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**VIA REGULAR MAIL**

June 8, 2014

The Honorable Kenneth P. Thompson  
District Attorney of Kings County  
350 Jay Street  
Brooklyn, New York 11201

RE: *People of the State of New York v. John Giuca*  
KINGS COUNTY INDICTMENT NO. 8166/2004  
Conviction Review Unit No. 14-01

Dear Mr. Thompson:

I request that pursuant to New York Rule of Professional Conduct 1.11(f)(3)<sup>1</sup> and in the interest of increasing public confidence in the criminal justice system, you commence an investigation into potential misconduct in connection with the nexus between the Kings County District Attorney's Office's ("the DA") prosecution of John Giuca for the murder of Mark Fisher and the Kings County Republican Party Executive Committee's ("the Committee") endorsement of Democrat former Kings County District Attorney Charles J. Hynes ("DA Hynes") in the 2005 campaign for Kings County District Attorney.

I further request that you publicly release your findings in order to provide a transparent view of the plethora of scandals that have festered beneath the surface of

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<sup>1</sup> Rule 1.11(f)(3), Special Conflicts of Interest for Former and Current Governor Officer and Employees, states in pertinent part that a prosecutor may not accept anything of value from someone if the prosecutor knows (or if it is obvious) that the offer is designed to influence the prosecutor's official duties.

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this case even as the former DA trumpeted Mr. Giuca's conviction as a model exercise of investigative technique. The public is entitled to the truth, which is less flattering than has been portrayed in many newspaper articles, as well as the book and television shows which have glowingly portrayed his prosecutors.

DA Hynes was endorsed by the Committee in 2005. *See*, Exhibit L. The Republican endorsement, which constituted an obvious apparent conflict of interest for DA Hynes would have diminished the credibility of Mr. Giuca's conviction a decade ago if it was known that DA Hynes negotiated for, and/or received it, from a Committee on which Susan Cleary<sup>2</sup> served as Vice Chair, at the same time her son Albert Cleary ("Cleary") was deeply involved in the case and himself faced exposure. *See*, Exhibit K.

An investigation is particularly important now in light of our findings, which have demonstrated that the flawed case against Mr. Giuca was built upon unreliable and wildly inconsistent witnesses, ignored exculpatory evidence, protected untruthful witness Angel DiPietro (the daughter of a personal friend of DA Hynes, whom he later hired as an assistant district attorney), and included some of the worst evidence of prosecutorial misconduct seen in a New York courtroom in years, including subornation of perjury (from Cleary and DiPietro among others), concealment of *Brady* and *Giglio* material, knowingly false argument, and the creation and use of fabricated and forged evidence in order to rig the trial's outcome against Mr. Giuca.

Additionally, an investigation is appropriate in view of recently disclosed evidence demonstrating that DA Hynes may have engaged in criminal conduct and professional misconduct during his 2013 re-election campaign for Kings County District Attorney, including the misuse of his official DA email account for

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<sup>2</sup> During this period, Susan Cleary was prominent in Brooklyn Republican politics. She ran unsuccessfully for the United States Congress in 2000 and 2002. She also was close to Cleary's attorney Phil Smallman, who unsuccessfully ran for a judgeship at the time he represented Cleary. Although Mr. Smallman was "unaffiliated" with a party, Ms. Cleary's Committee appeared to have endorsed him in his judicial race. *See*, 2005 Voter Guide Biography of Philip J. Smallman; *see also*, Bederow Letter, May 19, 2014, p. 21. Among the donors to Cleary's attorney's judicial campaign was DiPietro's father, who also donated to DA Hynes' campaign.

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campaign purposes.<sup>3</sup> See, The New York City Department of Investigation's Report of Findings Regarding Misconduct by Former Kings County District Attorney Charles J. Hynes, Justice Barry Kamins and Others, published by the *New York Times*, June 2, 2014. Accordingly, an investigation should be conducted and its findings released, so that the public may know whether DA Hynes sacrificed his official responsibilities in the investigation into Mark's death in order to further his own electoral prospects in the 2005 campaign.

*DA Hynes Desired the Republican Endorsement*

In 2004-2005, the DA was immersed in its quest to convict then Kings County Democratic Party Chairman Clarence Norman for assorted crimes. In 2005, DA Hynes faced John Sampson, who until 2013 was the most serious threat to his reelection. DA Hynes was understandably concerned about the prospect of losing core Democratic support because he had authorized the indictment of the party chairman, and Norman obviously was going to urge his supporters as well as the party establishment to back Sampson. DA Hynes also was likely concerned that he would not gain as much as the African-American vote (which comprised approximately one-third of the 2005 Brooklyn primary electorate) as he had previously because of the Norman indictments and the fact that his chief opponent was Sampson. See, *New York Times*, "Hynes wins a Fiercely Contested Primary Race for District Attorney," September 14, 2005.<sup>4</sup> Thus, employing an electoral hedge that he actually utilized in 2013, DA Hynes sought Republican ballot access in the event that he lost the Democratic primary (he eventually defeated Sampson 41%-37% in the Democratic primary).

DA Hynes' own words demonstrated that his desire and motive for Republican ballot access in the 2005 campaign were the Norman indictments. In a now ironic August 2013 statement, he said that the 2005 election was his most competitive race "because it's not a good idea to indict the county chairman of your party." Interview of Charles J. Hynes by Yochonon Donn for Hamodia.com, August

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<sup>3</sup> As part of your investigation, you should review DA Hynes' official email account from 2003 onward in order to determine if he discussed Mr. Giuca's case in connection with his 2005 campaign with Ms. Cleary or anyone else.

<sup>4</sup> Mr. Giuca's trial began on September 14, 2005.

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27, 2013. *See also, Brooklyn Daily Eagle*, "DA Hynes Fundraising Tops Half Million So Far," February 2, 2005 (DA Hynes stated that because of the Norman indictments he did not anticipate the support of the Democratic Party). Thus, DA Hynes' interest in a Wilson-Pakula waiver<sup>5</sup> and the Republican endorsement as a fallback option against a Democratic primary loss were self-evident.

*DA Hynes Knew that He Faced a Conflict of Interest*

Without more, DA Hynes' negotiation for, and acceptance of, a political endorsement from the Committee while he was engaged in the prosecution of Mr. Giuca created the appearance of a staggering conflict of interest. *See, New York Rule of Professional Conduct 1.11(f) (3)*. As leading prosecutorial ethics expert Professor Bennett L. Gershman has noted,

there is a serious appearance of impropriety when the District Attorney's political future is being furthered by a high-ranking party official at the same her son is linked to a murder, at risk of being charged criminally, and is used as a witness notwithstanding serious doubts as to his truthfulness.

*See, Letter of Professor Bennett L. Gershman to District Attorney Kenneth P. Thompson, February 24, 2014, p. 10.*<sup>6</sup>

In 2005, with his office entrenched in the prosecution of Mr. Giuca, yet concerned that he might lose the Democratic primary, DA Hynes apparently cast aside ethical considerations in favor of his political future. However, in 2012, DA Hynes all-but conceded that he knew endorsements which were intertwined with criminal cases created apparent conflicts which undermined the credibility and

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<sup>5</sup> In April 2013, as part of his crackdown on political corruption, Governor Cuomo sought to repeal the Wilson-Pakula Act of 1947.

<sup>6</sup> As you are aware, we have consulted with Professor Gershman in connection with our representation of Mr. Giuca, and his opinion letter of February 24, 2014, was prepared at our request.

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integrity of his office, when he sought a special district attorney to investigate then Democratic Party Chairman Vito Lopez.

In circumstances strikingly similar to the 2005 conflict, DA Hynes recused his office from a criminal investigation of Lopez because he had endorsed DA Hynes in prior campaigns for District Attorney, and DA Hynes intended to seek his support in future campaigns. DA Hynes acknowledged that because of the Lopez endorsements, if his office investigated him "there [would be] a risk that it would create an appearance of impropriety" and "even the risk of an appearance of impropriety, which might undermine the confidence of the public in the DA, warrants the assignment of a special district attorney." Affirmation of Charles J. Hynes, *In the Matter of the Application of Charles J. Hynes*, August 30, 2012, ¶6.

It is hard to fathom how DA Hynes distinguished the 2005 Committee endorsement from his decision to seek a special district attorney in the Lopez investigation for any reason other than fear of incoming political flak if he accepted the endorsement of the Committee at the expense of recusing the DA from the prosecution of Mr. Giuca, which by then had been proceeding for a significant period of time.

*Susan's Cleary's Protection of Her Son Increased the Degree of the Conflict*

Ms. Cleary obstructed the investigation and made false statements in order to shield Cleary from suspicion of his involvement in Mark's murder. Her inappropriate conduct and her potential role in the Committee's endorsement demands scrutiny of the DA's conduct in the prosecution of Mr. Giuca.

Although Ms. Cleary claimed to have been home with Cleary and DiPietro at the time of the murder, like them, she claimed that she heard nothing, even though five or six gunshots blasted through the quiet night across the street from her home, and a neighbor who lived a few houses away testified the shots were "really loud" and "seemed to be from close by." See, Schoenfeld Tr. 129. Nor did she, Cleary or DiPietro join neighbors outside in the aftermath of the shooting. See, Petition, p. 7; Voluntarily Recorded Interview of Daisy Martinez, October 19, 2013.

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Days later, aware that police knew Cleary was among the last people seen with Mark shortly before he was found shot to death across the street from her home, Ms. Cleary approached her then neighbor Daisy Martinez and asked her not to reveal anything about Cleary to police. *Id.* p. 10; Martinez Interview, October 19, 2013.<sup>7</sup>

In February 2004, shortly after Cleary and DiPietro were castigated by the Fishers and the police for their lack of cooperation, (four months before her son submitted a false polygraph report and ten months before he began cooperating with the DA), Ms. Cleary claimed that her son “told all he knows” before she expressed her sympathy to the Fishers. *See, Daily News*, “Cops Closing in on New Lead in Murder of Mark Fisher, But Cops Say Key Witnesses Won’t Talk,” February 13, 2004.

She also offered the false alibi that Cleary was home safely at 4:30 a.m., which if true, would have placed him and DiPietro sound asleep hours before Mark was shot almost literally outside his bedroom window at 6:40 a.m. *See, New York Times*, “Months After Killing, Few Answers; Investigation Stalls in Brooklyn Shooting,” February 22, 2004. At the time she provided Cleary with the false alibi, published reports erroneously stated that Mark had been at an ATM machine several blocks away from Cleary’s home at 4:23 a.m.<sup>8</sup> *See id.*; *see also*, Petition, p. 10.

*Albert Cleary’s Cover-Up of His Involvement and/or Knowledge in Mark’s Death*

Cleary’s lack of credibility, his exposure as a manipulative liar, and the possibility that he and DiPietro were present when Mark was killed previously has

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<sup>7</sup> The DA’s “elite team” of prosecutors apparently never learned about Ms. Cleary’s obstruction because they never saw fit to interview Martinez, even though she told police—including as early as less than three hours after the murder—that she saw a dark “squared off” vehicle speed up the block and *pull away from the driveway where Mark was discovered*. *See*, NYPD Canvas Report, October 12, 2003; Martinez DD5, July 16, 2004; Martinez Interview, October 19, 2013. At trial ADA Nicolazzi argued that Cleary’s stonewalling police was evidence of Mr. Giuca’s guilt, yet it turns out that Cleary’s own mother engaged in this conduct. *See*, Tr. 31-32.

<sup>8</sup> This was based upon the time listed on the ATM receipt found with Mark. This was incorrect; Mark was at the ATM machine at 5:23 a.m., when Cleary, by his own admission, was still at Mr. Giuca’s home. *See*, Cleary Tr. 254-256.

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been extensively detailed. *See*, Letters from Mark A. Bederow to Michael Trabulsi, Esq., May 13, pp. 2-5, 13-15; May 19, 2014.

Contrary to the DA's argument that Mr. Giuca organized an immediate cover-up of Mark's death, all of the credible evidence suggested that Cleary and DiPietro engaged in a cover-up of their own in the hours immediately after Mark's murder. According to ADA Nicolazzi, evidence of Mr. Giuca's cover-up was present in his advice to Cleary and Lauren Calciano "to get lawyers" and his purported "coaching" of Cleary before he first spoke to police. *See*, Tr. 29-30, 33-35, 987, 993, 998.

But evidence of Mr. Giuca's purported cover-up came from the now-exposed lies and perjured testimony of Cleary and DiPietro, whose testimony not only incriminated Mr. Giuca, but conveniently concealed evidence of their own cover-up. *See*, Bederow Letters, May 13 and 19, 2014. The evidence that Cleary and DiPietro engaged in a cover-up should have been obvious to the DA if it had taken the time to fairly analyze the case rather than simply seek evidence of Mr. Giuca's guilt. For example:

- Cleary told Mr. Giuca that there had been a shooting. Cleary Tr. 314. Cleary offered different versions of Mr. Giuca's purported response to being informed of a shooting. *See, e.g.*, Cleary DD5, November 16, 2003.
- DiPietro, among her too many lies to count, told police within 48 hours of Mark's murder that Mr. Giuca asked Cleary about Mark's whereabouts, and that she had been told by Meredith Denihan that Mark went home safely. DiPietro's lie about Denihan quickly was exposed, so she next claimed that Cleary asked Mr. Giuca where Mark was and that it was Mr. Giuca who claimed that Mark had went home safely. This covered-up the fact that DiPietro lied to Mark's friends that he had gotten home safely. *See*, Bederow Letters, May 13 and 19, 2014; DiPietro DD5s, October 14 and November 26, 2003.
- Cleary and DiPietro perjured themselves about a purported 11:00 a.m. phone call from Mr. Giuca, when Cleary's prior sworn testimony on two occasions

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and phone records introduced into evidence by the DA confirmed that the call occurred at 12:56 pm., long after DiPietro had lied to Mark's friends about his whereabouts. *See*, Cleary Tr. 270, 314-315, 317; DiPietro Tr. 219; *cf.* Phone Records of Mr. Giuca and Cleary, Cleary GJ 15; Cleary Sworn Statement to DA, p. 4.

- Although Cleary claimed that Mr. Giuca told him what to tell the police and "to keep asking for your lawyer," it was Cleary who advised Mr. Giuca to seek counsel from his own attorney, Phil Smallman, whom Cleary misleadingly described as "a family friend who was an attorney." In a serious conflict of interest, Mr. Smallman then represented Cleary and presumably advised him to incriminate Mr. Giuca after he was "squeezed." *See*, Tr. 35; Cleary Tr. 328-329. Cleary illogically implied that although Mr. Giuca told him to lie to the police, he incriminated Mr. Giuca about possession of a gun because he had followed Mr. Smallman's advice to tell the truth to the police. *See id.* 352. If Mr. Giuca was orchestrating a cover-up which necessitated everyone "lawyering up," why did Cleary retain counsel before Mr. Giuca and visit DiPietro's father within hours of Mark's murder?
- The DA argued that Mr. Giuca's advice to Lauren Calciano to consult counsel was evidence of his "leadership" in a cover-up, but Mr. Giuca did not tell Calciano what to say to police (as he allegedly had done with Cleary). This made no sense; if Mr. Giuca had confessed his guilt to Calciano as well as Cleary, he surely would have also sought to "control" what she told police. Calciano met investigators many times without the presence of an attorney. *See*, Calciano DD5s, October 15 and October 22, 2003; March 30 and October 1, 2004.
- Ms. Cleary obstructed and lied on Cleary's behalf, and Mr. Smallman appeared on national television in June 2004 and (inaccurately or falsely) claimed that Cleary was being truthful. *See*, Petition, pp. 7, 10; *CBS News*, "Teen Athlete Murder Mystery," June 8, 2004.

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- Cleary—without Mr. Giuca’s input—“came up with the idea” to submit a false polygraph report to the DA so that they would leave him alone. *See*, Exhibit F; Cleary Tr. 329, 338-339.
- Cleary and DiPietro decided to clean his garage just a few hours after Mark’s murder, despite partying until after 6:00 a.m., waking at 11:00 a.m., while aware that a body had been dumped across the street and that Mark was missing. Cleary lied under oath that his brother rather than DiPietro helped him clean the garage. *See*, Cleary Sworn Statement to DA, December 15, 2004; *cf.* DiPietro Tr. 220. They then spent the day on Long Island with her father, a criminal defense attorney. *See*, Bederow Letters, May 13 and 19, 2014.

In sum, Cleary’s conduct, which included varying degrees of a cover-up by him, DiPietro, Ms. Cleary and possibly his attorney, and which culminated in his and DiPietro’s false trial testimony, coupled with the Committee’s endorsement of DA Hynes, impairs the integrity of the DA’s prosecution of Mr. Giuca.

*The Waiver of Immunity*

In light of the endorsement, Cleary’s waiver of immunity should be scrutinized to determine whether it was a component of a political deal. His decision to waive his absolute right to automatic immunity, on the advice of counsel, defied common sense. *See*, Bederow Letter, May 19, 2014, pp. 18-21.

If there was discussion about an endorsement between DA Hynes and the Committee, Cleary’s disturbing and publicly reported involvement in the Fisher case must have been addressed: he had been publicly identified as Ms. Cleary’s son and criticized by the Fishers and the police, and it was frequently reported that Mark was found across the street from his home. *See, e.g., New York Post*, “Anatomy of an Unsolved Slay—Party Kids Snub Cops in College Jock’s Gruesome Murder,” July 25, 2004 (identifying Cleary as the son of “former congressional candidate Susan Cleary”). In order to avoid public criticism about a crooked deal involving “leniency for Cleary in exchange for Ms. Cleary’s support,” it would have been important to

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give the impression that Cleary theoretically remained subject to prosecution. A formal waiver of immunity<sup>9</sup> would have satisfied that concern.

*The Endorsement Impaired the Credibility of the Investigation and Prosecution*

The trial of Mr. Giuca was poisoned by DA Hynes' political conduct in the form of the endorsement and his astonishing decision to employ DiPietro. If the public fully comprehended these decisions, its confidence in controversial convictions secured by the prior DA would sink lower than it already has sunk.

The conflict which confronted DA Hynes in 2005 was suffocating. As evidenced by his 2012 recusal in the Lopez investigation, he knew about the conflict, and that an endorsement by the Committee would lessen the public's confidence in his office. Put simply, he had to choose between a political benefit at the risk of potentially destroying his ability to maintain the public's trust, credibly serve Brooklyn and seek justice in a very important case. He apparently chose politics over concerns about the credibility of his office.

A responsible prosecutor in DA Hynes' position in 2005 would have either recused his office from Mr. Giuca's case, rejected outright the Republican endorsement or at a minimum, publicly explained that Ms. Cleary played no role in the Committee's endorsement. DA Hynes apparently opted for none of the above.

DA Hynes' endorsement by the Committee calls into question every investigative decision made in Mr. Giuca's case, including (1) why the DA ignored ample exculpatory evidence which conclusively established that a young woman, young man and vehicle were present when Mark was murdered, (2) why the DA never called DiPietro to appear before an "investigative grand jury," (3) why Cleary illogically waived immunity before appearing in the grand jury, (4) why the DA ignored credible evidence that Cleary and DiPietro engaged in a cover-up, and (5) why the DA presented Cleary and DiPietro as witnesses against Mr. Giuca despite

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<sup>9</sup> On information and belief, Cleary was the only witness who waived his right to automatic immunity before appearing as an "unwilling" witness in an "investigative grand jury" empaneled in order to indict Mr. Giuca.

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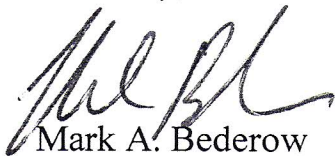
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actual knowledge that they were going to perjure themselves, and in Cleary's case contradict two prior sworn statements made while he was a cooperating witness.

Consequently, an investigation into whether political considerations influenced the DA's prosecution of Mr. Giuca is warranted. Combined with clear and convincing evidence of his actual innocence, the existence other critical flaws in the case, and the serious prosecutorial misconduct which prejudiced him, the Committee's endorsement of DA Hynes has further eroded the integrity of the case against Mr. Giuca.

I look forward to speaking with you soon about the status of your office's review of Mr. Giuca's conviction.

Sincerely,



Mark A. Bederow

Cc: Mark Feldman, Esq. (by email)  
Professor Ronald S. Sullivan, Jr.  
Mark Hale, Esq. (by email)  
Michael Trabulsi, Esq. (by email)