

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.

Indictment No.
8166/2004

**MEMORANDUM OF LAW IN SUPPORT OF
JOHN GIUCA'S C.P.L. § 440.10 MOTION TO
VACATE HIS JUDGMENT OF CONVICTION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT.....	1
INTRODUCTION.....	2
ARGUMENT.....	7
<u>POINT I</u>	
GIUCA’S CONVICTION SHOULD BE VACATED BECAUSE THE CUMULATIVE EFFECT OF THE SUPPRESSED EVIDENCE SATISFIES THE NEW YORK AND FEDERAL MATERIALITY STANDARDS.....	7
A. The <i>Brady</i> Rule.....	7
B. Russo’s Admission and the Ingram Recording Were Favorable to Giuca.....	10
C. Nicolazzi Suppressed Russo’s Admission and the Ingram Recording from Giuca.....	11
D. The Suppressed Evidence Was Material.....	18
1. The <i>Vilardi</i> Reasonable Possibility Standard Applies.....	18
2. Russo’s Admission to Ingram Was Admissible as a Declaration Against His Penal Interest.....	20
3. The Cumulative Impact of the People’s Suppression of Russo’s Admission to Ingram, the Ingram Recording and the Avitto Impeachment Evidence Was Material to the Outcome of the Trial.....	27

POINT II

GIUCA'S CONVICTION SHOULD BE VACATED BECAUSE NICOLAZZI'S EXPRESSION OF HER PERSONAL OPINIONS THAT GIUCA DISPOSED OF THE MURDER WEAPON AND IN HIS GUILT MADE HER PRETRIAL SWORN INTERVIEW OF INGRAM A MATERIAL ISSUE AT TRIAL AND CREATED A SUBSTANTIAL LIKELIHOOD OF PREJUDICE TO GIUCA.....41

A. The Unsworn Witness Rule.....41

B. Nicolazzi's Expression of Her Personal Opinions That Giuca Disposed of the Murder Weapon and in His Guilt Made Her Pretrial Sworn Interview of Ingram a Material Issue at Trial.....43

CONCLUSION.....48

TABLE OF AUTHORITIES

Cases

<i>Banks v. Dretke</i> , 540 U.S. 668 (2004).....	11, 18, 35
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	2, 6, 7, 10n
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	20
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	6, 8, 9, 34, 38
<i>Nevada v. Jackson</i> , 569 U.S. 505 (2013)	20
<i>People v. Andre W.</i> , 44 N.Y.2d 179 (1978)	9, 14
<i>People v. Bailey</i> , 58 N.Y.2d 272 (1983)	45
<i>People v. Brensic</i> , 70 N.Y.2d 9 (1987)	21
<i>People v. Conlan</i> , 146 A.D.2d 319 (1 st Dept. 1989).....	40-41
<i>People v. Consolazio</i> , 40 N.Y.2d 446 (1976)	14
<i>People v. Contreras</i> , 12 N.Y.3d 268 (2009)	9, 13-15
<i>People v. DiPippo</i> , 27 N.Y.3d 127 (2016)	20-21, 26-27
<i>People v. Fuentes</i> , 12 N.Y.3d 259 (2009)	7-8, 13
<i>People v. Garcia</i> , 46 A.D.3d 461 (1 st Dept. 2007)	17-18
<i>People v. Garrett</i> , 23 N.Y.3d 878 (2014).....	8
<i>People v. Giuca</i> , 2019 WL 2424481 (N.Y. June 11, 2019)	5n, 6, 38-41
<i>People v. Hunter</i> , 11 N.Y.3d 1 (2008)	9
<i>People v. Moye</i> , 12 N.Y.3d 743 (2009)	45
<i>People v. Negron</i> , 26 N.Y.3d 262 (2015)	9, 35-37
<i>People v. Paperno</i> , 54 N.Y.2d 294 (1981)	6, 42-43, 45-47
<i>People v. Robles</i> , 2019 WL 3043922 (2 nd Dept. July 10, 2019)	42, 45
<i>People v. Settles</i> , 46 N.Y.2d 154 (1978)	20-21, 26
<i>People v. Shortridge</i> , 65 N.Y.2d 309 (1985)	26

<i>People v. Soto</i> , 26 N.Y.3d 455 (2015)	21
<i>People v. Steadman</i> , 82 N.Y.2d 1 (1993)	8
<i>People v. Tassiello</i> , 300 N.Y. 425 (1950)	42, 45
<i>People v. Thibodeau</i> , 31 N.Y.3d 1155 (2018)	26
<i>People v. Ulett</i> , 2019 WL 2583106 (N.Y. June 25, 2019)	7-8, 34-35
<i>People v. Vilardi</i> , 76 N.Y.2d 67 (1990)	8-9, 19-20, 27, 35
<i>Smith v. Cain</i> , 565 U.S. 73 (2012)	8
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	10n, 14-15, 18
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	8
<i>United States v. Severdija</i> , 790 F.2d 1556 (11 th Cir. 1986)	17
<i>Wearry v. Cain</i> , 136 S.Ct. 1002 (2016)	9

Statutes

C.P.L. § 440.10(1).....	1
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Rules

New York Rule of Professional Conduct 3.3 (a1)	14n
New York Rule of Professional Conduct 3.4 (a1)	14n
New York Rule of Professional Conduct 3.4 (a3)	14n
New York Rule of Professional Conduct 3.7.....	41-42
New York Rule of Professional Conduct 3.8 (b)	14n

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PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of John Giuca, in support of his accompanying motion to vacate his conviction, 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. The facts are set forth in the August 5, 2019 affirmation of Mark A. Bederow ("Bederow Aff.") and are established by that affirmation and the exhibits and transcripts which are submitted on the accompanying flash drive.

INTRODUCTION

The People violated John Giuca's right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963) by suppressing evidence that on July 21, 2005, Joseph Ingram made an audio-recorded statement to lead prosecutor Anna-Sigga Nicolazzi and trial witness Detective James McCafferty, in which Ingram swore that Giuca's co-defendant Antonio Russo admitted that he shot Mark Fisher to death during a robbery and immediately went to Giuca's home, where Giuca refused to take the murder weapon from him ("the Ingram recording") (exhibit A).

In less than one month in the summer of 2005, Ingram was transferred from Clinton Correctional Facility to Rikers Island, placed in Giuca's cellblock, spoke to Giuca and Russo separately, swore to Nicolazzi and McCafferty that Russo exonerated Giuca, and was swiftly transferred from Rikers Island to Downstate Correctional Facility.

Nicolazzi's misconduct was insidious. Rather than comply with her professional and ethical obligations to disclose evidence that was plainly favorable to Giuca's defense that Russo was solely responsible for Fisher's murder, Nicolazzi concealed the evidence and then brazenly lied about its existence by unequivocally stating in open court that after she

personally reviewed her entire file, she had disclosed “*every single statement*” made by Giuca or Russo. She even put Ingram on the People’s witness list (under an incorrect name) suggesting to the trial court and defense that he would testify *against* Giuca.

Nicolazzi’s deliberate suppression of Russo’s admission and the Ingram recording were material to the outcome of the trial. Her blatant disregard for Giuca’s right to due process deprived the defense from presenting the jury with proof of Giuca’s actual innocence and evidence that would have severely damaged the case against him.

Russo’s admission to Ingram would have flatly contradicted Albert Cleary’s pressured and uncorroborated testimony that Giuca admitted ordering Russo to kill Fisher and then took the murder weapon (a .22 caliber pistol) from Russo after the crime.

It would have eliminated the possibility that Anthony Beharry could have disposed of the murder weapon for Giuca, even if the jury credited Beharry’s testimony. Beharry, another threatened witness,¹

¹ Beharry is one of four witnesses who has recanted their testimony against Giuca in sworn statements made under penalty of perjury. Lauren Calciano, John Avitto and Gregory Ware also have admitted that they testified falsely against Giuca. Beharry (Bederow Aff., ¶¶ 175-78) and Calciano (*Id.* at ¶¶ 165-69) testified falsely due to overbearing pressure from the prosecution. Avitto lied to help himself with his own

merely testified that Giuca gave him one gun of unknown caliber a day or two after the murder even though the People alleged Giuca had two guns, including a .380 that couldn't have been the murder weapon.

Russo's admission to Ingram that Giuca was home while he murdered Fisher a few blocks away would have reduced the testimony of late-trial witness John Avitto to rubble.

Nicolazzi exploited her suppression of this powerful exculpatory evidence by repeatedly lecturing jurors that "*they knew*" Giuca took the murder weapon from Russo and gave it to Beharry, which she reinforced with her personal guarantee that "*she knew*" the gun Giuca gave Beharry "*absolutely*" was the murder weapon, which she said, without more, "*of course*" proved Giuca's guilt.

Nicolazzi's concealment of Russo's admission and the Ingram recording gave her carte blanche to bolster Avitto's dreadful credibility with the false assurance that there was "*indisputable*" evidence Giuca wasn't home at the time of the murder, which according to Nicolazzi provided the only "common sense" explanation of the crime: Giuca told

legal problem (*Id.* at ¶ 188). Ware testified falsely because Nicolazzi promised him that she would look into relocating him to a more favorable prison (*Id.* at ¶¶ 200, 207).

Avitto the truth, which meant that he was with Russo when Fisher was murdered.

There were no eyewitnesses against Giuca. There was no forensic evidence linking him to Fisher's murder or the weapon Russo used to shoot Fisher. The case against Giuca was dependent on admitted liars who eventually were pressured into testifying that Giuca made a series of inconsistent and incompatible statements, and Avitto, who created an entirely different theory of Giuca's guilt after he volunteered to testify to "do the right thing" when, in fact, he held his allegations for months, until he had an obvious motive to curry favor with the prosecution and falsely accuse Giuca.²

Giuca learned about the suppressed evidence after almost 13 years, while his case was pending in the Court of Appeals in connection with Nicolazzi's suppression of favorable Avitto impeachment evidence. In a cruelly ironic outcome, the People unconscionably benefited from their suppression of Russo's admission and the Ingram recording on appeal

² Nicolazzi suppressed specifically requested favorable impeachment evidence that could have been used to establish that Avitto "was motivated to fabricate testimony to gain a benefit." *People v. Giuca*, 2019 WL 2424481, at *8 (N.Y. June 11, 2019) (dissenting opinion of Judge Rivera).

because the Court of Appeals, unaware of this evidence, concluded that Nicolazzi improperly withheld other evidence favorable to Giuca, but reinstated his conviction in substantial part because of “strong evidence” of his “*efforts to dispose of the murder weapon.*” *People v. Giuca*, 2019 WL 2424481, at *7 (N.Y. June 11, 2019) (emphasis added).

Giuca’s conviction should be vacated under *Brady* and *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) because the cumulative effect of Russo’s admission, the Ingram recording and the suppressed Avitto impeachment evidence establishes that had this evidence been disclosed, there was a reasonable possibility (or probability) that the outcome of the trial would have been different.

Giuca also should be granted a new trial under *People v. Paperno*, 54 N.Y.2d 294 (1981) because Nicolazzi’s repeated insistence to the jury that “*they knew*” Giuca disposed of the murder weapon and was guilty, which she fortified with her personal opinions that “*she knew*” Giuca disposed of the murder weapon and that “*of course*” he was guilty may have improperly influenced the jury and made her sworn interview of Ingram, which flatly contradicted her unsworn and improper remarks to

the jury, a material issue at trial and thereby caused a substantial likelihood of prejudice to Giuca. *Id.* at 300, 304.

Accordingly, the Court should grant Giuca's motion to vacate his conviction, or alternatively, if the People dispute the evidence with relevant sworn statements, a hearing should be held on the issues raised herein.

ARGUMENT

POINT I

GIUCA'S CONVICTION SHOULD BE VACATED BECAUSE THE CUMULATIVE EFFECT OF THE SUPPRESSED EVIDENCE SATISFIES THE NEW YORK AND FEDERAL MATERIALITY STANDARDS

A. The Brady Rule

The United States Constitution and the New York Constitution guarantee a criminal defendant the right to discover favorable evidence in the People's possession material to guilt. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *People v. Fuentes*, 12 N.Y.3d 259, 263 (2009). To establish a *Brady* violation and warrant a new trial, the defense must show that (1) the evidence is exculpatory in nature, (2) the evidence was suppressed by the People, and (3) the defense was prejudiced because the evidence was material. *People v. Ulett*, 2019 WL 2583106, at *1 (N.Y.

June 25, 2019); *Fuentes*, 12 N.Y.3d at 263. Whether the People acted in good faith is irrelevant to establishing a *Brady* violation. *Ulett*, 2019 WL 2583106, at *1; *People v. Steadman*, 82 N.Y.2d 1, 7-8 (1993).

Under federal law, materiality is established when there is a reasonable probability that had the evidence been disclosed to the defense, the result of the trial would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). A defendant need not show it was more likely than not that he would have been acquitted if the evidence had been admitted, *Smith v. Cain*, 565 U.S. 73, 75 (2012); the standard is met when the suppressed evidence “undermines confidence” in the outcome of the trial. *Kyles*, 514 U.S. at 435. New York courts apply the federal materiality standard in cases where the defense did not specifically request the information. *People v. Garrett*, 23 N.Y.3d 878, 891 (2014).

However, where, as here, the defense alerts the People of its interest in particular evidence it deems important, the failure to disclose that evidence is “seldom, if ever” excusable and reversal is required if there is any reasonable possibility that the evidence would have changed the result of the trial. *People v. Vilardi*, 76 N.Y.2d 67, 77 (1990). If the

withheld evidence “would have added a little more doubt to the jury’s view of the evidence” and it is reasonably possible that a little more doubt would have been enough,” the *Vilardi* materiality standard has been satisfied. *People v. Negron*, 26 N.Y.3d 262, 271 (2015); *People v. Hunter*, 11 N.Y.3d 1, 6 (2008).

Where more than one item of favorable evidence has been suppressed, a reviewing court must consider the cumulative impact or the “net effect” of all of the suppressed evidence, rather than analyze each piece of evidence “item by item.” *Wearry v. Cain*, 136 S.Ct 1002, 1007 (2016); *Kyles*, 514 U.S. at 436-37.

When the People have “some basis” to believe that they are in possession of potentially exculpatory material, “deference to the prosecutor’s discretion must give way” and they are obligated to provide the evidence to the trial court so that the court may decide whether the evidence should be disclosed to the defense because “the prosecutor is not to decide for the court what is admissible or for the defense what is useful.” *People v. Andre W.*, 44 N.Y.2d 179, 185 (1978); *see also, People v. Contreras*, 12 N.Y.3d 268, 272 (2009).

B. Russo's Admission and the Ingram Recording Were Favorable to Giuca

Giuca's defense was that Russo acted alone in murdering Fisher (Bederow Aff., ¶¶ 59, 61, 223). Ingram swore to Nicolazzi and McCafferty that Russo admitted killing Fisher by himself during a robbery and then went to Giuca's house, where Giuca refused to get rid of the gun for him (exhibit B, pp. 12, 16-17). Russo's admission to Ingram contradicted evidence that Giuca ordered Russo to murder Fisher because Fisher "disrespected" him (Cleary: T320-23), that Giuca wasn't home at the time of the murder and pistol-whipped Fisher before Russo took the gun from him and shot Fisher (Avitto: T773-75), that Russo gave the murder weapon to Giuca after the murder (Cleary: T324), and that Giuca disposed of it by giving it to Anthony Beharry (Beharry: T648-51). Russo's admission and the Ingram recording were favorable to Giuca.³

³ The Ingram recording contained evidence that both Giuca and Russo made statements to Ingram. Even if Nicolazzi believed that Giuca's statements were inculpatory, she still was obligated to disclose the entire Ingram recording as *Brady* material. See *Strickler v. Greene*, 527 U.S. 263, 282 n. 21 (1999) (*Brady* requires disclosure of evidence that may both inculcate and exculpate the defendant).

C. Nicolazzi Suppressed Russo's Admission and the Ingram Recording from Giuca

The People didn't disclose Russo's admission to Ingram or the Ingram recording to Giuca until June 4, 2018 (Bederow Aff., ¶¶ 311-22).

Nicolazzi clearly knew Russo's admission to Ingram that Giuca refused to take the murder weapon from him immediately after he killed Fisher was responsive to Giuca's discovery demands and favorable to Giuca's announced defense that Russo killed Fisher by himself (*Id.* at ¶¶ 59, 61, 74, 296).

Nicolazzi swore that she would comply with her discovery obligations and honor her ongoing duties to disclose favorable evidence to Giuca and to present any arguably favorable evidence to the trial court for an *in camera* review (exhibit MMM, ¶¶ 25, 34; Bederow Aff., ¶¶ 300-07). However, Nicolazzi never amended her original boilerplate representation that the People didn't possess any exculpatory evidence.

Once Ingram swore to her that Russo exonerated Giuca from any involvement in Fisher's murder, it was incumbent on Nicolazzi "to set the record straight" regarding the People's possession of favorable evidence. *Banks v. Dretke*, 540 U.S. 668, 676 (2004). But rather than disclose the evidence, Nicolazzi doubled down on her concealment of it, stating in

open court that she personally reviewed her entire file and had disclosed “*every single statement*” made by Giuca or Russo⁴ (T121).

Other than specifically telling Nicolazzi that he *did not* inform Giuca that Russo told him that he called Giuca and went to his house (which included the part about Giuca refusing to take the gun from Russo), Ingram’s description of what he told Giuca about his conversation with Russo was ambiguous (Bederow Aff., ¶ 278; exhibit B, pp. 20-21).

As a minister of justice with constitutional and ethical duties to inform the defense of the existence of any favorable evidence in the People’s possession, if it was Nicolazzi’s intent to avoid disclosure of Russo’s admission and the Ingram recording to Giuca, the onus was on her to conclusively establish that she wasn’t required to disclose the favorable information.

Given Nicolazzi’s pattern of withholding favorable evidence from Giuca (Bederow Aff., ¶¶ 6, 55) and her habit of misrepresenting the state

⁴ Ironically, Nicolazzi made this deliberately false representation while attempting to justify her untimely disclosure of *another* recording. Nicolazzi claimed that she didn’t know Meredith Denihan made a recorded statement to a colleague in her bureau and a detective on October 14, 2003, even though she prepped Denihan to testify (Bederow Aff., ¶¶ 345-46). Nicolazzi also “forgot” to disclose Lauren Calciano’s grand jury testimony until counsel demanded it after she completed her testimony (*Id.* at ¶ 344) and an audio recording of Alejandro Romero (*Id.* at ¶ 347).

of the evidence (*Id.* at 97-99, 120-22, 153-56, 159, 185-86), it wasn't surprising that the only fact she sought to clarify from Ingram regarding Russo's statement was whether Giuca's attorney was aware of what Russo told him (exhibit B, p. 25). Ingram's response that Giuca's attorney was on vacation made it clear to Nicolazzi that Giuca's counsel, who was in Alaska (exhibit E, ¶ 8), was unaware of Russo's admission (exhibit B, p. 25).

Nicolazzi's decisions to leave her conversation with Ingram equivocal and not to disclose evidence that exonerated Giuca "invite[d] trouble [by] push[ing] the rules of disclosure to their limit." *People v. Contreras*, 12 N.Y.3d 268, 272 (2009); *see also, Fuentes*, 12 N.Y.3d at 265 ("we do not condone the People's decision to withhold [evidence] from defendant or their failure to, at a minimum, inform the trial judge about it and request an in camera inspection to determine its admissibility").

Ingram's 2006 death (Bederow Aff., ¶ 262) renders it impossible to clarify what Nicolazzi chose to ignore before she withheld the exculpatory evidence. As a result, it would violate Giuca's right to due process to place the burden of discovering Russo's admission and the Ingram recording on Giuca where Nicolazzi deliberately misled the defense into

believing that she had disclosed all favorable evidence and every statement made by Russo (*Id.* at ¶¶ 296-307, 310). Her deceitful and unethical conduct⁵ relieved Giuca from any possible responsibility to discover on his own what Nicolazzi deliberately concealed and then lied about. *See Strickler v. Greene*, 527 U.S. 263, 284-87 (1999).

The burden of discovery also cannot be placed upon Giuca because Nicolazzi violated her sworn representation that she would present any “arguable” *Brady* material to the trial court for an *in camera* review (Bederow Aff., ¶ 321). As the lead prosecutor responsible for all decisions and an experienced homicide prosecutor well versed in *Brady* obligations (*Id.* at ¶¶ 9, 297-99), she knew that there was at least “some basis” to believe that Russo’s admission and the Ingram recording were *Brady* material, which required that “deference to [her] discretion must give way.” *Contreras*, 12 N.Y.3d at 272; *People v. Andre W.*, 44 N.Y.2d 179, 184 (1978); *People v. Consolazio*, 40 N.Y.2d 446, 453 (1976).

If Nicolazzi had simply complied with her sworn representation to present any “arguably” *Brady* material to the trial court, given Russo’s

⁵ Nicolazzi’s suppression of Russo’s admission and the Ingram recording and her false representations violated Rules 3.3(a)(1), 3.4(a)(1) and (a)(3) and 3.8(b) of the New York Rules of Professional Conduct.

exoneration of Giuca and Giuca's defense that Russo alone was responsible for Fisher's murder, the trial court unquestionably would have ordered Nicolazzi to immediately disclose Russo's admission and the Ingram recording to Giuca as *Brady* material.

Nicolazzi's overzealous decision to engage in gamesmanship rather than "err on the side of caution," *Contreras*, 12 N.Y.3d at 272, after she acquired evidence that tended to establish Giuca's innocence violated her "special role...in the search for truth" and further demonstrates that her decision to place the burden of finding the exculpatory evidence on Giuca was unconstitutional. *Strickler*, 527 U.S. at 280-81.

Moreover, the circumstances strongly suggest that Nicolazzi, acutely aware that Giuca, at a minimum, knew who Ingram was, even if not by name, deliberately created obstacles to keep the defense from finding Ingram or otherwise discovering Russo's admission and the Ingram recording on its own.

Just four days after he gave Nicolazzi a sworn statement that exculpated Giuca and informed her that Giuca's attorney was on vacation, Ingram was moved out of Rikers Island and sent to an upstate prison, where he remained throughout the trial (*Bederow Aff.*, ¶¶ 286-

88). Nicolazzi never told this to Giuca's attorney (exhibit E, ¶¶ 4-5). Instead, she placed Ingram *on the People's witness list under the wrong name* and didn't provide the defense with any meaningful notice about the exculpatory nature of his testimony or any useful contact information to locate him (Bederow Aff., ¶¶ 289-92). Rather than provide a copy of the witness' rap sheet, as she said she would, Nicolazzi gave counsel an incomplete handwritten list of "James Ingram's" convictions at the beginning of the trial (*Id.* at ¶¶ 289, 292).

Nicolazzi even put the trial court through the charade of reading Ingram's (incorrect) name to prospective jurors as a potential witness (*Id.* at ¶ 294). She let this ruse play out until the end of trial, when on the day before she rested the People's case, she finally announced that she didn't intend to call "our witness" "James Ingram"⁶ (*Id.* at ¶ 295).

Nicolazzi's crafty placement of Ingram on the People's witness list predictably (and reasonably) led counsel to believe that any testimony he gave would incriminate Giuca, not exculpate him (exhibit E, ¶ 6).

⁶ Ingram's Rikers Island records (exhibit C) further suggest that Nicolazzi never intended to call Ingram as a witness. If Ingram was an expected trial witness, he would have been moved to New York City in September 2005. Once he was moved out of Rikers in July 2005, Ingram was never transferred back to New York City (Bederow Aff., ¶ 287).

Nicolazzi's handling of Russo's admission and the Ingram recording is similar to what the First Department condemned as a "flagrant violation by the prosecutor of his constitutional and ethical obligations" in *People v. Garcia*, 46 A.D.3d 461, 463-64 (1st Dept. 2007). In *Garcia*, the court held that the People's inclusion of an exculpatory witness' *correct* name on their witness list, without any contact information or indication that the witness possessed evidence favorable to the defense failed to satisfy the People's *Brady* obligation because the People's tactics gave the defense

reason to believe that [the witness] would testify favorably for the prosecution. At bottom, however, it is irrelevant whether defense counsel should have discovered or should have known that [the witness] would contradict [the People's case]. The prosecution's constitutional and ethical obligations are independent obligations. The only relevant point here is that the prosecution did know of and did not disclose this significant [exculpatory] evidence

(*Id.* at 464); *see also*, *United States v. Severdija*, 790 F.2d 1556, 1559-60 (11th Cir. 1986).

This case is much worse than *Garcia*, because in addition to hiding an exculpatory witness in plain sight, Nicolazzi made the breathtakingly dishonest representation to the defense that she reviewed her entire file

and disclosed “*every single statement*” made by Giuca or Russo (Bederow Aff., ¶ 310).

Nicolazzi’s subterfuge amounted to an unreasonable game of “hiding” favorable evidence and requiring Giuca to “seek” it. *Banks*, 540 U.S. at 696. Sending Giuca “to scavenge for hints of undisclosed *Brady* material” when she represented “that all such material has been disclosed” (*Id.* at 695), was constitutionally infirm because the defense cannot be faulted for incorrectly assuming that Nicolazzi would comply with her ethical and professional obligations (*Id.* at 693); *Strickler*, 527 U.S. at 287; *Garcia*, 46 A.D.3d at 463-64.

Nicolazzi’s appointment of herself as “the gatekeeper of the evidence” improperly deprived the jury from receiving critical exculpatory evidence. Her “dishonest conduct or unwarranted concealment should attract no judicial approbation” from this Court. *Banks*, 540 U.S. at 696.

D. The Suppressed Evidence Was Material

1. The *Vilardi* Reasonable Possibility Standard Applies

The materiality of the suppressed evidence must be analyzed under the reasonable possibility standard because Giuca’s detailed requests for

information put Nicolazzi on notice that the defense wanted particular evidence it believed was important.⁷ *Vilardi*, 76 N.Y.2d at 73-74.

The defense demands (Bederow Aff., ¶ 296) combined with notice that they were made in support of Giuca's defense that Russo alone was responsible for Fisher's murder (*Id.* at ¶¶ 59, 61, 223) gave Nicolazzi specific notice *months before trial* that the defense deemed any evidence that Russo killed Fisher by himself important.

Nicolazzi's sworn acknowledgement that she would comply with her continuing disclosure obligations (*Id.* at ¶¶ 300-07), followed by her nondisclosure of Russo's admission and the Ingram recording and her deliberately misleading statement in open court that she had complied fully with the defense demands (*Id.* at ¶ 310) "violated basic concepts of fair play." *Vilardi*, 76 N.Y.2d at 76.

Vilardi makes it clear that when the defense requests particular evidence, the People must "review its file for exculpatory material or err on the side of disclosure where exculpatory value is debatable." 76 N.Y.2d

⁷ Nicolazzi's abdication of her sworn representations to honor her disclosure obligations wasn't limited to Giuca. She also ignored Russo's specific request for "any oral statements of the defendant (Russo) or co-defendant (Giuca) concerning the alleged criminal incident made to a person who is not a law enforcement officer or agent" (Bederow Aff., ¶¶ 308-09).

at 76-77). Accordingly, because Nicolazzi failed to comply with the defense demands and then misled the defense about her lack of compliance, “elemental fairness” to Giuca requires “heightened rather than lessened prosecutorial care” (*Id.* at 76).

The reasonable possibility standard applies.

2. Russo’s Admission to Ingram Was Admissible as a Declaration Against His Penal Interest

“The Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Nevada v. Jackson*, 569 U.S. 505, 509 (2013), quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *People v. DiPippo*, 27 N.Y.3d 127, 136 (2016).

If the defense had been aware of Russo’s admission to Ingram, it could have bolstered its case that Russo alone was responsible for the crime by offering his admission as a declaration against his penal interest through the testimony of Ingram and/or McCafferty.

A statement is admissible as a declaration against penal interest when (1) the declarant is unavailable, (2) the declarant knew at the time he made the statement that it was against his penal interest, (3) the declarant must have competent knowledge of the facts underlying the statement and (4) supporting circumstances independent of the

statement itself attest to its trustworthiness and reliability. *People v. Settles*, 46 N.Y.2d 154, 167 (1978).

The last factor requires “some evidence, independent of the declaration itself, which fairly tends to support the facts asserted therein” (*Id.* at 168). Supportive evidence is sufficient if it establishes a “*reasonable possibility* that the statement might be true,” without regard to whether a court believes the statement to be true or the apparent strength of the People’s case (*Id.* at 170) (emphasis added); *see also*, *DiPippo*, 27 N.Y.3d at 137.

Due process dictates that the threshold for admissibility is less when the proposed statement is offered by the defendant rather than the People. *People v. Soto*, 26 N.Y.3d 455, 462 (2015); *People v. Brensic*, 70 N.Y.2d 9, 15 (1987). A defendant need not show that the penal consequences to the declarant were of such magnitude that they “all but rule out any motive to falsify.” *Soto*, 26 N.Y.3d at 462. If the defendant can demonstrate the possibility of trustworthiness, the statement is admissible, and it becomes the function of the jury to determine its evidentiary value (*Id.*).

Russo, a co-defendant being tried at the same time for the same crime as Giuca, was unavailable. He knew that his statement to Ingram was a confession to murder and thus against his penal interest. Under indictment for Fisher's murder, he clearly had competent knowledge of the facts underlying his confession to the crime.

Russo's statement to Ingram was corroborated by some evidence which tended to establish a reasonable possibility of its truthfulness.

As an initial matter, Nicolazzi, as the lead prosecutor and an active participant in the investigative phase of the case, was more familiar with the evidence than anyone else. Assuming she acted in good faith, her placement of Ingram on the People's witness list approximately six weeks after she met him and vetted his credibility demonstrated that she found Ingram's sworn statement reliable and trustworthy.

If Nicolazzi was confident enough to inform the defense, trial court and jurors, that she intended to introduce Ingram's testimony against Giuca and/or Russo, then Russo's admission was trustworthy enough to be introduced by Giuca as a statement against Russo's penal interest.

Indeed, by Nicolazzi's own logic, Russo's admission to Ingram, a "similarly situated" inmate, was *more* reliable than anything Russo told

others before he was arrested (*see* T1008) (Nicolazzi argued that Giuca's statement to the "similarly situated" Avitto gave him no reason to "have any holds barred" and was more reliable than his statements to Cleary and Calciano).

Russo's admission to Ingram that he murdered Fisher by himself (while Giuca was home) by shooting him five times with a .22 after Fisher fought back during a botched robbery sometime after they visited an ATM and that Giuca didn't take the gun after the murder (exhibit B, pp. 12, 14, 16-17) was corroborated by numerous facts independent of the statement itself and consistent with sworn statements and reports from numerous witnesses, physical evidence and forensic evidence.

Russo's admission to Ingram was corroborated by the rips in Fisher's pants, the recovery of an ATM receipt on Fisher's body (Gaynor: T371-73) the recovery of Fisher's wallet from a sewer near Russo's home (Gaynor: T382-83; Bederow Aff., ¶ 214), the abrasions on Fisher's forehead, nose chin, cheek and hand (Gaynor: T369), the removal of five .22 caliber bullets from Fisher's body and the recovery of .22 caliber shell casings near his body (Bederow Aff., ¶ 276).

Russo's admission to Ingram was corroborated by his immediate consciousness of guilt for his terrible crime and his admissions to prosecution witnesses and others. Russo told Gregory Ware that sometime after he and Fisher went to an ATM, he shot Fisher when Fisher tried to fight back, threw Fisher's wallet in a sewer and quickly got a haircut because he was seen by a person in a van (*Id.* at ¶¶ 196, 203-04). He implied to Alejandro Romero that he shot Fisher because he fought back during a robbery and then dumped Fisher's wallet and the murder weapon in separate sewers. Romero swore to Nicolazzi that "everybody knew" Russo carried a gun and that he saw Russo with a gun a week before the murder (*Id.* at ¶¶ 215-16, 324-25). Alfredo Bethune testified that Russo sought a haircut approximately 20 minutes after Russo told him he shot someone and also said he was going to flee to California (*Id.* at ¶ 217).⁸

Prince Aviles' September 2004 statement to police was consistent with Russo's admission to Ingram. He told police that "Tweed" (Russo's street name) killed Fisher during the course of a robbery and then fled to

⁸ Conversely, there was no evidence that Giuca tried to change his appearance or flee the jurisdiction, which was consistent with Russo's admission to Ingram that he was alone when he shot Fisher.

California to avoid arrest. Aviles also told police that in July 2004 he saw Russo display a black gun which might have been a .22, which he called “his ratchet” (exhibit TTT).

An anonymous letter sent to police in 2004 by someone claiming to be privy to the details of Fisher’s murder was strikingly similar to Russo’s admission to Ingram. The anonymous writer, who clearly disliked Giuca, nevertheless alleged that Russo shot Fisher to death after a fight about money and said that Giuca was innocent (exhibit III).

Russo’s admission to Ingram that he went to Giuca’s home after the murder (exhibit B, pp. 16-17) was consistent with Denihan’s testimony that at some point while she was sleeping on Giuca’s living room couch she heard a door slam (Bederow Aff., ¶ 79).

Russo’s admission to Ingram that Giuca refused to take the weapon after the crime (exhibit B, pp. 16-17) was consistent with the substantial proof that Russo possessed a gun after he shot Fisher to death (Bederow Aff., ¶¶ 215-16, 323-28). Detective Grafakos even got a search warrant immediately after Russo was arrested, swearing that a witness told him that he overheard Russo instruct his girlfriend to go to his home and get rid of “the ratchet” for him (exhibit UUU).

All of the above-listed corroborating evidence tends to demonstrate that there was at least a reasonable possibility that Russo's statement to Ingram might have been true. *See DiPippo*, 27 N.Y.3d at 137; *Settles*, 46 N.Y.2d at 170. Moreover, the vast majority of the corroborating evidence came from numerous outside sources with firsthand knowledge, including numerous civilians who spoke directly to Russo and then volunteered information to the police and in several instances gave sworn testimony, and physical and forensic evidence, all of which enhances the trustworthiness of Russo's statement. *See DiPippo*, 27 N.Y.3d at 138 *cf. People v. Thibodeau*, 31 N.Y.3d 1155, 1160 (2018) (statement not admissible as a declaration against penal interest where proffered corroborating evidence was "speculative").

Nor did Russo have any conceivable motive to falsely incriminate himself to a fellow inmate while exculpating Giuca, especially when he and Giuca were awaiting trial and accusing each other of being solely responsible for Fisher's murder (Bederow Aff., ¶¶ 59, 61); *see People v. Shortridge*, 65 N.Y.2d 309, 313 (1985) (a strong motive to help a "loved one" and inculcate "an enemy" can render the statement untrustworthy and inadmissible).

Indeed, Russo's statement to Ingram buried himself when "it was in his best interest to keep quiet" about his guilt and Giuca's innocence. *See DiPippo*, 27 N.Y.3d at 137 *cf.* (Bederow Aff., ¶¶ 218-20) (shortly after the murder when Russo was trying to avoid arrest and planning to flee to California he falsely exonerated himself and implicated Giuca).

For these reasons, Russo's admission to Ingram would have been admissible as a declaration against his penal interest.

3. The Cumulative Impact of the People's Suppression of Russo's Admission to Ingram, the Ingram Recording and the Avitto Impeachment Evidence Was Material to the Outcome of the Trial

On June 11, 2019, the Court of Appeals, unaware of Russo's admission and the Ingram recording, denied Giuca's prior motion under the *Vilardi* standard, believing that "[Giuca's] efforts to dispose of the gun shortly after the murder" was "strong evidence" of his guilt. *People v. Giuca*, 2019 WL 2424481, at *7.

Evidence that Russo admitted to a "similarly situated" inmate that he murdered Fisher by himself during a botched robbery and then went to Giuca's home immediately after the murder in an unsuccessful bid to get Giuca to get rid of his gun was powerful evidence of Giuca's actual

innocence and material because it might have impacted the outcome of the trial.

The evidence in support of the People's emphatic claim that Giuca was guilty of Fisher's murder because he took the murder weapon from Russo immediately after the crime and gave it to Anthony Beharry a day or two later was flimsy. Beharry admitted that he repeatedly lied to the police and only agreed to testify after he was promised immunity in exchange for "truthful" testimony (Bederow Aff., ¶¶ 171, 173).

But even if the jury credited Beharry's testimony, it proved nothing about the disposal of *the murder weapon*, as opposed to the fact that Giuca wanted to get rid of "a gun" he had in house once he knew that his home was going to the focal point of police activity because Fisher and Russo had been at his house shortly before Fisher was killed.

Beharry testified that he disposed of *one* gun for which he didn't even know the caliber; the People introduced evidence that Giuca had *two* guns, one of which wasn't the same caliber of the murder weapon. If the jury heard and credited evidence that Russo admitted Giuca refused to take the murder weapon from him, it would have conclusively eliminated the possibility that Giuca gave Beharry the murder weapon

and discredited Cleary's uncorroborated claim that Giuca admitted taking the murder weapon from Russo (Bederow Aff., ¶ 105), which was a necessary link to prove that Giuca gave Beharry the murder weapon.

Russo's admission to Ingram would have strengthened Giuca's defense that he didn't dispose of the murder weapon because Cleary was an even worse witness than Beharry. Cleary was an admitted liar who cooperated only after being "squeezed" by the prosecution with a probation violation regarding a vicious assault he committed just a few months before Fisher was killed (*Id.* at ¶¶ 82, 85).

The jury knew that Cleary was a treacherous liar based upon his extraordinarily devious attempt to "fool" the prosecution with a polygraph report to "prove" that he didn't know anything about Fisher's murder (*Id.* at ¶¶ 84-86) before he was pressured into cooperating against Giuca, after which he claimed he knew "everything" about Giuca's role in the crime (*Id.* at ¶¶ 104-05).

Cleary's allegation that Giuca admitted to him and Lauren Calciano that he took the murder weapon from Russo was directly contradicted by Calciano, another admitted liar who testified only after she was heavily pressured by the prosecution (*Id.* at ¶¶ 151-52). The jury

heard these two unreliable witnesses describe a *joint conversation* with Giuca at which Cleary claimed Giuca said he ordered Russo to murder Fisher after which Russo gave Giuca the gun and Calciano claimed that Giuca said *none of those things* (*Id.* at ¶¶ 104-05 *cf.* ¶¶ 160-63).

If this wasn't bad enough, Cleary accused Calciano of disposing of a gun bag for Giuca (*Id.* at ¶ 106). Calciano emphatically denied Cleary's sworn claim and accused Cleary of lying under oath (*Id.* at ¶ 164). At a minimum, the spectacle of Cleary swearing that he saw Calciano tamper with evidence and Calciano denying it under oath established that the jury knew that at least one of these witnesses committed perjury about a purported meeting during which Giuca allegedly admitted his involvement in Fisher's murder.

The jury's awareness of Russo's admission to Ingram, combined with its knowledge of Cleary's dishonesty (*Id.* at ¶¶ 82, 84-86, 97-99, 109-10), the stunning conflicts between Cleary and Calciano (*Id.* at ¶¶ 104-05 *cf.* ¶¶ 16-63), and the discrepancies between Cleary's testimony about Giuca's disposal of two guns with different calibers (*Id.* at ¶¶ 93, 107-08) and Beharry's claim that he disposed of "a gun" of unknown caliber (*Id.* at ¶ 174), likely would have dismantled Cleary's credibility.

Nicolazzi increased the materiality of Russo's admission and the Ingram recording by conceding that merely having guns in the house "didn't in any way implicate" Giuca in the murder (T994) but then assuring the jury that "*they knew*" and "*she knew*" the gun Giuca gave Beharry "*absolutely*" was the murder weapon, which without more, proved Giuca was guilty of Fisher's murder (T1004-06, 1021-22; Bederow Aff., ¶¶ 237-39). If the jury had known about Russo's admission to Ingram, Nicolazzi's emphatic guarantees about the quality of the evidence likely would have been met with eye-rolling rather than head-nodding.

Russo's admission and the Ingram recording would have obliterated what eventually became the People's principal theory of Giuca's guilt: Giuca helped Russo beat and rob Fisher before Russo shot him to death (Bederow Aff., ¶¶ 241-44).

This theory required credible proof that Giuca *wasn't home* when Russo murdered Fisher. Nicolazzi told the jury that "*indisputable evidence*" proved "*there was no way*" Giuca was home when Fisher was killed, which demonstrated that Avitto's testimony that Giuca admitted

helping Russo attack Fisher was reliable because it provided the only “common sense” explanation of the crime (*Id.* at ¶¶ 242, 244).

The key evidence cited by Nicolazzi in support of this misleading claim were the superficial injuries to Fisher’s face and hands, which she said couldn’t have been caused by Russo alone (*Id.* at ¶ 244). But this argument was disingenuous. Fisher was found face down (Stewart: T737-38) and the People’s own expert conceded that the injuries to Fisher’s face and hands could have been caused by him falling on his face after having been shot (Guitierrez: T841).

Russo’s admission to Ingram that he encountered Fisher alone and then fought with him before shooting him was plausible, consistent with Fisher’s injuries and the People’s expert testimony, and would have poked a gaping hole in the People’s so-called “indisputable” proof that Giuca must have helped Russo assault Fisher before Russo murdered him.

Russo’s admission to Ingram that he called Giuca immediately *after* the murder to tell him he was coming to his house (exhibit B, p. 16) would have diminished the impact Nicolazzi placed on a 27-second call from Russo to Giuca at 6:38 a.m., which she alleged occurred *before* the

murder, and supported the “indisputable, concrete evidence” that there was “no way Giuca was in his house” when Fisher was murdered (T1015-18).

Moreover, if the defense had been provided the favorable evidence, it almost certainly wouldn’t have stipulated to the time of the murder being at 6:40 a.m., simply because a witness said he heard shots at that approximate time (Schoenfeld: T128; T861). In fact, the officer responding to the 911 call said he responded to a 911 call of shots fired opposite 145 Argyle Road “around 6:30 a.m.” (Stewart: T736).

Russo’s admission that he went to Giuca’s home after he murdered Fisher, but Giuca refused to take the gun, would have helped the defense neutralize Nicolazzi’s claim that Giuca was nervous about Meredith Denihan’s whereabouts because he helped kill Fisher (Bederow Aff., ¶ 234) by demonstrating that he was concerned that Denihan might have misinterpreted the meaning of seeing him and Russo talking about a gun immediately after Russo just murdered someone who just left his house.

If the jury had known that McCafferty was present when Ingram described Russo’s admission to Nicolazzi, the defense could have forcefully countered the People’s argument that investigators’ interviews

of between 100 and 150 witnesses (Bederow Aff., ¶ 189), which was “anyone and everyone even remotely involved or connected to the case” (T30-31), demonstrated that they conducted a “painstaking” investigation, with credible proof that the prosecution was hyper-focused on “getting Giuca.” See *Kyles*, 514 U.S. at 446-47; *Ulett*, 2019 WL 2583106, at *4 (undisclosed *Brady* material can be used to attack the thoroughness and good faith of the investigation).

Specifically, the defense could have juxtaposed the prosecution’s lack of follow-up investigation after McCafferty learned about Russo’s exculpatory admission to Ingram, which corroborated his prior knowledge that Russo was an unstable, violent, gun-toting lunatic who didn’t need anyone’s help to commit violent crimes (Bederow Aff., ¶¶ 91, 322-32) with detectives’ immediate arrest of Giuca on October 14, 2003, simply because of Russo’s uncorroborated self-serving claim that Giuca confessed to him (*Id.* at ¶¶ 218-20).

Finally, Nicolazzi’s mocking of counsel for resorting to histrionics and “wild speculation” rather than evidence for his claim that Russo committed the crime by himself (T1020-23), when, in fact, the *evidence she suppressed* would have been useful to the defense, compounded the

prejudice to Giuca and thus increased its materiality. *See Ulett*, 2019 WL 2583106, at *4.

The flawed case against Giuca was a house of cards propped up by unreliable and contradictory statements from admitted liars who were pressured into cooperating against Giuca and a jailhouse informant with an obvious motive to lie. There was no forensic or physical evidence that incriminated Giuca or linked him to the murder or the murder weapon. *See Banks*, 540 U.S. at 701; *Ulett*, 2019 WL 2583106, at *4 (a lack of forensic evidence tying defendant to crime is relevant to materiality). In these circumstances, it was reasonably possible that evidence of Russo's admission that he was singularly responsible for Fisher's murder would have changed the outcome at trial. *Vilardi*, 76 N.Y.2d at 77.

In *People v. Negron*, 26 N.Y.2d 262, 270 (2015), the Court deemed suppressed evidence less impactful than Russo's admission to Ingram "material" in a third-party culpability case. There, no physical evidence linked the defendant to a "road rage" shooting where he was identified by one disinterested eyewitness as the perpetrator (*Id.* at 264). While police were searching the defendant's apartment, another man who lived in his building was arrested trying to discard weapons on the roof of a

neighboring building. He was found with ammunition that matched the caliber of the bullets used in the shooting (*Id.* at 266).

The Court held that the third-party's consciousness of guilt (disposing of the guns) and his possession of ammunition matching the caliber used in the shooting was "plainly favorable to the defense" and thus "material" because it "would have added a little more doubt to the jury's view of the evidence" and it was reasonably possible "that a little more doubt would have been enough" (*Id.* at 269-70).

The exculpatory evidence withheld from Giuca was more valuable to him than the suppressed evidence was to the defendant in *Negron*. The favorable evidence of the third-party's guilt in *Negron* was entirely circumstantial; Russo's admission to Ingram was direct proof of his guilt and Giuca's actual innocence.

The defendant in *Negron* was identified by one disinterested witness; Giuca wasn't identified by anyone. Similar to *Negron*, there wasn't any forensic or physical evidence linking Giuca to the murder. Just like the third-party suspect's disposal of the weapons did in *Negron*, Russo's admission that he immediately tried to have Giuca dispose of the murder weapon for him demonstrated his consciousness of guilt.

The most critical fact in *Negron* was the third-party suspect's possession of the *same caliber ammunition* that was used in the shooting (*Id.* at 268-70). Here, even if the jury credited Beharry's testimony that Giuca gave him a gun, there was no proof that it was the same caliber as the murder weapon and the People's own evidence allowed for the distinct possibility that the gun Giuca gave Beharry was a *different caliber than the murder weapon* (Bederow Aff., ¶¶ 93, 107-08).

If the jury knew that Russo admitted that Giuca ***did not take the murder weapon*** from him, this "plainly favorable" evidence would have eliminated the possibility that Giuca could have given Beharry the murder weapon, discredited Cleary's claim that Giuca told him he took the gun from Russo and entirely undermined Avitto's testimony that Giuca wasn't home at the time of the murder.

Accordingly, Russo's admission and the Ingram recording were material. Given the state of the evidence against Giuca, the jury's awareness of Russo's admission and the Ingram recording "would have added a little more doubt to the jury's view." *Negron*, 26 N.Y.2d at 270.

* * *

The Court is required to consider the cumulative impact of all the suppressed evidence, *Kyles*, 514 U.S. at 436-37, which in addition to Russo's admission and the Ingram recording includes undisclosed evidence that would have impeached Avitto's credibility because the Court of Appeals reversal of the Appellate Division was solely on materiality grounds. *See People v. Giuca*, 2019 WL 2424481, at *7 (N.Y. June 11, 2019).

The suppressed Avitto impeachment material includes email from an executive ADA discussing Avitto's "special treatment" the day after he met Nicolazzi, Avitto's release without bail after he was kicked out of a drug program three days before he testified at trial, Nicolazzi's failure to correct Avitto's "mischaracterized" testimony that he was "doing well" in drug treatment, and "all of the details of what actually transpired" with respect to Nicolazzi's June 13, 2005, appearance on Avitto's case (*Id.* at * 6-7).

The details of the June 13, 2005, court appearance include evidence that after Avitto met Nicolazzi and offered information against Giuca, she personally escorted Avitto to court, appeared on his case, and

informed the court that Avitto “was giving information” against Giuca, after which he was released without bail (*Id.* at * 3, 6-7).

Avitto’s credibility was critical. He was the only witness who supported the People’s late-trial “Hail Mary” that Giuca’s presence with Russo when Fisher was killed blocks away from Giuca’s home was the only “common sense” explanation for how the crime was committed (Bederow Aff., ¶¶ 240-44, 246).

Even without any knowledge of Russo’s admission to Ingram that Giuca was home while he was murdering Fisher, the jury had strong reason to doubt Avitto’s credibility. He was a drug-addled career criminal and classic jailhouse informant who, according to Nicolazzi, volunteered to cooperate out of human decency, yet inexplicably waited four months to tell authorities that Giuca admitted that he helped Russo kill Fisher.

Evidence that Russo admitted Giuca was at home when he killed Fisher, combined with Meredith Denihan’s claim that she heard a door slam (T162) and the medical examiner’s conclusion that Fisher’s injuries could have been caused by blunt trauma associated with falling after

being shot (Guitierrez: T841) likely would have led the jury to reject Avitto's testimony.

If the jury knew about Russo's admission to Ingram *and* that Avitto leveraged his information until he was a fugitive, and that once he offered Nicolazzi information against Giuca she immediately notified a judge that Avitto was offering information against Giuca, and he was then released without bail, the jury assuredly would have dismissed Avitto out of hand. Even in reversing the Appellate Division, the Court of Appeals recognized that this undisclosed evidence would have "deepened the argument that Avitto was testifying falsely" in order to help himself, *Giuca*, 2019 WL 2424481, at *6.

The combined impact of this evidence also would have made it clear to the jury that Nicolazzi only used Avitto as a witness at the end of trial because Cleary and Calciano imploded (Bederow Aff., ¶¶ 72, 82-86, 98-99, 109-10, 151-64) and she knew Avitto's credibility was dreadful (*Id.* at ¶¶ 184-87), which exposed the absurdity of her claim that Avitto simply "for once, tried to do something right" (T1022-23). As the court recognized in *People v. Conlan*, 146 A.D.2d 319, 330 (1st Dept. 1989)

it is certainly not reasonable to conclude that a career criminal [and jailhouse informant] would

agree to assist the prosecution merely as a sign of good will or because he had taken aversion to defendant's boasting in prison...it required that the [ADA] almost willfully refuse to confront reality to have imagined that [the jailhouse informant] was taking the stand out of a concern for the public welfare

Accordingly, the cumulative effect of Russo's admission to Ingram, the Ingram recording and the withheld Avitto impeachment evidence would have eviscerated the purportedly "strong evidence" of Giuca's "efforts to dispose of the gun shortly after the murder," *People v. Giuca*, 2019 WL 2424481, at *7, and created a reasonable possibility (or probability) that the People's failure to disclose all of the suppressed evidence affected the verdict.

POINT II

GIUCA'S CONVICTION SHOULD BE VACATED BECAUSE NICOLAZZI'S EXPRESSION OF HER PERSONAL OPINIONS THAT GIUCA DISPOSED OF THE MURDER WEAPON AND IN HIS GUILT MADE HER PRETRIAL SWORN INTERVIEW OF INGRAM A MATERIAL ISSUE AT TRIAL AND CREATED A SUBSTANTIAL LIKELIHOOD OF PREJUDICE TO GIUCA

A. The Unsworn Witness Rule

Under the advocate-witness rule, a prosecutor should be disqualified if it appears that she may be called as a witness on a

significant issue of fact in the case. New York Rule of Professional Conduct 3.7.

The unsworn witness rule is designed to limit a prosecutor's conduct to ensure "that the criminal process [is] fair." *People v. Paperno*, 54 N.Y.2d 294, 301 (1981). The rule, which "has no definitive contours," prohibits a prosecutor from vouching for the credibility of witnesses, injecting her own credibility into the trial or "express[ing] [her] personal beliefs on matters which may influence the jury" (*Id.* at 300-01); see *People v. Tassiello*, 300 N.Y. 425, 428-30 (1950) (murder conviction reversed where prosecutor stated to the jury that "you know" and counsel "knows" that the defendant was guilty); *People v. Robles*, 2019 WL 3043922, at *2 (2nd Dept. July 10, 2019) (it is "inappropriate and unacceptable advocacy" to state "that all the evidence points at the defendant" and to state as "fact" that the defendant is guilty).

A prosecutor's expression of her personal opinion on the evidence amounts to "a subtle form of testimony" against the defendant for which there is no means of cross-examination and thus creates a "danger that the jury, impressed by the prestige of the office of the District Attorney,

will accord great weight to the beliefs and opinions of the prosecutor.”
Paperno, 54 N.Y.2d at 301.

Consequently, a conviction must be reversed when a prosecutor’s pre-trial conduct becomes a material issue at the trial and her conduct at the trial “improperly allowed her to become an unsworn witness” against the defendant, thereby causing a substantial *likelihood* of prejudice to the defendant (*Id.* at 304) (emphasis added).

B. Nicolazzi’s Expression of Her Personal Opinions That Giuca Disposed of the Murder Weapon and In His Guilt Made Her Pretrial Sworn Interview of Ingram a Material Issue at Trial

Giuca’s purported possession of the murder weapon before Fisher was murdered and his alleged disposal of it after the murder were hotly contested and critical issues at trial. Nicolazzi stated as “fact” to the jury that “*you know*” Giuca supplied Russo with the murder weapon “and that there alone...makes him guilty of murder” (T989). She later reminded the jury that “*you know* beyond any reasonable doubt that [Giuca] supplied the gun” Russo used to shoot Fisher (T1019).

Notwithstanding evidence before the jury that Giuca had two guns, including a .380 which couldn’t have been the murder weapon, and evidence that Beharry disposed of *one gun of unknown caliber* (Bederow

Aff., ¶¶ 93, 174), Nicolazzi assured the jury that “*you know*” Beharry took the murder weapon from Giuca (T1005), which was enough to find Giuca guilty (T1006).

Even worse, Nicolazzi reinforced jurors’ confidence in what “they knew” by personally guaranteeing them that the gun Beharry took from Giuca “*absolutely*” was the murder weapon (T1006) and through her assurance to jurors that “*I know* [the gun Beharry took from Giuca] is the murder weapon in this case” (T1021-22).

Lest there was any doubt remaining in any juror’s mind once Nicolazzi instructed jurors that “*they knew*” and “*she knew*” the gun Giuca gave Beharry was the murder weapon, Nicolazzi, while discussing Giuca’s possession of the gun, again personally guaranteed the jury that Giuca was guilty, matter-of-factly proclaiming “*so, of course he’s guilty of that*” (T1024) before reminding jurors that “*you know* the [murder weapon] was in his home” (T1025), and “*you know*” Giuca knew in advance that Russo was going to rob Fisher (T1026).

Near the end of her summation, Nicolazzi contrasted counsel’s “wild speculation” with the “tons” of “plain and simple” proof she presented to the jury, which “when you put them all together, the various pieces of the

puzzle” made out only “one clear picture,” which was Giuca’s guilt (T1023). Nicolazzi then instructed the jury to find Giuca guilty because it was “*required* by the law” (T1027).

Nicolazzi’s pervasive lecturing to the jury⁹ that “they knew” and “she knew” that Giuca “absolutely” gave the murder weapon to Beharry—which “*of course*” proved Giuca’s guilt—was “intended to have some influence on the verdict,” *Tassiello*, 300 N.Y. at 430, and created “the possible danger” that the jury would “accord great weight” to her “beliefs and opinions.” *Paperno*, 54 N.Y.2d at 301; *see also, Robles*, 2019 WL 3043922, at *2 (Nicolazzi “inappropriately and unacceptably” emphasized the “tons” of “plain and simple” evidence she presented which made out “one clear picture” of Giuca’s guilt); *People v. Moye*, 12 N.Y.3d 743, 744 (2009); *People v. Bailey*, 58 N.Y.2d 272, 277 (1983).

⁹Nicolazzi repeatedly vouched for the credibility of witnesses and for her own credibility. Cleary and Calciano were “truthful” (T1004-05). The jury “*knew*” that Cleary’s testimony was corroborated by Calciano (T997). The jury “*knew*” Giuca confided “bits and pieces” to Cleary and Calciano (T1011-12), but they “*knew*” Avitto wasn’t making this up” (T1008), that “everything Avitto told you is credible” (T1010), that “Avitto was being truthful” (T1010), “you could trust Avitto” (T1010), Avitto was “very honest about his problems and past” (1011) and that Giuca was “truthful” to Avitto (T1017). Nicolazzi vouched for her own credibility by assuring the jury that if Avitto had gotten consideration, she wouldn’t have hidden that from the jury (T1021-22).

Nicolazzi's improper remarks to the jury created a compelling need for Giuca to confront her under oath with irrefutable proof that *a person she placed on her witness list* told her under oath that Russo admitted murdering Fisher by himself and that Giuca refused to take the murder weapon from him after the crime. *Paperno*, 54 N.Y.2d at 301. Her testimony about her pretrial conduct was necessary because it related to a disputed matter that wasn't collateral or cumulative (*Id.* at 302 n. 7).¹⁰

Giuca need only demonstrate that his inability to confront Nicolazzi under oath with proof from a pretrial interview that contradicted her unsworn personal opinion that he disposed of the murder weapon created a substantial *likelihood* of prejudice (*Id.* at 304). This standard is easily satisfied because Giuca was actually prejudiced by the toxic combination of Nicolazzi's inflammatory expression of her personal opinion on the quality of the evidence against Giuca and her deliberate suppression of exculpatory evidence that would have impeached her subtle unsworn testimony.

¹⁰ Had Nicolazzi disclosed the Ingram recording, she might have avoided making her pretrial conduct a material issue at trial by allowing the defense to confront McCafferty. But since she suppressed the evidence, the defense had no idea that McCafferty might have been a suitable witness.

In sum, Nicolazzi's suppression of the Ingram recording and her false representations that she complied with her discovery and *Brady* obligations (Bederow Aff., ¶¶ 300-07, 310, 313-14, 318-19) left the defense without any "effective means" to cross-examine her unsworn testimony. *Paperno*, 54 N.Y.2d at 301. Nicolazzi's pretrial sworn interview of Ingram was that necessary evidence and its unavailability to Giuca created a substantial likelihood of prejudice to him. Therefore, Giuca's conviction "cannot stand" (*Id.* at 304).

CONCLUSION

The Court should vacate Giuca's judgment of conviction, or in the alternative, grant an evidentiary hearing on the motion.

Respectfully submitted,

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