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May 28, 2014

Honorable Kenneth P. Thompson
District Attorney, Kings County
350 Jay Street
Brooklyn, NY 11201-2908

Re: People v. John Giuca, Ind. No. 8166/2004
Petition for Review by Kings County District Attorney's Conviction Review Unit

Dear Mr. Thompson:

I have previously written a letter dated February 24, 2014 in support of the Petition filed by Mark A. Bederow, Esq., attorney for John Giuca, seeking review of Mr. Giuca's 2005 murder conviction by your office's Conviction Review Unit. In that letter I addressed several ethical issues relating to the conduct of the trial prosecutor, Assistant District Attorney Anna Sigga-Nicolazzi, including her distortion of the truth by presenting inconsistent and contradictory theories of guilt; apparent knowing use of false testimony (at least with respect to Albert Cleary, Angel DiPietro, and John Avitto); attacking the defendant's character with improper and inflammatory arguments; suppressing evidence favorable to the defendant; vouching for the credibility of her witnesses and the reliability of her evidence; and using false evidence to misrepresent the character and credibility of her most important witness, John Avitto.

I am taking the liberty of writing this letter to support a letter from Mr. Bederow to Michael Trabulsi, Esq., dated May 20, and to address what appears to be one of the most serious issues of prosecutorial misconduct that I have encountered recently. I refer to Mr. Bederow's claim that the prosecution created and used false evidence to convict Mr. Giuca, namely, a letter purportedly written by Sean Ryan, Mr. Avitto's case manager in his drug treatment program, which describes Mr. Avitto's status in the program. This letter, dated September 20, 2005, is either a forgery, as Mr. Bederow alleges, or is certainly a materially altered document that misrepresents Mr. Avitto's conduct in the program by conspicuously omitting a serious violation that was prominently described in Mr. Ryan's letter dated September 19th. However, the September 19th letter was altered, and the new letter of September 20th was created in its place to make it appear that Mr. Avitto was successfully participating in the drug program, and thereby allowed Ms. Nicolazzi to falsely represent to the jury that Mr. Avitto was doing well in the program, did not need the help of the District Attorney to get through the program, and testified because he was a responsible citizen trying to do the right thing. These preposterous arguments – all of them deliberate fabrications by Ms. Nicolazzi -- were used to convict Mr. Giuca.

There are few if any more serious violations by a prosecutor, legally and ethically, than using fabricated evidence to convict a defendant. See ABA Model Rule 3.3(a)(4); ABA Standards for Criminal

Justice 3-5.6(a). A prosecutor's use of false evidence usually involves false testimony by a prosecution witness which the prosecutor either solicits, or fails to correct, which apparently happened here. See *Giglio v. U.S.*, 405 U.S. 150 (1972); *People v. Savvides*, 1 N.Y.2d 554 (1956). A less frequent form of misconduct, but arguably more reprehensible, is a prosecutor's use of false physical evidence. See *Miller v. Pate*, 386 U.S. 1 (1967). The use of false physical evidence is reprehensible; it impairs the integrity of the trial by perverting the search for the truth with false evidence. And since the falsity is known only to the prosecution, and because of its physical nature, the use of this evidence prevents the defendant from effectively confronting and challenging this damning non-testimonial proof.

From my experience reviewing the conduct of prosecutors, the conduct of Ms. Nicolazzi in relying upon the possibly forged and certainly fabricated September 20th Ryan letter to enhance Mr. Avitto's credibility is as brazen as any conduct I have encountered. It is certain that the September 20th letter is a fabrication. Mr. Avitto in a court proceeding on September 19th was reprimanded by the judge for smuggling contraband into the Kingsboro drug facility and dispensing it to other inmates. Mr. Avitto, as the September 19th transcript clearly states, admitted his guilt in the presence of Mr. Ryan and the District Attorney. His misconduct was described in Mr. Ryan's letter of September 19th. There is absolutely no doubt that if Mr. Ryan's September 19th letter was known by Mr. Giuca's attorney, his cross-examination of Mr. Avitto would have been far more compelling, and would have effectively prevented Mr. Avitto and Ms. Nicolazzi from making their false and cynical representations to the jury that Avitto was "doing good" in the program, and effectively refuting Ms. Nicolazzi's claim that Avitto lacked a motive to seek a benefit in exchange for his favorable testimony. But Mr. Giuca's attorney never saw the September 19th letter; it was effectively suppressed, and a new letter dated September 20th was created to take its place for use during defense counsel's cross-examination.

The circumstances under which the September 20th letter was concocted, and the parties responsible for its preparation, are presently unknown. But it is virtually certain that Mr. Giuca's attorney possessed only the September 20th letter; the prosecution never disclosed Mr. Ryan's letter dated one day earlier. For example, a reference to the Seafield Rehab Center – which Mr. Giuca's attorney specifically noted in his cross-examination of Avitto - was contained in the September 20th letter, but was not contained in the September 19th letter. The critical violation by Avitto – smuggling contraband into the Kingsboro Rehab Center – was contained in the September 19th letter but omitted from the September 20th letter. Whether Ms. Nicolazzi (or anyone else from the District Attorney's Office) was responsible for the fabricated September 20th letter, and whether the letter is a forgery or a fabrication, is irrelevant to whether Mr. Giuca's fair trial rights were violated. Regardless of whether the prosecution actually knew about the falsity of the evidence, or used it unwittingly, the prosecution is deemed to be responsible for the injury to Mr. Giuca's ability to receive a fair trial. See *Giglio v. U.S.*, supra.

The creation and use of this fabricated letter to convict Mr. Giuca adds another layer of prosecutorial malevolence to the other serious issues of misconduct discussed in my February 24th letter. Taken together, these acts of misconduct demonstrate clearly and convincingly that Mr. Giuca did not receive a fair trial, and that his conviction lacks integrity.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bennett L. Gershman", written over a horizontal line.

Bennett L. Gershman