

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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THE PEOPLE OF THE STATE OF NEW YORK, :

: AFFIDAVIT

-against- :

JOHN GIUCA, : Indictment No.

Defendant. :

\_\_\_\_\_ x

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss:

John Avitto, being duly sworn, states under penalty of perjury, as follows:

1. I am 43 years old. I make this affidavit of my own free will. Nobody has provided me with, or promised me, or anyone else, any benefit or consideration in exchange for executing this affidavit.

2. I recognize the significance of this sworn statement. Making this statement is not an easy thing to do. In sum, I acknowledge that I testified falsely at the trial of John Giuca ("Giuca") in September 2005 in an effort to help the Brooklyn District Attorney's Office ("the DA") secure an important conviction in exchange for the DA's help in keeping me out of prison.

3. I have been wracked with guilt for years as the result of my false testimony. I regret that I have not revealed it earlier. However, at the time I testified, I was concerned about receiving a lengthy prison sentence because I had repeatedly violated a favorable plea agreement,

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and I wanted the DA to help me avoid incarceration. Additionally, in the years since I testified falsely against Giuca I have been concerned with being prosecuted for perjury and other serious crimes.

4. On or about October 21, 2004, I was arrested for burglary. Because of my lengthy criminal history, I was jailed after my arrest. For a period of time that I was detained on Riker's Island, I resided in the same dorm as Giuca. I was aware that Giuca was being held in connection with the Mark Fisher case.

5. On February 8, 2005, I pleaded guilty to burglary in Kings County Supreme Court with the understanding that I would be placed into a drug program. If I successfully completed the program, the indictment against me would be dismissed. However, if I violated the conditions of my release into the program, I would receive a sentence of 3 ½ to 7 years in state prison. I was specifically told that if I failed to complete the program, for example by leaving the program or getting kicked out of the program, I would receive the prison sentence.

6. On February 22, 2005, I was released from custody into a drug treatment program. Giuca and I have not spoken since February 2005 and the only time I have seen Giuca since February 2005 is when I testified against him in September 2005.

7. On or about June 5, 2005, I absconded from the program. I knew that this would result in a warrant for my arrest, and that I was in violation of the terms of my February 2005 release. I further understood that this would virtually guarantee that I would be sentenced to a lengthy state prison sentence, per the terms of my guilty plea.

8. After I absconded from the program in early June 2005, I began using cocaine again. It was during this time, while I was violating the terms of my release by using cocaine and absconding from the program, that I concocted a plan that I believed would help me avoid being

held in violation of my plea agreement. Because I had been housed with Giuca in jail and knew that the Fisher case was a high-profile and important prosecution, I decided to tell authorities that I had incriminating information against Giuca, which I would share in exchange for assistance with my own case.

9. While still a fugitive from justice, I called the NYPD and reported that I had information about the Mark Fisher case. I was then placed in contact with Detective Byrnes. I told him that I had information about the Fisher case, but that I had recently absconded from a drug program, that there was a warrant out for my arrest, and that I was facing a lengthy prison sentence. Detective Byrnes said that he could help me clear up the warrant if I had useful information about the Fisher case. Detective Byrnes clearly left me with the impression that if I alleged that I knew about Giuca's role in Mark Fisher's murder that law enforcement was going to help me with my case.

10. The only reason I contacted law enforcement in June 2005 in order to "help" them with the Fisher case was so that they in turn would help me avoid further incarceration after I had just recently violated my plea agreement by absconding from my program and using cocaine. At no time prior to my plea agreement violations of early June 2005, did I ever attempt to contact law enforcement claiming that I had information about the Fisher case. I contacted law enforcement when I did because I was in trouble and in order to help myself.

11. On or about June 13, 2005, Detective Byrnes escorted me to the DA's Office, where I was briefly interviewed by Assistant District Attorney ("ADA") Nicolazzi, Det. Byrnes and another female, who I believe also was a prosecutor.

12. During this first meeting with the DA, while still a fugitive, I claimed that while I was incarcerated with Giuca, he confessed to me his role in the Fisher murder. I claimed that

Giuca told me that he and two others went to an ATM machine with Mark Fisher and that after Mark withdrew \$20, Giuca pulled out a gun and beat Fisher. I further claimed that another individual then took the gun from Giuca and shot and killed Mark Fisher. ADA Nicolazzi took notes during this interview. I lied to the DA about Giuca's purported admissions to me about his involvement in Mark Fisher's murder. My hope was that the DA believed I was useful to them and that in return the DA would help me with my case.

13. I now know that my false version of events which incriminated Giuca was entirely (and obviously) inconsistent with the other evidence possessed by the DA as well as undisputed facts about the case. For example, I now know that no other witness has ever alleged that Giuca was physically present when Mark was shot, and no other witness has ever claimed that the shooting was committed in the presence of three perpetrators next to or near an ATM machine. I now also know that Mark returned safely to Giuca's house after withdrawing the \$20.

14. My false version of events was created largely from my recollection of newspaper accounts that I had read. From 2003 to 2005, the Mark Fisher murder case was frequently written about in all of the New York City newspapers.

15. I met with ADA Nicolazzi, Detective Byrnes and a few other members of the DA approximately two or three more times after our initial meeting. ADA Nicolazzi took some notes. During one of the subsequent meetings with the DA, I falsely claimed that I had overheard Giuca and his father have a discussion about why Giuca had a gun. I told the DA that this occurred during a visit at Riker's Island, when both of us were in the visitation room together with our families. I made up the story about the gun because I had in fact been present in a Rikers' visiting room with Giuca and I knew that if the DA secured those records, the

records would confirm the visits, and it would make me appear more credible. I never claimed to overhear anything during a jail visit during the first meeting with the DA.

16. As they had agreed before I spoke to them, immediately after my first meeting with the DA, ADA Nicolazzi and Detective Byrnes escorted me to court in order to clear up my warrant and keep me out of jail because I was helping them. I was not handcuffed or physically restrained when I was brought to court.

17. Once we arrived in court, ADA Nicolazzi immediately asked to approach the bench. I was not privy to this off the record conversation. Despite the fact that I had become a fugitive only a few months into a years-long treatment program, I was released on my own recognizance and instructed to appear back in court on June 21, 2005. I was warned that I had to cooperate fully with the program or the court would have "no choice but to put [me] back in jail." I expected to be released because ADA Nicolazzi and Detective Byrnes told me they would keep me at liberty if I cooperated with their investigation.

18. Within a few days after ADA Nicolazzi had secured my release, I again violated my release conditions by first refusing to submit to a urine test and then testing positive for recent cocaine usage after I finally took the test. I had used cocaine during the period of time that I had absconded and shortly before meeting with ADA Nicolazzi the first time. I was aware that my initial refusal to submit to a urine test and the eventual positive test were further violations of my release conditions. On June 16, 2005, only three days after I had been released without bail despite violating the terms of my plea, my program counselor notified the court that I was in violation again because of a positive cocaine test. My case was advanced from June 21 to June 17 as a result.

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19. At this appearance, ADA Grace Hogan appeared for the DA. The Court lectured me again about my continuing violations and that it had no choice but to put me in jail. ADA Hogan did not utter a single word during the hearing and did not request bail. Once again, I was released on my own recognizance.

20. In August 2005, I had another relapse. I appeared in court and again was released to enter a detox program rather than held on bail or sentenced to state prison. Once again, the DA did not seek bail or incarceration.

21. In early September 2005, shortly before I testified at trial, I again violated the conditions of my release by leaving the detox facility prematurely. Another warrant for my arrest was issued. Days later, on September 6, 2005, I appeared in court to answer to this latest violation. The DA did not seek bail or ask that I be remanded in order to be sentenced. Yet again, I was released on my own recognizance with instructions to enter a program. I entered the Kings Boro Rehab Facility.

22. Within days of my entry into the Kings Boro rehab facility, my counselor reported to the court that I was expelled from the Kings Boro program. On September 19, 2005, only three days before I testified against Giuca, I appeared in court to answer this latest violation. My counselor, Sean Ryan, informed the court that I had smuggled contraband (cigarettes) into the facility. A letter from Mr. Ryan outlining this violation, as well as several other violations, was submitted to the Court. Once again, the DA consented to my release. I was released on my own recognizance.

23. Recently, I reviewed another letter from Mr. Ryan, dated September 20, 2005, which also addresses my violations. This letter is virtually identical to the letter filed in court on September 19, 2005. This second letter deleted the language presented to the court that I had

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been discharged for smuggling in and distributing contraband. Instead, this revised version merely claims that I did not make an intake appointment and that my whereabouts were "unknown." I do not know why Mr. Ryan would have drafted two letters in this fashion, or if he was requested to do so by the DA.

24. On September 22, 2005, I testified against Giuca. From June 2005 to September 2005, despite several violations of my plea agreement, the DA kept its promise to help keep me out of jail and from being sentenced to prison for violating the conditions of my February 8, 2005, plea, in exchange for agreeing to testify against Giuca. Satisfied to this point in the assistance that I had received from the DA, I agreed to testify against Giuca.

25. I have reviewed a transcript of my direct and cross examination. I am ashamed of it. The testimony is riddled with knowingly false statements I made about Giuca. Some of the critical lies I swore to include:

a. I swore that in February 2005, during a crowded jail visitation session, I heard Giuca's father ask him why he had a gun with him and that Giuca replied "I just had it." This sworn statement was false. I never heard such a conversation.

b. I swore that sometime later, in the jail dorm, Giuca told me that he and three others, including "the deceased," went to the ATM, "the guy" withdrew \$20, Giuca became angry, pulled out a gun, hit him in the head, punched and kicked him, until one of the other two people grabbed the gun and shot and killed Mark Fisher. This sworn statement was false. Giuca never told me what I testified to in court. In fact, my incriminating sworn statements were in large part taken from my memory of published reports which I read in local newspapers.

c. In response to ADA Nicolazzi's question on how I was doing in my program since being released on my last case (which was in February 2005), I swore that "I'm

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doing good.” This was false testimony and ADA Nicolazzi knew that this was false—she knew that from June 2005 to as recently as days before I testified, I repeatedly violated the conditions of my program. (See ¶¶ 9-23).

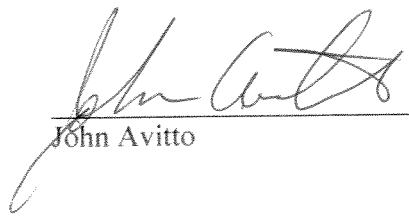
d. ADA Nicolazzi asked me whether I was given anything or promised anything in exchange for my testimony. I falsely swore that I had not. In fact, in exchange for my false testimony, ADA Nicolazzi and Detective Byrnes helped me by keeping me out of jail and avoiding a prison sentence despite numerous violations from June 2005 to September 2005, which should have resulted in my immediate incarceration.

e. ADA Nicolazzi asked me if I had asked for anything in exchange for my testimony. I swore that I did not ask for anything in exchange for my testimony. This testimony was false. In fact, as ADA Nicolazzi and Detective Byrnes knew, I only approached law enforcement after I had absconded from my program and faced a lengthy prison term specifically for the purpose of getting their assistance if I agreed to help them by testifying against Giuca. I told Detective Byrnes and ADA Nicolazzi this during our first meeting. I have reviewed ADA Nicolazzi’s summation where she claimed that I testified because “for once, [I] wanted to do something right.” She knew that I reached out to law enforcement only after I had absconded and was in jeopardy of receiving a lengthy prison sentence. She knew that I was seeking assistance from the DA in exchange for testifying against Giuca.

26. I have seen the trial transcript where ADA Nicolazzi stated that “there was never anything documented, there was never any notes taken” during my meetings with them. I observed her take notes.

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John Avitto

Sworn to before me this  
8 day of July, 2013



IGOR LAZEBNIK  
NOTARY PUBLIC, STATE OF NEW YORK  
Registration No. 01LA6245159  
Qualified in Kings County  
Commission Expires July 18, 2015