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February 24, 2014

Honorable Kenneth P. Thompson
District Attorney, Kings County
350 Jay Street
Brooklyn, NY 11201-2908

Re: People v. John Giuca, Ind. No. 8166/2004
Petition for Review by Kings County District Attorney's Conviction Review Unit

Dear Mr. Thompson:

I have been retained by the law firm of Bederow Miller LLP in connection with their representation of John Giuca. I am writing this letter in support of their Petition requesting your office's Conviction Review Unit to review Mr. Giuca's 2005 murder conviction. This letter addresses several ethical issues relating to the conduct of the trial, and especially the conduct of the trial prosecutor, Assistant District Attorney Anna Sigga-Nicolazzi. I have reviewed the extensive litigation materials in this case, including the trial transcript and exhibits, grand jury testimony, investigative documents, appellate briefs and opinions, and post-conviction materials, including sworn recantations by three of the principal prosecution witnesses. It should be noted that I have been critical of the conduct of former District Attorney Charles Hynes. See Graham Rayman, *Brooklyn Deserves New D.A.*, VILLAGE VOICE, January 2, 2013; Graham Rayman, *Brooklyn D.A. Charles Hynes Faces Questions About Hiring Reluctant Witness in Murder Case*, VILLAGE VOICE, June 12, 2013.

I served as an Assistant District Attorney in the New York County District Attorney's Office from 1966-1972. Thereafter I served as Assistant Attorney General in the New York State Special Prosecutor's Office from 1972-1976, which was established by the Governor of the State of New York to investigate and prosecute corruption in New York City's criminal justice system. I served as the Bureau Chief of the Appeals Unit and the Bronx Anti-Corruption Unit. I am a tenured Professor of Law at Pace Law School, in White Plains, New York, where I have been employed from 1976 to the present. I have taught many courses relating to criminal law, Criminal Procedure, Trial Evidence, and Constitutional Law. During my



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May 28, 2014

Honorable Kenneth P. Thompson
District Attorney, Kings County
350 Jay Street
Brooklyn, NY 11201-2908

Re: People v. John Giuca, Ind. No. 8166/2004
Petition for Review by Kings County District Attorney's Conviction Review Unit

Dear Mr. Thompson:

I have previously written a letter dated February 24, 2014 in support of the Petition filed by Mark A. Bederow, Esq., attorney for John Giuca, seeking review of Mr. Giuca's 2005 murder conviction by your office's Conviction Review Unit. In that letter I addressed several ethical issues relating to the conduct of the trial prosecutor, Assistant District Attorney Anna Sigga-Nicolazzi, including her distortion of the truth by presenting inconsistent and contradictory theories of guilt; apparent knowing use of false testimony (at least with respect to Albert Cleary, Angel DiPietro, and John Avitto); attacking the defendant's character with improper and inflammatory arguments; suppressing evidence favorable to the defendant; vouching for the credibility of her witnesses and the reliability of her evidence; and using false evidence to misrepresent the character and credibility of her most important witness, John Avitto.

I am taking the liberty of writing this letter to support a letter from Mr. Bederow to Michael Trabulsi, Esq., dated May 20, and to address what appears to be one of the most serious issues of prosecutorial misconduct that I have encountered recently. I refer to Mr. Bederow's claim that the prosecution created and used false evidence to convict Mr. Giuca, namely, a letter purportedly written by Sean Ryan, Mr. Avitto's case manager in his drug treatment program, which describes Mr. Avitto's status in the program. This letter, dated September 20, 2005, is either a forgery, as Mr. Bederow alleges, or is certainly a materially altered document that misrepresents Mr. Avitto's conduct in the program by conspicuously omitting a serious violation that was prominently described in Mr. Ryan's letter dated September 19th. However, the September 19th letter was altered, and the new letter of September 20th was created in its place to make it appear that Mr. Avitto was successfully participating in the drug program, and thereby allowed Ms. Nicolazzi to falsely represent to the jury that Mr. Avitto was doing well in the program, did not need the help of the District Attorney to get through the program, and testified because he was a responsible citizen trying to do the right thing. These preposterous arguments – all of them deliberate fabrications by Ms. Nicolazzi -- were used to convict Mr. Giuca.

There are few if any more serious violations by a prosecutor, legally and ethically, than using fabricated evidence to convict a defendant. See ABA Model Rule 3.3(a)(4); ABA Standards for Criminal

Justice 3-5.6(a). A prosecutor's use of false evidence usually involves false testimony by a prosecution witness which the prosecutor either solicits, or fails to correct, which apparently happened here. See *Giglio v. U.S.*, 405 U.S. 150 (1972); *People v. Savvides*, 1 N.Y.2d 554 (1956). A less frequent form of misconduct, but arguably more reprehensible, is a prosecutor's use of false physical evidence. See *Miller v. Pate*, 386 U.S. 1 (1967). The use of false physical evidence is reprehensible; it impairs the integrity of the trial by perverting the search for the truth with false evidence. And since the falsity is known only to the prosecution, and because of its physical nature, the use of this evidence prevents the defendant from effectively confronting and challenging this damning non-testimonial proof.

From my experience reviewing the conduct of prosecutors, the conduct of Ms. Nicolazzi in relying upon the possibly forged and certainly fabricated September 20th Ryan letter to enhance Mr. Avitto's credibility is as brazen as any conduct I have encountered. It is certain that the September 20th letter is a fabrication. Mr. Avitto in a court proceeding on September 19th was reprimanded by the judge for smuggling contraband into the Kingsboro drug facility and dispensing it to other inmates. Mr. Avitto, as the September 19th transcript clearly states, admitted his guilt in the presence of Mr. Ryan and the District Attorney. His misconduct was described in Mr. Ryan's letter of September 19th. There is absolutely no doubt that if Mr. Ryan's September 19th letter was known by Mr. Giuca's attorney, his cross-examination of Mr. Avitto would have been far more compelling, and would have effectively prevented Mr. Avitto and Ms. Nicolazzi from making their false and cynical representations to the jury that Avitto was "doing good" in the program, and effectively refuting Ms. Nicolazzi's claim that Avitto lacked a motive to seek a benefit in exchange for his favorable testimony. But Mr. Giuca's attorney never saw the September 19th letter; it was effectively suppressed, and a new letter dated September 20th was created to take its place for use during defense counsel's cross-examination.

The circumstances under which the September 20th letter was concocted, and the parties responsible for its preparation, are presently unknown. But it is virtually certain that Mr. Giuca's attorney possessed only the September 20th letter; the prosecution never disclosed Mr. Ryan's letter dated one day earlier. For example, a reference to the Seafield Rehab Center – which Mr. Giuca's attorney specifically noted in his cross-examination of Avitto - was contained in the September 20th letter, but was not contained in the September 19th letter. The critical violation by Avitto – smuggling contraband into the Kingsboro Rehab Center – was contained in the September 19th letter but omitted from the September 20th letter. Whether Ms. Nicolazzi (or anyone else from the District Attorney's Office) was responsible for the fabricated September 20th letter, and whether the letter is a forgery or a fabrication, is irrelevant to whether Mr. Giuca's fair trial rights were violated. Regardless of whether the prosecution actually knew about the falsity of the evidence, or used it unwittingly, the prosecution is deemed to be responsible for the injury to Mr. Giuca's ability to receive a fair trial. See *Giglio v. U.S.*, supra.

The creation and use of this fabricated letter to convict Mr. Giuca adds another layer of prosecutorial malevolence to the other serious issues of misconduct discussed in my February 24th letter. Taken together, these acts of misconduct demonstrate clearly and convincingly that Mr. Giuca did not receive a fair trial, and that his conviction lacks integrity.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bennett L. Gershman", with a large, sweeping flourish underneath.

Bennett L. Gershman

academic career I have represented as a defense lawyer numerous persons charged with crimes, including murders. I am frequently consulted as an expert in prosecution conduct, criminal procedure, and professional ethics. I have testified as an expert witness in legal proceedings and before Congress. I have written a treatise on the prosecutor's conduct entitled *Prosecutorial Misconduct* (2d edition Thomson/West, supplemented annually), and a treatise on criminal trial conduct and ethics entitled *Trial Error and Misconduct* (2d ed. Lexis-Nexis, supplemented annually). I have written extensively on issues relating to a prosecutor's conduct in investigating crime, interviewing witnesses, disclosure obligations, presenting evidence at trial, and arguments to the jury. I lecture frequently and write on issues of criminal procedure and professional ethics, and I am consulted often by members of the media on such issues. My *curriculum vitae* is attached to this letter, which includes a list of all publications I have authored and my expert testimony.

Most respectfully, after reviewing all of the materials in the case, it is my opinion that Mr. Giuca did not receive a fair trial. It is my further opinion that ADA Nicolazzi deviated on numerous occasions from ethical standards relating to a prosecutor's conduct in the presentation of evidence and argument to the jury. By her distortion, subversion, and suppression of evidence, and improper arguments to the jury, ADA Nicolazzi undermined Mr. Guica's right to a fair trial, and corrupted the integrity of the jury's verdict. ADA Nicolazzi, in order to win a murder conviction in a high-profile case, recklessly disregarded a prosecutor's overriding responsibility as a minister of justice to ensure that only reliable and trustworthy evidence be presented to the fact-finder. She further violated her ethical responsibilities to avoid using misleading, deceptive, and inflammatory tactics which have the potential to skew a jury's careful and rational assessment of the proof, and her conduct prevented the jury from arriving at a fair and reliable verdict. Indeed, a conviction whose foundation is built upon the presentation of false evidence which is then vouched for by the prosecutor violates Due Process and the prosecutor's duty to serve justice. Mr. Guica's Petition for Review by the Conviction Review Unit presents credible and material evidence that creates a "reasonable likelihood" that he did not kill Mark Fisher, or culpably participate in his death. Thus, pursuant to the recently amended ABA Model Rule 3.8 (g) and (h), and the New York Rules of Professional Conduct, Rule 3.8, comments [6B], [6C], [6D], and [6E], a prosecutor has an ethical post-conviction responsibility to undertake an investigation to determine whether there exists "clear and convincing evidence" that Mr. Guica was wrongly convicted of the murder of Mark Fisher.

Prosecutor's Duty to Serve Justice and Truth

A prosecutor, as a central component of his duty to serve justice, has a fundamental obligation to promote and protect the truth. Accordingly, a prosecutor has an overriding responsibility not simply to convict the guilty but to protect the innocent. *Berger v. United States*, 295 U.S. 78 (1935). The duty to serve truth arises from several sources, especially the prosecutor's constitutional obligation not to use false evidence or to suppress material evidence favorable to the defendant. The duty to truth also arises from various ethical proscriptions that require a prosecutor to have confidence in the truth of the evidence before bringing or maintaining criminal charges. The duty to truth, moreover, may be found in the prosecutor's domination of the criminal justice system, and his virtual monopoly of the fact-finding process. Indeed, the instant case is a paradigmatic example of the prosecutor's power to control the fact-finding process, to gain exclusive knowledge of the facts that will be used to convict the defendant, to employ coercive devices such as a grand jury and other investigative tactics to establish the facts, and a unique ability to shape the presentation of those facts to the jury. Indeed, the prosecutor, in his or her

role as representative of the government and voice of the community, has an extraordinary ability to affect the evaluation of those facts by the jury, who invariably view the prosecutor as a special custodian and warranter of the facts, indeed, as an expert who can be trusted to use the facts responsibly.

Distorting the Truth by Presenting Contradictory Theories, Inconsistent Motives, and Spurious Arguments

ADA Nicolazzi displayed a cynical disregard for the truth in her presentation of the evidence. ADA Nicolazzi, in my opinion, appeared to assume the role of a partisan avenger bent on winning a high-profile murder conviction at all costs, rather than conducting herself as a minister of justice with the duty to protect the integrity of the process, which includes a defendant's right to a fair trial. As described extensively in Mr. Giuca's Petition for Review, ADA Nicolazzi presented several different theories of Mr. Giuca's involvement through the testimony of witnesses Lauren Calciano, Albert Cleary, and John Avitto. Although these theories were inherently inconsistent and contradictory, ADA Nicolazzi represented to the jury that all of these theories was the truth. According to Calciano and Cleary, Russo was the actual killer, and Mr. Giuca supplied the gun. Although Calciano and Cleary were purportedly describing the same conversation, Calciano testified that the motive for the killing was robbery, but Cleary testified that the motive was a form of retaliation because Mark Fisher had disrespected Mr. Giuca's home. Cleary also testified to a different motive, namely, to enhance the reputation of Mr. Giuca's alleged gang. Avitto, on the other hand, testified that Mr. Giuca was present and actively participated in the killing, something no other witness testified to, and which was inconsistent with other evidence that Mr. Giuca was at his home when Mark Fisher was killed. Inconceivably, ADA Nicolazzi argued to the jury that all three witnesses were telling the truth. However, a prosecutor is ethically forbidden to play fast and loose with the evidence in the way ADA Nicolazzi did, and seek to persuade a jury of a defendant's guilt by offering a smorgasbord of theories and motives and then arguing cavalierly to the jury to select whatever theory they like, because, as ADA Nicolazzi argued, it really doesn't matter what theory is selected; "you know that this defendant is every bit involved in this crime" (Trial Tr. 1019).

Using Inflammatory Character Evidence to Contaminate the Jury

Character proof, as every trial lawyer knows, is one of the most dangerous types of evidence. Probably more than any other type of proof, attacking a defendant's character has the capacity to distort a jury's proper evaluation of the facts, and encourages a jury to find a defendant guilty based on speculative and inflammatory considerations. One of the most troubling features of ADA Nicolazzi's conduct was her constant effort to brand Mr. Giuca as the leader of a violent gang, and the killing of Mark Fisher as a gangland execution. By employing this inflammatory tactic, without any credible basis in the evidence and in violation of the court's ruling limiting the proof, ADA Nicolazzi all but destroyed Mr. Giuca's ability to receive a fair trial from an unbiased and impartial jury. From the outset, ADA Nicolazzi overwhelmed the jury with insinuations that the killing was gang-related, and offered the jury an array of reasons to speculate that Mr. Giuca, a "self-titled Mafioso" and "Tony Soprano" figure, according to ADA Nicolazzi, ordered his "soldier" Russo to "show (Mark Fisher) what's up." (Trial Tr. 26, 28). However, the prosecution's theory of Mr. Giuca's participation and motive in the killing, from the earliest stages of the investigation, into the Grand Jury, and as the trial approached, was that Mr. Giuca was an accomplice in a plan to rob Mark Fisher, which therefore provided the legal basis to charge Mr. Giuca as an accomplice in a felony-murder prosecution. Indeed, even though the police and prosecutors conducted a "painstaking" investigation for over a year, they discovered no evidence to link Mr. Giuca or the killing to a gang-type crime. However, as the trial loomed closer, the robbery theory morphed into a

new theory, with devastating consequences. The prosecution added a “Mafia” connection to the case, and ADA Nicolazzi offered the jury an assortment of reasons to credit this proof – that Mr. Giuca was offended that Mark Fisher sat on his table (Trial Tr. 35), that Mark Fisher’s conduct was “disrespectful” of Mr. Giuca’s alleged gang (Trial Tr. 37), and that Mr. Giuca’s gang was becoming too “soft” and needed to commit violent crimes to gain respectability (Trial Tr. 37). ADA Nicolazzi’s fixation on gangster rhetoric and gangster motifs throughout the trial was a clear invitation to the jury to convict Mr. Giuca of Mark Fisher’s murder based not on the facts of the crime itself but on Mr. Giuca’s involvement in gang activities.

Moreover, although prosecutors are forbidden to make arguments in summation calculated to appeal to the biases and prejudices of the jury, see *ABA Standards of Criminal Justice*, Standard 3-5.8(c), ADA Nicolazzi flaunted this admonition throughout her summation, repeatedly playing to the jury’s basest emotions, and the media as well, by employing inflammatory rhetoric to contrast the meekness and innocence of the victim with the malevolent viciousness of the defendant, and characterizing the crime scene as involving “a lamb surrounded by wolves,” an obvious appeal to the deepest sense of outrage by jurors at the tragic event (Trial Tr. 981).

It is difficult to overstate the impact that ADA Nicolazzi’s use of this incendiary proof had on the jury. The judge at a pre-trial hearing recognized the dangers of this proof, and its limited probative value, but nevertheless allowed ADA Nicolazzi some latitude to present limited evidence relating to the gang. As discussed in Mr. Giuca’s Petition for Review (pp. 35-36), ADA Nicolazzi violated the trial judge’s limiting instruction, and overwhelmed the jury with repeated references to gang colors, gang rituals, gang signals, gang attire, and prior acts of violence by gang members. And despite his limiting instruction to ADA Nicolazzi, the judge did not intervene when ADA Nicolazzi presented this voluminous gang evidence, nor did the judge give the jury a limiting instruction on the use of this prejudicial proof.

Subverting the Truth by Using False Evidence

As Mr. Giuca’s Petition for Review demonstrates, three of the four principal prosecution witnesses have provided sworn statements in which they aver that their trial testimony was false, and the reasons for their testifying falsely. To be sure, such recantations are looked upon by courts with utmost suspicion, See *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987). However, the instant recantations are not being submitted to a court in a motion for a new trial based on newly discovered evidence. They are being submitted to the same District Attorney’s Office that secured the defendant’s conviction, and to a newly-created unit in that office that is explicitly tasked with the responsibility to review new evidence, including a witness’s recantation of trial testimony, to determine whether the conviction lacks integrity.

John Avitto’s trial testimony was almost certainly false, as he now avers, and from the record it appears that ADA Nicolazzi knew it was false. As Mr. Giuca’s Petition for Review shows (pp. 22-26), Avitto, in the six months after pleading guilty to burglary and being released into a drug treatment program, violated the terms of his release on at least seven occasions. Nevertheless, ADA Nicolazzi, knowing full well that Avitto committed these serial violations, asked him on direct examination “how have you been doing in the program,” and Avitto answered “I’m doing good” (Trial Tr. 784.) When ADA Nicolazzi asked him “Have you had any relapses (in the program),” Avitto answered, falsely, “I had one,” and ADA Nicolazzi very likely knew that his answer was false. When ADA Nicolazzi asked Avitto whether he was “ever given anything or promised anything in exchange for your testimony,” Avitto answered, falsely, “No.” (Trial Tr. 785). When she asked him whether he “ever asked for anything,” Avitto

answered, falsely, “No.” (Trial Tr. 785). However, it is almost certain from the record, as discussed in Mr. Giuca’s Petition for Review, that ADA Nicolazzi knew that Avitto was testifying falsely. Indeed, Avitto’s sworn recantation discusses the benefits he received from the government, especially his ability to continue to remain at liberty prior to his trial testimony despite at least seven serious program violations. It would be interesting to ask ADA Nicolazzi why she, a senior homicide prosecutor, would appear in court for a low-level drug offender who just happened to be a witness in the most important case her office was prosecuting at the time, and confide privately with the judge at the bench unless she sought to obtain special treatment for Avitto, namely, to be released and to remain at liberty in a drug rehabilitation program, which ADA Nicolazzi told the jury she did not do. It would be interesting to ask ADA Nicolazzi why the District Attorney’s Office continued to help Avitto by consenting to his remaining at liberty despite so many program violations, which ADA Nicolazzi told the jury she and her office did not do. Moreover, it appears that ADA Nicolazzi deceived the jury with respect to Avitto’s motives for coming forward and testifying against Mr. Giuca. Avitto was a lifelong drug abuser with some 17 criminal convictions, many of which were for crimes of dishonesty. According to ADA Nicolazzi, in a shameless argument to the jury in response to defense counsel Sam Gregory’s summation: “[John Avitto] is a man who has made mistakes over and over all his life. And for once, he tried to do something right and for that Mr. Gregory wants you to condemn him.” (Trial Tr. 1022). And as discussed below, ADA Nicolazzi repeatedly vouched for Avitto’s truthfulness, assuring the jury that “you know that everything John Avitto told you is credible;” “you know he was being truthful;” “you know you could trust him;” “John Avitto was very honest.”

The U.S. Supreme Court established many years ago that a prosecutor’s deliberate use of perjured testimony to obtain a conviction violates Due Process and denies a defendant a fair trial. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). As the Court wrote: “Deliberate deception of court and jury by the presentation of testimony known to be perjured is inconsistent with the rudimentary demands of justice.” ADA Nicolazzi, by her deliberate presentation of Avitto’s perjured testimony, which she must have known was false, and then vouching for his truthfulness to the jury, violated Due Process and undermined Mr. Giuca’s right to a fair trial. See *Giglio v. United States*, 405 U.S. 150 (1972); *People v. Colon*, 13 N.Y.3d 343 (2009). Her misconduct was flagrant and by itself alone corrupted the integrity of the Mr. Giuca’s conviction.

Suppressing the Truth by Nondisclosure of Favorable Evidence

Given the prosecution’s superior investigative resources as well as its power to confer benefits on potential witnesses, it is not surprising that prosecutors and police would be able to acquire evidence that may be inconsistent with the prosecution’s theory of the case or otherwise favorable to the defense. Assuming that a prosecutor has exclusive knowledge and control of such evidence, and is in a position to disclose such favorable evidence to the defendant, a prosecutor can easily hide the evidence and obstruct the defendant’s access to the evidence, thereby obstructing the jury’s ability to learn the truth, and denying a defendant a fair trial.

One of the most well-established rules of criminal procedure is a prosecutor’s constitutional and ethical duty to make timely disclosure to the defense of favorable evidence. This duty was enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963), and is reinforced by ethical rules that mandate such disclosure. See *ABA Model Rules*, Rule 3.8(d); *ABA Standards for Criminal Justice*, Standard 3-3.11; *New York Rules of Professional Conduct*, Rule 3.8(b). Courts routinely condemn a prosecutor’s suppression of materially favorable evidence.

In the instant case, ADA Nicolazzi violated this disclosure duty by failing to advise the defense in a timely fashion of the critical testimony of John Avitto, who testified that Mr. Giuca was present and actively participated in the shooting death of Mark Fisher. Not only was Avitto's testimony a virtual bombshell, coming as it did at the end of the trial; his testimony also was directly inconsistent with the testimony of Calciano, Cleary, and Denihan, and would have provided the defense with powerful ammunition to impeach their testimony. See Mr. Giuca's Petition for Review, pp. 55-57. Moreover, ADA Nicolazzi knew when she made her opening remarks to the jury that Avitto would be a key prosecution witness – indeed, she knew he would be the last substantive witness she called. She even told the jury in her summation that "It is not a coincidence that we could give [Avitto's testimony] to you on the last day of the trial" (Trial Tr. 1007). Her comment in summation that Avitto's name was on a "witness list read to you even before jury selection" (along with some fifty other names) and therefore insinuating that the defense had ample notice of Avitto's testimony was a cynical effort to conceal her misconduct. (Trial Tr. 1007-1008). That ADA Nicolazzi in her opening statement neither mentioned Avitto's name nor alluded in to his forthcoming testimony was reprehensible. She deliberately sandbagged the defense when she called Avitto at the end of the trial, and thereby prevented the defense from having adequate time to prepare for his testimony, and using his testimony to discredit the testimony of other prosecution witnesses. Indeed, the theory of the prosecution up to the time of Avitto's testimony, which formed the entire basis for the defense preparation and examination of witnesses, was that Mr. Giuca, although he may have supplied Russo with a gun, was a passive accomplice, who was not present when Mark Fisher was killed.

Moreover, the fact that ADA Nicolazzi disclosed Avitto's evidence by calling him as a witness during the trial, and the fact that his testimony was incriminating, does not cure the *Brady* violation, or somehow absolve ADA Nicolazzi of misconduct. First, the evidence may have been incriminating but given the context, and the way it contradicted the other witnesses, it was clearly favorable to Mr. Giuca. Furthermore, coming so late in the trial, the disclosure undermined the defendant's ability to prepare for the evidence, or alter its theory of the defense. See *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001)(delayed disclosure of key prosecution witness, who was identified nine days before opening arguments and 23 days before defense began its case, prejudiced defendant's right to fair trial and violated *Brady*).

Personally Assuring the Jury of the Truth of the Evidence

"A prosecutor has a special duty not to mislead." *United States v. Myerson*, 18 F.3d 153(2d Cir. 1994). Misleading conduct distorts the search for the truth by interfering with the jury's ability to rationally evaluate the evidence. Thus, a prosecutor is forbidden to express his or her personal belief or opinion as to the truth or falsity of the evidence, or the guilt of the defendant. See *ABA Model Rules*, Rule 3.4(e); *ABA Standards for Criminal Justice*, Standard 3-5.8(b); *New York Rules of Professional Conduct*, Rules 3.4(d)(2) and 3.4(d)(3). The reason is straightforward: a prosecutor's expression of a personal opinion is a form of unsworn testimony and has the potential to exploit the prestige and influence of the prosecutor's office, and induce the jury to trust the prosecutor's judgment as an expert who can be trusted to use evidence properly. ADA Nicolazzi, in her closing argument to the jury, made a shambles of this fundamental rule of trial practice. Throughout her closing argument she repeatedly expressed her personal opinion about the truthfulness of witnesses, the reliability of evidence, and the guilt of the defendant. See Mr. Giuca's Petition for Review, pp. 62-65. The Petition for Review describes ADA Nicolazzi's misconduct, and how she repeatedly, and condescendingly, admonished the jury – as if she were lecturing to a high school class – that the jury had to "know" about closely contested evidentiary matters, thereby insinuating that if the jury did not "know" such obvious things about the

evidence, then the jury either was not intelligently viewing the evidence, or was not using its common sense. Manipulating in this way the jury's ability to rationally view the evidence is deceitful and dishonest. The impact of such argument on the jury's capacity to render an objective verdict is incalculable.

The following references are only a small selection from the numerous instances in which ADA Nicolazzi engaged in prohibited vouching. Thus, John Avitto's testimony – which he has now formally disavowed as perjurious (see Mr. Giuca's Petition for Review, Exhibit O) – probably was the most powerful evidence against Mr. Giuca. According to Avitto, Mr. Giuca was present and participated in the murder, and truthfully confided to Avitto his involvement. However, as the Petition for Review demonstrates, Avitto's testimony was so riddled with inconsistencies, and so palpably false, that it is difficult to imagine that a rational jury, knowing all the facts, would conclude that Avitto was testifying as an upright citizen seeking to serve the cause of justice, as he claimed, rather than, as he avers in his recantation, a witness who gave false testimony "because ADA Nicolazzi and Detective Byrnes told me they would keep me at liberty if I cooperated with their investigation." (p. 5). However, ADA Nicolazzi argued in her summation: "Everything Avitto told you is credible;" "Avitto was being truthful;" "You could trust Avitto;" "Avitto was very honest;" "You know that Avitto isn't making it up." (Trial Tr. 1010, 1017).

Similarly, despite the fact that Calciano and Cleary gave inconsistent, contradictory, and likely perjured testimony, particularly testimony by Cleary that Calciano removed a gun bag which Calciano denied, ADA Nicolazzi nevertheless assured the jury that both Calciano and Cleary were "truthful;" "You know," she told the jury, that "Cleary's testimony was corroborated by Calciano." (Trial Tr. 1002-1006),

Further, ADA Nicolazzi vouched for the testimony of Anthony Beharry, who testified that he disposed of a gun at Mr. Giuca's request, which ADA Nicolazzi claimed was the murder weapon. No gun was ever recovered. Beharry has recanted his trial testimony, claiming that it was given following threats from ADA Nicolazzi and other law enforcement officials that if he did not give the testimony they sought he would be charged with multiple crimes and he would lose access to his young daughter. See Mr. Giuca's Petition for Review, Exhibit J. ADA Nicolazzi, in her summation, vouched for Beharry's testimony, stating to the jury several times that "You know" that the gun which Beharry got rid of was the murder weapon. Indeed, ADA Nicolazzi went even further by stating: "I know the gun is the murder weapon in this case." Telling the jury that she "knows" the gun is the murder weapon" was a deliberate and outrageous tactic which constituted blatant unsworn testimony.

Whether Mr. Giuca gave Beharry a gun, and whether that gun was the murder weapon, were hotly contested issues. See Mr. Giuca's Petition for Review, p. 17. Investigators knew that Russo carried a gun, threatened to use it, and committed several violent crimes. A porter had found a gun in the back yard of Russo's apartment two weeks after Mark Fisher's murder. Russo told a friend that he killed Mark Fisher after retrieving a gun from the home of William Wenzel, and Wenzel was arrested for possessing a firearm. Moreover, Cleary testified that Giuca told him that Beharry had gotten rid of "the guns." Thus, given the confusion and uncertainty over whether Beharry had in fact disposed of a weapon, or weapons, and whether that weapon was the murder weapon, ADA Nicolazzi's formal pronouncement to the jury that she "knew" the gun Beharry disposed of was the murder weapon becomes even more significant, and egregious. By making that baseless comment, ADA Nicolazzi unfairly manipulated the jury's assessment of the evidence. She was aware – as every prosecutor is aware – that in appearing before a jury she is cloaked with tremendous authority and prestige. The jury

knows that a prosecutor has reviewed the evidence carefully and has complete access to all of the facts uncovered during the government's investigation of the case. Suggesting to the jury, as ADA Nicolazzi did, that she "knows" the gun is the murder weapon tells the jury that ADA Nicolazzi has access to private information in her files that proves her contention, and because the jury trusts the prosecutor, they believe her representation is the truth, however biased and baseless it really is.

And finally, ADA Nicolazzi pronounced her own verdict to the jury: John Giuca "is absolutely guilty" (Trial Tr. 1019).

Ethical Irregularities with Angel DiPietro and Albert Cleary

One of the most troubling features in the investigation and prosecution of John Giuca was the manner in which the prosecution interacted with witnesses Angel DiPietro and Albert Cleary. DiPietro and Cleary from the outset appeared to be closely allied to each other, to possess much more information than they disclosed to investigators, and to consistently falsify and mislead investigators, the media, and Mark Fisher's friends. Curiously, however, an investigation and prosecution presumably focused on aggressively learning all of the facts surrounding Mark Fisher's death, and determining who was responsible, appeared to display a cognitive dissonance towards these two individuals – a tunnel vision that obscured the possibility that they may have been far more involved in Mark Fisher's death than they let on. Interestingly, although ADA Nicolazzi engaged in speculation throughout her summation, she showed little interest in many details surrounding the crime that appeared far more incriminating. Thus, ADA Nicolazzi speculated: "John Giuca may very well have had a much larger role" (Trial Tr. 1011); "The order given to Russo whether it was then or before" (Trial Tr. 1014); ""Giuca may very well actually walked him there"(Trial Tr. 1015); "It is even possible that Giuca fired some of those shots himself" (Trial Tr. 1017); "Giuca very well maybe present" (Trial Tr. 1018); "Maybe" Giuca ran back from the shooting (Trial Tr. 1018); "Maybe" they ran in different directions (Trial Tr. 1018); "We don't know" exactly what happened (Trial Tr. 1019).

However, notwithstanding her conjectures about what might have happened at 6:40 am, the time of the shooting, ADA Nicolazzi showed no interest, and never even referred to, other evidence that appears to be relevant to the shooting. For example, several neighbors living near the driveway where Mark Fisher's body was found who were alerted by the shooting clearly heard at the time shots were fired the sound of a van door closing, and the distinct voices of a young man and a young woman. However, ADA Nicolazzi never alluded to these facts, and never even interviewed these neighbors. Moreover, the fact that only some of the shell casings were recovered near Mark Fisher's body suggested to investigators that Mark Fisher may well have been shot somewhere else and his body discarded near the driveway, across the street from Cleary's home, but ADA Nicolazzi did not refer to this proof in her presentation of the evidence.

Further, DiPietro and Cleary's actions the following day were unusual, and for months after the killing were accused by law enforcement of refusing to cooperate, and gave inconsistent and false statements to investigators. DiPietro, who according to ADA Nicolazzi, was the "common thread" among the several groups at Mr. Giuca's home on the night of the

crime (Trial Tr. 22), offered several inconsistent and conflicting accounts of her actions that night and Mark Fisher's purported trip home from Mr. Giuca's home. Based upon statements made to one of Mark Fisher's friends in the days following the murder, DiPietro's mother also lied to police about her whereabouts after the shooting. See Mr. Giuca's Petition for Review, pp. 8, 14-16, 20). After cleaning Cleary's garage, DiPietro and Cleary spent the day of the shooting with her father, a prominent defense attorney, at his home on Long Island, the first time Cleary ever met him.

Strangely, although DiPietro appeared to know much more than she disclosed, and was one of the witnesses who allegedly "stonewalled" the investigation, ADA Nicolazzi apparently interviewed DiPietro only once. Despite the heralded use of the "Hynes Grand Jury" to "squeeze" witnesses and compel testimony, DiPietro apparently was never brought into the Grand Jury for questioning (see Mr. Giuca's Petition for Review, p. 20), notwithstanding ADA Nicolazzi's 2010 admission on national television that all of those persons who were at Mr. Giuca's house shortly before Mark Fisher was murdered – including DiPietro – were "suspects or persons of interest...for well over a year after Mark Fisher's murder." See Mr. Giuca's Petition for Review, Exhibit E, p.10. And most strangely of all, there is the troubling appearance of a conflict of interest that may have animated the conduct of the District Attorney's Office. Indeed, it is astonishing that given DiPietro's suspicious conduct, including her false statements that obstructed the investigation, DiPietro a few years later was hired by Hynes as an Assistant District Attorney. Further, shortly after her hiring, her father made a substantial contribution – apparently the largest single contribution of several he has made - to Hynes's re-election campaign.

Cleary's role in this case also has been puzzling, even bizarre. Cleary, and his mother Susan, also appeared to be concealing their knowledge of what happened, and fabricating stories for their actions on the night of the shooting. See Mr. Giuca's Petition for Review, pp. 7, 10-14). Shortly after the shooting, Cleary contacted his attorney, Phil Smallman, and according to the sworn testimony of Cleary, Smallman gave advice to Mr. Giuca. Cleary left the party with DiPietro earlier in the evening and went to his house nearby where he and DiPietro claimed to have spent the night. Strangely, while several neighbors heard the shooting, Cleary and his mother claimed not to have heard anything. His mother apparently fixed the time of his arrival at 4:30 am to ensure that her son could not be seen to be involved. Shortly after the police began investigating, Cleary's mother approached a neighbor and told her to obstruct the investigation by refusing to discuss her knowledge of Cleary with the police. As described in Mr. Giuca's Petition for Review, Cleary was "squeezed" in the Grand Jury to implicate Mr. Giuca, and gave an account that varied markedly from his testimony at trial. And his account of the events on the night of the shooting continued to evolve factually, and become increasingly incriminating as the trial date grew closer.

And paralleling the irregularities in the prosecution's benign treatment of DiPietro, the prosecution not only featured Cleary as one of its star witnesses, but vouched for, and improperly bolstered, his truthfulness, notwithstanding known defects in his credibility. For example, Cleary's claim that Calciano disposed of a gun bag appears to be false; his changing

stories between his Grand Jury testimony and at trial about Mark Fisher's "disrespect" by sitting on a table appears to mesh more closely with the prosecution's newly evolved theory of Mr. Giuca's involvement; the results of Cleary's polygraph test – in which his statement that he knew nothing about the killing was found by the examiner to be truthful -- shows either that Cleary lied successfully to the polygraph examiner, or to the jury; and his waiver of immunity in the grand jury was a cynical tactic by ADA Nicolazzi and Cleary to provide Cleary with a legal cloak to support his claim of non-involvement. And notably, ADA Nicolazzi, in a disingenuous attempt to bolster Cleary's credibility, asked Cleary whether he took a polygraph test, thereby leaving the misleading impression with the jury that Cleary had taken the test and passed, and that his testimony at trial was truthful. Indeed, asking about a polygraph test, as ADA Nicolazzi surely knew, violates Rule 3.4(d)(1) of the New York Rules of Professional Responsibility, (lawyer must not offer evidence he or she knows is inadmissible).

As with DiPietro, Cleary's involvement in this case also raises serious questions about whether Hynes engaged in unethical conduct relating to prohibitions against conflicts of interest. See *ABA Standards for Criminal Justice*, Standard 3-3.1(f)(prosecutor must not permit professional judgment to be influenced by personal or political considerations); *New York Rule of Professional Conduct*, Rule 1.11(f)(3). In the instant case, Cleary's mother Susan, who appears to have played a central role in Cleary's refusal to cooperate in the investigation, was a high-ranking official in the Brooklyn Republican Party, and was a member of the small executive committee which crossed party lines and threw its support behind Hynes in a closely-contested campaign for re-election. See Mr. Giuca's Petition for Review, p. 21-22. Indeed, her committee's endorsement of Hynes in May 2005, several months before Mr. Giuca's trial, was the first time her committee supported Hynes. As an ethical matter, there is a serious appearance of impropriety when the District Attorney's political future is being furthered by a high-ranking Party official at the same time her son is linked to a murder, at risk of being charged criminally, and is used as a witness notwithstanding serious doubts as to his truthfulness.

Conclusion

John Giuca, in my opinion, for the reasons discussed above, did not receive a fair trial. The integrity of his conviction was corrupted by an evidentiary foundation built on false evidence, and further undermined by the misconduct of the prosecutor who knowingly presented perjured testimony, and vouched for its truthfulness.

Thank you for your consideration of this letter.

Respectfully submitted,



Bennett L. Gershman