

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

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

Respondent

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

-against-

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~~, 200~~8~~⁷, 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


Counsel for the Amici *XSPD*

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**

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

Respondent

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

-against-

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.

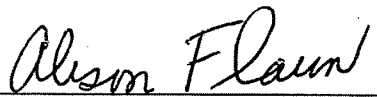
6. Since the Defendant-Appellant's conviction, much has been learned about the phenomenon of false confessions. False evidence ploys, such as those used during the Defendant-Appellant's interrogation, are powerful tools in extracting what are called "coerced persuaded false confessions."

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


Counsel for the Amici *vs AD*

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

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 certain 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 affidavit.

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.

