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

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN GIUCA,

Defendant.

Indictment No.
8166/2004

# REPLY MEMORANDUM OF LAW IN SUPPORT OF JOHN GIUCA'S C.P.L. § 440.10 MOTION TO VACATE HIS JUDGMENT OF CONVICTION

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## INTRODUCTION

The People haven't produced a shred of credible evidence that former prosecutor Anna-Sigga Nicolazzi disclosed the Ingram recording to John Giuca. Their suggestion that she "probably" did because she memorialized her intent to disclose every audio recording of a prosecution witness fails spectacularly because Nicolazzi ***did not*** disclose two other recordings until Antonio Russo's attorney demanded one of them during trial.

Indifferent to Nicolazzi's suppression of exculpatory evidence and denial of meaningful access to a favorable witness who has been dead since 2006, s*ee People v. Rong He*, 34 N.Y.3d 956, 958-59 (2019), the People have resorted to backward-looking and self-serving speculation to support their erroneous conclusion that there is no reasonable possibility disclosure of the Ingram recording would have affected the outcome of Giuca's trial.

To the contrary, had the jury known that (a) Russo admitted robbing and murdering Mark Fisher by himself and that Giuca refused to get rid of the murder weapon for him and (b) Nicolazzi suppressed evidence of key witness John Avitto's motive to lie, *People v. Giuca*, 33 N.Y.3d 462, 476-78 (2019), it is reasonably possible that the cumulative impact of this evidence, *see Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995), would have led to a different outcome at trial.

## ARGUMENT

## POINT I

### THE PEOPLE SUPPRESSED THE INGRAM RECORDING FROM GIUCA

Nicolazzi remembers taking a recorded statement from Joseph Ingram in the presence of Detective James McCafferty less than two

months before trial in which Ingram swore that Russo admitted robbing and murdering Fisher by himself and going to Giuca's home after the crime, where Giuca refused to take the murder weapon from him (People's Ex. 1, "Nicolazzi Affirm," ¶ 5; Ex. B, pp. 12-17). A transcript of Ingram's interview (bearing the initials "JM") was prepared (Ex. XXX). Shortly before trial, Nicolazzi placed "James" Ingram on the People's witness list (Nicolazzi Affirm, ¶ 11; Nicolazzi: H624) even though Ingram's sworn statement contradicted every witness against Giuca (*see* Bederow Affirm, ¶¶ 12-19).

Nicolazzi was aware of every decision made in Giuca's case (Nicolazzi: H409). She was "primarily responsible" for compiling and disclosing the *Rosario* material (*id.* at 453-54). She maintained "an exact reproduction" (of disclosures made to Giuca) "so we know what was turned over to the defense and how to categorize it" (*id.* at 451).

However, Nicolazzi "cannot say with certainty whether or not" she disclosed the Ingram recording to Giuca (Nicolazzi Affirm, ¶ 7). Nevertheless, the People feebly offer that it is "entirely possible" Nicolazzi disclosed it based upon her November 25, 2019 discovery of an unsigned cover letter, dated August 22, 2005 (People's Ex. 2, "the August

22 letter") which ostensibly memorialized her disclosure that same day of approximately 2,000 Bates-stamped pages of *Rosario* material and her intent to disclose 15 audio-recordings—*every* recorded statement of a prosecution witness (People's Resp., pp. 26-27; Nicolazzi Affirm, ¶¶ 8-10; Joblove Affirm, ¶ 12).

After the Appellate Division reversed Giuca's conviction in February 2018, *People v. Giuca*, 158 A.D.3d 642 (2nd Dept. 2018), in anticipation of a retrial, ADA Melissa Carvajal undertook a "box by box" review in order to provide Giuca with the entire contents of the People's file (Ex. YYY; Joblove Affirm, ¶ 12). On June 4, 2018, Carvajal provided the Ingram recording to Giuca (Bederow Affirm, ¶¶ 311-14) but not the transcript (Ex. XXX), which Giuca didn't receive until December 20, 2019.

For months, while Giuca's case was pending possible review in the Court of Appeals due to Nicolazzi's suppression of unrelated favorable evidence, the People conceded that Nicolazzi likely hadn't disclosed the Ingram recording. They abruptly changed tack after Nicolazzi located the August 22 letter in the file the day before the People filed their response to the instant motion (Nicolazzi Affirm, ¶¶ 8-10).

On June 6, 2018, Giuca demanded the "exact Bates-stamped production list of what was provided to the defense" (Bederow Affirm, ¶ 316; *see* Nicolazzi: H451). The following day, the Chief of the Trial Division acknowledged that the People had "no record" of the Ingram recording being disclosed prior to trial (Bederow Affirm, ¶ 318). On June 11, 2018, Carvajal pledged to disclose "all the information in our case file," but she refused to produce the "exact reproduction" of items Nicolazzi disclosed before trial (Ex. YYY). On August 2, 2018, Leonard Joblove wrote Judge Rowan Wilson of the Court of Appeals that "as best we can ascertain now the People did not disclose the Ingram recording prior to trial" (Bederow Affirm, ¶ 319).

By August 2, 2018, as evidenced by her substantial disclosure of evidence over the preceding months, including all 15 recordings (Ex. YYY), Carvajal had thoroughly reviewed the file. She and Joblove must have discussed the results of her review before the latter conceded to Judge Wilson that Nicolazzi likely hadn't disclosed the Ingram recording. If, prior to August 2, 2018, Carvajal had located evidence suggesting the Ingram recording had been disclosed prior to trial—the August 22 letter presumably had been in the file for 13 years—rather than admit

Nicolazzi likely hadn't disclosed it, Joblove would have said *then* what the People started arguing *after* Nicolazzi's November 25, 2019 discovery (Nicolazzi Affirm, ¶ 8).

Irrespective of the peculiar circumstances surrounding the apparent invisibility of the August 22 letter until Nicolazzi found it more than 14 years later, the document doesn't help the People. Although it purports to memorialize her disclosure of "***the*** *Rosario* material" and the imminent disclosure of 15 recordings (emphasis added), Nicolazzi ***did not*** disclose significant *Rosario* material, including three sworn statements of prosecution witnesses until mid-trial demands were made for the evidence.

In one egregious discovery violation, Nicolazzi withheld Lauren Calciano's grand jury testimony—the most significant *Rosario* material in the case—until Giuca's counsel Samuel Gregory demanded it *after* Calciano completed her testimony (Bederow Affirm, ¶¶ 344; T631-32). Nicolazzi also failed to disclose recorded sworn statements of prosecution witnesses Meredith Denihan and Alejandro Romero until Russo's attorney Jonathan Fink demanded the Denihan recording immediately before she testified (Bederow Affirm, ¶ 347; T114, 147).

Nicolazzi's explanation for her nondisclosure of the Denihan recording exposed her striking lack of candor. A member of the homicide bureau for almost five years (Nicolazzi: H406-07), she was aware of her bureau's practice of taking recorded statements from witnesses and documenting investigative events in a homicide investigative report ("HIR"). Indeed, she participated in 9 of the 15 recorded interviews in Giuca's case. An HIR detailing Denihan's October 15, 2003 recorded statement was prepared and maintained in the file (Ex. ZZZ).

Nicolazzi knew that Denihan was the only person who had been at Giuca's home on October 12, 2003 who initially cooperated with the police (*see* Denihan: T156, 167-69). She discussed Denihan's interview with police "a day or two" after the murder before Denihan testified (T116-17). In August 2005, Nicolazzi twice acknowledged that she possessed all 15 recorded statements (People's Ex. 2; Joblove Affirm, ¶ 12). But when questioned by the trial court on September 14, 2005 about her failure to disclose the Denihan recording, Nicolazzi represented that she "***didn't know it existed***" (T119-20).

The irreconcilable contradiction between Nicolazzi's specific representations to counsel that she possessed 15 recordings—*every*

recording—and her claim three weeks later that she didn't know that a recording of a witness she prepared to testify existed leads to the inescapable conclusion that Nicolazzi lied to the trial court and demonstrates the uselessness of the August 22 letter as persuasive evidence that she disclosed the Ingram recording.[1]

The People's assumption that Gregory's reference to Russo returning to Giuca's home, where he was thrown out after he told Giuca that "something" happened to Fisher (T46-47) likely demonstrated his awareness of Russo's admission to Ingram (People's Resp., pp. 25-26), ignores that Giuca and his brother were obvious sources of the information in Gregory's opening statement (*see* Ex. B, pp. 21-22; T50). No experienced attorney would have described Giuca's and Russo's interactions immediately after the murder and announce that Giuca's brother was a likely witness (T52-53) without discussing the facts with Giuca and his brother beforehand. Additionally, a reasonable attorney aware of the Ingram recording opting to preview a defense that Russo

[1] Every appellate jurist who considered Giuca's 2015 motion concluded that Nicolazzi withheld favorable evidence from the defense. *See Giuca*, 33 N.Y.2d at 476-78; *Giuca*, 158 A.D.3d at 646-47. Judge Jenny Rivera of the Court of Appeals excoriated Nicolazzi for her lack of candor and for her "particularly egregious violation of our law and [her] ethical obligations" which included deliberately misleading Giuca, the trial court and the jury. *See Giuca*, 33 N.Y.2d at 483.

was solely responsible for Fisher's murder would have told the jury that *Russo admitted* shooting Fisher and that Giuca refused to take the gun from him immediately after the crime.

Nicolazzi disclosed the same materials to Giuca and Russo (Nicolazzi Affirm, ¶¶ 9-10). Apparently blind to the irony that Nicolazzi claimed she didn't know whether she disclosed the Ingram recording due to "the passage of time" (*id.* at ¶ 7), the People cited Gregory's "limited" memory (People's Resp., p. 28) and dismissed his sworn belief that he wasn't given the Ingram recording (Ex. E, ¶¶ 3-5) but ignored Fink's affirmation, which detailed his confidence that it wasn't disclosed to him (Ex. F, ¶¶ 3-7).

In sum, the People haven't established that the Ingram recording was disclosed prior to trial. Alternatively, the Court should order an evidentiary hearing.

## POINT II

### THERE IS A REASONABLE POSSIBILITY THAT DISCLOSURE OF THE SUPPRESSED EVIDENCE WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL

The People have conceded that the reasonable possibility standard of materiality is applicable (People's Resp., pp. 2-3). Since Nicolazzi

suppressed evidence of Avitto's motive to lie, *Giuca*, 33 N.Y.3d at 476-78, the Court must weigh the cumulative impact of that evidence and the Ingram recording. *Kyles*, 514 U.S. at 436-37.

## A. Russo's Admission That Giuca Refused His Request To "Get Rid Of" The Murder Weapon Was Admissible

"Where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Second Department has recognized that

> depriving a defendant of the opportunity to offer into evidence another person's admission to the crime which he or she has been charged, even though that admission may only be offered as a hearsay statement, may deny a defendant his or her fundamental right to present a defense

*People v. Deacon*, 96 A.D.3d 965, 968 (2nd Dept. 2012) *citing People v. Gibian*, 76 A.D.3d 583 (2nd Dept. 2010).

An exculpatory statement offered by a defendant as a declaration against penal interest is afforded a more lenient standard for admissibility than an incriminating one offered by the prosecution. *People v. Soto*, 26 N.Y.3d 455, 462 (2015). If there is a reasonable *possibility* that an exculpatory declaration might be true, it is "the

function of the jury alone" to weight its impact, even if the court doesn't believe it's true (*id.*).

The People have interpreted *People v. Ennis*, 11 N.Y.3d 403 (2008) too broadly (*see* People's Resp., p. 5). In *Ennis*, the defendant sought to introduce evidence that during a proffer session with prosecutors the co-defendant said that the defendant wasn't with him when he shot the victim. 11 N.Y.3d at 408. The Court held that the statement that the defendant wasn't present was inadmissible because it didn't "directly inculpate" the co-defendant (*id.* at 413).

The Court emphasized that the co-defendant likely didn't believe the statement was against his penal interest because it was made in the presence of his attorney while he sought leniency, which left him "in control" of whether the statement could be used against him (*id.*). Conversely, Russo didn't benefit from admitting that Giuca refused to help him get rid of the murder weapon and he couldn't dictate what Ingram did with his incriminating statement.

Unlike in *Ennis*, where the defendant's absence from the crime scene didn't literally incriminate the co-defendant, Russo's admission that Giuca refused to take the murder weapon from him meant that he

possessed it immediately after he shot Fisher, which directly inculpated him in Fisher's murder and every other count which required proof that he possessed a firearm (Ex. AAAA).

Russo's admission corroborated evidence that he dumped the murder weapon in a sewer. Alejandro Romero testified that sometime after police recovered Fisher's wallet from a sewer,[2] he told Russo that police were searching sewers on Beverley Road and Russo nervously replied that they were searching the "wrong sewer" because he "would never put two things in the same sewer" (Romero: T752, 760-61; Bederow Affirm, ¶¶ 214-16; *see* Ex. BBB) (referring to the murder weapon, Romero asked Russo if he threw "anything" away, and Russo smiled and said "maybe").

Accordingly, Russo's admission that Giuca refused to "get rid of" the murder weapon for him immediately after he murdered Fisher was "disserving" to him. *See People v. Brensic*, 70 N.Y.2d 9, 16 (1987); *Ennis*, 11 N.Y.3d at 413.

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[2] Fisher's wallet was found in a sewer near Beverley Road on October 24, 2003 (Gaynor: T381-83).

Russo's admission to Ingram wasn't so unreliable that it couldn't *possibly* have been true, *see Soto*, 26 N.Y.3d at 462, a low threshold even where there is a direct conflict in the evidence. In *Soto*, a witness observed the male defendant slowly driving up and down the block until he collided with a parked vehicle. The defendant admitted to police that he was driving and got lost. 26 N.Y.3d at 458. A female friend of the defendant (who later became unavailable) claimed she was driving and crashed after turning "too fast" (*id.* at 458-59). A co-worker of the defendant's claim that he saw the declarant driving sometime before the accident at a different location was sufficient corroboration to allow the jury to determine the credibility of the declarant's statement (*id.* at 462).

Rather than demonstrate why Russo's admission to Ingram couldn't possibly have been true, the People have overemphasized inconsistent statements Russo made to others (*see* People's Resp., pp. 10-16). In any event, Russo's admission to Ingram was *more* reliable than the self-serving statements he made shortly after he murdered Fisher, when he was willing to do or say anything to avoid arrest (*see e.g.*, Bederow Affirm, ¶¶ 218-21; Exs. CCC and DDD) (Russo got a haircut shortly after the murder and fled to California days after telling

detectives that he saw Giuca and Cleary "plotting" against Fisher). Russo's obvious motive to lie rendered these statements unreliable. *See People v. Shortridge*, 65 N.Y.2d 309, 313 (1985).

In contrast, Russo, as Nicolazzi assured the jury about Avitto, had no reason to "hold back" the truth and falsely incriminate himself to the "similarly situated" Ingram (*see* T1008) less than two months before trial when "it was in his best interest to keep quiet."[3] *People v. DiPippo*, 27 N.Y.3d 127, 137 (2016).

The People's assertion that Russo's admission to Ingram was unreliable because he "lied" about the caliber of the murder weapon (People's Resp., pp. 8-9) missed the mark. Although Russo first said that he used a nine-millimeter pistol (Ex. B, p. 13), he ultimately said that he shot Fisher five times with a .22 caliber pistol (*id.* at pp. 12-15). To the extent that Ingram's "failure" to explain Russo's "lie" was somehow relevant to the admissibility of Russo's admission (*see* People's Resp., p. 9), the People should have raised that concern after Nicolazzi disclosed

[3] That Russo's admission followed a discussion about "snitching" doesn't mean that it couldn't possibly have been true (People's Resp., p. 8). It doesn't make sense that after he denied "snitching" on Giuca, Russo felt compelled to falsely incriminate himself when his defense was that Giuca was solely responsible for the crime (Bederow Affirm, ¶ 59; Ex. L).

the Ingram recording and afforded Giuca a meaningful opportunity to interview Ingram, not 15 years later, when Ingram is conveniently dead. *See Rong He*, 34 N.Y.3d at 959.

Russo's admission that he took Fisher's wallet and possessed the murder weapon (Ex. B, p. 16) established that his admission to Ingram might have been true. *See People v. Settles*, 46 N.Y.2d 154, 170 (1978). His claim that he fought, robbed and shot Fisher five times with a .22 caliber pistol was corroborated by forensic and ballistic evidence (Gaynor: T369, 371-73; 382-83; Guitierrez: T825, 835-39, 841, 843; Basoa: T851-55; *see also*, Opening Mem., pp. 23-26). His claim that he knocked on Giuca's door before Giuca refused to take the murder weapon from him was consistent with Denihan's testimony that while she was asleep on Giuca's couch she heard a door slam (Denihan: T162) and Romero's testimony that Russo strongly implied that he dumped the murder weapon and Fisher's wallet in separate sewers (*supra*, p. 12).

**B. Ingram Would Have Testified As A Defense Witness**

Ingram's testimony would have substantially undermined the People's case and supported Giuca's defense that Russo killed Fisher alone (*see* Bederow Affirm, ¶¶ 12-22, 222-27; Opening Mem., pp. 27-37).

Nicolazzi compounded her *Brady* violation by failing to fulfill her "broad obligation" to provide Giuca with a meaningful way to contact Ingram after he was whisked out of Rikers Island within days of speaking to her[4] (Bederow Affirm, ¶¶ 270, 286-95). *Rong He*, 34 N.Y.3d at 958-59; *see United States v. Rodriguez*, 496 F.3d 221, 226 (2nd Cir. 2007). Instead, Nicolazzi falsely claimed to the trial court that she disclosed "every single statement" made by Giuca or Russo (Bederow Affirm, ¶ 310).

The People have cherry-picked snippets from the Ingram recording and self-servingly determined that Giuca likely wouldn't have called Ingram as a witness (*see* People's Resp., p. 20). However, the People don't "decide for the defense what [evidence] is useful." *People v. Andre W.*, 44 N.Y.2d 179, 185 (1978). Giuca was entitled to review the Ingram recording and have an opportunity to interview Ingram before deciding whether to call him. *See Rong He*, 33 N.Y.3d at 959.

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[4] Nicolazzi misled the defense into believing that "James" Ingram was an inculpatory witness (Ex. E, ¶ 6; *see People v. Garcia*, 46 A.D.3d 461, 463-64 (1st Dept. 2007). Her implication that she placed Ingram on her witness list because his name might have been mentioned at trial (Nicolazzi Affirm, ¶ 11) is disingenuous. She stated that she didn't intend to call "***our witness*** James Ingram" (T746). Nor did she include Frank or Matthew Giuliano, two names the People elicited in their direct case on her "potential names list" (*see* Cleary: T253; Murphy: 468).

The full context of the Ingram recording demonstrates that Giuca sought the opinion of a seasoned criminal regarding what could happen to him if he knew something about a crime but didn't report it, which was *entirely consistent* with his defense (*see* Bederow Affirm, ¶¶ 59, 61, 74, 223, 226-27; Opening Mem., pp. 27-37). Ingram's muddled description of Giuca's purported concern about having a "small involvement" was equivocal and interspersed with Giuca's concern about not telling police what he knew:

> what if—you know—like what if a person knew something, um, about a crime or might have been involved or not involved but knows something about the crime but doesn't report it
>
> what if somebody did or had some—or knew something about a crime or had a small involvement, whatever, um, or didn't tell...is there any kind of time for that or is that a charge

(Ex. B, pp. 4, 28-29). Ingram told Nicolazzi that Giuca asked about "manslaughter or something like that" *after* Ingram told him it would be "ridiculous" to receive a 20 or 25-year sentence for "keeping his mouth shut" (*id.* at p. 29).

Nicolazzi's failure to clarify Ingram's statement, suppression of the Ingram recording and denial of any meaningful way for Giuca to locate

Ingram, deprived Giuca from enhancing what she left ambiguous. In these circumstances, the Court cannot credit the People's cherry-picked, self-serving interpretation of snippets from a suppressed exculpatory recording and assume that Ingram wouldn't have testified. *See Rong He*, 34 N.Y.3d at 458-59; *Andre W.*, 44 N.Y.2d at 185; *Rodriguez*, 496 F.3d at 226.

The possible admission of Russo's other statements wouldn't have deterred reasonable counsel from calling Ingram (People's Resp., pp. 17-19). As described (*supra*, pp. 13-14), these statements were self-serving, unreliable, demonstrably false, and in at least one instance harmful to the People's case because Russo accused Cleary of plotting to harm Fisher (McMahon: T436; Ex. CCC). Moreover, the People's concessions that they were part of Russo's "twisted web of lies" (T63-65) and that an inmate-to-inmate admission was more reliable (*see* T1008), would have diluted any adverse impact Russo's statements might have had on Giuca's defense.

### C. The Cumulative Impact Of The Suppressed Evidence Might Have Led To A Different Outcome At Trial

There is a reasonable possibility that disclosure of the Ingram recording might have led to a different outcome at trial because Ingram's testimony would have directly undermined "strong evidence" of Giuca's

guilt including "self-incriminating statements to his friends [and] ***his efforts to dispose of the gun shortly after the murder***." *Giuca*, 33 N.Y.3d at 478 (emphasis added).

Ingram's testimony would have discredited (a) Giuca's "friends" Cleary and Calciano, two admitted liars who, once pressured, gave incompatible accounts of the same "confession" and both of whom swore that the other lied (Bederow Affirm, ¶¶ 13-14, 82-115, 151-64; Opening Mem., pp. 28-30), (b) Avitto, who claimed that he overheard Giuca say that he had a gun and that Giuca admitted he pistol-whipped Fisher before Russo shot him (Bederow Affirm, ¶¶ 180-83), (c) Anthony Beharry, another admitted liar pressured into claiming that Giuca gave him a gun of unknown caliber a few days after the murder (*id.* at ¶¶ 171-74), and (d) Nicolazzi's nefarious theories about Giuca's concern over Denihan (*id.* at ¶¶ 18, 70, 226, 234) and for his telephone contacts with Russo after the crime (*id.* at ¶¶ 16-17, 190-93, 225-26, 245).

Nicolazzi's exploitation of the suppressed evidence in her summation exacerbated the prejudice to Giuca. *See People v. Ulett*, 33 N.Y.3d 512, 521 (2019). She concealed Russo's admission that *Giuca was home* when he murdered Fisher by himself but argued that Avitto's

testimony provided the only "common sense" explanation for Fisher's murder and that "indisputable evidence" proved "there was no way Giuca was in his house" when Fisher was killed "like the defense would have you believe." Nicolazzi even wondered aloud whether Giuca shot Fisher (Bederow Affirm, ¶¶ 240-44; T1016-18).

Nicolazzi suppressed Russo's admission that *Giuca refused to take the murder weapon from him* but personally guaranteed the jury that Giuca "absolutely" took the murder weapon from Russo and gave it to Beharry, who "[got] rid of the gun ***which I know is the murder weapon*** in this case" even though Cleary testified that Giuca had two guns with different calibers and Beharry couldn't identify the gun he took from Giuca (Bederow Affirm, ¶¶ 237-39; T1006, 1021-22).

Nicolazzi described the "tons" of "plain and simple evidence" that she put together like pieces "of a puzzle" then ridiculed Gregory's lack of evidence to support his argument that Giuca was home at the time of the murder and didn't take the murder weapon from Russo (Bederow Affirm, ¶¶ 227, 242, 247):

> he can be as loud and as dramatic as he wants to be with all his wild speculations that he threw out before you; that was ***based on no evidence*** that is anywhere in the record, ***no evidence to***

> ***corroborate anything that he said*** to you...even if you scream and yell, it [doesn't] make it so

(T1023).

*Ulett*, decided two weeks after *Giuca*, is on point. There, a Brooklyn prosecutor suppressed crime scene video but told the jury it didn't exist. 33 N.Y.3d at 517. Notwithstanding the "substantial" evidence of the defendant's guilt, which included several witnesses who placed him at the scene and two eyewitnesses who identified him as the murderer, the Court unanimously reversed because the "aggregate effect" of the video's suppression (which would have helped impeach witnesses and provided leads to additional evidence) and the prosecutor's denial of its existence and criticism of the defense for referring to "phantom evidence," satisfied the reasonable *probability* standard of materiality (*id.* at 514-16, 520-21).

The "aggregate effect" of Nicolazzi's conduct was worse than what the Court condemned in *Ulett*: after suppressing the Ingram recording, she sharpened the prejudice by arguing the absolute existence of facts and *personally guaranteeing* the state of the evidence which Russo's admission would have contradicted and criticizing the defense for *failing to produce the very evidence she suppressed.*

Moreover, the "aggregate effect" of Nicolazzi's conduct includes her suppression of evidence of Avitto's motive to lie, *Giuca*, 33 N.Y.2d 476-78, which enabled her to give the jury the false impression that Avitto, who she averred was the only witness to whom Giuca truthfully described Fisher's murder (*see* Bederow Affirm, ¶¶ 240-44), was an altruistic and honest man. Had the jury known about Russo's admission to Ingram and about Avitto's motive to lie, *see Kyles*, 514 U.S. at 436-37, it assuredly would have rejected Avitto's testimony. If the jury also knew that Nicolazzi "failed to disclose her involvement" at Avitto's court appearance immediately after he started offering information to her, *Giuca*, 33 N.Y.3d at 478, it likely would have scoffed at her portrayal of him as someone who "for once, tried to do something right" (T1010-11, 1022-23), which might have lessened the "possible danger that the jury, impressed by [her] prestige...accord[ed] great weight to [her] beliefs and opinions" about Avitto's credibility, that Giuca "indisputably" was at the crime scene and that he "absolutely" took the murder weapon from Russo. *See People v. Paperno*, 54 N.Y.2d 294, 301 (1981).

*Ulett* was reversed under the reasonable *probability* standard in spite of the "substantial" evidence of the defendant's guilt. 33 N.Y.3d at

517, 521. Here, the "strong evidence" of Giuca's guilt, *see Giuca*, 33 N.Y.3d at 478, which was less compelling than the multiple eyewitness identifications in *Ulett*, would have been directly undermined by the cumulative impact of Nicolazzi's suppression of the Ingram recording and Avitto's motive to lie and therefore created a reasonable *possibility* that had the jury been aware of the suppressed evidence the outcome of the trial would have been different (*see* Opening Mem., pp. 27-41).

## POINT III

### NICOLAZZI'S SUMMATION MADE HER PRE-TRIAL INTERVIEW OF INGRAM A MATERIAL ISSUE AND CREATED A SUBSTANTIAL LIKELIHOOD OF PREJUDICE TO GIUCA

Giuca's claim under *People v. Paperno*, 54 N.Y.2d 294 (1981) isn't a procedurally barred general attack on Nicolazzi's summation (People's Resp., p. 30). Giuca couldn't have raised this claim in his 2008 direct appeal since he first became aware of the Ingram recording on June 4, 2018 (Bederow Affirm, ¶¶ 311-14).

This claim isn't made under *Brady* (*see* People's Resp., pp. 31-32). The defense need only establish that Nicolazzi's summation made her pre-trial interview of Ingram a material issue at trial (*see* Opening Mem., pp. 43-46) and created a substantial ***likelihood*** that Giuca was

prejudiced. *See Paperno*, 54 N.Y.2d at 304. Because jurors likely afforded "great weight" to Nicolazzi's "beliefs and opinions" while she kept them ignorant to what Ingram told her, there was a substantial likelihood of prejudice to Giuca. *Paperno*, 54 N.Y.2d at 301. Accordingly, Giuca's conviction "cannot stand" (*id.* at 304; Opening Mem., pp. 41-47).

## CONCLUSION

For the reasons stated herein and in the prior motion papers, the Court should vacate Giuca's judgment of conviction, or in the alternative, grant an evidentiary hearing on the motion.

Respectfully submitted,

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