

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,	:	
 Appellee,	:	NOTICE OF MOTION FOR A CERTIFICATE GRANTING LEAVE TO APPEAL DENIAL OF
 -against-	:	C.P.L. § 440.10 MOTION
 JOHN GIUCA,	:	Ind. No. 8166/2004 (Kings Co.)
 Defendant-Appellant,	:	
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PLEASE TAKE NOTICE, that upon the annexed affirmation of MARK A. BEDEROW, attorney for the defendant-appellant herein, John Giuca, and all proceedings had herein to date, the undersigned on behalf of Giuca will move this Court on July 29, 2016 at 9:30 a.m., or as soon thereafter as counsel may be heard, at the Appellate Division Courthouse, 45 Monroe Place, Brooklyn, New York, for an order, pursuant to C.P.L. §§ 450.15, 460.15 and 22 N.Y.C.R.R. § 670.12(b), issuing Giuca a certificate granting him leave to appeal the judgment and order of the Supreme Court, Kings County (Chun, J.), dated June 9, 2016, denying his motion, under C.P.L. § 440.10, to vacate the judgment of conviction, and granting such other and further relief as would be just and proper under the circumstances.

The name and address of the applicant is John Giuca, c/o Law Office of Mark A. Bederow, P.C., 260 Madison Avenue, New York, New York 10016.

The name and address of the District Attorney is Kenneth P. Thompson, District Attorney, Kings County, 350 Jay Street, Brooklyn, New York 11201.

The indictment number is 8166/2004 (Kings County).

Among the questions of law which ought to be reviewed include the following:

- I. Whether under *Giglio v. United States*, 405 U.S. 150 (1972), *People v. Taylor*, 26 N.Y.3d 217 (2015), *People v. Colon*, 13 N.Y.3d 343 (2009) and *People v. Cwikla*, 46 N.Y.2d 434 (1979), a *quid pro quo* is necessary or whether the prosecution is obligated to disclose evidence it possesses from which a reasonable jury could conclude even in the absence of a formal agreement that a witness had a possible motive, bias or interest to falsely accuse a defendant?
- II. Whether under *Napue v. Illinois*, 360 U.S. 264 (1959) and *People v. Colon*, 13 N.Y.3d 343 (2009), the prosecution has a due process obligation to correct the testimony of an uncorroborated witness that created a misimpression regarding the witness' motive to testify by omitting the trial prosecutor's intervention into the witness' own case, where the trial prosecutor knew or should have known that the witness' testimony and her argument misled the jury about the circumstances surrounding the witness' cooperation? (The court below answered the question in the negative)

- III. Whether the prosecution violates a defendant's right to due process under *Giglio v. United States*, 405 U.S. 150 (1972) and *People v. Garrett*, 23 N.Y.3d 878 (2014), where it consciously avoids knowledge of specifically requested evidence that demonstrated an uncorroborated witness had a motive to testify falsely and was dishonest, and this evidence was contrary to the trial prosecutor's argument that the witness did not have a motive to testify falsely against the defendant and was truthful? (The court below answered the question in the negative).
- IV. Whether previously undisclosed records of an uncorroborated witness that document his history of severe and persistent mental illness, including evidence of his possibly impaired capacity to perceive and recall, and contain substantial evidence of his motive to falsely accuse the defendant, constitute "newly discovered evidence" under C.P.L. § 440.10(1)(g)? (The court below answered the question in the negative).

No personal appearance is necessary to answer this motion. Appellee is required to serve upon undersigned counsel, not later than 15 days after service of this application, answering papers or a statement that there is no opposition to this application.

No prior application for the relief requested herein has been made.

A copy of the decision and order denying the defendant-appellant's motion is included in the accompanying appendix.

Yours, etc.,



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Attorney for John Giuca
Defendant-Appellant

DATED: New York, New York
July 5, 2016

TO: Clerk of the Court
Appellate Division, Second Department

Honorable Kenneth P. Thompson
District Attorney, Kings County
(Attn: Diane Eisner, Assistant District Attorney)

John Giuca

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

Appellee,

: AFFIRMATION

-against- :

JOHN GIUCA,

: Ind. No. 8166/2004
(Kings Co.)

Defendant-Appellant :

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MARK A. BEDEROW, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms, under penalties of perjury, that the following statements are true:

1. I am the attorney for defendant-appellant, JOHN GIUCA, and am familiar with the facts and circumstances herein. I make this affirmation in support of his annexed Notice of Motion, pursuant to Criminal Procedure Law (“C.P.L.”) §§ 450.15 and 460.15 and N.Y.C.R.R. § 670.12(b), for a certificate granting him leave

to appeal the order of the Supreme Court, Kings County (Chun, J.), dated June 9, 2016, denying Giuca's C.P.L. § 440.10 motion to vacate his conviction.

2. This application is timely in that it is made within 30 days of service on Giuca of a notice of entry dated June 13, 2016 (A. 1-3, 24).¹

SUMMARY OF MOTION

3. This motion raises important questions regarding a prosecutor's federal and state due process obligations to disclose favorable impeachment evidence under *Giglio v. United States*, 405 U.S. 150 (1972), *People v. Taylor*, 26 N.Y.2d 217 (2015), *People v. Colon*, 13 N.Y.3d 343 (2009), *People v. Cwikla*, 46 N.Y.2d 434 (1979) and *People v. Garrett*, 23 N.Y.3d 878 (2014), and to ensure that the jury is not misled by inaccurate testimony and argument regarding the credibility of a jailhouse informant under *Napue v. Illinois*, 360 U.S. 264 (1959) and *Colon*.

4. Giuca's motion should have been granted because under the applicable materiality standards, the nondisclosure of specifically requested *Giglio* material is "seldom, if ever" excusable. *People v. Vilardi*, 76 N.Y.2d 67, 77 (1990); *see also*, *Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995) (federal standard is whether

¹ This application is accompanied by an appendix containing the decision and order of the lower court, motion papers and other submissions made in the court below, the trial transcript, the hearing transcript and the hearing exhibits relevant to this application. Upon request, a complete set of all of the hearing exhibits, which total in the hundreds of pages, will be made available to the Court. Materials reproduced in the appendix, trial transcript and hearing transcript will be referred to by "A.," "T.," and "H." followed by the page number, respectively. The lower court's written decision is contained in pages 4-24 of the appendix.

cumulative impact of suppressed material undermines confidence in verdict). Similarly, reversal is “virtually automatic” where the prosecution knowingly or recklessly elicited or failed to correct inaccurate testimony. *Napue*, 360 U.S. at 269; *United States v. Wallach*, 935 F.2d 445, 456 (2nd Cir. 1991); *Colon*, 13 N.Y.3d at 349-50 (*Vilardi* materiality standard applicable to use of inaccurate testimony). *See also, People v. Tankleff*, 49 A.D.3d 160 (2nd Dept. 2007) (newly discovered evidence standard requires that evidence “probably” would change the result of a new trial).

5. Giuca’s trial was extraordinary. He and Antonio Russo were tried together in front of separate juries for the murder of Mark Fisher. John Avitto testified against Giuca only. In essence, the People tried two distinct cases against Giuca, abandoning the first one after witnesses Albert Cleary and Lauren Calciano self-destructed in favor of a second one that embraced a new theory supported exclusively by the uncorroborated testimony of Avitto, a mentally ill, lifelong drug addict and career criminal, who was a jailhouse informant with a documented history of lying to benefit himself.

6. In the “first case,” the People alleged Russo killed Fisher by himself across the street from Cleary’s home after Giuca gave him a gun. When this theory fell apart because of Cleary’s and Calciano’s poor credibility, the prosecution called Avitto, who testified Giuca admitted to him that he pistol-whipped Fisher before someone else (presumably Russo) took the gun from him and shot Fisher.

7. This risky late-trial abandonment of the “first case” made Avitto’s credibility the critical issue for the jury’s consideration. In order to pull this off, the People misrepresented Avitto’s reason for testifying by concealing favorable impeachment evidence and exploiting his inaccurate testimony. These tactics allowed the prosecution to keep the jury ignorant about Avitto’s self-interested motive for testifying against Giuca while giving it the false impression Avitto was a credible, truth-telling Good Samaritan.

8. The defense proved at the hearing by a preponderance of the evidence that, among other things, the People withheld from the defense:

- a. Avitto’s documented history of lying in order to benefit himself
- b. Avitto’s documented history of serious and persistent mental illness, including a reported history of hallucinations, mania, mind control and impaired judgment
- c. Evidence that Avitto contacted the police to offer information against Giuca *immediately* after he exposed himself to a lengthy prison sentence by absconding from a residential treatment program and using cocaine
- d. The trial prosecutor’s personal appearance on Avitto’s return on warrant court appearance immediately after he started cooperating with her case against Giuca, and rather than receive a prison sentence pursuant his plea agreement, Avitto was released without bail after the trial prosecutor privately notified the court he provided information against Giuca
- e. DA notes that confirmed Avitto turned himself into the DA’s Office with information against Giuca, after which he was released without bail

9. The prosecution's suppression of specifically requested *Giglio* material that would have exposed Avitto's true motive for cooperating against Giuca was particularly egregious because trial prosecutor Anna-Sigga Nicolazzi also deliberately "erased" her own relevant pre-trial contacts with Avitto by eliciting misleading testimony from him before she faulted Giuca's counsel for failing to produce the very evidence she withheld.

10. The lower court denied Giuca's motion, concluding that there was no *Giglio* violation or inaccurate testimony from Avitto because there was no *quid pro quo* with the prosecution in exchange for his testimony. The court ruled the People's nondisclosure of favorable impeachment material contained within Avitto's psychiatric and drug program records maintained by EAC-LINK ("EAC") did not violate *Giglio* because the People did not possess the records. The court held these records were not newly discovered evidence because they were merely impeaching. Finally, the court held that even if the defense established any of these claims, there was no reasonable possibility the verdict might have been more favorable to Giuca if the jury knew the truth about Avitto's credibility.

11. Giuca's case warrants appellate review because the prosecution's "second case" virtually assured that his conviction was secured through the uncorroborated testimony of a mentally unstable jailhouse informant with a demonstrated history of lying to help himself. The evidence at the hearing

established that Avitto lied about his reason for testifying against Giuca and, in fact, volunteered to cooperate in this highly-publicized case with “evidence” that easily could have been fabricated from information in the public domain, immediately after he exposed himself to substantial prison time by violating the conditions of his residential mental health and drug addiction program.

12. The risk of an injustice resulting from the use of an unreliable jailhouse informant is well known.² If ever the full disclosure of the circumstances surrounding a witness’ cooperation was necessary, it was in Giuca’s case, where there existed such an inherent danger that the key witness lied. *See People v. Conlan*, 146 A.D.2d 319, 330 (1st Dept. 1989) (“it is certainly not reasonable to believe that a career criminal...would agree to assist the prosecution merely as a sign of good will or because he had taken an aversion to defendant’s boasting in prison”); *Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123-24 (9th Cir.

² Several states, including California, Texas, Illinois and Washington have considered legislation that restricts the use of jailhouse informants because of their inherent unreliability. *See e.g., Los Angeles Times*, July 31, 2011 (“California May Curb Use of Unsupported Jailhouse Informant Testimony”); *Washington Post*, May 8, 2015 (“End the Use of Jailhouse Informants”); *Chicago Tribune*, March 30, 2001 (“House Acts to Restrict Jailhouse Informants”). One prominent federal circuit court judge has called for strict restrictions on the use of jailhouse informants and for standardized and rigorous procedures for *Brady* and *Giglio* compliance. *Washington Post*, July 17, 2015 (“Judge Kozinski On Reforms That Can Help Prevent Prosecutorial Misconduct”). In 2005, the ABA House of Delegates adopted a resolution urging prosecutors to avoid using jailhouse informants without corroboration. *See* www.abanet.org/irr/midyear2005/summary.html. Today, there is a prolific scandal in Orange County, California regarding the use of jailhouse informants and the disclosure of *Giglio* material. *Los Angeles Times*, January 4, 2016 (“‘Failure of Leadership’ at the Orange County DA’s Office Led to Informant Issues, Report Says.”); *see also, Report of the 1989-90 Los Angeles County Grand Jury*.

2001) (jailhouse informant testimony is “fraught with the real peril that proffered testimony will not be truthful, but simply contrived to ‘get’ a target of sufficient interest to induce concessions from the government”).

13. However, the People buttressed a case dependent on Avitto’s uncorroborated testimony by suppressing evidence that Avitto had a motive to curry favor with the prosecution and exploiting Avitto’s misleading testimony in order to give the jury the false impression that Avitto testified solely because of his conscience. Such a perversion of justice leads to the inescapable conclusion that Giuca was deprived of a fair trial and the very real possibility he is actually innocent. In these circumstances, the interests of justice favor granting Giuca leave to appeal.

14. Leave to appeal also should be granted because this case presents significant legal questions, including:

- a. whether under *Giglio*, *Taylor*, *Colon*, and *Cwikla*, a *quid pro quo* is necessary or whether the prosecution is obligated to disclose evidence it possesses from which a reasonable jury could conclude even in the absence of a formal agreement that a witness had a possible motive, bias or interest to falsely accuse a defendant,
- b. whether under *Napue* and *Colon* the prosecution has a due process obligation to correct testimony of an uncorroborated jailhouse informant that created a misimpression regarding his motive to testify by deliberately omitting the trial prosecutor’s intervention into the witness’ own case, where the trial prosecutor knew or should have known that the witness’ testimony and her argument misled the jury about the circumstances surrounding the witness’ cooperation,

- c. whether the prosecution violates a defendant's right to due process under *Giglio* and *Garrett* where it consciously avoids knowledge of specifically requested evidence that demonstrated an uncorroborated witness had a motive to testify falsely and was dishonest, and this evidence was contrary to the prosecutor's argument that the witness did not have a motive to testify falsely against the defendant and was truthful, and
- d. whether previously undisclosed records of an uncorroborated witness that document his history of severe and persistent mental illness, including evidence of his possibly impaired capacity to perceive and recall, and contain substantial evidence of his motive to falsely accuse the defendant, constitute "newly discovered evidence."

PROCEDURAL AND FACTUAL BACKGROUND

The Trial

15. The "first case" against Giuca consisted primarily of his purported confession to Cleary and Calciano. Their testimony regarding the confession was inconsistent and its substance rendered impossible by the statements of several disinterested witnesses who lived in direct proximity to the crime scene.³ No eyewitnesses or forensic evidence linked Giuca to the crime.

³ Neighborhood residents heard a vehicle door open and close at the time of the murder, and seconds after Fisher was shot, one saw a vehicle leave the driveway where Fisher's body was found. One witness heard the voice of a young woman immediately before the shots were fired. H. 302, 305-307 (A. 1111, 1114-16). Rather than call any of these witnesses to testify, the People called a neighbor who simply heard several gunshots. T. 127-37 (A. 1962-72). Angel DiPietro, a young woman who was with Fisher and Cleary all evening, including at Giuca's home shortly before the murder, claimed at the time of the murder she was sleeping at Cleary's home. But DiPietro's roommate told detectives and Ms. Nicolazzi that DiPietro kept changing the time she left Giuca's home. See H. 311-15 (A. 1120-24). A few years later, DiPietro was hired as an

16. In her opening statement, Ms. Nicolazzi alleged Russo killed Fisher by himself after Giuca gave Russo a gun at his request. The prosecutor contended Giuca told his “lifelong friend” Cleary the “full story” about the murder while he “downplayed his role to Calciano.” T. 32-36 (A. 1867-71).

17. Cleary and Calciano testified they were together when Giuca confessed. They were inconsistent on every detail except one: Giuca was *not present* when Fisher was killed. Calciano testified Giuca told them he gave Russo a gun after the latter said he wanted to rob “Albert’s friend.” T. 581 (A. 2416). Cleary testified Giuca was upset at Fisher for “disrespecting” his home by sitting on a table,⁴ so he armed Russo and “basically” ordered him to show Fisher “what was up.” T. 320-21 (A. 2155-56). Calciano refuted Cleary’s account. T. 607-09 (A. 2442-44).

18. Cleary and Calciano both lied to the police for more than one year until they were heavily pressured by law enforcement to cooperate against Giuca. T. 338, 587-88, 604, 661 (A. 2173, 2422-23, 2439, 2496). In addition to their glaring inconsistencies about the same confession, Cleary’s and Calciano’s credibility was severely undermined when they clashed over Cleary’s allegation that Calciano

assistant district attorney by former Brooklyn District Attorney Charles Hynes. *See also*, Petition to Conviction Review Unit, February 1, 2014, at 5-9, 14-16, 48-50, 66-68 (A. 438-42, 447-49, 481-83, 499-501).

⁴ In the grand jury Cleary swore someone other than Giuca criticized Fisher for sitting on the table. Cleary “remembered” it was Giuca when he met with prosecutors the day before he testified. T. 277-78 (2112-13).

removed a gun bag from Giuca's home. Cleary swore he observed Calciano remove it; Calciano swore she did not and that Cleary was lying. T. 331, 589, 604, 628 (A. 2424, 2439, 2463). Thus, the jury knew that at least one of them committed perjury.⁵

19. After Cleary and Calciano imploded, the People turned to their "second case" and called Avitto in support of the new theory that Giuca was directly involved in Fisher's death. H. 525, 636-37, 650 (A. 1334, 1445-46, 1459). Avitto swore that in February 2005, he overheard Giuca tell his father—in the presence of two female relatives—that he had a gun. T. 772-73 (A. 2607-08). He claimed Giuca admitted accompanying Fisher to an ATM⁶ with two others, where Giuca pistol-whipped Fisher before one of the others took the gun from him and shot Fisher.⁷ T. 774-75 (A. 2609-10). No other witnesses corroborated Avitto.

20. Avitto testified that since he last was released from jail (April 28, 2005) he was "doing good" in the drug program he had been sentenced to in February 2005. T. 768, 797, 804 (A. 2603, 2632, 2639). He contacted authorities to cooperate against Giuca "sometime in June," four months after he had "taken that disposition."

⁵ Ms. Nicolazzi knew or should have known beforehand that at least one of these witnesses was going to lie under oath. H. 651-54 (A.1460-63).

⁶ Numerous media accounts reported that Fisher and Russo were at an ATM shortly before Fisher was murdered.

⁷ Ms. Nicolazzi acknowledged Fisher went to the ATM once on October 12, 2003, at 5:23 a.m., with Russo and without Giuca. Fisher was murdered at 6:40 a.m. that morning. Ms. Nicolazzi conceded that the murder could not have occurred at an ATM, as Avitto alleged Giuca told him. H. 476-78, 483 (A. 1285-87, 1292). Nevertheless, three times in her summation, she implied that Fisher went to the ATM a second time before he was killed. T. 1012-14 (A. 2847-49).

His own case “had nothing to do with why I went to the police or DA.” Avitto stated he did not seek, was not promised, and did not receive any consideration in exchange for his cooperation against Giuca. T. 784-86 (A. 2619-21).

21. On cross examination, Avitto admitted he absconded from his program on June 9 and returned to court on June 13, 2005. T. 799-800 (A. 2634-35). He denied calling the police “immediately” after he absconded from his residential program on June 9. T. 810. (A. 2645) *cf.* EAC Progress Note, June 13, 2005 (A. 2955-56) (Ms. Nicolazzi told Avitto’s EAC counselor that Avitto “contacted detectives on Thursday, June 9, 2005 stating he had information on [Giuca’s case]”). Avitto denied using cocaine before he appeared in court on June 13, 2005. T. 799-801 (A. 2634-36) *cf.* EAC Progress Note, June 15, 2005 (A. 2958) (Avitto admitted to his EAC counselor that he used cocaine on June 9 and 12, 2005).

22. In response to Ms. Nicolazzi’s leading questions on re-direct, Avitto testified that on June 13, he called EAC counselor Sean Ryan before they walked to court, where an unnamed “DA” stood on his case and Avitto “guessed” Ryan got him “another shot.” T. 812 (A. 2647). Ms. Nicolazzi had Avitto reiterate that Justice Marrus was not the judge who released him even though Avitto already had made it clear that it was a different judge in his preceding answer. *Id.* In response to her final (leading) question, Avitto agreed with Ms. Nicolazzi’s statement that his

own legal problem was unrelated to his decision to volunteer his cooperation against Giuca four months after he entered a drug program. T. 814 (A. 2649).

23. Avitto did not tell the jury any of the following actual facts before he went to court on June 13: (a) after he absconded from Samaritan Village on June 9, he used cocaine, (b) he called detectives on June 9 seeking to cooperate against Giuca, (c) he knew a warrant was issued for his arrest on June 10, (d) he used cocaine on June 12, (e) he met Ms. Nicolazzi on June 13 and started cooperating against Giuca, (f) Ms. Nicolazzi took him to court, (g) Ms. Nicolazzi was the unnamed “DA” who appeared on his case, and (h) that she spoke to the judge at the bench before he was released. Avitto also did not tell the jury that he was expelled from rehab three days before he testified he was “doing good” in his program or that he misled it about his mental illness and reason he took Seroquel. *See* Court Transcript, September 19, 2005 (A. 173-76); T. 785, 805-07 (A. 2620, 2640-42). Ms. Nicolazzi did not correct any of Avitto’s testimony.

24. After Avitto testified, in addition to his request for a “benefit charge” to the jury, Giuca’s counsel made a specific demand for evidence that Avitto sought or received a benefit in exchange for testifying against Giuca. Ms. Nicolazzi stated

there was “absolutely no evidence” Avitto received consideration. She disclosed nothing.⁸ T. 928-31 (A. 2763-66).

25. In her summation, Ms. Nicolazzi dismissed Giuca’s formerly “full story” to Cleary as “bits and pieces” that “partially danced around the truth.” T. 1008, 1011 (A. 2843, 2846). In contrast, she emphasized the accuracy of the “truthful,” “no holds barred” admission Giuca made to his “confidante” Avitto. T. 1008 (A. 2843). “Common sense” compelled the jury to credit Avitto’s “honest” testimony that Giuca actively participated in Fisher’s murder. Whereas Ms. Nicolazzi alleged in her opening that Russo returned the gun to Giuca and said “it’s done,” she now mused aloud whether Giuca shot Fisher. T. 1010, 1016-19 (A. 2845, 2851-54) *cf.* T. 36 (A. 1871). The prosecutor abandoned her “first case” by reasoning “it didn’t even make sense, if you think about it” that Russo could have killed Fisher by himself. Instead, the “second case” and Giuca’s direct role in the crime “made much more sense, just like Giuca admitted to Avitto.” Tr. 1016-17 (A. 2851-52).

26. Acutely aware that her eleventh-hour, “all in” commitment to the “second case” made the jailhouse informant’s credibility the most important consideration for the jury, Ms. Nicolazzi assured the jury it could “trust” Avitto, who

⁸ At a minimum, Ms. Nicolazzi should have informed Justice Marrus *in camera* about the circumstances surrounding Avitto’s cooperation. *See People v. Fuentes*, 12 N.Y.3d 259 (2009); *People v. Andre W.*, 44 N.Y.2d 179, 185 (1978) (“when there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful”).

was “very honest about his problems and criminal past. He freely admitted things that he isn’t proud of.” T. 1010-11 (A. 2845-46). She ridiculed defense “speculation” that Avitto was “willing to say anything because he is trying to help himself,” as uncorroborated nonsense requiring belief in a conspiracy involving the court, prosecution and police. She averred there was “absolutely no evidence” Avitto cooperated in order to help himself. T. 1020-23 (A. 2855-58). It was “there for [the jury] to see in black and white:” Avitto was released by the court because he responsibly self-reported violations to his EAC counselor. Ms. Nicolazzi praised Avitto’s cooperation as proof that “for once, he tried to do something right” and had the temerity to blame Giuca’s counsel for encouraging the jury to “condemn him.” T. 1022-23 (A. 2857-58).

The C.P.L. 440.10 Proceedings

27. The witnesses at the evidentiary hearing were John Avitto,⁹ retired detective Thomas Byrnes, ADA David Kelly, ADA Anna-Sigga Nicolazzi, trial counsel Samuel Gregory and Detective James McCafferty.

28. Jailed after his October 22, 2004, burglary arrest, Avitto quickly claimed he was hearing voices and would kill himself by smashing his head against a wall unless he was sent to the hospital. He warned doctors if they did not send him

⁹ None of the evidence cited herein relies upon Avitto’s hearing testimony.

to the hospital, “you’ll see me in the news.” Avitto was sent to the medical wing of the jail. Avitto Psychiatric Notes (A. 2990, 2997, 2999, 3016, 3025).

29. EAC possessed psychiatric records generated by doctors during Avitto’s incarceration from October 2004 until April 2005. These records documented Avitto’s history of attempted suicide, that his mind was dominated by forces beyond his control, that thoughts were put in his head that were not his own, and that he had a history of auditory hallucinations. Avitto claimed that his \$200 a day cocaine habit helped “take away the voices.” He told doctors he previously had been hospitalized pursuant to C.P.L. § 730. Doctors noted he appeared disoriented to time, had impaired concentration, labile affect and severely impaired judgment. He was diagnosed with mood disorder and deemed mentally ill. Avitto Psychiatric Notes (A. 2990, 2995, 2997-98, 3003).

30. On February 8, 2005, Avitto pleaded guilty to burglary with the understanding that if he completed a residential treatment program the indictment against him would be dismissed, but if he violated the terms of his release, the court was “required” to impose a prison sentence of 3 ½ to 7 years. Court Transcript, February 8, 2005 (A. 156-165).

31. Avitto languished in jail as several residential programs rejected him because of his suicidal ideation. After Avitto learned why he was stuck in jail, he recanted his threats of suicide and claimed he lied in order to stay out of general

population. EAC Progress Notes, February 23, March 1, 2 and 9, 2005 (A. 2939-41). *See e.g.*, Avitto Psychiatric Note, March 11, 2005 (A. 3041) (Avitto lied about his mental health because “I had to do what I had to do to change my situation”); Avitto Letter to EAC Counselor, March 13, 2005 (A. 3082-83) (Avitto “had to say the things I said because at that time I got court”).

32. On April 28, 2005, Avitto finally was released from jail and entered Samaritan Village, a residential drug treatment program in Queens. Immediately before he was released from custody, the court warned him that failure to comply with the rules would result in the promised prison sentence of 3 ½ to 7 years. Court Transcript, April 28, 2005 (A. 532-33).

33. On June 9, 2005, Avitto appeared in court for his first scheduled update since his April 28 release from jail. Samaritan Village informed the court Avitto had poor impulse control and was noncompliant with their rules. For the third time in four months, the court warned Avitto about the “big jail alternative” of 3 ½ to 7 years. Court Transcript, June 9, 2005 (A. 3068-70).

34. At 5:25 p.m. on June 9—just hours after the court’s most recent threat of imprisonment—Avitto absconded from Samaritan Village and used cocaine. He then contacted detectives seeking to cooperate against Giuca with information he purportedly gathered in jail four months earlier. EAC Progress Notes, June 10, 13, and 15, 2005 (A. 2953, 2955-56, 2958).

35. The following day, a warrant was issued for Avitto's arrest. Court Transcript, June 10, 2005 (A. 3071-73). Avitto attempted to admit himself to a psychiatric ward. Later that day, Avitto's EAC counselor told him about the warrant. Avitto told his counselor that he would report early on Monday, June 13. Avitto remained a fugitive over the weekend and used more cocaine on June 12. EAC Progress Notes, June 10 and 15, 2005 (A. 2954, 2958).

36. On June 13, 2005, Avitto met Ms. Nicolazzi and began informing against Giuca. H. 332-33 (A. 1141-42). After this meeting, Ms. Nicolazzi personally "returned him on the warrant," even though a prosecutor from her office was in the calendar part. H. 501 (A. 1310); *see* Affidavit of Jacqueline Lorber, October 14, 2015 (A. 3085-89). Ms. Nicolazzi warned Avitto he might be jailed and he was "going in on his own," but she assured him she would tell the court about their meeting. H. 511 (A. 1310). Once they arrived in court, Ms. Nicolazzi told Avitto's EAC counselor Sean Ryan that Avitto contacted detectives on Thursday, June 9, stating he had information on her murder case, and that she met with Avitto before they came to court. She asked Ryan if EAC had an available residential program for Avitto. Ryan told her they did not. H. 506 (A. 1315); EAC Progress Note, June 13, 2005 (A. 2955-56).

37. Ms. Nicolazzi appeared on Avitto's "voluntary" return on warrant and at the bench notified the court about Avitto's assistance on her murder case. Court

Transcript, June 13, 2005 (A. 148-50); H. 506, 515-17, 522 (A. 1315, 1324-26, 1331). She told the court “they” (Ms. Nicolazzi and EAC) wanted Avitto released to his mother’s home until EAC found a residential program for him. EAC Progress Note, June 13, 2005 (A. 2955-56). After warning Avitto that he would be jailed if he did not follow the rules, the court released Avitto on the terms requested by the prosecutor. Court Transcript, June 13, 2005 (A. 148-50).

38. On the morning of June 14, 2005, Anne Swern, Counsel to former District Attorney Hynes, emailed Ms. Nicolazzi, ADA David Kelly (supervisor of mental health cases), ADA David Heslin (supervisor of drug court), EAC Director Lauren D’Isselt and others at EAC to mark Avitto for “special attention.” (A. 3061); H. 376, 529, 531 (A. 1185, 1338, 1340). Ms. Swern sought updates about Avitto and reiterated her personal interest in the matter (A. 3063).

39. On or about June 14, 2005, Ms. Nicolazzi met with Alisha Akmal, the prosecutor who handled Avitto’s burglary case. Ms. Akmal previously had been updated by EAC about their efforts to place Avitto in an inpatient program. EAC Progress Note, April 12, 2005 (A. 2946). The two prosecutors spoke about Avitto’s case, and Ms. Nicolazzi reviewed Avitto’s file, but she claimed they did not discuss Avitto’s mental health problems. H. 537 (A. 1346).

40. On June 15, 2005, Avitto tested positive for cocaine. After repeatedly lying, Avitto eventually admitted using cocaine on June 9 and 12. EAC Progress

Note, June 15, 2005 (A. 2958). The following day, Avitto's EAC counselor met with supervisor Ruth O'Sullivan to discuss Avitto. EAC Progress Note, June 16, 2005 (A. 2959). Later that afternoon Ms. O'Sullivan expressed EAC's concern to David Kelly: Avitto had "*turned himself into the DA's Office*" *with information on a murder case and was not remanded*, but he then tested positive for cocaine. She said Avitto was using "a lot" of cocaine and that Anne Swern and EAC Director D'Isselt had discussed the matter. Notes of ADA David Kelly, June 16, 2005 (A. 3060); H. 378-82, 384-85 (A.1187-91, 1193-94).

41. On June 17, Avitto appeared in court because of his failed drug test. Noting that he had been "given a break" on June 13, the court told Avitto there was "not much more" it could do for him, and the next positive test would result in his incarceration. Avitto was released. Court Transcript, June 17, 2005 (A. 3078-81). After court, in the presence of Sean Ryan, EAC Director D'Isselt pointedly warned Avitto that EAC would "remain in direct contact" with Ms. Nicolazzi about his continuing poor performance and she would support any decisions EAC made about him. EAC Progress Note, June 17, 2005 (A. 2960).

42. At EAC's direction, Avitto underwent a psychiatric evaluation on July 18, 2005. He contradicted his March 2005 statements and again reported his history of attempted suicide. Avitto admitted having auditory and visual hallucinations, and said he recently hallucinated and "saw a snake." Doctors noted Avitto's paranoia,

restlessness, sadness, anxiousness and worrisome nature. They documented his limited insight, impaired judgment, poor short term memory, fair long term memory and high level of distractibility. Avitto was diagnosed with post-traumatic stress disorder and bipolar disorder, with concern over his “legal status” an Axis IV¹⁰ stressor. Avitto Psychiatric Evaluation, July 18, 2005 (A. 3045-49). An evaluation prepared one month later in connection with Avitto’s admission to a detox center after an August 24, 2005, relapse documented that he recently experienced mania and racing thoughts. St. John’s Psychiatric Evaluation, August 25, 2005 (A. 3050-55).

43. On September 6, 2005, Avitto appeared in court because he absconded from the detox facility. At the bench, the court told EAC counselor Ryan it would not remand Avitto without Ms. Nicolazzi’s input. EAC Progress Note, September 6, 2005 (A. 2979). On the record, the court criticized Avitto, threatened him with imprisonment, ordered him into rehab, and released him without bail. Court Transcript, September 6, 2005 (A. 167-69). After court, Ryan spoke to Ms. Nicolazzi. (A. 2979). Although Ms. Nicolazzi expressed her desire to speak with Avitto that same day, she claimed she and Ryan did not discuss that day’s court appearance. H. 567-68 (A. 1376-77).

¹⁰ Axis IV of the DSM multi-axial system for the assessment of mental illness reports psychosocial and environmental stressors that may affect the diagnosis, treatment and prognosis of mental disorders.

44. On September 7, 2005, Avitto entered rehab. While he was there, Ryan and Ms. Nicolazzi twice discussed the logistics of how she could meet Avitto to prepare for his testimony. Ryan advised Ms. Nicolazzi that she could not speak to Avitto unless Avitto agreed to execute a HIPAA waiver. EAC Progress Notes September 13 and 15, 2005 (A. 2980).

45. On September 19, 2005, Avitto was expelled from rehab for failure to comply with the facility's rules. He and Ryan appeared in court. At the bench, Ryan told the court he notified Ms. Nicolazzi about the violation, after which the court stated it would release Avitto because of his upcoming testimony against Giuca. EAC Progress Note, September 19, 2005 (A. 2981). In open court, the judge castigated Avitto for his "not good" record of compliance. After Avitto blurted out that he was testifying on a murder case that week, the court replied "well apparently we're going to give you another opportunity." In the familiar refrain, the court threatened him with prison before releasing him. Court Transcript, September 19, 2005 (A. 173-76).

46. After court, Ryan contacted Ms. Nicolazzi "to explain what happened" in court. Ms. Nicolazzi called Ryan the following day trying to locate Avitto in order to schedule his testimony, yet claimed she and Ryan never spoke about Avitto's

September 19 violation and court appearance.¹¹ H. 576, 578 (A. 1385, 1387); EAC Progress Notes, September 19 and 20, 2005 (A. 2981-82).

47. Ms. Nicolazzi testified that Avitto's "accurate" testimony about the "routine" events of June 13, 2005, did not require her to clarify for the jury that she met Avitto before court or that she was the unnamed "DA" who appeared on his case. H. 437, 666-67 (A. 1246, 1475-76). She said the jury was not entitled to know about these facts because they were not relevant to Avitto's credibility. H. 672-73 (A. 1481-82). Despite her extensive *Brady* and *Giglio* training, Ms. Nicolazzi "never kept track of his court dates." H. 434-35, 501, 572 (A. 1243-44, 1310, 1381).

48. Ms. Nicolazzi acknowledged the defense specifically requested the EAC records, but asserted she had no reason to review them because they were privileged and also out of respect for Avitto's right to privacy.¹² H. 414, 439-443, 473-74 (A. 1223, 1248-52, 1282-83) *cf.* EAC Progress Note, September 13, 2005 (A. 2980) (EAC counselor Ryan told Ms. Nicolazzi that Avitto *had to waive his right to privacy* before she could speak with him).

¹¹ Ms. Nicolazzi met Avitto at the rehab facility before he was expelled on September 19. H. 570 (A. 1379). It strains credulity that she spoke to Ryan after Avitto was expelled and contacted Ryan the next day trying to locate Avitto and they did not discuss Avitto's expulsion from rehab and the court appearance.

¹² Giuca's right to confront Avitto about his specific bias was far greater than the privacy rights of a man who *volunteered* to be a witness. *See Davis v. Alaska*, 415 US. 308, 320 (1972) ("the state's policy interest in protecting confidentiality...cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness").

49. Ms. Nicolazzi conceded that had she possessed them, she would have disclosed Avitto's psychiatric and drug program records because they contained "important" evidence that he said "false things" and gave differing accounts for his actions in order benefit himself. Yet she maintained that Avitto did not lie about *anything* at trial. H. 467, 592, 594, 596-98, 601-02, 611, 615-16 (A. 1296, 1401, 1403, 1405-07, 1410-11, 1420, 1424-25).

50. On June 9, 2016, after the parties submitted post-hearing memoranda of law (A. 556-809) and engaged in oral argument (A. 1627-1658), the court denied Giuca's motion (A. 4-24, 1659-64).

THE COURT'S DECISION

51. With respect, Justice Chun's opinion clearly was erroneous in several regards. He misconstrued applicable law and overlooked significant facts. He disregarded that Avitto's hearing testimony was inconsequential because the defense easily satisfied its burden through other testimonial and documentary evidence, instead scrutinizing it as "newly discovered evidence" even though the defense did not move to vacate the verdict on such grounds. Decision at 3, 19-20 (A. 6, 22-23) *cf.* Defendant's Post-Hearing Memorandum at 44, n.15 (A. 595); Defendant's Post-Hearing Reply Memorandum at 1-3 (A. 755-57); Transcript of Oral Argument, April 20, 2016 at 18-20 (A. 1644-46).

52. The court held there was no *Giglio* violation because Avitto did not have a written cooperation agreement or formal understanding with the prosecution in exchange for his testimony. Decision at 12-14 (A. 15-17). Justice Chun erred by deciding the *Giglio* question exclusively on the lack of a *quid pro quo* because he disregarded well-established precedent that required disclosure of credible evidence of Avitto's **possible** motive, bias or interest for testifying against Giuca. The People must disclose impeachment evidence that is "of such a nature that ***the jury could have found***, despite the witness' protestations to the contrary, there was indeed a tacit understanding between the prosecution ***or at least so the witness hoped***." *People v. Cwikla*, 46 N.Y.2d 434, 441 (1979). Even in the absence of an express promise, if there exists ***a strong inference, at the very least, of an expectation of leniency***, the jury is entitled to the evidence. *Id.* at 442. The persuasiveness of such an inference is suggested by the prosecution's use of "misleading and obstructive" tactics. *Id.*; *see also, People v. Wright*, 86 N.Y.2d 591, 595 (1995) (reversible error where People failed to disclose witness' **possible** motive to testify falsely where he had previously been informant, even though no evidence of benefits in this case); *People v. Novoa*, 70 N.Y.2d 490, 497 (1987) (obligation to disclose does not turn on prosecutor's classification of relationship to witness or any label affixed to it); *People v. Ford*, 41 A.D.2d 550, 551 (2nd Dept. 1973) (disclosure required even if no express promise made where there is "**possibility**" witness "**had the impression** that

their testimony incriminating defendant would be rewarded with at least some ‘consideration’”); *People v. Wallert*, 98 A.D. 47 (1st Dept. 1983) (reversible error where People failed to disclose that witness consulted with private civil attorney; potential of lawsuit gave rise to ***potential*** motive, bias or interest).

53. Overwhelming evidence created a strong inference that Avitto expected or hoped for a benefit such that the jury reasonably could have concluded that Avitto had a motive, bias or interest to favor the prosecution. *Cwikla*, 46 N.Y.2d at 441-42. The inference was supported by the prosecution’s misleading tactics. *Id.* at 442. Included among the factors supporting these conclusions:

- a. Avitto’s demonstrated history of lying to benefit himself. *See e.g.*, (A. 2999, 3041, 3082).
- b. Avitto volunteered to cooperate against Giuca on June 9, 2005, by offering months-old information *immediately* after he absconded from a residential program and used cocaine (A. 2955-56, 2958).
- c. Several times before he absconded on June 9 (including that same day) Avitto was warned by the court that a violation would result in his imprisonment (A. 163-64, 533, 3069).
- d. After Avitto met Ms. Nicolazzi, she escorted him to court and told him that although he was “going in on his own” and might be jailed, she would tell the court about their meeting. Ms. Nicolazzi then appeared on Avitto’s case, advised the judge about Avitto’s cooperation, and Avitto was released (A. 148-50, 1310, 1325-26).

- e. The day after Ms. Nicolazzi intervened in Avitto's case, an executive ADA advised her and others to mark him for "special attention" (A. 3061).
- f. DA notes confirmed that Avitto "turned himself into the DA's Office" with information against Giuca and he was released without bail (A. 3060).¹³
- g. Avitto was released on two occasions other than June 13, 2005, because of his status as a witness against Giuca (A. 2979, 2981).
- h. Avitto and Ms. Nicolazzi concealed the timing of his cooperation and her personal intervention into his case, which was followed by her claim Avitto testified only "for once to do something right" and there was "absolutely no evidence he was trying to help himself" (A. 2647, 2855-58).

54. The court's dismissal of *People v. Colon*, 13 N.Y.3d 343 (2009) and *People v. Taylor*, 26 N.Y.2d 217 (2015)—both reversals of murder convictions where the jury was deprived of evidence of the trial prosecutor's intervention into the case of a cooperating witness—failed to recognize the jury was entitled to consider whether that influenced the witness to testify favorably for the prosecution. *See Colon*, 13 N.Y.3d at 348-50 (homicide prosecutor's appearance to convey plea offer was among the activity the prosecution engaged in "on witness' behalf"); *Taylor*, 26 N.Y. at 225-26 (lack of bail request by homicide prosecutor at witness' probation violation hearing "necessarily" was a benefit because it was "evidence that

¹³ In addition to corroborating Giuca's claims, these suppressed notes constituted a stand-alone *Giglio* violation because they flatly contradicted Avitto's testimony and the People's argument about his motive for testifying. These notes were not referenced in Giuca's motion because the People disclosed them for the first time a few days before the hearing started.

the trial prosecutor had helped [the witness] to win pre-trial release” which “suggested [the witness] had a motive to testify falsely in favor of the prosecution at defendant’s trial out of gratitude for the prosecutor’s aid”).

55. The lower court incorrectly distinguished *Colon* on the basis it involved “clear cut and irrefutable benefits.” Decision at 15 (A. 18). The nondisclosure of the prosecutor’s “personal appearance” on the witness’ case was among “the errors” associated with the witness’ denial that he received a benefit. *Colon*, 13 N.Y.3d at 349. In fact, the lower court’s emphasis that Ms. Nicolazzi did not intend to confer a benefit on Avitto was insignificant because the prosecution’s lack of intent to benefit the witness is not determinative. *See Colon*, 13 N.Y.3d at 350 n. 4; Decision at 15-16 (A. 18-19). In any event, the court’s reasoning failed to consider Avitto’s *possible* motive, bias or interest. *See Cwikla*, 46 N.Y.2d at 441-42.

56. The court labeled *Taylor* “irrelevant” because the court appearance at issue there arose in the context of a jury note rather than a *Giglio* claim. Decision at 15 (A. 18). But the lower court’s focus on format rather than substance missed the point: the jury in that case heard evidence virtually identical to what the People suppressed from Giuca, but the Court of Appeals still reversed because the trial court’s failure to order readback about it in response to a note requesting “the benefits” *might have misled* the jury that the prosecutor’s intervention into the

witness' case was not a benefit or that it was irrelevant to the credibility of the witness. 26 N.Y.3d at 227.

57. If the prosecutor's intervention into the witness' case was not a benefit or was insignificant to the jury's assessment of the witness' credibility, the Court would have deemed an improper response to the jury's request to see "the benefits" harmless. Thus, *Taylor* turned on the fact that the jury was deprived from fair consideration of the impact the prosecutor's appearance on the witness' case might have had on his motive to testify favorably for the prosecution. If the failure to provide readback of what the jury already knew about the prosecutor's intervention into the witness' case was reversible error, clearly Ms. Nicolazzi's *wholesale suppression and misleading presentation* of the same exact evidence regarding an uncorroborated jailhouse informant unduly prejudiced Giuca.

58. Justice Chun wrongly concluded that Avitto's testimony did not mislead the jury because there was no agreement or understanding between Avitto and the prosecution. Decision at 12-13 (A. 15-16). *Colon* makes clear that irrespective of *Giglio*, a prosecutor is required to be "vigilant to avoid misleading" the jury about a witness' possible bias, motive or interest to favor the prosecution. *Colon*, 13 N.Y.3d at 350.

59. Avitto misrepresented **actual facts** relevant to when and why he sought to cooperate, and scrubbed Ms. Nicolazzi's role altogether from significant pre-trial

events. Ms. Nicolazzi then “exacerbated the problem” by “repeating and emphasizing the misinformation in summation” in order to convince the jury that Avitto’s cooperation was entirely unrelated to Giuca’s case, when she knew or should have known the exact opposite was true. Such conduct did not deal fairly with Giuca and was not candid with the court. *Colon*, 13 N.Y.3d at 349-50; *People v. Steadman*, 82 N.Y.2d 1, 7 (1993); *see also*, *Napue*, 360 U.S. at 270 (“had the jury been apprised of the true facts, however, it might well have concluded [the witness] had fabricated testimony in order to curry the favor of *the very representative of the State who was prosecuting the case* in which [the witness] was testifying, for the witness *might have believed* that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration”); *Taylor*, 26 N.Y.3d at 226 (prosecutor’s intervention on witness’ case “suggested [the witness] had a motive to testify falsely in favor of the prosecution...out of gratitude for the prosecutor’s aid”).

60. However, based on her personal involvement in actual and relevant events, Ms. Nicolazzi knew that if Avitto testified accurately—that he sought to cooperate immediately after he exposed himself to a prison sentence, and he offered her information against Giuca before she brought him to court, where he was released after she notified the court about his assistance—he would have obliterated the prosecution’s false premise that he cooperated for altruistic purposes.

61. Thus, Justice Chun failed to analyze a claim that easily should have been resolved in Giuca's favor. *See Napue*, 360 U.S. at 269 (conviction obtained through use of false evidence or failure to correct the same "must fall"); *Colon*, 13 N.Y.3d at 349-50; *People v. Vielman*, 31 A.D.3d 674, 675 (2nd Dept. 2006) (reversal where prosecutor's argument rests upon false premise and was blatant attempt to mislead jury); *Jenkins v. Artuz*, 294 F.3d 284, 294 (2nd Cir. 2002) (due process violated by prosecutor's use of "probably true, but surely misleading testimony"); *Wallach*, 935 F.2d at 456 ("if it is established the government knowingly permitted the introduction of false testimony reversal is virtually automatic").

62. The court wrongly held that Ms. Nicolazzi¹⁴ did not have a duty to disclose Avitto's psychiatric and drug program records, even though they were specifically requested and favorable to the defense, because it concluded the People did not possess the information. Decision at 16-17 (A. 19-20); Defense Omnibus Motions, February 3, 2005 (A. 106-09).

63. If the information contained in the EAC records was within the People's custody, possession or control, *Giglio* compelled disclosure. *People v. Garrett*, 23 N.Y.3d 878, 886 (2014). "Possession or control" over the information "has not been interpreted narrowly and it is beyond cavil that the government's duty to disclose

¹⁴ The court incorrectly focused on Ms. Nicolazzi's personal knowledge rather than that of her office as a whole. *See Giglio*, 405 U.S. at 154; *Steadman*, 82 N.Y.2d at 8 (disclosure is an institutional obligation).

under *Brady* reaches beyond evidence in the prosecutor's actual possession." *Garrett*, 23 N.Y.3d at 886-87. Imputation of knowledge is judged on a case by case basis. *Id.* at 889.

64. Beginning on June 13, 2005, Ms. Nicolazzi and other senior prosecutors were in regular contact with each other and EAC personnel for the specific purpose of sharing information regarding Avitto's mental health and drug addiction *and his involvement in Giuca's case*. Put simply, Ms. Nicolazzi was bombarded with leads to specifically requested favorable impeachment evidence by Avitto, others in her office and EAC, which she consciously ignored. *See* Defendant's Post-Hearing Memorandum at 60-68 (A. 611-19). The evidence of her willful blindness included:

- a. Ms. Nicolazzi spoke to EAC counselor Ryan at least six times about Avitto's mental health and drug addiction problems and his involvement in Giuca's case, including before, during and after court appearances that resulted in Avitto's release after his cooperation was brought to the court's attention. She was told by Ryan that Avitto had to waive his right to privacy before she met him at a rehab facility (A. 2555-56, 2979-82).
- b. Ms. Nicolazzi claimed she "never kept track of Avitto's court dates." H. 572 (A. 1381).
- c. At least one note from an Avitto post-June 13, 2005, court appearance had the handwritten note "John Avitto someone took for ADA Nicolazzi in homicide" (A. 3084).
- d. Between June 20 and September 21, 2005, Avitto and EAC counselor Ryan discussed his cooperation against Giuca at least

six times. Ryan knew that Avitto was released without bail three times after Avitto's cooperation against Giuca was discussed at the bench (A. 2955-56, 2960, 2964, 2972, 2975, 2979, 2981-82).

- e. Ms. Nicolazzi spoke "at length" to Avitto about his mental illness and drug addiction. She knew Avitto took psychotropic medication (A. 1280-82, 1343, 1354).
- f. Ms. Nicolazzi spoke to the prosecutor who handled Avitto's burglary case and reviewed her file in order to learn about him. That prosecutor had been informed about EAC's efforts to place Avitto in residential treatment (A. 1346, 2946).
- g. After June 13, 2005, Ms. Nicolazzi, Anne Swern, David Kelly, EAC Director Lauren D'Isselt and others at EAC discussed Avitto's poor performance in his mental health and drug treatment program, as well as his status in Giuca's case. Ms. Swern instructed them to pay Avitto "special attention." Mr. Kelly was involved in the discussion specifically because of Avitto's mental illness and his involvement in a murder case (A. 1172, 1185, 1192, 1338, 1340, 3061, 3063).
- h. An EAC supervisor told Mr. Kelly that Avitto "turned himself into the DA' office" with information on a murder case and was released, and that Avitto failed a drug test and was using an excessive amount of cocaine. All of this was discussed by Ms. Swern and EAC Director D'Isselt (A. 3060).
- i. Ms. D'Isselt confronted Avitto about his noncompliance with treatment program and warned him that she would remain in direct contact with Ms. Nicolazzi about his progress (A. 2960).

65. Consequently, the People had a "duty to learn of any favorable evidence known to others acting on the government's behalf..." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also, Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (death sentence reversed where prosecution held responsible for nondisclosure of

corrections file of “star witness” not in their possession where records demonstrated he was a “habitual liar”); *Valentin v. Mazzuca*, 2011 WL 65759 at 17-18 (WDNY 2011) (reversal where prosecution deemed to have constructive possession of witness’ criminal record; court criticized prosecution’s “hear no evil, see no evil, speak no evil” approach. “In short, ostrich-like behavior on the part of the prosecution is not tolerated by *Brady* and its progeny”).

66. The court failed to address the due process implications raised by Ms. Nicolazzi’s blatantly false arguments regarding Avitto’s lack of motive to falsely accuse Giuca and his overall truthfulness after she shirked her duty to seek truth and justice by consciously avoiding contrary evidence that might show (and here would have shown) that her most important and uncorroborated witness was a mentally unstable and self-interested pathological liar. *See* T. 1010 (A. 2845) (“everything John Avitto told you is credible”), T. 1011 (A. 2846) (“John Avitto, ladies and gentlemen was very honest about his problems and his criminal past. He freely admitted things he isn’t proud of and that goes to his credibility...”); T. 1020-23 (A. 2855-2858) (“absolutely no evidence, no evidence at all” or “corroboration” that Avitto was “willing to say anything because he’s trying to help himself;” if Avitto had received consideration “there would be nothing to hide about that”).

67. The court held Avitto’s EAC records were not newly discovered evidence because they were merely impeachment evidence. Decision at 19 (A. 22).

However, psychiatric records that call into question the witness' accurateness or capacity to perceive or recall may constitute newly discovered evidence. *See People v. Rensing*, 14 N.Y.2d 210 (1964); *People v. Collins*, 250 A.D.2d 379 (1st Dept. 1998); *People v. Dozier*, 163 A.D.2d 220 (1st Dept. 1990); *People v. Maynard*, 80 Misc.2d 279 (N.Y. Cty. Sup. Ct. 1974).

68. Avitto's EAC records documented serious symptoms of mental illness that related directly to his ability to perceive and/or recall. *See* Avitto Psychiatric Records (A. 2989-3058); Defendant's Post-Hearing Memorandum at 17-21 (A. 568-72); ¶¶ 28-29, 42, *supra*. Although it does not appear that the Second Department has ruled on what psychiatric evidence may constitute newly discovered evidence, its prior holdings and the substance of Avitto's records support relief on this basis. *See People v. Baranek*, 287 A.D.2d 74 92nd Dept. 2001) (Court relied on *Rensing* in holding defendant should have been permitted to cross examine witness about year-old mental hospitalization and hallucinations); *People v. Knowell*, 127 A.D.2d 794 (2nd Dept. 1987) (Court cited *Rensing* in holding defendant should have been permitted to cross examine witness about mental illness that might have had bearing on capacity to perceive and recall).

69. Moreover, because Giuca's conviction relied substantially on Avitto, evidence that demonstrated his unreliability was not merely impeaching. *People v. Jackson*, 29 A.D.3d 328 (1st Dept. 2006); *People v. Walker*, 116 A.D.2d 948 (3rd

Dept. 1986); *People v. Ramos*, 132 Misc.2d 609 (Kings Cty. Sup. Ct. 1985); *People v. Marzed*, 161 Misc.2d 309 (N.Y. Cty. Crim. Ct. 1993); *see also*, Defendant's Post-Hearing Memorandum at 102-05 (A. 653-56); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) (evidence of specific bias or motive to falsely accuse is never collateral).

70. The court held that even if Giuca established any of his claims, there was no reasonable possibility that the verdict might have been more favorable to the defense. But the court did not analyze the significance that discrediting Avitto might have had on the verdict in light of the prosecution's "two case" strategy and their abandonment of a "first case" built upon Cleary and Calciano in favor of a "second case" that theorized *only* Avitto's "truthful" testimony accurately proved Giuca's guilt. T. 1016-17 (A. 2851-52); *see People v. Negron*, 26 N.Y.3d 262, 271 (2015) (reasonable possibility standard met if "a little more doubt would have been enough"); *People v. Hardy*, 4 N.Y.3d 192, 199 (2005) ("People's "heavy reliance" on [the error] and exploitation of it satisfies reasonable possibility standard); Defendant's Post-Hearing Memorandum at 69-80 (A. 620-31); Defendant's Post-Hearing Reply Memorandum at 32-44 (A. 786-98).

71. Finally, Justice Chun failed to recognize the People's conduct deprived Giuca of his fundamental right to confront Avitto with evidence of his specific motive, bias or interest against him. Decision at 17 (A. 20). *See Davis*, 415 U.S. at 316-17 ("the partiality of a witness is subject to exploration at trial and is always

relevant at discrediting the witness and affecting the weight of his testimony”). Giuca was entitled to use evidence rather than resort to speculation to expose Avitto as an opportunist who concocted false testimony in order to help himself with his own legal problem. This was especially important because it was the prosecution who first placed Avitto’s lack of a specific motive, bias or interest for testifying against Giuca into issue. T. 785-86 (A. 2620-21). Had the jury known the truth about Avitto, it is possible that the jury would have rejected his testimony out of hand and the verdict might have been more favorable to Giuca.

REASONS FOR GRANTING LEAVE TO APPEAL

72. This Court should grant leave to appeal because under the exceedingly low materiality standards applicable to this case, the lower court should have granted the motion. The court failed to do so because it incorrectly applied the law and overlooked important facts.

73. The prosecution’s substantial reliance on the uncorroborated testimony of a mentally ill liar and opportunist who volunteered to cooperate immediately after he exposed himself to a lengthy prison sentence, but who, through the concealment of favorable impeachment evidence and the exploitation of inaccurate testimony, was presented to the jury as an honest and credible man simply “doing the right thing” made a mockery of Giuca’s right to due process. Giuca should be granted appellate review because the full disclosure of favorable impeachment material,

particularly evidence of Avitto's propensity to lie to benefit himself, and evidence of his motive, bias or interest in testifying was indispensable for the jury to properly evaluate the jailhouse informant's credibility. *See Taylor*, 26 N.Y.2d at 224-27; *Colon*, 13 N.Y.3d at 348-50; *Steadman*, 82 N.Y.2d at 7; *Novoa*, 70 N.Y.2d at 497; *Cwikla*, 46 N.Y.2d at 441-42; ¶ 12, n. 2, *supra*.

74. Leave to appeal should be granted to address the significant legal issues raised by Giuca's case. *See* ¶ 14, *supra*. Justice Chun's conclusion that the prosecution was not obligated to disclose a trial prosecutor's intervention into a witness' case absent a *quid pro quo*, even where the witness testified in a manner that might have misled the jury about his motive, bias or interest, should be reviewed to determine whether that decision is contrary to *Giglio* and the Court of Appeals' rulings in *Cwikla*, *Colon* and *Taylor*.

75. A related question an appellate court should answer is whether testimony by an uncorroborated jailhouse informant that omitted key facts related to the timing and circumstances of his cooperation, including the intervention of the trial prosecutor in his own case immediately after he started cooperating, where the prosecutor knew or should have known that the witness omitted these facts, was "inaccurate" and violates due process under *Napue*, *Colon*, *People v. Vielman*, 31 A.D.3d 674 (2nd Dept. 2006) and *Jenkins v. Artuz*, 294 F.3d 284 (2nd Cir. 2002).

76. The lower court decision raises important questions about a prosecutor's duty to investigate in furtherance of its obligation to disclose favorable impeachment evidence. The Appellate Division should review Giuca's case in order to provide guidance on whether a prosecutor "possesses" specifically requested evidence for *Giglio* purposes where it ignored specific leads to the evidence and consciously avoided actual knowledge of it. The Appellate Division also should determine whether it violates due process where the prosecutor argued to the jury that a witness lacked a motive to testify falsely and was credible after she ignored leads that would have resulted in the discovery of evidence contrary to her argument.

77. The Second Department should review the newly discovered evidence claim because it does not appear that the Court previously has interpreted *Rensing* and considered under what circumstances psychiatric records of a witness warrant 440.10 relief. Similarly, the Second Department should determine if, in a case that substantially relied upon the uncorroborated testimony of one witness, evidence that demonstrates the inherent unreliability of that witness may constitute newly discovered evidence.

78. Finally, the Appellate Division should accept review here because if the lower court opinion stands as the final word on this troubling case, it will serve as a blueprint for prosecutors on the use of tactics abhorrent to a fair trial. Justice Chun's decision will encourage "wink and nod" agreements with dubious witnesses. It will

encourage less disclosure and candor, which is a recipe for *Brady* and *Giglio* violations and wrongful convictions. An overzealous prosecutor will interpret the lower court decision as judicial approval for the “cutting and pasting” of actual facts in order to mislead the jury, when such gamesmanship should be condemned, not condoned. The decision contradicts existing federal and state law and will make confusing and dangerous precedent regarding the definition of “accurate” testimony. Finally, the lower court decision will embolden an unscrupulous prosecutor to remain willfully blind about credibility problems of witnesses in order to avoid disclosure of evidence that might help a defendant establish his innocence.

CONCLUSION

A trial is designed to seek truth. As a minister of justice, a prosecutor’s faithfulness to her constitutional obligations to disclose favorable impeachment material and present accurate evidence are essential components of a fair trial. This is especially true where the prosecution is based on the uncorroborated word of a jailhouse informant. Nothing corrupts the search for truth and destroys the public’s confidence in the criminal justice system more than an overzealous prosecutor who places winning above the accused’s right to a fair trial. Here, the evidence at the hearing conclusively established that John Avitto, the People’s star witness was a mentally ill and self-interested opportunist who perjured himself at trial. The People withheld, and were willfully blind of, evidence that demonstrated Avitto’s obvious

motive to falsely accuse John Giuca in order to unfairly advance their claim that he cooperated purely out of good citizenship. Even worse, the trial prosecutor exacerbated the prejudice to Giuca through her elicitation and exploitation of Avitto's misleading testimony.

While the court below had all of the available facts to easily determine the motion in Giuca's favor, it misconstrued the applicable law, ignored the salient facts, and did not reach the only reasonable conclusion: that the prosecution's non-disclosure of specifically requested favorable impeachment evidence and their misleading of the jury about their key witness' motive to cooperate violated Giuca's federal and state constitutional rights, and easily satisfied the low materiality standards applicable here.

Accordingly, we request that leave to appeal be granted so that John Giuca can obtain full appellate review of the important issues on which we believe, with respect, the court below ruled incorrectly.


MARK A. BEDEROW, ESQ.

AFFIRMED: New York, New York
July 5, 2016