RIVERA, J. (dissenting).

I would affirm the Appellate Division order which granted defendant John Giuca's CPL 440.10 motion and ordered a new trial based on the People's violation of defendant's rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)) and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)). Specifically, ***479** the People improperly failed to provide defendant with impeachment material regarding a jailhouse informant's motivation to fabricate defendant's alleged inculpatory statements and failed to correct misrepresentations during the informant's testimony (*People v. Steadman,* 82 N.Y.2d 1, 7, 603 N.Y.S.2d 382, 623 N.E.2d 509 [1993]). As the majority acknowledges, the prosecutor withheld information about the relationship between this key witness and the District Attorney's Office and also failed to correct the informant's inaccurate and misleading statements, including one brought out by the prosecutor on redirect (majority op. at 478, 104 N.Y.S.3d at 588, 128 N.E.3d at 665–66).

The Appellate Division accurately and comprehensively describes the relevant trial testimony, CPL 440.10 hearing evidence, and the People's suppressed information *****589** that establish the *Brady/Giglio/Steadman* violations and I summarize here only those events of particular significance to my analysis. After the People's jailhouse informant witness (JA) absconded from his drug program on June 9, 2005, he contacted police and then went to the District Attorney's Office on June 13th where he was questioned by the prosecutor on defendant's case. JA informed her that he had an open warrant for leaving his program. The detectives on the case and the prosecutor then walked JA to drug court, where she appeared on the record in place of the Assistant District Attorney handling ****667** JA's case. It was the prosecutor who requested a sidebar with the judge—not JA's counsel or someone else, as implied during JA's trial testimony. At the sidebar, the prosecutor informed the court that JA was providing information in a murder investigation. The prosecutor also received and reviewed a copy of the prosecution file in defendant's drug case. Shortly thereafter, the District Attorney's Office contacted the agency overseeing JA's drug treatment and requested that his case be flagged for "special attention" and the District Attorney's Office be updated on his progress.

At defendant's trial, defense counsel was able to cross-examine JA on the fact that he was in a drug treatment program as part of a guilty plea on his burglary case, that he had violated the program's terms several times without being remanded, that he had a lengthy criminal history, and that he was escorted to court by police officers when he returned on the warrant. However, the questioning was limited because counsel could not ask—because he did not know—about the prosecutor's sidebar or about the various requests and notes from her office archiving its ongoing communications with JA's ***480** drug program officials. Defense counsel's summation was similarly hampered by not having complete information about the People's involvement in JA's criminal case. Counsel argued to the jury that JA's testimony showed that the prosecutor presented an entirely different theory once the credibility of the People's other witnesses (defendant's friends) was challenged. To undermine JA's credibility, counsel stressed JA's criminal history—information previously brought out by the prosecutor on her direct examination. He remarked rhetorically, "isn't it funny" that the police in this case were present with JA in court when he appeared after a warrant was issued for him, suggesting that JA was not testifying against defendant simply for altruistic reasons. Significantly, the jury did not hear about the extent of the People's actions that may well have provided the basis for an inference of a tacit agreement or JA's expectation of beneficial treatment in his criminal case in exchange for his testimony against defendant.

The prosecutor, for her part, was able to take full advantage of JA's testimony during her summation to undermine counsel's argument that the witnesses presented an incoherent version of defendant's actions and the events leading to the murder. To set the stage for her counter-narrative, the prosecutor argued that JA's testimony tied all the evidence together and was key to understanding the testimony of the People's other witnesses. According to the prosecutor, defendant gave partial statements to his friends—explaining some of the testimonial inconsistencies—but did not hold back in talking to JA because he was "similarly situated" and was his "prison buddy." Taking this version to its logical conclusion, the prosecutor suggested defendant's statement to JA established that defendant had a much larger role in the murder than what he disclosed to his friends. Apart from using JA's testimony as the fulcrum to explain the prosecution's theory of disparate storytelling by defendant and his friends, the prosecutor worked mightily to paint JA in a positive *****590** light. She conceded that he had a criminal history and drug problems,

but urged the jury to see him as a flawed individual who was telling the truth about what defendant told him. To undermine counsel's argument that JA had a motive to fabricate his testimony, the prosecutor went further and offered her own opinion that JA was "very honest about his problems and his criminal past." She stressed that there was no evidence that JA received anything for his testimony, that it was not surprising he was given multiple ***481** chances in his drug ****668** program because he acted responsibly by contacting his caseworker after absconding, and that he had contacted police to help with defendant's case because "for once he tried to do something right."

At the hearing on defendant's CPL 440.10 motion, the evidence established that, contrary to the picture painted by the prosecutor at trial, there was, at a minimum, inferential evidence that JA actually benefitted and might reasonably expect continued benefits in his drug case in exchange for his testimony against defendant. The prosecutor admitted she was the "DA" who walked JA to his June appearance and requested a sidebar where she informed the judge that JA was a witness in a murder trial. Emails confirmed the numerous contacts between the District Attorney's Office and EAC, tracking JA's progress at the request of a supervising Assistant District Attorney within the office. "Prosecutors occupy a dual role as advocates and as public officers and, as such, they are charged with the duty not only to seek convictions but also to see that justice is done. In their role as public officers, they must deal fairly with the accused and be candid with the courts" (*Steadman,* 82 N.Y.2d at 7, 603 N.Y.S.2d 382, 623 N.E.2d 509 [internal citations omitted]). In furtherance of that duty, the prosecutor has a legal obligation under the federal constitution to turn over favorable information to a defendant (*see Giglio,* 405 U.S. at 154–155, 92 S.Ct. 763; *Brady,* 373 U.S. at 86, 83 S.Ct. 1194; *Steadman,* 82 N.Y.2d at 7, 603 N.Y.S.2d 382, 623 N.E.2d 509). Where, as here, a defendant makes a specific request for undisclosed evidence, such evidence is not material under *Brady* if there is no reasonable possibility that it would have changed the result of the proceeding (*see People v. Fuentes,* 12 N.Y.3d 259, 263, 879 N.Y.S.2d 373, 907 N.E.2d 286 [2009]). "[T]he existence of an agreement between the prosecution and a witness, made to induce the testimony of a witness, is evidence which must be disclosed under *Brady* principles" (*People v. Cwikla,* 46 N.Y.2d 434, 441, 414 N.Y.S.2d 102, 386 N.E.2d 1070 [1979]). In *Cwikla*, relying on *Brady* and *Giglio,* this Court held that the evidence relating to the witness should have been disclosed because it was "of such a nature that the jury could have found that, despite the witness' protestations to the contrary, there was indeed a tacit understanding between the witness and the prosecution, *or at least the witness so hoped*" (*id.* at 441, 414 N.Y.S.2d 102, 386 N.E.2d 1070 [emphasis added]). Similarly, "[w]here a prosecutor elicits or fails to correct [knowingly false or mistaken material testimony of a prosecution witness], reversal and a new trial are necessary unless there is no reasonable possibility that the error contributed to the conviction" (***482** *People v. Colon,* 13 N.Y.3d 343, 349, 890 N.Y.S.2d 424, 918 N.E.2d 936 [2009] [internal quotation omitted]).

Defendant's trial counsel made a specific request and there is no dispute that the prosecutor suppressed information about her involvement and her office's communications with JA's drug program administrators that could have been used to impeach JA and suggest JA was motivated to fabricate testimony to gain a benefit. Nor is there disagreement that the prosecutor bore a legal responsibility to correct JA's inaccurate and misleading statements. The *****591** only question on this appeal is whether there is a reasonable possibility that proper disclosure and corrective action would have made a difference in the outcome of defendant's trial. I conclude it would.[*]

****669** The suppressed information would have provided defense counsel with critical information to dispute the prosecutor's claim that JA was simply "doing the right thing" by testifying and that the court in JA's burglary case acted unaware of the People's interests in securing JA's testimony against defendant. Without the suppressed evidence, counsel was left to attack JA's credibility in general terms, exploring standard impeachment areas typical for a jailhouse informant, namely criminal history and a generic interest in gaining a benefit in exchange for information about a fellow inmate. What counsel could not argue is that the prosecutor was the one who requested a sidebar at the June 13th court appearance in JA's drug case—information that supported a foundation for an inference that such action influenced the judge's decision not to remand JA—even though JA had several relapses, absconded and was returned on a warrant, and had been warned several times that he faced incarceration for such violations. Defense counsel was unable to argue that the jury could infer that JA received a benefit in court on June 13th, the first of several, afforded every time he relapsed and avoided jail. Counsel could not urge the jury to reject that this treatment was more than mere coincidence or the beneficence of the court repeatedly giving a substance abuser another chance, as the prosecutor argued in summation. Counsel did not have available the notes ***483** from the District

Attorney's Office to suggest that the Office had an unusual heightened interest in JA's progress and that the officials at the drug program and the court understood that JA was an important witness in a homicide case, a highly publicized case with pressure on the District Attorney's Office to secure a guilty verdict. Conversely, the prosecutor was free to argue that JA received nothing and expected nothing in return for his testimony, even though the undisclosed information would suggest otherwise.

In violation of her duty as a public officer to "deal fairly with the accused and be candid with the courts" (*Steadman,* 82 N.Y.2d at 7, 603 N.Y.S.2d 382, 623 N.E.2d 509), the prosecutor also misled the court, the jury, and defense counsel by failing to correct JA's statements that he was doing well in his program, or disclose that she was "the DA" who appeared at the sidebar with the court and that it was she who told the judge in JA's drug case that he was providing information in a murder investigation. The latter is particularly troubling conduct as the prosecutor drew out the misleading statement on her redirect of JA to offset any possible damage to his credibility inflicted by counsel's cross-examination. This was not a mistake or misstep because the prosecutor was quick to have JA clarify that "the judge" in his drug case was not the same judge present during defendant's trial, while she avoided eliciting that she was "the DA" at the June 13th appearance. This was an attempt to recover ground by bolstering the credibility of the witness after defense counsel's cross examination—a particularly egregious violation of our law and the prosecutor's ethical obligations (22 NYCRR 1200.30 Rule 3.8[b]).

*****592** Although the majority concedes that "[t]here was undisclosed evidence that would have enabled defense counsel to deepen his argument that JA was testifying falsely in order to receive favorable treatment from the court with the People's acquiescence" (****670** majority op. at 476, 104 N.Y.S.3d at 586, 128 N.E.3d at 664), the majority concludes that this would merely have been cumulative to the impeachment evidence used by counsel at trial. I disagree with this characterization of the suppressed information and its potential use by defense counsel.

The information was not merely cumulative evidence of what counsel already had available—meaning "more of the same" or "tending to prove the same point" (*see* Black's Law Dictionary [10th ed. 2014]). The information the prosecutor failed to turn over concerned actions by the trial prosecutor ***484** and representatives of the District Attorney's Office —far different evidence than what counsel used on JA's cross examination and during summation, which focused on JA and the police, namely the informant's criminal history (which the prosecutor relied upon to suggest JA was trying to overcome his past), and his police escort to the court on June 13th. True enough that both types of information put in question JA's credibility, but only as a general matter, and as related to the actions of the police. In contrast, the suppressed information provides a distinct basis for an inference that JA fabricated defendant's alleged inculpatory statements based on benefits associated and derived from the prosecution. Labeling this information as additional but unnecessary for counsel's argument, as the majority does here, also underestimates the potential use of this information in the hands of a skilled defense lawyer (*see Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 [1974] ["Cross-examination is the principal means by which the believability of a witness and the truth of [the witness's] testimony are tested"]; *People v. Walker,* 83 N.Y.2d 455, 461, 611 N.Y.S.2d 118, 633 N.E.2d 472 [1994] ["[I]mpeachment is a particular form of cross-examination whose purpose is, in part, to discredit the witness and to persuade the fact finder that the witness is not being truthful"]).

The majority's view of what constitutes cumulative evidence is overly broad and unsound, as made apparent by simple illustrations of truly redundant information. For example, if the prosecutor had suppressed information that JA had an additional criminal conviction when it was already revealed to the jury that he had an extensive criminal history, this would be cumulative impeachment evidence as it would not have significantly aided the jury's assessment of JA's credibility. Therefore, failure to disclose this additional crime would not warrant reversal of defendant's conviction under *Brady.* Similarly, the suppressed information about JA's program violation, which I do not include as part of the prosecutor's *Brady* violation, is cumulative since two other program violations were known to defense counsel. Again, more of the same; not likely to surprise the jury or affect the verdict. These examples are in stark contrast to the undisclosed information of the prosecutor's personal involvement in JA's burglary case, her representations to the court and her office's ongoing interest in JA for the sole reason that he was a valuable People's witness. This undisclosed impeachment evidence was qualitatively different – not merely reflecting on JA's overall credibility ***485** but providing a specific, concrete reason for JA to lie in the hopes of receiving ongoing favorable attention from the District Attorney's Office.

Nor does the majority's reliance on *Turner v. United States,* —— U.S. ——, 137 S.Ct. 1885, 1893, 198 L.Ed.2d 443 (2017)), support a conclusion that the undisclosed ***593 information about the actions of the individual prosecutor and the District Attorney's Office was cumulative or would have had a cumulative effect given the trial evidence (**671 majority op. at 476–477, 104 N.Y.S.3d at 586–88, 128 N.E.3d at 664–65). *Turner* involved an assault and murder committed by a large group of individuals acting in concert. The petitioners alleged that they were denied information about the trial witnesses that would have permitted them to mount a defense that the murder was committed by one or two individuals, rather than, as the Government maintained, petitioners as a group. The withheld information in *Turner* in no way resembles what the prosecutor suppressed here, as a summary of the petitioners' alleged *Brady* material reveals. At the trial the record evidence showed that one witness was on PCP when she observed the events and so "it would not have surprised the jury to learn that [the witness] used PCP on yet another occasion"; another witness had been impeached "about changes in her testimony over time, leaving little added significance to the [undisclosed] note that she changed her mind" about agreeing with another witness's claims; and a third witness had effectively been impeached "with her shifting stories about what she witnessed [so] [k]now[ledge] that a detective raised his voice during an interview with her would have added little more" (*id.* at 1894–1895). Unlike the evidence suppressed in defendant's case, the undisclosed impeachment information in *Turner* was of questionable value to the defense because it was more of the same type of conduct by the same witness.

Here, the mere fact that counsel impeached JA to some extent cannot support excusing the People from their constitutional obligations. The majority quotes but misapprehends *Turner*'s warning about reading too much into its fact-specific conclusion, which states in full: "[w]e of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence. We conclude only that in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to undermine confidence in the jury's verdict" (*id.* at 1895 [citations and internal *486 quotation marks omitted]). The same cannot be said here where the suppressed information described actions by the prosecutor, actions which a jury may have considered more likely to motivate JA to fabricate statements favorable to the People's case against defendant.

The applicable standard, that there was no reasonable possibility that the result of the proceeding would have been different if the undisclosed material had been turned over, is an extremely low bar. It is lower than "reasonable probability," which "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal" (*Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 [1995]). Even under the higher reasonable probability standard, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence" (*id.; see also Matter of Beautisha B.,* 115 A.D.3d 854, 854, 982 N.Y.S.2d 351 [2d Dept. 2014] ["To establish a fact by a preponderance of the evidence means that the fact is more likely than not to have occurred"], citing *Matter of Tammie Z.,* 66 N.Y.2d 1, 494 N.Y.S.2d 686, 484 N.E.2d 1038 [1985]). The relevant question then is whether a reasonable possibility exists that the suppressed evidence may have affected the outcome of defendant's case. On this record, I cannot say that not ***594 even one juror would have thought JA held out hope—corroborated by the conduct of the prosecutor and her Office—for favorable **672 treatment by the courts or otherwise sought to curry the prosecutor's favor in JA's drug case. At least one juror could conclude that it was not simply the court, as usual, giving multiple chances to a person in rehabilitation—as suggested by the prosecutor in her summation and by the majority here (majority op. at 471, 475–476 and n. 6, 104 N.Y.S.3d at 583, 585–87 and n. 6, 128 N.E.3d at 660–61, 663–65 and n. 6)—but rather, special treatment for JA as the People's witness. Of course, just one juror would have been enough to change the outcome of defendant's trial (*see Turner,* 137 S. Ct. at 1897 [Kagan, J., dissenting] [suppressed evidence "could well have flipped one or more jurors—which is all *Brady* requires"]).

Finally, as all the Justices in *Turner* agreed, expansive disclosure should be the norm and the "better course is to take care to disclose any evidence favorable to the defendant" (*Turner,* 137 S. Ct. at 1893). Even the dissent joined in this part of the majority opinion, agreeing that "such *487 evidence ought to be disclosed to defendants as a matter of course" (*id.* at 1897 [Kagan, J., dissenting]). Indeed, a generous policy of disclosure of *Brady* material fully aligns with our recognized interests in finding the truth and rejecting efforts at gaming the criminal justice system that undermine the truth-finding process (*Strickler v. Greene,*

527 U.S. 263, 280–281, 119 S.Ct. 1936, 144 L.Ed.2d 286 [1999] [The *Brady* line of cases "illustrate the special role played by the American prosecutor in the search for truth in criminal trials"]). "The *Brady* rule's 'overriding concern [is] with the justice of the finding of guilt', and the Government's 'interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done' " (*Turner,* 137 S. Ct. at 1893 [internal citations omitted]). All this reflects the principled view that "[c]onstitutional requirements aside, turning over exculpatory materials is a core responsibility of all prosecutors" (*id.* at 1897 [Kagan, J., dissenting]). "Put another way, '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, 404 N.Y.S.2d 578, 375 N.E.2d 758 [1978] quoting *Griffin v. United States,* 183 F.2d 990, 993 [D.C. Cir.1950]). The District Attorney's Office here asserts that it is the policy of its office to "generally disclose all information that is identified as even arguably favorable to the defense, regardless of the prosecutor's assessment of the materiality of that information." This correct articulation of the prosecutor's duty comes too late for defendant.

Since there is a reasonable possibility that counsel's use of the suppressed information would have changed the result of the proceedings, defendant met his burden in support of his 440.10 motion for a new trial (*Fuentes,* 12 N.Y.3d at 263, 879 N.Y.S.2d 373, 907 N.E.2d 286; *People v. Vilardi,* 76 N.Y.2d 67, 77, 556 N.Y.S.2d 518, 555 N.E.2d 915 [1990]). The majority's reversal of the Appellate Division order granting the same is erroneous on the law as applied to the record before us. I dissent.

Judges Stein, Garcia, Wilson and Feinman concur; Judge Rivera dissents and votes to affirm in an opinion; Judge Fahey took no part.

Order reversed and order of Supreme Court, Kings County, reinstated.

All Citations

33 N.Y.3d 462, 128 N.E.3d 655, 104 N.Y.S.3d 577, 2019 N.Y. Slip Op. 04642

Footnotes

1 In response to defense counsel's request for *Rosario* material immediately following JA's testimony, the ADA advised that she had been "present for all [of the police] interviews" with JA. This fact was not elicited before the jury by the prosecutor, likely in order to avoid any claim of improper bolstering of a prior consistent statement by the witness.

2 Defendant's trial lasted nearly two weeks and the jury took less than four hours to deliver its guilty verdict. In addition, when affirming the judgment of conviction, the Appellate Division characterized the evidence against defendant as "overwhelming" (58 A.D.3d at 751, 871 N.Y.S.2d 709).

3 Defendant also asserted an additional *Brady* argument – that the People failed to disclose JA's EAC–Link records concerning his prior psychiatric history – as well as *Rosario* and newly discovered evidence claims. EAC–Link is a nonprofit organization comprised of social workers who provide case management for criminal defendants who are participating in drug or mental health diversion programs.

4 On cross-examination, JA admitted that he did not recant his trial testimony until more than seven years after trial, after he was approached by an individual connected to defendant. In his initial recorded conversations with a defense investigator, JA maintained that his trial testimony was truthful. However, he eventually signed a written recantation containing statements that, by JA's own admission, were false.

5 Federal courts have been more explicit in holding that the prosecution does not have to disclose evidence of an agreement that does not exist, even if the witness may have hoped to obtain some consideration or favorable treatment as a result of his or her testimony (*see White v. Steele,* 853 F.3d 486, 491 [8th Cir. 2017] ["without a hint or deal, even if (the witness) did expect to get something, the State could not have known of (the witness's) expectation. Accordingly, the State did not violate *Brady* ... by failing to disclose an agreement that did not exist"]; *Collier v. Davis,* 301 F.3d 843, 849 [7th Cir. 2002] [the witness's "general and hopeful expectation of leniency is not enough to create an agreement or an understanding"]; *Shabazz v. Artuz,* 336 F.3d 154, 163 [2d Cir. 2003]).

6 Relapse is a common occurrence and the legislature has recognized judicial flexibility is necessary in making determinations regarding violations of conditions for participants in drug diversion programs (*see People v. Fiammegta,* 14 N.Y.3d 90, 896 N.Y.S.2d 735, 923 N.E.2d 1123 [2010]; CPL 216.05).

7 We note that any confusion in determining what information the People must turn over may be attributed to the failure of the police and prosecutor to document the basic facts and circumstances of the witness's cooperation. As defense

counsel argued at trial, the absence of a "single solitary note" recording these "critical interviews" in a murder investigation would appear to be anomalous.

* Since I conclude that the People violated defendant's right to a fair trial by suppressing *Brady* material regarding JA's motive to fabricate, and the People disclosed the suppressed materials prior to the 440.10 hearing, I do not address defendant's remaining contention that he was entitled to JA's drug treatment and psychiatric records from the agency overseeing his drug rehabilitative services.

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