SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 35

THE PEOPLE OF THE STATE OF NEW YORK, :

:

Ind. No. 8166/2004

-against- :

JOHN GIUCA, :

Defendant. :

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

MARK A. BEDEROW, ESQ
Law Office of Mark A. Bederow, P.C.
260 Madison Avenue
New York, New York 10016
212.803.1293 (Phone)
917.591.8827 (Fax)
mark@bederowlaw.com

Attorney for Defendant John Giuca

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

Other

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 35

THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No. 8166/2004

-against-

JOHN GIUCA,

Defendant.

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

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of the defendant, John Giuca, in support of his accompanying motion to vacate his conviction, pursuant to C.P.L. § 440.10(1)(b), (c), (f), and (h). The facts are set forth in the affirmation of Giuca's present attorney, Mark A. Bederow ("Bederow Affirm.") and are established by that affirmation, the affirmation of Giuca's

appellate and prior 440.10 counsel, Lloyd Epstein, the affidavits of Giuca and John Avitto, and the exhibits which are submitted in a separate volume.

Giuca's motion establishes that the prosecution suppressed essential *Brady* and *Rosario* material related to their key witness, John Avitto, and relied upon his false and misleading testimony to secure Giuca's conviction. The People also benefited from the use of a doctored (and likely forged) report which concealed evidence of Avitto's credibility deficiencies.

The case against Giuca for the murder of Mark Fisher was weak. Initially, the prosecution attempted to build it upon Giuca's purported statements to Lauren Calciano and Albert Cleary, who both claimed that he confessed in their joint presence. However, they contradicted each other on virtually every detail of what Giuca allegedly said. Each denied any knowledge of Giuca's purported role in the murder for more than a year, until they finally succumbed to pressure by law enforcement and testified against him. On the witness stand, Cleary alleged that he witnessed Calciano commit a crime; she denied it and accused him of perjuring himself. At the end of the trial, the People abandoned these discredited witnesses in favor of Avitto, who offered an alternative theory of Giuca's guilt which contradicted the entire case the prosecution had already presented to the jury.

Avitto was a jailhouse informant who volunteered his services as a witness in exchange for help with his own criminal problem after he absconded from a drug

treatment program on June 9, 2005 and abused cocaine on June 9 and 12. On June 10, a warrant was issued for his arrest in connection with a mandatory prison sentence he was required to serve pursuant to the terms of a February 2005 plea agreement. Avitto met with prosecutors on June 13 and began cooperating against Giuca that same day.

Avitto claimed that he overheard Giuca confess to his father and that Giuca later confessed directly to him. Despite his background and the circumstances which led to his cooperation, Avitto testified that he never sought, expected or received consideration in exchange for his cooperation. He said that he was "doing well" in a court mandated drug program which he had been sentenced to months before he contacted law enforcement.

Thus, Avitto's motive to testify, including whether he sought, expected or received benefits in exchange for his testimony was the critical issue for the jury to consider in assessing his credibility. Giuca's counsel, Samuel Gregory, confronted Avitto about his motive to fabricate his testimony, but he lacked any concrete evidence and was unable to prove that Avitto sought help from prosecutors in exchange for his cooperation, let alone that he lied about it.

The prosecutor, Anna-Sigga Nicolazzi, argued that Avitto was "truthful," "very honest about his problems and criminal past," and that his only motive for testifying was "for once, to do something right." She chastised Giuca's counsel for

"condemning" Avitto with speculative attacks on his credibility for which there was "absolutely no evidence" and "no corroboration."

Giuca now has evidence which establishes that Avitto's testimony was a lie and that the People suppressed evidence that on June 13, 2005—the same day Avitto started cooperating against Giuca—ADA Nicolazzi personally intervened on his criminal case, which resulted in his release without bail. We now know that the prosecution also suppressed evidence which proved that Avitto had been thrown out of a rehab facility on September 19, 2005, just three days before he testified he was doing well in it. In addition to concealing this evidence, a false report, dated September 20, was hastily created in order to prevent the defense from cross-examining Avitto about this violation. Reasonably competent counsel in possession of this significant impeachment evidence would have severely undermined Avitto's credibility, which possibly could have affected the verdict.

The evidence which forms the basis of the present motion consists of Avitto's sworn statements which are "conclusively substantiated by unquestionable documentary proof" in the form of certified court transcripts from Avitto's case, the trial record, and other documents which confirm the due process violations. Accordingly, Giuca's motion to vacate his conviction must be granted on the moving papers, or alternatively, if the People dispute the allegations with relevant sworn

statements which might impact the applicable law, a hearing should be held on the issues raised herein. C.P.L. § 440.30(3)(c).

ARGUMENT

POINT I

GIUCA'S CONVICTION SHOULD BE VACATED BECAUSE THE PROSECUTION FAILED TO DISCLOSE *BRADY* MATERIAL

A. The *Brady* Rule

More than 50 years ago, the United States Supreme Court ruled in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), that the prosecution's suppression of evidence favorable to a criminal defendant "violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Several years later the Court extended *Brady's* rule of disclosure to include impeachment evidence as "favorable" evidence. *Giglio v. United States,* 405 U.S. 150 (1972). Favorable impeachment evidence includes an offer of leniency or a benefit to a witness. *Id.* The duty to comply with *Brady* is an institutional one; the obligation of disclosure exists irrespective of an individual prosecutor's good or bad faith. *Id.* at 154; *People v. Steadman,* 82 N.Y.2d 1, 7 (1993).

Under federal constitutional law, in order to establish a *Brady* violation, a defendant must show that (1) exculpatory or impeaching evidence, (2) was suppressed by the prosecution, and (3) the evidence was material. In this context,

evidence is material if 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, 680 (1985). A "reasonable probability" means nothing more than "the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." *Smith v. Cain,* 132 S.Ct. 627 (2012). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). It requires that a reviewing court "can be confident that the jury's verdict would have been the same" had the withheld evidence been disclosed. *Id.* at 453.

New York employs a more lenient materiality standard where the defense made a specific request for the withheld favorable evidence. In these circumstances, the failure to disclose is "seldom, if ever excusable" and reversal is required if there is a "reasonable possibility" that the prosecution's failure to disclose favorable evidence could have contributed to the defendant's conviction. *People v. Vilardi,* 76 N.Y.2d 67, 76-77 (1990).

When the prosecution suppresses more than one item of *Brady* material, the reviewing court must consider the cumulative prejudice resulting from the suppression. *Kyles,* 514 U.S. at 437.

B. The Applicable Law on Benefits

Evidence of an agreement between a witness and the prosecution must be disclosed to the defense because

> Where a promise of leniency or other consideration is held out to a self-confessed criminal for his cooperation, there is a grave danger that, if he be weak or unscrupulous, he will not hesitate to incriminate others to further his own self-interest...existence of such a promise might be a strong factor in the mind of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony. The failure to disclose an "understanding" or a promise cannot but seriously impair the jury's ability to pass upon this vital issue, and that is precisely the infirmity under which the jurors labored in the case before us.

People v. Savvides, 1 N.Y.2d 554, 557 (1956).

Whether an agreement between the prosecution and a witness is express or tacit, if there is evidence which suggests that the witness might have expected leniency in exchange for his testimony, the prosecution must disclose it to the defense because this evidence is

> of such a nature that the jury could have found that despite the witness' protestations to the contrary, there was indeed a tacit understanding between the witness and the prosecution, or at least so the witness hoped.

People v. Cwikla, 46 N.Y.2d 434, 441 (1979). A homicide prosecutor's appearance on a witness' criminal case constitutes "activity on a witness' behalf" which must be disclosed to the defense because such a benefit might evince a tacit understanding

or at least create the hope of one in the mind of the witness. *People v. Colon,* 13 N.Y.3d 343, 348-350 (2009).

Thus, even in the absence of an express promise by a prosecutor, where there is "*nonetheless a strong inference, at the very least, of an expectation of leniency*" by the witness, such evidence must be presented to the jury for its consideration. *Cwikla,* 46 N.Y.2d at 442 (emphasis added). Disclosure is required if "*a substantial possibility had arisen in the mind of the witness* that [his] testimony incriminating defendant would be rewarded by the prosecutor with at least some 'consideration' in the handling of charges then pending against the witness." *People v. Ford,* 41 A.D.2d 550 (2nd Dept. 1973) (emphasis added). "Misleading and obstructive" tactics by a prosecutor which conceal evidence of a possible benefit increase the persuasiveness of the inference that the witness had "an expectation of leniency." *Cwikla,* 46 N.Y.2d at 442.

The prosecutor's obligation to disclose is not premised upon her own subjective characterization, interpretation or belief regarding the relationship between the prosecutor and witness. *People v. Novoa,* 70 N.Y.2d 490, 497 (1987). Once there exists some credible evidence which supports the argument that there may have been an understanding or expectation of some benefit, "it is for the jury to determine how much value to assign it in terms of assessing the witness' credibility." *Id.; Cwikla,* 46 N.Y.2d at 441-442; *Ford,* 41 A.D.2d at 551.

If the defense requested evidence of a benefit, and there is "some basis" for believing the prosecutor possesses the evidence, "deference to the prosecutor's discretion must give way, and the duty to determine the merits for disclosure then devolves to the trial court." *People v. Andre W.,* 44 N.Y.2d 179, 184 (1978); *People v. Consolazio,* 40 N.Y.2d 446, 453 (1976). "When there is substantial room for doubt, the prosecutor is not to decide for the court what is admissible or for the defense what is useful." *Griffin v. United States,* 183 F.2d 990, 993 (D.C. Cir. 1950); *see also, People v. Springer,* 122 A.D.2d 87, 90 (2nd Dept. 1986); *People v. Saddy,* 84 A.D.2d 175, 178 (2nd Dept. 1981); *People v. Wallert,* 98 A.D.2d 47, 50 (1st Dept. 1983) ("Given the nature of the People's evidence, it was fundamentally obvious that the complainant's credibility and motive for testifying would be a crucial issue. We have before emphasized a prosecutor's duty in such situations to, at the very least, submit to the Trial Judge the question of whether disclosure is required."); *People v. Crespo,* 168 Misc.2d 182, 186-187 (Bronx Cty. Sup. Ct. 1995) ("New York courts have made it clear on several occasions that it is not for the prosecutor to decide the "usefulness" of evidence...It is for the trier of fact, and not the prosecutor, to decide the credibility of witnesses").

C. The People Violated Their *Brady* Obligation by Suppressing the Prosecutor's Personal Intervention into Avitto's Underlying Criminal Case and Evidence of His September 19, 2005 Program Violation

The People violated their *Brady* obligation by failing to disclose (1) ADA Nicolazzi's personal intervention into Avitto's criminal case immediately after he agreed to become a cooperating witness against Giuca, and (2) that three days before he testified that he was succeeding in his drug program, Avitto was thrown out of rehab for noncompliance which resulted in an unplanned court appearance, where he was released on his own recognizance after informing the court about his upcoming testimony against Giuca.

Without more, the People's failure to disclose ADA Nicolazzi's intervention into Avitto's case was a *Brady* violation. *Colon,* 13 N.Y.3d at 349-350.

Her appearance on Avitto's case, and in particular her immediate request to disclose information to the court off the record before it considered Avitto's bail status, was powerful corroboration for the defense argument that Avitto sought, expected and received consideration in exchange for his testimony. When ADA Nicolazzi appeared on his case, the stakes were high for both Avitto and the People. Avitto already had done his part by offering evidence against Giuca, and as his liberty hung in the balance, he expected the prosecutor to do her part. Similarly, the prosecutor must have known that if Avitto was jailed after he had helped her, the likelihood that he would continue to cooperate was nil. This obvious concern

assuredly was the sole reason ADA Nicolazzi appeared with Avitto at all. Her personal intervention into Avitto's case constituted favorable impeachment material under *Brady* and its progeny because it was credible evidence that Avitto and the prosecution traded "testimony for freedom."

The circumstances which immediately preceded Avitto's decision to cooperate must have made the People's *Brady* obligation obvious to an experienced homicide prosecutor. On the afternoon of June 9, 2005, while Avitto was compliant with his drug program and without imminent legal problems, he apparently had no interest in cooperating against Giuca. That evening, he absconded from his drug program and went on a cocaine bender. Now facing 3 ½ to 7 years in prison, Avitto quickly sought out law enforcement in order to share evidence from February 2005, even though he had been out of jail more than three months by June 2005. The next business day, Monday, June 13, Avitto was being debriefed in ADA Nicolazzi's office after which she helped him get his warrant vacated.

What reason other than to inform the court that Avitto was a cooperating witness before bail was determined could ADA Nicolazzi have had for intervening on his otherwise mundane case? What could Avitto have thought other than "she is going to bat for me because I helped her" as he watched the powerful prosecutor speak privately with the judge who controlled his liberty before he was released? At

the conclusion of his court appearance, both parties had accomplished their goal: Avitto had his freedom, the People had their cooperating witness.

These events established, at a minimum, a "strong inference" of a tacit benefit[1] and an "expectation of leniency" by Avitto which compelled disclosure. *Cwikla*, 46 N.Y.2d at 442; *Ford*, 41 A.D.2d at 551. The prosecution's "misleading and obstructive tactics" which concealed the evidence from the defense strengthened the inference that Avitto received a tacit benefit and expected leniency. *Cwikla,* 46 N.Y.2d at 442. These efforts included eliciting false and misleading testimony about it from Avitto, Tr. 768, 784-786, 812, 814; the prosecutor's misleading statements to the Court that there was no evidence that Avitto received a benefit in response to a specific request by the defense about benefits Avitto might have received, Tr. 929, and her false and misleading argument about Avitto's credibility. Tr. 1010-1011, 1020-1023.

The deception employed by the People here to conceal favorable impeachment evidence has been condemned by the Court of Appeals and resulted in reversals. *See, People v. Colon,* 13 N.Y.3d 343 (2009) (criticizing prosecutor for failing to disclose her intervention into witness' case and then repeating and emphasizing witness' false testimony); *People v. Steadman,* 82 N.Y.2d 1 (1993)

[1] Avitto expressly told law enforcement that he sought and expected help with his own case in exchange for cooperating against Giuca. Affidavit of John Avitto, July 8, 2013, ¶¶9, 16-17.

(criticizing the "determined effort by the prosecution to...undermine the rule of *Savvides*"); *People v. Novoa,* 70 N.Y.2d 490 (1987) (the trial prosecutor's failure to disclose a possible benefit was a "breach of her own obligations as an officer of the court"); *People v. Cwikla,* 46 N.Y.2d 434 (1979) (prosecutor's personal knowledge of possible undisclosed benefit made his failure to disclose "particularly inexcusable" because he denied knowledge of it).

The People committed an additional *Brady* violation by withholding critical impeachment evidence that three days before he testified he was doing well in his drug program, Avitto had been thrown out of his program for non-compliance. They also withheld evidence that as a result of this violation Avitto was compelled to appear in court, where after a bench conference, the court berated him for his poor performance. Avitto cited his upcoming testimony as an excuse before the court hesitantly released him, saying "*apparently* we're giving you another chance." Bederow Affirm., ¶¶67-69; Exhibit K (emphasis added).

Whether Giuca's prosecutors had actual knowledge or not about the events of September 19 was irrelevant because an assistant district attorney was present in court. Bederow Affirm., ¶68; *Giglio,* 405 U.S. at 154; *Steadman,* 82 N.Y.2d at 8. The concealment of this *Brady* material occurred under disturbing circumstances. Not only was Giuca deprived of specifically requested impeachment material, he was provided falsified evidence which whitewashed it. This enabled the prosecutor

to argue falsely with impunity about Avitto's credibility. Bederow Affirm., ¶¶70-79.

The suppressed September 19 evidence clearly was favorable impeachment evidence. It flatly contradicted Avitto's testimony about his success in his program, and supported the defense argument that he had a motive to fabricate his testimony because of his ongoing legal problems. Evidence that Avitto was performing poorly in his program at the time he contacted law enforcement and immediately before he testified also would have crippled the prosecution's claim that his success in a drug program demonstrated that he lacked a motive to seek help from the prosecution in exchange for testifying against Giuca.

Put simply, had the defense been aware of the *Brady* material, Avitto could not have fooled the jury with his perjury and the prosecutor would have been unable to sway the jury with her impassioned, yet false and misleading defense of Avitto's "civic duty" motive for testifying against Giuca. Tr. 1022-1023.

D. The Withheld *Brady* Material was "Material" Under the Reasonable Possibility Standard

As noted above, the failure to disclose specifically requested *Brady* material is "seldom, if ever" excusable. *Vilardi,* N.Y.2d at 77. Here, the reasonable possibility standard applies because the defense made detailed requests for impeachment material. The first demanded "all evidence...which might tend to

adversely affect the credibility of any eyewitnesses...in accordance with *Giglio v. United States,* 405 U.S. 150 (1972)." Bederow Affirm., ¶20. The defense also requested any evidence that a witness had received drug abuse treatment and all *Rosario* material. *Id.* The People responded that they were unaware of any impeachment material related to "non-police witnesses," but were "aware of their continuing duty under *Brady* to disclose exculpatory evidence to the defense and will honor that obligation." *Id.* at ¶21. Prior to summations, counsel made an extraordinarily detailed demand for any evidence regarding possible consideration Avitto received. Bederow Affirm., ¶48; Tr. 928-931. The prosecutor represented to this Court that "there is absolutely no evidence...he's never been given consideration." Tr. 929.

Even where there exists overwhelming proof of a defendant's guilt (which is not the case here), there must be no reasonable possibility that the error contributed to the conviction in order for the verdict to be upheld. *People v. Harris,* 93 A.D.3d 58 (2nd Dept. 2012). In *Harris,* the Second Department reversed a murder conviction because the overwhelming evidence of guilt was circumstantial or consisted of alleged statements made by the defendant to witnesses who had a motive to testify favorably for the prosecution, which created a reasonable possibility that the error "contributed" to the conviction. *Id.* at 71. "Where guilt rests on witness credibility,

key evidence affecting credibility is not merely corroborative or cumulative" to other witnesses or evidence in the case. *Wood v. Ercole,* 644 F.3d 83 (2nd Cir. 2011).

Where the prosecutor specifically directs the jury to consider the evidence or issue comprising the error, and that evidence "supports the testimony of other witnesses whose credibility was questionable, there exists a reasonable possibility that [the evidence] might have contributed to the jury's decision to convict the defendant." *Harris,* 93 A.D.3d at 74; *see also, People v. Goldstein,* 6 N.Y.3d 119, 129 (2005); *People v. Hardy,* 4 N.Y.3d 192, 199 (2005) ("the People's heavy reliance on [the error] creates a reasonable possibility that its admission and subsequent exploitation by the prosecutor contributed to the verdict."); *People v. Richardson,* 137 A.D.2d 105 (3rd Dept. 1988) ("in view of the...prosecutor's extensive reference to the improperly admitted portions in his summation, the error cannot be considered harmless").

Avitto's background as a jailhouse informant and the circumstances surrounding his cooperation made his motive for testifying the critical issue for the jury in assessing his credibility. If the jury believed that Avitto made a deal, or at least expected or sought consideration in exchange for his cooperation, and then lied about it, the negative impact on his overall credibility would have been catastrophic. The cumulative prejudice suffered by Giuca as the result of the prosecution's suppression of ADA Nicolazzi's intervention into Avitto's underlying case and the

concealment of his drug program violation just three days before he testified he was "doing good" in it was incalculable. *Kyles*, 514 U.S. at 445.

That Avitto's testimony was necessary to secure a conviction is demonstrated by the prosecution's decisions to call him as a witness at all and then to anchor its case to him in summation. *See, People v. Jones*, 47 N.Y.2d 528, 534 (1979) (in affirming lower court's reversal of conviction, the Court noted "undoubtedly the People's case was strong, but apparently not so strong that they felt they could do without [an improperly admitted confession] at trial...Significantly, during summation the prosecutor argued that the confession corroborated the eyewitness accounts").

Avitto's testimony was the only evidence which linked Giuca to the People's principal argument that he was actually present at, and an active participant in, Fisher's murder and robbery. The prosecutor dedicated a substantial portion of her summation vouching for Avitto's credibility and emphasizing that Giuca's admission to him was "truthful" and the only one which "made sense." Tr. 1017. The significance of the prosecutor's argument that ***it did not even make sense that Russo could have killed Fisher by himself*** cannot be overstated. In effect, she told the jury that ***only Avitto's testimony*** accurately described what happened to Fisher:

> **Another detail, ladies and gentlemen that John Avitto would have no way to know on his own, have no way to know would be corroborated by the undisputable**

> **physical evidence in this case if it was not exactly what this defendant had told him and it doesn't even make sense if you think about it that Russo could have done all of this alone. Mark was 6 foot 5. How did Russo hold the gun, demand money, go through Mark's pocket to get that money, beat him, his face, his body, all at the same time? It makes much more sense, common sense, that he had help. It makes much more sense just like Giuca admitted to Avitto that there was more than one person. He said there were 3.**

Tr. 1016-1017 (emphasis added). The prosecutor even manipulated Avitto's testimony in order to speculate that Giuca himself shot Fisher:

> **It is even possible that Giuca fired some of those shots himself...More evidence, ladies and gentlemen that Giuca was being truthful when [he] told [Avitto] he was present...**
>
> * * *
>
> It is proof that Giuca was out of the house; very well maybe present like he told Avitto.
>
> * * *
>
> Did he fire the first shots? 1, 2, 3, then hand over the gun to Russo to finish and walk? Did Russo fire every one of those shots that pumped into Mark Fisher's body brutalizing him over and over again until he died? We don't know. But one thing is abundantly clear, that [Giuca] was every bit involved in this crime.

Tr. 1017, 1019. Therefore, the prosecution's considerable reliance on Avitto in and of itself satisfies the reasonable possibility standard. *See, Goldstein,* 6 N.Y.3d at

129; *Hardy,* 4 N.Y.3d at 199; *Jones,* 47 N.Y.2d at 534; *Harris,* 93 A.D.3d at 74-75; *Richardson,* 137 A.D.2d at 108; *Wood,* 644 F.3d at 97-99.

Without Avitto, the remainder of the case against Giuca was in shambles. No eyewitnesses or forensic evidence linked him to the crime. The prosecution failed to tether Giuca's alleged admission to Avitto to Anthony Beharry's pressured and ambiguous (and since recanted) testimony about the disposal of the murder weapon. Notwithstanding the prosecutor's unsworn testimony to the contrary, Beharry's testimony, which did not include evidence about the caliber of the weapon[2] or whether it was even loaded, failed to establish that Giuca possessed the murder weapon, let alone that he gave it to Russo. Bederow Affirm., ¶45; Exhibit G; Tr. 649; 1005-1006, 1021-1022 (prosecutor claimed "she knew" and the jury "knew" the gun "absolutely" was the murder weapon).[3]

The remaining "proof" of Giuca's involvement in the murder and robbery was the discredited and incompatible testimony of Lauren Calciano and Albert Cleary. If the prosecution believed that these witnesses were sufficient to convict Giuca, they would not have abandoned them at the last-minute in favor of a jailhouse informant who contradicted them.

---

[2] Cleary alleged that he saw Giuca with two weapons, one of which was a .380 and could not have been the murder weapon. He claimed Giuca told him that Beharry got rid of the "guns," but Beharry testified only that he disposed of one gun of unknown caliber. Tr. 464 *cf.* 649.

[3] The prosecution introduced testimony before Russo's jury which suggested that he disposed of the murder weapon in a sewer. Tr. 750-753.

Calciano and Cleary both lied to the police for more than one year.[4] Both testified against Giuca only after having been subjected to immense pressure and threats. Each contradicted the other on virtually every detail surrounding Giuca's purported confession, even though both claimed that the other was present when Giuca confessed:

The Time of the "Confession"

> Cleary: He spent all day October 12, 2003 on Long Island with Angel DiPietro. He ate dinner with her family before returning to Brooklyn that evening, where Giuca confessed to him and Calciano. Tr. 293-294, 319.
>
> Calciano: Giuca confessed to her and Cleary on the afternoon of October 12, before it was dark out, and before she went about her plans for the day. Tr. 580, 583, 607-608.

The Reason for the Shooting

> Cleary: Giuca said he felt "disrespected" because Fisher sat on a table, so he "basically" told Russo to "show him what's up." Tr. 320-321. [Cleary contradicted his grand jury testimony in which he said another person was upset that Fisher sat on the table after he "recalled" that it was Giuca after huddling with prosecutors the day before he testified]. Tr. 277-278.
>
> Calciano: Giuca said that Russo told him that he (Russo) wanted to rob "Albert's friend." Tr. 581.

[4] Although defense counsel inexplicably kept the jury ignorant of its exculpatory result after the prosecution opened the door, Cleary presented the People with proof that he "passed" a polygraph examination which established that he knew nothing about Fisher's death, including Giuca's purported role. Calciano has recanted her testimony against Giuca. Exhibit E.

Russo and Fisher's Exit from Giuca's Home

> Cleary: Russo went outside and waited for Fisher, where he ambushed him before shooting and killing him. Tr. 322.
>
> Calciano: Russo and Fisher left Giuca's together. Tr. 581.

Calciano specifically refuted everything Cleary alleged that Giuca admitted in their joint presence. Tr. 607-609. The only "detail" that these two witnesses agreed upon—that Russo shot Fisher alone—was discredited by what the prosecutor called Giuca's "truthful" admission that "he told Avitto he was present [at Fisher's murder]." Tr. 1017. The prosecutor conceded that Calciano and Cleary's testimony was unreliable because Giuca's statements to them were "bits and pieces" and "partially danced around the truth,"[5] as opposed to the "no holds barred" statement he made to Avitto[6] Tr. 1008, 1011.

Calciano and Cleary imploded so spectacularly that the only conclusive proof either provided to the jury was that one of them committed perjury regarding Calciano's alleged removal of evidence from Giuca's home. Tr. 331 (Cleary testified "I saw [Calciano] remove a gun bag that I had seen before.") *cf.* Tr. 589

---

[5] This was a remarkable shift from the prosecutor's preview of the evidence in her opening statement, which made no mention of Avitto and alleged that Giuca told Cleary "the full story" about what happened to Fisher. Tr. 33.

[6] The prosecution knew that all of Giuca's purported admissions were impossible in light of the disinterested evidence from several witnesses near the crime scene which established that a vehicle was used during the crime or flight therefrom, and that more than one person—including a young woman--was present. *See, e.g.,* Hiroko Swornik DD5, June 15, 2004; Daisy Martinez, July 16, 2004; NYPD Canvas Report, October 12, 2003.

(Calciano testified that she "absolutely did not" remove a gun bag"); 628 (Cleary statement that she removed evidence was "a lie").

In sum, the prosecution's failure to disclose significant *Brady* material regarding Avitto's motive to testify favorably for them created a reasonable possibility that the error might have contributed to the guilty verdict in a case which consisted exclusively of alleged admissions to witnesses with credibility problems and circumstantial evidence. *Vilardi,* 76 N.Y.2d at 76-77; *Harris,* 93 A.D.3d at 71, 74-75.

POINT II

THE PEOPLE'S SUPPRESSION OF *ROSARIO* MATERIAL DEPRIVED GIUCA OF A FAIR TRIAL

A. Avitto's Statements of September 19, 2005

Avitto was required to appear in court on September 19, 2005 because he had been thrown out of a rehab facility less than two weeks after he was ordered to go there as the result of a relapse. His counselor, Sean Ryan, prepared and filed and served a violation letter which contained statements Avitto made to him. Exhibit J ("the September 19 Letter"). At the court appearance, Avitto admitted the violation but in an apparent effort to seek leniency, he told the court that he did it because he was testifying in a murder case this week. Exhibit K.

The September 19 Letter and the statements made by Avitto in court related to the subject matter of his testimony because he testified about his program performance on direct, cross and re-direct. Tr. 784-785, 797, 802-804, 812. However, the defense was not provided with the September 19 Letter, nor was it told about Avitto's September 19 court appearance or provided with a transcript. Bederow Affirm., ¶¶16-17, 40-41, 58, 69. Instead, sometime between September 19 and Avitto's September 22 testimony, Giuca was given a letter, dated September 20, which on its face appeared authentic, but in reality was a falsified document which deleted all of the evidence related to the circumstances surrounding Avitto's September 19 violation and court appearance. Exhibit L ("the September 20 Letter"). Consequently, despite the voluminous amount of favorable impeachment evidence surrounding the September 19 violation and court appearance, counsel never cross examined Avitto about either of them. Bederow Affirm., ¶¶40-41.

B. The *Rosario* Rule

The *Rosario* rule requires that after the jury has been sworn and before an opening statement the People make available to the defense "any written or recorded statement...made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness' testimony." C.P.L. § 240.45; *People v. Rosario,* 9 N.Y.2d 286 (1961). The rule was founded out of a "right sense of justice" that a defendant be afforded "a fair opportunity to cross-

examine the People's witnesses at trial. *People v. Poole,* 48 N.Y.2d 144, 148-149 (1979); *People v. Ranghelle,* 69 N.Y.2d 56 (1986). The *Rosario* rule "insures that defense counsel...do the strategic viewing, weighing and exercising of the defendant's fair trial advocacy interests." *People v. Flores,* 84 N.Y.2d 184, 188 (1994). Justice Marrus, then sitting in the New York County Criminal Court, described the "key elements" of the *Rosario* rule as requiring defense "[a]ccess to the statements and self-determination by the defense as how to use them." *People v. Grissom,* 128 Misc.2d 246, 248 (N.Y. Cty. Crim. Ct. 1985).

The prosecution's failure to disclose *Rosario* material mandates reversal "if there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial." C.P.L. § 240.75. This standard of review is "perhaps the most demanding test yet formulated" for harmless error review. *People v. Machado,* 90 N.Y.2d 187, 193 (1997). This low threshold has been satisfied in murder cases where withheld evidence undermined the credibility of one prosecution witness in multi-witness cases. *See, People v. Colon,* 13 N.Y.3d 343 (2009) (reasonable possibility standard met in two witness case); *People v. Bond,* 95 N.Y.2d 840 (2000) (three witness case); *Su v. Filion,* 335 F.3d 110 (2nd Cir. 2003) (three witness attempted murder case).

C. The September 19 Letter and September 19 Transcript were *Rosario Material*

The September 19 Letter contained recorded statements of Avitto which were in the possession or control of the People and related to the subject matter of his testimony. Without more, the People's failure to disclose it to the defense was a clear cut *Rosario* violation.

The People's failure to provide a transcript of Avitto's September 19 appearance (or failure to notify the defense about it in order to give the defense a fair opportunity to order a transcript before examining Avitto), constituted a second *Rosario* violation. *Rosario* requires that *ex parte* statements which would otherwise remain undisclosed be given to the defense. *People ex rel. Cadogan v. Mcmann*, 24 N.Y.2d 233, 236 (1969); *Grissom,* 128 Misc.2d at 248. Merely because a recorded statement is not in the sole custody of the prosecution does not excuse the People from their *Rosario* obligations. *Ranghelle,* 69 N.Y.2d at 64.

New York courts which have considered whether *Rosario* requires the prosecution to turn over transcripts of proceedings in which a witness made a prior statement have focused on the defense's knowledge of the prior statement and whether equal access to the material satisfied the "make available" language in C.P.L. § 240.45; *Poole,* 48 N.Y.2d at 148.

In *People v. Fishman,* 72 N.Y.2d 884, 885-886 (1988), the Court held that no *Rosario* violation occurred where the defense was not provided a prior statement after the People had ordered, but not yet received a transcript from a co-defendant's guilty plea because the defense was aware of the plea and could have obtained it at any time. *See also, People v. Zanotti,* 30 N.Y.2d 926 (1972) (no *Rosario* violation for failure to turn over prior trial testimony because "defendant was present at trial and knew what the testimony was"); *Cadogan,* 24 N.Y.2d at 236 ("*Rosario*...did not require that the defense be afforded transcripts of testimony given in the presence of both the defendant and his counsel..."); *see also, People v. Thompson,* 177 Misc.2d 803, 810 (Kings Cty. Sup. Ct. 1998); *People v. Caban,* 123 Misc.2d 943 (Kings Cty. Sup. Ct. 1984).

Conversely, courts have held that *Rosario* was violated where the defense was unaware of the prior statement and not provided a transcript, or where the defense did have knowledge, it was denied a reasonable adjournment to order the transcript. *See, People v. Lugo,* 176 A.D.2d 823 (2nd Dept. 1991) (reversal required where defense did not receive transcript of prior testimony until mid-examination of the witness and was unaware of its existence beforehand); *Matter of Bertha K.,* 58 A.D.2d 811 (2nd Dept. 1977) (trial court abused discretion in failing to grant adjournment for defense to receive transcript); *People v. Beal,* 57 A.D.2d 306 (2nd Dept. 1977) (reversible error for court to refuse to adjourn hearing in order to allow

defense to obtain transcript of prior grand jury testimony where minutes were in process of being transcribed); *People v. Yanowitch*, 140 Misc.2d 575 (Nassau Cty. Ct. 1988) (court ordered a reasonable adjournment to allow defense to procure prior testimony); *but see, People v. Ward,* 121 Misc.2d 1092 (N.Y. Cty. Sup. Ct. 1983) (court compelled prosecution to transcribe prior trial testimony, even where defense was aware of its existence).

Justice Marrus has provided a detailed explanation on "equal access" as the dispositive issue on whether *Rosario* requires the People to provide the defense with a transcript of a prior statement of a witness. In *Grissom,* the Court held that the People were not obligated to do so "as long as the defense is aware of the existence of this prior testimony and has equal access to it." *Id.* at 247. The Court emphasized *Rosario's* intent was to provide fundamental fairness in cross-examination:

> It is evident from a reading of [*Rosario*] that the New York Court of Appeals intended that the defense would have access to prior statements of witnesses called by the prosecution so that defense counsel would be free to decide what use, if any, the prior statements could be used for impeachment of the witnesses' testimony. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination. *Rosario* at 289. Access to the statements and self-determination by the defense as to how to use them, were the key elements of the *Rosario* decision. Indeed, the Court of Appeals itself defined the purpose of the *Rosario* decision as follows: "to afford the defendant a *fair*

> *opportunity* to use a witness' prior relevant statements for impeachment purposes." *People v. Poole,* 48 N.Y.2d 144, 150 (1979).

Grissom, 128 Misc.2d at 247-248 (emphasis in original). The Court noted that "it made perfect sense" to require disclosure for material in which that party had "superior access," such as grand jury testimony, which is "peculiarly within the control of the district attorney and cannot be readily ordered by the defense." *Id.* at 248. On the other hand, if the opposing party "has been made aware of the prior testimony and has equal access to it," *Rosario's* "make available" requirement has been satisfied. *Id.* Accordingly, the Court held:

> If the existence of the prior testimony is not made known to opposing counsel before the hearing or trial commences...[t]he party calling the witness in its behalf would then be obligated to provide the transcript of the prior testimony.

Id. Because the defense was aware of the proceeding, *Rosario* did not obligate the prosecution to provide a transcript. However, the Court granted the incarcerated defendant an adjournment to order a copy of the transcript. *Id.*

Grissom illustrates perfectly how *Rosario's* "right sense of justice" and intent "to afford the defendant a fair opportunity to confront a key witness against him with critical material which would have exposed his perjury," were violated here. *Ranghelle*, 56 N.Y.2d at 62; *Poole*, 48 N.Y.2d at 148-149. The People were a party to Avitto's September 19 court appearance; Giuca was not. The defense had no

reasonable basis to know about the appearance. The People's non-disclosure of it was particularly troubling in light of the fact that on September 21, 2005, the Court adjourned Avitto's testimony to the following day in order to allow the defense to get access to all of the relevant cross-examination materials. Tr. 744-745. But rather than receive authentic *Rosario* material related to Avitto's court appearance, the defense was given the falsified September 20 Letter which concealed the *Rosario* material.

Thus, the People's failure to provide Giuca a transcript or at least notice about Avitto's September 19 court appearance before Avitto testified on September 22, violated *Rosario.* By virtue of the People's presence at Avitto's appearance and their concealment of it with the September 20 Letter, the prosecution's "superior access" to the critically important statements made by Avitto in court on September 19 required disclosure.[7] *Grissom,* 128 Misc.2d at 248.

The *Rosario* violations here easily satisfy the reasonable possibility standard. In the hands of reasonably skilled counsel, the September 19 Letter and Avitto's admission that he violated the conditions of his release three days before he testified, and reference to his upcoming testimony as an excuse before he was released would

[7] Whether Giuca's prosecutors had actual knowledge of Avitto's September 19 appearance is meaningless for purposes of *Rosario* analysis. The People's good or bad faith is irrelevant because "the focus of *Rosario* is on fairness to the defendant—not on the conduct or the motives of the prosecutor. If *Rosario* material is denied the defendant, he has been deprived of what he should have." *People v. Jones,* 70 N.Y.2d 547, 553 (1987); *see also, Ranghelle,* 69 N.Y2d at 64; *Novoa,* 70 N.Y.2d at 498. In any event, it seems unlikely that the prosecutor in the part would not have reported to Giuca's prosecutors that Avitto had been violated in light of the fact that Avitto blurted out that he was testifying in a murder case that week. Exhibit K.

have been put to devastating use and destroyed Avitto's credibility. Avitto's portrayal of himself as a sentenced defendant who was doing very well in a drug program without a motive to testify falsely would have been exposed as a fantastic lie.

Defense possession of the suppressed *Rosario* also would have eviscerated (or prevented altogether) the prosecutor's argument that Avitto was "very honest about his problems and criminal past" and "someone you could trust." Tr. 1010-1011, 1017. *See, Su. Filion,* 335 F.3d 110, 129 n.6 (2nd Cir. 2003) ("we have previously held that the very fact of the witness' untruthfulness is itself relevant to an analysis of prejudice"; also noting "how devastating to the prosecution's case it might have been had the jury learned that the prosecutor knowingly (or recklessly) elicited the false testimony").

In light of the weakness of the remainder of the case against Giuca, *see* Point I, there was a reasonable possibility that if the *Rosario* material had been disclosed, the jury's decision could have been different.

POINT III

THE PROSECUTION'S KNOWING USE OF FALSE AND MISLEADING TESTIMONY MISLED THE JURY AND VIOLATED GIUCA'S RIGHT TO DUE PROCESS

A. The Applicable Law

Prosecutors, in their role as public officers "must deal fairly with the accused, and be candid with the courts." *People v. Steadman,* 82 N.Y.2d 1, 7 (1993). The People have a "duty of fair dealing to the accused" and a duty of "candor to the courts." *People v. Pelchat,* 62 N.Y.2d 97, 105 (1984). "Deliberate deception of court and jury by the presentation of testimony known to be perjured is inconsistent with the rudimentary demands of justice." *Mooney v. Holohan,* 294 U.S. 103, 112 (1935). Due process requires that a prosecutor correct false testimony. *Banks v. Dretke,* 540 U.S. 668 (2004); *Alcorta v. Texas,* 355 U.S. 28 (1957). This includes a duty to correct mistaken testimony. *People v. Colon,* 13 N.Y.3d 343, 349 (2009); *Steadman,* 82 N.Y.2d at 7-8. The United States Supreme Court and the Court of Appeals have both unanimously held that a prosecutor's obligation to correct false testimony includes correcting testimony which relates solely to a witness' credibility. *Napue v. Illinois,* 360 U.S. 264 (1959); *People v. Savvides,* 1 N.Y.2d 554, 557 (1956).

Due process is violated if a prosecutor allows a witness to "mischaracterize" facts or if she knowingly exploits a witness' inaccurate testimony in summation. *Novoa,* 70 N.Y.2d at 497-498. A prosecutor's misleading presentation of evidence,

or one which gives the jury a false "impression" similarly violates due process. *People v. Vielman,* 31 A.D.3d 674 (2006) (conviction reversed where prosecutor knew her argument rested on a "false premise" and was "blatant attempt to mislead jury"); *see also, Jenkins v. Artuz,* 294 F.3d 284, 294-296 (2nd Cir. 2002) (affirming habeas reversal of murder conviction in case where prosecutor elicited "technically accurate testimony" that no plea deal with witness existed, but questions were "misleading" and phrased in a manner which "left the jury with the mistaken impression" that no agreement existed with the witness).

The trial prosecutor need not be aware of the falsity of a witness' testimony; if any member of her office is aware that the testimony is inaccurate, this knowledge and the responsibility to correct the false testimony is imputed to the trial prosecutor. *Steadman,* 82 N.Y.2d at 8.

Even if the prosecutor does not have actual knowledge of the witness' false testimony, she is obligated to correct it if she should have known of its falsity. *People v. Witkowski,* 19 N.Y.2d 839 (1967); *People v. Robertson,* 12 N.Y.2d 355, 360 (1963); *Su v. Filion,* 335 F.3d 119, 126-127 (2nd Cir. 2003); *People v. Irvin,* 180 A.D.2d 753 (2nd Dept. 1992); *People v. Stern,* 226 A.D.2d 238, 240 (1st Dept. 1996); *see also, People v. Bermudez,* 25 Misc.3d 1226(a) (New York Cty. Sup. Ct. 2009) (the First and Second Departments have acknowledged that CPL 440.10(1)(c) encompasses...situations where the prosecutor should have known of false

testimony). "Good faith" or negligence is not a defense to a prosecutor's obligation to present accurate testimony and correct it if it is false or misleading. *Robertson,* 12 N.Y.2d at 359-360; *Savvides,* 1 N.Y.2d at 557.

A conviction tainted by a prosecutor's knowing use of false or mistaken testimony requires reversal and a new trial "unless there is no reasonable possibility that the error contributed to the conviction." *Colon,* 13 N.Y.3d at 349; *People v. Pressley,* 91 N.Y.2d 825, 827 (1997). If a prosecutor "knowingly permitted the introduction of false testimony, reversal is "virtually automatic." *United States v. Wallach*, 935 F.2d 445, 456 (2nd Cir. 1991).

B. The People's Violation of Their Duty to Correct False Testimony by Avitto Requires that Giuca's Conviction Be Vacated

The Prosecutor Intended to Mislead the Jury with Avitto's False Testimony

Notwithstanding her own knowledge of, and prominent role in, the circumstances surrounding Avitto's cooperation, the prosecutor elicited testimony from him that he was not given anything, was not promised anything and did not ask for anything in exchange for testifying against Giuca. Tr. 785-786. He emphatically stated that his legal circumstances had nothing to do with his decision to cooperate. Tr. 804, 806. Even though the People knew that Avitto had been thrown out of rehab just three days earlier in violation of a conditional sentence, the prosecutor elicited testimony that Avitto had been "sentenced" to a drug program, in which he was

"doing good." Tr. 768, 784. Only on cross was it revealed that Avitto's sentence was conditional and that he faced a lengthy prison sentence if he violated it. Tr. 787. Nevertheless, Avitto maintained on cross that "things were going well for him" in his program. Tr. 797.

On re-direct, the prosecutor had the presence of mind to elicit from Avitto that Justice Marrus had no involvement in the decision to release him from custody on June 13, 2005, even as she remained silent while Avitto slyly omitted her presence from it. Tr. 812. ADA Nicolazzi's final leading question of Avitto encapsulates the prosecution's deceitful argument that his legal problem had no temporal or spatial relationship to his decision to cooperate against Giuca:

> Q: Just lastly, you were asked questions about, well, when you reached out to the police, that was because you'd left the program and you said no. At the time that you were first interviewed and you spoke with the police about this case, had it already been four months since you had taken that disposition about the drug program?
>
> A: Correct.

Tr. 814.

The above examples demonstrate that the prosecutor portrayed Avitto as a good citizen whose criminal case was "over"; therefore he had no reason to seek help from the prosecution in exchange for his testimony. However, we now have proof of what the prosecution assuredly knew, but hid from Giuca, in 2005: that all

of Avitto's testimony was false and misleading.[8] Avitto Affidavits, July 8, 2013 ¶¶3, 8-10, 16-17, 24-25; April 10, 2014, ¶¶3-4; Bederow Affirm., ¶¶59-79; Exhibits F, J-M.

It strains credulity that an experienced prosecution team, led by the former Chief of Homicide and then Chief of Rackets, Michael Vecchione,[9] and a seasoned, senior homicide prosecutor with a reputation for being "meticulous" and "preparing everything"[10] did not know that Avitto's testimony was false and misleading. Every reasonable person understands that a jailhouse informant is the most unreliable type of witness whose motive to help the prosecution is almost always premised on the prosecution helping him. *See,* Robert M. Bloom, "Jailhouse Informants," Criminal Justice Magazine, Spring 2003, Volume 18, Number 1; *see also*, Report of the 1989-90 Los Angeles County Grand Jury into the Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County, June 26, 1990; available at http://www.ccfaj.org.

---

[8] Avitto was not mentioned during the trial until he was called as the People's final substantive witness. One day before Avitto testified, counsel acknowledged he did not know anything at all about Avitto. Tr. 745-746. One federal court has noted that "[t]he prosecutor's decision to spring [the witness'] testimony at the last minute...provided circumstantial evidence of the prosecutor's knowing complicity in [the witness'] false testimony." *Drake v. Portuondo*, 553 F.3d 230, 243 (2nd Cir. 2009).

[9] Mr. Vecchione's methods have routinely been criticized by federal judges, District Attorney Thompson, newspaper editorial boards and others. Allegations of misconduct have resulted in the dismissal of several substantial murder cases in which he has been involved, including the conviction of Jabbar Collins. The federal judge presiding over Collins' habeas proceedings called the prosecution's conduct (which included allegations that Mr. Vecchione elicited false and misleading testimony and exploited it with false argument) "shameful." *New York Times,* "Facing Misconduct Claims, Brooklyn Prosecutor Agrees to Free Man Held 15 Years," June 15, 2010.

[10] *Daily News,* "Brooklyn DA's Office Top Prosecutor Joins Controversial Sex Abuse Case," January 23, 2014; *New York Magazine,* "Prosecutor from Central Casting Defends Perfect Record against 16-Year Old Prank Killer," October 18, 2010.

A jailhouse informant's primary motivation of self-interest is even more obvious where, as here, Avitto *sought out law enforcement in order to volunteer as a witness immediately after placing himself in legal peril* because of his recent criminal conduct. The First Department succinctly described similar circumstances:

> It is certainly not reasonable to conclude that a career criminal such as [the 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 simply out of a concern for the public welfare.

People v. Conlan, 146 A.D.2d 319, 330 (1st Dept. 1989). However, rather than comply with her Constitutional obligation to correct Avitto's false and misleading testimony, the prosecutor enhanced its prejudicial impact. *See, Colon,* 13 N.Y.3d at 349; *Steadman,* 82 N.Y.2d at 7; *Novoa,* 70 N.Y.2d at 497-498.

The Prosecutor's False and Misleading Summation

The prosecutor dedicated approximately three pages of her summation to a spirited, yet false and misleading defense of Avitto's selfless motive for testifying. She insisted that Avitto was "very honest about his problems and his criminal past." Tr. 1010-1011. She argued that Avitto "wasn't making up his testimony," "everything he told you was credible," "there was no way he could make it up," "you know he was being truthful and you could trust him." Tr. 1008, 1017-1018. She

confidently asserted—it was "there for you to see in black and white"—that "every time" Avitto had a problem with his drug program he contacted his counselor "right away," which showed that he was responsible and explained why a judge would release him without bail. The falsity of this argument was apparent from the suppressed evidence in the September 19 Letter and from the court appearance of the same day. Tr. 1020-1021; *cf.* Exhibits J, K.

The prosecutor misled the jury by claiming that Avitto's guilty plea "months before he ever contacted the police" meant that he "came to the police with this information on his own...for once to do something right." Tr. 1022. She argued that in order to believe Avitto received any benefits the jury had to find the existence of a conspiracy between the People, the police and the Court.[11] Tr. 1022. Her adamant and frequent denials that Avitto had a motive to fabricate his testimony and that he cooperated for altruistic purposes suggest that she "doth protest too much, methinks."[12]

Avitto's sworn statements, the June 13 and September 19 transcripts, the September 19 and 20 Letters, and a common sense analysis of Avitto's

[11] The "conspiracy argument" was improper and violated Giuca's right to a fair trial. *See, People v. Forbes*, 111 A.D.3d 1154, 1159 (3rd Dept. 2013) ("A prosecutor's reference to a conspiracy in no way constitutes fair comment on the evidence adduced...There is no question that one of the jury's roles in a criminal trial is to assess the credibility of the witnesses who testify...Here, the prosecutor's commentary set up a far different credibility contest by suggesting to the jury that it could believe defendant only if it also believed that the trial judge, among others, had permitted the People's witnesses to lie to the jury and/or otherwise engaged in some form of misconduct"). *See also, People v. Casanova*, 119 A.D.3d 976 (3rd Dept. 2014).

[12] *Hamlet,* Act III, Scene II.

circumstances when he approached the People prove that ADA Nicolazzi's summation was riddled with inaccuracies and based on a "false premise" which violated Giuca's right to a fair trial. *See, Vielman,* 31 A.D.3d at 675; *People v. Walters*, 251 A.D.2d 433 (2nd Dept. 1998) (reversal where prosecutor knowingly advocated a false argument).

Reversal is Required Under People v. Colon

Giuca's conviction must be reversed under the controlling authority of *People v. Colon,* 13 N.Y.3d 343 (2009). *Colon* is strikingly similar to Giuca's case. In *Colon,* a key prosecution witness denied receiving benefits, when in fact, among other things, the Manhattan homicide prosecutor (later judge) had appeared on his pending case in order to convey an offer which had been approved by his case prosecutor. *Id.* at 347-349. The prosecutor not only failed to correct the false testimony, she "compounded the error by repeating and emphasizing the misinformation during summation." *Id.* at 349.

The Court of Appeals reversed Colon's murder conviction on false testimony principles, noting that prosecutors have a duty not only to disclose exculpatory and impeaching evidence, but also to correct the knowingly false or mistaken testimony of a witness. *Id.* The Court explained that the false testimony may have impacted the jury's assessment of the witness' credibility because "by their very nature benefits conferred on a witness by a prosecutor provide a basis for the jury to

question the veracity of a witness on the theory that the witness may be biased in favor of the People." *Id.* at 350.

Like the witness in *Colon,* Avitto denied receiving any benefits even though the prosecutor's appearance on his case was more impactful than the Manhattan prosecutor's appearance at a calendar call in *Colon.* Here, ADA Nicolazzi appeared on Avitto's case when his liberty was the only issue before the court. Like the prosecutor in *Colon,* ADA Nicolazzi did not disclose her involvement in Avitto's case, and she elicited testimony which prompted him to deny it. Similarly, not only did she fail to correct Avitto's false testimony, she misled the jury by "exacerbat[ing] the problem during her closing comments." *Colon,* 13 N.Y.3d at 350.

In *Colon,* the prosecutor "repeated and emphasized the misinformation." *Id.* at 349. Here, ADA Nicolazzi went far beyond merely vouching for the truthfulness of Avitto's inaccurate testimony. She made a mockery of Giuca's right to a fair trial by taking advantage of her own suppression of favorable impeachment material and belittling the "speculative" defense argument that Avitto sought and received a benefit because it lacked evidence and corroboration to support it:

> **Now [the] defense has suggested with respect to John Avitto well, he's making this up and willing to say anything because he's trying to help himself and he's getting some sort of a deal. First of all, there is no evidence of that, just like there is almost no evidence at all of almost anything Mr. Gregory told you.**

* * *

If he had gotten consideration, then there would be absolutely nothing to hide about that.

* * *

If the judge decided ultimately he failed the program that he was facing the amount of time, he said 3 and a half to something, maybe 7 years, so to believe the defense, the DA is in on it, the police are in on it and even the Judge is in on it but **that makes absolutely no sense and is not corroborated. There is absolute[ly] [no] evidence, no evidence at all, and yet when somebody was given consideration, you heard about that right from the start.**

* * *

[Avitto] is a man who has made mistakes over and overall his life. **And for once, he tried to do something right and for that Mr. Gregory wants you to condemn him.**

* * *

Now, during his summation, Mr. Gregory, ladies and gentlemen, can be as loud and dramatic as he wants to be with all his wild speculations that he threw out before you; that was based on no evidence that is anywhere in the record, no evidence to corroborate anything that he said to you, so ladies and gentlemen, even if you scream and yell, it [doesn't] make it so.

Tr. 1020-1023 (emphasis added). ADA Nicolazzi's misleading claim that there was "no evidence" and "no corroboration" to support the defense's speculation that Avitto received a benefit was egregious misconduct. New York Rule of Professional Conduct 3.3, *Conduct Before a Tribunal.* This purported dearth of evidence in

support of Giuca's argument was caused by the prosecution's suppression of it. Her gross exploitation of Avitto's false and misleading testimony violated her duty to "deal fairly with the accused and be candid with the courts," *Steadman,* 82 N.Y.2d at 7, and violated Giuca's right to due process. *Colon,* 13 N.Y.3d at 349-350.

C. Under the Reasonable Possibility Standard, the People Cannot Establish Beyond a Reasonable Doubt That Their Reliance Upon False and Misleading Testimony and Argument Did Not Affect the Verdict

New York state and federal courts have frequently reversed convictions and indictments where the prosecutor relied on false testimony and/or false argument. *See, e.g., Colon,* 13 N.Y.3d 343 (2009) (murder); *Steadman,* 82 N.Y.2d 1 (1993) (manslaughter); *Novoa,* 70 N.Y.2d 490 (1987) (murder); *People v. Pelchat,* 62 N.Y.2d 97 (1984); *Witkowski,* 19 N.Y.2d 839 (1967); *Robertson,* 12 N.Y.2d 355 (1963); *Savvides*, 1 N.Y.2d 554 (1956); *People v. Bournes,* 60 A.D.3d 687 (2nd Dept. 2009); *Vielman,* 31 A.D.2d 674 (2nd Dept. 2006); *People v. Jones,* 31 A.D.3d 666 (2nd Dept. 2006) (murder); *People v. Anderson,* 256 A.D.2d 413 (2nd Dept. 1998) (murder); *Walters,* 251 A.D.2d 433 (2nd Dept. 1998) (murder); *People v. Schwartz,* 240 A.D.2d 600 (2nd Dept. 1997); *People v. Lewis,* 174 A.D.2d 294 (1st Dept. 1992) (murder); *Conlan,* 146 A.D.2d 319 (1st Dept. 1989) (murder); *Su,* 335 F.3d 119 (2nd Cir. 2003) (murder); *Jenkins*, 294 F.3d 284 (2nd Cir. 2002) (murder).

It is hard to comprehend anything which would have destroyed Avitto's credibility more than exposing him—a jailhouse informant who withheld his

evidence until he volunteered it immediately after he was in trouble—as a liar, who with the assistance of the trial prosecutor, deceived the jury about any benefits he sought and received, and was dishonest about his motive for testifying against Giuca. In these circumstances, reversal is "virtually automatic." *Wallach*, 935 F.2d at 456. For these reasons and those detailed in Point I, had the jury known that Avitto testified inaccurately, there was a reasonable possibility that the verdict could have been different.

POINT IV

GIUCA's CONVICTION MUST BE VACATED PURSUANT TO C.P.L § 440.10(1)(b) BECAUSE IT RESTED UPON FRAUDULENT EVIDENCE

Under C.P.L. § 440.10(1)(b), vacatur is warranted where the defense is provided fraudulent evidence by "a person acting for or in behalf of a court or a prosecutor," even if the prosecution was uninvolved in the fraud. *People v. Seeber*, 94 A.D.3d 1335 (3rd Dept. 2012).

The September 20 Letter was falsified and possibly forged evidence created to harm Giuca rather than for its ostensible purpose of providing the court with information about Avitto. Bederow Affirm., ¶¶70-79; Exhibit M.

Avitto's counselor Sean Ryan has stated that the signature on the September 20 Letter "appears" to be his.[13] Exhibit N. In 2005, Ryan's duties at EAC-LINK included monitoring Avitto's compliance with a court-mandated drug program. He frequently appeared in court, provided updates to the court, and filed reports which became part of Avitto's official court file. The court relied on his updates, as did the Department of Probation when it recommended its sentence for Avitto. Accordingly, the September 20 Letter was prepared by a person "acting for or in behalf of a court."

In *Seeber*, unknown to the prosecutor, the defendant was provided with a falsified fiber analysis report of a state police investigator before she pleaded guilty to murder. 94 A.D.3d at 1335, 1337. The Third Department upheld the trial court's vacatur of her conviction because the report was, at the least, "misleading." *Id.*

Unlike *Seeber*, the prosecution here was not blameless in the dissemination of the fraudulent evidence. The People knew that Avitto was in court on September 19 and that the September 20 Letter was false evidence. Moreover, as detailed earlier, the prosecution engaged in a pattern of suppression and deception regarding disclosure of favorable impeachment evidence which would have undermined Avitto's credibility. Bederow Affirm., ¶¶48, 54, 62-69.

[13] On February 19, 2015, I was told by the prosecution that during their review of Giuca's conviction, Ryan was interviewed by telephone and thus was not shown the questioned documents in person. I was also told that Ryan had no explanation why he would have authored the September 20 Letter.

The prejudice suffered by Giuca as a result of his reliance on the September 20 Letter was substantial; in addition to its falsity, it concealed separate massive *Brady* and *Rosario* violations, which corrupted Giuca's constitutional right to conduct meaningful cross examination of the most significant witness against him. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested"); *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986) (a defendant has a right to cross-examine a witness about pending charges because it might expose a motive for the witness to fabricate his testimony); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (the jury is "entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place" on a witness' testimony).

Reasonably skilled counsel armed with the authentic, rather than fabricated report, would easily have exposed Avitto's perjured testimony about his performance in his program and advanced the defense theory that he fabricated his testimony in exchange for help from the prosecution. However, the dissemination of the fraudulent evidence, whether the fault of the People, Ryan, others at EAC-LINK, or any combination thereof, stacked the deck against Giuca and deprived him from getting to the truth about Avitto's motive to testify against Giuca:

> However, first of all, you know from Avitto's testimony on cross that **every time Avitto had a problem with drug use or with his program** and he told you he did leave on his own, that **it was he, who contacted his counselor right away and I said I relapsed or I left the program.**
>
> **...It's there for you to see in black and white and John Avitto told you he called his counselor on his own** so...it's not surprising that a Judge would give him multiple chances when **he was showing himself to still be acting responsibly...**

Tr. 1020-1021; *cf.* the September 19 Letter ("**On September 19, 2005, case manager Sean Ryan was contacted by Kingsboro and informed that [Avitto] was being discharged**...") (emphasis added).

Accordingly, the dissemination of fraudulent evidence to Giuca violated his federal and state due process rights, and requires vacatur under C.P.L. § 440.10(1)(b); *Seeber*, 94 A.D.3d at 1338.

POINT V

THE COURT MUST CONSIDER THE MERITS OF GIUCA'S MOTION

Under C.P.L. §§ 440.10(1) and 440.30(3), the Court must consider and determine the present motion on the merits so long as it is based upon sworn allegations of fact where the motion does not fall within C.P.L. §§ 440.10 (2) or (3). If the People fail to dispute the facts presented here, the Court must grant the motion without a hearing. C.P.L. § 440.30(3)(c).

C.P.L. § 440.10(2), which relates to appellate issues, has no applicability here. Under C.P.L. § 440.10(3), the court may deny the motion where (a) the defendant could have raised the ground on direct appeal through the use of due diligence, (b) the ground or issue was previously determined in a previous motion, or (c) the defendant was in position to "adequately" raise the grounds underlying the present motion but did not. Even if one of the above bases for denial exists, the court may grant the motion in the interests of justice and for good cause shown.

§ 440.10(3) has no applicability because Giuca previously was not positioned to adequately raise the issues presented here. None of the relevant information and evidence, including Avitto's affidavits, the September 19 Letter and the transcripts were available to Giuca at trial or during his prior 440.10 motion, which related solely to the issue of juror misconduct. All of the evidence critical to this motion was discovered after that motion was denied.

Giuca was entitled to rely upon the good faith of the People's representations that they complied with their *Rosario* obligations and that they did not possess or control any *Brady* material. *See, Banks v. Dretke,* 540 U.S. 668 (2004) ("our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed"); *Strickler v. Greene,* 527 U.S. 263, 289 (1999) (excusing federal habeas petitioner from raising *Brady* claim in state court where prosecutor

suppressed at trial and petitioner relied upon prosecutor's open file policy of discovery); *People v. Qualls,* 70 N.Y.2d 863, 865 (1987) (reversing lower court's denial of 440.10 motion on due diligence grounds; trial counsel was entitled to rely on prosecution's representation that no deal had been made with a witness). Giuca was not required to assume the prosecution was lying and that impeachment material existed when they represented that no such material exists or that they will disclose any such material if it does exist. Exhibit D. He was similarly allowed to assume that evidence supplied to him was legitimate, rather than doctored evidence.

Additionally, Giuca's ability to discover the evidence necessary for the present motion was thwarted by the People's suppression, concealment, misdirection, and even dissemination of fabricated evidence, regarding it. The People did not provide any *Rosario* material for Avitto, and they kept him under wraps until they unleashed him as their final substantive witness. Tr. 744-747.

Even if the Court finds that it has the discretion to deny Giuca's claims without a hearing, the Court should review them in the interest of justice. Brooklyn is the epicenter of a nationwide wrongful conviction crisis.[14] The District Attorney has candidly acknowledged that he "inherited a legacy of disgrace with respect to wrongful convictions" from his predecessor.[15] The District Attorney admirably has

[14] *USA Today*, "Brooklyn 'Ground Central' for Wrongful Conviction Claims," July 26, 2014.
[15] *New York Daily News*, "Wrongfully Convicted Brooklyn Man Goes Free after 29 Years, DA Slams Tactics of Original Prosecution," October 15, 2014.

stated that his "ultimate goal is to ensure that the People of Brooklyn have faith in the fairness of our criminal justice system." DA Press Release, February 1, 2014.

Giuca's case has been controversial and a matter of public interest for more than ten years.[16] The evidence we have unearthed exposes a series of constitutional violations, disturbing allegations of prosecutorial misconduct and an overzealousness to win at any cost, which go to the core of the wrongful conviction crisis. A thorough and transparent review of all of the issues which potentially undermine the credibility and integrity of Giuca's conviction will benefit the criminal justice and the public's confidence in it.

[16] *See e.g., New York Daily News,* "Waiting for Justice in Brooklyn," August 11, 2014; *New York Post,* "Ghetto Mobster or Innocent Man? An NYC Murder Case Falls Apart, August 17, 2014; *New York Observer,* "Did an Ambitious Prosecutor Convict the Wrong Man for the Killing of Mark Fisher?," September 24, 2014.

CONCLUSION

John Giuca was deprived of a fair trial. The Court should vacate his conviction on his motion and supporting papers alone, or in the event the People's response creates relevant issues of fact, a hearing should be held.

Respectfully submitted,

MARK A. BEDEROW
260 Madison Avenue
New York, New York 10016
212.803.1293 (phone)
917.591.8827 (fax)
mark@bederowlaw.com

Dated: New York, New York
March 26, 2015