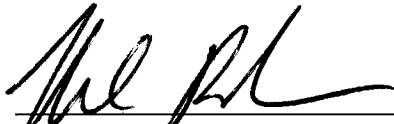


SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 35

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THE PEOPLE OF THE STATE OF NEW YORK,	:	
	:	NOTICE OF MOTION TO VACATE CONVICTION PURSUANT TO C.P.L. § 440.10
-against-	:	
JOHN GIUCA,	:	Ind. No. 8166/2004
Defendant.	:	
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PLEASE TAKE NOTICE that upon the annexed affirmations of MARK A. BEDEROW and LLOYD EPSTEIN, the annexed affidavits of the defendant JOHN GIUCA and JOHN AVITTO, the accompanying exhibits, and the accompanying Memorandum of Law, and upon all prior proceedings had herein, the undersigned will move the Supreme Court of the State of New York, Part 35, County of Kings, 320 Jay Street, Brooklyn, New York, on the 4th day of May 2015 at 9:30 in the forenoon of that day, or as soon as thereafter as counsel can be heard, for an Order, pursuant to C.P.L. § 440.10(1)(b), (c), (f) and (h), and the Due Process Clauses of the New York State and United States Constitutions, vacating defendant John Giuca's September 27, 2005, conviction herein and ordering a new trial, or alternatively, granting an evidentiary hearing to determine this motion.

Yours etc.,

By: 
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*Attorney for Defendant
John Giuca*

Dated: New York, New York
March 26, 2015

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

The Honorable Kenneth P. Thompson
District Attorney of Kings County
350 Jay Street
Brooklyn, New York 11201

BEDEROW
AFFIRMATION

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

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THE PEOPLE OF THE STATE OF NEW YORK	:
	: AFFIRMATION
	:
-against-	:
JOHN GIUCA,	: Ind. No. 8166/2004
Defendant.	:
	x
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MARK A. BEDEROW, an attorney admitted to practice law before the Courts of this State, affirms under penalty of perjury, as follows:

1. I am the attorney of record for the defendant, JOHN GIUCA. I am familiar with the facts and circumstances herein, and make this affirmation in support of Giuca's motion seeking an order, pursuant to CPL § 440.10(1)(b), (c), (f), and (h), vacating his judgment of conviction entered September 27, 2005, before this Court, for murder in the second degree, robbery in the first degree and criminal possession of a weapon in the second degree, based upon: (1) *Brady* violations, (2) *Rosario* violations, (3) the People's knowing use of false and misleading testimony,

and (4) the People's use of fraudulent evidence against Giuca, or in the alternative, granting an evidentiary hearing on this motion.

2. Prior to making this affirmation on Giuca's behalf, I have reviewed the trial transcript,¹ materials provided by the People to Giuca's trial defense,² the court file from *People v. John Avitto*, Kings County Indictment No. 6823/2004, and several court transcripts from Avitto's case.

3. Much of the factual record of this case, taken from court records, transcripts, and police records is set forth in the accompanying exhibits and Memorandum of Law in support of Giuca's motion, which I incorporate by reference into this affirmation.

4. Giuca's present motion demonstrates that in their zeal to win an important and high-profile murder case, the People violated his right to a fair trial by misleading this Court, the jury and his trial counsel about the circumstances surrounding jailhouse informant John Avitto's cooperation with them and his motive for testifying against Giuca. This motion further reveals that the People deprived Giuca of favorable and significant evidence about Avitto which they were constitutionally and statutorily obligated to disclose to him.

¹ References to the trial transcript will be cited as "Tr. [page number]."

² In connection with the People's continuing obligation to provide *Brady* material, see *Leka v. Portuondo*, 257 F.3d 89 (2nd Cir. 2001), I made detailed *Brady/Giglio* demands on April 1, 2014 and January 22, 2015. The People have not responded to either request.

5. By the end of the trial, it was apparent that Avitto was the most important witness in the case. Avitto, a drug-addled career criminal who frequently placed his own interests above those of society, contacted law enforcement and volunteered months-old information against Giuca shortly after he absconded from a drug program and used drugs, which put him at serious risk of receiving a lengthy prison sentence because his conduct violated a plea agreement. By any account, his motive for cooperating with the People was the critical issue for the jury to determine in assessing his credibility.

6. Yet despite specific defense requests for discovery and impeachment material, including a detailed request for evidence that Avitto received consideration from the prosecution, the People denied the existence of any such evidence and suppressed significant *Brady* and *Rosario* material from Giuca, including:

a. evidence that immediately after the then-fugitive Avitto became a cooperating witness against Giuca, trial prosecutor Anna-Sigga Nicolazzi personally intervened in Avitto's burglary case (Indictment 6823/2004) and requested a private bench conference, after which Avitto was released without bail; and,

b. evidence which established, contrary to Avitto's testimony and the prosecutor's argument, that at the time Avitto testified against Giuca, he was

performing poorly in a court-mandated drug program with a conditional prison sentence, which gave him an obvious motive to testify favorably for the prosecution.

7. Avitto's credibility deficiencies were camouflaged by a fraudulent drug program report which was given to Giuca in place of authentic *Brady* and *Rosario* material. This falsified report literally erased proof of Avitto's most recent violations, including evidence that he had been thrown out of a drug program only *three days before he appeared as a witness against Giuca*. This resulted in an unscheduled court appearance where Avitto acknowledged his guilt, but cited his upcoming testimony against Giuca as an excuse before he was released on his own recognizance without a bail request by the People.

8. Despite all of this, the prosecutor had Avitto testify that he did not ask for or receive any consideration in exchange for his testimony, that "things were going well for him" in his drug program, and that his own bleak legal predicament had nothing to do with his reasons for volunteering as a witness against Giuca. Instead of correcting Avitto's inaccurate testimony, the prosecutor exacerbated his perjury by vouching for it, which culminated in her derision of counsel's argument that Avitto sought or received consideration for which she claimed there was "absolutely no evidence" and "no corroboration." She argued that Avitto's only motive for testifying was "for once, to do something right." We now know that Avitto's testimony was a lie and that the prosecutor's defense of his credibility was

false, misleading and disingenuous. These egregious due process violations severely prejudiced Giuca and deprived him of his right to a fair trial.

9. Avitto has now acknowledged under oath that he testified falsely at trial and that he did seek, expect and receive consideration in exchange for his testimony against Giuca. Avitto's sworn statements are corroborated by documents which Giuca's defense was unaware of at trial and which were discovered after his last 440.10 motion was denied, including court transcripts and documents filed in connection in with Avitto's and Giuca's case.

PROCEDURAL HISTORY

10. By judgment entered September 27, 2005, Giuca was convicted after a jury trial of murder in the second degree, robbery in the first degree and criminal possession of a weapon in the second degree. On October 19, 2005, he was sentenced to concurrent terms of 25 years to life on the murder count, 25 years on the robbery count and 15 years on the weapons possession count.

11. Giuca's direct appeal was denied on January 29, 2009. *People v. Giuca*, 58 A.D.3d 750 (2nd Dept. 2009). On June 17, 2009, leave to appeal was denied. *People v. Giuca*, 12 N.Y.3d 915 (2009). On appeal, he argued that his rights were violated by (a) the prosecutor's violation of this Court's *Molineux* ruling, (b) improper and prejudicial use of "gang evidence," (c) improper jury instructions

regarding prior bad acts and consciousness of guilt, and (d) improper jury instructions on the law of felony murder.

12. On December 1, 2008, Giuca brought a C.P.L. § 440.10 motion alleging that he was denied a fair trial because of juror misconduct. On April 1, 2009, this Court denied that motion without a hearing. *People v. Giuca*, 885 N.Y.S.2d 712 (Kings Cty. Sup. Ct. 2009). That decision was affirmed by the Second Department. *People v. Giuca*, 78 A.D.3d 729 (2nd Dept. 2010). Leave to appeal was denied. *People v. Giuca*, 16 N.Y.3d 859 (2011). Giuca has not sought any additional relief before this Court.

13. In April 2012, Giuca filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. *See*, 12-cv-02059 (FB). That petition related solely to the juror misconduct issue. This petition was denied on May 14, 2013. *Giuca v. Lee*, 2013 WL 2021336 (Block, SJ).

14. I was engaged by Giuca on April 15, 2013. After conducting a thorough review of his case, on February 1, 2014, I presented a lengthy Petition seeking review of Giuca's conviction by the District Attorney's newly-formed Conviction Review Unit ("CRU").³ The CRU agreed to review the matter. Exhibit A (Letter from Tamara Edelstein to Mark A. Bederow, February 24, 2014). The People agreed that

³ At the Court's request, I will provide the Court with a copy of the Petition, its accompanying exhibits, and supplemental correspondence submitted to the District Attorney in support of the Petition.

they would not argue in any future post-conviction litigation that the period of time spent on a review of Giuca's conviction constituted a delay on Giuca's part. Exhibit B (Letter from Mark Hale to Mark A. Bederow, April 11, 2014). On January 12, 2015, Mr. Hale notified me in a brief phone call that the District Attorney would not move this Court to "disturb Giuca's conviction."

15. Since the District Attorney denied Giuca's Petition, I have been preparing Giuca's present motion. At my request, in early February 2015, Giuca's trial counsel, Samuel Gregory, reviewed Avitto's trial testimony, his own summation, ADA Nicolazzi's summation, letters ostensibly drafted by Sean Ryan, dated September 19 and 20, 2005, other documents and transcripts from Avitto's case, defense omnibus motions, the People's response to defense motions, the charge conference, and the jury instructions. On February 10, 2015, Mr. Gregory advised me that he did not recall any trial issues related to Avitto's credibility, including those related to the People's disclosure of *Brady* and *Rosario* material. Mr. Gregory has declined to execute an affirmation about any matters associated with Giuca's case.

16. Prior to the present motion, Giuca has not been in position to put forth the issues raised here surrounding Avitto. Giuca and his appellate counsel were unaware of legal issues related to Avitto at any time before the preparation of his first 440.10 motion. Affidavit of John Giuca, March 19, 2015, ¶¶4-7; Affirmation

of Lloyd Epstein, February 16, 2015, ¶¶4, 7. They never discussed legal issues related to Avitto's credibility, and on information and belief, Mr. Epstein never discussed the evidence which constitutes the present motion with trial counsel. Epstein Affirmation, ¶¶5-7. On information and belief, based upon the examination of Avitto and the arguments by the prosecutor and the defense, trial counsel also was unaware of these issues, or he undoubtedly would have raised them at trial.⁴

17. On information and belief, at the time of Giuca's trial it was the policy of the Kings County District Attorney's Office to document all *Brady* and *Rosario* disclosures. Indeed, *Rosario* material and other evidence disclosed to Giuca was Bates stamped. During motion practice, the People acknowledged that they would disclose all *Rosario* material and recognized their continuing obligation to disclose *Brady* material. My review of the record and my conversations with the CRU⁵ lead me to believe that the People have never made any *Brady* or *Rosario* disclosures with respect to ADA Nicolazzi's June 13, 2005 appearance on Avitto's case or his September 19, 2005 violation and/or court appearance.

⁴ To the extent that the People claim that any of the suppressed impeachment material described in this motion was disclosed to the defense, and counsel simply failed to use the favorable evidence, we add a claim of ineffective assistance of counsel to this motion. Without question, defense counsel's failure to introduce evidence which conclusively would have established Avitto's perjury and the prosecutor's false and misleading argument would have had no legitimate strategic basis. See, *People v. Benevento*, 91 N.Y.2d 708, 711 (1998).

⁵ For example, on January 29, 2015, I was told that after interviewing ADA Nicolazzi and others, the CRU found "no evidence" that Avitto sought, expected or received a benefit in exchange for his testimony. If the People's position in 2005 was that Avitto did not seek, expect or receive consideration, then one may safely assume that the prosecution saw no reason to disclose to trial counsel ADA Nicolazzi's personal intervention into Avitto's case.

STATEMENT OF FACTS

18. In late December 2004, the People secured an indictment against Giuca after recalcitrant witnesses Lauren Calciano and Albert Cleary finally succumbed to extensive pressure applied by law enforcement and testified against Giuca. Both had adamantly denied any knowledge about Mark Fisher's murder for more than a year. As they would later do at trial, Calciano and Cleary contradicted each other on every essential detail about a "confession" Giuca purportedly made in their joint presence, and which at that time served as the only direct evidence of his guilt until Avitto testified at trial.

19. At the time of Giuca's indictment, Avitto was in jail in connection with indictment number 6823/2004. He was released from custody into a drug program in late February 2005. On June 13, 2005, a few days after he violated the conditions of his release from custody, he appeared on the People's doorstep and volunteered months-old evidence against Giuca which contradicted the entirety of the People's case.

Pre-Trial Discovery Demands and Issues

20. In addition to a request for *Brady* material, the defense separately demanded "all evidence within the custody or knowledge of the DA's Office, which might tend to adversely affect the credibility of any eyewitnesses that the prosecution

intends to call at trial, in accordance with *Giglio v. United States*, 405 U.S. 150 (1972).” Exhibit C (Defense Omnibus Motions, February 3, 2005, ¶¶8(a), (b)). The defense further demanded evidence that any witness had received psychiatric treatment and drug abuse treatment. *Id.* at ¶¶16(a), (b). The defense also sought “all written, or otherwise recorded, statements of any witnesses made in connection with the case.” *Id.* at ¶13.

21. ADA Nicolazzi swore in her response that the People were unaware of any impeachment material related to “non-police witnesses.” Exhibit D (People’s Response to Defense Omnibus Motions, February 17, 2005, ¶25). She wrote

the People are aware of their continuing duty under *Brady* to disclose exculpatory evidence to the defense and will honor that obligation. Any *arguably* exculpatory material will be submitted to the Court for an in camera inspection.

Id. (emphasis added). On information and belief, the prosecution never submitted any “arguably” exculpatory material to the court for an *in camera* review. With respect to *Rosario* material, she replied

Rosario material is not due until after the jury is sworn...[Prior statements of the People’s witnesses] will be provided to defendant to the extent and at the time prescribed by law. See C.P.L. §§ 240.44(1), 240.45(1)(a)

[T]he defendant will receive, prior to trial, all *Rosario* material to which he is entitled...

Id. at ¶¶26, 32.

22. The Court ordered the People to provide the defense with all *Rosario* material on August 22, 2005, which was three weeks prior to jury selection. Hearing Transcript, June 26, 2005, p. 5.

23. In addition to the violations alleged in the present motion, several other *Rosario* irregularities occurred during Giuca's trial. In a massive *Rosario* violation, the prosecutor did not disclose Lauren Calciano's grand jury minutes to the defense until after her re-direct examination, when Mr. Gregory apparently learned for the first time that she had testified before the grand jury. Tr. 622; 631-633. The Court denied a defense request for a mistrial. Tr. 632. The People found a recording of Meredith Denihan after she had completed most of her direct testimony. Tr. 174. A detective lost his interview notes from an interrogation of co-defendant Antonio Russo. Tr. 440.

The Trial of John Giuca

24. Giuca and Russo were tried at the same, but before separate juries. Avitto testified only against Giuca.

25. In essence, the People prosecuted two separate and incompatible cases against Giuca at one trial. The first one relied on Cleary and Calciano, whose inconsistent testimony created a hybrid theory that Russo shot Fisher alone near Argyle Road after Giuca gave him a gun. At the end of the trial the People called Avitto in support of the alternative theory that Giuca was actually present at, and

was an active participant in, Fisher's robbery and murder, which occurred at an ATM rather than Argyle Road.

26. In her opening, the prosecutor said that Cleary had "the full story" on what happened to Fisher.⁶ Tr. 33. She minimized Calciano as someone to whom Giuca "downplayed his role" and gave "his little spin." Tr. 32. Although Avitto would later dominate the prosecutor's summation, he was not mentioned until he testified as the People's final substantive witness.

Albert Cleary's Testimony

27. According to Cleary, Giuca confessed his role in Fisher's murder to Calciano and him on the evening of October 12. Tr. 293, 319. Giuca told them that he was upset because Fisher "disrespected" his house by sitting on a table,⁷ so he "basically" told Russo to "show him what was up." Tr. 320-321. Giuca purportedly said that Russo asked him for a gun before Russo went outside, "waited" for Fisher to come out, where he then ambushed him. Russo beat, shot and killed Fisher, before returning the gun to Giuca and telling him "it is done." Tr. 322.

28. Cleary claimed that shortly before Fisher's murder, Giuca, a "capo" in Ghetto Mafia and his "boss" Robert Legister decided that Ghetto Mafia was getting

⁶ Conversely, in her summation, the prosecutor diminished Cleary and argued that Giuca truthfully confided in Avitto because he was Giuca's "confidante" in jail. Tr. 1008.

⁷ In the grand jury, Cleary claimed that it was Tommy Saleh, not Giuca, who criticized Fisher for sitting on the table. Cleary "recalled" it was Giuca, not Saleh, after he huddled with prosecutors less than 24 hours before he testified at trial. Tr. 277-278. Saleh has confirmed under oath that it was he, not Giuca, who told Fisher to get off the table. Affidavit of Tommy Saleh, January 9, 2014, ¶4.

“soft” and that new members should be required to commit a murder before entering the gang.⁸ Tr. 263. Giuca showed Cleary two guns shortly before Fisher’s murder, including a .22 (the caliber of the murder weapon) a week before Fisher was shot and a .380 on the evening of the murder. Tr. 265-267. The day after the murder Giuca told him that he gave the “guns” to Beharry for disposal.⁹ Tr. 463-464. Cleary saw Calciano remove a gun bag from Giuca’s home. Tr. 331.

29. Cleary admitted that he lied to police and cooperated only after he was “squeezed” and threatened with a violation of probation in connection with a vicious assault in which he had rendered a man unconscious by kicking him in the head. Tr. 338. Cleary presented the prosecutor with a polygraph examination, the results of which flatly contradicted his trial testimony and showed that he had been truthful when he said that he did not know who killed Mark Fisher. Tr. 329, 338-339; Polygraph Examination Report of Albert Cleary, June 23, 2004.

Lauren Calciano’s Testimony

30. Calciano testified that in the early morning of October 12, 2003, “after 5:00, after 6:00 a.m.” Giuca called her and said that he needed to see her.¹⁰ Tr. 578-

⁸ In October 2003, purported Ghetto Mafia “boss” Legister was a college student at Elizabeth City State University in North Carolina, double majoring in accounting and economics. Affidavit of Robert Legister, January 20, 2014, ¶¶4, 7-8.

⁹ Cleary had to be recalled in order to give his testimony about the disposal of guns because the prosecutor “forgot” to ask him. See, Tr. 325.

¹⁰ In her opening, the prosecutor said that Calciano “will tell you that she got a call from [Giuca] the morning right after the murder.” Tr. 32. However, Giuca’s phone records confirmed that after they spoke *twenty minutes before the murder*, they did not speak again until more than seven hours later. Giuca Telephone Records, October 12, 2003.

579. Although Calciano purportedly detailed the same conversation as Cleary, she contradicted him on every detail. She said they met at Giuca's home in the afternoon, "before it was dark"¹¹ and she left to attend to "her plans for the day." Tr. 580, 583, 607-608. [Cleary claimed the meeting was in the evening, after he had spent the day with Angel DiPietro on Long Island Tr. 318-319]. Calciano said that Giuca gave Russo a gun after the latter stated a desire to rob "Albert's friend," at which point Russo and Fisher left together. Tr. 581. [Cleary described Giuca's anger over "disrespect," an order to "show him what's up" and a Russo ambush. Tr. 320-322].

31. Calciano specifically refuted every detail of Cleary's description of Giuca's alleged confession. Tr. 607-609. She denied removing a gun bag from Giuca's house, and labeled Cleary a liar for claiming otherwise. Tr. 589, 604, 627-628.

32. Calciano lied to the police on at least four occasions. Tr. 587-588. The police tried to trick her into incriminating Giuca. Tr. 594-595. During one interview, a "number" of prosecutors and detectives pressured her, alone, for more than three hours, but she still did not incriminate Giuca. Tr. 597-603. She acknowledged that in October 2003 (and before) her relationship with Giuca was one of distrust and that he "sometimes" lied to her. Tr. 591-592.

¹¹ On October 12, 2003, sundown in Brooklyn occurred at 6:21 p.m. Timeanddate.com

33. Calciano has recanted her trial testimony under oath. Exhibit E (Affidavit of Lauren Calciano McCulloch, January 23, 2014).

John Avitto's Substantive Testimony

34. The Court mistakenly (but understandably) believed Avitto was an incarcerated witness. He was scheduled to testify as the People's final substantive witness on September 21, 2005, but his testimony was delayed one day in order to "give the defense an opportunity to have all of the available records at the time the witness testifies." Tr. 744-745. Mr. Gregory noted that he "didn't know anything about Avitto other than what I've read in the documentation I gathered, what I got from Ms. Nicolazzi," none of which included *Rosario* material, because she denied any existed. Tr. 746-747.

35. Avitto testified that while incarcerated with Giuca in February 2005, he overheard Giuca's father (in the presence of Mary DiMatteo and Kelly Hajaistran Raucci) ask him why he had a gun, to which Giuca replied "I just had it," before they returned to discussing "family stuff."¹² Tr. 772-773. Giuca later confessed to Avitto, that he, Fisher and "two others" left his home to get more alcohol. They went to an ATM, where Giuca became angry that Fisher withdrew "only" \$20, so he took out a gun and pistol-whipped Fisher until one of the "others" "pulled the gun"

¹² In February 2005, Giuca's father's speech was severely impaired as the result of a series of strokes. He was incapable of holding a normal conversation as described by Avitto. Affidavits of Mary DiMatteo, July 8, 2013 and February 25, 2015; Affidavits of Kelly Hajaistran Raucci, July 3, 2013 and February 27, 2015.

from him, and shot and killed Fisher. Tr. 774-775. Avitto admitted that he took Seroquel, but he denied that he had schizophrenia, instead claiming that he took it for sleep deprivation.¹³ Tr. 805-806.

36. Avitto has recanted the entirety of his trial testimony. Avitto Affidavits, July 8, 2013, ¶25; April 10, 2014, ¶11.

Avitto's Testimony about His Motive for Cooperating

37. Avitto, aged 35 when he testified, had been committing crimes his entire adult life. Tr. 779, 788. His impressive criminal history registered approximately 17 convictions, almost all of which were felonies, crimes of dishonesty and/or drug offenses. Tr. 779-784. His record also consisted of parole and probation violations, as well as bench warrants. Tr. 791-793. In one case, after he absconded probation and fled upstate, he provided a false name and was convicted of providing false information to authorities who tried to discover his identity. Tr. 782, 788-789. In other words, in 2005, Avitto had a proven record of dishonesty and lying to law enforcement when he thought it would be to his advantage to do so.

38. On direct, when questioned about the "status" of his burglary case, Avitto claimed that he had been "sentenced to a drug program." Tr. 768. On cross he was forced to admit that his "sentence" was actually conditional, and required a

¹³ Avitto was diagnosed with schizophrenia shortly after he went to Riker's Island in October 2004. Avitto Pre-Sentence Report, p. 5. He has since admitted under oath that he was diagnosed with schizophrenia in 2004 and that he perjured himself when he denied it at trial. Affidavit of John Avitto, April 10, 2014, ¶¶2, 11.

mandatory prison sentence of 3 ½ to 7 years in the event that he did not successfully complete his drug program. Tr. 786-787. However, when he first contacted law enforcement in order to volunteer as a witness against Giuca, it had “already been four months since he had taken that disposition about the drug program.” Tr. 814. He was “doing good” in his drug program since he had been released from custody—“things were going well for him”—so his criminal case “had nothing to do with why I went to the police or DA.” Tr. 784, 797, 806.

39. Avitto began cooperating with the People in June 2005, and met with law enforcement on four occasions. Tr. 785. ADA Nicolazzi was present at every meeting one of those sessions.¹⁴ Tr. 815. He did not “immediately” call the police after he absconded from his drug program.¹⁵ Tr. 810. He acknowledged that “police officers associated with this case” took him to the courthouse, but his cooperation “had nothing to do” with why the People never sought bail after his program violations; “if the cops or the DA did anything, it was [without my knowledge.]” Tr. 800, 804. ADA Nicolazzi elicited unequivocal testimony from Avitto that he did not seek, was not promised, and did not receive any consideration from the People in exchange for testifying against Giuca:

¹⁴ No notes were taken at Avitto’s four interview sessions. On information and belief, this was at the direction of the prosecutor so that the People would not have to disclose any *Brady* or *Rosario* material to the defense, including information which would have contradicted the People’s other witnesses.

¹⁵ Avitto absconded from his program on June 9, a warrant was issued on June 10, and by June 13, he had called the police, been debriefed by prosecutors and had his warrant vacated after ADA Nicolazzi appeared on his case.

Q: Were you given anything or promised anything in exchange for your testimony? Did you ever ask for anything?

A: No.

Tr. 785-786.

40. On information and belief, because the People suppressed evidence of Avitto's September 19 violation and court appearance from counsel, described *infra*, Avitto **was not** cross-questioned about (a) his poor program performance after September 6, (b) his entry into Kingsboro rehab facility on September 7, (c) his ejection from Kingsboro on September 19 because of non-compliance with facility rules, (d) that the facility notified his counselor of his ejection, (e) that Avitto was required to appear in court on September 19 because of his poor performance, (f) that he was berated by the court for his continuing poor program performance, (g) that Avitto admitted the September 19 violation, (h) that he blamed his upcoming testimony as the cause, and that (i) after a private bench conference, he was hesitantly released by the court without the People requesting bail. *See*, Tr. 786-810.

41. As detailed later, Avitto **was** cross examined with the contents of a falsified letter, dated September 20, which purported to describe Avitto's performance in his drug program. Mr. Gregory quoted directly from it and referred

to Seafield Rehab, a facility which was referenced only in the text of the falsified letter. Tr. 803.

42. On re-direct, ADA Nicolazzi quickly focused Avitto's attention on the first time he went to court after he violated his program—an appearance at which she represented the People. She elicited from Avitto that this Court did not release him from custody, while Avitto concealed her involvement in his case.

Q: The first time you left the program [June 9], did they have to come find you, or did you contact your counselor on your own after you left?

A: I went to Sean Ryan's office. I contacted him on my own. And then we walked over to court and Judge Parker and Ryan **and the DA** came up to the judge

Q: And, just so it's clear, it's not this judge? (indicating Justice Marrus)

A: Not this judge (indicating Justice Marrus). The judge of my case and I guess Sean Ryan had a talk and he got me another shot.

Tr. 812 (emphasis added); Exhibit F (Avitto Transcript, June 13, 2005) (confirming that "the DA" was ADA Nicolazzi).

43. The prosecutor's final question of Avitto was designed to demonstrate that Avitto did not even have a motive to seek a benefit, let alone that he expected or received consideration in exchange for his decision to volunteer as a witness 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 you were first interviewed and you spoke to the police about this case, had it already been four months since you had taken the disposition about the drug program?

A: Correct.

Tr. 814.

Additional Evidence

44. No other witnesses implicated Giuca in Fisher's murder.

45. After being threatened with the loss of his child and immunized for what amounted to frivolous criminal charges,¹⁶ Anthony Beharry testified that he disposed of a gun at Giuca's request shortly after the murder. Exhibit G (Affidavit of Anthony Beharry, January 13, 2014). Beharry's testimony was ambiguous at best, misleading at worst. He was unable to state whether the gun was even a .22, or whether it was loaded, notwithstanding ADA Nicolazzi's unsworn testimony that "she knew" the gun "absolutely" was the murder weapon.¹⁷ Tr. 649, 1005-1006, 1021-1022. His testimony contradicted Cleary, who testified that Giuca told him he gave Beharry two guns. Tr. 649 *cf.* Tr. 464.

¹⁶ Beharry was threatened with possession of a weapon, hindering prosecution and tampering with evidence charges even though no firearm was recovered, there was no evidence that Beharry disposed of the murder weapon, and the only theoretical witness against him was Cleary, who in addition to having hearsay evidence, had already submitted a polygraph report which "proved" that he knew nothing about the circumstances surrounding Fisher's murder. Tr. 640.

¹⁷ During Russo's trial, outside of the presence of Giuca's jury, the People presented testimony which implied that Russo disposed of the murder weapon in a sewer. Tr. 751-753.

46. Beharry has recanted his trial testimony. Exhibit G, ¶¶13-14.

47. The People argued that a phone call from Russo to Giuca around the time of the murder (there was no proof that it was answered) and other calls between them in the several days after the murder proved Giuca's guilt. Tr. 1015, 1018.

The Charge Conference: A Second Specific Brady Request

48. During the charge conference, counsel made what was tantamount to a specific demand for Avitto-related *Brady* material, the existence of which ADA Nicolazzi unequivocally denied:

Mr. Gregory: Judge, I would request a charge on Avitto, with respect to consideration, and with respect to his status vis-à-vis the case he has. I know on direct examination he says he's sentenced, he's a sentenced defendant. The case is over. We find out in cross-examination that not only is the case open but he's facing three and a half to seven years and the police in the case have brought him back to court...so it seems to me that **although there is a statement he hasn't received anything, it's really not up for me to decide or Ms. Nicolazzi to decide. It's up to the jurors to decide.** I would ask that you give a charge reflecting his status as somebody who is a person who has gotten consideration from the prosecution.

ADA Nicolazzi: I would object to every single portion of what Mr. Gregory has just alleged. First of all, **there is absolutely no evidence in front of this jury. Just as I put on the record before, he's never been given consideration....There is absolutely no evidence before this jury at all that there was any consideration at all.** I never heard of such a charge to, to ask the jury to start speculating about what could have been, what is. **I mean he can talk about it, based on anything the witness said**

during the course of his testimony but ...to give this jury a charge to decide if there is consideration when actually he knows there hasn't been, and **the evidence was that there hasn't been, is for us, putting something in front of the jury that just isn't there and I object to it.**

Mr. Gregory: [I]t seems to me that the DA doesn't ask for bail...and they represent [that he has been sentenced] and he's not [been] sentenced, that **something is going on here. I can't prove what is going on here but something is happening here to protect him, that it's up to them [the jury] to decide whether or not he got any consideration. I think he did get consideration and not that Ms. Nicolazzi here is lying to this Court, but that if he weren't involved in what he's involved in, he would have come through the back door, not the [front] door.**

The Court: [W]hen I charge the jury regarding credibility one of the things I'll mention is the motive or motivation a witness has for testifying in a case and they may consider whether or not a witness would get any benefit out of testifying...I don't think I'm going to have to say any witness is getting a benefit or not. They can consider and you can allude to that in the charge, any motive a witness has for testifying, including any possible benefit the witness could achieve by testifying in the case.

Tr. 928-931 (emphasis added).

Avitto was the Cornerstone of the People's Summation

49. Mr. Gregory argued that the People called Avitto as a last minute desperation witness, because their case had "fallen apart" as a result of Cleary and Calciano's contradictions. Tr. 945, 961, 968, 975. However, he lacked the critically needed (and substantial) evidence in support of his argument that Avitto's motive

for testifying was to help himself, so his attacks on Avitto's credibility were speculative ("you would have thought this guy is a sentenced guy and out of the goodness of his heart he's doing a good Samaritan deed coming forward on a case. That's what you would have thought.") Tr. 970-971.

50. The prosecutor tried to minimize the problematic inconsistencies between Calciano and Cleary by arguing that "their focus was different based on what they knew and how they knew it." Tr. 1000. They "[said] a lot of the same thing, just in two different ways." Tr. 1001. "The way they told it to you goes to their memories; human nature and the point they each focus on, that's all." Tr. 1002. Yet she conceded that Giuca's admissions to them "partially danced around the truth" and consisted of "bits and pieces." Tr. 1008, 1011.

51. Conversely, the prosecutor spent a large portion of her summation emphasizing the significance of Avitto's testimony. Tr. 1007-1023. She described him as the most reliable witness because Giuca trusted his jailhouse "confidante," and had "no reason to have any hold barred" in telling him the truth. Tr. 1008.

52. The prosecutor's pervasive vouching for Avitto's credibility confirmed that he anchored the People's case. The jury "knew" Avitto "[wasn't] making it up" that Giuca told his father he had a gun. Tr. 1008-1009. "Everything that John Avitto told [the jury] [was] credible." Tr. 1010. There was "no way Avitto could make it up if it wasn't what [Giuca] told him." Tr. 1010. He was "truthful;" the jury "could

trust him.” Tr. 1010. Most importantly, Avitto’s “honest” and “truthful” testimony served as the gateway for the prosecution argument which assuredly sealed Giuca’s fate: he was guilty because Avitto’s credible testimony *proved* that he was actually present and an active participant in Fisher’s murder:

Giuca told Avitto that he had been there, and he was actually participating in that robbery, he was mad Mark didn’t give him the money so he struck Mark’s face with a gun. It’s not a coincidence, ladies and gentlemen, that that is corroborated by the evidence on his face, just like Det. Gaynor and Dr. Gutierrez told you about the bruises and contusions he had on his face too, specifically one to his right cheek.

He said that once Mark Fisher fell to the ground, that they all punched him and kicked him and that makes sense by what Detective Gaynor saw when he turned Mark Fisher over as he lay on the ground soon after that, again.

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 was 3. You know Mark Fisher’s clothing was ripped, his buttons were off, his pants pocket taken off somewhat. He was cut and bruised all over and Russo,

who did anything Giuca said, was made Giuca's patsy¹⁸ by ultimately having that gun in his hand and firing bullet after bullet into Mark Fisher's body.

It is even possible that Giuca fired some of those shots himself. You know the 911 caller Edward Schoenfeld told you he heard 3 shots, then a pause and then two more shots because Mark Fisher, as you know, was shot five times in all. **More evidence, ladies and gentlemen that Giuca was being truthful when [he told] Avitto he was present** and that only two minutes later, you know that after those shots were fired, John Giuca's brother was calling him, only two minutes later and that's indisputable, concrete evidence.

I suggest if you clearly infer there was no way that Giuca was in the house with his brother or that call would never have been placed, never.

It is proof that Giuca was out of the house; very well maybe present like he told Avitto.

Tr. 1016-1018 (emphasis added).

53. Ironically, the prosecutor criticized Giuca's counsel for speculating about Avitto's motive to testify (which he had to do because the People suppressed the evidence he needed to make fact-based argument) Tr. 1017, 1020, 1022-1023, while she got so carried away in her exploitation of his testimony that she mused about whether Giuca himself shot Fisher. Tr. 1017, 1019.

¹⁸ This misrepresented Avitto's testimony. He testified that while Giuca was punching and kicking Fisher, "one of his other friends *pulled the gun off him* and shot the kid." Tr. 775.

The Prosecutor Denies Avitto Sought, Expected or Received Consideration

54. ADA Nicolazzi argued that Avitto was “very honest about his problems and criminal past.” Tr. 1011. She ridiculed counsel’s contention that Avitto was “willing to say anything because he’s trying to help himself and he’s getting some sort of deal.” Tr. 1020. Her claim that Avitto was credible was premised on the fact that Avitto was “sentenced” and “doing good” in his drug treatment; thus he did not need the People’s help, which meant that he did not have a motive to testify falsely. Instead, his motive was civic duty:

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 deal.

First of all, **there is no evidence of that, just like there is no evidence at all of almost anything Mr. Gregory told you...**[Y]ou know from Avitto’s testimony on cross that **every time Avitto had a problem with drug use or his program...that it was he who contacted his counselor right away and 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 choose to give him multiple chances when he was showing himself to still be acting responsibly... **If he had gotten some consideration, then there would be absolutely nothing to hide about that...**

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You know from his testimony that John Avitto had plead guilty months before he ever contacted the police. And if

the judge decided he ultimately failed that program he was facing [3 1/2 to 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 no sense and is not corroborated. There is absolutely [no] evidence, no evidence at all, and yet when somebody was given consideration, you heard about that right from the start.**

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John Avitto, you know from him, that he came to the police with this information on his own. This is a man who has made mistakes over and over all his life and for once, he tried to do something right and for that Mr. Gregory wants you to condemn him.

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Now during his summation, Mr. Gregory, ladies and gentlemen, he 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 that 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).

Jury Charge and Verdict

55. The Court instructed the jury that one of its “chief functions” was to determine the credibility of witnesses and consider whether any witnesses might have a motive to fabricate testimony because of a benefit:

...consider any interest or motive the witness may have had for testifying in this case...Ask yourselves whether what a witness told you was supported or contradicted by

the other evidence in the case; ask yourselves whether a witness had an interest or lack of interest in the outcome of this case and **whether or not the witness had a motive to tell you the truth or to not tell you the truth. Also consider whether any witness has received any advantage or benefit for testifying here at this trial. If a witness did receive a benefit, it doesn't disqualify the witness from testifying. However, you should scrutinize the testimony of that witness in light of any benefit the witness may have received to determine if it had an effect on the witness' testimony.**

Tr. 1035-1037 (emphasis added).

56. The Court's instruction on credibility was rendered toothless because the jury's ability to "scrutinize" Avitto's credibility "in light of any benefit he may have received" was severely impaired by the People's suppression of the impeachment material. *Id.*

57. Giuca was convicted of all charges and sentenced as described above. He is presently serving that sentence at the Clinton Correctional Facility in Dannemora, New York. As of April 2015, he has been incarcerated ten years and four months.

FACTS RELATED TO THE PRESENT MOTION

Evidence Related to Avitto's Relationship with the People

58. I have reviewed documents associated with Kings County indictment 6823/2004, which on information and belief, were not disclosed to the defense and were not seen or available to Messrs. Gregory, Epstein and Giuca, including

transcripts from June 13 and September 19, 2005, and a letter drafted by Sean Ryan on September 19, 2005. Epstein Affirmation, ¶¶4, 7; Giuca Affidavit, ¶¶4-7; Exhibits C ¶¶8(a), (b), 16(a), (b); D, ¶¶25-26, 32; Tr. 786-810, 928-931, 945-947, 968-971, 1007-1023.

59. Avitto has acknowledged under oath that he had sought, expected and received consideration from law enforcement in exchange for his testimony, and that his trial testimony denying this was false:

At the time I testified, I was concerned about receiving a lengthy prison sentence because I had repeatedly violated a favorable plea agreement, and I wanted the DA to help me avoid incarceration.

Avitto Affidavit, July 8, 2013, ¶3.

It was during this time, while I was violating the terms of my release by using cocaine and absconding from the program, that I concocted a plan that I believed would help me avoid being held in violation of my plea agreement...**I decided to tell authorities that I had incriminating information against Giuca, which I would share in exchange for assistance with my own case.**

Id. at ¶8.

While still a fugitive from justice, I called the NYPD and reported that I had information about the Mark Fisher case. I told [Detective Byrnes] that I had information about the Fisher case, but that I had recently absconded from a drug program, that there was a warrant out for my arrest, and that I was facing a lengthy prison sentence. Detective Byrnes said that he could help me clear up the warrant if I had useful

information about the Fisher case. Detective Byrnes clearly left me with the impression that if I alleged that I knew about Giuca's role in Mark Fisher's murder that law enforcement was going to help me with my case.

Id. at ¶9.

The only reason I contacted law enforcement in June 2005 in order to "help" them with the Fisher case was so that they in turn would help me avoid further incarceration...At no time prior...to June 2005, did I ever attempt to contact law enforcement...I contacted law enforcement when I did because I was in trouble and in order to help myself.

Avitto Affidavit, July 8, 2013, ¶10

...My hope was that the DA believed I was useful to them and that in return the DA would help me with my case.

Id. at ¶12.

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

Id. at ¶16

....Once we arrived in court, ADA Nicolazzi immediately asked to approach the bench. I was not privy to this off the record conversation...I expected to be released because ADA Nicolazzi and Detective Byrnes told me they would keep me at liberty if I cooperated with their investigation.

Id. at ¶17.

From June 2005 to September 2005...the DA kept its promise to help keep me out of jail and from being sentenced to prison...in exchange for agreeing to testify against Giuca.

Avitto Affidavit, July 8, 2013, ¶24.

In response to ADA Nicolazzi's question on how I was doing in my program since being released on my last case...I swore that I'm "doing good." This was false testimony and ADA Nicolazzi knew this was false—she knew that from June 2005 to as recently as days before I testified, I repeatedly violated the conditions of my program.

Id. at ¶25(c).

ADA Nicolazzi asked me whether I was given anything or promised anything in exchange for my testimony. I falsely swore that I had not. In fact, in exchange for my testimony, ADA Nicolazzi and Detective Byrnes helped me by keeping me out of jail and avoiding prison...

Id. at ¶25(d).

ADA Nicolazzi asked me if I had asked for anything in exchange for my testimony. I swore that I did not ask for anything in exchange for my testimony. This testimony was false. In fact, as ADA Nicolazzi and Detective Byrnes knew, I only approached law enforcement after I had absconded from my program and faced a lengthy prison sentence specifically for the purpose of getting their assistance if I agreed to help them by testifying against Giuca. I told Detective Byrnes and ADA Nicolazzi this during our first

meeting. I have reviewed ADA Nicolazzi's summation where she claimed that I testified because "for once, [I] wanted to do something right." She knew that I reached out to law enforcement only after I had absconded and was in jeopardy of receiving a lengthy prison sentence. She knew that I was seeking assistance from the DA in exchange for testifying against Giuca.

Id. at ¶25(e).

60. In 2014, Avitto further described the role that the police played in monitoring his problems while he was a cooperating witness:

In addition to meeting with ADA Nicolazzi and Detective Byrnes a few times in June 2005, I spoke to Detective Byrnes on the telephone several times. When I would warrant or otherwise get into trouble with my drug program, I would notify Detective Byrnes. He in turn would tell me to notify my counselor Sean Ryan, who would then appear with me in court after I was "violated."

Avitto Affidavit, April 10, 2014, ¶3.

Detective Byrnes absolutely knew that I was having problems in my program after I became a cooperating witness. In fact, the reason I would call Detective Byrnes was to notify him that I had a problems so that he would work with the DA and help keep me from going to prison.

Id. at ¶4.

On the day that I testified against Giuca, I was picked up at my house by someone from the DA's Office, who I believe was a detective.

Id. at ¶10.

61. Avitto's sworn statements are corroborated by the transcripts of June 13 and September 19, and a letter filed at the latter date's appearance. The two most egregious due process violations involve suppression of (a) the circumstances surrounding Avitto's initial decision to volunteer as a witness, including evidence of ADA Nicolazzi's personal intervention into Avitto's case on June 13, 2005, and (b) evidence regarding Avitto's poor performance in his drug program for the few weeks which immediately preceded his testimony, including disclosure of the events which occurred at an unplanned September 19, 2005 court appearance.

June 13, 2005: Suppression of ADA Nicolazzi's Intervention in Avitto's Case

62. Avitto was arraigned on burglary charges in late November 2004. On February 8, 2005, he pleaded guilty with the understanding that he would be released from custody into a residential and outpatient drug program, the completion of which would result in the dismissal of the indictment. If he failed to complete the program, by leaving it or getting kicked out of it, he would receive a 3 ½ to 7 year prison sentence. Exhibit H (Avitto Transcript, February 8, 2005).

63. On June 9, 2005, Avitto absconded from his program. The following day, Friday, June 10 a warrant was issued for his arrest. Over that weekend, Avitto, now a fugitive facing years in state prison, went on a cocaine bender. Recognizing that he now was in serious trouble, he contacted the police seeking to trade

cooperation against Giuca in exchange for help with his own legal problem. Avitto Affidavit, July 8, 2013, ¶¶8-9. The People were eager to debrief their new volunteer witness; detectives brought him to meet ADA Nicolazzi the next business day, June 13. *Id.* at ¶11.

64. On June 13, Avitto met with ADA Nicolazzi and Detective Byrnes and began cooperating against Giuca. *Id.* at ¶12. In June 2005, ADA Nicolazzi was a seasoned prosecutor with the title “Senior Assistant District Attorney, Homicide Bureau.” Detective Byrnes had been employed by the NYPD for almost 22 years and had spent almost three years as a detective on the exclusive Major Case Squad. Tr. 887. It strains credulity to believe that these experienced professionals and Avitto ignored the “elephant in the room” and did not expressly discuss or tacitly elude to Avitto’s obvious interest in, and need for, consideration in exchange for his cooperation.

65. At the conclusion of his initial debriefing session, ADA Nicolazzi accompanied the fugitive, and now cooperating witness, to a staffed calendar court part, where she appeared on his case: *Id.* at ¶16:

Ms. Nicolazzi: Office of the District Attorney, Anna-Sigga Nicolazzi. Your Honor, this is a voluntary return on a warrant. **Can we approach?**

The Court: Yes.

(Whereupon, a discussion was held off the record at the bench).

The Court: What I am going to do is vacate the warrant...

Exhibit F (emphasis added). *Id.*

66. On information and belief, during the private bench conference ADA Nicolazzi told the court before it decided Avitto's bail status that he was cooperating in the Fisher case. Indeed, it is hard to fathom why else the homicide prosecutor on a high-profile murder case would appear in court and promptly seek an off-record discussion on what was otherwise an ordinary defendant on a garden-variety case.

September 7 to September 19, 2005: the Suppressed Rehab Violation

67. On September 6, in the presence of Sean Ryan, Avitto was warned that if he did not enter a rehab facility immediately, he would be arrested for non-compliance. The court advised Avitto that he was perilously close to the prison sentence. Exhibit I (Avitto Transcript, September 6, 2005). The next day Avitto entered Kingsboro Rehab facility. However, less than two weeks later—and only three days before he testified—he was thrown out because of his failure to follow the facility's rules. Kingsboro notified Ryan, who dutifully prepared a violation report, dated September 19, which was filed with the court and resulted in an impromptu court appearance on September 19. Exhibit J (EAC-LINK Letter Prepared by Sean Ryan, September 19 2005) ("the September 19 Letter"). On

information and belief, counsel was not given the September 19 Letter. *See, supra*, ¶¶16-17, 40; Epstein Affirmation, ¶¶4, 7; Giuca Affidavit, ¶¶4-7.

68. At the September 19 appearance, the People were represented by former assistant district attorney Taylor Koss. Avitto and Ryan were present. Avitto immediately sought to explain himself. Instead, a private bench conference was held. At its conclusion, Judge Parker referenced the September 19 Letter and severely criticized Avitto for his poor performance in rehab:

The Court: Mr. Avitto, I don't quite understand what's going on here. Now listen to me, just listen to what I'm saying to you. **The letter, you can see how long this is. It's all underlined. You know what that means? That means it's not good.**

The Defendant: Yes.

The Court: **They say you're bringing cigarettes in.**

The Defendant: Yes, ma'am. Yes.

The Court: Why are you doing that? This is a non-smoking facility. They're trying to get people off from addictions and you are bringing in cigarettes.

The Defendant: The people were up there, we were smoking and everything. I went in with the cigarettes. They didn't take them from me. So when I went to the hospital for checkups, I bought some more cigarettes to bring in. The only thing is because I have a hard time with the cigarettes. I'm a big smoker. **I'm supposed to be testifying for this week in a murder case**, so I was smoking a lot. So I apologize for that.

The Court: All right. **Well, apparently, we're going to give you another opportunity** but, I mean, not only are you jeopardizing your position in these programs, you know, the jail alternative you face is three-and-a-half to seven. Plus, cigarettes are bad for you. You are going to give yourself lung cancer. I mean, you're going to give yourself a death sentence as well as three and a half to seven. Neither one of those are any good. **There aren't too many times that I can keep giving you another opportunity.**

The Defendant: I appreciate it.

The Court: Do you understand? You have to figure out the rules of the program and follow them or you go to state prison. That's as simple as I can make it for you.

The Defendant: Yes.

The Court: Do you understand?

The Defendant: Yes.

The Court: I can't bring—Bridge Back to Life says they will take you back, so good luck.

Exhibit K (Avitto Transcript, September 19, 2005). Based upon what was said at the private bench conference, the court begrudgingly agreed to release Avitto once again and adjourned his case to October 6. *Id.*

69. As noted earlier, on information and belief, the truthful events of September 19 were suppressed from the defense. Instead, counsel was provided with a letter ostensibly signed by Avitto's counselor Sean Ryan, dated September 20, which purportedly described Avitto's current status in his program, but in reality

was fabricated evidence which secreted all of the events from September 6 to September 19 from the defense, including the fact that he was thrown out of his program only three days before he testified. Exhibit L (EAC LINK Letter Prepared by Sean Ryan, September 20, 2005) (“the September 20 Letter”). As a consequence, Giuca was deprived of critical impeachment evidence which the People were obligated to disclose under *Brady* and *Rosario*.

The September 20 Letter was Fraudulent Evidence

70. In 2014, handwriting expert Ruth Brayer analyzed EAC-LINK letters dated June 16, July 19, as well as the September 19 and 20 Letters, all of which ostensibly were drafted by Sean Ryan. It is Ms. Brayer’s expert opinion to a reasonable degree of certainty¹⁹ that the September 20 Letter was *not* signed by the same hand that signed the other documents, even though Ryan purportedly signed all of them:

Although there are some indications that the questioned signature was written off in a rapid, free manner, we have observed significant irregularities between the questioned and known signatures, in terms of form, initial and end strokes, alignment and directional changes, including disjointed lines on the initial letter “S” and on the final stroke on the letter “n.”

Exhibit M (CV and Report of Ruth Brayer, May 19, 2014).

¹⁹ Ms. Brayer could not state her opinion to a high degree of certainty because she was not able to observe actual handwriting from Ryan in her presence.

71. All of the following highlighted discrepancies between the September 19 and 20 Letters are added for emphasis to assist this Court in comparing the two reports.

72. The heading of the September 19 Letter accurately denoted Avitto's October 6 court appearance; the September 20 Letter deleted it (which appeared to cause the text in this letter to be tabbed differently under "Violation"). The text after "Date" on the September 20 Letter was indented improperly and it contained a typo between "September" and "20."

September 19 Letter:

VIOLATION:

To:	Presiding Judge Parker
Date:	September 19, 2005
Part:	30
Reference:	John Avitto
Next Court Date:	October 6, 2005
IND#:	6823/04
NYSID:	5893932P

September 20 Letter:

VIOLATION:

To:	Presiding Judge Parker
Date:	September20, 2005
Part:	30
Reference:	John Avitto
IND#:	6823/2004
NYSID:	5893932P

73. The introductory sentence of the September 20 letter changed the word “defendant” in the original to “client”:²⁰

September 19 Letter: This is to inform the court of the above named **defendants** status:

September 20 Letter: This is to inform the court of the above named **clients** status:

74. The two letters were spaced differently; the September 19 Letter contains 22 lines of text, the September 20 Letter contains 18. The preparer of the September 20 Letter accidentally omitted the date Avitto was released from custody:

September 19 Letter: The defendant was ROR’d to EAC-LINK on **February 22, 2005** for placement in Samaritan Village...

September 20 Letter: The defendant was ROR’d to EAC-LINK on **February, 2005** for placement in Samaritan Village...

75. The September 19 Letter accurately documented that on September 6 Avitto was ordered to go to rehab, which he did the following day when he went to Kingsboro. These facts are corroborated by the Avitto transcripts from September 6, September 19, and by Avitto himself. Exhibits I, K.

On August 24, 2005 case manager Sean Ryan was contacted by the **defendant** who admitted to relapsing on

²⁰ In two other instances in the September 20 Letter, Avitto is referred to as a “client” where he was described as a “defendant” in the September 19 Letter, even though the immediate surrounding text of the two letters is otherwise virtually identical.

cocaine. **Due to this** the defendant was placed in **St. John's Detoxification Center** and targeted for Kingsboro Rehabilitation Center. **The defendant made intake at St. John's Rehabilitation Center** on August 29, 2005, but left against request of EAC-LINK on September 2, 2005. The defendant was referred to and made intake at **Kingsboro Rehabilitation Center** on September 7, 2005. **On September 19, 2005 case manager Sean Ryan was contacted by Kingsboro and informed that the defendant was being discharged for bringing cigarettes into the facility and distributing them to other patients.**

76. The September 20 Letter deleted all of the events from September 7 to 19, instead denoting that sometime prior to September 20, Avitto simply "disappeared." Whomever falsified these facts misspelled "due to this" ["do to this"] from the original document, referred to Avitto as a "client," and abbreviated St. John's:

On August 24, 2005, case manager Sean Ryan was contacted by the **client** who admitted to relapsing on cocaine. **Do to this** the defendant was placed in **St. John's Detox** and targeted for **Seafeld Rehab**. **The client entered into St. John's Detox** but left against request of EAC-LINK and did not make intake at Seafeld Rehab. **The defendant has not contact EAC-LINK and his whereabouts are unknown.**

77. If Ryan signed the September 19 and 20 Letters, his claim on September 20 that Avitto's "whereabouts are unknown," was demonstrably false and constituted a fraud upon the court. *Ryan was with Avitto in court on September 6 and September 19.*

78. The September 19 Letter was co-signed by Ryan's supervisor, Ruth O'Sullivan. She has confirmed the authenticity of her signature. Exhibit N (Letter from Michael Trabulsi to Mark A. Bederow, August 15, 2014). The September 20 Letter was co-signed by a different supervisor, Patricia Lorusso. However, Ms. Lorusso's ostensible signature does not match the printed signature line of her name (the typed name added an additional "s"):

Handwritten Signature:	Patricia Lorusso, MA
Signature Line:	Patricia Lorusso, MA

79. Only persons with an interest in Avitto as a witness against Giuca—rather than as an ordinary defendant in a drug program—had reason to conceal authentic and fertile impeachment material about Avitto and replace it with doctored evidence. The persons with the most obvious interest in Giuca's conviction were prosecutors from the Kings County District Attorney's Office.

GROUND FOR MOTION AND RELIEF REQUESTED

80. Giuca is entitled to vacatur of his conviction and a new trial, pursuant to C.P.L. § 440.10(1)(b), (c), (f) and (h).

81. First, the People's failure to disclose specifically requested impeachment material, such as evidence of ADA Nicolazzi's personal intervention in Avitto's criminal case and evidence regarding Avitto's poor performance in his drug program, including that he was thrown out of the program only days before he

testified, violated the People's obligations under *People v. Vilardi*, 76 N.Y.2d 67, 77 (1990), and *Brady v. Maryland*, 373 U.S. 83 (1963), and was material under New York State (any reasonable possibility of a more favorable outcome) and Federal (reasonable probability of a more favorable outcome) constitutional due process standards.

82. Second, the People's withholding of the September 19 Letter and a failure to provide Giuca a transcript of the September 19 Avitto proceeding (or at a minimum providing him notice so that he could order the transcript) violated *Rosario*. Under the *Rosario* materiality standard, there is at least a reasonable possibility that this evidence, had it been disclosed, would have affected the outcome of the trial.

83. Third, in violation of Giuca's State and Federal Constitutional due process rights to a fair trial, the People knowingly presented, and failed to correct, Avitto's false and misleading testimony regarding the circumstances surrounding his cooperation with the People and his motive for testifying against Giuca. Combined with the prosecutor's pervasive vouching for Avitto's inaccurate testimony, the People cannot demonstrate that there was no reasonable possibility that this affected the outcome of the trial.

84. Fourth, Giuca's State and Federal Constitutional rights to due process and his rights under C.P.L. § 440.10(1)(b) were violated because the September 20

Letter ostensibly drafted by Sean Ryan was procured by misrepresentation and fraud, and prejudiced Giuca by concealing the People's *Brady* violations, which hid the truth about Avitto's credibility deficiencies from the defense and the jury. The People cannot demonstrate that there was no reasonable possibility that this misconduct did not affect the outcome of the trial.

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

By:



MARK A. BEDEROW

AFFIRMED:

New York, New York
March 26, 2015

EPSTEIN
AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,

x

:

: AFFIDAVIT

-against-

:

JOHN GIUCA,

: Indictment No. 8166/2004

Defendant.

:

x

LLOYD EPSTEIN, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms, under penalty of perjury, that the following is true upon personal knowledge:

1. I am an attorney at Epstein & Weil, LLC, with offices in New York County. I was admitted to practice in 1979 and am an experienced criminal defense attorney. I frequently represent clients in state and federal post-conviction work, including direct appeals and CPL § 440.10 motions. I make this affirmation at the request of Mark A. Bederow, John Giuca's present attorney, who I understand is preparing a CPL § 440.10 motion on behalf of Giuca.

2. I represented Giuca in connection with his direct appeal and a prior CPL § 440.10 motion. On direct appeal, I argued that Giuca's trial counsel, Samuel Gregory, provided ineffective counsel only with respect to his failure to object to the admission of "gang evidence" and his subsequent failure to request a limiting instruction after such evidence was admitted

against Giuca. The prior 440.10 motion related solely to allegations of juror misconduct at Giuca's trial.

3. At Mr. Bederow's request, before executing this affirmation, I recently reviewed many documents related to Giuca's case. These included: a transcript in the case of *People v. John Avitto*, Indictment 6823/2004, dated June 13, 2005 (where the People were represented by Giuca's trial prosecutor, Anna-Sigga Nicolazzi); a transcript from the same proceeding, dated September 19, 2005; a transcript of Avitto's September 22, 2005 trial testimony; a copy of Ms. Nicolazzi's summation; a transcript of the charge conference, a letter dated September 19, 2005, from Sean Ryan of EAC-Link describing Avitto's performance in his drug treatment; and a letter dated September 20, 2005, ostensibly drafted by Ryan and also describing Avitto's performance in his drug treatment.

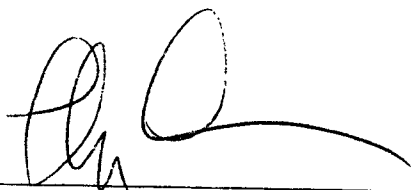
4. Prior to my preparation of Giuca's direct appeal and his prior 440.10 motion I was not aware that Ms. Nicolazzi appeared on Avitto's criminal case on June 13, 2005. Nor was I aware at any time prior to my preparation of Giuca's appeal and prior 440.10 motion that *two* Ryan letters describing Avitto's drug treatment performance—dated September 19 and 20, 2005—existed.

5. Prior to perfecting Giuca's appeal, I reviewed the trial transcript and other documents related to his trial. I spoke with Mr. Gregory, who provided me with documents from Giuca's case. I reviewed all of the documents which Mr. Gregory provided to me for purposes of Giuca's appeal. It is my practice to discuss any possible appellate or post-conviction motion issues with trial counsel. Although I was aware that Mr. Gregory had argued at trial that Avitto had a motive to fabricate his testimony, and that he sought and/or received consideration in exchange for his testimony, I do not recall one way or the other whether Mr. Gregory and I

discussed the fact that Ms. Nicolazzi had intervened and/or appeared on Avitto's existing case while he was a prosecution witness against Giuca.

6. Based upon my review of Avitto's trial testimony, the charge conference and the summations, it was obvious that (a) the defense argued that Avitto testified for the prosecution because he had sought and/or received a benefit, and b) that the prosecution strenuously denied these facts, instead arguing that Avitto was "doing well," in a drug program, was "responsible" and thus had no motive to seek a benefit in exchange for his testimony.

7. In light of Avitto's trial testimony that (a) he did not seek or receive a benefit in exchange for his testimony, (b) the prosecutor's steadfast denial that he sought or received a benefit, (c) her denial that Avitto had a motive to seek a benefit, and (d) her argument that Avitto was released by a judge without bail because he was "doing well" and was "responsible," had I been aware that Ms. Nicolazzi had appeared on Avitto's case, and had I been aware of the existence of the two letters referenced above and their contents, I would have researched and investigated these issues for possible inclusion in Giuca's direct appeal and/or prior CPL § 440.10 motion. However, I did not research these issues for inclusion in the direct appeal or 440.10 motion because I was unaware of them.



LLOYD EPSTEIN, ESQ.

AFFIRMED: New York, New York
 February 16, 2015

GIUCA
AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK, :
: AFFIDAVIT

-against- :
JOHN GIUCA, : Ind. No. 8166/2004
Defendant. :

X

STATE OF NEW YORK)
COUNTY OF CLINTON) ss:

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

1. I am the defendant in the above-captioned case. I have been in custody in connection with this case since December 21, 2004.
2. I am innocent of this crime. I did not shoot Mark Fisher. I was not present when he was killed. I did not give Antonio Russo a gun on October 12, 2003, in order for him to rob or kill Mark Fisher.
3. I am familiar with the testimony of Albert Cleary, Lauren Calciano and John Avitto. I did not tell any of them that I was involved in Mark's death

4. I was as involved in my defense as I could be. By this, I mean that whatever documents my attorney provided to me, I reviewed. I would speak to my attorney and make suggestions and offer my opinion when I could.

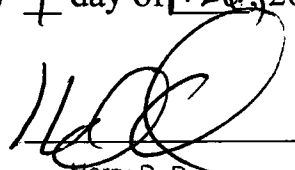
5. During the course of my trial and during my appeal and prior CPL § 440.10 motion, I was unaware that the trial prosecutor, Anna-Sigga Nicolazzi, appeared on Avitto's criminal case immediately after he became a cooperating witness. If I had known this, I am certain that I would have discussed this with my lawyer. However, Mr. Gregory and I never discussed this fact. I also never spoke about this issue at any time Lloyd Epstein represented me during my direct appeal or prior 440.10 motion. I am certain that Mr. Epstein and I also would have discussed this issue if either one of us had been aware of it.

6. At no time during the period of time that I was represented by Mr. Gregory or Mr. Epstein, was I aware that Avitto had been thrown out of a drug program only days before he testified. I was also unaware that Mr. Gregory had apparently been provided false evidence which deleted this impeachment evidence. If I had known this, I would have discussed this and encouraged Mr. Gregory to use this at trial. I cannot think of any reason why Mr. Gregory would not have presented this evidence if he had known about it. If I had known about it at any time during the period that Mr. Epstein represented me, I would have encouraged him to address this issue in my direct appeal or prior CPL § 440.10 motion.

7. To be clear, at no time that any of my appeals or my prior 440.10 was pending before this Court, was I aware of any of the legal issues surrounding Avitto which are raised in this present motion. At the time that my prior post-conviction litigation was pending, I was unaware of and had not seen transcripts from Avitto's case dated June 13 and September 19, 2005, nor had I seen a letter from Sean Ryan dated September 19, 2005.


~~John Giuca~~

Sworn to before me this
19 day of March 2015


Harry D. Duran
Notary Public, State of New York
No. 01DU6008379
Qualified in Clinton County
Commission Expires 08/2018

AVITTO

AFFIDAVIT

7/8/13

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

_____ x
THE PEOPLE OF THE STATE OF NEW YORK, :
: AFFIDAVIT

-against- :
JOHN GIUCA, : Indictment No.
Defendant. :
_____ x

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

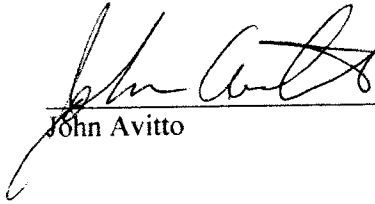
c. In response to ADA Nicolazzi's question on how I was doing in my program since being released on my last case (which was in February 2005), I swore that "I'm

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

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

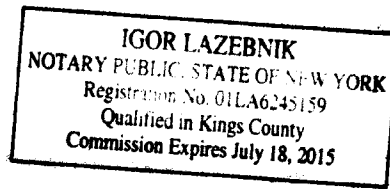
e. ADA Nicolazzi asked me if I had asked for anything in exchange for my testimony. I swore that I did not ask for anything in exchange for my testimony. This testimony was false. In fact, as ADA Nicolazzi and Detective Byrnes knew, I only approached law enforcement after I had absconded from my program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

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


John Avitto

Sworn to before me this
8 day of July, 2013





AVITTO
AFFIDAVIT
4/10/14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK, :
: AFFIDAVIT

-against- :
JOHN GIUCA, : Indictment No.
Defendant. :
_____X

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

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

1. This Affidavit is intended to supplement, not replace, my prior Affidavit, which was executed on July 8, 2013.
2. I was diagnosed with mental illnesses, including schizophrenia, while I was incarcerated in Riker's Island in 2004. I met with a jail psychiatrist who diagnosed me and then prescribed me Seroquel, among other medications.
3. In addition to meeting with ADA Nicolazzi and Detective Byrnes a few times in June 2005, I spoke to Detective Byrnes on the telephone several times. When I would warrant or otherwise get into trouble with my drug program, I would notify Detective Byrnes. He in turn would tell me to notify my counselor Sean Ryan, who would then appear with me in court after I

was "violated." As detailed in my July 8, 2013, at all times I was a cooperating witness with the DA, I remained out of jail despite my violations and problems in my treatment program.

4. Detective Byrnes absolutely knew that I was having problems in my program after I became a cooperating witness. In fact, the reason I would call Detective Byrnes was to notify him that I had a problem so that he would work with the DA and help keep me from going to prison.

5. ADA Nicolazzi, Detective Byrnes and another woman whom I believe was a Brooklyn prosecutor, visited me in my inpatient program, while I was a cooperating witness. I believe this occurred when I was in Kingsboro.

6. On or about September 19, 2005, I smuggled cigarettes into the inpatient facility, which I knew was against the rules. I then absconded from the program and was subsequently discharged. This occurred a few days before I testified as a witness against John Giuca.


7. I have reviewed the "violation" letters dated September 19 and 20, 2005. Both of them are true. In other words, as the September 19 letter indicates, I did smuggle contraband into the program and I was discharged. As the September 20 letter indicates, at that time, I had absconded and my counselor may not have known my whereabouts.

8. I have no idea why Sean Ryan prepared the September 20 letter or why he deleted the reference to my smuggling contraband and the fact that I had a court appearance scheduled for October 6, 2005.

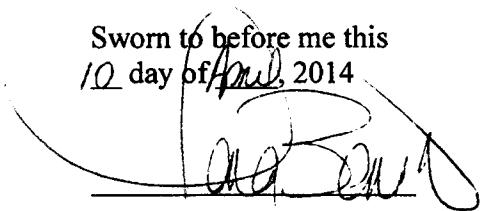
9. I called Detective Byrnes after I absconded the program. For the few days after I absconded and before I testified, I slept at home. Detective Byrnes knew this because I told him. Nobody from the warrant squad or police arrested me.

10. On the day that I testified against John Giuca, I was picked up at my house by someone from the DA's Office, who I believe was a detective.

11. I testified at trial that I received Seroquel in order to help me sleep and that not because of my schizophrenia. Although it is true that the Seroquel did help me sleep, I testified falsely when I claimed that I did not receive a prescription for it because of my schizophrenia. As I stated above, I was diagnosed for schizophrenia and prescribed Seroquel as a result of that diagnosis.


John Avitto

Sworn to before me this
10 day of April, 2014



TARA M. BONILLA
Notary Public, State of New York
No. 01806257717
Qualified in Queens County
Commission Expires 3/19/16