

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

THE PEOPLE OF THE STATE OF NEW YORK,

VS

MARTIN H. TANKLEFF,

Defendant,

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: BRASLOW, J. C. C.
:
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: DATE: March 17, 2006
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: COURT CASE NO.: 1535-88
: 1290-88
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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, Joeseoph 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 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.

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. Kassir'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. Kassir.

In the instant matter, Dr. Ofshe has performed the function that Dr. Kassir 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 inadmissible 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 Guarascio 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,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke.

STEPHEN L. BRASLOW - J.C.C.