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

THE PEOPLE OF THE STATE OF NEW YORK, :

:

Ind. No. 8166/2004

-against- :

JOHN GIUCA, :

Defendant. :

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

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

ARGUMENT

THE FACTS CONCEDED IN THE PEOPLE'S RESPONSE ESTABLISH MATERIAL VIOLATIONS OF LAW WHICH WARRANT VACATUR OF JOHN GIUCA'S CONVICTION WITHOUT A HEARING

A. Introduction

The majority of the People's 44 page reply is an exhaustive history of a juror misconduct claim resolved in their favor years ago. Their germane response is less than two pages of snippets from the accompanying May 21, 2015 affirmation of ADA Anna-Sigga Nicolazzi ("Nicolazzi Affirmation" or "Nicolazzi Aff."), in which she finally revealed the existence of favorable impeachment evidence she concealed from John Giuca at trial: her personal intervention into the burglary case of John Avitto immediately after he started cooperating against Giuca, which resulted in Avitto's release from custody even though he faced a mandatory prison sentence. Other than this partial admission,[1] the Nicolazzi Affirmation appears so incredible on its face that one must "almost willfully refuse to confront reality" to credit it.[2]

[1] ADA Nicolazzi declined to say why she appeared on Avitto's case, omitted from her sworn statement her immediate request for a private bench conference, and failed to explain why she sought the bench conference and what she said at it. *See*, Nicolazzi Aff. ¶11 *cf.* June 13, 2005 Transcript (Exhibit F).

[2] According to ADA Nicolazzi, Avitto volunteered to assist the prosecution because he was bothered by Giuca's wrongdoing so he wanted "to do the right thing." Yet he kept his evidence to himself for more than three months while

People v. Conlan, 146 A.D.3d 319, 330 (1st Dept. 1989) (prosecutor's claim that a jailhouse informant testified out of "good will," because he was upset about defendant's boasting of his crime or out of a "concern for the public welfare" was not credible).

The Nicolazzi Affirmation served as her general denial of "wrongdoing" and was non-responsive to Giuca's motion except for the claim that she did not "intentionally" do anything which might be construed as promising Avitto consideration in exchange for his testimony. ¶¶7-8. Rather than refute Giuca's well-sourced allegations or make legal argument before the Court rules on the defense papers, the People consented to a hearing.[3]

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he was succeeding in a drug program; after he absconded and engaged in drug use which exposed him to a mandatory prison sentence, he immediately offered his cooperation. Notwithstanding his timing and bleak legal circumstances, Avitto told ADA Nicolazzi "on more than one occasion" that he "was not seeking a benefit" in exchange for his cooperation. Assuming, *arguendo*, that Avitto said this, it strained credulity that an experienced, senior homicide prosecutor believed him. Despite Avitto's apparent instructions not to help him, ADA Nicolazzi nevertheless personally appeared on his post-plea burglary case and immediately sought to share private information about him with the court before he was released without bail. Furthermore, ADA Nicolazzi claimed that Avitto's testimony was consistent "with other evidence of which she was aware" even though he contradicted every other witness about every critical fact, including whether Giuca was an active participant in Mark Fisher's murder and the location and time of the murder. Avitto testified that Giuca told him that he pistol whipped Fisher after he withdrew "only" $20 from an ATM, and that Giuca and two others beat Fisher before one of them "pulled the gun" from Giuca and shot and killed Fisher. Tr. 774-775. Trial evidence (testimony, electronic data, a 911 call and forensic evidence) proved that Fisher and Antonio Russo—without Giuca—went to an ATM at the corner of Coney Island Avenue and Beverley Road where Fisher withdrew $20 at 5:23 a.m. Tr. 371-373. There was no evidence that Fisher went to an ATM a second time on October 12, 2003. Fisher was shot to death at 6:40 a.m. on Argyle Road, across the street from Albert Cleary's home, several blocks away from the ATM he was at earlier that morning. Lauren Calciano and Cleary claimed that Giuca told them Russo alone murdered Fisher. Cleary was among the witnesses who testified that Giuca was home the entire time Fisher and Russo were at the ATM, and that they returned to Giuca's within minutes. Finally, ADA Nicolazzi's reference to bruising on Fisher's face and hand as the "best proof" that Avitto was consistent with the other evidence was unpersuasive. Contrary to her claim that these injuries "indicated he had been in a fight before he was shot," the medical examiner could not state whether the injuries were more likely caused by being punched and kicked, or by Fisher falling down face first after being shot in the back. Nicolazzi Aff., ¶¶9-11, 13-14 *cf.* Tr. 841, 843.

[3] While we do not believe that a hearing is necessary to adjudicate Giuca's motion in his favor, to the extent that the Court believes the evidence requires clarification, we welcome the opportunity to examine ADA Nicolazzi under oath about her interactions with Avitto, her understanding of, and compliance with, the People's *Brady* and *Rosario* obligations, and the manner in which she elicited testimony from Avitto and vouched for his credibility.

The prosecution team consisted of at least four prosecutors and several detectives, but the Nicolazzi Affirmation was the only sworn statement included with the People's response, even though Giuca's due process claims implicate the conduct of the Fisher prosecution team as a whole, not just the "lead" prosecutor. *See, Giglio v. United States,* 405 U.S. 150 (1972); *People v. Wright,* 86 N.Y.2d 591, 598 (1995); *People v. Steadman,* 82 N.Y.2d 1 (1993); *People v. Jones,* 70 N.Y.2d 547 (1987).

The People's scant response means that they have conceded the truthfulness of the majority of Giuca's allegations; consequently those admitted facts cannot serve as the basis for granting them a hearing. *Wright,* 86 N.Y.2d at 595-596; *People v. Ciaccio,* 47 N.Y.2d 431, 438 (1979); *People v. Gruden,* 42 N.Y.2d 214, 216 (1977).

Nevertheless, the People incorrectly have framed the determinative issue as a credibility contest between Avitto[4] and ADA Nicolazzi, the resolution of which requires a hearing. *See,* Affirmation of Diane Eisner, May 21, 2015 ("Eisner Affirmation" or "Eisner Aff.") ¶¶60-61; Nicolazzi Aff. ¶5. Even if the Nicolazzi Affirmation created a single question of fact on a *quid pro quo* with Avitto, a hearing

[4] When Avitto was a drug-addled schizophrenic and jailhouse informant facing years in prison who voluntarily approached the prosecution with information which contradicted the entirety of the prosecution's case, ADA Nicolazzi described him as "credible," "honest," and "someone you could trust." She criticized trial counsel for "condemning" him. Tr. 1010-1011, 1017, 1023. Now, despite the fact that his present sworn statements are supported by common sense and overwhelming documentary proof, the People are eager to destroy Avitto in an effort to salvage the conviction which his "truthful" testimony delivered to them.

is unnecessary because under C.P.L. § 440.30(3)(c) the Court must resolve the motion in Giuca's favor on other grounds. *Wright,* 86 N.Y.2d at 595-596.

B. The Court Must Vacate Giuca's Conviction Because the Facts Conceded by the People and the Unquestionable Documentary Proof Establish a Material *Brady* Violation Under the Reasonable Possibility Standard

In order to rule on Giuca's *Brady* claim, the Court must determine whether (1) favorable impeachment evidence existed, (2) it was suppressed by the prosecution and (3) it was material, which in this case means whether there was a "reasonable possibility" that the prosecution's failure to disclose might have contributed to Giuca's conviction. *Giglio,* 405 U.S. at 154-155; *People v. Fuentes,* 12 N.Y.3d 259, 263 (2009).

1. *The Reasonable Possibility Standard Applies Because the Defense Specifically Requested Favorable Impeachment Evidence*

Where undisclosed *Brady* material was the subject of a specific disclosure request, the defense need only show that if it had been disclosed, there existed a "reasonable possibility" of a more favorable outcome. *People v. Vilardi,* 76 N.Y.2d 67, 77 (1990). Under this standard, failure to disclose in response to a specific *Brady* request is "seldom, if ever" excusable. *Id.*

In addition to a request for exculpatory material, the defense made a pre-trial request for "all evidence...which might tend to adversely affect the credibility of any eyewitness...in accordance with *Giglio v. United States*, 405 U.S. 150." The

defense also sought all records regarding drug treatment for prosecution witnesses. *See,* Affirmation of Mark A. Bederow, March 26, 2015 ("Bederow Aff."), ¶20. During the charge conference, trial counsel made a second, more detailed request for any evidence that Avitto received consideration. ADA Nicolazzi adamantly denied the existence of any such evidence. Bederow Aff., ¶48; Tr. 928-931.

2. *There Was a "Strong Inference" That the People Provided Avitto a Tacit Benefit or That He Sought or Expected Leniency*

A prosecutor's appearance on the criminal case of a cooperating witness is a "benefit extended" which must be disclosed to the defense. *People v. Colon*, 13 N.Y.3d 343, 348-350 (2009). *See,* Defense Memorandum of Law, March 26, 2015 ("Opening Mem.") pp. 10-12, 38-41. As trial counsel correctly argued when he demanded any evidence that Avitto received consideration, "it [was] for the jury to determine how much value to assign it in terms of assessing the witness' credibility." *People v. Novoa*, 70 N.Y.2d 490, 497 (1987); Tr. 928-931. This is true even where there was no express promise by the prosecutor or the witness denied the existence of an agreement or expectation, but the jury still could have found the evidence sought was of such a nature that there was a tacit understanding, or "at least so the witness hoped." *People v. Cwikla*, 46 N.Y.2d 434, 441 (1979).

If the evidence supported the finding of a "strong inference, at the very least, of an expectation of leniency, it should have been presented to the jury for its

consideration." *Id.* at 442. "Misleading and obstructive" tactics by a prosecutor which conceal evidence of a possible benefit strengthen the inference that a witness had an expectation of leniency. *Id.*

There was a plethora of evidence which reasonably implied that Avitto expected leniency in exchange for his testimony. He purportedly began gathering evidence against Giuca while they were incarcerated together on February 19, 2005. Tr. 1008. Less than two weeks earlier, he had entered into a plea agreement on his burglary case, the terms of which included the eventual dismissal of the indictment if he successfully completed a drug treatment program. Justice Dimango warned him that if he "failed to complete the program, for example if you should leave the program or if you should get kicked out the program, then you will receive a state prison sentence of 3 ½ to 7 years."[5] February 8, 2005 Transcript (Exhibit H). On February 22, Avitto was released from custody.

Avitto performed satisfactorily in his program from February 22 until June 9. During this uneventful period, he did not volunteer as a witness against Giuca. On the evening of June 9, he absconded from his program and used cocaine. A warrant was ordered the following day. June 10, 2005 Transcript (annexed hereto as Exhibit O). Now a fugitive who knew that he had exposed himself to a lengthy prison

[5] On June 9, 2005, Avitto absconded from the program. On September 19, he was kicked out of his program.

sentence, Avitto quickly sought out law enforcement in order to cooperate against Giuca.[6]

Avitto's lack of interest in cooperating against Giuca for the 107 days he was compliant with the terms of his guilty plea was in stark contrast to the whirlwind of activity the fugitive instigated between law enforcement and himself in the four days between June 9 and June 13, which culminated in his release immediately after ADA Nicolazzi privately addressed the court about her new cooperating witness. Nicolazzi Aff., ¶11; Exhibit F.

Notwithstanding Avitto's (now recanted) denials, there existed a strong inference that he expected leniency in exchange for his cooperation which at the very least "might have been a strong factor in the minds of the jurors in assessing [his] credibility and in evaluating the worth of his testimony." *Cwikla*, 46 N.Y.2d at 441 *citing People v. Savvides*, 1 N.Y.2d 554, 557 (1956). The People's pervasive use of "misleading and obstructive tactics," which hid the circumstances surrounding Avitto's cooperation from the defense, strengthened this inference. *Cwikla*, 46 N.Y.2d at 441-442; *see, e.g.,* Exhibits D, F; Tr. 928-931; *infra,* pp. 16-24; Opening Mem., pp. 12-13.

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[6] According to ADA Nicolazzi, Avitto "wanted to do what was right" because he "did not hurt people" and he thought what Giuca had done was "wrong." Nicolazzi Aff., ¶9. At the time Avitto approached the prosecution, his rap sheet included two arrests for robbery in the second degree, an assault arrest, two arrests for resisting arrest, a conviction for stalking which resulted in a 60 day jail sentence, and arrests for the use of a child in a sexual performance and endangering the welfare of a child which resulted in a conviction for attempted endangering the welfare of a child and a 25 day jail sentence.

There is little doubt that ADA Nicolazzi's personal intervention into Avitto's case immediately after he became her cooperating witness created in him the appearance that she was interested in his case and had the power to influence its outcome depending upon his willingness to cooperate against Giuca.[7] Anyone in Avitto's shoes would have recognized this. More to the point, had the prosecution not kept them ignorant about it, Giuca's jurors would have appreciated this.

The prosecution was required to disclose the favorable impeachment evidence to the defense. In the event they deemed it credible to do so after making the disclosure, they could have argued that the timing and circumstances of ADA Nicolazzi's intervention into Avitto's case was not relevant to his motive to testify. The People's failure to disclose the impeachment material violated Giuca's right to due process by interfering with the jury's ability to weigh its impact on Avitto's credibility. *Colon,* 13 N.Y.3d at 348-350; *Cwikla,* 46 N.Y.2d at 441-442; *Novoa,* 70 N.Y.2d at 497.

[7] The People's assertion that it was "routine" for a senior homicide prosecutor who had just gratuitously secured the cooperation of a fugitive facing years in prison to appear in a staffed calendar part in order to stand on an unscheduled return on warrant proceeding for reasons unrelated to his cooperation was remarkable. Eisner Aff., ¶59. An immediate request by the homicide prosecutor to approach the bench in order to discuss anything about the witness with the court other than his cooperation was peculiar. If ADA Nicolazzi's appearance on Avitto's case was "routine," there was no reason to mislead the jury about it. Tr. 812, 1020-1023. Beyond Giuca's case, if the People's undisclosed handling of Avitto was "routine" Brooklyn practice, one cannot help but wonder how many other convicted defendants have been prejudiced by similar *Brady* violations.

3. *The People Did Not Disclose the Favorable Impeachment Evidence to Giuca or to the Trial Court*

The People have not disputed Giuca's claim that they failed to disclose the favorable impeachment evidence. Thus, they have conceded the point. *Wright,* 86 N.Y.2d at 595; *Gruden,* 42 N.Y.2d at 216; *see also,* Tr. 928-931.

Nor did the People present the requested information to the trial court for a ruling on whether it constituted *Brady* material. Where the defense specifically demanded favorable impeachment evidence and there was "some basis" for believing the People possessed it, "deference to the prosecutor's discretion must give way, and the duty to determine the merits for disclosure devolved to the trial court." *People v. Andre W.,* 44 N.Y.2d 179, 184 (1978); *People v. Consolazio,* 40 N.Y.2d 446 (1976). "Some basis" is an "undemanding" threshold to trigger the prosecutor's obligation to defer to the trial court. *People v. Contreras,* 12 N.Y.3d 268, 272 (2009).

When presented with a request for evidence which undermines the credibility of an important witness, the prosecutor may not simply choose to disbelieve it or determine that disclosure is not required. *See, People v. Baxley,* 84 N.Y.2d 208, 213-214 (1994) (prosecutor's subjective determination of what constituted *Brady* does not relieve the People of their obligation to disclose favorable impeachment evidence); *see also, People v. Wallert,* 98 A.D.2d 47, 50 (1st Dept. 1983) ("...it was

fundamentally obvious that the [witness'] credibility and motive for testifying would be a critical issue...a prosecutor's duty in such situations [is] to, at the very least, submit to the Trial Judge the question of whether disclosure is required"); *People v. Crespo*, 168 Misc.2d 182, 186-187 (Bronx Cty. Sup. Ct. 1995) ("...it is not for the prosecutor to decide the 'usefulness' of evidence...it is for the trier of fact, and not the prosecutor, to decide the credibility of witnesses").

However, ADA Nicolazzi usurped the trial court's authority by unilaterally decreeing that the jury was not entitled to consider evidence which contradicted her position about Avitto's credibility. This abuse of her prosecutorial power deceived the trial court and defense and betrayed her sworn representation that "the People were aware of their continuing duty under *Brady*...and will honor that obligation. *Any arguably exculpatory material will be submitted to the court for an in camera inspection.*" Affirmation of ADA Nicolazzi, February 17, 2005, ¶34 (Exhibit D) (emphasis added); *see, Banks v. Dretke,* 540 U.S. 668 (2004); *Strickler v. Greene,* 527 U.S. 263 (1999) (defense may rely on good faith representation that People will comply with *Brady*).

ADA Nicolazzi's failure to honor her *Brady* obligation severely prejudiced Giuca. Justice Marrus understandably accepted her representation at face value. Had he been aware of its existence, he certainly would have ordered disclosure of

impeachment evidence of this magnitude,[8] which would have prevented ADA Nicolazzi from eliciting misleading testimony from Avitto and from running amok in summation. If he had knowledge of the truth about Avitto, his jury instruction regarding the impact of a benefit on a witness' credibility likely would have influenced the jury's assessment of Avitto's credibility, rather than serving as a virtually meaningless boilerplate instruction. Tr. 1035-1037.

"When the prosecutor receives a specific and relevant [*Brady*] request, the failure to make any response is seldom, if ever, excusable." *Cwikla*, 46 N.Y.2d at 441 *citing United States v. Agurs*, 427 U.S. 97, 106 (1976). Giuca's trial counsel could not have been clearer in his demand for evidence consistent with his belief that Avitto sought, expected and/or received consideration in exchange for his testimony. Tr. 928-931; Bederow Aff., ¶20. ADA Nicolazzi's decision to deny, secrete and mislead rather than disclose "invited trouble" and "exceeded the limits on the rules of disclosure." *See, Contreras,* 12 N.Y.3d at 272; *Fuentes,* 12 N.Y. 3d at 265.

4. *The Brady Violation Satisfies the Reasonable Possibility Standard*

The Court need only review the trial transcript in order to rule that the People's failure to disclose favorable impeachment evidence might have affected the outcome

[8] On September 21, Justice Marrus delayed Avitto's testimony one day in order to provide the defense with the opportunity to compile all available records for use on cross examination. Tr. 745.

of the trial. *Vilardi,* 76 N.Y.2d at 66-67. This test is easily met because of the prosecution's argument that Avitto was the only witness to whom Giuca "truthfully" confessed, which meant that his description of Mark Fisher's murder was the only one which "made sense."[9] *See,* Bederow Aff., ¶¶50-53; Opening Mem., pp. 14-22. In addition, Avitto's singular testimony that Giuca was present at the murder scene served as the springboard for ADA Nicolazzi's highly prejudicial (and entirely speculative) argument that Giuca might have even shot Fisher himself. Tr. 1017, 1019.

The prosecution's eleventh hour transition to Avitto as the only witness with the accurate story of what happened to Fisher made his credibility the most critical issue for the jury's determination. ADA Nicolazzi's description of him as an altruistic and honest man with nothing to gain from his cooperation, while she suppressed evidence which would have blown this false premise out of the water, deprived Giuca of a fair opportunity to challenge the prosecution's theory and get to

[9] The People's rudderless trial strategy illustrated Avitto's significance to the verdict. ADA Nicolazzi did not mention him at any time during the trial until he appeared as the final substantive witness. Before he testified, the prosecution presented numerous theories of Giuca's guilt, none of which were consistent with Avitto's testimony. The prosecutor initially claimed that Giuca dissembled to Lauren Calciano, but confessed the "full story" of his role in Fisher's death to his "lifelong close friend" Albert Cleary. Tr. 32-33. Cleary and Calciano testified that Giuca confessed in their joint presence, but they repeatedly contradicted each other about its crucial details. Their credibility was so poor that taken together, their testimony proved that at least one of them committed perjury regarding whether Calciano tampered with evidence. Tr. 331 *cf.* 589, 628. After these witnesses imploded, the prosecution called Avitto and shifted to an entirely different theory of Giuca's guilt. Prior to summations, the court dismissed the intentional murder count—a theory supported only by Cleary's testimony. In summation, ADA Nicolazzi downplayed Cleary and Calciano's testimony by arguing that Giuca's statements to them "partially danced around the truth." Tr. 1008. Instead, she claimed that Giuca's "no holds barred" confession to his jailhouse "confidante" Avitto was the only "truthful" and sensible explanation of what happened to Fisher. Tr. 1008, 1016-1017.

the truth about Avitto's motive. *See, Davis v. Alaska,* 415 U.S. 308 (1974) (recognizing a defendant's fundamental right to show the motive, bias or interest of a prosecution witness). Reasonably skilled trial counsel with knowledge about the truth of June 13 easily would have exposed the absurdity of Avitto's portrayal of himself as someone without a motive to curry favor with the People.

There are no unresolved factual questions which preclude the Court from concluding that the People failed to disclose evidence which, at a minimum, created a strong inference that Avitto received, expected, or hoped for leniency. Under binding Court of Appeals authority, this *Brady* violation requires vacatur of Giuca's conviction.

C. The Court Must Vacate Giuca's Conviction Because the People Have Conceded That a Detective Made Undisclosed Promises to Avitto

Giuca has presented sworn evidence that Detective Thomas Byrnes promised Avitto that he would help him with his warrant if he cooperated against Giuca. When Detective Byrnes met Avitto, he brought him to ADA Nicolazzi's office rather than to court, even though he was a fugitive with an active Supreme Court warrant. After Avitto began cooperating against Giuca, Detective Byrnes escorted him un-cuffed to court, where ADA Nicolazzi appeared on the proceeding which resulted in Avitto's release. Avitto Affidavit, July 8, 2013, ¶¶9, 11, 15-16. After Avitto became a cooperating witness and violated the conditions of his release, he contacted

Detective Byrnes, who advised him to "voluntarily" report them to Sean Ryan. Avitto Affidavit, April 14, 2014, ¶¶3-4, 9.

Avitto's sworn allegations made out a promise which required disclosure to the defense. *Giglio,* 405 U.S. at 150; *People v. Savvides,* 1 N.Y.2d 554 (1956). The People did not respond to this allegation or include a sworn denial from Detective Byrnes, even though they summarized the claim in their response and the Conviction Review Unit ("CRU") interviewed him in 2014. Eisner Aff., ¶¶52-53; Letter from Michael Trabulsi to Mark Bederow, August 15, 2014 (Exhibit N). Thus, the People have conceded the truthfulness of the claim and the Court must vacate Giuca's conviction if the *Brady* violation was material under the reasonable possibility standard. *Wright,* 86 N.Y.2d at 595-596; *Gruden,* 42 N.Y.2d at 218; *Vilardi,* 76 N.Y.2d at 66-67.

For the reasons stated earlier, reversal is required because the jury's knowledge that Avitto received consideration in exchange for his testimony might have affected the outcome of the trial. *See also,* Opening Memo, pp. 14-22.

D. The Court Must Vacate Giuca's Conviction Because the People Have Conceded That Giuca Was Not Provided With the September 19, 2005 *Rosario* Material

Giuca's motion alleged that the People failed to disclose the September 19 Letter (Exhibit J) and transcript from that day's court appearance (Exhibit K), or at least notify him about the latter's existence. Bederow Aff., ¶¶67-79; Opening Mem.,

pp. 22-30. Exhibits J and K were *Rosario* material: both were in the People's possession or control, Giuca was ignorant of them, and each contained statements from Avitto which related to the subject matter of his testimony. Exhibit J ("[Avitto] "admitted to relapsing on cocaine"); Exhibit K (Avitto admitted the September 19 violation and then blurted out "I'm supposed to be testifying this week in a murder case, so I was smoking a lot. So I apologize for that").[10] *See*, C.P.L. § 240.45; Opening Mem., pp. 23-29. The non-disclosure of the *Rosario* material was evidenced further by counsel's otherwise inexplicable failure to examine Avitto on September 22 about the credibility-destroying events of September 19.[11] Tr. 800-804.

The People did not respond to Giuca's *Rosario* claim, and thus have conceded its merits. *Wright,* 86 N.Y.2d at 595-596; *Gruden,* 42 N.Y.2d at 215-217. The only remaining issue is application of the reasonable possibility standard codified in C.P.L. § 240.75, which is "perhaps the most demanding test yet formulated for harmless error review." *People v. Machado,* 90 N.Y.2d 187, 193 (1997).

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[10] On September 19, after he was confronted by an angry judge who literally told him that his situation was "not good," *cf.* Tr. 784 (On September 22, ADA Nicolazzi elicited testimony from Avitto that he was "doing good" in his program), Avitto, in open court, cited his status as a cooperating witness in order to stay out of jail. Yet according to ADA Nicolazzi, a few months earlier in the privacy of her office Avitto offered to assist her on an important murder case immediately after he placed himself at risk of a prison sentence, but told her that "he was not seeking a benefit." Nicolazzi Aff. ¶9.

[11] Trial counsel cross-examined Avitto about his violations in chronological order, but ended his inquiry where the September 20 Letter (Exhibit L) started to conceal the events of September 19.

The importance of Avitto's credibility to the verdict previously has been described. The devastating impact that possession and use of the undisclosed *Rosario* material by reasonably skilled counsel would have had on Avitto's credibility was incalculable. Such counsel easily would have unraveled Avitto's false testimony about his "success" in a drug program he had been tossed out of three days earlier. This would have exposed the prosecution's implication that Avitto lacked a motive to seek consideration because his case was effectively over months before he decided to cooperate as the disingenuous nonsense it was. Armed with the transcript, reasonably skilled counsel would have proved—with Avitto's own words—that as recently as three days before testified, he exploited his cooperation in an effort to keep himself out of jail.

E. The Court Must Grant Giuca's Motion Because the People Knowingly or Recklessly Presented Inaccurate Testimony From Avitto Which Satisfies the Reasonable Possibility Standard

1. *The Reasonable Possibility Standard Applies When a Prosecutor Knowingly or Recklessly Presented False or Misleading Testimony*

Where a defendant can demonstrate that the prosecutor presented, or failed to correct, false or misleading testimony or argument, reversal is required unless there is no reasonable possibility that the inaccuracy contributed to the conviction. *People v. Colon,* 13 N.Y.3d 343, 349 (2009). This is also true where a prosecutor allows a witness to "mischaracterize" facts or allows a witness to give the jury a "false

impression." *People v. Novoa,* 70 N.Y.2d 490, 497-498 (1987); *People v. Vielman,* 31 A.D.3d 674 (2nd Dept. 2006). If the prosecutor has actual knowledge of the false or misleading testimony, reversal is "virtually automatic." *United States v. Wallach,* 935 F.2d 445, 456 (2nd Cir. 1991). The same standard applies where the prosecutor purportedly lacked actual knowledge of the false or misleading testimony, but she should have known about it and failed to correct it. *People v. Witkowski,* 19 N.Y.2d 839 (1967); *People v. Robertson,* 12 N.Y.2d 355 (1963).

2. *The Prosecution Knew or Should Have Known That Avitto Gave Inaccurate Testimony*

Avitto testified that he did not seek, expect or receive consideration in exchange for his testimony. Tr. 785-786, 797, 804, 814. He pleaded guilty months before he cooperated and he was "doing good;" "things were going well" in the drug program to which he had been "sentenced." Tr. 768, 784, 797. His own case "had nothing to do" with his decision to cooperate. Tr. 804, 806, 814. ADA Nicolazzi's final statement/leading question of Avitto perfectly summarized the misleading impression given to the jury: his case was "over" in February 2005, and thus his June decision to cooperate had no spatial or temporal relationship to his own legal problems:

> Q: Just lastly, you were asked questions about, well, when you reached out to the police, that was because you left the program and you said no. At the time you were first interviewed and you spoke

with the police about this case, had it already been months since you had taken that disposition about the drug program?

A: Correct.

Tr. 814.

On cross-examination, Avitto allowed that his sentence was conditional with a potential prison term. He said that he left his program on June 9 but returned to court on June 13. Tr. 786-787, 799-800. ADA Nicolazzi quickly sealed the small crack counsel opened up by eliciting testimony from Avitto that he simply returned to court on his own, even though she knew that this was inaccurate. Nicolazzi Aff., ¶11. Under her leading questioning, Avitto described his return:

Q: The first time you left the program [June 9], did they have to come find you, or did you contact your counselor [Sean Ryan] on your own after you left?[12]

A: I went to Sean Ryan's office. I contacted him on my own. And then we walked over to the 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 to Justice Marrus].

A: Not this judge. [Indicating to Justice Marrus]. The judge of my case and I guess Sean Ryan had a talk and he got me another shot.

[12] This misleading question was emblematic of the prosecution's concealment of any evidence which suggested that Avitto sought or received consideration. ADA Nicolazzi restricted his answer to two possibilities (either "they" came to look for him or he "responsibly" contacted Ryan) when she knew that neither of these "choices" was accurate since Avitto essentially threw himself at law enforcement in order to cooperate against Giuca almost immediately after his June 9 violation.

Tr. 812 (emphasis added).

Avitto's implication that his June 13 "voluntary" return to court merely involved contacting Sean Ryan and returning to court with him, where Ryan "got him another shot" in the presence of "the DA" grossly mischaracterized the truth. *Novoa,* 70 N.Y.2d at 497. He left out that the predicate for his return was the prospect of a lengthy prison sentence, which led him to quickly volunteer to become a cooperating witness on a murder case for the same prosecutor who thereafter appeared on his case and immediately requested a bench conference which resulted in his release.[13] With the acquiescence of "eyewitness" ADA Nicolazzi, Avitto twisted or secreted every fact—including his crafty substitution of "the DA"[14] in place of ADA Nicolazzi—which would have undermined the prosecutor's false premise that he testified only to "do the right thing." Tr. 1023.

It was doubtful that Avitto made the decision to deceive the jury about the circumstances surrounding his return to court, since ADA Nicolazzi knew the truth about it. Nicolazzi Aff., ¶11. More likely was that the prosecutor and witness

[13] Avitto misled the jury when he testified that he did not "immediately" contact the police after his Thursday, June 9 violation, even though by Monday, June 13, a warrant had been issued for his arrest, he had called the police offering help with the Fisher case, he had met Detective Byrnes and ADA Nicolazzi, he had become a cooperating witness and he had been released after she personally appeared on his case. Tr. 810.

[14] Although "the DA" literally was present, "that a statement standing alone is factually correct does not mean that it cannot mislead based on the natural and reasonable inferences it invites." Technically accurate questions may also be phrased "so as to reinforce" a false impression. *Jenkins v. Artuz,* 294 F.3d 284, 294-295 (2nd Cir. 2002). Here, Avitto deliberately concealed ADA Nicolazzi's presence from the jury.

discussed his expected testimony about it at some point during their four prep sessions. Tr. 785.

ADA Nicolazzi's sworn admission that on June 13 she met Avitto and appeared on his case later that day combined with her misleading question about his return to court provided damning and seemingly conclusive proof of her complicity in the subterfuge.[15] Nicolazzi Aff., ¶11; Exhibit F; Tr. 812. That she was acutely aware of Avitto's duplicity and shared his intent to mislead the jury that his release was unrelated to his status as a witness in the Fisher case was evidenced by her emphasis on the fact that Justice Marrus was not involved in Avitto's June 13 release, even after Avitto already had testified that he was not.

ADA Nicolazzi also must have (or should have) known that she elicited false testimony from Avitto that he was "doing good" in a drug program he had been thrown out of days earlier. Tr. 784; *see also*, Tr. 797 (Avitto reaffirmed on cross-examination that "things were going well for him" in his program). In any event, it was the People's responsibility to correct this false testimony. Exhibits J, K; *see, People v. Steadman*, 82 N.Y.2d 1, 8 (1993) (knowledge imputed to trial prosecutor).

[15] The People's inaccurate exploitation of evidence extended well beyond Avitto. Other examples included the misrepresentation of cell phone records, the introduction of false or misleading testimony from Albert Cleary and Angel DiPietro (who since has been hired as a Kings County Assistant District Attorney), the misleading use of Cleary's exculpatory polygraph, and their conscious avoidance of Argyle Road witnesses whose testimony they knew rendered Giuca's purported admissions demonstrably false. *See*, Petition for Review, pp. 9, 12-16, 28, 48-50, 52, 60-61, 66-69, a copy of which is annexed hereto as Exhibit P.

The ease with which ADA Nicolazzi argued the absolute truth of what she must have known was patently false was nothing short of alarming. She told the jury that there was "no evidence" that Avitto was "willing to make this up and say anything because he's trying to get a deal;" that if he had received consideration, "there would be nothing to hide about that," even though she hid *everything* "about that." Tr. 1020-1021; *cf.* Tr. 928-931; Exhibit F. She described Avitto as "very honest and open about problems and his criminal past," and someone who "freely admitted" things, even though she assuredly knew that he misrepresented the circumstances surrounding his cooperation and his dreadful performance in a drug program. Tr. 1011.

She confidently engaged in false argument designed to convince the jury that Avitto had no reason to seek assistance from the People:

> First of all, there is no evidence of that, just like there is almost no evidence at all of almost anything [counsel] told you. However, first of all, you know from Avitto's testimony on cross that **every time Avitto had a problem with drug use or with his program and he told you he did leave on his own, that it was he, who contacted his counselor right away and said, I relapsed or I left the program**...Ladies and gentlemen, if there is any questions of any portion of the testimony, ask to have it read back. **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] this man with a long history...it's not surprising that a judge would choose to give him multiple chances when **he was showing himself to still be acting responsibly**...

Tr. 1020-1021 (emphasis added).

She knew that Avitto did not "responsibly self-report" his June 13 and September 19 violations; on both occasions he leveraged his status as a cooperating witness after his ***irresponsible*** conduct placed himself in legal jeopardy. However, ADA Nicolazzi had *carte blanche* to exploit Avitto's misleading testimony because Giuca was powerless to stop her because of his complete ignorance of the evidence which would have prevented her false argument. *See,* Nicolazzi Aff., ¶11; Exhibit F; Exhibit J ("On September 19, 2005 case manager Sean Ryan was contacted by Kingsboro and informed that [Avitto] was being discharged"); Exhibit K (The court criticized Avitto's irresponsible behavior: "Mr. Avitto, I don't quite understand what is going on here. Now listen to me, just listen to what I am saying. The letter, [Exhibit J] you can see how long this is. It's all underlined. You know what that means? That means it's not good...There aren't too many more times that I can keep giving you another opportunity. 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." After Avitto cited his upcoming testimony against Giuca as an excuse for the violation, the court begrudgingly released him: "All right, well **apparently** we're going to give you another opportunity...") (emphasis added).

ADA Nicolazzi vouched for her own honesty by assuring the jury that "when somebody was given consideration you heard about that right from the start." Tr. 1021-1022. She pounded the false premise that Avitto was responsible and succeeding in his drug program as she implored the jury to trust her that Avitto's only motive for cooperating was his decency:

> You know from his testimony that John Avitto had pleaded guilty months before he ever contacted the police. And if the judge decided he ultimately failed that program that he was facing [3 ½ 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,[16] but that makes absolutely no sense and is not corroborated. There is absolutely no evidence, no evidence at all...you know from [Avitto] that he came to the police with this information on his own. This is a man who had made mistakes over and overall his life. And for once, he tried to do something right and for that [counsel] wants you to condemn him...[Counsel] can be as loud and dramatic as he wants with all of his wild speculation that he threw out before you; that was based on no evidence that is anywhere in the record, no evidence to corroborate anything he said to you, so ladies and gentlemen even if you scream and yell, it [doesn't] make it so

Tr. 1022-1023.

[16] The blatantly misleading implication that the jury had to believe that the court was part of a conspiracy to frame Giuca in order to conclude that Avitto sought or received consideration in exchange for his testimony, without more, violated his right to due process. *See, People v. Forbes*, 111 A.D.3d 1154 (3rd Dept. 2013); *People v. Casanova*, 119 A.D.3d 976 (3rd Dept. 2014). Moreover, ADA Nicolazzi's taunting of Giuca's counsel in her "conspiracy argument" was beyond the pale: "the DA" in her hypothetical conspiracy was *herself* and she *did* withhold evidence of her personal intervention into Avitto's case immediately after he started cooperating against Giuca.

Put simply, ADA Nicolazzi made a mockery of Giuca's right to due process by eliciting misleading testimony from Avitto, vouching for its accuracy and depriving the defense of the fair opportunity to challenge it with compelling evidence to the contrary. At a minimum, her reckless disregard for the truth severely prejudiced Giuca's right to a fair trial.

3. *The People's Response Did Not Create a Question of Fact On Whether They Knowingly or Recklessly Presented Inaccurate Testimony*

The People's only response to Giuca's false or misleading testimony claim was ADA Nicolazzi's statement that she believed Avitto did not testify falsely. Nicolazzi Aff., ¶13. This astonishing claim[17] cannot serve as the basis for ordering a hearing because it is nothing more than opinion which did not create an alternative explanation to the unquestionable documentary proof which conclusively established that the prosecution should have known Avitto gave inaccurate testimony which they failed to correct. *Novoa,* 70 N.Y.2d at 497-498; *Witkowski,* 19 N.Y.2d at 839; *Robertson*, 12 N.Y.2d at 360.

[17] ADA Nicolazzi's sworn admission that she was personally involved in the events of June 13 made her sworn claim that she believed Avitto testified truthfully unworthy of belief. She knew that Avitto's testimony which emphasized his "responsible" behavior and the assistance of Sean Ryan as the impetus for his "voluntary" return to court was inaccurate. She further knew that his concealment of the circumstances surrounding his cooperation, including the suppression of her own important role in his "voluntary" return to court and release, was misleading. Nicolazzi Aff., ¶¶9-11; *cf.* ¶13; *see also,* Tr. 812.

4. *Vacatur is Required Under the Reasonable Possibility Standard*

Giuca's conviction must be vacated because Avitto's inaccurate testimony and the prosecutor's vouching for it must have contributed to the conviction. At the least, it satisfies the standard for reversal because it might have. *See* Opening Mem., pp. 14-22, 41-42. The prosecution's false depiction of Avitto as an honest man with no motive to curry favor with the prosecution was built upon a combination of undisclosed and misleading circumstances which deprived the jury from getting the full picture regarding Avitto's credibility. Reversal is "virtually automatic" in these circumstances. *Wallach*, 935 F.2d at 456 (2nd Cir. 1991).

It is easy to see why the People did not correct Avitto's inaccurate testimony: had they done so, they would have had to acknowledge that their crucial witness lied and deliberately misled the jury, which would have obliterated his and ADA Nicolazzi's credibility, and sunk their case. *See, Colon,* 13 N.Y.3d at 350 ("the false testimony elicited by the prosecutor regarding the benefits extended may well have impacted the jury's perception of the [witness'] credibility"); *Su v. Filion,* 335 F.3d 119, 129 n.6 (2nd Cir. 2003) (the fact that the witness lied under oath is in and of itself a relevant factor in determining prejudice, and it would be devastating to the [prosecution] if the jury learned that the prosecutor knowingly or recklessly elicited the false testimony).

People v. Colon is on point. There, a witness claimed that leniency on a misdemeanor drug charge was the "only benefit" he received in exchange for his testimony. He testified that the homicide prosecutor "had nothing to do with" the favorable disposition of a subsequent felony drug case. In summation, the prosecutor re-affirmed that she had nothing to do with the witness' felony case, even though she had not disclosed (among other things) that she had appeared at a calendar call and conveyed a pre-approved plea offer.

The Court of Appeals reversed Colon's double-murder conviction, holding that the prosecutor's failure to correct the witness' misleading testimony regarding benefits he received (including her appearance on the felony case), which she "repeated and emphasized" in summation, prejudiced Colon's right to a fair trial:

> the false testimony elicited by the prosecutor regarding the benefits extended may well have impacted the jury's perception of [the witness'] credibility. By their very nature, benefits conferred on a witness by a prosecutor provide a basis for the jury to question the veracity of a witness on the theory that the witness may be biased in favor of the People. For this reason, it is important that witnesses provide truthful testimony when questioned about the receipt of such benefits, and the People must be vigilant to avoid misleading the court or jury. Rather than correct the inaccurate testimony, the prosecutor here exacerbated the problem during her closing comments

13 N.Y.3d at 349-350.

ADA Nicolazzi's actions were more prejudicial to Giuca than the prosecutor's in *Colon*. Similar to the witness there, Avitto testified that his cooperation and the Fisher prosecution had nothing to do with his release. Tr. 804. Unlike the regularly scheduled court appearance in *Colon*, Avitto's June 13 appearance was hastily arranged when he "voluntarily" returned to court after he became ADA Nicolazzi's cooperating witness. Although the only issue before the court was his liberty in connection with a warrant on a burglary case, the homicide prosecutor with whom Avitto had just started cooperating quarterbacked proceedings where the critical issue occurred off the record at her request.

Awareness of the true circumstances surrounding the circumstances of the June 13 appearance, rather than Avitto's revisionist history, would have had a greater impact on the jury's assessment of Avitto's credibility than the Colon prosecutor's appearance, especially since Colon's jury at least was informed that the witness received some consideration in exchange for his testimony.

ADA Nicolazzi withheld *all* evidence consistent with possible benefits Avitto sought or received before she elicited misleading testimony from him regarding his motive for testifying against Giuca. Thus, the resulting prejudice to Giuca was greater than in *Colon* because unlike Colon, Giuca lacked concrete evidence to support his argument that Avitto sought consideration and to attack the claim that Avitto's only motive for cooperating was "for once to do something right." Tr. 1022.

Moreover, after burying specifically requested evidence which supported the defense argument that Avitto sought or received consideration, ADA Nicolazzi gallingly ridiculed counsel for his "wild speculation" which "ma[de] no sense," and for which there was "absolutely no evidence" and "no corroboration." Tr. 1023.

Because the People were not "vigilant" to avoid misleading the jury about evidence which suggested that Avitto sought, expected and/or received a benefit, and then "exacerbated the problem" in summation, *Colon* compels vacatur of Giuca's conviction. 13 N.Y.3d at 350; s*ee also, People v. Vielman,* 31 A.D.3d 674, 675 (2nd Dept. 2006) (reversal where prosecutor knew that her argument rested on a false premise which was "blatant attempt to mislead the jury").

In the final analysis, it does not matter whether ADA Nicolazzi intended to elicit inaccurate testimony or to mislead the jury. The point is that the jury was misled and Giuca was prejudiced by it. *Steadman,* 82 N.Y.2d at 8 ("it does not matter whether the trial assistant [was] generally aware...or not. A prosecutor [has an] obligation to correct false testimony given by prosecution witnesses..."); *Conlan,* 146 A.D.2d at 330 (reversal where prosecutor "whether unwittingly or not, misled the jury by allowing [the witness] to testify untruthfully"); *People v. Wallert,* 98 A.D.2d 47 (1st Dept. 1983) (reversal required where prosecutor "argu[ed] that which wasn't"); *Jenkins v. Artuz,* 294 F.3d 284, 293-294 (reversal of murder

conviction where prosecutor's summation "placed the [People's] credibility behind [the] untruthful testimony, which "sharpened the prejudice" to defendant).

F. The Court Must Grant Giuca's Motion Under C.P.L. § 440.10(1)(b) Because of the Unquestionable Documentary Proof That Giuca Was Provided With Fraudulent Evidence

Giuca has presented compelling documentary proof that the September 20 Letter was a fraudulent document which erased evidence contradicting the People's claim that Avitto lacked a motive to testify favorably for them, including proof of his ejection from his drug program just days before he testified falsely that he was succeeding in it.

It is undisputed that the September 20 Letter was not drafted for Avitto's case, but instead was created shortly after his unanticipated mid-trial September 19 violation and before his September 22 testimony in order to triage his credibility as a witness against Giuca. *See,* Bederow Aff., ¶¶70-79; Exhibits J-M; Avitto Calendar Sheet (annexed hereto as Exhibit Q) (first entry after September 19 is October 6); October 6, 2005 Transcript (annexed hereto as Exhibit R) (no reference to September 20 Letter; Sean Ryan stated that since September 19 Avitto had been compliant; court joked about cigarettes, which was subject matter of September 19 appearance); November 4, 2005 Violation Letter (annexed hereto as Exhibit S) (reference made to September 19 court appearance and violation and October 6 appearance; form,

language and grammar consistent with September 19 Letter; no reference to September 20).

On September 21, ADA Nicolazzi provided the defense with documents pertaining to Avitto's cross-examination which were not reports or notes from her several meetings with Avitto. *See,* Bederow Aff., ¶34; Tr. 744-747 (Counsel stated he knew nothing about Avitto other than "what I've read in the documentation I gathered, what I got from Ms. Nicolazzi"). The People have not revealed what documents ADA Nicolazzi turned over the day before Avitto testified. Their point that ADA Nicolazzi provided the defense with a witness list before trial so it could review all of Avitto's records failed to account for the fact that Avitto's September 19 violation occurred almost one week after Giuca's trial started and two days before Avitto was scheduled to testify. Eisner Aff., ¶56.

Trial counsel's failure to cross-examine Avitto about the legitimate events of September 19 (Exhibit J) and his examination on "evidence" which existed exclusively in the September 20 Letter (Exhibit L) proved that Giuca was given the latter:

> Exhibit J: On August 24, case manager Sean Ryan was contacted by the **defendant** who admitted to relapsing on 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, 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 (emphasis added)

Exhibit L: On August 24, case manager Sean Ryan was contacted by the **client** who admitted relapsing on cocaine. **Do to this** the defendant was placed in St. John's Detox and **targeted for Seafield** Rehab. The **client** entered into St. John's Detox but **left against request of EAC-LINK and did not make intake at Seafield** Rehab (emphasis added)

Cross-examination of Avitto (Tr. 803):

Q: You enter into Saint John's detox, but leave against the request of EAC-LINK, and did not go to **Seafield** Rehab; isn't that what happened, sir? (emphasis added)

The People's response did not create an issue of fact on the legitimacy of the September 20 Letter. They incorrectly claimed that ADA Nicolazzi denied any knowledge of the September 20 Letter, when she swore only that she did not "create or cause [it] to be created." Nicolazzi Aff., ¶12 *cf.* Eisner Aff., ¶57.

In any event, the prosecution's knowledge that the evidence was fabricated is not required for a successful fraudulent evidence claim under C.P.L. § 440.10(1)(b). *People v. Seeber*, 94 A.D.3d 1335, 1338 (3rd Dept. 2012) (reversal of murder conviction where the defense was given a forensic report which was "at the very least, misleading" even though the prosecution was unaware of the inaccuracy).

The People failed to include the sworn statement of Sean Ryan, the ostensible author of the irreconcilable September 19 and 20 Letters and the only person

competent to refute the claim that the September 20 Letter was fraudulent evidence. One prosecutor's hearsay summary of a telephonic interview during which Ryan purportedly claimed that the signature on a copy of the September 20 Letter "appeared" to be his, but without an explanation of its contents or why he created it,[18] was meaningless to the determination of the fraudulent evidence claim. Eisner Affirm., ¶55; *see also,* Exhibit N. Although the possible forgery of the September 20 Letter presented a fascinating question, the relevant issue to the determination of Giuca's claim concerns the document's fraudulent contents, not its author.

Accordingly, the People have not contradicted Giuca's compelling documentary evidence that the September 20 Letter was fraudulent evidence and have not raised a question of fact which warrants a hearing before the Court rules in Giuca's favor. *Wright,* 86 N.Y.2d at 595-596; *Gruden,* 42 N.Y.2d at 216.

[18] Our handwriting expert has opined that Ryan did not sign both the September 19 and 20 Letters. Exhibit M. If Ryan executed both, he perpetrated a fraud on the court. He was present in court with Avitto on September 6 and 19, but in the September 20 Letter, "Ryan" informed the court that he did not know Avitto's whereabouts since he left St. John's Detoxification Center on September 2. Exhibits J, K, L. The September 20 Letter also deleted reference to Avitto's upcoming court date, referred to him as a "client" rather than "defendant," was filled with typos, and was co-signed by a different supervisor whose name was misspelled. Ryan had no explanation why he would have created the September 20 Letter. Opening Mem., p. 43, n.13.

CONCLUSION

John Giuca's motion to vacate his conviction should be granted on the moving papers pursuant to C.P.L. § 440.30(3). Alternatively, Giuca has raised questions of fact, which combined with the People's consent, at a minimum, requires a hearing on all of his claims.

Respectfully submitted,

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