

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 19

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN GIUCA,

Defendant.

NOTICE OF C.P.L.
§ 440.10 MOTION

Indictment No.
8166/2004

PLEASE TAKE NOTICE that upon the annexed affirmation of MARK A. BEDEROW, the accompanying exhibits on the included flash drive, and the accompanying memorandum of law, and upon all prior proceedings had herein, the undersigned will move the Supreme Court of the State of New York, Part 19, County of Kings, 320 Jay Street, Brooklyn, New York, on the 9th day of September 2019 at 9:30 in the forenoon of that day, or as soon as counsel can be heard, for an Order, pursuant to C.P.L. § 440.10(1)(b), (f) and (h), and the Due Process Clauses of the New York State and United States Constitutions, vacating defendant John Giuca's September 27, 2005, conviction herein and ordering a new trial, or alternatively, granting an evidentiary hearing to determine this motion.

Yours etc.,

By: 

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Attorney for John Giuca

Dated: New York, New York
August 5, 2019

TO: Clerk of Court
Criminal Term
Supreme Court, Kings County
320 Jay Street
Brooklyn, New York 11201

Eric Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN GIUCA,

Defendant.

AFFIRMATION

Indictment No.
8166/2004

MARK A. BEDEROW, an attorney admitted to practice law before the Courts of this State, affirms under penalty of perjury, as follows:

1. I am the attorney of record for the defendant, JOHN GIUCA. I am familiar with the facts and circumstances herein, and make this affirmation in support of Giuca's motion seeking an order, pursuant to CPL § 440.10 (1) (b), (f), and (h), and the Due Process Clauses of the United States and New York State Constitutions, vacating his judgment of conviction entered September 27, 2005, for murder in the second degree, robbery in the first degree and criminal possession of a weapon in the second degree, based upon the People's violation of Giuca's right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963) and *People v.*

Paperno, 54 N.Y.2d 294 (1981), or in the alternative, granting an evidentiary hearing on this motion.

2. Prior to making this affirmation on Giuca's behalf, I have listened to a recorded sworn interview of Joseph Ingram by former ADA Anna-Sigga Nicolazzi in the presence of Detective James McCafferty on July 21, 2005 ("the Ingram recording") (exhibit A) and I have reviewed a transcript prepared by an experienced court reporter ("the Ingram transcript") (exhibit B).

3. I have reviewed Ingram's 2005 Rikers Island records (exhibit C), his rap sheet (exhibit D), the trial transcript, the transcript from a 2015 C.P.L. § 440.10 hearing, materials provided to Giuca's defense over the past several years, and other legal filings from Giuca's case. I have spoken with numerous prosecutors assigned to prosecute or supervise Giuca's case, Samuel Gregory (Giuca's trial counsel) and Jonathan Fink (Russo's trial counsel) regarding the disclosure and substance of the Ingram recording. Affirmations from Gregory (exhibit E) and Fink (exhibit F) are annexed hereto.

4. The numerous exhibits and the memorandum of law accompanying this motion are incorporated by reference into this

affirmation. The exhibits and copies of the trial transcript, 2015 hearing transcript, and relevant judicial decisions from Giuca's case are contained on a flash drive accompanying this affirmation.

5. References to the trial, 2015 § 440.10 hearing and grand jury transcripts will be referred to as "T," "H," and "GJ," respectively, followed by the page numbers.

INTRODUCTION

6. This motion to vacate John Giuca's conviction follows the recent decision of the New York Court of Appeals, *People v. Giuca*, 2019 WL 2424481 (N.Y. June 11, 2019), which reversed the order of a unanimous panel of the Appellate Division granting Giuca a new trial, *People v. Giuca*, 158 A.D.3d 642 (2nd Dept. 2018), on the grounds that the People suppressed favorable impeachment evidence of important trial witness John Avitto and failed to correct his misleading testimony. The Court of Appeals agreed with the Appellate Division that the People withheld impeachment material from Giuca and failed to correct Avitto's misleading testimony but held that the errors weren't material.

7. The present motion again demonstrates that contrary to their stated policy "to generally disclose all information that is identified as

even arguably favorable to the defense, regardless of the prosecutor's assessment of the materiality of that information,"¹ the Brooklyn District Attorney's Office has engaged in a 13-year pattern of suppressing favorable evidence from Giuca, during which time they also have misled the trial court, this Court, the Appellate Division and the Court of Appeals.

8. As detailed herein, Nicolazzi deliberately concealed from Giuca evidence that less than two months before trial, in a sworn, recorded statement to her and McCafferty, Ingram told them that Antonio Russo admitted shooting Mark Fisher to death after he and Fisher fought while Russo robbed him and that immediately after he killed Fisher, Russo called Giuca, went to Giuca's home and asked Giuca to dispose of the murder weapon, but *Giuca refused to take it from him*.

9. Nicolazzi was aware of, and responsible for, every strategic decision the People made in connection with Giuca's trial (Nicolazzi: H409). She knew that Russo's admission and the Ingram recording

¹ See *People v. Giuca*, 2019 WL 2424481, at *8 (N.Y. June 11, 2019) (dissenting opinion of Judge Rivera).

constituted powerful exculpatory evidence in support of Giuca's defense that Russo was solely responsible for Fisher's murder.

10. Rather than disclose what was obviously favorable evidence to the defense, Nicolazzi ignored Giuca's *Brady* and discovery demands, placed Ingram on the People's witness list, and blatantly lied in open court that she provided the defense with "*every single statement*" allegedly made by Giuca or Russo.

11. From June 28 to July 25, 2005, Ingram (a) was sent from Clinton Correctional Facility to Rikers Island, (b) placed in Giuca's cellblock, (c) spoke to Giuca and Russo separately about Fisher's murder, (d) was produced to the DA's Office where he made a sworn statement to Nicolazzi that inculpated Russo but exculpated Giuca, and (e) four days after he spoke to Nicolazzi was moved out of Rikers Island and sent to Downstate Correctional Facility.

12. Russo's admission and the Ingram recording materially contradicted the testimony of Anthony Beharry, Albert Cleary and John Avitto. Beharry and Avitto (as well as Lauren Calciano and Gregory Ware) have since recanted their testimony against Giuca in sworn statements made under penalty of perjury.

13. Fisher was murdered with a .22 caliber pistol. Russo's admission to Ingram that Giuca refused to take the murder weapon from him contradicted the People's argument that a gun of unknown caliber Giuca purportedly gave Beharry a day or two after the murder was the weapon Russo used to shoot Fisher. However, Cleary alleged that a week or two before the murder, Giuca showed him a .380 and a .22 and told him after the murder that he gave *both guns* to Beharry. In other words, even if the jury credited Beharry and Cleary there was no evidence that Beharry took a .22 from Giuca as opposed to a .380, which couldn't have been the murder weapon.

14. Russo's admission to Ingram that he intended only to rob Fisher but shot him after Fisher fought back undermined Cleary's testimony that Giuca admitted to him that he armed Russo with a .22 and instructed him to shoot Fisher in furtherance of boosting credibility for his purported gang, Ghetto Mafia, and because Fisher had "disrespected" his home. Russo's admission and the Ingram recording also undermined Cleary's claim that Giuca told him Russo returned the gun to him immediately after he murdered Fisher.

15. Russo's admission to Ingram that he met Giuca at Giuca's home with the murder weapon in hand immediately after he murdered Fisher contradicted Avitto's uncorroborated testimony that Giuca admitted that he brought the gun to the crime scene, where he and Russo assaulted Fisher immediately before Russo used Giuca's gun to shoot Fisher.

16. Russo's admission that he called Giuca immediately *after* the murder to tell him he was returning to his home, but that Giuca refused to take the gun from him would have diluted the significance Nicolazzi placed on a 6:38 a.m. call from Russo to Giuca that she alleged was made *before* the murder and proved that Giuca wasn't home when Fisher was killed.

17. Russo's admission that Giuca refused to take the murder weapon from him would have diluted the apparently incriminating nature of Giuca's and Russo's attempts to call each other in the days following the murder.

18. Russo's admission that he went to Giuca's home after the murder but was rebuffed in his effort to have Giuca dispose of the murder weapon for him would have explained Giuca's concern that Meredith

Denihan, who was asleep on his couch, might have misinterpreted what she saw or heard when Russo re-appeared at Giuca's house with a gun shortly after he left with Fisher.

19. Russo's admission to Ingram could have effectively challenged the People's argument that they conducted a thorough and good faith investigation before concluding that Giuca was responsible for murdering Fisher.

20. Nicolazzi compounded the prejudice caused Giuca by her suppression of Russo's admission and the Ingram recording by instructing jurors that "*they knew*," and assuring them that "*she knew*" the gun Beharry purportedly took from Giuca "*absolutely*" was the murder weapon, which she argued, without more, proved Giuca was guilty of Fisher's murder.

21. Nicolazzi deliberately misled the jury about the true state of the evidence by asserting there was "indisputable proof" that Giuca wasn't home when Fisher was killed and that the only "common sense" explanation for Fisher's murder was Avitto's testimony that Giuca participated in the violent attack on Fisher.

22. Nicolazzi had the temerity to blame the defense for lacking the favorable evidence she suppressed. She ridiculed Giuca's counsel for his "loud and dramatic" argument, which was little more than "screaming and yelling" as he engaged in "wild speculation" based on "no evidence that is anywhere in the record" to support Giuca's defense that Russo was solely responsible for murdering Fisher.

23. In March 2018, McCafferty interviewed Russo to determine whether he might be a witness against Giuca at a retrial. In essence, Russo told McCafferty what Ingram swore to him in 2005: Russo murdered Fisher by himself, with a gun "he had for a while." In contrast to Nicolazzi's deception, Melissa Carvajal, the prosecutor assigned to Giuca's retrial immediately disclosed the contents of Russo's admission to Giuca as "potential *Brady* material."

24. The People didn't disclose the Ingram recording to Giuca until June 4, 2018—more than 12 years after trial and more than three years after Giuca filed the 2015 C.P.L. § 440.10 motion, which similarly established that Nicolazzi withheld favorable evidence from him.

25. Giuca's unawareness of Russo's admission and the Ingram recording in 2015, prevented the defense from including due process

claims related to this evidence in his 2015 motion. It also deprived counsel from confronting Nicolazzi and McCafferty about the circumstances surrounding the substance, nondisclosure and materiality of Russo's admission and the Ingram recording before this Court deemed Nicolazzi and McCafferty credible witnesses. Those limited findings snowballed into a woefully incomplete record before this Court, the Appellate Division and the Court of Appeals, and ultimately left the Court of Appeals unable to consider this evidence in addition to the Avitto-related due process violations.

26. The consequences of the limited hearing record couldn't have been more serious: the Court of Appeals was unaware that Nicolazzi suppressed evidence that Giuca *did not* dispose of the murder weapon before the Court relied on "strong" proof that Giuca *did* dispose of it to reinstate his conviction, notwithstanding the Court's conclusion that Nicolazzi suppressed Avitto-related evidence.

27. Thus, the People's suppression of Russo's admission and the Ingram recording prevented the Court of Appeals from considering the cumulative impact of *all* of the due process violations, *see Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995), before it concluded that there

wasn't a reasonable possibility that the verdict would have been different had the People disclosed the Avitto-related impeachment evidence.

28. Giuca's conviction should be vacated under *Brady v. Maryland*, 373 U.S. 83 (1963) because the cumulative impact of the People's suppression of Russo's admission to Ingram, the Ingram recording and the favorable impeachment material of Avitto was material under New York (any reasonable possibility of a more favorable outcome) and Federal (any reasonable probability of a more favorable outcome) constitutional due process standards.

29. Giuca's conviction also should be vacated under *People v. Paperno*, 54 N.Y.2d 294 (1981) because Nicolazzi's expression of her personal opinions that Giuca disposed of the murder weapon and in Giuca's guilt amounted to unsworn testimony against him which made her pretrial sworn interview of Ingram a material issue at trial and created a substantial likelihood of prejudice to him.

PROCEDURAL HISTORY

30. On September 27, 2005, Giuca was convicted after a jury trial of murder in the second degree (felony murder), robbery in the first degree and criminal possession of a weapon in the second degree. He was

sentenced to 25 years to life in prison on the murder and lesser concurrent sentences on the other charges. Giuca has been incarcerated since December 21, 2004, or more than 5,400 days as of the time of this filing.

31. Giuca's direct appeal was denied, *People v. Giuca*, 58 A.D.3d 750 (2nd Dept. 2009), *lv. denied*, 12 N.Y.3d 915 (2009). A C.P.L. § 440.10 motion alleging that he was denied a fair trial because of juror misconduct was denied without a hearing, *People v. Giuca*, 885 N.Y.S.2d 712 (Kings Cty. Sup. Ct. 2009) and affirmed on appeal. *People v. Giuca*, 78 A.D.3d 729 (2nd Dept. 2010), *lv. denied*, 16 N.Y.3d 859 (2011). A petition for a writ of habeas corpus related to the juror misconduct issue was denied in the United States District Court for the Eastern District of New York. *Giuca v. Lee*, 2013 WL 2021336 (Block, SJ).

The 2015 C.P.L. § 440.10 Motion

32. On March 26, 2015, Giuca filed a motion to vacate his conviction, alleging that Nicolazzi suppressed *Giglio* material and failed to correct false and misleading testimony from jailhouse informant John Avitto.

33. A hearing on the motion was held in late 2015. The prosecution hearing team was led by Nicolazzi's longtime mentor and supervisor and Chief of the Homicide Bureau, Kenneth Taub, and included Chief of Appeals Leonard Joblove and Diane Eisner, who handled all of Giuca's prior post-conviction litigation. In November 2015, these three prosecutors had more than 100 years of combined experience.

34. The defense witnesses were Avitto, retired Detective Thomas Byrnes, ADA David Kelly, Nicolazzi and Gregory. The People called McCafferty as a witness.

The People Suppressed Favorable Evidence from Giuca

35. Ironically, at a hearing held to determine whether Nicolazzi suppressed favorable evidence from Giuca at trial, the People suppressed evidence which entirely supported Giuca's claims that Avitto first contacted detectives about Giuca on June 9, 2005, immediately after he absconded from a drug program and that he first met them with Nicolazzi at the DA's Office on June 13, 2005.

36. Byrnes and McCafferty, testifying in November 2015 without the aid of notes about events from spring 2005, inaccurately recalled first

meeting Avitto in his “Brooklyn” drug program a few weeks before they met with Avitto and Nicolazzi at the DA’s Office.²

37. Byrnes had “no doubt in his mind” that he and McCafferty (without Nicolazzi) met Avitto in an East New York rehab facility or halfway house covered in scaffolding a few weeks before they met him with Nicolazzi at the DA’s Office (H322-24).

38. McCafferty similarly had “no doubt” that he and Byrnes met Avitto at his “Brooklyn North” program, which he described as a repurposed commercial building, two to four weeks before Avitto met Nicolazzi at the DA’s Office (H758-61, 770).

39. In fact, from April 28 to June 9, 2005, Avitto lived at Samaritan Village, a residential drug program located at 88-83 Van Wyck Expressway, Jamaica, Queens. Contrary to Byrnes’ and McCafferty’s ten-year “recollection,” Avitto’s program was housed in a two-story, non-commercial, non-repurposed building that has never required scaffolding, set back from the public sidewalk in a fenced yard, adjacent to Jamaica Boulevard, directly across the Van Wyck

² Nicolazzi was present at *every* meeting Byrnes and McCafferty had with Avitto (T815) and first met Avitto on June 13, 2005 (Nicolazzi: H458-59; H462).

Expressway from Jamaica Hospital Medical Center (Samaritan Village documents and photographs) (exhibit G).

40. In contrast, Kingsboro, the inpatient residential program Avitto briefly attended in September 2005 until he was thrown out three days before he testified he was “doing good” in treatment (Avitto: T784), was located at 754 Lexington Avenue, within “Brooklyn North,”³ in a repurposed garage that frequently underwent exterior work and was covered with scaffolding (Avitto program record and 754 Lexington Avenue records and photographs) (exhibit H).

41. Prior to the hearing, Taub met with Byrnes and McCafferty to discuss their upcoming testimony (Byrnes: H319, 323-24; McCafferty: H780). Taub knew that Byrnes was interviewed by the Conviction Review Unit (CRU) in 2014 (Byrnes: H340).

42. On January 22, 2015, two months before I filed the motion, I wrote directly to District Attorney Ken Thompson and then Chief Assistant Eric Gonzalez, demanding production of any CRU reports from

³ “Brooklyn North” consists of all Brooklyn precincts beginning with the 73rd Precinct and above. 754 Lexington Avenue is in Bedford-Stuyvesant, within the confines of the 81st Precinct and Brooklyn North.

interviews of detectives questioned about “Avitto’s cooperation with the DA” against Giuca. The People didn’t respond to this demand.

43. Giuca and the Court were unaware that during the hearing the People possessed at least one report that was responsive to my January 2015 demand: an interview report summarizing Byrnes’ May 23, 2014, interview with the CRU (“the Byrnes report”) (exhibit I). This document flatly contradicted Byrnes’ and McCafferty’s testimony and corroborated Giuca’s argument that Byrnes and McCafferty first met Avitto with Nicolazzi at the DA’s Office *after* he left his drug program.

44. The Byrnes report revealed that one year before he testified at the hearing, Byrnes told the prosecution that he first met Avitto *at the DA’s Office* and

an assistant district attorney was always present at these meetings [with Avitto]...He does not recall any drug rehab program or ever going to visit anyone at a drug rehab facility

45. On information and belief, during the hearing, Taub and his experienced colleagues knew about the existence of the Byrnes report, knew that it was favorable to Giuca, and consciously decided not to disclose it to the defense because it would have helped establish Giuca’s

claims. To the extent none of these experienced prosecutors were aware that the Byrnes report was favorable to Giuca, they should have known.

46. In particular, it strains credulity that Taub, the most experienced trial attorney in the DA's Office, was unaware of the Byrnes report, given that he prepped Byrnes and McCafferty before they testified and he knew that Byrnes was interviewed by the CRU (Byrnes: H319, 323-24, 340; McCafferty: H780).

47. Taub exploited the People's concealment of the Byrnes report in his closing argument by emphasizing Byrnes' and McCafferty's excellent credibility and ridiculing the defense claim that Avitto first contacted detectives while he was in his drug program⁴ (April 20, 2016 transcript, pp. 6-7).

48. This Court, as ignorant as Giuca was about the existence of the Byrnes report, credited Byrnes' and McCafferty's testimony, concluding that they first met Avitto without Nicolazzi in his "Brooklyn" drug program, and denied Giuca's motion (June 9, 2016 decision, pp. 6, 11, 21).

⁴ Throughout the proceedings, the People relied upon the Court's finding that Avitto was not credible while also cherry-picking snippets from his interviews with a defense investigator as "proof" that he met with detectives before he left his program.

49. The defense didn't learn about the existence of the Byrnes report until June 27, 2018, when Carvajal included it as "KCDA investigatory report number 3" as part of a document dump in anticipation of a retrial (discovery packet 6) (exhibit J).

50. In August 2018, contrary to their stated *Brady* disclosure policy (*see, supra*, ¶ 7) and just months after the District Attorney publicly announced his "Justice 2020" initiative, which promised to implement "progressive" principles regarding "conviction integrity," the Chief of Appeals asserted in writing that the People "had no obligation" to disclose the Byrnes report to Giuca during C.P.L. § 440.10 proceedings.

The Appellate Division Reversal

51. A justice of the Appellate Division granted Giuca leave to appeal this Court's denial of his motion, and on February 7, 2018, a unanimous panel of the Second Department reversed this Court's decision and ordered a new trial, holding that Nicolazzi's failure to disclose *Giglio* material and her failure to correct Avitto's false and misleading testimony violated Giuca's right to due process. *People v. Giuca*, 158 A.D.3d 642, 646-47 (2nd Dept. 2018).

The People Misled the Court of Appeals

52. The People were granted leave to appeal to the Court of Appeals, where they again exploited their suppression of the Byrnes report. They argued in their letters seeking leave, briefs and at oral argument that any undisclosed impeachment evidence wasn't material because this Court's conclusion that Byrnes and McCafferty were credible made it an established "fact" (and thus beyond review in the Court of Appeals, *see* C.P.L. § 470.35) that Avitto first accused Giuca in a meeting with Byrnes and McCafferty a few weeks before he left his program.

53. On June 11, 2019, in a 5-1 decision, the Court of Appeals reversed the Appellate Division and reinstated Giuca's conviction, holding that although Nicolazzi failed to disclose favorable impeachment material, failed to correct Avitto's inaccurate testimony, and failed to clarify the record regarding her personal involvement in Avitto's case immediately after she first met Avitto, there was no reasonable possibility that these errors impacted the verdict.

54. The majority acknowledged that the undisclosed evidence would have "deepened" the defense argument that Avitto testified falsely

in order to receive favorable treatment, but it deemed the evidence “cumulative” to other impeachment evidence. *People v. Giuca*, 2019 WL 242481, at *6-7. The Court cited Giuca’s “***efforts to dispose of the gun shortly after the murder***” as “strong evidence” of his guilt (*Id.* at *7) (emphasis added).

55. In dissent, Associate Judge Jenny Rivera criticized Nicolazzi’s deliberate suppression of evidence and efforts to mislead the court, the jury and Giuca about Avitto’s motive to falsely accuse Giuca. Judge Rivera was “particularly troubled” by Nicolazzi’s deliberate exploitation of Avitto’s misleading testimony which she described as a “particularly egregious violation of the law and her ethical obligations” (*Id.* at *8).

56. The People’s suppression of Russo’s admission and the Ingram recording severely prejudiced Giuca before the Court of Appeals because it deprived the Court from considering the cumulative impact of all of the suppressed evidence before it reversed the Appellate Division on materiality grounds related solely to impeachment evidence of Avitto.

57. The Court’s lack of knowledge about Russo’s admission and the Ingram recording also deprived the Court from considering whether Nicolazzi’s unsworn testimony made her pretrial sworn interview of

Ingram a material issue at trial and created the substantial likelihood that Giuca was prejudiced.

STATEMENT OF FACTS

The Trial of John Giuca

Giuca's Third-Party Culpability Defense

58. Russo was indicted in November 2004. Giuca wasn't indicted until December 2004, after the People finally secured Albert Cleary's cooperation. On February 5, 2005, Nicolazzi moved to consolidate the indictments and empanel two juries for the trial (exhibit K).

59. The defense response to the People's motion alerted Nicolazzi that Giuca and Russo had mutually antagonistic defenses and that Giuca's defense would be that "he had nothing to do with the death of Mark Fisher and that it was defendant Russo who shot and killed him" (exhibit L).

60. The trial court consolidated the two indictments and ruled that separate juries for Giuca and Russo would be empaneled (February 23, 2005 decision).

61. On August 22, 2005, Giuca moved for a separate trial (exhibit M). Counsel reiterated that after speaking with Russo's attorney, Giuca's

and Russo's defenses remained antagonistic and that Giuca's defense was that "Russo is solely responsible for the death of Mark Fisher and that he acted alone" (*Id.* at ¶ 7).

62. The trial court denied Giuca's severance motion (September 10, 2005 decision).

63. Thus, before trial Nicolazzi knew that: (a) Russo admitted to Ingram that he murdered Fisher by himself and after the crime Giuca refused to take the murder weapon from him (exhibit B, pp. 12-17), (b) Russo's admission to Ingram entirely supported Giuca's announced defense that Russo was solely responsible for Fisher's murder (exhibits L and M), (c) Giuca made pretrial demands for any statements made by Russo and any evidence that was favorable to his stated defense (*see, infra*, ¶ 296), (d) her sworn response to Giuca's demands assured the defense that she had disclosed all statements made by Russo and acknowledged her continuing duty to disclose favorable evidence (*see, infra*, ¶¶ 302-07), and (e) she didn't disclose Russo's admission and/or the Ingram recording to Giuca (*see, infra*, ¶¶ 313-14, 318-19).

64. The trial of Giuca and Russo, with dual juries, began before Justice Alan Marrus on September 13, 2005.

The People's Opening

65. Right out of the gate, Nicolazzi smeared Giuca as a “self-styled Mafioso” akin to Tony Soprano⁵ and a leader of Ghetto Mafia, an alleged street gang whose members included his subservient “soldier” Russo (T26, 35).

66. Nicolazzi alleged that shortly before Fisher’s murder, Giuca and “another leader” of Ghetto Mafia, lamenting the fact that the gang was perceived as “soft,” decided that any new member would have to kill someone in order to join. (T36-37).

67. According to Nicolazzi, Giuca’s rage over his belief that Fisher “disrespected” him by sitting on his table led him to arm Russo with a .22 caliber pistol and “order” his soldier to “show [Fisher] what was up”—which meant kill him (T28, 35-37).

68. Nicolazzi told the jury that after Russo shot Fisher to death, he went back to Giuca’s house, returned the gun and told Giuca, “it’s done” (T36).

⁵ From 1999-2007, *The Sopranos* was one of the most popular shows on television. Tony Soprano was the “boss” of a powerful Mafia family whose “soldiers” were expected to comply with any order given by Tony Soprano.

69. Nicolazzi claimed that Giuca gave the murder weapon to his friend Anthony Beharry, who disposed of it for him (T37).

70. Nicolazzi alleged that Giuca's concern that Meredith Denihan, who spent the night on his couch, might have seen or heard something linking him to the killing, led him to orchestrate a cover-up of his crime (T33-35).

71. Nicolazzi assured the jury that the police conducted a "painstaking investigation" and interviewed "anyone and everyone even remotely involved or connected to this case." She said that some of these witnesses "finally" told police what they knew, implying that all of these witnesses incriminated Giuca (T30-31), when she knew that Ingram exculpated Giuca.

72. Nicolazzi told the jury that Giuca "downplayed his role" in the crime to Lauren Calciano but told his "boyhood friend" Albert Cleary "more of the full picture, the full story" of what happened to Fisher (T32-33). Nicolazzi didn't mention John Avitto in her opening statement, didn't allege that Giuca wasn't home at the time of the murder, didn't allege that Giuca was with Russo at the time of the murder, and didn't allege that Giuca helped Russo physically attack and/or murder Fisher.

73. In her opening statement before Russo's jury, Nicolazzi's co-counsel Patricia McNeill described numerous incriminating admissions Russo made to several people, but didn't mention Russo's detailed confession to Ingram, no doubt because it would have exonerated Giuca (T61-73).

The Defense Opening

74. The defense stated that Russo, an unstable "whacko," murdered Fisher by himself and that Giuca learned what happened shortly after the crime (T41, 46, 48-49).

Meredith Denihan

75. After bar hopping in Manhattan, Denihan, Angel DiPietro, Giuca, Cleary and Fisher went to Giuca's Brooklyn home, where they eventually met Russo and a few other of Giuca's friends. Denihan drank alcohol in Manhattan and drank and smoked marijuana at Giuca's home (T140-41, 148-52, 190). She denied asking for ecstasy at Giuca's home (T190), although Cleary was "sure" she asked for the drugs (Cleary: T279, 308).

76. Denihan testified that she went to the bathroom and when she came out, Cleary and DiPietro had left for the evening without notifying her, and Fisher and Russo had gone to an ATM (T152-54).

77. While Fisher and Russo were at the ATM, Denihan testified that Giuca “joked” about the danger of Brooklyn ATMs (T153). She testified that Giuca said his brother had a gun, but through a past recollection recorded, acknowledged that she told police that Giuca said he and his brother each had a gun in the house (T155-57).

78. Denihan was “positive” that Cleary and DiPietro were already gone for the evening when Fisher and Russo returned from the ATM (T192-93). In other words, according to Denihan, she and Giuca were alone when he allegedly joked about the ATM and told her about guns in the house (*see* T1003).

79. Denihan spent the night on Giuca’s couch. At some point while she was asleep she heard a door slam (T162).

80. When she woke up “around 10 or 11 the next morning,” Denihan went into the kitchen and made several calls from Giuca’s home phone trying to get a ride home (T161-63).⁶

81. Denihan didn’t speak to DiPietro until the evening of October 12⁷ (T165-66).

Albert Cleary

82. From October 2003 to November 2004, Cleary repeatedly denied that he knew anything about Fisher’s murder (Cleary: T329-30).

83. Cleary took extraordinary efforts to convince the People that he didn’t know anything about Fisher’s murder. On June 8, 2004, his attorney, Phil Smallman, appeared on the *CBS Morning Show* and declared to a national television audience that Cleary had cooperated with police but he didn’t know anything about Fisher’s murder. Smallman confidently asserted that Cleary had “answered every

⁶ Denihan woke up around 11:00 a.m. Giuca’s home phone records (exhibit N), which were moved into evidence (T921-22) confirm that she made 17 calls from 11:00 a.m. to 11:13 a.m.

⁷ On October 14, 2003, Denihan told police that she refused to speak to DiPietro on October 12 because she was angry that DiPietro left Giuca’s home without her.

question, no conditions, no holds barred.” Smallman said that Cleary had “certainly” told the police everything he knew about the crime.⁸

84. On the heels of his television appearance, Smallman arranged for Cleary to take a polygraph examination. He gave Nicolazzi the June 23, 2004, report (exhibit O), which concluded that Cleary’s answers to the following questions *were not* deceitful:

- “regarding the murder of Mark Fisher, do you intend to answer truthfully each question about that?” (answer given: **YES**)
- “do you know who murdered Mark Fisher?” (answer given: **NO**)
- “do you know any information about Mark Fisher’s murder that you are holding back from the police?” (answer given: **NO**)

85. Within a few months of “proving” that he didn’t know anything about Fisher’s murder, Cleary was “squeezed” by the prosecution and threatened with a probation violation in connection with a vicious assault he committed in January 2003 that resulted in his expulsion from Fordham University (T338).

⁸ I have previously viewed the segment, titled “Teen Athlete Murder Mystery” at <http://www.cbsnews.com/video/watch/?id=606230n>. The link is still posted at Fisher’s memorial website (www.markstevenfisher.org), but it appears to have been deactivated.

86. Cleary capitulated to the pressure. He admitted that he lied to the police (T335) and his attorney (T337), abandoned the results of the apparently “fraudulent” polygraph report (T338-39), and alleged that Giuca admitted ordering Russo to murder Fisher (T346-49).

87. Once he agreed to cooperate, Cleary, in Smallman’s presence, was warned by “experienced detectives and ADAs” that they wanted him to testify in the grand jury, but if he lied he would be charged with perjury (Cleary: T329-30, 354-55).

88. Notwithstanding the devious tactics he used to deliberately mislead the prosecution and the threatened consequences if he didn’t tell the truth, Cleary agreed to be questioned under oath and recorded by Nicolazzi and McCafferty about his knowledge of Fisher’s murder *without* Smallman being present (Cleary recorded statement, December 15, 2004) (exhibit P).

89. The next day, with Smallman by his side, Cleary appeared before the grand jury and swore that “it was his desire” to waive his statutory right to immunity so he could testify before the grand jury (waiver of immunity and Cleary GJ5-9, December 16, 2004) (exhibit Q).

90. Smallman, an experienced criminal defense attorney and former prosecutor, knew that Cleary could have asserted his absolute right not to testify before the grand jury (as he and his client wanted) unless he was guaranteed transactional immunity, but instead it appears that he encouraged Cleary to waive this valuable right and testify against Giuca.

91. At trial, Cleary testified that Giuca was a “capo” in Ghetto Mafia and “higher” in the gang than Russo (T259, 261, 265), although he acknowledged that Russo was “nuts,” “snapped,” and got angry for no reason (T345).

92. Cleary claimed that a week or two before Fisher was killed, Giuca told him that he and Robert Legister, the “head” of Ghetto Mafia⁹ decided that future members would have to kill someone in order to join (T259, 263).

93. According to Cleary, one week before the murder, Giuca showed him a .22 caliber Ruger and a .380 (T265-67).

⁹ In the fall of 2003, Legister attended college in North Carolina. He told Nicolazzi this under oath (Legister GJ5, 8-10) (exhibit R). In 2006, Legister graduated with a double major in accounting and economics (Legister affidavit, January 20, 2014, ¶ 4) (exhibit S). Cleary’s testimony about Legister was false (*Id.* at ¶¶ 7-8, 10).

94. Cleary contradicted Denihan, testifying that he and DiPietro were still at Giuca's home when Fisher and Russo went to the ATM and when they returned from the ATM (Cleary: T280-82 *cf.* Denihan: T152-54, 192-93). According to Cleary, this meant that he and DiPietro must have been at Giuca's home at the time Denihan claimed she and Giuca discussed the presence of guns in the house by themselves.

95. Cleary also contradicted Denihan's testimony that he and DiPietro left without notifying her. He was "positive" he announced that he and DiPietro were leaving and recalled that Denihan even asked him if DiPietro was leaving with him (Cleary: T281-82 *cf.* Denihan: T152-54).

96. Cleary said he and DiPietro arrived at his 1306 Albemarle Road home at approximately 6:00 a.m. and stayed awake for a period of time. Fisher was shot five times in front of 144 Argyle Road, directly across the street from his home no later than 6:40 a.m., but Cleary claimed that he didn't hear any shots, even though his bedroom window faced Argyle Road and he had heard sounds through the window before (T296-99, 302-03).

97. Cleary swore that later that morning, Giuca called him, anxiously trying to find Denihan. According to Cleary, he asked Giuca

where Fisher was and Giuca replied that Fisher took a train home. Cleary claimed he told Giuca there was a shooting and Giuca replied that “we may have had something to do with that” since “Tony kind of left with him” (T314-16).

98. However, Giuca’s home phone records (exhibit N), cell phone records (exhibit T), and Cleary’s cell phone records (exhibit U) conclusively proved that the first time Giuca and Cleary spoke after Fisher was murdered was at 12:56 p.m.

99. Nicolazzi knew that Cleary’s testimony about the purported morning call with Giuca was patently false. Giuca’s home and cell phone records and Cleary’s cell phone records were moved into evidence (T859-60, 921). Cleary also swore to Nicolazzi on December 15, 2004, that he and Giuca didn’t speak until the afternoon of October 12 (exhibit P).

100. Cleary testified that in the afternoon, he and DiPietro went to DiPietro’s (Garden City, Long Island) home, where they spent several hours with her father, a prominent Brooklyn criminal defense attorney (T318).

101. Cleary’s cell phone first picked up a “Garden City” sensor at 3:05 p.m. on October 12 (exhibit U).

102. According to Cleary, after watching a football game with DiPietro's father and eating dinner with her family, he and DiPietro drove to the Bronx to pick up DiPietro's boyfriend Daniel Fraszka, stopped for pizza, and went back to Cleary's Brooklyn home, intending to watch the Red Sox-Yankees playoff game (scheduled for 8:05 p.m.), but the game was rained out so they watched "a couple" of movies (T293, 318-19).

103. Cleary's cell phone last picked up a "Garden City" sensor at 7:46 p.m. and began consistently picking up the sensor that his phone frequently hit when he was in Brooklyn at 8:44 p.m. (exhibit U).

104. Cleary claimed that he "snuck out" of his house and went to Giuca's home, where he met Giuca and Lauren Calciano (T318-19). According to Cleary, Giuca told them "he was pretty much fed up" with Fisher after he sat on a table,¹⁰ so he gave Russo a gun and "basically" told him to show Fisher "what was up." Cleary testified that Giuca told

¹⁰ Cleary testified that Giuca asked Fisher why he was sitting on the table and told him it is not a chair" (T253). Several months earlier, Cleary testified that it was Tommy Saleh who "had a problem with Fisher" and told him that the table "is not a chair (T276-78; Cleary GJ13). Saleh simply told Fisher to get off the table and sit on the couch (Saleh affidavit, January 9, 2014, ¶ 4) (exhibit V) Saleh was unable to testify at Giuca's trial because he was under indictment at the time (*Id.* at ¶¶ 7, 14); *see, infra*, ¶ 113).

them Russo waited outside and after Giuca “sent” Fisher out of his home, Russo attacked Fisher and shot him to death (T320-23).

105. Cleary swore that Giuca told him and Calciano that Russo returned to Giuca’s home, gave Giuca the gun back, and told him “it was done” (T322, 324).

106. Cleary swore that he saw Calciano remove a gun bag from Giuca’s home (T331).

107. Cleary testified that the next evening (Monday, October 13), he asked Giuca if the house was “clean,” (meaning did Giuca have any guns or drugs in the house), and Giuca replied that the house was clean (T324-26). He was never questioned why he didn’t ask Giuca about the disposal of evidence at the time Giuca purportedly admitted his involvement in the crime to him and Calciano and he claimed he saw Calciano dispose of a gun bag for Giuca.

108. Nicolazzi had to recall Cleary to the stand because she “forgot” to ask him what Giuca told him about disposing of “the gun” (the .22 that she alleged was the murder weapon) (T451-52). Cleary replied that Giuca said Beharry took *them* (plural) (T463-64).

109. Cleary claimed that he lied to the police for more than one year because Giuca told him what to say (T327-28). But he retained Smallman before Giuca engaged counsel and he urged Giuca to seek advice from Smallman. Cleary took Giuca to meet with Smallman on a Brooklyn street corner on Monday, October 13 (T328-29).

110. Cleary admitted that it was his idea to take a polygraph examination and submit the “false” report to the People in order to avoid cooperating with authorities (T338-39).

111. The day after Smallman met with Giuca and Cleary, he took Cleary to meet detectives, where Cleary told them that Giuca was the only person from the party he had ever seen with a gun (Cleary: T334-36). He didn’t tell police that he knew Russo “snapped on a moment’s notice,” got “real angry for no reason” and was “nuts” (*see, supra*, ¶ 91).

112. Smallman continued to represent Cleary as he cooperated against Giuca, a conflict of interest that Giuca never waived.

113. Shortly after she completed the Fisher-related trials in January 2016,¹¹ Nicolazzi wrote a letter of recommendation on Cleary’s

¹¹ Saleh and Petrillo were tried for witness tampering and perjury (Petrillo only). Both were acquitted of witness tampering and Petrillo was convicted of a misdemeanor perjury count (*see* exhibit V, ¶¶ 7-8).

behalf, describing him as a “valuable prosecution witness” who gave “crucial” testimony¹² (exhibit W).

114. To date, the defense hasn’t obtained concrete proof that Cleary testified with the understanding that he wouldn’t be prosecuted or have his probation revoked and/or with an assurance that Nicolazzi would provide the expelled college student and felony probationer with a letter of recommendation.

115. However, it is hard to fathom why Cleary, with the advice of experienced counsel, steadfastly refused to cooperate and deliberately tried to mislead the People with a false polygraph report, but then agreed to make a sworn, recorded statement to Nicolazzi without his lawyer being present and waived his automatic right to immunity before he “voluntarily” testified in the grand jury.

Angel DiPietro

116. On October 11, 2003, DiPietro, Denihan, Cleary and some other friends went into Manhattan, where they ran into some of her

¹² The People disclosed this letter to Giuca as part of a document dump on June 15, 2018.

Fairfield University classmates, including Fisher, Janet Early, Jackie Conway and her roommate Kate Siembieda (DiPietro: T205-08).

117. Fisher left his group to flirt with Denihan and he eventually joined DiPietro's group. They met Giuca in Manhattan. Eventually, DiPietro, Fisher, Denihan, Cleary and Giuca took a taxi to Giuca's Brooklyn home (T210-13). Fisher didn't have his cell phone with him so he used DiPietro's phone to leave messages with his friends (DiPietro: T212).

118. DiPietro testified that she fell asleep shortly after she arrived at Giuca's. She claimed that the entire time she was at Giuca's home she didn't see anyone other than the group she arrived with (T214-15). In other words, she claimed that she never saw Russo and she was asked only to identify Giuca at trial (T211).

119. DiPietro said that she and Cleary left Giuca's home together and went straight to Cleary's home, where they spent the night (T215-16). Like Cleary, she claimed that she didn't hear the burst of several gunshots fired from directly across the street shortly after she arrived (T219).

120. DiPietro corroborated Cleary's lie that Giuca called him in the morning. She testified falsely that as she was waking up at approximately 11:00 a.m., ***when Denihan was in Giuca's kitchen using his home phone*** (Denihan: T161-63; exhibit N), Cleary entered her room as he received a call from Giuca, who asked Cleary if Denihan was with them (DiPietro: T219).

121. DiPietro wasn't asked whether Cleary spoke to Giuca on his home phone or cell phone, but in November 2003, she told police that Cleary "woke me up around 11 and his cell phone rang and it was [Giuca]" (DiPietro DD5, November 26, 2003) (exhibit X). But Cleary couldn't have spoken to Giuca on either his home or cell phone at that time (*see, supra*, ¶ 98; exhibits N, T and U).

122. According to DiPietro, during the nonexistent 11:00 a.m. call, ***Cleary asked Giuca*** where Fisher was and Giuca said that ***he*** gave Fisher directions to the subway before he left the night before (T219).

123. DiPietro corroborated Denihan's testimony (Denihan: T165-66) that they didn't speak to each other until the evening of October 12 (DiPietro: T222).

124. After they ate breakfast and cleaned Cleary's garage,¹³ DiPietro and Cleary went to her Long Island home¹⁴ (T220-22).

125. DiPietro's testimony materially contradicted a statement she gave detectives less than 48 hours after the murder. She told detectives that *Giuca asked Cleary* where Fisher was and that *Denihan* told her on the *morning* of October 12 that Fisher asked Giuca for directions to the subway (DiPietro DD5, October 14, 2003) (exhibit Y).

126. In November 2003, DiPietro, now represented by counsel, materially changed her story, telling detectives that *Cleary asked Giuca* where Fisher was and that *Giuca* said that he gave Fisher directions for the train (exhibit X).

127. In February 2004, DiPietro spoke to her college newspaper in an attempt to counter published reports that she was uncooperative with the investigation. DiPietro again changed her story, abandoning her November 2003 claim that Giuca was the source of her information that Fisher went home safely (exhibit X) and reverting back to the original lie

¹³ Cleary confirmed that he and DiPietro, after partying until past 6:00 a.m. and waking up at 11:00 a.m. to news that there was a murder across the street from his home and that Fisher was missing, cleaned his garage before heading out to spend the day with her father (exhibit P).

¹⁴ DiPietro told police she and Cleary were dropped off at a train station at approximately 3:15 p.m. (exhibit X).

she told detectives on October 14 (exhibit Y), claiming that *Denihan* told her on the morning of October 12 that “Mark went home all right.” *Fairfield Mirror*, February 11, 2004, “More Questions than Answers in Fisher Case” (exhibit Z).

128. On the morning of October 12—before Giuca spoke to Cleary at approximately 1:00 p.m. (exhibits N, T and U) and before she spoke to Denihan that evening (Denihan: T165; DiPietro: T222)—Janet Early and Jackie Conway, who had been with Fisher in Manhattan the previous evening (*see, supra*, ¶ 116) called DiPietro attempting to locate Fisher. DiPietro lied to them, claiming that she “heard” Fisher took a train home earlier that morning after Denihan gave him money (Early and Conway DD5s, October 13, 2003) (exhibit AA).

129. DiPietro also wasn’t forthright with another of Fisher’s friends or her Fairfield roommates. She repeatedly changed her story with respect to where she was on the evening Fisher was killed, whether she saw Fisher before she claimed he “just disappeared,” and the time that she left Giuca’s home. She even changed her story about whether she was ever at the house where Fisher was killed (Brian DiDonato DD5,

October 17, 2003; Katherine Siembieda DD5, July 21, 2004; Jennifer Hlavin DD5, July 30, 2004) (exhibit BB).

130. Siembieda told Nicolazzi and Byrnes that while they were inside a bar in Manhattan, DiPietro “hinted” that she and her group—which included Cleary but not Giuca—were “frustrated” at being “stuck” with Fisher (Siembieda DD5) (exhibit BB). DiPietro denied this (T225-26).

131. Nicolazzi’s direct participation in the interviews of DiPietro’s roommates (Siembieda and Hlavin), her awareness of DiPietro’s interviews with police, and her overall supervision of the case (Nicolazzi: H409) established that she knew before trial that DiPietro repeatedly lied to the police (exhibits X and Y), Fisher’s friends (exhibit AA), her roommates (exhibit BB), and the media (exhibit Z).

132. Nicolazzi knew that DiPietro’s sworn corroboration of Cleary’s testimony about an 11:00 a.m. phone call between Giuca and Cleary, during which *Giuca* said Fisher left to take the subway, was patently false testimony.

133. Nicolazzi knew that Giuca couldn’t have told Cleary or DiPietro that Fisher safely left his home until 12:56 p.m. (exhibits N, T,

and U). Nicolazzi knew that DiPietro's original story that Denihan told her Fisher left safely was a lie (*see* Denihan: T165; DiPietro: T222). Nicolazzi knew that if DiPietro told Early and Conway before 12:56 p.m. that Fisher left safely (exhibit AA), that someone other than Giuca or Denihan must have been the source for DiPietro's inaccurate claim that Fisher took a train home (*see* exhibits X and Y).

134. DiPietro told police that Fisher intended to spend the night at Cleary's house with her and Denihan (exhibit X). Russo told police on October 14, 2003, that Fisher asked him where DiPietro was, so he directed Fisher towards Cleary's home (*see, infra*, ¶ 219).

135. On October 12, 2003, a 2002 silver Toyota Sienna LE minivan with sliding doors was registered in Cleary's father's name at 1306 Albemarle Road (exhibit CC).

136. Hiroko and Michel Swornik resided at 144 Argyle Road. Fisher was found shot to death at the foot of their driveway. At the time the Swornik's heard several shots fired from a few feet beneath their window, *they heard a van door "slide" open or closed*, and the voices of "young" people, one of which was "*definitely*" a female voice (Hiroko

and Michel Swornik affidavits, January 8, 2014) (exhibit DD); (Hiroko Swornik DD5, June 15, 2004) (exhibit EE).

137. Daisy Martinez, the Swornik's next door neighbor at 136 Argyle Road, heard the shots and then immediately saw a vehicle quickly "pull away from the [Swornik's] driveway" (Martinez DD5, July 16, 2004) (exhibit FF).

138. Within minutes of the shooting almost all of the neighbors in the immediate vicinity came out to see what was happening due to the commotion. However, Martinez noticed that nobody from the Cleary home came outside, which she found "strange" (Jay Salpeter affidavit, February 2, 2015, ¶ 10) (exhibit GG).

139. A few days later, Cleary's mother instructed Martinez not to speak with the police about Cleary (*Id.* at ¶ 14).

140. Archie Willard, who lived two houses away from the Swornik's at 162 Argyle Road, heard "car doors closing" immediately after the shots were fired (DD5 of NYPD canvas, October 12, 2003) (exhibit HH).

141. Ella Peeples, who lived at 1221 Albemarle Road (at the corner of Argyle Road, kitty-corner to Cleary's home) heard gunshots and then saw a "white or light colored van/SUV type vehicle" go north down Argyle

Road and turn on Albemarle Road towards Coney Island Avenue at a high rate of speed (Peeples DD5, November 4, 2003) (exhibit II).

142. This meant that the vehicle Peeples saw, which matched the description of the Cleary minivan, came from the direction of the Swornik's and Cleary's home before it passed her house and sped away from the crime scene.

143. Several other area residents heard a car leave the scene after the shots were fired¹⁵ (DD5s of area canvas, October 12, 2003) (exhibit HH).

144. In 2004, Russo admitted to Gregory Ware that when he shot Fisher, he was seen by someone in a van. In 2018, Russo told McCafferty that when he shot Fisher to death, he was seen by a "**woman** in car at Albemarle Road" who could identify him (*see, infra*, ¶¶ 202, 204, 337).

145. DiPietro claimed that she didn't see anyone at Giuca's house other than Denihan, Fisher, Giuca and Cleary (all of whom are

¹⁵ Rather than call the Swornik's, Martinez, Willard, Peeples or any other witness who saw and heard important things related to the shooting, Nicolazzi called an area resident who heard gunshots, saw nothing, ducked under a table and then went into another room, where he didn't see or hear anything else (Schoenfeld: T129-30).

Caucasian) and she wasn't asked to identify Russo at trial (*see, supra*, ¶ 118).

146. DiPietro's testimony that on the night Fisher was killed she never saw Russo or anyone else at Giuca's home (other than the people she arrived with) was false. Shortly after the murder, she told Fraszka that "other people" were at Giuca's and it was racially mixed crowd.¹⁶ She told Fraszka that "one of Albert's friends" (presumably Russo) was "scary" (Fraszka DD5, October 27, 2003) (exhibit JJ).

147. In late 2004 or early 2005, Frank Pacheco, who on information and belief is a family friend or relative of the Fisher's, wrote former Brooklyn District Attorney Charles Hynes a letter expressing his and the Fisher's views that DiPietro and Cleary were the "masterminds" of a crime that "set up" Fisher to be injured. On January 5, 2005, former DA executive Dino Amoroso informed Nicolazzi about Pacheco's letter to Hynes and the family's belief that Cleary and DiPietro were complicit in the crime (exhibit KK). It is unclear whether this information was disclosed to Giuca.

¹⁶ The other people who were at Giuca's home while DiPietro was there were Russo (Hispanic), Arty Gminsky (black) and Saleh (white) (Cleary: T252).

148. On October 5, 2006, the Fishers sued DiPietro. They sought access to Hiroko Swornik's interview with police (exhibit EE), which established the presence of a vehicle and a female in close proximity to Russo when he murdered Fisher. The Brooklyn DA's Office refused to provide the Fisher's with the police report. *See New York Post*, October 15, 2006, "Slain Grid Kid's Kin Suing to Bare...Conspiracy of Silence" (exhibit LL).

149. In 2010, Hynes offered DiPietro a job as a Brooklyn assistant district attorney two years before she completed law school. DiPietro started as a Brooklyn assistant district attorney in January 2012. *See Village Voice*, June 12, 2013, "Brooklyn D.A. Charles Hynes Faces Questions about Hiring Reluctant Witness in Murder Case" (exhibit MM).

150. On July 10, 2012, DiPietro's father donated \$3,000 to Hynes' re-election campaign (Hynes campaign finance disclosure report) (exhibit NN).

Lauren Calciano

151. From October 2003 to November 2004, Calciano repeatedly denied knowing anything about Fisher's murder (T587-88).

152. Calciano cooperated against Giuca only after she was heavily pressured by law enforcement. Detectives mentioned her lack of cooperation and her pending job application with the U.S. marshals, warning her that if she didn't "do what they wanted her to do," she never would become a U.S. marshal (Calciano: T594-603; Beharry: T660-61).

153. Once she agreed to testify against Giuca, Calciano testified that "after 5:00, after 6:00 a.m." on October 12, 2003, Giuca called her and told her that he needed to see her, so she agreed to meet him that day (T578-79).

154. Nicolazzi elicited this ambiguous (and meaningless) testimony to give the jury the false impression that Giuca told Calciano that he needed to speak to her immediately *after* the murder, presumably to show his guilty conscience and to set the stage for the meeting between Giuca, Calciano and Cleary (*see, infra*, ¶ 229).

155. Nicolazzi deliberately misled the jury in her opening statement when she alleged that Calciano "will tell you that she got a call from [Giuca] the morning *right after the murder*. And he said to her, I need you to come over, I have to talk to you" (T32).

156. Nicolazzi knew her opening statement was false because Giuca's phone records proved that he and Calciano spoke at 6:22 a.m., approximately 20 minutes *before* the murder and then didn't speak again until 1:55 p.m.—*more than seven hours after the murder* (exhibits N and T).

157. Contrary to Cleary's description of a meeting with Giuca and Calciano on the evening of October 12 (Cleary: T319), Calciano was adamant that she and Cleary met Giuca "in the late afternoon," "before it was dark"¹⁷ (Calciano: T580). She specifically said that she had to leave Giuca's home because she had "other plans for the day" (T583).

158. However, Cleary's cell phone records proved that in the late afternoon and until approximately 8:00 p.m., almost two hours after sunset, he was on Long Island with DiPietro (exhibit U; *see also, supra*, ¶¶ 101-03).

¹⁷ According to timeanddate.com, on October 12, 2003, sunset in Brooklyn (11226) was at 6:20 p.m.

159. Nicolazzi knew that Cleary's cell phone records meant that Calciano's testimony about the timing of their purported meeting with Giuca couldn't have been accurate.¹⁸

160. According to Calciano, during their meeting with Giuca, Cleary appeared more nervous than Giuca (T582-83). Calciano said Giuca told them that Russo wanted to rob "Albert's friend" and asked Giuca for a gun, so Giuca gave him one (T580-81).

161. Calciano testified that after Giuca said he gave Fisher a blanket before Fisher and Russo left together, "the next thing he knew" sirens were heading towards Argyle Road, which Cleary noted was towards his house (Calciano: T583).

162. Calciano contradicted Cleary's allegation that Giuca told them Russo came back to the house and returned the gun to Giuca (Calciano: T583 *cf.* Cleary: T322-24).

163. Calciano refuted every other material detail Cleary gave about their conversation with Giuca. According to Calciano, Giuca didn't

¹⁸ Nicolazzi knew for months that Calciano's timing of the meeting couldn't have been correct. Calciano swore to her on November 29, 2004, that the meeting was "most likely in the afternoon" (Calciano recorded statement) (exhibit OO). On December 2, 2004, Calciano swore to Nicolazzi that "if I had to say, I would say [the meeting with Cleary and Giuca] had to be approximately sometime in the afternoon" before she had "to go to work that afternoon" (Calciano GJ8, 12) (exhibit PP).

complain about Fisher disrespecting him (Calciano: T608 *cf.* Cleary: T320), he didn't say that he told Russo to harm Fisher or "show him what's up" (Calciano: T608 *cf.* Cleary: T322), and Giuca said that Fisher and Russo left together (Calciano: T608-09), not that he led Fisher out of the house where Russo was waiting in ambush for him (Cleary: T322).

164. Calciano emphatically denied Cleary' sworn claim (Cleary: T331) that she removed a gun bag from Giuca's home (Calciano: T589, 604, 615, 617, 627-28). In other words, the jury knew that either Cleary or Calciano committed perjury about Calciano's purported removal of evidence. Nicolazzi knew beforehand that if both were questioned on this topic, one of them would lie (Nicolazzi: H652, 654).

165. In early 2014, Calciano, represented by experienced criminal defense attorney Avrom Robin, executed a sworn affidavit recanting her trial testimony against Giuca (Calciano affidavit, January 23, 2014) (exhibit QQ).

166. In her sworn recantation, Calciano expressed regret for her perjury, which she attributed to the "relentless" pressure placed on her by Nicolazzi and detectives (*Id.* at ¶ 11).

167. Calciano was accused of tampering with evidence, warned that refusing to cooperate would make things “hard” for her family, told that her career would be damaged if she didn’t cooperate, and that her failure to testify against Giuca would lead to the release of embarrassing personal information. After she did capitulate to the pressure, Nicolazzi advised her to “save her money” and discharge her attorney, even though Calciano had made a sworn, recorded statement to her and had been threatened with perjury (*Id.* at ¶ 17(a)-(j)).

168. Calciano emphasized that Cleary’s testimony against Giuca was false and that his sworn claim that she tampered with evidence was “outrageous and false” (*Id.* at ¶¶ 19-22).

169. Calciano swore that the People’s description of Ghetto Mafia was overblown and that it was a name local kids called themselves rather than an organized or structured street gang. She described Nicolazzi’s allegations that Giuca was a gang boss who used Russo as his subservient “soldier” as “ridiculous and unfair” (*Id.* at ¶¶ 23-26); *see also*, (exhibit S, ¶¶ 6-10; exhibit V, ¶¶ 9-11).

170. In 2018, Calciano’s attorney reiterated that if the People called her to testify at a retrial, her testimony would be “completely

consistent” with her sworn recantation, notwithstanding the People’s suggestion that she might be offered immunity from perjury charges if she testified consistently with her 2005 trial testimony (Robin letter, May 21, 2018) (exhibit RR).

Anthony Beharry

171. Beharry denied knowing anything about Fisher’s murder or its aftermath until February 1, 2005. That evening, he met with detectives, but denied knowing anything about Giuca’s purported involvement in the crime (Beharry: T652).

172. After Nicolazzi entered the interview room and threatened him with meritless criminal charges,¹⁹ Beharry changed his story and told her that he got rid of a gun for Giuca shortly after Fisher’s murder (T652-53); (Beharry DD5, February 1, 2005) (exhibit SS).

173. Beharry testified only after he was promised immunity in exchange for “truthful testimony” related to his purported disposal of the murder weapon (Beharry: T651-53).

¹⁹ Nicolazzi knew there was no basis to prosecute Beharry for gun possession, hindering prosecution or tampering with evidence. No weapon was recovered. There was no evidence that the unrecovered gun purportedly possessed by Beharry was operable, a .22 caliber pistol and/or the murder weapon. Nor was there any evidence to corroborate Beharry’s pressured admission.

174. Beharry testified that a day or two after the murder Giuca gave him *one* black gun to give to another person. Beharry didn't know the caliber of the gun or what type of gun it was other than it wasn't a revolver (T648-51).

175. In 2014, Beharry executed a sworn affidavit recanting his trial testimony against Giuca (Beharry affidavit, January 13, 2014) (exhibit TT).

176. Beharry swore that he was told that Cleary and Calciano said he discarded the murder weapon and was threatened with arrest if he didn't cooperate (*Id.* at ¶ 5).

177. Beharry wasn't going to testify but on the morning of his testimony, Nicolazzi told him if he refused that he would be arrested for disposing of a gun, as well as perjury in connection with a prior sworn statement he had made to her (*Id.* at ¶ 12).

178. Beharry regretted testifying falsely against Giuca but at that time he had been embroiled in a custody dispute over his young daughter and he was warned that he wouldn't see his daughter if he didn't cooperate (*Id.* at ¶¶ 5-7, 13-14).

179. On November 17, 2014, Beharry was interviewed by the CRU while he was incarcerated at Rikers Island. He waived his *Miranda* rights and made a sworn, audio-recorded statement in which he reiterated that he testified falsely at trial and that Giuca didn't give him a gun after Fisher was killed.

John Avitto

180. Avitto, a classic jailhouse informant, approached the prosecution in June 2005, alleging that four months earlier, while he and Giuca were seeing visitors at Rikers Island, he overheard Giuca's father ask him why he had a gun with him and Giuca admitted, in the presence of his aunt and female cousin, that he "just had it" (T771-73).

181. On February 19, 2005, Giuca's father (also named John Giuca), aunt (Mary DiMatteo) and stepsister (Kelly Hajaistron) visited Giuca at Rikers Island (Giuca 2005 Rikers Island visitation records) (exhibit UU).

182. In February 2005, Giuca's father couldn't speak in complete sentences because of a series of debilitating strokes (Kelly Hajaistron Raucci affidavit, July 3, 2013, at ¶¶ 4-6; Mary DiMatteo affidavit, July 8, 2013, at ¶¶ 4-6) (exhibit VV). DiMatteo and Hajaistron (and Avitto, *see*,

supra, ¶ 188) have sworn that Avitto's testimony about what he "overheard" at the Rikers visit was patently false (Raucci affidavit, ¶¶ 7-8; DiMatteo affidavit; ¶¶ 7-9) (exhibit VV).

183. Avitto further alleged that Giuca told him that he and another person took Fisher to an ATM, where Giuca pistol-whipped Fisher before the other person "pulled the gun" from him and shot Fisher (T774-75).

184. As detailed in the 2015 motion to vacate, the defense was unaware that at the time Avitto claimed he "overheard" Giuca make admissions to him, and at the time he testified, Avitto was prescribed Seroquel for treatment of auditory and visual hallucinations. Avitto perjured himself when he testified that he was prescribed Seroquel as a sleeping aid (T805-09, 813).

185. The defense was unaware that when Avitto first met Nicolazzi and volunteered to cooperate against Giuca with information several months old there was an active warrant for his arrest (Nicolazzi: H471).

186. Giuca was unaware that immediately after Avitto met Nicolazzi, she escorted him to court, appeared on his return of warrant and notified the court about his cooperation before he was released without bail (Nicolazzi: H506, 516-17).

187. Giuca didn't know that Avitto's drug program records demonstrated that he frequently lied "to achieve something he wanted" (see June 9, 2016 decision, p. 16).

188. In 2013, Avitto executed a sworn affidavit recanting his testimony against Giuca. In November 2015, he tearfully apologized to Giuca from the witness stand, stating that he was "sorry" for lying "to help himself." Avitto explained that he knew he couldn't "do a drug program" so he just "fabricated the story more and more" so the DA would believe [him] about [Giuca] and that he was "truly, truly sorry. Please forgive me"²⁰ (Avitto: H113-14).

Detective James McCafferty

189. McCafferty testified that detectives interviewed between 100-150 people in at least four states (T865-67) and reviewed "well over 100" sets of phone records, including Giuca's, Russo's and Cleary's records (T874-75).

190. Nicolazzi asked McCafferty to compare the phone records of Giuca (exhibit T) and Russo (exhibit WW). He testified that from 5:13

²⁰ The Court's conclusion that Avitto's hearing testimony wasn't credible has no bearing on the absurdity of Nicolazzi's assertion that Avitto cooperated against Giuca "for once, to do something right" (T1022-23).

a.m. on October 12 (almost 90 minutes before Fisher was murdered) through the end of October 14, 2003, Russo and Giuca called each other 26 times, whereas from October 9 to 11, they placed only four calls to and from each other²¹ (T875-78).

191. McCafferty wasn't asked to discuss the specific details of Giuca's and Russo's call patterns, which revealed that the earliest they could have spoken to each other after the murder was more than 13 hours later, at 8:05 p.m. on October 12 (connect time 1:09) and again at 9:30 p.m. (connect time 1:04) (exhibits T and WW).

192. Giuca and Russo attempted a total of five calls on October 13, all of which were clustered within 30 minutes and with the exception of the last call, which had a connect time of slightly more than two minutes, consisted of 13, 24, 37 and 4 seconds of connect time, which suggested that Giuca and Russo had one brief conversation on October 13 (exhibits T and WW).

193. Similarly, there were a total of 15 attempted calls between Giuca and Russo on October 14, but these calls also were clustered and

²¹ From 5:13 a.m. on October 12 through October 14, Giuca and Cleary had far more substantive communication than Giuca and Russo (see exhibits T and U).

mostly consisted of seconds of connect time, suggesting that they didn't speak except during one call which had a connection time of slightly more than one minute. Two of the records appear to be "double call records" (exhibits T and WW).

Gregory Ware

194. Ware, who was in state prison in 2004 and during Giuca's trial, testified in front of Giuca's jury that Giuca, Russo, Saleh, and Legister were former Crips who became members of Ghetto Mafia (T671).

195. Ware contradicted Cleary by identifying Saleh rather than Legister as a "leader" of the gang (Ware: 673 *cf.* Cleary: T259), when, in fact, neither was a "leader" in a "gang" (*see* exhibit S, ¶¶ 6-7, 10; exhibit V, ¶¶ 9-11).

196. Ware testified in front of Russo's jury that Russo admitted shooting Fisher during the course of a robbery after Fisher "charged" at him (T678-79). Russo told Ware that after he shot Fisher, he took his wallet and dumped it in a sewer and got a haircut (T678-81).

197. Ware testified that Russo said Giuca gave him the gun, but later claimed that he got it from the Wenzel's house on 86th Street (T682);

(*see, infra*, ¶ 220). Russo didn't tell Ware what he did with the gun after he shot Fisher (T698).

198. Ware originally withheld information from the prosecution when detectives interviewed him for a few hours at Greene Correctional Facility (683-84).

199. After stonewalling detectives for hours, Nicolazzi entered the interview room and Ware agreed to tell authorities what he knew (T684, 688-89). After agreeing to cooperate, Ware was quickly brought to Brooklyn to make a sworn, recorded statement and to testify before the grand jury (T684).

200. In fact, Ware changed his tune and agreed to cooperate with the People because Nicolazzi told him that if provided information to the authorities, she might be able to help relocate him to a more favorable prison closer to New York City (Ware affidavit, July 31, 2019, ¶¶ 6-7) (exhibit XX).

201. On information and belief, Nicolazzi never disclosed this promised benefit to Giuca or Russo.

202. After Ware agreed to cooperate with Nicolazzi, he maintained that Russo didn't tell him where he got the gun from or what he did with

it after he murdered Fisher. Ware told investigators that Russo told him he had been seen by a person in a van during the crime (Ware DD5, September 3, 2004) (exhibit YY).

203. On September 14, 2004, Nicolazzi, McCafferty and some other investigators took a sworn, recorded statement from Ware. Now under oath, Ware reiterated that Russo told him he shot Fisher during the course of a robbery (Ware recorded statement) (exhibit ZZ).

204. Ware again said that Russo ran away, tossed Fisher's wallet and quickly got a haircut after someone in a van saw him during the crime²² (exhibit ZZ).

205. In his sworn statement, Ware didn't allege that Russo had accused Giuca of any involvement in the crime (exhibit ZZ).

206. On November 17, 2004, Ware testified before the grand jury. Nicolazzi didn't ask him any questions about where Russo got the murder weapon or what he did it with it after he murdered Fisher (Ware GJ) (exhibit AAA).

²² Russo's admission that he was witnessed murdering Fisher by a person in a van would have constituted powerful evidence that explained why Russo immediately got his braids cut off. However, Nicolazzi didn't elicit this evidence from Ware, no doubt because she didn't want the jury to hear any evidence that a van and a woman were present at the crime scene (*see, supra*, ¶¶ 135-44).

207. On July 30, 2019, Ware executed a sworn recantation in which he admitted that he falsely identified Giuca as a former Crip and “leader” of Ghetto Mafia (exhibit XX, ¶¶ 14-15). Ware further acknowledged his testimony that Ghetto Mafia was a structured organization with “bosses,” “capos,” and “soldiers” was untrue (*Id.* at ¶¶ 14-16).

208. Ware told Nicolazzi that Russo claimed he got the gun from Giuca because it was clear to him that is what Nicolazzi wanted him to say. He also told her that Russo said he got the gun from the Wenzel’s house because he had heard one of the Wenzel brothers was arrested for possessing firearms shortly after the murder. (*Id.* at ¶ 11).

209. Neither Russo nor Giuca has ever told Ware that Giuca was involved in Fisher’s murder or its aftermath, including providing Russo a gun beforehand or disposing of one after the crime (*Id.* at ¶¶ 11-13, 18).

Nicolazzi’s Violation of the Trial Court’s “Ghetto Mafia” Ruling

210. In a pretrial *Molineux* ruling, the trial court expressly limited any “gang evidence” to statements made by alleged members regarding the relationship between Giuca, Russo other alleged members who were at Giuca’s home on the night Fisher was killed. The court ruled

inadmissible any reference to past gang acts of violence or “gang colors” (June 26, 2005 transcript, pp. 20-23).

211. Nicolazzi brazenly ignored the trial court’s ruling and introduced evidence in front of Giuca’s jury about gang colors (Valentin: T502; Ware: 672-73), that Giuca wore flags and beads in the gang’s colors (Cleary: T260-61), that Giuca usually “called the meetings” (Ware: T673), and that Giuca and Russo used gang handshakes and hand signals (Valentin: T503-04).

212. Nicolazzi offered inflammatory and irrelevant (and since recanted, *see*, exhibit XX, ¶ 14) evidence in front of Giuca’s jury alleging that Giuca was formerly a Crip (Ware: T672), describing violent Crip initiations of former Ghetto Mafia members (Cleary: T260; Valentin: T503), and that members of Russo’s Crip gang wore “war beads” when they were about to fight somebody” (Valentin: T502-04).

213. Nicolazzi’s detailed examination of Ware’s attempted murder conviction in front of Giuca’s jury made a mockery of the trial court’s *Molineux* prohibition against the admission of prior acts of gang violence. Like her ridiculous comparisons of Giuca to “Tony Soprano” and a “mafioso” (T26, 35), she smeared Giuca with inadmissible evidence by

establishing that Ware, a purported Ghetto Mafia member who lived in the same building as Russo and hung out with some of the same people as Giuca and Russo, shot a man in the back (as Fisher was), after a dispute between rival groups of young men (Ware: T668-71).

Evidence That Russo Disposed of the Murder Weapon Himself

214. On October 24, 2003, police recovered Fisher’s wallet from a sewer at Turner Place and Stratford Road (Gaynor: T382-83), which was consistent with what Russo told Ware (Ware: T680-81; Ware GJ 24) (exhibit AAA); *see also*, (exhibits YY and ZZ).

215. Alejandro Romero testified—outside of the presence of Giuca’s jury—that sometime after Fisher’s wallet had been recovered, he told Russo that police were searching the sewers on Beverley Road and Stratford Road (two blocks away from Russo’s residence at 60 Turner Place). A “stressed” Russo replied that they were checking the “wrong sewer” and that he would “never put two things in the same sewer” (Romero: T750-53).

216. In March 2004, Romero had provided the police with more details about his interactions with Russo. In addition to seeing Russo with a gun ***a week before the murder*** (*see, infra*, ¶¶ 324-25), a “real

nervous” Russo said, “if the kid did not get stupid, I wouldn’t be in this predicament” (Romero DD5, March 27, 2004) (exhibit BBB). Referring to the gun, Romero asked if he threw anything away near someone else’s house, and Russo smiled and said “maybe.”

Evidence of Russo’s Consciousness of Guilt

217. At 7:00 a.m. on October 12, 2003, approximately 20 minutes after he was seen by a person in a van murdering Fisher, a nervous Russo asked a family friend to cut off his long braids and told him that he was going to California (Bethune: T709-11); (exhibits YY and ZZ).

218. At 11:20 p.m. on October 14, 2003, Russo, who according to Nicolazzi “would do anything for Giuca” to “impress him” (T988, 995), met with detectives and in an effort to steer them away from his own crime, promptly fingered Giuca as the murderer (Russo DD5, October 17, 2003) (exhibit CCC).

219. Russo said that he saw Giuca and Cleary “plotting” against Fisher. He claimed Giuca told him that he was going to murder Fisher and admitted that he did the next day²³ (exhibit CCC).

²³ Based exclusively on Russo’s dubious and obviously self-serving statement, detectives quickly arrested Giuca. The Brooklyn DA’s Office declined to prosecute (Garbarino DD5, October 15, 2003) (exhibit DDD).

220. In order to further disassociate himself from his crime, Russo planted the seed that led to investigator's belief that Fisher was killed in the name of "Ghetto Mafia," telling them that Giuca was a member of the purportedly violent street gang and when they needed to dump "hot" guns after a shooting, they stored them at the Wenzel's house ²⁴ (exhibit CCC).

221. On October 17, 2003, Russo fled to California because he feared things were "hot" in Brooklyn (Valentin: T539-41). He returned on October 23 (T861).

222. Russo maintained a macabre shrine to celebrate his crime. He sickeningly displayed a newspaper article about Fisher's murder which contained his picture on his bedroom wall (Sikhial: T726-27).

The Defense Summation

223. The crux of the defense argument was that although Giuca quickly learned that Russo killed Fisher, Russo was entirely responsible for Fisher's murder (T942, 951, 973).

224. Counsel emphasized that the People switched theories throughout the case and that if Cleary and Calciano had been credible

²⁴ A few hours later, detectives went to the Wenzel's house and recovered two .380's, a .45 and a sawed-off shotgun. The murder weapon wasn't recovered but one of the Wenzel's was arrested (Martin DD5, October 15, 2003) (exhibit EEE).

witnesses, Nicolazzi never would have called Avitto and argued that Giuca was actually present when Fisher was killed (T945-47).

225. Counsel explained the misleading nature of the People's cell phone evidence and how the records suggested that Giuca and Russo spoke only a few times in the days after the murder (T947-51).

226. Counsel argued that since Giuca knew Russo killed Fisher shortly after he left his house, where there had been underage drinking, drug use, discussion about guns, and Fisher's body was found with a blanket from Giuca's house, it was understandable that Giuca would be concerned and speak to Russo in the days following the murder (T951, 973).

227. Counsel emphasized that Beharry's testimony that he disposed of one gun, coupled with Cleary's claims that Giuca told him Beharry got rid of two guns and that Cleary previously saw a .380, which couldn't have been the murder weapon, at Giuca's home suggested that Beharry didn't dispose of the murder weapon because "[it] never made it back to (Giuca's) house" (T967-68).

The People's Summation

228. Nicolazzi outrageously labeled Giuca a “wolf” and a gangland leader who wanted his “pathetic, fledgling gang” to “toughen up” by preying upon the “lamb” Fisher (T980-81, 995, 1024).

229. As she did in her opening and during Calciano’s examination (*see, supra*, ¶¶ 153-56), Nicolazzi blatantly misrepresented Giuca’s phone records to support her false premise that Giuca called Calciano “early that morning” *after* the murder because he desperately needed to speak to her so he could tell her what happened to Fisher (T981-82); *see also*, (exhibit T).

230. Nicolazzi emphasized that Calciano’s testimony was corroborated by the recovery of Fisher’s wallet (T982-83). Unknown to the jury, the recovery of Fisher’s wallet also was corroborated by Ingram’s sworn statement to Nicolazzi (exhibit B, pp. 12, 16) (Russo “had the intention of robbing him...and he ended up shooting him...and he took his wallet”).

231. Nicolazzi lectured the jury that “***you know***” Giuca gave Russo the murder weapon and “that there alone...makes him guilty of murder” (T989). She later instructed the jury “***you know*** beyond any

reasonable doubt that [Giuca] supplied the gun” and knew that it was going to be used to rob Mark Fisher, to show him “what’s up...” (T1019).

232. Nicolazzi portrayed Russo as an impressionable, starry-eyed “patsy” who “looked up to his gangland leader” Giuca, who he wanted “to impress” and was willing “to do anything for” (T988, 995, 1017).

233. Nicolazzi argued that Giuca “sanctioned everything” his “soldier” did, and that when Giuca ordered Russo, who “did anything Giuca said,” to kill Fisher, Russo did precisely as he was told. She emphasized that Russo “completed the mission” Giuca sent him to do by returning to Giuca’s home, handing Giuca the gun and telling him “it’s done” (T990, 1014, 1025).

234. Even though DiPietro and Cleary testified falsely about an 11:00 a.m. call in which Giuca purportedly was trying to locate Denihan (who was in Giuca’s kitchen, *see, supra*, ¶¶ 80, 97-99, 120-22), Nicolazzi exploited their perjury as proof that Giuca’s inability to locate Denihan led him to panic because she might have “known what he had done and he was worried about being found out” (T985-86).

235. Nicolazzi attempted to reconcile the striking inconsistencies between Cleary’s and Calciano’s description of a joint conversation with

Giuca as “natural” and demonstrative of “their truthfulness.” Nicolazzi conceded that Giuca spoke to them in them “*in each other’s presence*” which meant although their “focus was different,” they said, “ a lot of the same thing...just in two different ways” (T998-1001).

236. Nicolazzi didn’t attempt to explain the inconsistencies between Cleary and Calciano by arguing that Giuca spoke to Cleary and Calciano separately, as the People have suggested in previous post-conviction litigation.

237. Nicolazzi conceded that “having guns...doesn’t in any way implicate [Giuca] for the murder” (T994), but she instructed the jury that “*you know*” the gun Beharry received from Giuca “*absolutely*” was the murder weapon (T1004-06). She bolstered this unequivocal claim by assuring the jury that Beharry “possess[ed] the gun and [got] rid of the gun *which I know is the murder weapon* in this case” (T1021-22).

238. Nicolazzi emphasized the significance of Beharry’s purported disposal of a gun for Giuca, rhetorically stating that Giuca wouldn’t have made sure the gun Beharry took from him couldn’t be found if he wasn’t guilty of killing Fisher (T1006).

239. Nicolazzi improperly told the jury that “through Beharry you have enough evidence of [Giuca’s] guilt” for Fisher’s murder (T1006).

240. Nicolazzi told the jury that “*you know*” Avitto didn’t make up that he overheard Giuca admit to his father that he had a gun with him because Giuca’s visitation records proved that his father and two women visited him at the same time Avitto had a visitor (T1008-09).

241. Unlike Giuca’s statements to Cleary and Calciano, which “partially danced around the truth,” Nicolazzi embraced Avitto’s status as a jailhouse informant to emphasize the reliability and the accuracy of Giuca’s “no holds barred” statements to the “similarly situated” inmate (T1008).

242. Vouching for the “honest,” forthright and altruistic Avitto (T1011, 1020-23), Nicolazzi asserted that there was “*indisputable evidence;*” “*there was no way Giuca was in the house*” at the time of the murder “like the defense would like you to believe” (T1017-18).

243. Nicolazzi assured the jury that “*you know*” Giuca participated in the violence that ended Fisher’s life because he led Fisher to his death by taking him to where Russo was laying in ambush, waiting to shoot Fisher near Cleary’s home (T1016). Exploiting Avitto’s

testimony to the hilt, Nicolazzi encouraged the jury to openly speculate whether *Giuca* shot Fisher (T1017, 1019).

244. Nicolazzi asserted that Fisher's "indisputable physical injuries" proved that *Giuca* was with Russo when he killed Fisher. The bottom line, according to Nicolazzi, was that "it didn't even make sense" that Russo could have attacked Fisher by himself because Russo couldn't have subdued Fisher without the help of another person; it made "much more sense, common sense" that *Giuca* helped him, which demonstrated that *Giuca's* admission to Avitto was the "truthful" version of Fisher's demise (T1016-18).

245. Just as she did with purported phone calls between *Giuca* and Cleary (*see, supra*, ¶¶ 80, 97-99, 120-22), and *Giuca* and Calciano (*see, supra*, ¶¶ 153-56), Nicolazzi misrepresented the phone record evidence, twice telling the jury that *Giuca* and Russo called each other 26 times in the three days "*right after*" the murder (T996, 1020), when she knew that five of the 26 attempted contacts occurred more than an hour before the murder and that the length of the connection time on the vast majority of calls made after the murder strongly suggested *Giuca* and Russo

actually spoke infrequently after the murder²⁵ (*see, supra*, ¶¶ 191-93; exhibits T and WW).

246. Nicolazzi improperly vouched for her own honesty, declaring that if Avitto had sought or requested consideration, she wouldn't have hidden it, as evidenced by her granting immunity to Beharry for disposing of the gun which "she knew" was the murder weapon (T1021-22); *but see*, (exhibit XX, ¶ 6) (Nicolazzi didn't disclose her promise to Ware that she might be able to help relocate him to a prison closer to New York City in exchange for his cooperation).

247. Nicolazzi mocked counsel's summation as little more than "wild speculation" akin to "screaming and yelling" without any evidence to corroborate Giuca's defense that Russo was entirely responsible for the crime. In contrast, Nicolazzi told the jury that she presented "tons" of "plain and simple" evidence, all of which fit "like piece[s] in a puzzle" and created "one clear picture": Giuca was guilty of murdering Fisher (T1023).

²⁵ Nicolazzi illogically argued that a 64-second call from Giuca to Cleary at 5:57 a.m. might have gone to voicemail (Cleary: T300; 996) but a 34 second call from Russo to Giuca at 5:13 a.m. was too long to have gone to voicemail (T1012-13).

248. Near the end of her summation, Nicolazzi reemphasized her personal beliefs that Giuca gave the murder weapon to Beharry and in Giuca's guilt, proclaiming that "***of course he's guilty of*** [possessing a gun in his home]" and reminding jurors that "***you know***" [the murder weapon] was in his home (T1024-25).

249. Nicolazzi completed her summation by instructing the jury to find Giuca guilty of felony murder because "***you know***" Giuca knew in advance that Russo was going to rob Fisher and by decreeing that a guilty verdict "***was required by the law***"²⁶ (T1026-27).

Verdict and Sentence

250. Giuca was convicted of felony murder, robbery and criminal possession of a weapon and received an aggregate sentence of 25 years to life. Russo also was convicted of murder and robbery and sentenced to 25 years to life.

²⁶ Nicolazzi's instruction that the evidence required a conviction was contrary to the trial court's instructions to the jury. The trial court repeatedly instructed the jury that the jury "must" find Giuca not guilty if they had a reasonable doubt and "should" find him guilty if they found proof beyond a reasonable doubt (T1040-50).

FACTS RELATED TO THE PRESENT MOTION

The Timing of This Motion

251. As soon as I received the Ingram recording from the People, I immediately sought relief from this Court and further information from the People about Russo's admission to Ingram.

252. On June 12, 2018, in anticipation of a possible retrial after the Appellate Division decision, I filed a motion to dismiss the indictment due to the People's suppression of Russo's admission and the Ingram recording. That motion wasn't answered by the People or addressed by this Court, presumably because the parties were still awaiting a decision on whether the Court of Appeals would hear an appeal of the Appellate Division's decision.

253. On June 14, 2018, I requested from the People any records in their custody, possession or control "regarding Ingram's local and state inmate movement records and his parole records or anything that would explain his presence in Rikers." The People didn't supply any information responsive to the request.

254. On June 22, 2018, I wrote District Attorney Eric Gonzalez (and copied this Court), urging him to investigate how and why the Ingram recording was suppressed from Giuca for years. In addition, I requested disclosure of

any relevant evidence in your possession, custody or control, or to which you may gain access, including your servers, regarding the circumstances surrounding Ingram's exculpatory statement, including but not limited to, email, memorandums, notes, movement orders, orders to produce, state and local custody records, parole records, evidence that tends to establish Ingram's prior history as an informant for any agency, and evidence that Ingram was deliberately placed near Giuca to gather evidence from him.

The District Attorney didn't respond to the letter.

255. On July 16, 2018, shortly after the Court of Appeals granted the People leave to appeal the decision of the Appellate Division, I filed a motion in this Court seeking to re-open the 440.10 hearing due to ADA Melissa Carvajal's recent disclosures of the Ingram recording (*see, infra*, ¶ 311) and the Byrnes report (*see, supra*, ¶¶ 43-50). I explained that Giuca should be entitled to take additional testimony in order to create an accurate record before the Court of Appeals considered the case.

256. That same day, I wrote the Clerk of the Court of Appeals a letter requesting that an appeal be stayed in light of the People's recent disclosures and their significance to Giuca's motion. This Court was copied on that letter (letter to John Asiello, July 16, 2018) (exhibit FFF).

257. A deputy clerk from the Court of Appeals responded that there was no need to take any action on my request since the matter was still pending a final leave determination (letter from Heather Davis, July 20, 2018) (exhibit GGG).

258. This Court took no action on the motion to reopen the 440.10 hearing other than signing a defense subpoena for Ingram's Rikers Island records (exhibit C).

259. Concomitant with the July 16 motion to reopen the hearing, I demanded specific *Brady* material related to Ingram from the People. They didn't respond to the demand.

260. On June 12, 2019, one day after the Court of Appeals reversed the Appellate Division and reinstated Giuca's conviction, I made another specific *Brady* demand of the People in preparation for the instant motion. As of the filing of this motion, I haven't received a substantive

response from the People (letter to Joseph Alexis and response, June 12, 2019) (exhibit HHH).

Joseph Ingram's Background and 2005 Incarceration at Rikers

261. In July 2005, Joseph Ingram was 41 years old. His extensive multi-state and federal criminal history included several firearms-related convictions (exhibit D).

262. I am informed by Carvajal that Ingram died on August 12, 2006.

263. On December 20, 1999, Ingram entered Downstate Correctional Facility as a result of a felony DWI conviction in Manhattan. He was paroled on March 18, 2003 (*Id.* at pp. 12-13).

264. In August 2003, Ingram, then on parole, was arrested for felony DWI in Essex County. His September 28, 2004, guilty plea on that case resulted in a parole violation on the 1999 Manhattan case. On October 19, 2004, Ingram entered Clinton Correctional Facility to serve his sentence (*Id.* at pp. 4-6, 13).

265. On June 2, 2005, Ingram was scheduled to be sent to Rikers Island, apparently for inclusion in the High Impact Incarceration Program (*Id.* at p. 13-14).

266. On June 28, 2005, Ingram entered Rikers Island. He was housed in "8 Upper" (8U) of the Otis Bantum Correctional Center (OBCC), the same housing area as Giuca (exhibits C and UU).

267. From July 13 to 19, 2005, Ingram went to the Rikers Island medical clinic three times. On July 19, he was taken to the Bellevue Hospital Prison Ward ("BHPW") (exhibit C, p. 3).

268. On July 20, 2005, Ingram returned to the housing area of OBCC. Within an hour, he contacted the New York County Defender Services, a public defender agency that represents clients on Manhattan criminal cases. The call lasted 8 minutes and 42 seconds (*Id.* at p. 8).

269. During his brief time at Rikers Island, only two of the 121 telephone calls Ingram made were to New York County Defender Services. On information and belief, during the July 20 call, Ingram notified his attorney that that he wished to speak with Nicolazzi about Giuca and/or Russo. Later that day, he was returned to 8U (*Id.* at p. 3).

270. On July 21, 2005, Ingram was transferred from Rikers Island to Kings County Supreme Court ("SKJ3") (*Id.* at p. 4). On information and belief, the People prepared a take-out order and supporting affidavit in order to temporarily transfer Ingram from the custody of the

Department of Correction to the custody of the Brooklyn DA's Office for Ingram to be interviewed by Nicolazzi and McCafferty. After the interview, Ingram was returned to the custody of the Correction Department and Rikers Island.

Russo's Admission and the Ingram Recording Exculpate Giuca

271. Ingram's approximately 35-minute statement to Nicolazzi and McCafferty on July 21, 2005, was a sworn statement which exposed him to perjury charges if Nicolazzi believed that he lied about his interactions with Russo (exhibit B, p. 2).

272. Based upon her decision to place Ingram on the People's witness list approximately six weeks later after vetting his credibility (*see, infra*, ¶ 289), Nicolazzi found Ingram's sworn statement credible.

273. Ingram told Nicolazzi that he was housed with Giuca at 8U in OBCC and that a "couple of days ago" (July 19), he met Russo while the two of them were being taken to Bellevue (exhibit B, pp. 3-5). Ingram's jail records confirm that he was housed in 8U with Giuca and went to Bellevue on July 19, 2005 (exhibit C, pp. 2-3).

274. Ingram told Nicolazzi that he and Russo discussed Russo's case (exhibit B, pp. 11-12). Without alleging that Giuca was involved in

any aspect of the crime, Russo admitted murdering Fisher during the course of a botched robbery (*Id.* at p. 12):

Ingram: [Russo] told me that he left the party with [Fisher] and he said he just had the intention of robbing him—and [Fisher] didn't have enough money. He had the intention of robbing him, and [Fisher] didn't have enough on him, and he was going to take him to the ATM machine; and then he got into some kind of fight, and [Russo] ended up shooting him.²⁷

275. Russo initially told Ingram that he used a .9 millimeter. Ingram was very familiar with firearms (exhibit B, pp. 12-15) and as they continued to talk, Russo eventually admitted that he shot Fisher five times with a .22 caliber pistol (*Id.* at p. 14).

276. The medical evidence confirmed that five bullets were recovered from Fisher's body and that Fisher had been shot five or six times with a .22 (Guitierrez: T841; Basoa: T844, 852).

²⁷ In August 2004, Detective Gaynor received an anonymous letter from someone claiming to be privy to the details of the crime. The anonymous writer relayed a story strikingly similar to Russo's admission to Ingram, telling Gaynor that Russo shot Fisher after a fight over money. The author's disdain for Giuca was palpable, but he or she nevertheless wrote "I don't want to see an innocent person go to jail" (letter and Gaynor DD5, August 22, 2004) (exhibit III).

277. Nicolazzi asked Ingram what Russo told him happened after he shot Fisher. Ingram's reply contradicted all of the evidence Nicolazzi introduced and every argument she made about Giuca's disposal of the murder weapon at trial (exhibit B, pp. 16-17):

Ingram: [Russo] called John's house and asked John if he could come over, um, and he had just shot [Fisher] in the leg...John had let [Russo] come over or he came over. I don't know if John allowed—told him to come over, or if he just came over...[Russo] said he initially knocked on the door...

Nicolazzi: Okay.

Ingram: Okay. John answered the door. *[Russo] asked him to get rid of the weapon and John refused.*

Nicolazzi: *Who is telling you that now?*

Ingram: *Russo.*

Nicolazzi: Okay, and then what did Russo tell you happened? *So he said that John refused to take the weapon?*

Ingram: *Right.*

Nicolazzi: And then what?

Ingram: And then [Russo] left.

Nicolazzi: And did [Russo] tell you anything else?

Ingram: No.

278. Ingram said that he spoke to Giuca after his conversation with Russo. But Nicolazzi left the conversation between Giuca and Ingram ambiguous as she and Ingram weaved back and forth between Ingram's separate conversations with Giuca and Russo. Ingram ultimately said that he "might have" told Giuca some of what Russo told him about the crime (*Id.* at pp. 20-21).

279. Ingram specifically swore to Nicolazzi that he ***did not*** tell Giuca "about the part of [Russo] coming over to the house and the telephone call and all that shit" (*Id.* at p. 21).

280. Nicolazzi appeared more interested in debriefing Ingram about what Giuca told him rather than what Russo said. Ingram told her that Giuca said Russo called him and asked to come over after he shot Fisher "in the leg" (*Id.*).

281. Ingram told Nicolazzi that Giuca said Russo showed up, banged on the door, and asked him to get rid of the gun, but Giuca rebuffed him, telling Russo that "he didn't want any part of it" (*Id.* at pp. 21-22).

282. Ingram swore that Giuca was concerned because “a girl” (Denihan) was sleeping on the couch when Russo showed up with the gun (*Id.* at 21-22, 30-31).

283. Ingram told Nicolazzi that Giuca said Russo used a .22 that he (Russo) carried “all the time” (*Id.* at 27-28).

284. Obviously aware that Russo’s admission to Ingram exonerated Giuca, Nicolazzi asked Ingram if he and Giuca had discussed notifying Giuca’s lawyer about what Russo told him. Ingram responded that Giuca’s attorney was on vacation (*Id.* at p. 25).

285. In the summer of 2005, Giuca’s attorney was in Alaska and he didn’t return to New York until a few weeks before trial (exhibit E, ¶ 8).

Ingram’s Removal from Rikers Island

286. On July 22, 2005, just one day after Ingram exculpated Giuca in a sworn statement to Nicolazzi and informed her that Giuca’s attorney assuredly was unaware of Russo’s admission, Ingram was transferred to the medical clinic (exhibit C, p. 4).

287. On July 25, 2005, at 12:30 a.m., less than four days after Ingram told Nicolazzi that Giuca’s attorney was on vacation and thus

was unaware that Russo's admission exonerated Giuca, Ingram was moved out of Rikers Island and sent to Downstate Correctional Facility, where he remained until January 6, 2006 (*Id.*; exhibit D, p. 14).

288. In the span of 27 days, Ingram was sent from Clinton Correctional Facility to Rikers Island, placed in Giuca's cellblock, spoke to Giuca, spoke to Russo, met with Nicolazzi and made a sworn statement to her inculcating Russo and exculpating Giuca, and was shipped out of Rikers Island (exhibits A-D).

Ingram Is Presented as a Witness Against Giuca

289. Just prior to jury selection, Nicolazzi provided the defense with a witness list containing the name "***James Ingram***" (exhibit JJJ) (emphasis added) and a handwritten list of "James Ingram's" convictions (exhibit KKK) (Nicolazzi: H624; Gregory: H722-23).

290. "James Ingram's" handwritten list of convictions didn't include his date of birth, social security number, NYSID number, address, current location, custody status or any other contact information (exhibit KKK).

291. The handwritten list of convictions also didn't include Ingram's 2003 Essex County DWI, the case which triggered the parole

violation which eventually led Ingram to Rikers Island in June 2005 (exhibit KKK); (*see; supra*, ¶ 264).

292. The handwritten list of convictions provided to the defense included a note that “James Ingram’s” rap sheet would be available for the defense to review” (exhibit KKK) but Nicolazzi never provided Ingram’s rap sheet to the defense.

293. Nicolazzi’s placement of Ingram on the People’s witness list led Giuca’s attorney to believe that if Ingram testified he would have incriminated Giuca (exhibit E, ¶ 6).

294. On September 13, 2005, during jury selection, the trial court read the name “James Ingram” as a possible trial witness (voir dire transcript, p. 6).

295. Nicolazzi told Giuca’s counsel that Ingram “probably” wasn’t going to be called as a witness (exhibit E, ¶ 7). On September 21, 2005, the day before she rested her case (T891), Nicolazzi stated in open court that she didn’t intend to call “*our witness*” “James Ingram” to testify (T746).

Pre-trial Discovery Demands and Responses

296. Giuca's numerous specific pre-trial demands (exhibit LLL) gave Nicolazzi clear notice that any statement made by Giuca or Russo as well as any evidence favorable to his defense that Russo committed the crime by himself was of particular interest to the defense. These demands included:

- any recorded statements of Giuca or Russo made to a public servant engaged in law enforcement, or to any person then acting under his direction or in cooperation with him (*Id.* at Section II, ¶ 1),
- anything required to be disclosed to the defense prior to trial by the federal and state constitutions, including, but not limited to "all evidence within the custody or knowledge of the District Attorney's Office which is favorable to the defendant, in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976)" (*Id.* at ¶ 8(a)),
- "all evidence within the custody or knowledge of the District Attorney's office, which might tend to adversely affect the credibility of any eyewitnesses that the prosecution intends to call at trial, in accordance with *Giglio v. United States*, 402 U.S. 150 (1972)" (*Id.* at 8(b)),
- all written or recorded statements of any witnesses made in connection with this case (*Id.* at ¶ 13),

- the “exact date, time, and location” information was brought to the police, the name, date of birth and address of the person bringing forth information, and the “manner the information was conveyed to police” (*Id.* at ¶ 14),
- whether any civilians were used by the NYPD or DA’s Office, acting as an agent, during the course of the investigation into Mark Fisher’s death, and if so, the witness’ name, address, date of birth, date, time and location of the conversations, and copies of any recorded statement made by the witness (*Id.* at ¶ 15),
- if Giuca was alleged to have made a statement to a person “acting in cooperation with law enforcement,” notice of the location, date and time of the statement, and the identity of any police officers present (*Id.* at Section III, ¶ 10).

297. At the time Nicolazzi prepared the People’s response to the defense demands, she was a Senior Assistant District Attorney who had been assigned to the Homicide Bureau for four years (Nicolazzi: H406-07).

298. During her career, Nicolazzi received extensive training on a prosecutor’s *Brady* obligations, attended CLE, and went to “many long-term courses” that included *Brady* training (Nicolazzi: H434-35).

299. Nicolazzi didn’t rely upon specific defense demands as a factor in determining whether she was obligated to disclose evidence. She

relied on her own knowledge of the existence of favorable evidence within the People's custody, possession or control (Nicolazzi: H440).

300. In a sworn response to the defense demands (exhibit MMM) Nicolazzi wrote that "any written, oral or recorded statements" of Giuca and Russo, "to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him...have heretofore been disclosed" (*Id.* at ¶ 10).

301. Nicolazzi swore that the People were unaware of any evidence tending to impeach the People's non-police witnesses, but she assured the defense that "any arguably exculpatory material will be provided to the Court for *in camera* inspection" (*Id.* at ¶ 25).

302. Nicolazzi swore that she would turn over prior statements of witnesses and *Rosario* material at the time prescribed by law (*Id.* at ¶ 26).

303. The trial court ordered all *Rosario* material to be disclosed by August 22, 2005, or almost one month after Nicolazzi took the sworn, recorded statement from Ingram and three weeks before trial (June 26, 2005 transcript, p. 5).

304. Nicolazzi swore that Giuca would receive “prior to trial” all *Rosario* material and a copy of a witness list (exhibit MMM, ¶ 32). Read together, she indicated that the *Rosario* material of witnesses who appeared on the witness list would be disclosed before trial. Nicolazzi didn’t state that Ingram wouldn’t appear as a prosecution witness until September 21, 2005, near the end of the trial (T746).

305. Nicolazzi swore that the People were unaware of the existence of any *Brady* material, but she assured the defense that “the People are aware of their continuing duty under *Brady* to disclose exculpatory evidence to the defense and will honor that obligation.” She reiterated that “any arguably exculpatory material will be submitted to the Court for *in camera* inspection” (exhibit MMM, ¶ 34).

306. Nicolazzi knew before trial that Giuca’s demands for Russo’s statements and any favorable evidence were in support of his defense that Russo was solely responsible for Fisher’s murder (*see, supra*, ¶¶ 59, 61).

307. Nicolazzi’s knowledge of (a) Russo’s admission (exhibit A), (b) the Ingram recording (*Id.*), (c) Giuca’s stated defense that Russo was solely responsible for the crime (exhibits L and M), (d) Giuca’s demand

for Russo's statements and any favorable evidence (exhibit LLL), and (e) her sworn representations that she would comply with her continuing duties to disclose exculpatory evidence to Giuca and any "arguably" exculpatory evidence to the trial court (exhibit MMM), "put her on notice that there [was] particular evidence the defense [didn't] have and believed to be important." *See People v. Vilardi*, 76 N.Y.2d 67, 73-74 (1990).

308. Russo's omnibus motions (exhibit NNN), in addition to requesting the same information sought by Giuca, demanded the disclosure of the contents of any oral statements made by Giuca or Russo "concerning the alleged criminal incident made to a person who is not a law enforcement officer" and the name of the witness to whom the statement was made and contact information for the witness (*Id.* at motion for discovery, ¶ 17).

309. Nicolazzi's responses to Russo's specific demands were as unresponsive and misleading as her responses to Giuca's demands (exhibit OOO).

310. On September 14, 2005—during trial and less than two months after Ingram swore to her that Russo told him he murdered

Fisher by himself and Giuca refused to take the murder weapon from him, Nicolazzi blatantly lied to the trial court, claiming that she fully complied with her discovery and *Brady* obligations (T121):

Every single statement [counsel for Giuca and Russo] allege [was] made by the defendants they have previously been provided with. I've gone through everything myself. I know it's all there. If they say that's not accurate I'd like to hear what it is the details are.

Russo's Admission and the Ingram Recording Were Suppressed

311. On June 4, 2018, Carvajal provided the defense with 45 pieces of evidence in anticipation of a retrial. Item no. 8 was an audio disc titled "Audio A05-0335 (Joseph Ingram) (exhibit A)," which contained a copy of the Ingram recording²⁸ (discovery packet 3) (exhibit PPP).

312. Prior to receiving the Ingram recording from Carvajal, I was unaware that Russo admitted to Ingram that he murdered Fisher by himself and that Giuca refused to take the murder weapon from him after

²⁸ The Court should demand that the People explain how Carvajal, who admirably took a "disclose everything" approach after Giuca's conviction was overturned on *Giglio* grounds, located exculpatory evidence "hiding in plain sight" in the People's file for 13 years before the conviction was overturned. It is incomprehensible that neither Nicolazzi, her trial partners, her supervisors, appellate lawyers, CRU lawyers or any member of the 440.10 hearing team recognized the Ingram recording's obvious exculpatory value to Giuca and disclosed it.

the crime. I also was unaware that before trial Ingram made a sworn, recorded statement to Nicolazzi in McCafferty's presence.

313. Russo's admission and the Ingram recording were not disclosed to Giuca's trial attorney at any time (exhibit E, ¶¶ 3-5).

314. Russo's admission and the Ingram recording were not disclosed to Russo's trial attorney at any time (exhibit F, ¶¶ 3-7).

315. All of the materials disclosed to Giuca before trial were Bates stamped and catalogued in order for the People to maintain "an exact reproduction within the office" and to document exactly what was turned over to the defense (Nicolazzi: H451).

316. On June 6, 2018, I demanded from Carvajal the production of "any and all materials or evidence in your custody, possession or control related to Joseph Ingram," including the "exact Bates stamped production list of what was provided to the defense" that Nicolazzi described in her 2015 hearing testimony.

317. Carvajal refused to provide me with the Bates stamped production list from 2005, which leads me to conclude the list confirms

that Nicolazzi didn't disclose Russo's admission or the Ingram recording to Giuca.²⁹

318. On June 7, 2018, I was informed by Joseph Alexis, Chief of the Trial Division, that the People "had no record" of the Ingram recording being disclosed to Giuca prior to June 4, 2018.

319. On August 2, 2018, Leonard Joblove acknowledged in writing that "as best we can ascertain now, the People did not disclose the Ingram recording prior to trial."

320. As described (*supra*, ¶ 310), Nicolazzi lied to the trial court, stating that after having gone through her entire file, she had disclosed "***every single statement***" made by Giuca and Russo.

321. Despite her sworn representation that she would disclose any arguably exculpatory material to the trial court for an *in camera* inspection (exhibit MMM, ¶¶ 25, 34), Nicolazzi didn't present any arguably exculpatory material for an *in camera* review (Nicolazzi: H438).

²⁹ In 2012, Russo filed a pro se 440.10 motion alleging that certain *Rosario* material was withheld from him. In his decision denying the motion, Justice Marrus noted that the People's file contained a "summary of the Rosario material" given to the defense (*People v. Russo* decision, April 27, 2012).

322. Giuca's trial counsel relied on the good faith of Nicolazzi's *Brady* and discovery responses and representations (Gregory: H715).

The People Knew Before Trial That Russo Carried His Own Gun Before and After Fisher's Murder, and Was Violent and Unstable

Evidence That Russo Possessed A Gun Before Fisher's Murder

323. Shortly before he shot Fisher to death, Russo twice threatened to kill Jonathan Cardona, telling him he had a "burner" (a gun) and would "put a cap in his ass." Russo also bragged to Cardona that he had put a gun in someone else's face and threatened to shoot that person (Cardona DD5, September 16, 2004) (exhibit QQQ).

324. One week before the murder, Alejandro Romero saw Russo carrying a black gun in his waistband (exhibit BBB). As described (*supra*, ¶ 215), Romero testified—in front of Russo's jury only—that Russo strongly implied that he dumped the murder weapon and Fisher's wallet in two different sewers.

325. Romero swore to Nicolazzi in November 2004 that "everybody" knew Russo carried a gun. He reiterated that one week before the murder, he saw the black handle of a gun sticking out of Russo's rear waistband (Romero GJ6-7) (exhibit RRR).

Evidence That Russo Possessed a Gun After Fisher's Murder

326. A few weeks after the murder, Russo racked a gun in Jessie Domenech's presence and threatened to shoot him unless he put his hand through a glass window. Russo told Domenech that he had killed two people (Domenech DD5, November 3, 2003) (exhibit SSS).

327. In the summer of 2004, Russo showed Prince Aviles a .22 or .25 caliber black pistol he was carrying in his waistband (Aviles DD5, September 10, 2004) (exhibit TTT).

328. On November 23, 2004, immediately after Russo was taken into custody for Fisher's murder, Russo called his girlfriend from the precinct and told her to "go to my crib, get the ratchet and put it in your crib" (Grafakos affidavit, November 23, 2004) (exhibit UUU).

329. Nicolazzi introduced evidence that Giuca possessed firearms, including a .380 that couldn't have been the murder weapon, a week or two before the murder (Cleary: T265-67) even though she conceded that such possession didn't "in any way implicate him in the murder" (T994).

330. Yet in addition to withholding exculpatory evidence that Russo kept the murder weapon after the crime, she didn't introduce

evidence against Russo that he frequently carried a pistol before and after he shot Fisher.

Evidence That Russo was Violent and Unstable

331. From September 18, 2001, to February 21, 2003, Russo abused his grandmother at least ten times. In one incident, Russo beat his grandmother with a broom stick and spit in her face (DD5, February 13, 2004) (exhibit VVV).

332. In 2003, in addition to assaulting and abusing his own grandmother, Russo was known to commit robberies (exhibit QQ, ¶ 26), engage in random acts of violence (exhibit V, ¶¶ 12-13), and to be “volatile, violent and impulsive” (exhibit XX, ¶ 17).

Russo’s 2018 Admission That the Murder Weapon Was His Gun

333. On February 23, 2018, an investigator for the defense attempted to interview Russo at Greenhaven Correctional Facility, but Russo refused to speak with him.

334. On March 22, 2018, Russo agreed to be interviewed by McCafferty. Russo told McCafferty that he shot Fisher to death with a black gun (which he described as a .9 mm) that he pulled out of his waistband while he robbed him (Russo DD5, March 22, 2018) (exhibit

WWW). A few days later Carvajal disclosed Russo's statement to McCafferty to the defense as "potential *Brady* material."

335. Just as Ingram swore to McCafferty and Nicolazzi in 2005, Russo told McCafferty that he shot Fisher by himself with *his own gun*. Russo told McCafferty that he had the gun for "awhile and shot someone else with it," which corroborated what he told Domenech shortly after he murdered Fisher (*see* exhibit SSS).

336. Russo was unable to recall where he got the gun or how long he owned it before he shot Fisher (exhibit WWW).

337. Russo corroborated what he told Ware in 2004 (*see, supra*, ¶¶ 202, 204), telling McCafferty that "a woman in a car at Albemarle Road" saw him and could have identified him (exhibit WWW).

338. Similar to what Ingram swore to McCafferty and Nicolazzi in 2005, during his approximately 55-minute interview with McCafferty, Russo never alleged that Giuca was involved in the crime or that he disposed of the murder weapon after the shooting.

The People's Pattern of Suppressing Evidence from Giuca

339. Nicolazzi's suppression of Russo's admission and the Ingram recording were not isolated instances of misconduct, but instead were a

part of the People's pattern of failing to comply with their *Brady*, *Giglio*, and *Rosario* obligations during the trial and 2015 C.P.L. § 440.10 proceedings.

340. Every Judge of the Court of Appeals and Justice of the Appellate Division who considered Giuca's 2015 motion concluded that Nicolazzi (a) failed to disclose favorable impeachment material, (b) should have disclosed her personal appearance on Avitto's case, and (c) failed to correct Avitto's inaccurate testimony. *People v. Giuca*, 2019 WL 2424481, at *6-7 (June 11, 2019); *People v. Giuca*, 158 A.D.3d 642, 646-47 (2nd Dept. 2018).

341. Judge Rivera of the Court of Appeals concluded that Nicolazzi deliberately misled the court, defense and jury, and described her conduct as unethical and "particularly egregious." *Giuca*, 2019 WL 2424481, at *8 (dissenting opinion).

342. Nicolazzi promised Ware that she would try to help him relocate to a more favorable prison if he provided information against Giuca and Russo (exhibit XX, ¶¶ 6-7). On information and belief, this wasn't disclosed to counsel for Giuca or Russo.

343. The trial court instructed Nicolazzi to turn over all *Rosario* material by August 22, 2005, which was three weeks before the trial started (June 26, 2005 transcript, p. 5).

344. Nicolazzi didn't disclose Lauren Calciano's grand jury testimony until counsel specifically demanded it on September 19, 2005, *after* Calciano had completed her trial testimony (T622, 631-32, 744). Nicolazzi claimed she "overlooked" disclosing the sworn testimony of a witness who claimed that Giuca confessed his involvement in Fisher's murder to her (Nicolazzi: H453-54).

345. Nicolazzi didn't disclose an audio-recorded statement of Meredith Denihan until Russo's counsel specifically demanded it on September 14, 2005, immediately before Denihan testified (T114-15).

346. Nicolazzi claimed this belated disclosure was "inadvertent," absurdly claiming that she *didn't know* that a cooperative witness who was at Giuca's home with Fisher—and a witness she prepped to testify immediately before trial—made a sworn, audio-recorded statement to a

case detective and one of her colleagues in the homicide bureau on October 14, 2003 (T120).³⁰

347. Nicolazzi didn't disclose an audio recording of trial witness Alejandro Romero until September 15, 2005, which was "one other tape" she and McNeill "found" while looking for the Denihan recording (T174).

348. As described (*supra*, ¶¶ 43-50), the People suppressed the Byrnes report at the 2015 hearing.

GROUND FOR MOTION AND RELIEF REQUESTED

349. Giuca is entitled to vacatur of his conviction and a new trial, pursuant to C.P.L. § 440.10 (1) (b), (f) and (h), and the Due Process Clauses of the United States and New York State Constitutions.

350. First, the People's failure to disclose Russo's admission and the Ingram recording suppressed substantial exculpatory evidence that supported Giuca's defense that Russo alone was responsible for Fisher's murder.

³⁰ Nicolazzi trivialized her *Rosario* violation by claiming the audio-recording had little value to the defense. The trial court rejected her excuse, noting that the defense was the proper party to assess the usefulness of the "substantial," "very extensive," "very detailed," and untimely disclosed recording (T121-22).

351. Nicolazzi's failure to disclose Russo's admission and the Ingram recording violated the People's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and the cumulative impact of the People's suppression of this evidence and the Avitto impeachment evidence, see *People v. Giuca*, 2019 WL 2424481, at * 6-7 (June 11, 2019), was material under New York State (any reasonable possibility of a more favorable outcome) and Federal (reasonable probability of a more favorable outcome) constitutional due process standards.

352. Second, the People violated Giuca's right to due process under *People v. Paperno*, 54 N.Y.2d 294 (1981) because Nicolazzi's unsworn expressions of her personal belief that Giuca disposed of the murder weapon and in his guilt made her suppressed, sworn pretrial interview of Ingram a material issue at trial and created a substantial likelihood of prejudice to Giuca.

WHEREFORE, upon this affirmation and the accompanying exhibits, for the reasons set forth above and in the annexed Memorandum of Law, which defendant incorporates by reference herein, the conviction should be vacated, or an evidentiary hearing held on this motion. We request the opportunity to submit a reply brief in the event that the People contest this motion.

By: */s/ Mark A. Bederow*

MARK A. BEDEROW

AFFIRMED: New York, New York
 August 5, 2019