

**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

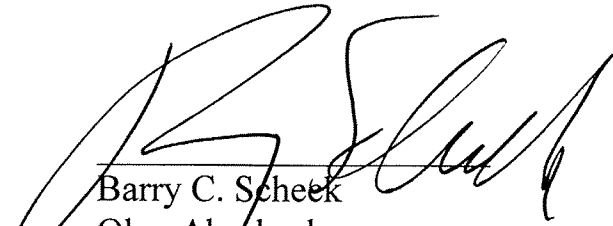
**NOTICE OF MOTION FOR LEAVE TO FILE *AMICI CURIAE*
BRIEF IN SUPPORT OF DEFENDANT-APPELLANT**

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

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

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

Dated: New York, New York
December 6, 2006



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

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

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

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

2. I make this affirmation in support of the Motion for Leave to File *Amici Curiae* Brief submitted by the Project and the Network, referred to collectively herein as “Prospective *Amici*”.
3. True and correct copies of the County Court’s denial of Defendant-Appellant’s motion pursuant to C.P.L. Section 440.10 and Defendant-Appellant’s Notice of Appeal are attached hereto at Tabs A and B, respectively.

Interests of Prospective *Amici*

4. The Project is a nonprofit organization founded at and affiliated with the Benjamin N. Cardozo School of Law in New York, New York. The Project provides *pro bono* legal assistance to persons whose claims of innocence can be conclusively proven through post-conviction DNA testing.
5. The Project pioneered the post-conviction DNA litigation model that has to date exonerated 21 innocent persons in New York and 187 persons nationwide, and served as counsel or provided critical assistance in a majority of these cases. The Project’s Litigation Department currently has a caseload of over 200 post-conviction DNA matters from around the nation, including 29 in the State of New York.
6. The Network is an association of 36 member organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners

whose actual innocence may be established by post-conviction evidence.¹

The Network currently represents hundreds of prisoners with innocence claims throughout the country.

Issues to be Addressed

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

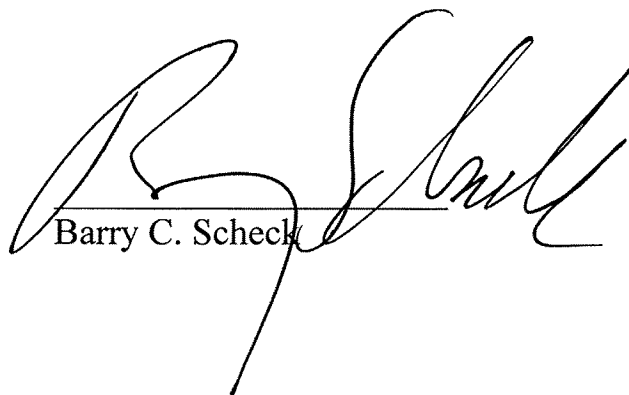
¹ The Network's members include: Arizona Justice Project; Association in Defense of the Wrongly Convicted; Barbara C. Salken Criminal Justice Clinic; California & Hawaii Innocence Project; Center on Wrongful Convictions; Cooley Innocence Project; Downstate Illinois Innocence Project; Florida Innocence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

8. Given the pervasiveness of coerced and false confessions and the devastating consequences such confessions have on our justice system, Prospective *Amici* will also write to encourage the Appellate Division to adopt a rule, as courts have in several other jurisdictions, that where there is an unexcused failure to electronically record a custodial interrogation, the resulting confessions are inadmissible or in the alternative the jury must be instructed that such confessions are inherently more unreliable. Electronic recording of interrogations creates an objective record that allows judges and juries to make more accurate determinations as to whether a particular suspect confessed and whether the confession was voluntary and reliable.
9. Prospective *Amici* will also address the County Court's erroneous denial of Defendant-Appellant's motion for post-conviction DNA testing on fingernail scrapings from one of the victims. DNA testing has the potential to provide undisputed scientific evidence in support of a convicted person's claim of innocence. Although this error is being appealed in a separate proceeding, the County Court's denial of Defendant-Appellant's DNA motion casts significant doubt on whether the County Court fulfilled its duty to carefully consider the evidence presented during the 440.10 proceedings.
10. Prospective *Amici* will aid the Court by drawing upon their extensive experience litigating post-conviction exoneration cases throughout the

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

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

Dated: New York, New York
December 6, 2006


Barry C. Scheck

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

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, Joeseeph 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

