To Be Argued By:
Mark A. Bederow
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No. 2016-06775

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

JOHN GIUCA,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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Kings County Clerk's Indictment No. 8166/04

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

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THE PEOPLE OF THE STATE OF NEW YORK,

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1. The indictment number of the case in the Court below is 8166/04.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, Kings County.
4. This action was commenced on or about December 20, 2004, by the filing of the Indictment of the Grand Jury of the County of Kings.
5. The nature and object of the action: is for Murder in the Second Degree, Robbery in the First Degree and Criminal Possession of a Weapon in the Second Degree.
6. The appeal is from a decision and order of the Supreme Court, Kings County, by the Honorable Danny K. Chun, dated June 9, 2016 and entered June 13, 2016, denying defendant's motion, pursuant to C.P.L.R. §440.10, to vacate the judgment of conviction and to order a new trial. Permission to appeal was granted by order of the Honorable Thomas A. Dickerson, dated August 22, 2016.
7. This appeal is being perfected on the Appendix method.

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QUESTIONS PRESENTED

1. Whether the prosecution violated appellant's federal and state rights to due process under *Giglio v. United States,* 405 U.S. 150 (1972) and *People v. Cwikla,* 46 N.Y.2d 434 (1979), and their progeny, by failing to disclose evidence, even in the absence of an express agreement with the prosecution, that demonstrated the prosecution's key witness had a possible motive, bias or interest to falsely accuse a defendant?

   (the court below answered this question in the negative.)

2. Whether the prosecution violated appellant's federal and state rights to due process under *Napue v. Illinois,* 360 U.S. 264 (1959), *People v. Colon,* 13 N.Y.3d 343 (2009) and *People v. Novoa,* 70 N.Y.2d 490 (1987), by introducing and/or failing to correct false or misleading testimony by their key witness that misled the jury about his possible motive, bias or interest to falsely accuse appellant?

   (the court below answered this question in the negative.)

3. Whether the prosecution violated appellant's federal and state rights to due process under *Giglio v. United States,* 405 U.S. 150 (1972) and *People v. Novoa,* 70 N.Y.2d 490 (1987), and their progeny, by consciously avoiding knowledge of specifically requested favorable impeachment material that demonstrated their key witness lied in order to benefit himself, demonstrated his possible motive to falsely accuse appellant, and demonstrated his serious and persistent mental illness?

(the court below answered the question in the negative.)

4. Whether the previously undisclosed mental health records of the prosecution's key witness, which documented his long history of serious and persistent mental illness and other evidence that impacted his ability to perceive and recall, constitute newly discovered evidence?

(the court below answered the question in the negative.)

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

THE PEOPLE OF THE STATE OF NEW YORK,	:	
Respondent,	:	
		App. Div. No. 2016-06775
-against-	:	
		Ind. No. 8166/2004
JOHN GIUCA,	:	(Kings County)
Defendant-Appellant.	:	

DEFENDANT-APPELLANT'S OPENING BRIEF

PRELIMINARY STATEMENT

John Giuca respectfully appeals from an order of the Supreme Court, Kings County (Chun, J.), dated June 9, 2016, denying after an evidentiary hearing, his C.P.L. § 440.10 motion to vacate his conviction for murder in the second degree and related charges, for which he was sentenced to 25 years to life imprisonment.[1]

[1] This Court affirmed Giuca's conviction at a time when the evidence that serves as the basis for the instant motion had not been disclosed to the defense. *People v. Giuca*, 58 A.D.3d 750 (2nd Dept. 2009). Leave to appeal was denied. 12 N.Y.3d 915 (2009). A previous § 440.10 motion related solely to juror misconduct was denied, *People v. Giuca*, 885 N.Y.S.2d 712 (Sup. Ct. Kings

INTRODUCTION

Jailhouse informant testimony is "fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to 'get' a target of sufficient interest to induce concessions from the government."[2] However, some overzealous prosecutors seek to increase the likelihood of a conviction by suppressing evidence of a jailhouse informant's selfish motive for cooperating and presenting evidence in a false or misleading manner. Such an unconstitutional win-at-all-cost approach violates a prosecutor's duty of candor and corrupts the adversarial system. In 2005, the Brooklyn District Attorney's Office's unscrupulous use of jailhouse informant John Avitto resulted in John Giuca's wrongful conviction for the murder of Mark Fisher.

Giuca's trial was remarkable. Within the same trial, the prosecution employed a "two-case" strategy that first alleged Giuca *was not* at the crime scene before they argued he *must have been* there. The "first case" relied on Albert Cleary and Lauren Calciano, who claimed Giuca admitted giving Antonio Russo[3] a gun before Russo shot and killed Fisher on a residential street while Giuca was at home. After they

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Cty. 2009), affirmed by this Court, 78 A.D.3d 729 (2nd Dept. 2010), and leave was denied, 16 N.Y.3d 859 (2011). A petition for a writ of habeas corpus on the juror misconduct issue was denied. *Giuca v. Lee*, 2013 WL 2021336 (E.D.N.Y. 2013). Associate Justice Thomas A. Dickerson granted Giuca leave to appeal the decision of the lower court to the Appellate Division. *People v. Giuca,* 2016 WL 4442220 (2nd Dept. 2016).

[2] *Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123-24 (9th Cir. 2001).

[3] Giuca and Russo were tried together before separate juries.

were discredited, the prosecution pivoted to the "second case," which relied exclusively on Avitto's claim that while he and Giuca were in jail together, Giuca confessed that he helped rob and kill Fisher at an ATM. In summation, prosecutor Anna-Sigga Nicolazzi argued Avitto gave the only testimony that accurately described Fisher's murder.

Avitto was a classic jailhouse informant. But the trial defense was unaware the career criminal was a mentally ill drug addict with a $200-a-day cocaine habit that "helped take away the voices in his head." If that wasn't bad enough, Avitto also had a documented history of lying to benefit himself, including an obvious incentive to falsely accuse Giuca. Not surprisingly, Avitto pounced at the opportunity to volunteer information against Giuca after his own legal problem exposed him to a lengthy prison sentence.

If ever a case demanded transparency surrounding a jailhouse informant's credibility, it was Giuca's. However, Nicolazzi, who markets herself as the prosecutor "who has never lost a homicide case" in furtherance of media opportunities, Appendix ("A.") 468-71, suppressed and consciously avoided favorable impeachment evidence, elicited misleading testimony from Avitto and vouched for his credibility in order to give the jury the false impression that he testified against Giuca "for once, to do something right," when, in fact:

- Avitto contacted detectives to incriminate Giuca with months-old information the *same day* he absconded from an inpatient program and used cocaine, which exposed him to a lengthy prison sentence;

- Aware that a warrant had been issued for his arrest because he left his program, Avitto met Nicolazzi and started cooperating against Giuca. Nicolazzi then escorted him to court, where she privately notified the judge he provided information against Giuca before the court released Avitto on his own recognizance;

- The day after Avitto started cooperating against Giuca, an executive ADA instructed Nicolazzi, the EAC[4] director and others to flag Avitto for "special attention";

- The prosecution memorialized that Avitto, who was "using a lot" of drugs, "turned himself into the DA's Office" with information against Giuca and he was not remanded;

- The EAC director warned Avitto she would remain in regular contact with Nicolazzi and her Giuca co-counsel regarding his program noncompliance;

- Avitto lied about the severity and symptoms of his mental illness in order to get out of jail and then perjured himself about it;

- Shortly before he testified against Giuca, Avitto twice violated his program, but was released without bail because of his upcoming testimony against Giuca.

As demonstrated below, the lower court's decision misconstrued applicable law and overlooked significant facts. Under the appropriate materiality standard, there is a reasonable possibility that, if the jury knew the truth about Avitto's

[4] EAC is a not-for-profit organization that monitored Avitto's court-ordered mental health and drug treatment program.

credibility, the outcome would have been more favorable to Giuca. The judgment of conviction should now be vacated, and John Giuca, who has been incarcerated more than 12 years, should finally be granted the fair trial he was deprived of in 2005.

STATEMENT OF THE CASE

SUMMARY OF THE TRIAL

At approximately 6:40 a.m., on October 12, 2003, Mark Fisher was shot and killed on Argyle Road in Brooklyn. Earlier that morning, Fisher, Giuca, Russo, Cleary, Angel DiPietro,[5] Meredith Denihan and others had been at Giuca's Stratford Road home, a few blocks away from Argyle Road. At 5:23 a.m., Fisher, accompanied by Russo, withdrew $20 from an ATM and returned to Giuca's home.

The ensuing investigation, sensationalized in the tabloids as the "Grid Kid" murder case, included severe criticism by Fisher's family of uncooperative witnesses (particularly DiPietro) and pressure on law enforcement to make an arrest (which led to a change in the prosecution team). In December 2004, Giuca was indicted for murder. A. 30-33.

No forensic evidence or eyewitness testimony linked Giuca to the crime. Cleary, Calciano, and Avitto all claimed Giuca confessed, but they were inconsistent

[5] In 2012, DiPietro was hired as a Brooklyn assistant district attorney.

with each other and all of them were flatly contradicted by disinterested witnesses and evidence recovered from the crime scene.[6]

The "first case," a hybrid of Cleary's and Calciano's inconsistent testimony, supported the allegations that led to Giuca's indictment: Giuca armed Russo, who robbed and shot Fisher by himself on a residential street. The "second case" rested upon Giuca's purported jailhouse admission to Avitto that he accompanied Russo and Fisher to an ATM, where he pistol whipped Fisher before Russo shot him.

Until Avitto testified near the end of the trial, the prosecution relied exclusively on the "first case." Prior to Avitto's testimony, Nicolazzi neither mentioned him nor alleged Giuca accompanied Fisher and Russo to an ATM. In her opening, Nicolazzi assured the jury Cleary would detail the "full story" of Fisher's demise. She conceded Calciano would be less reliable than Cleary because her testimony would consist of Giuca's "spin" that "downplay[ed] his role." A. 956-60.

A seasoned prosecutor like Nicolazzi should have recognized the several red flags surrounding Cleary's and Calciano's credibility. Both witnesses repeatedly

[6] At the time Fisher was shot, area residents heard a vehicle door open and close, and seconds later heard a vehicle speed away from the driveway where Fisher's body was found. The resident closest to the crime scene heard the distinct voice of a young female almost immediately before the shots were fired. DiPietro, who claimed she was sleeping at Cleary's home directly across the street from where Fisher was found, gave inconsistent accounts of the evening, including the time she left Giuca's home. A. 349-53. Fisher was shot five times and the crime scene was secured within minutes, but only two shell casings were recovered. A. 340-45. At trial, the prosecution ignored compelling evidence that a vehicle was used during the crime and a young woman witnessed Fisher's shooting, all of which contradicted the evidence against Giuca.

denied knowledge of Giuca's purported involvement in Fisher's murder for more than one year. Cleary presented the prosecution with a polygraph report that demonstrated his "truthful" lack of knowledge about Fisher's murder, yet he incriminated Giuca at trial after he was threatened with perjury and a probation violation in connection with a vicious assault he committed a few months before Fisher was killed across the street from his home. A. 1253, 1262-63. Calciano was grilled several times and was warned that she would never achieve her goal of becoming a U.S. Marshal if she did not tell the police what they wanted to hear about Giuca. A. 1521-27, 1585.

Cleary testified that on the morning of October 12, a few hours after the murder, Giuca called him demanding to know Denihan's location, and during the call he implied that he and Russo were involved in Fisher's death. A. 1238, 1240. But Nicolazzi knew no such call happened; she moved Giuca's and Cleary's cell phone records into evidence, which confirmed the first time they spoke after Fisher was killed was at 12:56 p.m. A. 1806. Nicolazzi also knew Cleary previously testified in the grand jury and in another sworn statement that the first time he and Giuca spoke after the murder was on the afternoon of October 12.[7]

[7] DiPietro's testimony that Giuca spoke to Cleary on the phone at 11:00 a.m. was false. A. 1143. Nicolazzi argued Giuca's concern about Denihan's location and the possibility she might be a witness against him was the genesis of his cover-up of the crime. A. 957-59, 1931-33. However, Denihan's testimony and Giuca's telephone records proved that at the time DiPietro claimed Giuca was seeking to locate Denihan, she was in his kitchen using his home telephone. A. 1085-87.

Giuca allegedly confessed his involvement in Fisher's murder to Cleary and Calciano in the same conversation, yet at trial they contradicted each other on virtually every detail. Cleary said he spent the day on Long Island with DiPietro, where he watched football and ate dinner with her family, after which he went to the Bronx before driving back to Brooklyn, where he met Giuca and Calciano later that evening. But Calciano said she met Giuca and Cleary during the day, before she went about her plans that day. A. 1242-48, 1264-66 *cf.* 1507, 1529-30.

Cleary claimed Giuca felt disrespected after Fisher sat on a table,[8] so he gave Russo a gun and "basically" told him to "show [Fisher] what was up." According to Cleary, Russo left Giuca's home alone, waited in ambush for Fisher on Turner Place,[9] and attacked and shot Fisher before he returned the gun to Giuca and told him "it was done." A. 1244-47.

Calciano categorically refuted Cleary's account. A. 1531-33. She alleged Giuca told them Russo asked Giuca for a gun because he wanted to rob "Albert's friend." According to Calciano, there was no ambush of Fisher; Giuca told them

[8] In the grand jury, Cleary swore someone else was perturbed by Fisher sitting on the table. Cleary "remembered" it was Giuca when he huddled with prosecutors the day before he testified at trial. A. 1201-02.

[9] Turner Place was close to Giuca's home and several blocks away from the Argyle Road location where Fisher was shot. Thus, Cleary's version placed the crime near Giuca's home and away from his own.

Fisher and Russo left his home together. A. 1505. The only fact Cleary and Calciano agreed upon was that Giuca remained home when Russo shot and killed Fisher.

Cleary swore he saw Calciano remove evidence from Giuca's home; she adamantly denied it and accused Cleary of lying. A. 1255 *cf.* 1513, 1528, 1552. Thus, in addition to their other credibility deficiencies, there existed conclusive proof that at least one of them committed perjury. Disturbingly, Nicolazzi knew beforehand one of them was going to lie under oath. A. 689-92.

After Cleary's and Calciano's weak credibility was exposed, the prosecution sandbagged the defense by turning to Avitto and the "second case." Avitto (who unknown to the defense heard voices and experienced hallucinations) claimed he overheard Giuca tell his father (in the presence of his aunt and cousin) that he had a gun before they returned to idle chit-chat about "family stuff." Avitto further alleged Giuca told him he went to the ATM with Fisher and a third person, where Giuca pistol whipped Fisher before the other person "pulled the gun"[10] from Giuca and shot Fisher.[11] A. 1718-21.

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[10] Avitto's testimony directly contradicted the bill of particulars, which stated that Giuca "provided" a gun to Russo. A. 912.

[11] Avitto had ample opportunity to cull his testimony from various media accounts that reported Fisher and Russo were at an ATM shortly before the murder. But Fisher went to an ATM only once on October 12, 2003—more than hour before he was killed—while Giuca was home. A. 1296-97. Fisher and Russo returned to Giuca's home after they visited the ATM. A. 1179. Nevertheless, Nicolazzi bolstered Avitto's testimony and misled the jury by arguing Fisher went to an ATM a second time before he was killed. A. 1958 (Fisher was supposed to have been killed "during that *first* visit to the ATM machine"); 1959 (reference to a phone call made when Russo and Fisher were on their way to the ATM "the *first* time"); 1960 (discussing Fisher's trip to the

Avitto's late-trial emergence as the key witness made his credibility a critical issue for the jury. Although the prosecution knew he was noncompliant with his EAC program, Nicolazzi elicited from Avitto that he was "doing good" in it since his release from jail months earlier. A. 1730. She led Avitto to say he contacted authorities "sometime in June" 2005, four months after he was "sentenced" to the program in which he was "doing good," which implied he did not have an existing legal problem that could have motivated him to cooperate against Giuca out of his own self-interest. Avitto declared that he did not seek, expect or receive anything in exchange for testifying. A. 1731-32, 1752, 1760. He denied a history of severe mental illness, including hallucinations, delusions, loss of contact with reality, and that he used Seroquel to treat his mental illness. A. 1731, 1751-53.

Avitto left his program on June 9 and appeared in court on June 13. He denied "immediately" calling the police to cooperate against Giuca after he absconded or that this influenced his decision to volunteer evidence against Giuca. A. 1756. Avitto denied using cocaine from the time he left his program on June 9 and before he appeared in court on June 13. A. 1745-47. On re-direct, Nicolazzi led Avitto to explain the circumstances surrounding his June 13 return to court:

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

ATM, she argued the murder did not occur "that *first* time around") *cf.* A. 521 (Nicolazzi testified at the hearing "I never believed there was a second trip to the ATM machine").

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.

A. 1758. Nicolazzi concluded her examination of Avitto by leading him to affirm her contention that his legal status was unrelated to his decision to incriminate Giuca:

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

A: Correct.

A. 1760.

During the charge conference, the defense demanded specific, undisclosed *Giglio* material related to any possible consideration Avitto received from the prosecution. Nicolazzi disclosed nothing. A. 1874-77.

Although Nicolazzi never even mentioned the "second case" in her opening, in summation she emphasized Avitto's significance over Cleary and Calciano. She

minimized Cleary's and Calciano's accounts as "bits and pieces" that "partially danced around the truth." A. 1954 *cf.* 33 (in her opening, Nicolazzi told jury they would hear "more of the full picture, the full story" from Cleary). Her repudiation of the "first case" in favor of Avitto and the "second case" was unequivocal: she conceded the substance of Cleary's and Calciano's testimony "didn't even make sense" because Russo could not have subdued and killed Fisher by himself. A. 1962-63.

Nicolazzi instead urged the jury to credit Avitto and "the second case," which "made much more sense" because it proved Giuca was directly involved in the murder "just like he admitted to Avitto." Nicolazzi's emphatic endorsement for Avitto's accuracy even led her to muse aloud whether Giuca shot Fisher. A. 1962-63.

Nicolazzi pervasively vouched for Avitto's integrity and his lack of motive to falsely accuse Giuca. She assured the jury it could trust the forthright Avitto because he was "very honest about his problems and his criminal past" and he "freely admitted things he isn't proud of." A. 1957. She ridiculed defense speculation that Avitto would say anything to help himself as requiring a conspiracy between the prosecution, police and court.[12] She declared there was "absolutely no evidence"

[12] The "conspiracy argument" violated Giuca's right to due process. *People v. Casanova*, 119 A.D.3d 976 (3rd Dept. 2014); *People v. Forbes*, 111 A.D.3d 1154 (3rd Dept. 2013).

Avitto was motivated to cooperate in order to help himself and his release without bail was the result of his "responsible" behavior. According to Nicolazzi, Avitto testified against Giuca because "for once, he tried to do something right." A. 1966-69.

THE C.P.L. § 440.10 HEARING

A. Evidence Contradicting Avitto's Trial Testimony that He Did Not Expect, Seek or Receive a Benefit, and that the Prosecution Failed to Correct His Inaccurate Testimony

1. Evidence that Nicolazzi Personally Intervened into Avitto's Criminal Case After He Volunteered to Cooperate against Giuca

Evidence at the hearing[13] conflicted with Avitto's trial testimony and Nicolazzi's argument that Avitto volunteered to cooperate against Giuca out of conscience and that he did not have a possible motive, bias or interest to falsely incriminate Giuca.

Avitto claimed he gathered evidence against Giuca on February 19 and 20, 2005. A. 1954-55. Approximately two weeks earlier, Avitto pleaded guilty to burglary and was promised dismissal of the indictment if he successfully completed a treatment program. However, if he violated the terms of his release, he was warned

[13] The merits of Giuca's claims do not rely on the credibility of Avitto's hearing testimony. The lower court overemphasized its significance and analyzed it as "newly discovered evidence" (a claim not raised by Giuca's motion), rather than focusing on what the hearing evidence exposed about Avitto's *trial* testimony. A. 21-22. Avitto's EAC records, which include EAC counselor Sean Ryan's detailed contemporaneous notes about Avitto's progress and Avitto's voluminous psychiatric records, were only disclosed to the defense after the lower court ordered a 440.10 hearing.

he would be sentenced to 3 ½ to 7 years in prison. A. 2056-65. On April 28, Avitto was released from jail and entered residence at Samaritan Village in Jamaica, Queens. Before he was paroled, the court again warned Avitto that he would be sentenced to prison if he was noncompliant with the rules. A. 2066-67. On June 9, Avitto appeared in court for his first regularly scheduled update since he had been released from jail. Samaritan's report was not good, so for the third time in four months, the court warned Avitto about the "big jail alternative" if he was noncompliant. A. 2068-70.

On June 9, at 5:25 p.m., just hours after he was warned about the consequences of failing to follow the rules, Avitto absconded from Samaritan Village and used cocaine. On the same evening Avitto first violated his plea agreement and exposed himself to a prison sentence—*109 days* after he purportedly heard Giuca incriminate himself—Avitto contacted detectives offering to provide information against Giuca. A. 2521, 2523, 2527.

On June 10, a warrant was issued for Avitto's arrest. Avitto told Ryan he left Samaritan because of psychiatric problems and that he tried to admit himself into a psychiatric ward. Ryan told Avitto about the warrant and informed him he had to appear in court on Monday, June 13. Avitto said he would return to court on June 13. Over the weekend, he used more cocaine. A. 2521-23, 2527.

Instead of going to court on June 13, Avitto went to Nicolazzi's office and offered information against Giuca. After he told Nicolazzi about Giuca's purported admissions, Nicolazzi personally returned Avitto on his warrant, even though a prosecutor already was in the calendar part. A. 34-38. On the way to court, Nicolazzi told Avitto he was "going in on his own" and he faced the possibility of being jailed, but she assured him she would tell the court about their meeting. A. 549. When they arrived in court, Nicolazzi told Ryan that Avitto contacted detectives on Thursday, June 9, with information on her murder case and she had just met with him. She asked Ryan if Avitto could be placed in another program. A. 2523.

Nicolazzi appeared on Avitto's case, immediately sought an off-the-record conference, and notified the court Avitto had provided information against Giuca. A. 544, 553-55, 2074-76. She told the court she and EAC wanted Avitto released until EAC located a new TADD[14] program for him. A. 2523-24. After warning Avitto that he would be jailed if he didn't follow the rules, the court released him on the terms requested by Nicolazzi. A. 2075-76.

[14] TADD (Treatment Alternatives for the Dually Diagnosed) programs treat defendants who suffer from severe and persistent mental illness and a substance abuse disorder. In other words, Nicolazzi was aware of the extent of Avitto's severe mental health problems and drug abuse. A. 509-11, 572.

The morning after Nicolazzi appeared on Avitto's return on warrant, Anne Swern, Counsel to DA Hynes, emailed Nicolazzi, David Kelly (the prosecutor in charge of mental health court), David Heslin (the prosecutor in charge of drug court), EAC Director Lauren D'Isselt and other EAC supervisors, instructing them to mark Avitto for "special attention" and to keep her informed about him. A. 2048. On or about the same day, Nicolazzi met with Alisha Akmal, who prosecuted Avitto's burglary case. A. 2052. Akmal, who was familiar with EAC's efforts to place Avitto in a residential program, spoke to Nicolazzi about Avitto's case. A. 2514. Nicolazzi requested and maintained Akmal's file. A. 574-75.

On June 15, Avitto tested positive for cocaine. After initially lying, Avitto admitted using cocaine on June 9 and 12. A. 2526-27. Later that day, after D'Isselt sought from Swern her office's opinion on Avitto, Swern reiterated her interest in Avitto to Nicolazzi and Heslin and instructed them to "monitor him closely." A. 2049.

On June 16, EAC held a meeting to address Avitto's noncompliance. They discussed his positive drug test and propensity to lie. A. 2527. After the meeting, an EAC supervisor expressed their concern over Avitto's drug abuse and noncompliance to the DA's Office. Kelly memorialized the conversation. He recorded that Avitto *"turned himself into the DA's Office" with information on a*

murder case and was not remanded, but continued to use "a lot" of cocaine. Kelly noted that Swern and D'Isselt already discussed this. A. 2054 (emphasis added).

On June 17, Avitto appeared in court because of the failed drug test. Yet again, he was reprimanded by the court, warned that another positive test would result in jail, and released without bail. A. 2077-80. A handwritten note from that court appearance (disclosed for the first time during the hearing after the lower court reviewed Avitto's file) referenced Avitto's case information and that "someone took for ADA Nicolazzi in homicide." A. 597-601, 2055.

After the June 17 appearance, D'Isselt and Ryan confronted Avitto about his noncompliance. D'Isselt told Avitto that she would remain in "direct contact" with Nicolazzi and her Giuca co-counsel about his poor performance. She warned Avitto that Giuca's prosecutors would support EAC if they sought to violate him and recommend incarceration. A. 2528. On June 21, Swern again asked Nicolazzi to update her on Avitto's status. A. 2048.

In late August, Avitto again tested positive for cocaine. A. 2234, 2543. Instead of being jailed, he was sent to detox. In early September, he absconded from the detox facility, which resulted in another violation and court appearance on September 6. A. 2081-83. At the bench, the court told Ryan it would not incarcerate Avitto without Nicolazzi's consent. A. 2547. On the record, the court criticized

Avitto, threatened him with imprisonment, ordered him into rehab, and released him without bail. A. 2082. Ryan spoke to Nicolazzi after court. A. 2547.

On September 7, Avitto entered rehab. On September 19, Avitto was expelled from the facility for failing to comply with its rules, which necessitated another unscheduled court appearance. At the bench, Ryan told the court he notified Nicolazzi about the problem. Citing Avitto's upcoming testimony against Giuca, the court replied it "wanted to keep Avitto out" of jail. A. 2549. In open court, the judge castigated Avitto for his "not good" record of compliance. In an obvious attempt to benefit from his cooperation against Giuca, Avitto boasted that he was testifying against Giuca that week. Implying that it was acting at the behest of Nicolazzi, the court responded "well *apparently* we're going to give you another opportunity" and released him. A. 2084-87 (emphasis added). After court, Ryan told Nicolazzi what occurred in court. A. 2549.

Three days later, on September 22, in response to Nicolazzi's leading questions, Avitto testified that he contacted the police to cooperate against Giuca "sometime in June," several months after he was sentenced to a drug program in which he was "doing good" since he was released from jail (in April 2005), and that his own legal situation did not influence his decision to incriminate Giuca. A. 1730-32, 1750, 1752, 1756, 1760.

Nicolazzi testified at the hearing there was no need to disclose evidence or correct Avitto's "accurate" testimony regarding his "routine" June 13 appearance. A. 544, 553-55, 708, 724. She maintained that her identity as "the DA" who appeared in court with Avitto was irrelevant and something the jury had no right to know. A. 704, 710-11. Despite substantial proof demonstrating Nicolazzi's connection to, and interest in, Avitto's case after their June 13, 2005, meeting, she testified she "definitely was not involved in his case," and that she had no responsibility for Avitto's case after June 13. A. 555-56 *cf.* 2048-52, 2055, 2523, 2528. According to Nicolazzi, she "never kept track of Avitto's court dates." A. 610.

In its decision, the hearing court overlooked per se undisclosed *Giglio* material in the prosecution's possession—including email and notes documenting the "special attention" Avitto received after he "turned himself into the DA's Office" seeking to cooperate on a murder case. A. 2048, 2054. The court incorrectly reasoned that because there was no evidence of an express agreement, the prosecution was not obligated to disclose evidence of Avitto's possible motive, bias or interest to falsely incriminate Giuca. A. 14-16. It held there was "absolutely no evidence" that Nicolazzi "requested or recommended" Avitto's release on June 13, even though Ryan's detailed and contemporaneous notes revealed that on that date, Nicolazzi "explained [to the court] that they wanted to have Avitto stay with his

mother..." A. 18, 2523. Separate and apart from the *Giglio* question, the court failed to acknowledge that Nicolazzi's questioning of Avitto and her argument misled the jury about the relationship between Avitto's legal situation and his cooperation against Giuca and her failure to be candid with the court.

2. Evidence that the Prosecution Suppressed Favorable Impeachment Material that Documented Avitto's Mental Illness and Propensity to Lie to Help Himself

Several prosecutors, including Nicolazzi, knew that Avitto constantly was noncompliant with his EAC mental health and drug program while he was cooperating against Giuca. Prosecutors and EAC supervisors expressed concern over Avitto's noncompliance with EAC specifically because of its impact on his cooperation against Giuca. A. 401, 421, 567, 569, 574-75, 2048, 2052, 2055, 2523-24. Yet Nicolazzi claimed she did not review, let alone disclose, the treasure trove of *Giglio* material contained in Avitto's EAC records, including:

- Avitto's history of hallucinations and hearing voices, and that his $200-a-day cocaine habit "helped take away the voices." A. 2261, 2268, 2284-85.

- Avitto's history of suicide attempts, including his conditional threat to kill himself and "make news" unless he was sent from Rikers Island to the hospital. A. 2260, 2263, 2272-76, 2281-85.

- Avitto's serious mental illness, disorientation to time, impaired concentration, labile effect, poor impulse control and severely impaired judgment. A. 2275-76, 2284, 2501.

- Documentation that Avitto fabricated the severity of his mental illness because he "*had to do what he had to do to change my situation*" (i.e., get out of jail) because "at that time I got court." A. 2282, 2287, 2289, 2463, 2466, 2509.

- After he was out of jail and cooperating against Giuca, Avitto "recanted his recantation" and again alleged a history of suicide attempts and hallucinations, including a recent one where he "saw a snake." A. 2259-66.

- Shortly before he testified, Avitto was diagnosed with bipolar disorder and post-traumatic stress disorder, with symptoms including mania, racing thoughts, paranoia, restlessness, limited insight, impaired judgment, poor short term memory, fair long term memory, a high level of distractibility. A. 2256, 2259-91, 2264-65.

- While Avitto was a cooperating witness, doctors reported his concern with his "legal status" as an Axis IV stressor.[15] A. 2265.

- Avitto frequently was prescribed Seroquel for severe and persistent mental illness. A. 2260, 2262, 2266, 2268-69, 2275, 2282, 2286-87, 2314, 2369.

The hearing court held the prosecution did not possess this favorable impeachment evidence because Nicolazzi was unaware of it and she had no obligation to review EAC's records. A. 18-19. It overlooked that Nicolazzi ignored obvious warnings about Avitto's poor credibility before she falsely vouched for his truthfulness and altruistic motive to cooperate against Giuca.

[15] Axis IV of the of the DSM multiaxial system of assessment reports psychosocial and environmental stressors that may affect the diagnosis, prognosis and treatment of mental disorders.

ARGUMENT

POINT I

THE PROSECUTION WITHHELD SPECIFICALLY REQUESTED *GIGLIO* MATERIAL AND REPEATEDLY MISLED THE JURY REGARDING THEIR KEY WITNESS'S MOTIVATION FOR TESTIFYING; UNDER THE APPLICABLE MATERIALITY STANDARD GIUCA'S CONVICTION MUST BE VACATED

A. The Applicable Law

1. Due Process Requires the Prosecution to Disclose Favorable Impeachment Material Regarding a Witness's Possible, Motive or Bias, to Prevent or Correct a Witness's False or Misleading Testimony, and to Refrain From Engaging in Inaccurate Argument, Regarding the Witness's Motivation

A defendant has a constitutional right to present the jury with evidence of a witness's possible motive, bias or interest in testifying against him. *Davis v. Alaska*, 415 U.S. 308 (1974); *People v. Hudy*, 73 N.Y.2d 40, 57 (1988). "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." *Davis*, 415 U.S. at 316-17. Due process compels the prosecution to disclose evidence that tends to demonstrate a witness's interest in testifying for the prosecution. *Giglio v. United States*, 405 U.S. 150 (1972); *People v. Steadman*, 82 N.Y.2d 1 (1993).

The prosecution's *Giglio* obligation is an institutional one that applies irrespective of their good or bad faith. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). The prosecution has a duty to learn of favorable evidence known to others

working on its behalf. *Id.*; *People v. Wright*, 86 N.Y.2d 591, 598 (1995). Whether the prosecution has "possession or control" over favorable impeachment material is not interpreted narrowly. *People v. Garrett*, 23 N.Y.3d 878, 886-89 (2014). A prosecutor may not consciously avoid *Giglio* obligations through disinclination to investigate a "subject that should have been of particular interest in view of its pertinence" to a witness's credibility. *People v. Novoa*, 70 N.Y.2d 490, 498 (1987).

A prosecutor must not elicit testimony regarding a witness's credibility she knows or should know is false or misleading, or fail to correct such inaccurate testimony. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *People v. Colon*, 13 N.Y.3d 343, 349 (2009). Nor may a prosecutor pose artful questions that mislead the jury about a witness's motive for testifying. *Jenkins v. Artuz*, 294 F.3d 284, 294 (2nd Cir. 2002); *see also*, *People v. Perez*, 127 A.D.2d 707, 710 (2nd Dept. 1987) (reversal where prosecutor's questions were deliberate attempt to mislead jury).

A prosecutor must not exploit a witness's inaccurate testimony in summation. *Colon*, 13 N.Y.3d at 349-50; *Novoa*, 70 N.Y.2d at 497-98; *People v. Vielman*, 31 A.D.3d 674, 675 (2nd Dept. 2006). A prosecutor may not simply "assume the risk" that argument about a witness's motivation for testifying is untrue and may mislead the jury; she must undertake "obvious" and "appropriate" inquiries before making statements in summation she should have known were false. *Novoa*, 70 N.Y.2d at 498; *People v. Conlan*, 146 A.D.2d 319, 330 (1st Dept. 1989) (court rejected

prosecutor's claim of willful ignorance regarding knowledge of jailhouse informant's selfish motivation to testify because jury still might have been misled "unwittingly"); *see also*, Su *v. Filion*, 335 F.3d 119, 127 (2nd Cir. 2003) (court criticized prosecutor's inaccurate summation denying benefits were provided to witness; prosecutor "had a fundamental obligation to determine whether that is so").

2. The Court Below Erred in Concluding There Must Be an Express Agreement Between the Prosecution and Witness to Provide the Witness with a Benefit in Exchange for His Testimony Before the Prosecution's *Giglio* Obligation Arises

The hearing court held there was no *Giglio* violation because Giuca failed to prove there was an agreement or understanding between Avitto and the prosecution about providing him benefits in exchange for his cooperation. A. 14-16. This clearly is not the law.

The constitutional duty to disclose *Giglio* material does not turn on whether the circumstances constitute "technically…a promise" or a "binding contract." *United States v. Bagley*, 473 U.S. 667, 683-84 (1985). "[I]t is upon such subtle factors as the *possible* interest of the witness testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269 (emphasis added).

The prosecution must disclose facts that "create an *expectation* of some benefit, *Novoa*, 70 N.Y.2d at 497, and evidence that is "of such a nature that the jury *could have found that,* despite the witness's protestations to the contrary, there was

indeed a tacit understanding between the witness and the prosecution, *or at least so the witness hoped.*" *People v. Cwikla*, 46 N.Y.2d 434, 441 (1979) (emphasis added).

Even if the evidence sought does not prove the existence of an express promise, if there is a "strong inference, at the very least, of an *expectation* of leniency," the evidence must be disclosed. *Id.* at 442 (emphasis added). The persuasiveness of such an inference is suggested by the prosecution's use of "misleading and obstructive tactics." *Id. See Wright*, 86 N.Y.2d at 595 (reversible error where prosecution failed to disclose witness's *possible* motive to testify falsely where he previously had been an informant, even though no evidence of benefits in current case); *People v. Ford*, 41 A.D.2d 550, 551 (2nd Dept. 1973) (disclosure required if there is *possibility* witness *had the impression* that testimony would be rewarded with some consideration).

A homicide prosecutor's off-the-record appearance on a witness's case to convey a plea offer is evidence of a "benefit extended" that might impact the jury's perception of the witness's credibility. *Colon*, 13 N.Y.3d at 349-50. Similarly, a homicide prosecutor's appearance on a witness's probation violation at which she does not request bail has "an especially strong bearing on the witness's credibility" because it suggests that the witness "ha[s] a motive to testify falsely in favor of the prosecution…out of gratitude for the prosecutor's aid." *People v. Taylor*, 26 N.Y.3d 217, 225-26 (2015).

A prosecutor may not unilaterally determine the value of favorable impeachment material. At a minimum, evidence that is arguably *Giglio* material should be presented to the trial court for an *in camera* review because "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." *People v. Andre W.*, 44 N.Y.2d 179, 185 (1978).

3. Under the Applicable Materiality Standard, Giuca's Conviction Must Be Vacated If There is a "Reasonable Possibility" of a More Favorable Outcome Had the Jury Known the Truth about Avitto

Under federal law, there must be a reasonable probability that had the evidence been disclosed, the outcome would have been more favorable to the defense. *Bagley*, 473 U.S. at 682. New York law applies a more lenient standard if the defense made a specific demand for disclosure. In these circumstances, the failure to disclose is "seldom, if ever" excusable and reversal is required if there is a reasonable possibility that the non-disclosure of favorable evidence contributed to the conviction. *People v. Vilardi*, 76 N.Y.2d 67, 77 (1990). The *Vilardi* standard is met if the withheld information "would have added a little more doubt to the jury's view of the evidence" and it is "reasonably possible a little more doubt would have been enough." *People v. Negron*, 26 N.Y.3d 262, 271 (2015). Where multiple items of evidence have been withheld, they must be considered individually, but materiality is evaluated by their cumulative impact. *Kyles*, 514 U.S. at 437.

The "reasonable possibility" standard also applies when a prosecutor elicits or fails to correct inaccurate testimony. *Colon*, 13 N.Y.3d at 349. *See United States v. Wallach*, 935 F.2d 445, 456 (2nd Cir. 1991) (reversal "virtually automatic" where prosecutor knew or should have known testimony was false or misleading).

The prosecution conceded at the hearing that Giuca made specific pre-trial demands for favorable impeachment material regarding possible benefits received by Avitto, his drug abuse, and his psychiatric history. The defense also made a second specific demand at the conclusion of Avitto's testimony. A. 477-79, 894-95, 897, 1874-77.

B. The Prosecution Violated Giuca's Right to Due Process by Withholding Evidence Demonstrating Avitto's Possible Motive, Bias, or Interest to Falsely Incriminate Giuca and by Failing to Correct Avitto's Inaccurate Testimony

Even if Nicolazzi, as she claimed at the hearing, subjectively believed she was not required to disclose evidence or to correct Avitto's testimony, due process still required her to do so. She improperly anointed herself "gatekeeper of the evidence" by restricting the jury to evidence that supported her contention that Avitto's credibility was excellent. It was the province of the jury to determine, based on *all* of the relevant evidence, whether Avitto's decency or his own self-interest motivated him to testify favorably for the prosecution. *Napue*, 360 U.S. at 270; *Colon*, 13 N.Y.3d at 350; *Novoa*, 70 N.Y.2d at 497; *Andre W.*, 44 N.Y.2d at 185.

Nicolazzi presented the jury with a skewed portrayal of Avitto's credibility by depriving it of critical evidence demonstrating his strong motive to falsely implicate Giuca in Fisher's murder. *Cwikla*, 46 N.Y.2d at 442. She elicited evidence from Avitto that he was "doing good" in his program since his release from jail months earlier, which if true, would have eliminated his self-interest as a motive to testify favorably for the prosecution. But the hearing evidence proved the blatant falsity of both Avitto's testimony and Nicolazzi's premise that Avitto was succeeding in his program. A. 2077-87. Indeed, Avitto was reprimanded by a judge for his consistently "not good" performance just three days before Nicolazzi elicited from him that he was "doing good" since his release from jail. A. 2084-87.

Nicolazzi's suggestion that Avitto contacted police "sometime in June" four months after he was sentenced to a drug program was misleading. Avitto denied contacting the police "immediately" after he left his program on June 9 and denied using drugs between June 9 and June 13, but the hearing evidence proved he did just that—and Nicolazzi knew it. A. 1745, 1747, 1756 *cf.* 2048-52, 2055, 2500, 2523, 2528, 2547, 2549. She knew Avitto absconded from his program on June 9, used cocaine, and *that very evening*[16] called detectives seeking to cooperate against Giuca

[16] At the hearing, the prosecution relied on the obviously inaccurate ten-year recollections of two detectives as "proof" Avitto first met detectives before June 9, at his program, which they adamantly claimed was in Brooklyn. A. 360-62, 808. The prosecution's argument defied the evidence and common sense. On June 13, 2005, Nicolazzi told Ryan that Avitto contacted detectives on Thursday, June 9. A. 2523. Nicolazzi first met Avitto on June 13 and told the trial

with "information" four months old. Avitto knew his conduct triggered the prison sentence he had been warned about this several times, including only hours before he absconded. A. 2068-70. He knew a warrant was issued for his arrest. A. 2522. He then used cocaine again on June 12 and rather than turn himself into court, he met Nicolazzi to offer crucial, yet false information against Giuca. When Nicolazzi appeared in court with Avitto on June 13, 2005, *she* "explained that [Avitto] had contacted detectives on Thur. 6/9/05 stating he had information on a present murder trial." A. 500, 560, 2523.

Nicolazzi's actual knowledge about the truth, combined with the crafty manner in which she questioned Avitto about his June 13 court appearance, proved she deliberately misled the jury about the nexus between Avitto's legal problem and his decision to incriminate Giuca, including her prominent role in it. She limited Avitto to two possible explanations for the court appearance: (1) he was picked up by the warrant squad or (2) he called his EAC counselor on his own. A. 1758. She knew this was a false choice and that any responsive answer would conceal the

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court she was present at every meeting between Avitto and law enforcement. In fact, because of her presence at every meeting with him, she was able to represent she knew there was no Avitto-related *Rosario* material. A. 496-97, 1761. Numerous EAC documents admitted into evidence at the hearing confirmed that from April 28, 2005, until he absconded at 5:25 p.m. on June 9, Avitto resided at Samaritan Village in Jamaica, Queens. A. 2066-73, 2092-93, 2447-51, 2455, 2462, 2471. Finally, if Avitto had reached out to police before he absconded on June 9, at trial Nicolazzi would have elicited such testimony and argued it demonstrated his lack of interest in a benefit in exchange for his cooperation. She didn't. A. 1760.

timing and relationship between Avitto's legal situation and his decision to volunteer evidence against Giuca.

Naturally, Avitto lied that he called Ryan before they walked to court together, where an anonymous prosecutor appeared on the case. Avitto "guessed" he was released after Ryan "got him another shot." A. 1758. Nicolazzi then emphasized that Giuca's trial judge was not the jurist who released Avitto. She stressed that Avitto first contacted the police four months after he had been sentenced to a drug program. A. 1758, 1760.

Thus, the jury never knew that after Avitto's June 9 violation and before his June 13 court appearance:

- Avitto called police seeking to offer information against Giuca the very evening that he absconded from his program and used cocaine,
- Aware there was a warrant for his arrest, Avitto met with Nicolazzi and began cooperating against Giuca before he returned to court,
- Nicolazzi escorted Avitto to court and told him that although he was "going in on his own" and might go to jail, she would notify the court he provided information about Giuca, and
- Nicolazzi appeared on Avitto's case, where she notified the court that Avitto provided information against Giuca before she asked that he be released until a program could be located.

The prosecution suppressed additional evidence that would have proved Avitto's selfish motive to testify against Giuca and exposed the inaccuracy of his testimony and Nicolazzi's argument to the contrary. In light of Nicolazzi's argument

that Avitto cooperated out of decency and conscience months after he had been sentenced to a program in which he was succeeding, it would have been significant for the jury to know that the prosecution suppressed an internal document that memorialized precisely what Avitto denied and Nicolazzi misled the jury about: Avitto "turned himself into the DA's Office and he has [information] on a murder [case] and he was not remanded," and he continued to use "a lot" of cocaine. A. 2054.

Similarly, if jurors knew that the morning after Avitto began offering the prosecution information against Giuca, executive prosecutors, Nicolazzi and senior staff at EAC flagged this otherwise ordinary defendant with a mundane post-plea burglary case for "special attention," they assuredly would have been less inclined to believe Avitto was motivated to cooperate for reasons unrelated to his own legal problems. A. 2048.

The jury should have known that after Avitto failed a drug test just days after he first met Nicolazzi, the EAC director warned him she would remain in "direct contact" with Nicolazzi and her Giuca co-counsel regarding his continued noncompliance. A. 2528. Any reasonable juror would have interpreted this a threat to Avitto that his "value" to the Giuca prosecution was conditional upon Nicolazzi's satisfaction with his performance in his program. The jury had a right to know that after June 13, 2005, rather than Avitto's burglary case prosecutor, *Nicolazzi* was

EAC's point of contact about his noncompliance. If the jury knew the truth it would have appreciated that "pleasing Nicolazzi" benefited Avitto (as evidenced by the events of June 9 to 13, 2005) and "disappointing her" might harm him (as evidenced by D'Isselt's June 17 threat to report Avitto's noncompliance to Nicolazzi).

The jury also was kept ignorant that shortly before Avitto testified at trial, he twice was released without bail after program violations because of his upcoming testimony against Giuca, and that when he got into trouble three days before he testified, he exploited his status a witness against Giuca in order to gain his release. A. 2086, 2547, 2549.

Rather than disclose any of this specifically requested favorable impeachment material or correct Avitto's inaccurate testimony, Nicolazzi instead made patently false argument that there was "absolutely no evidence" Avitto lied or that he was "willing to say anything because he's trying to help himself and he's getting some sort of deal." She maintained that Avitto's release on June 13 (and beyond) was unrelated to his cooperation against Giuca, when the exact opposite was true. A. 1966-67. Her "affirmative mischaracterizations" in summation "repeated and emphasized [Avitto's] misinformation" and "compounded the error" caused by Avitto's misleading testimony. Novoa, 70 N.Y.2d at 498; *Colon*, 13 N.Y.3d at 349. Consequently, her failure "to be vigilant to avoid misleading the court or jury"

"exacerbated" the prejudice to Giuca and violated his right to due process. *Colon*, 13 N.Y.3d at 350.

The lower court acknowledged Avitto lied "in order to achieve something he wanted," but it denied Giuca's motion because of its belief there was insufficient proof of an agreement between Avitto and the prosecution. A. 18-19. However, it ignored decades of U.S. Supreme Court and Court of Appeals precedent establishing that proof of a *quid pro quo* is not required to establish a *Giglio* violation. *See Bagley*, 473 U.S. at 683-84; *Napue*, 360 U.S. at 269; *Novoa*, 70 N.Y.2d at 497; *Cwikla*, 46 N.Y.2d at 441.

The cumulative impact of the withheld evidence, Avitto's false testimony and Nicolazzi's inaccurate argument, if known by the jury, *could* have led it to find—notwithstanding Avitto's denials—that he had a *possible* motive to testify falsely or *at least hoped* for consideration. *See Cwikla*, 46 N.Y.2d at 441; *Wright*, 86 N.Y.2d at 595; *Kyles*, 514 U.S. at 437. The suppressed evidence and the prosecution's "misleading and obstructive tactics" easily created a "strong inference" that Avitto *"at the very least"* expected leniency at the time he volunteered and then testified against Giuca. *Cwikla*, 46 N.Y.2d at 442; *see Conlan*, 146 A.D.2d at 330 ("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 a defendant's boasting in prison").

The lower court incorrectly dismissed *People v. Taylor*, 26 N.Y.3d 217 (2015), as irrelevant to the due process issues raised by the evidence at the hearing. A. 17. In *Taylor*, a homicide prosecutor appeared on a key witness's probation violation court appearance and did not request bail. However, unlike Nicolazzi, the prosecutor disclosed her appearance and she did not mislead the jury about her intervention into the witness's case. Instead, the prosecutor in *Taylor* argued her conduct did not benefit the witness. 26 N.Y.3d at 220-21. During deliberations, the jury requested to see "the benefits offered," but the court failed to provide read back of testimony describing the prosecutor's intervention into the witness's case.

The Court held the evidence of benefits "necessarily included" "that the trial prosecutor in defendant's case spared him from having to post bail in his probation proceeding." *Id.* at 225. If it was error to deny read back of a *disclosed* benefit that consisted of conduct virtually identical to Nicolazzi's intervention into Avitto's return on warrant proceeding, then Nicolazzi's *wholesale* suppression, elicitation of misleading testimony and false argument about the same assuredly prejudiced Giuca by depriving the jury of evidence regarding the "advantages of [Avitto's] cooperation with the People." *Id.*

The Court's reasoning in *Taylor* perfectly explains how Nicolazzi's conduct violated Giuca's right to due process:

> [T]he People's favorable treatment of [the witness] was essential to the jury's ability to judge the credibility of [the witness]...The evidence sought by the jurors had an especially strong bearing on the witness[s]' credibility. Indeed, because [the evidence] showed that the trial prosecutor had helped [the witness] to win pretrial release in another case, [the evidence] 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

26 N.Y.3d at 226.

The Court also held that the failure to provide read back might have given the jury the wrong impression that the prosecutor's intervention into the witness's case was unimportant. *Id.* If this was a concern even though the jury heard the evidence, such concern is substantially enhanced here, where in addition to denying the jury evidence of Nicolazzi's intervention into Avitto's case, the prosecution suppressed the fact that Nicolazzi informed the court Avitto provided information against Giuca before he was released, as well as additional evidence that demonstrated Avitto's strong motive to testify falsely. A. 544, 553-55, 2048, 2054, 2523, 2528, 2547, 2549.

The Court in *Taylor* reversed a murder conviction out of concern that the jury's ability to properly assess the credibility of a witness was compromised even though the jury knew the homicide prosecutor appeared on the witness's case and did not seek bail. If this conduct was not essential to the witness's credibility, the Court would have deemed the error harmless and affirmed Taylor's murder conviction. But the Court's reversal re-affirmed what it recognized in *Colon*: "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." 13 N.Y.3d at 350.

Because all of the compelling evidence of Avitto's possible benefits withheld from Giuca's jury was more substantial than in *Taylor*, and unlike the prosecutor in *Taylor*, Nicolazzi deliberately suppressed evidence and misled the jury, Giuca's right to due process was violated.

Nicolazzi's unconstitutional gamesmanship was pernicious. As an actual witness to the matters on which she misled the jury, she was the necessary defense witness to expose Avitto's lies[17] because

> had the jury been apprised of the true facts...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 [the trial prosecutor] was in a position...to implement a promise of consideration.

Napue, 360 U.S. at 270 (emphasis added).

Nicolazzi's contention that the fact that Avitto met her before court on June 13, or that she, as opposed to any of the other several hundred Brooklyn prosecutors

[17] In light of the non-disclosure of her pre-trial conduct, Nicolazzi should have been disqualified from the prosecution. *See People v. Paperno*, 54 N.Y.2d 294 (1981) (if prosecutor's pre-trial conduct is a material trial issue, the prosecutor is a potential witness and should be recused from the case).

without an interest in Avitto, appeared on his case to notify the court about his cooperation, was irrelevant, demonstrated her overzealousness and disregard for Giuca's right to due process. A. 704-06, 711. Even if she believed Avitto's testimony was "literally true" it still was "surely misleading" because it was designed to give the jury a false impression. *Jenkins*, 294 F.3d at 294.

Avitto began cooperating "sometime in June," but it was highly misleading to conceal from the jury that it was June 9—the same day he exposed himself to a lengthy prison sentence. A. 1731 *cf.* 2523. Although Avitto did speak to Ryan sometime before he went back to court before June 13, he left out that Nicolazzi, not Ryan, took him to court. A. 2522 *cf.* 549. Nicolazzi did not correct this false testimony. Avitto testified Ryan helped secure his release in the presence of "the DA;" but Nicolazzi admitted at the hearing she told Avitto that she would notify the court about his efforts to help the case against Giuca. A. 1758 *cf.* 549. Again, Nicolazzi let Avitto's misleading testimony stand.

Nicolazzi's questions that hid from the jury that she was "the DA" who appeared on Avitto's case and that he started cooperating immediately before he appeared in court, followed by her emphasis that Giuca's trial judge played no part in Avitto's release were "phrased so as to reinforce the false impression" that Avitto did not have a possible motive to fabricate his testimony. Such advocacy "has no place in the administration of justice and should neither be permitted nor rewarded."

Jenkins, 294 F.3d at 294-95 *citing United States v. Young*, 470 U.S. 1, 9 (1985); A. 1758, 1760, 2523.

Accordingly, the prosecution violated Giuca's right to due process because "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." *Colon*, 13 N.Y.3d at 350; *People v. Savvides*, 1 N.Y.2d 554, 557 (1956) ("[T]he District Attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."); *see Vielman*, 31 A.D.3d at 675 (reversal required where argument rests upon a false premise designed to mislead jury).

C. The Prosecution Violated Giuca's Right to Due Process by Consciously Avoiding Avitto's Specifically Requested EAC Records, Which Demonstrated Benefits Avitto Received by Cooperating against Giuca, His Motive to Testify Falsely, His History of Lying to Help Himself and His Serious and Persistent Mental Illness

As described, *supra,* although the defense requested favorable impeachment material regarding Avitto's drug addiction, mental illness and possible benefits he received, the lower court held the prosecution had no duty to obtain or disclose his EAC records. A. 18-19. It ignored substantial proof that the prosecution's frequent contact with Avitto and discussions between and among the prosecution and EAC regarding his noncompliance and its impact on his status as a possible witness against Giuca, demonstrated the prosecution knew or should have known about the voluminous *Giglio* material Nicolazzi consciously avoided:

- Nicolazzi and Avitto spoke "at length" about his mental health problems, his medication and drug addiction. He told her the TADD program he absconded from on June 9, 2005, did not properly address his mental health needs. A. 510, 572.

- From June 13, 2005, until Avitto testified, Nicolazzi and Ryan spoke at least six times about Avitto's mental health, his drug addiction and his involvement in Giuca's case, including before and after court appearances at which he was released because of his cooperation against Giuca. A. 2523, 2532, 2547-50.

- Shortly after she met Avitto, Nicolazzi met with the prosecutor who handled Avitto's case. This prosecutor previously had been told about the difficulties EAC had placing him in a mental health and drug program. A. 574-75, 2052, 2514.

- After Avitto started informing against Giuca, Executive ADA Swern, Nicolazzi, Kelly (mental health supervisor), Heslin (drug court supervisor), D'Isselt (EAC director) and others at EAC treated Avitto with "special attention" and monitored him closely. A. 2048-55. Kelly only became involved in Avitto's situation because of Avitto's mental health issues and the fact that he likely was a witness on a homicide case. A. 377, 401.

- A concerned EAC supervisor warned Kelly that even after Avitto had been released without bail after "turning himself into the DA's Office" with information against Giuca, he continued to abuse cocaine, which had been discussed by Swern and D'Isselt. A. 2054.

- D'Isselt told Avitto that she would keep Nicolazzi and her Giuca co-counsel updated about his noncompliance with his program. A. 2528.

- Despite claiming she "never kept track of Avitto's court appearances," which was contrary to the express instructions of her superior, Nicolazzi received oral and written updates on Avitto's post-June 13, 2005, court appearances. A. 610 *cf.* 2048-49, 2055, 2547, 2549.

In other words, Nicolazzi was bombarded with leads to specifically requested favorable impeachment material that she ignored. Her testimony that she was not obligated to investigate Avitto's mental health and drug issues because of her concern with his privacy was absurd. Avitto volunteered to be a witness. A. 2523. He frequently discussed his mental illness and drug addiction with her. Shortly before Nicolazzi met Avitto at a rehab facility a few days before he testified, Ryan told her she needed "Avitto to sign a waiver to speak with her." A. 480, 509-12, 2548. It was Nicolazzi who placed into evidence Avitto's history of drug abuse, his use of medication and the fact he was sexually abused as a child. A. 1730-31, 1759-60. Her testimony, if believed, evinced her conscious choice to remain ignorant about Avitto's poor credibility. She was an experienced prosecutor who knew Avitto frequently was noncompliant with his mental health and drug program, yet she incredibly claimed she never even kept track of his court appearances. A. 473-79, 610.

A reasonable prosecutor would have known that Giuca's fundamental right to confront Avitto outweighed any concern for his privacy. *Davis*, 415 U.S. at 320. Put simply, Nicolazzi buried her head in the sand when "[o]strich-like behavior on the part of the prosecution is not tolerated by *Brady* and its progeny." *Valentin v. Mazzuca*, 2011 WL 65759 at 17-18 (WDNY 2011). *See Garrett*, 23 N.Y.3d at 886-

87 ("it is beyond cavil" that possession or control for *Giglio* purposes expands beyond actual possession).

Even worse, Nicolazzi exploited her willful blindness to Avitto's pathetic credibility by pervasively vouching for his excellent credibility in a summation riddled with breathtakingly inaccurate statements:

- "Everything John Avitto told you is credible"; "It's as much by what he didn't tell you as it is by what he did that lets you know he was being truthful and you could trust him" A. 1956.

- Avitto "was very honest about his problems and criminal past. He freely admitted things he clearly isn't proud of and that goes to his credibility" A. 1957.

- There was "no evidence" Avitto was "making this up and willing to say anything because he's trying to help himself and he's getting some sort of deal"..."Every time" Avitto violated his program he contacted his counselor... "it's there for you to see in black and white," so it was not surprising "that a judge would choose to give him multiple chances when he was showing himself to be acting responsibly"..."If he had gotten some consideration, then there would be absolutely nothing to hide about that" A. 1966-67.

- Avitto pleaded guilty months before he contacted the police, "so to believe the defense [claim that Avitto was self-interested] the DA is in on it, the police are in on it and even the judge is in on it but that makes absolutely no sense and is not corroborated"... "There is absolutely no evidence, no evidence at all [that Avitto received consideration]" A. 1968.

- "John Avitto...came to the police with this information on his own...This is a man who has made mistakes overall his life. And for once, he tried to do something right and for that [counsel] wants you to condemn him" A. 1968-69.

- Defense claim that Avitto was self-interested "was based on no evidence that is anywhere in the record, there was no evidence to corroborate anything he said" A. 1969.

Nicolazzi's "delinquen[cy] in failing to discover" the truth because of her "disinclin[ation]" to learn about her star witness's credibility deficiencies before misleading the jury with inaccurate argument violated Giuca's right to due process. *Novoa,* 70 N.Y.2d at 498. It goes without saying that if the jury knew about the cornucopia of impeachment material in Avitto's EAC records, it might have impacted the jury's assessment of his credibility.

Excusal of Nicolazzi's conscious avoidance of favorable impeachment material and her inaccurate argument "could only serve the undesirable objective of discouraging the obvious, appropriate inquiry." *Id.* This Court's affirmance of the lower court's acceptance of her failure to investigate a "subject that should have been of particular interest in view of its pertinence to [Avitto's] credibility" followed by her patently false statements and pervasive vouching for Avitto's credibility in her summation would serve that objective. *Id.*

D. There is a Reasonable Possibility that the Prosecution's Withholding of *Giglio* Material and Their Presentation of False or Misleading Testimony and Argument Affected the Outcome of the Trial

Under the applicable materiality standards, the cumulative impact of the prosecution's numerous *Giglio* violations and exploitation of Avitto's inaccurate

testimony, makes reversal "virtually automatic." *Napue*, 360 U.S. at 269; *Kyles*, 514 U.S. at 436-37; *Colon*, 13 N.Y.3d at 349-50; *Vilardi*, 76 N.Y.2d at 77.

The lower court concluded there was no reasonable possibility that any Avitto-related errors might have affected the verdict. A. 18-19. It held that the defense's cross-examination on Avitto's criminal record and drug abuse provided a sufficient basis to discredit him. A. 19. But the court overlooked that the prosecution's conduct thwarted Giuca's ability to exercise his fundamental right to confront Avitto about his possible specific bias against him. *Davis*, 415 U.S. at 316-18.

The prosecution's late-trial transition to Avitto and the "second case" makes it obvious that the verdict might have been different if the jury knew the truth about his credibility. At the conclusion of the "first case," Cleary's and Calciano's dreadful credibility left the prosecution in shambles. Both were exposed as admitted liars who were pressured into testifying against Giuca with wildly inconsistent versions of the same critical conversation. Calciano bluntly told the jury that Cleary's account of Giuca's purported admission was not true. Cleary swore he observed Calciano remove evidence; she denied it and called him a liar. The jurors clearly understood this meant at least one of them committed perjury. The only "fact" they agreed on was that Giuca was not present when Fisher was killed, which Nicolazzi later argued did not even make sense.

Cleary and Calciano were so discredited that Nicolazzi sabotaged the "first case" by contradicting her opening statement and the theory that led to Giuca's indictment in favor of Avitto and the "second case." In her opening, she never mentioned Avitto and she assured the jury Cleary would report "the full story." A. 956-60. In her summation, she dismissed Cleary's and Calciano's testimony as "bits and pieces" that "partially danced around the truth." A. 1954.

Nicolazzi argued that not only did Avitto's credible testimony establish Giuca's direct involvement in the crime, but his testimony provided the only sensible explanation for Fisher's murder. A. 1962-63. Without question, Nicolazzi's summation made Avitto's credibility the most important issue for the jury as it weighed Giuca's guilt.

Even though the jury knew about Avitto's lengthy criminal history and drug use, Nicolazzi still made powerful arguments to demonstrate his truthfulness. She exploited Avitto's status as a jailhouse informant, arguing that as Giuca's "confidante" he gained Giuca's trust and was perfectly situated to acquire Giuca's "no holds barred" admission. A. 1954. She described Avitto as truthful, credible, honest and forthright. A. 1956-57. She sympathized Avitto as a man turning his life around and succeeding in a treatment plan, who honorably sought to report evidence of a terrible crime "for once, to do something right." She criticized defense counsel for attacking his integrity. A. 1968-69. She logically contended that because Avitto

was "doing good" in his drug program and approached law enforcement several months after he had been sentenced, he had no plausible basis to seek assistance with his own legal problem in exchange for his willingness to incriminate Giuca.

Avitto's credibility with the jury—and Nicolazzi's—would have been eviscerated had she disclosed favorable impeachment material and corrected Avitto's misleading testimony. Imagine the impact on the jury if it knew that contrary to Avitto's testimony and Nicolazzi's argument that Avitto cooperated "to do the right thing," Avitto, in fact, "turned himself into the DA's Office" seeking to offer old information against Giuca immediately after he exposed himself to a lengthy prison sentence, and after he met Nicolazzi, he was treated with "special attention," which included his release without bail after Nicolazzi appeared in court to notify the judge about his assistance. A. 1968 *cf.* 2054. Similarly, if jurors knew Avitto lied about his serious and persistent mental illness in order to benefit himself, there is little doubt they would have concluded he committed perjury.

Nicolazzi's "heavy reliance" on Avitto in summation created the reasonable possibility that the false impression she gave the jury about Avitto's credibility contributed to the verdict. *People v. Hardy*, 4 N.Y.3d 192, 199 (2005). This Court has found the reasonable possibility standard satisfied where the jury considered improper evidence as part of its analysis of a key witness' credibility, even where, unlike in Giuca's case, the evidence of guilt was overwhelming. *People v. Harris*,

93 A.D.3d 58 (2nd Dept. 2012). *See also, Vielman*, 31 A.D.3d at 675; *People v. Cotton*, 242 A.D.2d 638, 639 (2nd Dept. 1997) (prosecutor's "blatant misrepresentation of the facts" was "closely related to credibility issue" and required reversal); *People v. Richardson*, 137 A.D.2d 105 (3rd Dept. 1988) (prosecution's extensive reference to improperly admitted evidence in summation not harmless).

This Court's decision in *Harris* is illustrative. Like Giuca's case, the principal evidence against Harris consisted of alleged admissions and testimony from witnesses with an interest in testifying favorably for the prosecution. This Court held the prosecution's emphasis in summation on improperly admitted evidence might have contributed to the guilty verdict due to the lack of direct evidence and because the key witnesses against him had strong motives to favor the prosecution. *Id.* at 71-74. Thus, even though the evidence of Harris' guilt was overwhelming, reversal was required because the error was not "unimportant and insignificant." *Id.* at 75. *Harris* supports reversal here because the prosecution repeatedly misled the jury about Avitto's poor credibility and Nicolazzi implored the jury to convict Giuca on Avitto's testimony, which she pervasively vouched for with inaccurate argument.

Finally, the very fact of a witness's untruthfulness and a prosecutor's complicity in it is relevant to an analysis of the prejudice caused to a defendant. *See Su*, 335 F.3d 119, 129 n.6 (2nd Cir. 2003) ("the very fact of the witness's untruthfulness is itself relevant to an analysis of prejudice" and would be

"devastating" if the jury knew that the false testimony was elicited knowingly or recklessly); *Jenkins*, 294 F.3d at 295 (recognizing the "heightened opportunity for prejudice where the prosecutor, by action or inaction, is complicit in the untruthful testimony").

POINT II

AVITTO'S EAC RECORDS CONSTITUTE NEWLY DISCOVERED EVIDENCE BECAUSE THEY CONTAINED PROOF OF HIS LONGTIME SERIOUS AND PERSISTENT MENTAL ILLNESS, WHICH IF KNOWN BY THE JURY LIKELY WOULD HAVE RESULTED IN A MORE FAVORABLE VERDICT FOR THE DEFENSE

A court may vacate a conviction based upon newly discovered evidence where such evidence (1) will probably change the result if a new trial was granted, (2) has been discovered since trial, (3) could not be discovered before trial by the exercise of due diligence, (4) was material, (5) is not cumulative and (6) must not be merely impeaching or contradicting the former evidence. *People v. Salemi*, 309 N.Y. 208 (1955); *People v. Tankleff*, 49 A.D.3d 160 (2nd Dept. 2007).

Avitto's EAC records were disclosed to the defense for the first time shortly before the hearing began in November 2015, or more than ten tears after Giuca's trial. The trial defense first learned about Avitto when his name appeared in the middle of a long witness list at the beginning of the trial. The prosecution did not disclose any information about him, or mention him or any testimony that he might offer at trial until he appeared as a witness. The defense relied on Nicolazzi's

representations that she was unaware of any favorable impeachment evidence, and there was no way for the trial defense reasonably to have acquired the records for use during the trial. A. 755-56, 760-63; *see Banks v. Dretke*, 540 U.S. 668 (2004); *Strickler v. Greene*, 527 U.S. 289 (1999).

Evidence of a witness's history of serious mental illness is not merely impeaching and may constitute newly discovered evidence under the *Salemi* test. *People v. Rensing*, 14 N.Y.2d 210, 213-14 (1964). This Court, citing *Rensing,* has recognized that a defendant's fundamental rights to confrontation and a fair trial include the opportunity to alert the jury that a key prosecution witness's "capacity to perceive and recall" might have been impaired due to mental illness. *People v. Baranek*, 287 A.D.2d 74, 78-79 (2nd Dept. 2001). Such evidence includes evidence of a witness's chronic mental illness and the witness's mentally ill condition one year prior to the crime she testified about. *Id.* at 79. Like the Court of Appeals in *Rensing,* this Court has recognized that evidence the witness experienced hallucinations and delusions is significant. *Id. See also*, *People v. Knowell*, 127 A.D.2d 794 (2nd Dept. 1987) (reversal where jury was deprived of evidence that witness had lengthy psychiatric history, including hospitalizations and diagnosis of paranoia); *People v. Collins*, 250 A.D.2d 379 (1st Dept. 1998) (psychiatric records demonstrating witness's long-standing history of mental illness constituted newly discovered evidence).

The lower court held Avitto's EAC records were entirely impeachment material. A. 21. This analysis overlooked the voluminous psychiatric records contained therein, which documented Avitto's history of severe and persistent mental illness.

Avitto's EAC records documented his mental health status that from the time he was arrested in October 2004 until he testified against Giuca in September 2005. They memorialized his history of chronic mental illness, bipolar disorder, mood disorder, depression, post-traumatic stress disorder, and polysubstance dependence. They noted his history of experiencing hallucinations and hearing voices. A. 2261, 2268, 2284-85. Only two months before he testified against Giuca, Avitto hallucinated and "saw a snake." A. 2265. Shortly before he testified, Avitto suffered from paranoia, anxiety, mania and racing thoughts. A. 2256, 2259-61, 2264-65. He demonstrated poor impulse control, limited insight, impaired judgment, poor short term memory and fair long term memory. A. 2264. The records also revealed Avitto's history of psychiatric hospitalizations since the 1990's, including one for a C.P.L. 730 examination, and his several suicide attempts, which included cutting himself, trying to hang himself, and threatening to bang his head against a wall. A. 2260-61, 2268, 2271, 2282-85.

Avitto's history of serious and persistent mental illness was relevant to his ability to recall and perceive, which granted Giuca the absolute right to attack

Avitto's capacity as a witness. *Baranek*, 287 A.D.2d at 78. This line of attack would have been particularly important because Avitto was a man who heard voices and experienced hallucinations who claimed he overheard Giuca make admissions, and Nicolazzi told the jury it "knew Avitto was not making that up." A. 1954-55. The EAC records also confirmed Avitto perjured himself when he denied that he suffered from mental illness and took Seroquel as a sleeping aid. A. 1751-53 *cf.* 2260, 2262, 2266, 2268-69, 2275, 2282, 2286-87, 2314, 2369.

The jury was entitled to know that contrary to Nicolazzi's certainty regarding the accuracy of Avitto's testimony, he was, in fact, a self-interested pathological liar with a long history of hallucinations and delusions and someone whose mind had been "dominated by forces beyond his control" which required extraordinary amounts of cocaine as "medication." A. 2268, 2284, 2287-89. Without question, Avitto's psychiatric records, in addition to serving as favorable impeachment material, contained "material bearing on the reliability and accuracy" of his testimony. *Knowell,* 127 A.D.2d at 795.

This case is similar to *People v. Maynard*, 80 Misc.2d 279 (Sup. Ct. N.Y. Cty. 1974), where the court reversed a murder conviction based upon newly discovered evidence of the key witness's psychiatric history. Like Avitto, the key witness, Febles, was one of three who incriminated Maynard. Also like Avitto, the prosecution portrayed Febles as an ordinary witness, although he had an extensive

history of mental illness, which was not revealed to the defense before trial. However, the prosecution in *Maynard* was unaware of Febles's psychiatric history[18] while Giuca's prosecution knew about Avitto's mental health problems. *Id.* at 288.

The court rejected the claim that Febles's long history of psychiatric treatment was merely impeaching because it related directly to "his ability to perceive and remember the facts to which he testified." *Id.* at 285. The evidence of Febles's mental illness, which paled in comparison to Avitto's mental health history, "raised the question of accurateness, perception, truthfulness and susceptibility to suggestion of Febles as a witness." *Id.* at 288. Avitto's EAC records demonstrated he was inaccurate, had difficulty perceiving, was a pathological liar and was highly susceptible to suggestion, as evidenced by his history of hallucinations and hearing voices which instructed him to take certain actions.

The court, recognizing the "imperfections" of the remaining two witnesses against Maynard held Febles must have factored into the jury's verdict and that his

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[18] The court in *Maynard* did not excuse the prosecution's conscious avoidance of Febles's criminal record (which would have led to the discovery of his mental illness), finding it "difficult to conceive why such a basic and elementary means of preparing a witness for trial was dispensed with in this case...It is difficult to understand why the District Attorney, in such a celebrated and important murder prosecution, would never obtain the criminal record of a most important witness, if only to forestall any surprise impeachment at the trial." 80 Misc.2d at 283. The court also rejected a claim of privilege similar to Nicolazzi's self-serving justification for her failure to discover Avitto's mental health history, noting that *Davis v. Alaska* made clear that a witness's right to privacy "must yield" to a defendant's right to confront an adverse witness, and that if the prosecution was so concerned for a witness's privacy, it should not call the witness to testify. *Id.* at 291.

mental illness was material. Significantly, the court held without the witness's mental health history, the jury was misled, which required reversal because the psychiatric evidence might have led the jury to dismiss Febles's testimony out of hand. *Id.* at 289.

Here, for the reasons described, *supra*, particularly the poor credibility of Cleary and Calciano and the prosecution's substantial emphasis on Avitto, reversal is required because the error undermines the confidence in the verdict, which likely would have been different if the jury knew the truth about Avitto's serious and persistent mental illness. *See Smith v.* Cain, 132 S. Ct. 627 (2012); *Kyles*, 514 U.S. at 453.

CONCLUSION

For the foregoing reasons, the order of the court below denying John Giuca's C.P.L. § 440.10 motion should be reversed, the motion should be granted, Giuca's judgment of conviction should be vacated, and a new trial should be ordered.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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