illinois and that his mother, Ruth Gauger, was missing. Paramedics and McHenry County sheriffs' deputies arrived at the farm

shortly thereafter and, at approximately 1:40 p.m., Mrs. Gauger's body was also located. After they found the body of Ruth Gauger, sheriffs detained Gary Gauger inside a squad car for two and one-half hours until 4:00 p.m., when they drove him to the sheriffs' department for questioning. Over the next 18 hours, Gauger would be interrogated by three sheriffs' deputies and a polygrapher. Gauger's marathon interrogation was not recorded. Vollen & Eggers at 81-114.

During the first eight hours of interrogation, detectives questioned Gauger about his parents' routines and habits, his and their activities on the days leading up to their murder, and various aspects of his life; Gauger was fully cooperative. When he grew tired of the same questions, and asked if he could go home, Gauger was told he could not. Exhausted and anxious to leave, Gauger agreed to take a polygraph exam, which the investigators eagerly arranged. *Id.* at 90.

During the exam, Gauger was informed for the first time that his parents' throats had been cut. He was then told that he had failed the test. The news floored him. The interrogating detectives then used a number of other false evidence ploys, telling Gauger that they had a stack of evidence against him, that they had found bloody clothes in his bedroom, bloody sheets and the murder weapon, and a bloody knife in his pocket. *Id.* at 93. When Gauger denied that he killed his parents, the

detectives kept accusing him and repeating the evidence they claimed to have against him, at one point even throwing pictures of his parents' dead bodies in front of him. *Id.* at 95. Gauger disputed the detectives' claims throughout the night, but they convinced him that they were not lying about the evidence by telling him that they would not be willing to jeopardize their careers. *Id.* at 93.

By this point, Gauger had become both confused and physically exhausted, but his requests to go to sleep were denied. Gauger was asked to construct a hypothethical scenario of how he could have killed his parents in order to jog his memory. As he later explained, Gauger agreed to this because, "I'm thinking, if I killed my parents, I wanted to know about it." *Id.* at 95. Gauger searched his memories for details of how he might have killed his parents, but kept coming up blank. He tried to imagine doing it and pieced together an account of sneaking up behind each parent and slashing their throats, relying, in part, on information he had learned from the photos he had been shown. As he described how he would have caught his mother and laid her down gently to prevent her from getting hurt, Gauger began to sob uncontrollably. *Id.* at 96. For the first time, he began to wonder if he had killed his parents, yet he still had no memory of it. Gauger asked one of the

detectives if it was possible that he had a blackout and was assured that it was. *Id.* at 97.

Throughout the early morning hours, the detectives pressed Gauger for details, suggested scenarios to him, offered him motives. At approximately 6 a.m. – fourteen hours into the interrogation – Gauger repeated the hypothetical scenario he had told detectives earlier in the evening, but followed it by saying "but I don't remember doing any of this." By this point, Gauger had become convinced that he had killed his parents in a blackout. The detectives asked him to sign a confession that they had written up but Gauger refused, insisting "I'm not going to sign a confession if I have no memory of it." *Id.* at 98.

Gauger was immediately charged with capital murder of both of his parents, despite the fact that his confession was inconsistent with many facts of the crime and even though not a single piece of evidence linked him to the double murder. A jury convicted Gauger of two counts of first-degree murder in October, 1993, and the trial judge sentenced him to death in January, 1994, a sentence he later reduced to life without parole. An Illinois Appeals Court reversed Gauger's conviction in March, 1996 after ruling that the sheriffs had improperly obtained his confession.

Gauger was released from prison in August 1996 after spending three-and-a-half years behind bars (and almost a year on death row).

In June 1997, Randall Miller, a member of a Wisconsin motorcycle gang, was heard on tape confessing to the crime. A federal grand jury indicted Miller and James Schneider, another gang member, for the murders of the Gaugers. Schneider pled guilty in 1998, while Miller was convicted in 2000. *Id.* at 105-106.

D. *Michael Crowe*

After Escondido police separated fourteen-year-old Michael Crowe from his parents, multiple detectives interrogated him in Escondido, California for more than ten hours over three days from January 21st to the 23rd, 1998, for the murder of his younger sister, Stephanie. The interrogations occurring on the 22nd and the 23rd were recorded almost in their entirety. Over the course of the interrogations, the detectives confronted Michael with multiple forms of false or non-existent evidence that they said conclusively established his guilt. For example, they told Michael that they found blood in his room and that his sister was found with his hair in her hand. When he asked where the blood was found the detective stated, "I'm sure you know. It's easy to make mistakes in the dark." *See* Steven A. Drizin

& Beth Colgan, *Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects* in INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 127-162, 135 (G. D. Lassiter ed. 2004)(hereinafter "Drizin & Colgan").

After repeatedly denying that he killed his sister, Michael was directed to take a Computer Voice Stress Analyzer ("CVSA") exam – which detectives told him was both scientific and accurate – under the pretense that it would allow him to prove his innocence.[5] Not surprisingly, detectives informed Michael that he failed the CVSA and that it established his guilt conclusively. Michael was devastated and began to sob almost uncontrollably. For hours, he continued to insist that he knew nothing about the murder, but over time, his confidence in his innocence began to weaken and he began to question his own memory:

> Mr. Crowe [Michael]: Why are you doing this to me? I didn't do this to her. I couldn't. God, God. Why? (Indiscernible). I can't even believe

[5] The theory behind the CVSA is that the "voice emits inaudible vibrations called microtremors." When a person lies, or is under stress, "the vocal muscles tighten and the microtremors decrease, appearing as flattened lines on a computer screen." Although it is marketed as a "truth detection" device, the truth is that questions about the CVSA's reliability have surrounded the technology from its inception. *See* Mark Hansen, *Truth Sleuth of Faulty Detector?: Voice Stress Analyzer as Polygraph Alternatives Goes on Trial,* 85 A.B.A. L. J. 16 (May 1999).

myself anymore. I don't know if I did it or not. I didn't though. (Indiscernible).
Mr. Claytor [Detective]: Well, I think you're on the right track. Let's go ahead and think through this now.
Mr. Crowe: I don't think -- if I did this I don't remember it. I don't remember a thing."
Mr. Claytor: You know what, that's possible.

Id. at 141.

The detectives provided Michael with an explanation for his memory lapses, telling him that there were "two Michaels" – a good and a bad Michael – and suggesting that he had a multiple personality disorder which had caused him to black out while the bad Michael committed the crime outside the conscious awareness of the good Michael. *Id.* at 139. Michael ultimately accepted this explanation, telling police that he believed an evil part of his personality called "Odin" had killed Stephanie but, no matter how hard he tried, he was never able to come up with a credible account of how he had killed his sister. He did, however, come to believe he had killed Stephanie, stating "I'm not sure how I did it. All I know is I did it." *Id.* at 141.

Following his confession, local prosecutors charged Michael with the murder of his sister and he spent over seven months in juvenile detention awaiting trial. The murder charges were dismissed, however, when his sister's blood was

found on the shirt of Richard Tuite, a mentally ill drifter who several people had reported present and acting suspiciously in the Crowe neighborhood on the night of the murder. Eventually, state prosecutors filed charges against Tuite and he was convicted of killing Stephanie Crowe. *Id.,* at 144-145.

***

There is a kinship among the *Four Amici* and Mr. Tankleff and their stories share many common themes. Like Mr. Tankleff, the *Four Amici* are all of normal intelligence, a fact which should put to rest any misguided beliefs that only the mentally retarded give false confessions. All were raised to respect and trust the police and had little or no prior encounters with law enforcement that could have prepared them for the pressures inherent in a homicide interrogation. All not only confessed or implicated themselves in murder, they were all charged with murdering loved ones. Like Mr. Tankleff, both Mr. Reilly (age 18) and Mr. Crowe (age 14), were only teenagers when they were interrogated, a fact that made them especially vulnerable to the techniques used against them. *See* Jessica Owen-Kostelnik *et al.*, *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, AM. PSYCHOLOGIST (May-June 2006). Three of the *Four Amici* were, like Mr. Tankleff, wrongfully convicted; only Michael Crowe, who

was fortunate enough to have the benefit of DNA testing, was exonerated of his charges before he had to stand trial. As with all coerced persuaded false confessions, highly orchestrated false evidence ploys were essential to manipulating the *Four Amici* to confess or make incriminating admissions. These lies caused both the *Four Amici* and Mr. Tankleff to lack confidence in their memories. In their struggles to reconcile the supposedly evident fact of their guilt with their lack of memory, all used language suggesting that they were "dreaming" or having "visions" or "imagining" scenarios. In an especially eerie likeness, both Peter Reilly and Mr. Tankleff used identical language when describing how the images of the crime were "coming to them." Police suggested, gave or accepted suspects' plausible explanations for these memory lapses, including repressed memory (Reilly), post-traumatic stress disorder (Monroe), blackouts (Gauger and Tankleff), and multiple personality disorder (Crowe).

During the post-admission narrative phases of their interrogations, neither the *Four Amici* nor Mr. Tankleff were able to provide the police officers with any information that the police did not already know. Nor could they provide police with the kind of detailed factual knowledge known only to the true perpetrators. They made mistakes when guessing about such information or, to the extent that

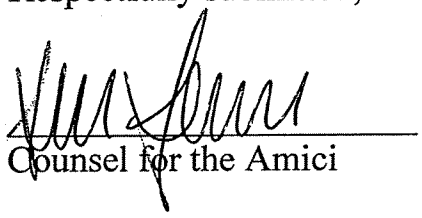
some of the facts in their confessions were borne out by the evidence, all described being led by police to these facts or inferring them from information suggested to them during the interrogation. Such leading is especially evident in the recorded interrogations of Mr. Crowe and Mr. Reilly and presumably would have been obvious in the other cases had the interrogations of Mr. Tankleff, Mr. Gauger, and Ms. Monroe been recorded in their entirety.

In short, *Amici's* cases provide powerful additional support for Mr. Tankleff's claim that he was pressured into giving a false confession to murdering his parents and belie entirely Judge Braslow's conclusions regarding the interrogation at issue in Mr. Tankleff's case.

CONCLUSION

For all of the above reasons, *Amici* respectfully request that this Court reverse the County Court's denial of Mr. Tankleff's 440 motion.

Respectfully submitted,



Counsel for the Amici

Alison R. Flaum, Registration No. 2836856
Northwestern University School of Law
Center on Wrongful Convictions
357 East Chicago Avenue
Chicago, IL 60611

APPENDIX

Additional False Confessors

Douglas Warney (Rochester, NY)

In 1996, a man was found lying on his back with 19 puncture wounds on his neck and chest in the kitchen of his home. Mr. Warney, a man with a history of mental health issues and advanced AIDS, called the police department, stating that he had information about a crime. When interrogated by the police, Mr. Warney confessed to the crime. Although the confession included some details of the crime scene, it was filled with inconsistencies. For instance, Mr. Warney implicated an accomplice who was later found to be confined to a clinic at the time of the murder. Additionally, there was no physical evidence that linked Mr. Warney to the crime. Enzyme tests were conducted on the various blood samples collected from the crime scene, none of which linked to Mr. Warney. Despite the lack of physical evidence, Mr. Warney was convicted of second degree murder and was sentenced to 25 years to life in prison.

In 2004, Mr. Warney sought DNA testing of the blood samples from the crime scene. The test results excluded Mr. Warney. The DNA profile matched that of Eldred Johnson, Jr., a New York state inmate already serving a life sentence for other crimes. When Johnson was interviewed, he confessed, stating that he had

killed the victim and that he acted alone. He did not know Mr. Warney. On May 16, 2006, after serving nine years for a crime he did no commit, Mr. Warney's conviction was vacated and he was released from prison.

John Kogut, John Restivo (Lynnbrook, NY)

In the winter of 1984, the naked body of a sixteen year-old girl was found in a wooded area in Lynnbrook, New York. She had last been seen a month earlier, leaving her job from a local roller rink. The victim had been killed by ligature strangulation. Vaginal swabs from the body contained semen and sperm, suggesting that the victim also had been raped. The police believed the crime was similar to other crimes in the area involving the abduction of young women. By the spring of the following year, the police officers began to focus on a man named Dennis Halstead, who allegedly was associated with another young woman who had disappeared. John Restivo was interviewed by the police in connection with their investigation of Mr. Halstead. Mr. Restivo allegedly implicated Mr. Halstead. Mr. Restivo also mentioned that he was acquainted with John Kogut.

In March 1985, Mr. Kogut was interviewed by the local police and agreed to take a polygraph test. After three polygraph tests, Mr. Kogut was told that he lied about not being involved in the sixteen year-old's murder. The police then subjected Mr. Kogut to 12 hours of interrogation, after which the police produced a

brief videotaped confession given by Mr. Kogut implicating himself, Mr. Restivo and Mr. Halstead in the rape and murder. The confession was allegedly the sixth version of facts given by Mr. Kogut and contained no details of the crime that were not already known by law enforcement. At trial, despite the lack of physical evidence conclusively linking Mr. Kogut, Mr. Restivo or Mr. Halstead to the crime, the confession lead to the conviction of all three men.

Post-conviction efforts to exonerate the three men began in 1994. DNA testing of the semen samples went through several rounds during a period of ten years. The tests repeatedly excluded all three men as the donor of the semen. In addition, a key state witness – an expert at the 1986 trial – provided an affidavit stating that the only physical evidence allegedly linking the three men to the crime had, in fact, been falsified. In 2003, the convictions for all three men were vacated. Only Mr. Kogut faced retrial. In 2005, Mr. Kogut was found not guilty after a three month bench trial. All three men spent almost two decades in prison for a crime they did not commit.

Yusef Salaam, Kharey Wise (New York, NY)

In April 1989, a twenty-eight-year old woman was brutally attacked and raped in Central Park. The wounds that the victim suffered were so severe that, when she recovered, she could not remember anything about the attack.

Investigators focused on a group of African-American and Latino youths who were in police custody for a series of other attacks that had been perpetrated in the park. After prolonged interrogations, Yusef Salaam and Kharey Wise were among the five teenagers who confessed to the crime. Salaam's confession was an oral confession and Wise's confession, like those of the three other defendants, was captured on videotape. None of the interrogations was recorded. The confessions were presented at trial, although significant variations existed among them as to the time, location and the details of the rape. Hair sample evidence was also presented at trial, with the prosecution arguing that a hair found on one of the defendants "matched and resembled" that of the victim. Furthermore, hair found on the victim was believed to be from one of the defendants. All five defendants were convicted, Mr. Wise, then sixteen years old, was sentenced to five to fifteen years. Mr. Salaam was sentenced to five to ten years in prison.

In 2002, Matias Reyes admitted to authorities that he alone had committed the attack on the jogger. Unlike the confessions of Mr. Salaam and Mr. Wise, Reyes' confession corroborated details of the crime scene and was consistent with other crimes Reyes had committed. Indeed, Reyes was a convicted murderer and rapist who had committed another rape in Central Park using the same modus operandi. Later, DNA testing confirmed that Reyes was the donor of the spermatozoa found in the jogger's rape kit. Testing of the hair found on the victim

also revealed a match to Reyes. Mitochondrial DNA testing of the hair that had been found on one of the defendants showed that that hair was not the victim's after all.

In December 2002, the convictions of all five defendants were overturned. Mr. Salaam had served six and a half years and Mr. Wise eleven and half years for a crime neither of them committed.

Christopher Ochoa (Austin, TX)

Christopher Ochoa and his roommate, Richard Danziger, were picked up by the police during an investigation of a rape and murder that had occurred at a Pizza Hut in Austin, Texas A Pizza Hut waitress had reported the two men to the police after she observed them eat and drink beer in what she thought was a toast to the victim. The two were separately questioned by the police. After prolonged interrogations, and being repeatedly threatened with the death penalty, Mr. Ochoa agreed to "cooperate" and confess to committing the crime. He also implicated his roommate as the shooter and agreed to testify against Mr. Danziger at his trial .

At Mr. Danziger's trial, Mr. Ochoa changed his story and stated that he, not Mr. Danziger, was the one who had shot the victim. Although Mr. Ochoa had plead guilty, Mr. Danziger maintained his innocence, providing his girlfriend as an

alibi witness at trial. Semen samples from the crime scene were never tested. Both Mr. Ochoa and Mr. Danziger were sentenced to life in prison.

Many years later, Governor George W. Bush's office and the Austin District Attorney's office received letters by an inmate named Achim Marino who claimed to be the true perpetrator of the 1988 rape murder. At the time of the letters, Marino was serving three life sentences for other crimes. Marino's letters provided intricate details of the crime scene as well as directions for discovering the murder weapon. In his letters, Marino also stated that he did not know Mr. Ochoa or Mr. Danziger and did not understand why they would have confessed to a crime that he alone had committed. Later, a test of the semen samples collected from the victim excluded both Mr. Ochoa and Mr. Danziger from any involvement in the crime and implicated Marino. After serving twelve years in prison for a crime they did not commit, Mr. Ochoa and Mr. Danziger were exonerated and released in 2001.

Jeffrey Deskovic (Peekskill, NY)

In 1989, the body of a fifteenyear-old high school student was found in a pond in Peekskill, New York. The teenager had last been seen two days before taking photographs for a photo class. Jeffrey Deskovic, a sixteen-year-old classmate of the victim, was questioned by the police and released. In the months that ensued, Mr. Deskovic while repeatedly asserting his innocence, attempted to

assist the police in the investigation. Due to his fascination with the case, Mr. Deskovic offered the fruits of his own investigations and theories of the crime. On one occasion, the police officers asked that Mr. Deskovic take a polygraph test. Mr. Deskovic complied. Between the sessions of questioning for the polygraph test, Mr. Deskovic was further interrogated by the police, without his parents or attorneys present without access to any food. Mr. Deskovic was then told that he had failed the polygraph test. Under these circumstances, Mr. Deskovic confessed to the crime. At the end of the six hour interrogation, Mr. Deskovic was curled up in a fetal position under a desk and sobbing.

At trial, the jury was told that the semen sample found on the victim did not match Mr. Deskovic. Nonetheless, the jury convicted Mr. Deskovic based entirely on his confession.

In early 2006, attorneys from the Innocence Project requested that the semen sample be subjected to a more advanced form of DNA testing. These test results were then entered into a national database and resulted in a to another New York inmate who was incarcerated for a different murder. That inmate has since confessed to the murder of the fifteenyear-old high school student. Although the charges against Mr. Deskovic have not yet been formally dropped, it is a formality that is expected to occur any day in light of the new DNA evidence and the confession from the true perpetrator.

Michael Pardue (Mobile, AL)

In May of 1973, two service station clerks were brutally murdered in the two nearby counties of Mobile and Baldwin, Alabama. Enormous pressure was put on law enforcement to solve the two murders quickly. On the night of the murders, seventeen-year old Michael Pardue was with friends at a motel located two miles from one of the service stations. Mr. Pardue committed two car thefts with a friend that night. One of the car thefts was committed eight miles away from one of the service station murders and at approximately the same time as the murder. Due to the car thefts, the police focused on Mr. Pardue in the investigation of the two gas station murders. Intending to confess to the car thefts, Mr. Pardue voluntarily went to the police station. What ensued was a 78 hour interrogation where Mr. Pardue was afforded no aid of counsel, no sleep and very little food. During the interrogation, it became known to the police that Alabama Power Company had workers discovered the skeleton of a forty three year-old man. At the end of the interrogation, Mr. Pardue confessed to murdering the two service station clerks and the forty three year-old man.

At trial, police and prosecutors wove together a web of fabricated forensic evidence to conform to Mr. Pardue's confession. The jury convicted Mr. Pardue of all three murders and sentenced him to three life sentences. While in prison, Mr.

Pardue, hopeless that the justice system would right this wrong, made three short-lived escape attempts. These escapes resulted in another life.

In 1994, more than two decades after Mr. Pardue's confession, district court judges issued writs of habeas corpus for all three murder convictions based on the fact that Mr. Pardue's rights were violated in the interrogation and proceedings leading up to his trial. Prosecutors in both Mobile and Baldwin counties dropped all three murder charges against Mr. Purdue. In February 2001, Michael Pardue was released from Alabama state prison after serving 28 years for a crime he did not commit.

Bruce Godschalk (Montgomery County, PA)

In the winter of 1986, a burglary and two rapes occurred in an apartment in Montgomery County, Pennsylvania where two female occupants lived. One of the victims identified Bruce Godschalk as the perpetrator. The other victim assisted the police in creating a composite sketch that bore similarities to Mr. Godschalk's features. In January 1987, after a series of interrogations, the police obtained a confession by Mr. Godschalk. The taped confession contained details of the crime known only to law enforcement. At trial, semen samples from the crime scene were produced and conventional serology tests could not exclude Mr. Godschalk as the donor. The prosecution also called as a witness a jailhouse snitch who testified that Mr. Godschalk had made inculpatory statements to him relating to the

crimes. Mr. Godschalk was convicted by a jury of both counts of rape and one count of burglary. He was sentenced to ten to twenty years.

In 2002, after much effort was made by Mr. Godschalk's attorneys to search for the physical evidence presented at trial, the prosecution finally provided two semen samples, one from the carpet at the crime scene and the other from the victims. The DNA profiles of the semen samples matched one another and excluded Mr. Godschalk. After serving fifteen years for a crime he did not commit, Mr. Godschalk was finally released from prison shortly thereafter.

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

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

Name of Typeface: Times New Roman
Foint Size: 14
Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 6756.

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