STATE OF NEW YORK: SUPREME COURT
COUNTY OF KINGS:

THE PEOPLE OF THE STATE OF NEW YORK,	:	
	:	
-against-		Indictment No. 8166/2004
	:	
JOHN GIUCA,	:	
Defendant.		

PETITION FOR REVIEW BY THE KINGS COUNTY DISTRICT ATTORNEY'S OFFICE CONVICTION INTEGRITY UNIT OF JOHN GIUCA'S CONVICTION

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INTRODUCTION

A prosecutor "may strike hard blows, but he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78 (1935).

John Giuca ("John") stands wrongfully convicted for the October 12, 2003 murder of Mark Fisher ("Mark"), a popular college student who was shot and killed by Antonio Russo ("Russo"), likely in the presence of a young woman and a young man in front of 150 Argyle Road in Brooklyn. Mark's murder was a senseless act which rightfully outraged his family and the community. However, in its zeal to solve the controversial case, the Kings County District Attorney's Office ("the DA") prevented John from receiving a fair trial, in substantial part because of its pervasive misconduct. As a result, John has languished in a jail or prison cell since his arrest on December 21, 2004.

John's conviction was championed as a major success for the DA, but upon peeling back the onion, the investigation and prosecution is exposed as a travesty of justice. The DA ignored evidence which pointed away from John, unfairly portrayed him as a Mafia-style "boss," unduly pressured witnesses, presented perjured testimony, violated its *Brady* and *Giglio* obligations, and trampled John's due process rights in support of five vastly inconsistent theories of John's guilt:

(1) **The Calciano Theory**: John provided a gun to Russo, after he asked John for a gun in order to rob Mark. Russo robbed, shot and killed Mark. After the murder, Russo returned the gun to John.

(2) **The First Cleary Theory**: John ordered Russo to shoot Mark because Mark had "disrespected" his home by sitting on a table. John armed Russo. After the murder, Russo returned the gun to John.

(3) **The Second Cleary Theory**: John armed and ordered his Ghetto Mafia ("GM") soldier Russo to shoot Mark in order to boost GM's street credibility. After the murder, Russo returned the gun to John.

(4) **The Avitto Theory**: John accompanied Mark, Russo and another individual to an ATM, where John pistol-whipped Mark, beat him and robbed him before Russo took the gun and shot Mark in John's presence.

(5) **The Nicolazzi Theory**: John accompanied Mark to the ATM with Russo and another individual, pistol whipped Mark, robbed him and shot Mark himself.

In Kafkaesque fashion, the prosecutor argued that John was present during the murder and that John was not present during the murder. She argued that John was the shooter and that John was not the shooter. She argued that Mark was shot in a simple robbery and because he "disrespected" John's home and as part of a gang execution. In order to cling to all of these contradictory theories, the prosecutor consistently vouched for perjured testimony and testified as an unsworn witness that she "knew" what happened to the unrecovered murder weapon.

We now petition the DA to review John's case and the compelling evidence our own investigation has uncovered, including the sworn recantation of trial testimony by three witnesses: Lauren Calciano McCulloch ("Calciano"), Anthony Beharry ("Beharry") and John Avitto ("Avitto").

Among the specific factors which destroy the integrity of John's conviction are:

- The thoroughly discredited testimony of four substantive witnesses, including sworn recantations by three of them.

- The DA's violation of John's due process rights because it knew, or should have known, that it presented perjured testimony.

- The DA's violation of *Brady* and *Giglio* by concealing and then misrepresenting that Avitto sought and received a benefit from the DA in exchange for false testimony.

- The DA's violation of *Brady* by withholding the substance of Avitto's testimony even though it was favorable to the defense and undermined the credibility of Calciano and Albert Cleary ("Cleary").

- The DA's summation violated John's due process rights because the prosecutor denigrated John and his counsel, testified as an unsworn witness, and consistently vouched for the truthfulness of perjured testimony in support of five inconsistent theories.

- Ineffective assistance of counsel based upon counsel's failure to conduct appropriate investigations, failure to cross examine DA witnesses effectively, and failure to call witnesses who would have destroyed the DA's case.

- Misconduct by a juror who was prejudiced against Jews, read prejudicial newspaper accounts during trial, and had purported pre-trial knowledge of GM and its activities.

We respectfully submit that upon a complete review of this matter, the DA will agree that the foundation underlying John's guilt has collapsed, and that justice requires vacating his conviction.

STATEMENT OF FACTS

An Evening in Manhattan

On Saturday evening, October 11, 2003, Mark and some friends went bar hopping on the Upper East Side of Manhattan. He ran into Angel DiPietro ("DiPietro"), a classmate from Fairfield University, and some of her friends, including Cleary and Meredith Denihan ("Denihan"). Mark and Denihan flirted with each other, so Mark remained with the DiPietro and Denihan. As the night wore on, DiPietro told her roommate Katherine Siembiede ("Siembiede") that she "and her group" (which included Cleary) were frustrated at being "stuck" with Mark. Siembiede DD5, July 21, 2004; Cleary Tr. 286.[1] DiPietro denied saying this at trial. DiPietro Tr. 226.

[1] References to the Transcript will be as follows: [Witness Name] Tr. [Page Number].

As the evening was winding down, John and a few of his friends met up with the DiPietro/Cleary group outside of a bar. The group was unable to get Mark home because he had no money and was intoxicated. Cleary Tr. 251. John's parents were in Florida, so he invited the group to his Brooklyn home. *Id.* Right before the group left, Mark (who had left his cell phone in New Jersey) borrowed DiPietro's cell phone and left a message for his friend Chris Peters ("Peters"), who he had been with earlier that evening. Denihan Tr. 146; Peters DD5, October 13, 2003. Mark became aware that DiPietro planned to spend the night at Cleary's and told her that he would sleep there too. DiPietro DD5, November 26, 2003. Sometime after 4:00 a.m., John, Mark, Cleary, DiPietro and Denihan piled into a taxi destined for John's home in the Prospect Park South section of Brooklyn.

The Party at John Giuca's House

Shortly after they arrived at John's home, Russo, Tommy Saleh ("Saleh") and Arty Gminsky ("Gminsky") joined the group. When Saleh arrived at the front door, Cleary, trying to act "tough" told Mark that "there may be a problem." Cleary Tr. 288.

At one point, Mark sat on a table. Saleh told Mark to get off the table. Exhibit A (Affidavit of Tommy Saleh, dated January 8, 2014) ¶4. Cleary described it as "nothing more" than Saleh telling Mark to get off the table, which Mark did without incident. Cleary GJ 13. Some of the group went onto the back porch and began drinking alcohol and smoking marijuana. Cleary denied that he and DiPietro went out back while the group drank and smoked; Denihan said DiPietro and Cleary were part of the group that went outside. Cleary Tr. 253-254; *cf.* Denihan Tr. 151-52.

Mark stated that he needed to go to an ATM. Cleary Tr. 254. John unsuccessfully attempted to provide him with directions. *Id.* Russo accompanied Mark to an ATM on Coney Island Avenue and Beverley Road. *Id.* John remained home while Mark and Russo were at the

ATM. *Id;* Denihan Tr. 152. At 5:23 a.m., Mark withdrew $20. Gaynor Tr. 373. This was the only ATM withdrawal that Mark made while he was in Brooklyn. Mark and Russo returned to John's home shortly. Cleary Tr. 255.

Soon after Mark and Russo returned from the ATM, Cleary and DiPietro left. *Id.* According to Denihan, they snuck out without notifying her. Denihan Tr. 153-154. According to Cleary, he told Denihan they were leaving and she asked him if DiPietro was going with him. Cleary Tr. 255. According to DiPietro, she did not see anybody before she and Cleary left. DiPietro Tr. 215.

The last people remaining at John's home were John, his brother Matthew Giuliano ("Giuliano"), Russo, Denihan and Mark. Denihan fell asleep on a couch. At 5:57 a.m., John called Cleary. Phone Records of John Giuca ("Phone Records"). Although the call lasted 64 seconds and occurred around the time he left John's home, Cleary later claimed to have no recollection of the call. Cleary Tr. 299-300.

The Murder of Mark Fisher

DiPietro was the only person at the party that Mark knew. She left with Cleary. Mark had used her cell phone to leave messages with his friends earlier that evening. Denihan Tr. 146; Peters DD5, October 13, 2003. Sometime after John spoke to Cleary at 5:57 a.m., Mark left John's home with one of John's mother's blankets. At approximately 6:40 a.m., shots rang out and Mark was found shot and killed at the foot of Hiroko and Michel Sworniks' driveway near 150 Argyle Road, a few blocks from John's home and directly across the street from Cleary's then home at 1306 Albemarle Road.

Immediately before the shooting, the Sworniks were awoken by the sound of their dog barking at voices in their driveway. Exhibit B (Affidavit of Hiroko Swornik, dated January 8,

2014) ¶3. Mrs. Swornik looked outside, but her view was blocked by trees. *Id.* ¶4. She heard the voices of young people, including the distinct voice of a young female. *Id.* ¶¶4-5. Almost immediately, she heard the sound of gunshots and a van door sliding. *Id.* ¶6. Michel Swornik also heard the young voices, including one distinct female voice, gunshots and the sound of a van door sliding. Exhibit C (Affidavit of Michel Swornik, dated January 8, 2014) ¶¶4-5. In October 2003, the Cleary's owned a minivan. Voluntarily Recorded Interview of Daisy Martinez ("Martinez"), by Jay Salpeter, October 19, 2013 ("Martinez Int").[2]

At least five Argyle Road residents, including Martinez, reported that they saw and/or heard a vehicle at the time of the gunshots. NYPD Canvas Report, October 12, 2003; Martinez DD5, July 16, 2004. Hiroko Swornik told the police about the voices she heard, including the young woman. Exhibit B ¶8. Archie Willard told police that he heard a car door close after the gunshots. NYPD Canvas Report. Despite the close proximity of Cleary's home, where he, DiPietro and his mother Susan Cleary purportedly all were sleeping at the time of the shooting, each later claimed not to have heard gunshots. DiPietro Tr. 218; Cleary Tr. 303; Martinez Int. Police did not interview Cleary, DiPietro or Susan Cleary on the morning of October 12. NYPD Canvas Report.

Mark was shot five or six times with a .22 caliber pistol. Guittierez Tr. 841. He was found face down, with a bloodstained blanket from John's home—without any bullet holes—underneath his thighs and midsection. Keating DD5, October 24, 2003; Crime Scene Photos. The right side of his face and his hands were heavily bruised, suggesting he was in a fight with a left-handed person before he was shot. Autopsy Report of Mark Fisher. John is right-handed. Some of the entry wounds traveled in an upward direction while others traveled in a downward direction, indicating

[2] At the DA's request, we will provide a copy of the original recording of this interview.

that Mark was shot from two separate positions. *Id.* Mark's wallet had been stolen. Police later recovered it in a sewer a few blocks away, between John's home at 152 Stratford Road and Russo's home at 60 Turner Place.

The Immediate Aftermath of the Murder

Police arrived at the pre-sunrise murder scene within minutes, yet only two of the five or six .22 caliber shell casings were recovered. 911 Sprint Report; Lupo Tr. 99. If all of the shots were fired from the street, as opposed to a vehicle, the killer, after waking up the neighborhood by firing several shots, felt around in the dark, successfully retrieved three or four shell casings, missed two, and fled without being seen, heard or caught before the police arrived. What appeared to be the impression of a recently made bare-footed footprint was left in the wet mud a few feet away from Mark, next to the shell casing at crime scene marker label 2. Exhibit D (Enhanced Photographs of Crime Scene). The murder weapon was never recovered and no forensic evidence has ever linked John to Mark's death.

Prospect Park South is a quiet, residential area with large Victorian homes and tree-lined streets. In October 2003, Susan Cleary was active in the block association, had recently run for Congress and was a Vice-Chair of the Kings County Republican Party. In the immediate aftermath of the shooting, almost all of her neighbors came outside amid the early Sunday morning commotion. However, she didn't. Martinez Int.

Meanwhile, a few blocks away from where Mark lay dead, Russo had rushed home and had his signature dreadlocks hastily shorn off within minutes of the shooting. Alfredo Bethune DD5, November 29, 2004. Although he offered the pathetic excuse that Mark had attacked him, Russo admitted shooting Mark within minutes of killing him. *Id.* That evening, he contacted Delta

Airlines and arranged for a flight to California, where he fled days later. Although Russo changed his appearance and plotted his getaway, John remained home.

Later that day, Cleary and DiPietro cleaned out his garage and then went to her Long Island home where they spent several hours with her father, a prominent criminal defense attorney. DiPietro Tr. 220, 229. Before arriving home, DiPietro instructed Cleary to lie to her parents about where she had been the previous evening and to say that they had met earlier that day in Manhattan. DiPietro DD5, November 26, 2003; Cleary DD5, November 16, 2003. Cleary had never been to DiPietro's home and met her parents for the first time several hours after Mark was murdered. Cleary DD5, November 16, 2003.

Police had trouble locating DiPietro in the aftermath of Mark's death. She was "not immediately available" and was "difficult to locate." *New York Times*, "Months After Killing, Few Answers; Investigation Stalls in Brooklyn Shooting," February 22, 2004. On the morning of October 13, police asked one of Mark's friends, Jackie Conway ("Conway") to help them locate DiPietro. Conway called the DiPietro residence, and DiPietro's mother told her that she had not seen her daughter "in a few days," even though DiPietro had spent several hours after Mark's murder at home with her parents and Cleary. Conway DD5, July 21, 2004; DiPietro DD5, November 26, 2003; Cleary DD5, November 16, 2003.

On Monday, October 13, Fairfield University hosted a memorial service for Mark in order for his friends to grieve together. DiPietro did not attend. Siembiede DD5, July 21, 2004. Siembiede moved out of the room she shared with DiPietro immediately after Mark's funeral. *Id.*

The Early Investigation

The investigation quickly devolved into a tabloid sensation dubbed the "Grid Kid" slaying. Law enforcement was under extraordinary pressure to make quick arrests because of the high-

profile nature of the case and because investigators complained that they were being "stonewalled" by witnesses with lawyers. *New York Times*; "Frustration Boils Over in a Murder Mystery," February 5, 2004; Exhibit E (Transcript of *On the Case with Paula Zahn,* May 18, 2010, pp. 7-8).

Based upon the amount of witnesses who heard or saw a vehicle, the absence of three or four spent shell casings, and the condition and positioning of the blanket under Mark, police operated under the theory that Mark had been shot in a vehicle, wrapped in the blanket, and dumped in the Sworniks' driveway. *See e.g., New York Post,* "Bid to End Slay Silence-Grand Jury Eyed to Nail Grid-Kid Slayers," October 12, 2004; *New York Times*, "Second Suspect is Charged in 2003 Murder of Student," December 22, 2004; *New York Sun,* "Second Suspect Arrested in 2003 Murder," December 22, 2004. Saleh was an early suspect because he had driven a vehicle to John's house. He was cleared once police reviewed surveillance video which proved that he arrived home before Mark was shot. *New York Post,* "Two More Busted in Grid-Star Slay Case," January 21, 2005.

At trial, the DA ignored the vehicle which was at the crime scene. The DA never interviewed either of the Sworniks or Martinez. *See,* Exhibits B, C; Martinez Int. The only Argyle Road resident who testified was Edward Schoenfeld ("Schoenfeld"), who simply said that he heard gunshots. Schoenfeld Tr. 129.

Police immediately suspected John because Mark had been seen last at John's home and was found with his mother's blanket. He was even arrested early in the investigation based upon Russo's self-serving statements.[3] Russo DD5s, October 14 and 15, 2003. Russo first claimed he gave Mark directions to Cleary's house after Mark asked him where he could find DiPietro. *Id.* Then he claimed that John and Cleary "plotted" to harm Mark. *Id.* Russo then planted the seed

[3] Russo blamed John at his first available opportunity, yet the DA argued that he was John's obedient "soldier."

which months later blossomed into the Second Cleary Theory when he told police that John was a member of GM. *Id.*

In the days following the murder, Susan Cleary approached her neighbor Martinez and told her not to speak with the police about her son. Martinez Int. Months later, however, Susan Cleary told the *New York Times* that her son had arrived home at 4:30 a.m. even though DiPietro had already told police that she and Cleary arrived at his home at approximately 6:10 a.m. *New York Times*, February 22, 2004; DiPietro DD5, November 26, 2003; *see also,* DiPietro Tr. 217. Notably, at the time Susan Cleary misled the public about her son's arrival home, the media had erroneously reported that Mark had been at an ATM blocks away from the Cleary house around 4:30 a.m. *New York Times,* February 22, 2004; *New York Post,* "Silent Witnesses: Cops Stonewalled in College Grid-Slay Probe," October 30, 2003.

After several interviews, the investigation stalled. A reward was offered for information leading to a conviction. By late 2004, the reward had grown to $100,000.

Early 2004: Anger Builds and Pressure Mounts

On February 4, 2004, Mark's family and the NYPD held a press conference across the street from John's home and urged witnesses to step forward. Mark's father criticized Cleary and DiPietro for their lack of cooperation with law enforcement. *New York Times,* February 5, 2004. Christopher Deneen chastised DiPietro for withholding information, urging her to come clean and to "think about your old friend Mark." Robert Mladinich and Michael Benson, *Hooked Up for Murder*, Pinnacle Books (2007), p. 76. A scathing February 6 *Daily News* editorial called the uncooperative witnesses "beyond pathetic" and described the "stench" from their lack of cooperation "intolerable." *Id.* p. 77. The Fishers were also outraged at their treatment by the DA, which according to a law enforcement source, included being screamed at by a prosecutor and told

to sue if they wanted to see documents in the case file. *Daily News,* "Slain Student's Kin Pin Hopes on Tip," February 14, 2004.

Frustrated and angry, law enforcement resorted to media leaks. They labeled Cleary and DiPietro uncooperative. *New York Times,* February 5, 2004; *Fairfield Mirror,* "More Questions than Answers in Fisher Case," February 11, 2004. Cleary was accused of having "holes" in his story and withholding information from police. *Daily News,* "Cops Closing in a New Lead in Murder of Mark Fisher, But Cops Say Key Witnesses Won't Talk," February 13, 2004; *New York Post,* "Fatal 'Friends;' Resentful City Toughs Behind Grid Kid Slay, March 7, 2004. Susan Cleary, however, continued to maintain that her son was cooperative, claiming he "has told all he knows. My heart goes out to those parents." *Daily News,* February 13, 2004. DiPietro publicly defended herself by repeating the false statement she told police two days after Mark's murder: she left Mark with Denihan, who told her the following morning that Mark had left John's home safely. *Fairfield Mirror,* February 11, 2004.

The pressure to solve the case boiled over in May 2004 when the Fishers met with former Kings County District Attorney Charles J. Hynes ("DA Hynes") and demanded that ADA Kenneth Taub be replaced with a new prosecutor. Website of Mark Steven Fisher Foundation. http://markstevenfisher.org/id1.html. The stalled investigation had become an albatross around DA Hynes' neck as a closely contested primary for Brooklyn District Attorney loomed on the horizon.

The "Elite Team"

DA Hynes created an "elite team" led by former ADA Michael Vecchione. *Daily News,* "Full-Court Press Broke '03 Student Slay Case," February 9, 2005. The new prosecution team

included lead trial attorney ADA Anna-Sigga Nicolazzi, ADA Patricia McNeill and former ADA Josh Hanshaft.

Shortly after the formation of the "elite team," the DA leaked investigative information to the press, including its intent to pressure witnesses who had been at John's house (including Cleary) by subpoenaing them before a grand jury. *New York Post,* "Grand Jury to Probe Grid-Kid Slay," June 21, 2004; *New York Post,* October 12, 2004. The DA further leaked that John and Russo were the targets of the investigation. *New York Post,* June 21, 2004.

Albert Cleary Passes a Polygraph Examination

On Monday, October 13, 2003, Cleary brought John to see his attorney Phil Smallman ("Mr. Smallman") for legal advice. Cleary Tr. 328. John, Cleary and Mr. Smallman met and discussed the situation. *Id.* Although John sought legal advice from Mr. Smallman on Cleary's recommendation, Mr. Smallman instead represented Cleary even as he cooperated against John.

On October 14, Cleary and Mr. Smallman met with police. Although Cleary claimed that he "protected" John in that interview and had rehearsed with him the day before what to tell them, Cleary told police that he had previously seen John with a gun. Cleary Tr. 327; Cleary DD5, October 14, 2003. A month later, he "protected" John again when he told detectives that John was an ecstasy dealer and reiterated that John frequently carried a gun. Cleary DD5, November 16, 2003.

As pressure mounted on Cleary, he maintained that he did not know who killed Mark. Cleary must have taken notice of the DA's June 21, 2004 press leak that he would be subpoenaed, because two days later, Mr. Smallman produced the results of a polygraph examination he had arranged for Cleary to take in order to demonstrate his truthfulness to the DA. *See, New York Post,*

June 21, 2004; Exhibit F (Report of Albert Cleary Polygraph Examination by Wall Street Investigative Services, June 23, 2004).

According to the report Cleary was asked three questions:

(1) "Regarding the Murder of Mark Fisher, do you intend to answer each question truthfully about that?" Cleary answered "yes." No deception was detected in that answer.

(2) "Do you know who murdered Mark Fisher?" Cleary answered "no." No deception was detected in that answer.

(3) "Do you know any information about Mark Fisher's murder that you are holding back from the police?" Cleary answered "no." No deception was detected in this answer.

Yet a few months later, Cleary contradicted his polygraph results and swore that John had admitted to him that he orchestrated Mark's death and had asked him to cover-up his role. Cleary Tr. 327-329.

At trial, ADA Nicolazzi craftily questioned Cleary about his polygraph examination in her case-in-chief. Cleary Tr. 329. As an experienced prosecutor, she knew that it was improper to question Cleary about plainly inadmissible evidence. *See, People v. Angelo*, 88 N.Y.2d 217 (1996); *People v. Shedrick*, 66 N.Y.2d 1015 (1985); *People v. Tarsia*, 50 N.Y.2d 1 (1980); *People v. Leone*, 25 N.Y.2d 511 (1969); *People v. De Lorenzo*, 45 A.D.3d 1402 (4th Dept. 2007). Merely planting the idea that Cleary had taken a polygraph, at the end of her direct examination as she elicited his decision to finally "come clean" with the DA, likely left the jury with the false impression that his test results incriminated John and were consistent with his trial testimony. In fact, the opposite was true. Cleary Tr. 329-331; Exhibit F.

ADA Nicolazzi's gamesmanship with Cleary's polygraph examination was designed to prejudice John by encouraging the jury to speculate about inadmissible evidence. *See*, New York

Rule of Professional Conduct 3.4(d)(1), Fairness to Opposing Party and Counsel ("A lawyer shall not in appearing before a tribunal…state or allude to any matter that the lawyer does not reasonably believe is relevant or that will be supported by admissible evidence").

Angel DiPietro's Inconsistent Narrative of Events

In the summer of 2004, the "elite team" learned that a young female was in the immediate vicinity of the Sworniks' driveway when Mark was shot. H. Swornik DD5, June 15, 2004. The DA turned its investigative attention to DiPietro and interviewed people she interacted with in the days immediately following Mark's murder. They soon discovered that she gave several conflicting accounts of her whereabouts and her knowledge of the events of October 12, 2003.

On the morning and early afternoon of October 12, 2003 (before 12:30 p.m.), DiPietro received several calls from Mark's friends asking her where he was. She told them numerous stories, including that Mark had taken a train home earlier that morning, that she had fallen asleep at Cleary's, and that she had fallen asleep next to Denihan at John's. *See,* Janet Early ("Early") DD5, October 13, 2003; Conway DD5s, October 13, 2003 and July 21, 2004. DiPietro told Conway that Denihan had given Mark money to get home. Conway DD5, October 13, 2003. She did not mention to Conway until later in the day that there had been a fatal shooting across the street from Cleary's home despite purportedly being told about it by Cleary's mother shortly after she woke up at 11:00 a.m. Conway DD5, July 21, 2004; DiPietro Tr. 220-221.

At trial, DiPietro testified falsely that "as she was waking up" around 11 a.m. on October 12, Cleary came into her room and said that John had called asking whether Denihan was with them. DiPietro Tr. 219 *cf.* Cleary GJ 15; Phone Records (confirming John's first call to Cleary after the 5:57 a.m. call on October 12 was at 12:56 p.m.).

Later in the day, DiPietro frantically told Brian DiDonato ("DiDonato") that Mark had been with her and "they" were getting ready to leave when Mark just disappeared and "they left." DiDonato DD5, October 17, 2003. DiPietro never defined who "they" were. *Id.* When she said this "a condescending male voice" (she was with Cleary all day) was in the background. *Id.* She claimed that she had been at a bar with Mark and that they "got separated." DiDonato DD5, July 22, 2004.

Jennifer Hlavin ("Hlavin"), one of DiPietro's roommates, told ADA Nicolazzi in July 2004 that DiPietro "was never open" about what happened to Mark and "changed her story several times." Hlavin DD5, July 30, 2004. DiPietro told Hlavin at least four different stories. She first admitted to being "at the house where Mark was killed." *Id.* She then denied being at the house where he was killed. *Id.* Then she claimed that she "fell asleep upstairs and knew nothing." *Id.* Finally, she told Hlavin she and the others were in a house, that she left to sleep "somewhere else" and that she left Mark with Denihan. *Id.*

DiPietro's second roommate, Siembiede, told ADA Nicolazzi in July 2004 that DiPietro "kept changing the time she left the party in Brooklyn. Her times changed each time she spoke to someone different." Siembiede DD5, July 21, 2004. "The first time [DiPietro] said she left later to sleep at [Cleary's] house. Then she changed the time and said she left earlier." *Id.*

Two days after Mark was killed, DiPietro told police that Denihan told her on the morning of October 12 that Mark had woken up John around 6:00 a.m. and asked him where to catch a train. DiPietro DD5, October 14, 2003. However, Denihan had refused to speak to DiPietro on October 12 because she was angry that DiPietro had left her alone at John's. Denihan DD5, October 14, 2003; Denihan Tr. 165-166; *cf.* DiPietro DD5, October 14, 2003. DiPietro granted an interview to the *Fairfield Mirror* on February 11, 2004, and repeated her false claim that Denihan

had told her that Mark left safely. She admitted at trial that she did not speak to Denihan on the morning of October 12. DiPietro Tr. 219-220, 222. Instead, she claimed that *John* was the source of her information that Mark took a train home, even though John and Cleary did not speak until almost two hours later than DiPietro testified that she was told that Mark had taken a train home. *Id.* 219; *see also*, DiPietro DD5, November 26, 2003; *cf.* Phone Records.

DiPietro twice told police that she did not see anyone at John's house other than those she arrived with from Manhattan (John, Mark, Cleary and Denihan; all Caucasian), but she told her then boyfriend Daniel Fraszka ("Fraszka") the crowd was racially mixed (Russo and Gminksy were not Caucasian) and included a "scary guy." DiPietro DD5s, October 14 and November 26, 2003; *cf.* Fraszka DD5, October 27, 2003. Fraszka also contradicted DiPietro's claim that she had not planned to spend the night with Cleary in Brooklyn all along; he said that DiPietro told him of her intent to sleep at Cleary's around 9:30 p.m. on October 11. *Id.*

In July 2004, ADA Nicolazzi had direct knowledge of DiPietro's wildly inconsistent statements by virtue of her interviews with both of her roommates. Siembiede DD5, July 21, 2004; Hlavin DD5, July 30, 2004. The DA also knew that DiPietro had provided several different accounts of October 12, 2003 to Mark's friends, the police and the media. The DA also had compelling evidence that a young woman was near the Sworniks' driveway when Mark was killed. H. Swornik DD5, June 15, 2004; *see also*, Exhibits B, C. However, DiPietro was interviewed only once between November 2003 and when she testified in September 2005.[4] DiPietro Tr. 224.

[4] After the "elite team" took over the investigation, the DA apparently stopped documenting interviews of critical witnesses, including DiPietro, Cleary and Avitto. In 2013, it was revealed that former ADA Vecchione trained prosecutors to avoid writing down statements of witnesses in order to avoid compliance with *Brady* and *Rosario* obligations. *See, New York Post*, "Brooklyn DA's Rackets Chief Advised Prosecutors to Withhold Sex Trafficking Evidence: Sources." August 12, 2013.

Antonio Russo's Penchant for Violence

Unlike the impressionable follower the DA portrayed him as at trial, investigators knew that Russo was a violent, arrogant and unstable young man who frequently carried a gun and threatened to use it. Approximately a week before the murder, he was seen armed with a gun. Alejandro Romero DD5, March 27, 2004. He had shown another man a .22 or .25 caliber pistol a few months before the murder. Prince Aviles DD5, September 10, 2004. Shortly before the murder, Russo threatened to shoot two other people and bragged about having "a burner." Jonathan Cardona DD5, September 16, 2004. He implied to one friend that police were searching in the wrong place for the murder weapon. Romero DD5. When asked if he disposed of the murder weapon, Russo said "maybe." *Id.*

A porter found a pistol in the back yard of Russo's apartment building approximately two weeks after the murder. Det. Zambito DD5, April 9, 2004. Already aware that he was a prime suspect in Mark's murder, Russo threatened to shoot a young man shortly after Mark's death. *New York Times*, February 22, 2004. He was arrested, but the DA permitted him to plead guilty to disorderly conduct. *Id.* Russo had once randomly assaulted a man which resulted in Saleh being stabbed. Exhibit A ¶12. He also had committed numerous robberies and beaten his own grandmother. Exhibit G (Affidavit of Lauren Calciano McCulloch, dated January 23, 2014) ¶26.

Russo told his best friend Gregory Ware ("Ware") that he had robbed and killed Mark after getting a gun from the Wenzels' house. Ware DD5, September 3, 2004. Police eventually arrested William Wenzel for possessing a firearm.

A Grand Jury "Wielded Like a Hammer"

In late 2004, the DA empaneled a grand jury designed to pressure witnesses into testifying "truthfully." As many as 150 people may have been interviewed or subpoenaed, but the DA's

tactic netted only two witnesses who offered substantive testimony against John: Calciano and Cleary. Both were pressured before finally incriminating John.

Although Calciano had consistently denied any knowledge of John's role in Mark's death over the course of several interviews for approximately one year, *see* Calciano DD5s, October 15 and October 22, 2003; March 30 and October 1, 2004, she finally yielded after being subjected to a relentless barrage of pressure and intimidation. Exhibit G ¶¶14-17.

Among the pressure law enforcement subjected Calciano to:

> I was pressured to 'admit' that John had told me that he gave [Russo] a gun before he shot and killed Mark Fisher. *Id.* ¶16
>
> Law enforcement officers suggested that I was involved in the aftermath of the crime by telling me that Albert Cleary had told them that I had removed a gun bag…Although this was untrue…this claim intimidated me. *Id.* ¶17(a).
>
> ADA Nicolazzi and detectives told me that they were aware that my father was in prison and that by not cooperating with them I was 'going to make it hard on him and my family.' This threat terrified me and caused me great concern for the well-being of my father, my family and myself. More than any other factor, this threat influenced me to testify in the manner they desired. *Id.* ¶17(b).
>
> Law enforcement threatened me with jail and told me that I could be charged with obstruction and/or perjury. *Id.* ¶17(c).
>
> Prior to testifying at trial, I had applied for an internship with the U.S. Marshals. I had also expressed an interest in attending law school. The police and DA pressured me by often telling me to 'think about my future' as they attempted to gain my cooperation. They told me 'this will follow you the rest of your life' if I did not cooperate with them. I interpreted these statements as threats and that they would ruin my future if I did not do as they said. Exhibit G ¶17(d).
>
> Before I told law enforcement what they wanted to hear, at one interview, one investigator became extremely animated and yelled at me that my statements 'were ridiculous.' *Id.* ¶17(e).

> Law enforcement officers pushed me to testify simply that John said he gave [Russo] the gun. They told me if I said that it was not as bad as stating that he had used the gun himself. *Id.* ¶17(f).
>
> ADA Nicolazzi told me that if I did not cooperate with her that police would show up at my place of employment with a subpoena. *Id.* ¶17(g).
>
> At one point before I agreed to testify as they wished, a female NYPD detective pulled me aside for a 'woman to woman' conversation in which she told me that law enforcement had recovered embarrassing photos of me which John had allegedly shared with his friends. Exhibit G ¶17(h).
>
> On another occasion before I testified, ADA Nicolazzi referenced a very personal issue between John and me which was discussed only in our private letters. She told me 'you don't want this coming out at trial.' I interpreted this as a not so subtle threat that I would be publicly humiliated by the DA if I did not cooperate with the DA, but that they would prevent me from being humiliated if I did cooperate with them. *Id.* ¶17(i).
>
> At one point, I had consulted an attorney during the investigation. After I became a cooperating witness, ADA Nicolazzi advised me to discharge the attorney and 'save my money for school,' even though I had already been threatened with arrest for obstruction and perjury. *Id.* ¶17(j).

Successfully intimidated, Calciano testified that she went to John's home on the afternoon of October 12, where in the presence of Cleary, John admitted giving Russo a gun after Russo stated he wanted to rob "Albert's friend." Calciano GJ 8-11.

Cleary also was "squeezed" into incriminating John. Cleary Tr. 338. Months earlier, he had been sentenced to felony probation for kicking and beating a defenseless man unconscious. Exhibit H (Criminal Complaint, *People v. Albert Cleary*, Bronx County Docket No. 2003BX005937, Indictment No. 1534/2003).

Cleary executed a waiver of immunity before testifying in the grand jury. Exhibit I (Waiver of Immunity Executed by Albert Cleary in the Investigation into the Death of Mark Fisher); Cleary

GJ 5-9. He testified that *Saleh* "had a problem with Mark" sitting on the table. Cleary GJ 13 (Emphasis added). He claimed that John admitted to him in Calciano's presence that he told Russo "to show Mark what was up" because Mark had "disrespected" his house. Cleary GJ 11, 18, 24-25.

In announcing John's indictment, DA Hynes credited the "classic technique" of using the grand jury to pressure witnesses. *New York Sun,* December 22, 2004. The media approvingly reported[5] that the DA "wielded the grand jury like a hammer" by "hauling witnesses before [it] and granting them immunity from the killing," [except Cleary] and facing "mounting pressure" [Calciano and Cleary] gave up John. *Daily News,* February 9, 2005. On information and belief, DiPietro did not appear before the grand jury.[6]

Because Cleary's testimony had not yet evolved into the completed version of the First Cleary Theory and he had not even alleged facts in support of the Second Cleary Theory, law enforcement announced robbery (the Calciano Theory) as the motive. *New York Post*, "Bust in Slay of Grid-Kid—2nd B'klyn Suspect," December 21, 2004; *New York Post,* " 'Do it Right'-Chilling Words in Grid-Kid Slay: Cops," December 22, 2004; *New York Times,* December 22, 2004.

When John was indicted in December 2004, GM was an afterthought. By September 2005, GM and Tony Soprano were the story. *New York Times,* "Murder Case Called a Tale of 3 Worlds," September 15, 2005; *Daily News,* "Trial Details Too Much for Slain Teen's Mom," September 15, 2005; *New York Post,* "'This is the Guy I Shot'-Grid Killer Boast: DA," September 15, 2005.

[5] The media coverage of the investigation was patently unfair. Law enforcement, including the DA, fed leaks to the media which all-but pronounced John guilty well before he was even charged with Mark's murder. Numerous prejudicial factual inaccuracies, too many to list, were reported. The New York papers were so careless in their reporting that they did not even properly spell John's surname.

[6] In our review of case documents and files associated with the case, we have not come across a transcript of DiPietro's grand jury testimony.

Post Indictment Events

On January 20, 2005, the DA linked Mark's death to gang activity by indicting Saleh and James Petrillo ("Petrillo") for threatening Saleh's girlfriend with Sopranos references. DA press release, January 21, 2005. Both were acquitted of witness tampering; Petrillo was convicted of a misdemeanor perjury count.

Anthony Beharry is Threatened by Law Enforcement

On February 1, 2005, Beharry contradicted his previous statements and told investigators that he had disposed of a gun for John shortly after Mark's murder. Beharry DD5s, March 28 and August 26, 2004. Before doing so, he was threatened with arrest and the loss of his daughter:

> On or about February 1, 2005, I denied disposing of a gun shortly after the murder of Mark Fisher. I was then threatened by police. They told me that both Lauren Calciano and Albert Cleary told them that I removed the murder weapon from John Giuca's house at his request. Exhibit J (Affidavit of Anthony Beharry, dated January 13, 2014) ¶5.
>
> I was threatened with arrest and told that if I wanted to see my daughter I must cooperate with them. At this time, my daughter was less than two years old and I was embroiled in a custody and visitation dispute in Family Court. *Id.* ¶6.
>
> After I was threatened with arrest, I was told that they would let me go home if I cooperated with them. *Id.* ¶7.

DA Hynes Is Endorsed by Susan Cleary's Executive Committee

In May 2005, just months after Cleary waived immunity before the grand jury and shortly before he testified at trial, DA Hynes sought and received the endorsement of the Kings County Republican Party Executive Committee for his re-election as District Attorney. Susan Cleary was a Vice-Chair of the Committee which offered DA Hynes the endorsement. Exhibit K (Kings County Republican Party County Committee Certificate of Election of Officers, filed October 1,

2003); Exhibit L (Certified Election Result for Kings County District Attorney General Election 2005, November 28, 2005).

John Avitto Becomes a Fugitive and Immerses Himself in the Case

Avitto was incarcerated with John in early 2005. He was 35 years of age when he testified, had been committing crimes since 1989 and had amassed approximately 17 criminal convictions, most of which were felonies and/or crimes of dishonesty connected to his drug abuse. He had frequently bench warranted, and violated his parole and probation. One of his convictions arose from a criminal personation arrest in which he had absconded from parole and lied about his identity when apprehended. Avitto Tr. 779.

At the time he claimed John had confided in him, Avitto was taking Seroquel, a medication generally prescribed for schizophrenia, hallucinations and depression (he claimed it was for insomnia), and Zoloft for depression. *Id.* 807. In short, he was a lifelong drug abuser and an unreliable career criminal that specialized in crimes of dishonesty.

On February 8, 2005, Avitto pleaded guilty to burglary with the understanding that if he completed an 18-24 month residential drug treatment program followed by an outpatient program, his indictment would be dismissed. Exhibit M (Transcript, *People v. John Avitto,* Ind. No. 6823/2004 ("Avitto Transcript"), February 8, 2005). If he failed to complete the program, including leaving the program or being kicked out of it, he would receive a sentence of 3 ½ to 7 years in prison. *Id.* In April 2005, Avitto was released into a program.

On June 5, 2005, Avitto absconded from the program. By doing so, he committed the felony of Absconding from a Community Treatment Facility. *See,* P.L. § 205.19 (Violation 1). He was never charged. On June 6, his counselor, Sean Ryan ("Ryan") notified the court of Avitto's

violation and a bench warrant was issued. Exhibit N (Avitto Transcript, June 6, 2005). Avitto was now a fugitive facing a mandatory prison sentence.

Despite purportedly knowing significant details about John's involvement in Mark's murder for four months, Avitto waited until a warrant for his arrest was issued before he contacted law enforcement. He then contacted the police because he thought if he "helped" law enforcement with the Fisher case they would help him avoid incarceration. Exhibit O (Affidavit of John Avitto, dated July 8, 2013) ¶8.

On June 13, 2005, Avitto met with ADA Nicolazzi and case detectives. *Id.* ¶12. During this meeting, and in subsequent meetings, Avitto told the DA that John had admitted to him his involvement in Mark's death. *Id.* Law enforcement in turn assured him that they would help him with his warrant and provide him with assistance in exchange for cooperating against John. *Id.* ¶¶9, 25(e).

Avitto told the DA that during a jail visit, he overheard John's father ask why he had a gun, to which John replied, "I just had it." Exhibit O ¶25(a). He also alleged that John admitted being present at the ATM with two others when Mark withdrew $20. He said that John was angry at the small withdrawal, pistol-whipped and then punched and kicked Mark. *Id.* ¶25(b). "Another guy" took the gun from him and shot and killed Mark in John's presence. *Id.* ¶25(b). The DA did not disclose the substance of Avitto's testimony until he testified at the end of the trial. Tr. 744-748.

Thus, in June 2005, the Avitto Theory—evidence which contradicted Calciano and Cleary's testimony and should have been disclosed to the defense under *Brady* and *Giglio*—was born. *See, People v. Waters*, 35 Misc.3d 855 (Bronx Cty. Sup. Ct. 2012) Although Avitto was interviewed at least four times, the DA claimed that no notes were taken during any of his interviews. Tr. 747, 815. Avitto, however, saw ADA Nicolazzi take notes. Exhibit O ¶26.

John Avitto's Consideration: Liberty in Exchange for Testimony

Immediately after Avitto's first debriefing session, ADA Nicolazzi escorted him to court in order to clear up his warrant. *Id.* ¶16. Although still a fugitive, Avitto was not handcuffed or restrained in any manner during his trip to court. *Id.* A senior homicide prosecutor handling one of the DA's highest-profile cases, ADA Nicolazzi appeared at an otherwise ordinary appearance for an ordinary defendant in an ordinary courtroom save the fact that the defendant was the DA's new secret witness in the Fisher case with serious legal problems of his own. Exhibit P (Avitto Transcript, June 13, 2005).

ADA Nicolazzi immediately asked to approach the bench for privacy, where she presumably advised the court of Avitto's newly-minted status. *See id.* Despite his criminal history and the existence of a plea agreement which mandated a lengthy prison sentence, he was released on his own recognizance without ADA Nicolazzi requesting bail. *Id.* The court warned him "If at any point I find that you are not cooperating [with the program], I have no choice but to put you back in jail." *Id.* He was ordered to re-appear in court on June 21. *Id.* However, Avitto made it less than one day without violating the conditions of his release.

Avitto's case was advanced to June 17 after Ryan notified the court that Avitto had violated the terms of his release by refusing a drug test on June 14 (Violation 2) and then testing positive for cocaine on June 15 after he finally took a test (Violation 3). Exhibit Q (Letter from Sean Ryan, June 16, 2005); Exhibit R (Avitto Transcript, June 16, 2005). Another warrant for Avitto's arrest was issued. On June 17, 2005, the court noted that Avitto had been given a "break" yet had used cocaine anyway. The court told him that if he continued to use cocaine he would go back to jail. Exhibit S (Avitto Transcript, June 17, 2005). The DA did not seek remand or bail. Avitto again was released on his own recognizance. *Id.*

On August 16, 2005, Avitto was declared "non-compliant" with his treatment (Violation 4). Exhibit T (Letter from Bridge Back to Life Center, August 16, 2005). Nevertheless, at an August 18, 2005 status conference, the DA did not request bail, none was set, and no warrant was ordered. Exhibit U (Avitto Court Action Sheet).

On August 24, 2005, Avitto again used cocaine (Violation 5). Exhibit V (Letter from Sean Ryan, September 19, 2005). On August 29, he was placed in a detox center, but he absconded a few days later (Violation 6). *Id.* Another warrant for his arrest was ordered. Exhibit U.

On September 6, in the now familiar refrain, Avitto appeared in court and was released on his own recognizance because "no one requested bail." *Id.*

On September 19, 2005, Avitto again appeared in court to answer his latest violations. This time Avitto had violated program rules by smuggling cigarettes into the program and distributing them to other patients (Violation 7). Exhibit V. Ryan reported that (1) Avitto absconded in June, (2) relapsed on cocaine on August 24, (3) left his program on September 2, and (4) smuggled and distributed the contraband on September 19. *Id.* Avitto was discharged from the program because of the smuggled contraband. Exhibit U. However, Avitto again was allowed to remain at liberty. *Id.*

A second, modified violation letter co-signed by a different supervisor surfaced on September 20, the day before Avitto was scheduled to testify. This letter sanitized the previous day's letter by deleting all references to Avitto's contraband violation. Exhibit W (Letter from Sean Ryan, September 20, 2005).

Thus, from June 13, when he first met the DA until September 22, when Avitto testified, the DA never sought bail despite his commission of at least seven program violations, which

included two drug relapses, three bench warrants, the commission of crimes and smuggling contraband into his program.[7] *See,* Exhibits M-W.

The Molineux Hearing

At a pre-trial hearing on June 26, 2005, the DA for the first time claimed that less than two weeks before Mark's murder, John and alleged GM "boss" Robert Legister ("Legister") decided that "all those in the gang" would be required to commit a homicide in order to improve the gang's street credibility. Hearing Transcript ("H") 12-13. Six months after Cleary had testified in the grand jury, the DA had unveiled the Second Cleary Theory. The court allowed this evidence as relevant to motive. *Id.* 19-21. However, at trial Cleary testified differently than how ADA Nicolazzi proffered his testimony and alleged that the edict applied only to proposed new members "before" they got into the gang. *See,* Cleary Tr. 263.

ADA Nicolazzi's inaccurate proffer resulted in the admission of prejudicial and inflammatory evidence which would have been excluded if she had proffered Cleary's actual trial testimony. Russo was a "full member" of GM in October 2003; indeed he was alleged to be John's obedient "soldier." Tr. 26. Because Russo was a full-fledged member of GM, Cleary's trial testimony that the edict required prospective members to commit a murder, had little, if any, relevance because it could not serve as a motive for John to order Russo to shoot Mark. What little relevance it had was substantially outweighed by the prejudice attached to Cleary's revised allegation.

ADA Nicolazzi represented to the court that the "full scope" of GM evidence she sought to admit was restricted to the membership and hierarchy of the GM members. H. 14-15. She said

[7] In 2006, no longer of any value to the DA, Avitto was sentenced to the mandated sentence of 3 ½ to 7 years.

that she would not introduce evidence of prior acts of violence committed by gang members. *Id.* 22.

The trial court credited ADA Nicolazzi's representations and allowed the admission of GM evidence for the narrow purpose of demonstrating the relationship between John, Russo and other "GM attendees" at John's house on October 12, 2003. *Id.* 20-21. The court restricted evidence to statements that John and Russo made and those about the hierarchy of GM members. *Id.* 21. The court explicitly forbade the DA from eliciting testimony about gang colors. *Id.* 23. The court prohibited the DA from presenting evidence of any prior bad acts committed by John or other alleged GM members. *Id.* 21.

At trial, ADA Nicolazzi disregarded the court's *Molineux* ruling and compared John to Tony Soprano, called him a "self-styled Mafioso," referred to alleged GM members as "bosses," "capos," and "soldiers," elicited testimony about gang colors, war beads, John's "Brooklyn" tattoo, music lyrics, books, hand signals, allegations of John's alleged earlier membership in the notorious Crip gang, violent gang initiations and a prior shooting by a GM member which resembled the allegations of the Second Cleary Theory. *See, e.g.*, Tr. 26, 35, 988-990, 1004; Cleary Tr. 259-260; Ware Tr. 668-673; Valentin Tr. 501-504; Denihan Tr. 150, 157.

Although the court had advised it would provide a limiting instruction about the relevance of GM evidence at the conclusion of the trial, it never did. H. 21.

THE TRIAL

The *People of the State of New York v. John Giuca and Antonio Russo* commenced on September 12, 2005, before the Honorable Alan J. Marrus. The cases were heard before two separate juries because of *Bruton* issues.

The DA's Opening: the First and Second Cleary Theories

ADA Nicolazzi opened exclusively on the First and Second Cleary Theories. She alleged that John ordered Russo to "show Mark what was up" because Mark had "the nerve" to disrespect his house by sitting on a table. Tr. 35-36.

She also portrayed Mark's shooting as a gangland execution ordered by John, the "Tony Soprano figure"[8] and "self-styled Mafioso" leader of GM with power and influence over his impressionable "soldier" Russo because GM "was getting soft" and "wasn't getting the respect they wanted to have." *Id.* 26, 36-37.

Inferring that John bore a guilty conscience, ADA Nicolazzi told the jury that John called Calciano "right after the murder" asking her to come over. Tr. 32. However, ADA Nicolazzi demonstrated full command of the phone record evidence throughout the trial and must have known that their last call on the morning of October 12, 2003, was at 6:22 a.m.—twenty minutes before Mark was shot. *Id.* 32; Phone Records. Calciano never testified that John called her "right after the murder."

ADA Nicolazzi expressed her own disbelief in the Calciano Theory as "John's little spin" and him "downplaying his role." Tr. 32. Conversely, she endorsed the Cleary Theories as "more of the full picture, the full story."[9] *Id.* 33. She did not address Avitto in her opening; but a few weeks later she implored the jury to adopt the Avitto Theory, because it "makes much more sense." Tr. 1017.

[8] In September 2005, the Sopranos was in the prime of its HBO run. Anyone with access to cable television knew that Tony Soprano was the boss of an organized crime family who regularly ordered executions.
[9] The DA's Russo opening did not allege that Russo shot Mark in furtherance of the Cleary Theory. *See,* Tr. 54-74.

The DA's Case against John Giuca

At trial, despite a witness list containing 47 names, only Cleary, Calciano, Avitto and Beharry offered substantive testimony against John. Exhibit X (Witness List, *People v. John Giuca*).[10]

Albert Cleary

Cleary contradicted his grand jury testimony and testified that John (not Saleh) first complained about Mark sitting on a table. Cleary Tr. 253; *cf.* Cleary GJ 13; *see also,* Exhibit A ¶4.

John attempted to provide Mark with directions after Mark mentioned he wanted to go to an ATM. Cleary Tr. 254. John "asked" Russo to go with him to the ATM. *Id.* 280. John did not accompany Mark and Russo to the ATM. *Id.* 255; *cf.* Avitto Tr. 774-775. Cleary said that he told Denihan that he and DiPietro were going home; Denihan claimed they snuck out. Cleary Tr. 255; *cf.* Denihan Tr. 192.

Cleary testified that he and DiPietro arrived at his home around 5:30 a.m. Cleary Tr. 271. But DiPietro claimed they got to his house at approximately 6:00 a.m. or 6:10 a.m. DiPietro Tr. 216; DiPietro DD5, November 26, 2003. His mother had publicly claimed that he got home at 4:30 a.m. *New York Times,* February 22, 2004. Cleary did not recall a 64 second phone call that he received from John at 5:57 a.m., although he had a detailed recollection of an alleged series of calls from John the following morning and afternoon. Cleary Tr. 299-300; 314-319; Phone Records.

[10] Despite investigating and prosecuting the case for almost two years, the DA's witness list misspelled the names of both John and DiPietro.

Cleary awoke at 11:00 a.m. on October 12. Cleary Tr. 256. When he woke up his mother told him, alone, that there had been a shooting nearby. *Id.* 290. Yet DiPietro claimed that Susan Cleary told both of them that a dead body had been dumped across the street. DiPietro Tr. 229.

Contradicting his two prior sworn statements, Cleary testified that John called him that morning and suggested "their" potential involvement in the shooting. Cleary Tr. 314, 316; *cf.* Cleary GJ 15 (Cleary first spoke to John "around 1:00 p.m.") Cleary Sworn Statement to DA, December 15, 2004, p. 4 (Cleary corrected ADA Nicolazzi's mistaken belief that that the first call occurred in the morning and said it was in the afternoon). The first call between John and Cleary was at 12:56 p.m. Phone Records.

Cleary said later that evening, after he returned from DiPietro's home, he "snuck out" of his home, where he had been watching movies with DiPietro and Fraszka, and went to John's home, where he, John and Calciano talked. Cleary Tr. 319. According to Cleary, John admitted that he ordered Russo to harm Mark. *Id.* 321. He had previously sworn that Calciano was present when John made this admission. Cleary GJ 25.

According to Cleary, John was upset that Mark had disrespected his house and he gave Russo a gun and "basically" told Russo to "show him what's up." *Id.* 321. John hoped Mark was alive so he could identify Russo as the shooter. *Id.* 320, 324. John described how Russo laid in wait and attacked Mark when he went outside past Turner Place. *Id.* 322. Cleary also claimed that Calciano removed a gun bag. *Id.* 331.

The next day, Cleary said he asked John "if the house was clean," and John told him that Beharry had gotten rid of **"the guns**."[11] *Id.* 464. He had claimed that he saw John with a .22 and

[11] The DA had to recall Cleary to testify about Beharry's disposal of the guns because the DA "forgot" to ask him during his initial appearance as a witness. Cleary Tr. 463. Yet Cleary had methodically answered the question in the same part of his narrative before the grand jury and in a sworn statement to the DA. *See,* Cleary GJ 21; Cleary Sworn Statement, December 15, 2004, p. 13.

.380 shortly before the murder. Cleary Tr. 266-267. Beharry later testified that he disposed of **"a gun."** Beharry Tr. 650. (Emphasis added).

Cleary gave contrived answers about John and Russo's relationship: John was "the boss" and Russo did whatever he said. Cleary Tr. 257. He dutifully reported that Russo always wanted to impress John and would do anything to impress him. *Id.* 258.

He described GM as in the "Crip set." *Id.* 259. Legister was the "boss" of GM; John, Saleh and Ware were "capos." *Id.* He described orange as the gang's color, which they wore on flags and beads. *Id.* 260. Although he had never witnessed a GM initiation, he claimed to have witnessed a Crip initiation years before. *Id.* He described it as the inductee being forced to stand inside a square in order to fight four people at the same time. *Id.* The location of the Crip initiation was at Turner Place and Coney Island Avenue (very close to John and Russo's homes). *Id.* Cleary never testified that John was a part of the Crip initiation. This evidence was irrelevant and prejudicial.

Cleary alleged that a week or two before October 12, John told him that GM was "getting soft" and that he and Legister decided that new members should "get a body" before gaining admission to the gang. *Id.* 263. He "did not believe" that Russo was present when John told him about the new GM edict. *Id.* 276.

At the time Cleary alleged that Legister was a powerful gang boss who callously plotted the murder of innocent people in order to increase the profile of his gang, Legister was a college student in North Carolina with a double major in accounting and economics. Exhibit Y (Affidavit of Robert Legister, dated January 20, 2014) ¶4. Law enforcement knew that Legister had been out of Brooklyn for a few years attending school. McCafferty Tr. 866. Legister did not discuss "getting a body with John" and he was not the "boss" of GM. *Id.* ¶¶7-8.

Cleary attributed his year-long campaign of lies which preceded his cooperation to John's request that he cover for him. Cleary Tr. 327; 330-331. He blamed his stonewalling of the police on John's directive to ask for his attorney, yet it was he who advised John to seek counsel from his own attorney. *Id.* 318-319, 328. He also "came up with the idea on his own" to commission a polygraph examination (which directly contradicted his sworn testimony) in the hope that law enforcement "would leave him alone." *See,* Exhibit F; Cleary Tr. 329; 338.

Lauren Calciano

Calciano testified[12] that she went to John's house sometime after noon on October 12 but before it was dark. Calciano Tr. 580. John told her and Cleary that Russo thought "Albert's friend" was cocky and that Russo wanted to rob him. *Id.* 580-581. She testified that Russo asked John for a gun and John gave him one. *Id.* 581-582. She said John gave Mark a blanket (which made no sense if he knew of Russo's evil intent) and Mark then left with Russo. Calciano Tr. 582.

Calciano contradicted virtually everything Cleary said. She was adamant that they met during daylight hours,[13] before she went about her day's plans, while Cleary did not even leave for DiPietro's Long Island home until sometime between 2:00 p.m. and 3:15 p.m., where he claimed that he (1) watched a football game, (2) ate dinner with DiPietro's family, (3) drove to the Bronx to pick up Fraszka, (4) drove to Brooklyn from the Bronx, (5) stopped for pizza or sandwiches and (6) watched movies before going to John's home. Calciano Tr. 583, 605-606; *cf.* Cleary Tr. 318-319; Cleary DD5, November 16, 2003; DiPietro DD5, November 26, 2003.

[12] The DA committed a serious *Rosario* violation when it failed to provide the defense with Calciano's grand jury testimony until after her redirect examination. The DA also failed to disclose Denihan's prior sworn statement in a timely fashion, Tr. 174, and it did not provide the defense with interview notes from Russo's interrogation because the detective claimed that he had lost them. McMahon Tr. 440.

[13] On October 12, 2003, sundown in Brooklyn was at 6:21 p.m. Timeanddate.com

Cleary wondered whether Mark was dead or alive and was "a nervous wreck." *Id.* 582-583, 606; *cf.* Cleary Tr. 320. Calciano denied that John had: (1) claimed Russo disrespected his house, (2) told Russo to "show him what's up," and (3) described how Russo laid in wait and attacked and killed Mark. *Id.* 607-609; *cf.* Cleary Tr. 322. She denied Cleary's claim that she removed evidence. *Id.* 628; *cf.* Cleary Tr. 331.

Calciano allowed that Russo, a few years younger than John, "looked up" to him, but he was not subservient or deferential to John. Calciano Tr. 577; Exhibit G ¶24.

Calciano described GM as simply "what the guys called each other." Calciano Tr. 570. It was not an "organized" gang and she never heard John or his friends refer to each other as "capos" or "soldiers" or plot violent acts on behalf of the gang or in furtherance of gaining street credibility. Exhibit G ¶23.

Anthony Beharry

Beharry testified after being orally promised immunity for gun possession, tampering with evidence and hindering prosecution, outside the courtroom immediately before he testified. Tr. 640. He refused to testify until he also was threatened with perjury. Exhibit J ¶12.

ADA Nicolazzi told the jury that his immunity was prefaced on "honest" and "truthful testimony," (which she had defined outside the presence of the jury as "consistent with his prior sworn statements)." Tr. 653; *see id.*, 640. This practice has been condemned as improper vouching. *See, U.S. v. Roberts*, 618 F.2d 530 (9th Cir. 1980); *U.S. v. Arroyo-Angulo*, 580 F.2d 1137 (2nd Cir. 1978) (concurring opinion of J. Friendly).

ADA Nicolazzi threatened Beharry with prosecution while promising him immunity in exchange for testimony which she alone deemed credible. However, the threatened charges were not supported by probable cause or admissible evidence—the only "evidence" of Beharry's alleged

crimes were hearsay statements from Cleary. *See,* Cleary Tr. 464. *See also,* Rule 3.8 of the Rules of Professional Conduct, Special Responsibilities of Prosecutors.

Beharry testified that he disposed of one "black gun" which was "not a revolver" at John's request a day or two after the murder. Beharry Tr. 649. Beharry's testimony was inconsistent with his prior "cooperative" DD5. *See,* Tr. 648-651 *cf.* Beharry DD5, February 1, 2005.

John Avitto

Avitto testified that he overheard a conversation at Riker's Island between John and his father. *Id.* 772. He heard "almost everything his father said." *Id.* He noted the presence of two women whom he believed were John's aunt and cousin. *Id.* 772. Avitto testified that John's father asked John why he had the gun with him and John replied, "I just had it." Avitto Tr. 773; Exhibit O ¶25(a).

This testimony was impossible. John Giuca, Sr., had suffered debilitating strokes which deprived him of his ability to speak years before he visited John at Riker's Island. Exhibit Z (Medical Records of John Giuca, Sr.); Exhibit AA (Affidavit of Mary DiMatteo, dated July 8, 2013) ¶¶5-9; Exhibit BB (Affidavit of Kelly Hajaistron Raucci, dated July 3, 2013) ¶¶5-8.

According to Avitto, John told him that he, two others and Mark left the party because they were out of alcohol and Mark offered to go to the ATM. Avitto Tr. 774. John became enraged after Mark withdrew only $20, pulled out a gun, pistol-whipped, punched and kicked Mark. Avitto Tr. 774-775. Mark was robbed and then one of the "other guys" took the gun from John and shot Mark. *Id.*

Avitto said that he was doing "good" and "things were going well" in his program since he had been released in April 2005, despite the fact that he had relapsed twice and committed at least seven violations during the brief period of time he was cooperating with the DA. *Id.* 784, 797;

See, Exhibits M-W. He claimed that he did not seek or receive consideration from the DA in exchange for his testimony. Avitto Tr. 785-786. His legal predicament "had nothing to do with" why he approached the DA in June 2005. *Id.* 806.

Additional GM Evidence

The DA called Ware and Crystal Valentin ("Valentin") as witnesses against John in order to smear John as the leader of a violent gang. Ware contradicted Cleary's claim that Legister was the "boss" of GM, but testified that he, John and Russo were previously Crips. Ware Tr. 671-672. He noted that GM's color was orange and that John called "most" of the meetings. *Id.* 673.

Under the crafty guise of establishing Ware's "background," ADA Nicolazzi swept aside the *Molineux* ruling which prohibited the introduction of prior acts of violence by GM members and elicited from him that he was a GM member serving a seven year sentence for a 2002 attempted murder conviction in which he had laid in wait outside of Russo's building before he shot a man in the back after a dispute which had arisen at a house party held by Beharry. Ware Tr. 668-670. Thus, she successfully introduced evidence that John and Ware were both "capos" in GM and demonstrated similarities between Ware's crime and the Second Cleary Theory in order to influence the jury that John was the leader of a violent gang.

Valentin testified that Russo was a member of "Outlaw Mafia Crip," whose colors were blue and grey. Valentin Tr. 501-502. She claimed gang members wore "war beads" when "they were about to fight somebody." *Id.* 503. Other than Russo, she did not recall who else wore gang colors. *Id.* 504. She said John, Russo and other GM members used gang "handshakes and hand signals." Tr. 504. Valentin's testimony about "war beads" and gang signals left the jury with the impression that John and Russo were gang members who frequently planned and engaged in acts of violence.

Denihan described one of the men at John's house as "the man in the orange shirt." Denihan Tr. 150. ADA Nicolazzi elicited from her the irrelevant fact that John showed her his "Brooklyn" tattoo, and then later argued this constituted evidence of John "playing his gangster stuff." Denihan Tr. 157; Tr. 1004.

The DA's deliberate and frequent violation of the court's *Molineux* ruling, which forbade the admission of evidence of the Crips, gang colors, gang beads, hand signals, tattoos and prior acts of violence by other GM members, was misconduct. *See, People v. Cavallerio,* 71 A.D.2d 338 (1st Dept. 1979). This prejudicial "guilt by association" evidence had no business being before the jury.

The Defense Case and Summation

The defense did not call any witnesses. The defense summation touched on some of the inconsistencies among the witnesses and argued that Avitto was called as a last minute, desperation witness, to salvage a flagging case. *See,* Tr. 940-978.

The DA's Summation: Pretzel Logic

ADA Nicolazzi argued that the Calciano Theory was conclusive proof of John's guilt: "you don't need anything more." *Id.* 982. She cited Cleary's uncorroborated and contradicted testimony as proof that John ordered his "soldier" Russo to shoot Mark in furtherance of GM's street credibility or because Mark had sat on a table. *Id.* 988-990, 995, 1004 1024.

She ignored the obvious and incompatible discrepancies between Calciano and Cleary as simple as two people saying the same thing "just in different ways." Tr. 1001. She declared both "truthful" despite the stark differences in their testimony and irrefutable proof that at least one of them had committed perjury on the issue of whether Calciano removed evidence. Tr. 1004; *see* Cleary Tr. 331; *cf.* Calciano Tr. 589.

Despite offering evidence that Beharry disposed of only one of two guns which Cleary said John gave him after the murder, ADA Nicolazzi testified as an unsworn witness that she "knew" and the jury "knew" that the gun Beharry disposed of was the murder weapon. Tr. 989, 1004, 1005; 1021-1022.

Although she referred to the Cleary Theories as "the full story" and ignored Avitto altogether in her opening, ADA Nicolazzi now urged the jury to adopt the Avitto Theory because it "didn't even make sense that Russo could have done all this alone." Tr. 33, 1017. It made "much more sense, common sense that [Russo] had help." Tr. 1017.

She unveiled the Nicolazzi Theory and mused about the possibility that John shot Mark himself: "it's even possible that [John] fired some of those shots himself." *Id.* 1017; *see also,* 1017-1019. She argued that Schoenfeld, who heard nothing more than a gap between gunshots, and phone calls between John and his brother "proved" that John was out of the house. Tr. 1017. Ultimately, ADA Nicolazzi conceded "we don't know" if John shot Mark. Tr. 1019.

In the span of two weeks, ADA Nicolazzi argued the following:

<u>Opening</u>

(1) The Calciano Theory was John's "spin" and him "downplaying his role." Tr. 32.

(2) The First and Second Cleary Theories were "the full story." Tr. 33, 35-37.

(3) She ignored the Avitto Theory altogether.

<u>Summation</u>

(4) She argued that the Calciano Theory "alone" proved John's guilt, yet moments later dismissed it because "it didn't even make sense that Russo could have done this alone." Tr. 982; *cf.* 1017.

(5) She argued that each of the Cleary Theories "alone" proved John's guilt, yet moments later dismissed them because "it didn't even make sense that Russo could have done this alone." Tr. 998; *cf.* 1017.

(6) She argued that "through Beharry you have enough evidence for [John's] guilt," even though she only offered proof that Beharry disposed of "a gun." Tr. 1006.

(7) The Avitto Theory "made the most sense." Tr. 1017.

(8) She created the Nicolazzi Theory out of whole cloth, yet acknowledged moments later "we don't know" if it was a valid theory. Tr. 1017-1019.

In order to navigate through these incompatible arguments, the prosecutor vouched for the truthfulness of each inconsistent witness. *See.* Tr. 1004, 1008-1017. ADA Nicolazzi placed all of her credibility, as well as the integrity of the DA's case squarely at issue when she went "all in" and repeatedly personally vouched for Avitto's "truthfulness" and "honesty." *See*, Tr. 1008-1017. She defended his motive in coming forward as simply "doing the right thing." Tr. 1022-1023. She unequivocally stated that there was "no evidence that he was trying to help himself and get a deal" by coming forward, and that Avitto had acted responsibly in his rehab. *Id.* 1020-1021.

John was convicted of felony murder and related charges in less than two hours.

Sentencing

John has always maintained his innocence. Before John was sentenced, he said:

> I have been painted as an evil guy. Took part in this terrible crime. Who doesn't care. But none of that stuff is true. My heart goes out to the Fisher family. I can't imagine the pain they feel. I didn't know anyone who was going to hurt your son, and I didn't approve of it after. Sentencing Tr. 28.

Judge Marrus praised the police work and described the performance of the DA as "extraordinary." *Id.* 29. He commended the "vigorous and aggressive" defense. *Id.* He then sentenced John to a prison term of 25 years to life. *Id.*

John's direct appeal was denied. *See, People v. Giuca,* 58 A.D.3d 750 (2nd Dept. 2009), *lv. denied,* 12 N.Y.3d 91 (2009).

The Aftermath of the Trial

The DA received many accolades for its successful conviction. In 2005, ADA Nicolazzi was awarded the prestigious Thomas E. Dewey Medal by the New York City Bar Association in large part for her successful prosecution of John. In the fiscal year which followed John's conviction, DA Hynes rewarded ADA Nicolazzi and ADA McNeill with the two largest DA salary increases (over $43,000 and $39,000, respectively) in his office. Former ADA Hanshaft received a substantial raise of more than $28,000.

The DA has frequently used John's conviction in order to promote itself in print and television. Former ADA Hanshaft and ADA McNeill were favorably portrayed as dogged *Law and Order* type investigators in Robert Mladinich and Michael Benson's *Hooked Up for Murder,* Pinnacle Books (2007). Former ADA Vecchione was personally thanked by the authors for his "invaluable logistical support." *Id.* In 2010, ADA Nicolazzi was prominently featured in Paula Zahn's "On the Case," *A Lamb Amongst Wolves*. In 2012, she, ADA McNeill and former ADA Hanshaft were featured in another television show about the case, "Fatal Encounters," *A Killer Night in Brooklyn*.

The Fisher family, however, has never been satisfied with the DA's prosecution of Mark's murder. Immediately after John's sentencing, Mark's father re-affirmed the family's long held belief that Cleary and DiPietro were involved. Speaking directly to them, as he did in February

2004, he said "I think there's still a girl and guy involved in this killing. Until they're brought to justice, our family's not going to have any closure." *New York Times,* "Two Receive 25 to Life for Student's Murder in 2003," October 20, 2005.

On October 5, 2006, the Fishers sued DiPietro and Cleary. Exhibit CC (Complaint, *Fisher v. DiPietro*). In support of their claim, they sought documents from the DA, including Hiroko Swornik's DD5 about the "young woman" near her driveway when Mark was shot. The DA refused to provide the Fishers with any documents and even ignored a subpoena from the Fishers. *New York Post,* "Slain Grid Kid's Kin Suing to Bare…Conspiracy of Silence," October 15, 2006. The lawsuits were eventually dismissed. *See, Fisher v. DiPietro,* 54 A.D.3d 982 (2nd Dept. 2008); *Fisher v. Cleary,* 69 A.D.3d 671 (2nd Dept. 2010).

In late 2007, John's mother, Doreen Giuliano ("Doreen") surreptitiously recorded conversations with Jason Allo ("Allo"), a juror on John's case. Allo revealed that prior to serving on the jury he had personal knowledge about GM and violent acts allegedly committed by some of its members. December 2007 Transcript[14] ("Dec. Tr.") 14-16; Exhibit DD (Affidavit of John O'Hara, dated May 22, 2008) ¶27. Allo incorrectly believed John was Jewish and revealed his anti-Semitic animus. Nov. Tr. 71, 88; Exhibit DD ¶32. He admitted reading tabloid accounts of the case. Exhibit DD ¶29. Doreen's efforts served as the basis for a 440.10 motion, appeal and a federal habeas corpus petition, all of which were denied relief. *See, People v. Giuca,* 78 A.D.3d 729 (2nd Dept. 2010); *Giuca v. Lee,* 2013WL2021336 (E.D.N.Y. May 14, 2013).

DiPietro was hired by DA Hynes as an assistant district attorney in 2012. She remains in that office today. That same year, her father made a $3,000 campaign donation to DA Hynes. Exhibit EE (Financial Disclosure Report for Friends of Charles J. Hynes, July 2012).

[14] The transcripts of Allo's recordings are available on PACER under *Giuca v. Lee,* 1:12-cv-02059 (FB). Copies of the actual recordings will be provided to the DA upon request.

As of February 2014, John has been incarcerated for more than nine years.

ARGUMENT

Point I: The Testimony of Each of the Four Substantive Witnesses against John Giuca has been Thoroughly Discredited, Including Recantations by Lauren Calciano, Anthony Beharry and John Avitto.

"Few rules are more central to an accurate determination of innocence or guilt than the requirement that one should not be convicted on false testimony." *Sanders v. Sullivan*, 900 F.2d 601, 607 (2nd Cir. 1990).

Calciano, Beharry and Avitto all have provided sworn recantations of their trial testimony. Cleary's testimony was perjured, uncorroborated, contradicted by other witnesses, inconsistent with his own prior sworn and unsworn statements, and the results of the polygraph examination he voluntarily undertook.

Lauren Calciano

At the time Calciano testified at trial, she was 22 years old. Calciano Tr. 568. She is now 30 years old, happily married with a young daughter and maintains a successful career. Exhibit G ¶2. Calciano has regretted her testimony and thought about it regularly for years. *Id.* ¶11. She has now recanted her testimony:

> My testimony at trial was that John stated in the presence of Albert Cleary and myself that [Russo] asked him for a gun and that he, John, gave [Russo] a gun after [Russo] told John he wanted to rob Albert's friend, meaning, Mark Fisher. In fact, John never stated that in my presence. I have regretted this testimony since I was first pressured to claim this by law enforcement, including NYPD officers and ADA Nicolazzi. Exhibit G ¶10.
>
> In fact, I was present at John's house with Albert Cleary the day after Mark Fisher was killed. Although there was general discussion about Mark Fisher and Tony Russo's likely involvement, John did not say Tony asked him for a gun and he gave it to him, or that he

> gave Antonio Russo a gun before the shooting. During this meeting, John was very calm. Albert Cleary, however, was nervous, pacing and worried about whether Mark Fisher was alive. *Id.* ¶18.

In 2012, John wrote a letter to Calciano's father, in which he pleaded with him to encourage his daughter to tell the truth. *Id.* Because she had moved on from this difficult period of her life, Mr. Calciano withheld the letter from his daughter for several months before he finally showed it to her. Exhibit G ¶12. The letter had a profound effect on her. She discussed the truth with her husband and courageously sought us out in order to set the record straight. *Id.* ¶13. She then relayed the falsity of her trial testimony and the pressure applied to her in order to secure it. *See id.* ¶17(a)-(j).

Calciano's recantation has all of the indicia of reliability. *See, People v. Jenkins,* 84 A.D.3d 1403 (2nd Dept. 2011). Evidence of law enforcement's undue pressure on her seeped out at trial. *See*, Calciano Tr. 594, 596-602, 604; Beharry Tr. 661 (Calciano told Beharry that if she did not "do what the DA wanted her to do, she would never be a US Marshal").

Her decision to come forward to right a wrong was proactive, sincere and without ulterior motive. She was represented by counsel before executing her sworn recantation and was aware of the consequences of her actions. Exhibit G ¶1. She approached us on her own initiative. *Id.* ¶¶11-13. She has struggled with the guilt of her false testimony for years. *Id.* ¶11. She no longer has a relationship with John or his family and has not seen or spoken to John in almost ten years. *Id.* ¶4. She has no desire to see him or re-establish a relationship with him or his family. Given the high-profile nature of this case, she assuredly is aware of the possibility of unwanted public attention she may draw to herself by coming forward in the manner she did.

Calciano's trial testimony was singular and uncorroborated. The sole reason she testified in the manner she did was because of the pressure applied to her by law enforcement. Exhibit G

¶16. Conversely, her reasons for recanting are based on morality and "doing the right thing." *Id.* ¶¶11-13.

Calciano's recantation has destroyed the reliability of her trial testimony and has provided further evidence of Cleary's lack of credibility. *See*, Exhibit G ¶¶19-22. The DA argued that Calciano's trial testimony "alone" was proof of John's guilt; now Calciano's sworn recantation "alone" has compromised the integrity of the verdict. *See.* Tr. 982, 1004-1005.

Anthony Beharry

Like Calciano, Beharry contradicted previous denials and relented to pressure from law enforcement after he was threatened with arrest and the loss of his young daughter. Exhibit J ¶¶5-9. His sworn recantation is corroborated by evidence of the use of similar tactics by law enforcement against Calciano. *See*, Exhibit G ¶¶14-17. He has now recanted his testimony:

> As the result of the pressure, I finally said that I had disposed of a gun for John shortly after Mark Fisher's murder. This was false. They showed me John Giuca's phone records and asked me about a few phone calls between us. I lied to them about the calls and worked the calls into my false story about disposing of the gun a day or two after the murder. Exhibit J ¶9.
>
> In fact, I did not see John Giuca for approximately a week after the murder. *Id.* ¶11.
>
> I lied when I testified that I disposed of a gun after Mark Fisher's death and in describing how I disposed of the gun. I did this because of the threats made against me by the police and DA that I would be arrested and I was afraid that I would not be able to see my daughter anymore and would suffer other harm as well, such as losing my job. The truth is, as I told the police earlier, I had disposed of a gun for John Giuca months before Mark Fisher was killed. *Id.* ¶13.

Under heavy pressure, Beharry distorted facts from a previous incident and conformed them to fit the DA's theory. Beharry Tr. 649, 653; Exhibit J ¶¶8-9. Almost immediately, he notified John's counsel, Samuel Gregory ("Mr. Gregory") that he had been pressured into lying by

the police. Exhibit J ¶10. Months later, he refused to testify until he was again threatened with charges related to disposing of a gun, as well as perjury with respect to a prior sworn statement that he made. He testified only after he was granted immunity. *Id.* ¶12.

The DA knew that threatening Beharry bought flimsy testimony. Notably, ADA Nicolazzi never asked Beharry the caliber of the gun which he purportedly had disposed for John. She knew that Cleary testified that John had given Beharry "the guns," which included a .380 (which could not have been the murder weapon). *See,* Cleary Tr. 464.

ADA Nicolazzi never reconciled why Beharry only got rid of one gun if John had given him two. She conceded "having guns does not implicate [John] for Mark's murder," yet then testified as an unsworn witness that Beharry got rid of the gun "which I know is the murder weapon in this case." Tr. 994, 1021-1022; *cf.* Cleary Tr. 464.

John Avitto

That the DA called Avitto as a witness was surprising. That ADA Nicolazzi vouched for the truthfulness of his testimony was stunning.

Avitto has recanted the entirety of his substantive testimony, acknowledged that he sought and received consideration from the DA, and that his motive for testifying was to avoid prison. Exhibit O ¶¶8-10.

> During this first meeting with the DA, while still a fugitive, I claimed that while I was incarcerated with Giuca, he confessed to me his role in the Fisher murder. I claimed that Giuca told me that he and two others went to an ATM machine with Mark Fisher and that after Mark withdrew $20, Giuca pulled out a gun and beat Fisher. I further claimed that another individual then took the gun from the Giuca and shot and killed Mark Fisher. ADA Nicolazzi took notes during this interview. I lied to the DA about Giuca's purported admissions to me about his involvement in Mark Fisher's murder. My hope was that the DA believed I was useful to them and that in return the DA would help me with my case. Exhibit O ¶12.

> My false version of events was created largely from my recollection of newspaper accounts that I had read. From 2003 to 2005, the Mark Fisher murder case was frequently written about in all of the New York City newspapers. *Id.* ¶14.
>
> …During one of the subsequent meetings with the DA, I falsely claimed that I overheard Giuca and his father have a discussion about why Giuca had a gun. I told the DA that this occurred during a visit at Riker's Island, when both of us were in the visitation rooms together with our families. I made up the story about the gun because I had in fact been present in a Riker's visiting room with Giuca and I knew that if the DA secured those records, the records would confirm the visits, and it would make me appear more credible. I never claimed to overhear anything during a jail visit during the first meeting with the DA. *Id.* ¶15.

The detailed Riker's Island conversation which ADA Nicolazzi assured the jury "Avitto wasn't making up," was, in fact, impossible. John's father, John Giuca Sr., had been unable to speak since suffering a series of debilitating strokes years before he visited his son at Riker's Island in February 2005. Tr. 1008-1009; *cf.* Exhibits Z; AA ¶¶5-9; BB ¶¶5-8.

Avitto's testimony that John admitted going to the ATM with Mark, pistol-whipped and then beat him before Russo shot him, was contradicted by every DA witness at the party, each of whom provided John with an airtight alibi. Avitto Tr. 774-775; *cf.* Cleary Tr. 254-255; Denihan Tr. 152-153. Denihan even testified about a specific conversation she had with John while Mark and Russo were at the ATM. Denihan Tr. 152-153.

Basic logic compelled the conclusion that either Avitto or Cleary and Denihan perjured himself and/or herself about Mark's trip to the ATM. It was either an event which resulted in a robbery, beating and murder (Avitto) or it was a brief and uneventful trip (Denihan and Cleary). Avitto Tr. 774-775; *cf.* Cleary Tr. 254-255; Denihan Tr. 152-153. Yet ADA Nicolazzi illogically claimed that (1) Avitto was "truthful," (2) Denihan "corroborated everything," and (3) Denihan's

conversation with John while Mark and Russo were at the ATM was "crucial" proof of John's guilt and corroborative of Calciano and Cleary. Tr. 1017; *cf.* Tr. 1002-1003.

If John had accompanied Mark, Russo and two others to the ATM, where Mark made a withdrawal at 5:23 a.m. at Coney Island Avenue and Beverley Road, and Mark indisputably was shot blocks away across the street from Cleary's home at 6:40 a.m., where were John, Mark, and the "mystery men" for the hour and seventeen minutes when other DA witnesses said Mark, John and Russo were at John's home? *See*, Gaynor Tr. 373; Schoenfeld Tr. 128-129.

The DA's claim that telephone calls made by Russo to Giuliano proved the truthfulness of John's admission to Avitto that he was present at the ATM does not make sense because the calls occurred more than an hour after Avitto placed John and Mark at an ATM, where John allegedly pistol-whipped Mark after he only withdrew $20. *See*, Tr. 1017-1020; *see also,* Avitto Tr. 774-775.

Finally, the DA ignored the absurdity of the proposition that John gave Mark a distinctive blanket from his home minutes before he participated in his murder. *See*, Avitto Tr. 774-775; Keating DD5, October 24, 2003.

Avitto's sworn recantation is inherently believable because his substantive testimony strained credulity, was contrary to all of the other DA evidence, was contradicted by medical evidence and witnesses present at the Riker's Island visit. His testimony obviously derived from newspaper accounts. *See, e.g., Daily News,* "Dropout Killed to Get $20, Cops Say Teen Caught and Charged After Pals Finally Blab in a Year-Old Murder Mystery," November 24, 2004 (DA Hynes announced that Russo went to the ATM and shot Mark after Mark had withdrawn $20 and that John and "possibly others" witnessed the killing).

His four month delay in reporting what he "knew," conveniently was timed to his desperate attempt to avoid prison after becoming a fugitive. Furthermore, his ability to avoid jail while he served as a DA witness, which included ADA Nicolazzi's pro-active role in securing his release at his first court appearance after becoming a cooperating witness, support the reliability of Avitto's recantation. His demeanor at trial was that of an arrogant criminal enjoying his turn on the witness stand; today he is remorseful for the harm he caused. Exhibit O ¶¶2-3.

The DA's Use of John Avitto's Perjured Testimony Violated Due Process

A prosecutor's deliberate use of perjured testimony violates due process. *Mooney v. Holohan,* 294 U.S. 103 (1935). Failure to correct perjured or misleading testimony violates due process. *Alcorta v. Texas,* 33 U.S. 28; *People v. Colon,* 13 N.Y.3d 343 (2009). If the DA should have known that a witness perjured himself, due process requires reversal. *People v. Stern,* 226 A.D.2d 238 (1st Dept. 2006); *People v. De La Cruz,* 11 Misc.3d 1069(A) (Bronx Cty. Sup. Ct. 2006).

When a witness testifies falsely without the knowledge of the DA, due process is violated if the perjured testimony was material and without it the defendant likely would not have been convicted. *Ortega v. Duncan,* 333 F.3d 102 (2nd Cir. 2003); *Sanders v. Sullivan*, 863 F.2d 218 (2nd Cir. 1988). For the reasons noted above, the DA must have known, or should have known, that at the time he testified, Avitto lied. Even if the DA did not know that Avitto perjured himself at the time he testified, John's conviction violated due process because Avitto's perjury likely played a substantial part in the guilty verdict.

ADA Nicolazzi's exploitation of Avitto's perjured testimony shattered the integrity of the verdict because she cited him as the most important witness against John. She even urged the jury to adopt the Avitto Theory as the one which made the most common sense, and argued that it did

not even make sense that Russo could have acted alone. Tr. 1017. Significantly, she implored the jury to rely on Avitto rather than Calciano or Cleary, when she expressed her personal belief that John's "admission" to Avitto was the actual truth, as opposed to what John "admitted" to Calciano and Cleary. Tr. 1017; 1007-1012, 1015-1019; *cf.* Tr. 982, 988.

Thus, whether the DA suborned perjury, should have known that Avitto perjured himself, or somehow was fooled by Avitto's false evidence, the incontrovertible facts are that: (1) ADA Nicolazzi presented Avitto's perjured testimony, (2) ADA Nicolazzi personally vouched for the truthfulness of Avitto's perjured testimony, and (3) ADA Nicolazzi emphasized that Avitto's perjured testimony was the most important evidence in the case because it was the "true version" of John's role in Mark's death. By doing so, ADA Nicolazzi undermined her own credibility, undermined the credibility of the DA and corrupted the integrity of the DA's case against John.

Albert Cleary

A thorough review of the evidence reveals that Cleary was devoid of credibility. His testimony alone cannot save the flawed verdict.

Albert Cleary and Angel DiPietro's Interactions on October 12

Cleary perjured himself and/or provided testimony which was directly inconsistent to DiPietro's testimony in connection with their post-murder interactions on October 12, 2003. He claimed she was not present when his mother notified him of a shooting on the morning of October 12, but according to DiPietro, she was present. *See*, Cleary Tr. 256 *cf.* DiPietro Tr. 229.

Cleary testified that John first called him on the morning of October 12. Cleary Tr. 314. By doing so, he directly contradicted two prior sworn statements. *See*, Cleary GJ 15 (John called me "around 1:00 p.m."); Cleary Sworn Statement to DA p. 4 (Phone call was in the afternoon);

see also, Cleary DD5, October 14, 2003 (John called at 2:00 p.m.); *cf.* Phone Records (First call from John was at 12:56 p.m.).

His testimony that he spoke to John in the morning synchronized his to DiPietro's impossible testimony that John called him when she woke up at 11:00 a.m. *See,* DiPietro Tr. 219. By advancing the time of his phone conversations with John to the morning—before Mark's friends began demanding answers from DiPietro—he helped her use John as an alternative source of information to Denihan for her false statements to Mark's friends, the police and media. *See,* DiPietro DD5, October 14, 2003 (DiPietro claimed Denihan told her on the morning of October 12 that Mark had woken up John at 6:00 a.m. and asked how to get a train home); Conway DD5, October 13, 2003 (DiPietro claimed on October 12 that Mark went home safely after Denihan gave him money for a train); Early DD5, October 13, 2003 (DiPietro heard that Mark took a train home); *Fairfield Mirror*, February 11, 2004 (DiPietro said "I called [Denihan] in the morning [October 12] and she said that Mark went home alright"); *cf.* DiPietro Tr. 219 ("I was told [by Cleary at 11:00 a.m. on October 12] that John had given Mark directions to take a train and he took the train home the night before"); DiPietro Tr. 219-220 (DiPietro admitted she did not speak to Denihan until the evening of October 12).

DiPietro needed an alternative source of information because Denihan swiftly refuted her claim that she told DiPietro on the morning of October 12 that Mark got home safely. Denihan Tr. 165 (first conversation with DiPietro on October 12 was at night); Denihan DD5, October 14, 2003 (Denihan first spoke with DiPietro on October 13; she was mad at DiPietro for leaving her alone at John's house and refused to speak to her on October 12).

On October 12 at 11:30 a.m., or *almost 90 minutes* before John first spoke to Cleary, DiPietro told Jackie Conway that Mark had taken a train home at 8:00 a.m. or 9:00 a.m. Conway

DD5, October 13, 2003. At 12:30 p.m., DiPietro told Early that Mark had taken a train home at 7:00 a.m. or 8:00 a.m. Early DD5, October 13, 2003. Thus, long before John first spoke to Cleary at 12:56 p.m., DiPietro had provided Mark's friends with specific details that she had heard Mark left safely. But neither Denihan nor John, DiPietro's claimed sources of the information, could have told her what she then relayed to Mark's friends on the morning of October 12.

DiPietro lied to Mark's friends, the police and to the media that Denihan had told her that Mark left safely, and she then testified to the separate falsity that John was the source of the information during an 11:00 a.m. telephone call which never happened. *See,* DiPietro DD5, October 13, 2003; *Fairfield Mirror*, February 11, 2004; *cf.* DiPietro Tr. 219; Phone records.

Cleary's testimony that he "tried to keep it together" and hide what little he knew from DiPietro during the day of October 12 rang hollow. *See* Cleary Tr. 319.

Cleary also swore that he cleaned his garage on October 12 with his brother, rather than DiPietro, who admitted it was she who helped Cleary clean his garage. Cleary Sworn Statement to DA, p. 6; *cf.* DiPietro Tr. 220. There was no reason for Cleary to remove her from the seemingly innocuous event of cleaning his garage the morning after Mark was murdered across the street from his home unless it was not innocuous. *See,* Exhibit B ¶¶5-6; Exhibit C ¶¶4-5; Martinez Int.; Lupo Tr. 99.

The October 12 Confession

Cleary's description of the detailed "confession" John allegedly made to him and Calciano on the evening of October 12 was uncorroborated and repudiated by Calciano in all significant areas. Calciano Tr. 589, 606-609; Exhibit G ¶¶18-25.

"Disrespect" Over Mark Fisher Sitting on the Table

Cleary testified in the grand jury that "[Saleh] had a problem with Mark…sitting on a table…" and Saleh asked Mark what his problem was, and told him to sit in the chair. Cleary GJ 13. Saleh looked around at the rest of the group and there was "nothing more of it." *Id.* At trial, Cleary contradicted his grand jury testimony and claimed that it was John who complained about Mark sitting on the table. Cleary Tr. 253. He admitted that he changed his testimony only after it "came up" in a meeting with prosecutors less than 24 hours before he testified at trial. *Id.* 277. Cleary's change from Saleh to John occurred after Denihan already had testified that it was John who ordered Mark off the table. Denihan Tr. 151, 183. Saleh has admitted that he was the one who told Mark to get off the table. Exhibit A ¶4.

The Ghetto Mafia Edict

The only evidence offered in support of the Second Cleary Theory was Cleary's uncorroborated and inconsistent testimony. Cleary named Legister as "boss" of GM, even though at the time he was a college student in North Carolina. *See,* Exhibit Y ¶¶4, 7-8; McCafferty Tr. 866; *see also,* Ware Tr. 673, Exhibit A ¶11; Exhibit J ¶4. He hedged on whether Russo was present when John allegedly told him that he and Legister had decided to murder innocent people. Cleary Tr. 276.

Cleary did not allege that John and Legister spoke about murder shortly before Mark's murder or GM's thirst for street credibility in either of his prior sworn statements. The DA first announced (a different version of) the Second Cleary Theory months after the "Sopranos threat"[15]

[15] Although ADA Nicolazzi described Cleary as "at least one step removed from the gangland fantasy" that John had created, Tr. 985, Cleary was (and apparently remains) an organized crime and violent crime buff, as reflected in his choice of books, movies and TV shows (including the Sopranos) that he "likes" on his Facebook page. When James Gandolfini (Tony Soprano) passed away on June 19, 2013, Cleary updated his Facebook status the next day "Everyone needs to wake up this morning and go get yourself a gun in memory of this man. RIP TONY SOPRANO! Among his favorite books is "Johnny Got His Gun." Exhibit FF (Facebook page of Albert Cleary, captured January 11, 2014).

indictment of Saleh and Petrillo. *See,* H. 12-13, *cf.* Tr. 263. Legister has denied under oath that he was the "boss" of a gang or that he discussed with John the need for GM to commit murders. When he appeared before the grand jury, the DA did not question the purported "boss" of GM about his gang's activities. Exhibit Y ¶¶8-11; Legister GJ 7.

The Polygraph

Cleary's lack of credibility was best demonstrated by his underhanded efforts to deceive the DA about his knowledge of the circumstances surrounding Mark's death. He lied to police and denied any role or knowledge about Mark's death, while providing them with incriminating bits and pieces about John, such as his claim that John dealt ecstasy and carried a gun. Cleary DD5s, October 14 and November 16, 2003. He lied to his own attorney. Cleary Tr. 337.

But Cleary did not merely claim ignorance; he affirmatively commissioned a false polygraph examination designed to mislead the DA. Exhibit F. By cooperating with the DA months later and disowning the favorable findings, he confirmed that he either (1) procured a false polygraph examination report, (2) truthfully passed the polygraph examination and thus repeatedly perjured himself over the course of three sworn statements, or (3) was such a talented liar that he "fooled" the polygraph expert and convinced him that he was truthful despite the fact that he was lying.[16] In any of these scenarios, Cleary was exposed as a manipulative liar without any credibility.

[16] This seems unlikely in light of the nervousness demonstrated by Cleary and his mother. *See*, Exhibit G ¶18; Christine Burns ("Burns") DD5, October 1, 2004 (Cleary used third parties to hide contact with John); Elizabeth Marra DD5, August 24, 2004 (Cleary said "he would overcome this incident"); Rima Ibrahim DD5, August 30, 2004 (Cleary said "he would get through this"); Fraszka DD5, October 27, 2003 (Shortly after the homicide, Cleary said "things were bad"); Fraszka DD5, September 1, 2004 (Fraszka called Cleary and an older man answered the phone, would not allow Cleary to speak and asked him if he had spoken with the police). *See also, New York Times,* February 22, 2004 (Susan Cleary provided false alibi); Martinez Int. (Susan Cleary's request of Martinez to refrain from talking to police about Cleary).

The Waiver of Immunity

Cleary exerted extraordinary effort to try to avoid testifying before the grand jury. He lied for over one year and presented the DA with a false polygraph report in the hope that it would convince the DA that he did not have any knowledge about Mark's death. Cleary Tr. 329, 338; Cleary DD5s, October 14 and November 16, 2003; Exhibit F. He had legitimate reasons to refuse to testify before the grand jury or to accept automatic immunity if he did: his lying and efforts to mislead the DA were suspicious, and Mark was found directly across the street from his house shortly after he was seen with Mark.

In these circumstances, it defied common sense that Cleary testified against his will while waiving immunity, unless he had a secret understanding from the DA that he would not be prosecuted. Like the concealment of Avitto's benefit, failure to disclose a secret understanding with Cleary would have violated *Brady*. *See, Colon,* 13 N.Y.3d at 349; *People v. Steadman,* 82 N.Y.2d 1, 7 (1993).

Cleary increased his risk of exposure by waiving immunity. His waiver and his theoretical criminal exposure severely undermined ADA Nicolazzi's argument that he cooperated out of fear of prosecution and fear of jail as soon as he received a subpoena. Tr. 998. To the contrary, common sense suggested that Cleary knew when he testified that he would not be prosecuted as long as he told the DA what it wanted to hear. No person afraid of criminal exposure would waive his absolute right to immunity in these circumstances.

Point II: The DA Deliberately Misled the Jury about Consideration Sought by John Avitto and Leniency it Provided Him in Exchange for His Testimony.

An offer of leniency in exchange for favorable testimony provides strong motivation for a witness to "exceed…the bounds of truth." *People v. Savvides,* 1 N.Y.2d 554 (1956).

The DA presented Avitto as an honest man who testified as a matter of civic duty. Nothing could have been farther from the truth.

Avitto denied that he had sought or received consideration in exchange for his testimony. Avitto Tr. 781-786. He testified that the mandatory 3 ½ to 7 year prison sentence he faced at the time he contacted police did not influence his decision to come forward. *Id.* 806. The prosecutor agreed "there was no evidence Avitto was trying to help himself and get a deal;" rather he cooperated because "for once he tried to do something right." Tr. 1022.

However, there was credible proof that Avitto sought help from law enforcement and the evidence suggested that the DA affirmatively helped keep Avitto out of jail. Exhibits M-W; Exhibit O ¶¶2-3; 10, 25.

Avitto has now admitted:

> …It was during this time, while I was violating the terms of my release by using cocaine and absconding from the program, that I concocted a plan that I believed would help me avoid being held in violation of my plea agreement. Because I had been housed with Giuca in jail and knew that the Fisher case was a high-profile and important prosecution, I decided to tell authorities that I had incriminating against Giuca, which I would share in exchange for assistance on my own case. Exhibit O ¶8. *See also, id.* ¶¶9, 17.
>
> ADA Nicolazzi asked me if I had asked for anything in exchange for my testimony. I swore that I did not ask for anything in exchange for my testimony. This testimony was false. In fact, as ADA Nicolazzi and Detective Byrnes knew, I only approached law enforcement after I had absconded from my program and faced a lengthy prison term specifically for the purpose of getting their assistance if I agreed to help them by testifying against Giuca. I told Detective Byrnes and ADA Nicolazzi this during our first meeting….She knew that I was seeking assistance from the DA in exchange for testifying against Giuca. *Id.* ¶25(e).

The existence of any agreement between the DA and a witness, made to induce the witness to testify must be disclosed under *Brady*. *People v. Cwikla*, 46 N.Y.2d 434 (1979). This obligation

arises because of the *quid pro quo* nature of the agreement between the DA and witness. *See, People v. Novoa*, 70 N.Y.2d 490 (1987). Any promise of leniency given to a witness in exchange for favorable testimony must be disclosed. *Steadman*, 82 N.Y.2d at 7.

If Avitto did not seek a benefit and the DA did not help him:

- Why did ADA Nicolazzi escort Avitto to court, appear on a return of a warrant, in a post-plea drug case and request an off-record conversation unless she informed the court that he was a key witness in a high-profile murder case and that the DA preferred his release? Exhibit P.

- Why, despite Avitto's two drug relapses, three bench warrants and other program violations from June to September 2005, didn't the DA seek bail for a lifelong criminal who clearly violated his plea agreement unless it had agreed not to in exchange for his testimony? Exhibits Q-W.

- Why did Avitto's counselor whitewash a one-day old program violation letter the day before Avitto was scheduled to testify? Exhibits V, W.

The DA's failure to disclose that Avitto had in fact sought and received a benefit in exchange for his testimony was a *Brady* violation which prejudiced the defense. As a result of the DA's misconduct, the defense was forced to attempt to extract from Avitto (unsuccessfully), what the DA was obligated to disclose, only to be denigrated by the DA for its efforts. Tr. 1022-1023.

If the jury had known that Avitto testified in order to secure a favorable outcome to his own legal problem, combined with his other credibility deficiencies, it is virtually certain that the jury would have rejected his testimony out of hand.

Point III: The DA Withheld John Avitto's Testimony from the Defense in Violation of its *Brady* Obligations.

Notwithstanding the fact that Avitto's testimony "incriminated" John, it was favorable to the defense because it undermined Calciano and Cleary's testimony by destroying the reliability of the purported "admissions" John made to them. It also undercut Denihan's testimony and contradicted all of the other evidence which suggested that John never went to the ATM with

Mark. *See*, Denihan Tr. 152-153. Because the DA withheld Avitto's favorable evidence from June 2005 until he testified as the final substantive witness at trial, the defense was not prepared to defend John against allegations that he was both present and not present at Mark's murder.

The DA did not disclose the substance of Avitto's testimony to Mr. Gregory before he testified. Tr. 745. Mr. Gregory did not even know whether Avitto was acting at the behest of law enforcement. *Id.* 745-746. *See, Massiah v. United States,* 377 U.S. 201 (1964). On September 22, 2005, the DA ambushed the defense when it called Avitto, who testified that John was an active participant in Mark's murder. Avitto Tr. 773-775.

Withholding Avitto's favorable testimony was a *Brady* violation and made a farce of the DA's "open file discovery" policy. Evidence that bears on trial strategy and/or the credibility of the DA's main witnesses constitutes *Brady* material. *People v. Waters*, 35 Misc.3d 855 (Bronx Cty. Sup. Ct. 2012). "Evidence which impugns the credibility of the DA's principal witness against the defendant tends to negate his guilt and, therefore…must be disclosed to the defense as soon as possible." *Id.* at 860. *See also, People v. Hunter,* 11 N.Y.3d 1 (2008); *People v. White,* 178 A.D.2d 674 (2nd Dept. 1991) (disclosure of *Brady* material must be made in time for the defense to use the evidence effectively).

Withholding Avitto's statements deprived the defense of the opportunity to prepare properly for trial and present a meaningful defense. For example, had he known about Avitto before he opened, Mr. Gregory assuredly would have alerted the jury that incompatible witnesses and contradictory theories are the telltale sign of weak case.

Because Avitto was the DA's final substantive witness, the defense was prejudiced in its earlier cross examinations of Cleary, Calciano, Denihan, DiPietro and Schoenfeld. Mr. Gregory was deprived of the opportunity to discredit Avitto by examining Cleary and Denihan in greater

detail about John's whereabouts while Mark and Russo were at the ATM. The defense also would have focused on events at John's home between 5:23 a.m. (the time Mark and Russo were at the ATM) and 6:40 a.m. (when Mark was shot across the street from Cleary's home).

Mr. Gregory did not cross-examine Schoenfeld about a delay in gunshots because at the time Schoenfeld testified, the defense was oblivious to its potential significance. *See,* Schoenfeld Tr. 127-137. Had the defense known at the time Schoenfeld testified that the DA emphasized the delay in gunshots in order to lay the foundation for and to corroborate Avitto's upcoming testimony that John was present when Mark was murdered, Mr. Gregory likely would have crossed Schoenfeld about the delay in gunshots. *See,* Tr. 1017.

Avitto's testimony was an ambush which sandbagged the defense. *See, Waters,* 35 Misc.3d at 861 (withholding *Brady* until revealing it in ambush at trial was unfair and deprived the defense the opportunity to be thoroughly be prepared for trial); *People v. Copicotto,* 50 N.Y.2d 222, 226 (1980) (trial "should not be a sporting event where each side remains ignorant of the facts in the hand of the adversary until events unfold at trial"). *See, People v. Grega*, 72 N.Y.2d 489, 497 (1988); *People v. Calandra*, 164 A.D.2d 638 (1st Dept. 1991).

Point IV: The DA's Summation Violated John Giuca's Due Process Rights.

In her summation, the prosecutor denigrated John and Mr. Gregory, made misleading statements of fact and law, vouched for perjured testimony and testified as an unsworn witness.

Denigration of John Giuca

ADA Nicolazzi appealed to the passions of the jury by contrasting Mark and John in a "good vs. evil" prism peppered with inflammatory rhetoric. For "19 short years" Mark was "a handsome, bright, college student" who should have had a "long future ahead of him." He was popular, active in his community, a church volunteer, good natured, with a sense of trust. Tr. 980.

Conversely, John was the leader of a "pathetic, fledgling gang," who left Mark a "John Doe" lifeless, body lying in the street. Tr. 980. He was one of "these characters"—an obvious negative reference to GM. *Id.* 985. He was a "gangland leader" who "played gangster stuff." *Id.* 988-991; 995, 1004, 1024.

ADA Nicolazzi even differentiated Mark and John in biblical terms, casting Mark as a "lamb surrounded by wolves."[17] *Id.* 981. Lest the impact of this prejudicial rhetoric be doubted, the tabloids pounced on the sound bite and led with it in their coverage of the summations. *New York Post*, "Grid Kid was 'Lamb Surrounded by Wolves,'" September 27, 2005; *Daily News*, "Teen 'Lamb' Led to Slaughter, DA Says," September 27, 2005. In 2010, when ADA Nicolazzi was featured in an episode of *On the Case with Paula Zahn*, it was titled "A Lamb Amongst Wolves."

The prosecutor's inflammatory rhetoric was improper. *People v. Rivera*, 75 A.D.2d 544 (1st Dept. 1980) (improper to refer to defendants as "wolves of society" and victim as the sheep); *People v. Hall*, 208 A.D.2d 1044 (3rd Dept. 1994) (improper to describe defendant as "wolf in sheep's clothing"); *People v. Anderson*, 83 A.D.3d 854 (2nd Dept. 2011) (reversal of murder conviction based upon improper rhetoric including defendant was "as remorseless as a hunter who kills deer").

Denigration of Counsel

During the investigation, John, Cleary, Calciano, DiPietro, Denihan and others retained counsel. One wanted for questioning by police is not unwise to consult counsel, even if innocent of wrongdoing. *People v. Collins*, 140 A.D.2d 186, 188-189 (1st Dept. 1988). Consultation of an

[17] In her Russo summation, ADA Nicolazzi shockingly referred to John and other purported GM members as "that crew of sharks" whom she suggested lacked "an ounce of humanity." Russo Tr. 1012.

attorney by one suspected of a crime has minimal probative worth which is outweighed by the risk of prejudice to a defendant. *People v. Conyers*, 49 N.Y.2d 174, 182 (1980).

Throughout the investigation and trial, ADA Nicolazzi denigrated the role of defense counsel. *See,* Tr. 30 (she cited retention of counsel as evidence of witnesses stonewalling investigation); 35 (she implied that John was guilty and sought to cover up his role by imploring Cleary to "keep asking for your lawyer"); Exhibit E pp. 7-8; Exhibit G ¶17(g) (ADA Nicolazzi advised Calciano to discharge her attorney even after she had been threatened with prosecution).

ADA Nicolazzi improperly argued that Cleary took him to see Mr. Smallman because Cleary knew "his friend was going to need help." Tr. 995-996. This implied John's guilt simply because Cleary (who himself already had counsel) encouraged him to consult counsel. She misled the jury when she referred to Mr. Smallman as a "close family friend" rather than what he really was—*Cleary's attorney* who despite providing John with legal advice on Cleary's recommendation, represented Cleary as he cooperated against John.

The prosecutor implied John's guilt and personally insulted his trial counsel when she mocked John's advice for Calciano to get a lawyer: "don't worry, Lazzaro and Gregory, the attorneys, they will be there for you too." Tr. 987. ADA Nicolazzi chastised Mr. Gregory for, in her opinion, asking the jury to "condemn" Avitto simply because he attempted to extract the truth from an unwilling Avitto. *Id.* 1022-1023.

She mocked Mr. Gregory's ability and style as that of a showman who was trying to trick the jury with style rather than substance: "There was no evidence at all of almost anything he said." *Id.* 1020. She described him as a loud and overly dramatic. *Id.* 1023. Ironically, she accused him of engaging in "wild speculation." *Id.* She ridiculed him when she stated "even if you scream and yell, it doesn't make it so." *Id.* She improperly mocked Mr. Gregory's (correct) argument that

Avitto received consideration as "uncorroborated" and a theory which required belief in a conspiracy among the police, DA and judge. *Id.* 1022.

Denigrating defense counsel or a defense theory is misconduct. *People v. LaPorte*, 306 A.D.2d 93 (1st Dept. 2003) (robbery conviction reversed in part because prosecutor ridiculed counsel, mocked his theory and accused counsel of manipulating jury and trying to prevent them from exercising common sense). Arguing that acceptance of a defense position required belief in a conspiracy involving law enforcement and a judge is improper and prejudicial. *People v. Forbes*, 111 A.D.3d 1154 (3rd Dept. November 27, 2013) (assault and robbery convictions reversed for prosecutor's misconduct in arguing that belief of defense required conspiracy between police, prosecutor and judge).

Misleading Statements

Prosecutors have a special obligation as public officers to deal fairly with the court and the accused. It is misconduct for a prosecutor to make false or misleading statements. *Colon*, 13 N.Y.3d at 349 (2009); *People v. Rice*, 69 N.Y.2d 781 (1987). Throughout her summation, ADA Nicolazzi made several misleading statements of fact and law.

The prosecutor repeatedly referred to John as "the leader" of "his gang," despite Cleary's testimony that Legister was the "boss" of GM Tr. 989, 995, 1024; *cf.* Cleary Tr. 259. Revisiting an inaccurate claim from her opening statement, she inferred that John called Calciano with a consciousness of guilt after the murder even though she knew that John's last call to Calciano was 20 minutes before Mark was murdered. Tr. 32, 981; *cf.* Phone Records.

In order to force the jury to agree with her own belief that Beharry disposed of the murder weapon, ADA Nicolazzi inaccurately said that John told Cleary that he gave Beharry "the gun" when in fact Cleary testified that John told him he gave Beharry "the guns." This left open the

possibility that even if Beharry did dispose of a gun it might have been the .380 Cleary described rather than the murder weapon. *Id.* 992; *cf.* Cleary Tr. 463-464.

Despite her own admission that "having guns does not implicate [John] for Mark's murder," Tr. 994, ADA Nicolazzi repeatedly instructed the jury that "you know" that the gun Beharry took from John was the murder weapon. *Id.* 989, 1004-1006, 1021-1022.

ADA Nicolazzi misled the jury about Russo's role in the Avitto Theory by implying that Russo was John's "patsy," "did anything [John] said," and ultimately shot Mark because John told him to do so." Tr. 1017. However, Avitto testified that after John pistol-whipped Mark and while they were beating Mark, "one of his other friends *pulled the gun off [John]* and shot [Mark]." Tr. 774-775 (emphasis added).

She claimed that "every time" Avitto violated his program he self-reported and that despite at least seven violations in three months he "acted responsibly" since he had last been released from jail. Tr. 1020-1021; *cf.* Exhibits O-W. She argued that Avitto was simply testifying "to do the right thing," despite the consideration he sought from the DA. *Id.* 1022; *cf.* Exhibits O ¶¶8-10.

The prosecutor made critical misstatements of law. She told the jury that Calciano "alone" proved felony murder under a "knowingly" mens rea, which was inaccurate.[18] Tr. 982, 1026. She declared by fiat that John was guilty of the weapons and robbery charges, "so of course he was guilty of weapons possession" because "you know" the gun was in his house. *Id.* 1024-1025.

She improperly stated her personal opinion of, and confidence in, John's guilt by stating that one year after the trial, "I'm sure each one of you would remember that the case was about a 19 year old man who was robbed and killed and that…[John] was involved." *Id.* 999. She further expressed her personal belief in John's guilt when she decreed that a guilty verdict was "required"

[18] The DA conceded this misstatement of law in its appellate brief. *See*, DA Appellate Brief, *People v. Giuca*, pp. 55-56.

and inferred that the case was "open and shut" by advising the jury to "take as much or as little time as you need. *Id.* 1026-1027.

Vouching for Witnesses

An attorney may not vouch for the credibility of witnesses, may not speculate on matters not in evidence, nor become an unsworn witness in the case. *See, Forbes*, 111 A.D.3d at 1158; *People v. Spence*, 92 A.D.2d 905, 905 (2nd Dept. 2012); *People v. Woodrow*, 91 A.D.3d 1188, 1190 (3rd Dept. 2012). ADA Nicolazzi vouched for witnesses in order to navigate through five utterly incompatible theories, all of which were built upon witnesses who contradicted each other. Her vouching took many forms: she expressly stated her personal opinion, declared witnesses truthful and honest, and repeatedly lectured the jury that they "knew" disputed facts were decided as she alleged. Her vouching included:

Cleary and Calciano

- Calciano and Cleary were both "truthful" in describing the "admission" John made on October 12. Tr. 1004.
- "You know" Cleary went to sleep 40 minutes before Mark was killed. *Id.* 996.
- "You know" Cleary's testimony was corroborated by Calciano. *Id*. 997.
- "You know" that John confided "bits and pieces" of what he had done to Calciano and Cleary. *Id.* 1011-1012.
- "You know beyond any reasonable doubt that [John] supplied the gun, that he knew it was going to be used to rob Mark, to 'show him what's up', and you know they took his wallet completing the robbery." *Id*. 1019.

Avitto

- "You know that Avitto isn't making that up" in describing his perjured description of the jailhouse conversation between John and his father. Tr. 1008.
- "Everything Avitto told you is credible." *Id.* 1010.

- "There is no way Avitto could make it up." *Id.* 1010.
- "Avitto was being truthful." *Id.* 1010
- "You could trust [Avitto]." Tr. 1010.
- Avitto was "very honest about his problems and past." *Id.* 1011.
- John was "truthful" to Avitto. *Id.* 1017.
- "You know" Avitto's drug problem was caused by sexual abuse. *Id.* 1021.
- "Indisputable" that John not in house when Giuliano called him. *Id.* 1018.

Beharry/the Alleged Murder Weapon

- "You know" the gun John gave Russo was the murder weapon. Tr. 989.
- John showed Cleary the .22 "you know" is the murder weapon. *Id.* 1004.
- Beharry saw the gun "you know" is the murder weapon. *Id.* 1005.
- "You know" that Russo asked Beharry if he had gotten rid of the weapon that "absolutely" was the murder weapon. *Id.* 1006.
- Beharry admitted "possessing the gun and getting rid of the gun *which I know is the murder weapon in this case.* And that was important evidence." *Id.* 1021-1022 (emphasis added).

Other Vouching

- John tried to shift himself away from the role "you know" he played. Tr. 987.
- "You know" Russo looked up to John. *Id.* 988.
- "There is tons of evidence. Plain and simple." *Id.* 1023.
- "You know" that the 5:13 a.m. call was not a coincidence. *Id.* 1012
- "You know" the ATM withdrawal was at 5:25 a.m. *Id.* 1013
- "You know" Russo called John at 6:37 a.m. *Id.* 1015.
- "You know" what happened when Mark got near Cleary's house. Tr. 1016.

- "Indisputable, concrete" evidence Giuliano called John two minutes after shots fired. *Id.* 1017-1018.

ADA Nicolazzi's vouching was stunning in its degree. *See, e.g., People v. Brown,* 26 A.D.3d 392 (2nd Dept. 2006) (robbery conviction reversed where DA engaged in misconduct by vouching that its witnesses were "credible and accurate" and a witness "told the truth"); *People v. Pagan,* 2 A.D.3d 879 (2nd Dept. 2003) (conviction reversed where DA improperly vouched that witness was "perfectly candid," "being forthright," "very accurate" and "I submit to you that his testimony is credible and it is also accurate"); *People v. Blowe,* 130 A.D.2d 668 (2nd Dept. 1987) (rape conviction reversed where DA improperly vouched that witness was "credible" "forthright," "worthy of belief," "a quality witness," "an honest person," " a person of integrity," "truthful and accurate and worthy of your belief").

Even worse, by vouching for perjured testimony, ADA Nicolazzi sunk the DA's credibility and destroyed the integrity of the guilty verdict. Her vouching for Avitto was extraordinarily prejudicial because of her description of him as the witness in whom John truthfully confided. Tr. 1017. Her description of both Cleary and Calciano as "truthful" was misleading since she knew at least one of them committed perjury with respect to whether Calciano removed evidence. *See,* Cleary Tr. 331 ("I saw Calciano remove a gun bag") *cf.* Calciano Tr. 628 (Cleary lied by stating she removed a gun bag); *see also,* Exhibit G ¶20. Her vouching for Calciano and Cleary also was reckless in light of the extraordinary pressure used to extract Calciano's favorable testimony and because of Cleary's polygraph fiasco.

It should have been obvious that ADA Nicolazzi vouched for perjured testimony in 2005. It is beyond dispute in 2014. Deliberate or not, she ignored waving red flags which required a responsible prosecutor to exercise caution before calling and then vouching for witnesses who

were either pressured into testifying or sought and received consideration. *See,* Exhibit G ¶14-17; Exhibit J ¶¶5-9, 12-13; Exhibit O ¶¶9-10, 25(d)-(e); Cleary Tr. 338, 354-355.

Point V: Mr. Gregory's Failure to Properly Investigate, Failure to Cross-Examine and Failure to Call Witnesses Who Would Have Destroyed the DA's Case was Ineffective Assistance of Counsel.

John was deprived of effective assistance of counsel due to Mr. Gregory's failure to conduct meaningful investigations and his failure to present a vigorous defense. Basic investigation would have exposed Avitto's perjury, destroyed Calciano and Cleary's "admission" evidence against John, and established the presence of a young woman and van at the murder scene, all of which would have severely undermined the DA's case.

Failure to Expose John Avitto's Perjury

By the end of the trial, Avitto had become the DA's most important witness. This was a gift for the defense. Avitto's credibility should have been eviscerated in any number of ways without any risk to the defense. However, Mr. Gregory did not attempt to impeach Avitto's credibility with evidence that John's father could not speak. In fact, he did not ask Avitto one question about the substance of his testimony. He did not introduce medical records, which family members rushed to get after hearing Avitto's false testimony. *See*, Exhibits Z, BB. He did not even interview DiMatteo and Raucci, who were present at the Riker's visit and easily would have exposed Avitto's perjury. *See,* Exhibits Z, AA, BB. He did not call John Giuca Sr. or his doctor to demonstrate John's father's inability to speak. Inexplicably, Mr. Gregory did nothing.

Without more, Mr. Gregory's failure to even attempt to discredit the DA's key witness with conclusive proof that he committed perjury was beneath the acceptable standard of meaningful representation. *See, People v. Oliveras,* 21 N.Y.3d 339 (2013) (murder conviction reversed on ineffective assistance grounds due to counsel's failure to properly investigate critical

medical records which would have provided valuable information); *People v. Fogle*, 10 A.D.3d 618 (2nd Dept. 2004) (murder conviction reversed on ineffective grounds where there was a "complete failure to investigate by counsel, there was no strategic reason for this lack of investigation and…[investigation] would likely have revealed evidence favorable to the defense which could have been utilized at trial)."

Failure to Interview the Sworniks and Daisy Martinez

The DA ignored compelling evidence that a young woman, at least one young man, and a vehicle were present when Mark was killed. These facts severely undermined the reliability of John's purported "admissions" to Cleary, Calciano and Avitto, and also undermined DiPietro's credibility. Mr. Gregory's failure to investigate and exploit these facts severely prejudiced John.

It was plausible that DiPietro and Cleary were near the foot of the Sworniks' driveway at the time Mark was shot. Mr. Gregory was obligated to pursue this credible possibility because it was favorable to the defense. Yet despite being provided DD5s and a canvas report indicating that the Sworniks and Martinez had significant information, Mr. Gregory never bothered to interview any of them. *See,* Exhibit C ¶8; Martinez Int. He did not even attempt to seriously cross-examine DiPietro or Cleary about their possible presence at the murder. *See,* DiPietro Tr. 224-229; Cleary Tr. 303.

Cleary and DiPietro likely snuck out of John's home together. *See,* Denihan Tr. 192. Cleary and DiPietro both repeatedly changed the time they claimed that they arrived at Cleary's home. Cleary Tr. 273 (left John's at 5:30 a.m.); Cleary Tr. 284 (remained at John's past 5:30 a.m.); Cleary GJ 15 (arrived home at 5:15 a.m.); Cleary DD5, October 14, 2003 (left John's at 5:00 a.m. or 5:30 a.m.); DiPietro Tr. 216 (arrived at Cleary's at 6:00 a.m.); DiPietro DD5, October 14, 2003

(left John's at 5:30 a.m.); DiPietro DD5, November 26, 2003 (arrived at Cleary's at 6:10 a.m.); *see also,* Siembiede DD5, July 21, 2004; Hlavin DD5, July 30, 2004.

The only alibi for his and DiPietro's presence at his home at the time of Mark's murder was Susan Cleary who claimed that they arrived home at 4:30 a.m. *New York Times,* February 22, 2004. Susan Cleary also: (1) obstructed the investigation by telling Martinez not to speak to police about her son, (2) helped contribute to Cleary's false claim that he was "cooperative" in the early stages of the investigation and (3) was the Vice-Chair of the Executive Committee of the Republican Party which endorsed DA Hynes during the pendency of the case. *See,* Martinez Int.; *New York Times,* February 22, 2004; *Daily News,* February 13, 2004; Exhibits K, L.

DiPietro was Mark's classmate and the only person he knew in Brooklyn. He had used her cell phone to leave messages for his friends. Denihan Tr. 146; Peters DD5, October 13, 2003. He said that he would join DiPietro at Cleary's home. DiPietro DD5, November 26, 2003. Cleary "forgot" a 64 second phone call at 5:57 a.m. from John. Cleary Tr. 299. Mark was found across the street from the Cleary home with a blanket from John's house. Common sense suggested his intent was to find DiPietro when he left John's home.

The Sworniks heard a van at the murder scene; the Clearys owned a van. Exhibit B ¶6; Exhibit C ¶5; Martinez Int. Despite their close proximity to the murder scene, neither Cleary nor DiPietro heard gunshots. DiPietro Tr. 218; Cleary Tr. 303. Three or four shell casings were missing from the crime scene, even though police arrived within a few minutes. Lupo Tr. 99. Some witnesses heard a delay in the shots. Schoenfeld Tr.129; Martinez DD5, July 16, 2004. Mark was found face down with a blanket lacking bullet holes underneath him. Keating DD5, October 24, 2003. Circumstantial evidence suggested that at least some of the shots were fired from inside a vehicle from which Mark was then tossed.

A few hours after a murder directly across the street, and after lying to Mark's friends that Denihan had told her that Mark went home safely, DiPietro helped Cleary clean his garage before taking him to her Long Island home, a place Cleary had never been before. DiPietro Tr. 220; Cleary DD5, November 16, 2003.

Cleary and DiPietro both falsely claimed that John called Cleary on the morning of October 12. DiPietro Tr. 219; Cleary Tr. 314; Phone Records. This could have been easily exposed; DiPietro told many different accounts and Cleary contradicted two prior sworn statements. DiPietro DD5s, October 14 and November 26, 2003; Conway DD5s, October 13, 2003 and July 21, 2004; Siembiede DD5, July 21, 2004; Hlavin DD5, July 30, 2004; Cleary GJ 15; Cleary Sworn Statement to DA, p. 4.

Despite this mountain of favorable evidence right in front of him, Mr. Gregory did not even attempt to investigate it or introduce any of it at trial. If he had done so he would have exposed the case against John as a sham and left it in tatters.

If Mr. Gregory had interviewed Martinez, he likely would have uncovered Susan Cleary's effort to keep her from discussing her son with the police. *See*, Martinez Int. Had he presented any of this evidence, Mr. Gregory also would have damaged the DA's credibility (and lessened the impact of ADA Nicolazzi's personal vouching) by exposing the fact that the DA ignored compelling evidence which pointed away from John.[19]

[19] It appeared that the DA refused to consider seriously the possibility that DiPietro was not forthright or truthful. Despite her numerous inconsistent and impossible statements, on information and belief, she did not testify before the grand jury, even though the DA's purpose in empaneling an investigative grand jury was to confront witnesses who had not been truthful. *See, New York Post,* June 21, 2004. Despite DiPietro's differing accounts and credible evidence which established that a young woman was near the Sworniks' driveway when Mark was murdered there, the DA never even bothered to interview the Sworniks or other important witnesses. *See,* Exhibit B ¶10; Exhibit C ¶7; Martinez Int. Instead, the DA simply excised these disturbing facts from the investigation and trial as it prepared to seek an indictment and conviction of John.

Mr. Gregory's failure to pursue leads, investigate and interview these witnesses was ineffective representation.[20] *See, People v. Bennett*, 29 N.Y.2d 462 (1972) (Meaningful representation includes "conducting appropriate investigations…to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial.")

Failure to Properly Cross-Examine

Mr. Gregory failed to use phone records which would have damaged the credibility of the DA, Cleary and Calciano. He should have exposed the falsity of the DA's claim that John called Calciano with a guilty conscience after the murder by simply cross-examining Calciano with the phone records, which would have proved that no such call occurred. *See* Tr. 32, 981-982. He also should have used the phone records and prior sworn statements to expose Cleary and DiPietro's lies about John's alleged October 12 morning calls with irrefutable proof that John did not speak with Cleary until almost 1:00 p.m. Phone records; *cf.* Cleary Tr. 314, 316. If he had done so, he would have discredited Cleary's uncorroborated claim that John made incriminating statements during a series of phone calls on the morning of October 12. *See,* Cleary Tr. 314-317.

Mr. Gregory did not cross-examine Cleary with the exculpatory results from his polygraph examination even after the DA unethically opened the door to this issue. He objected to evidence which if not sustained *sua sponte* by the court, would have severely undercut Cleary's credibility. Cleary Tr. 329. In any event, once the DA placed the "pink elephant" of the polygraph examination before the jury, he should have emphasized the credibility-destroying fact that Cleary had presented scientific "proof" of his lack of knowledge about Mark's murder months before giving sworn testimony incriminating John. Yet Mr. Gregory merely confirmed the DA's point that

[20] Mr. Gregory didn't attempt to interview Calciano, whom he knew personally from his prior representation of her father. Exhibit G ¶8. He did not even know that she testified in the grand jury until the completion of her re-direct testimony at trial. Tr. 622-623. If he had interviewed her, he likely would have learned about the undue pressure applied to her in order to secure her testimony.

Cleary sat for a polygraph examination. Cleary Tr. 338-339. By addressing the polygraph yet keeping the jury ignorant of its exculpatory results, he bolstered the DA's improper conduct.

Mr. Gregory failed to examine Cleary about his decision to waive immunity, which provided circumstantial evidence of the existence of a pocket immunity deal between the DA and Cleary.

He did not cross examine Cleary about his attempt to forge identifications. *See,* Burns DD5, October 1, 2004. Coupled with his submission of a frivolous polygraph result, and his other credibility deficiencies, this constituted powerful evidence of Cleary's willingness to lie and deceive at will in order to help himself.

Mr. Gregory failed to rebut the DA's argument that Russo was an impressionable "patsy" ordered by John to harm Mark. He should have easily refuted this by calling any of several witnesses who had described Russo's possession of a gun shortly before Mark's murder, or who had heard him brag that he had a gun and threatened to shoot people. *See,* Romero DD5, March 27, 2004; Aviles DD5, September 10, 2004; Cardona DD5, September 16, 2004.

The combined effect of Mr. Gregory's ineffective assistance of counsel deprived the jury of significant and compelling evidence which would have destroyed the credibility of witnesses against John. It is virtually certain that John would have been acquitted if Mr. Gregory had conducted basic investigation and presented a vigorous defense.

Point VI: Juror Jason Allo Committed Misconduct by Failing to Disclose That He Read Media Accounts of the Case During Trial, That He Had Personal Knowledge about the Activities of Alleged GM Members, and That He was Personally Prejudiced Against John Giuca.

John was deprived of his fundamental right to a fair and impartial jury by the inclusion of Jason Allo on the jury. Allo engaged in serious juror misconduct when he deliberately concealed personal knowledge about GM and because of his shocking anti-Semitic animus towards John

because he mistakenly believed him to be a "rich Jew" in order to satisfy his own eagerness to serve on the jury. After Allo made it on the jury, he read the prejudicial tabloid coverage of the case, including reports about evidence restricted to Russo's jury.

Allo's misconduct was exposed by Doreen during an "undercover sting"[21] which served as the subject of a C.P.L. § 440.40 motion, appeal and federal habeas petition. All were denied.

Allo described John as a tall, skinny, Jewish kid from a neighborhood of million dollar homes, but the problem was "they are all Jewish." Nov. Tr. 71, Exhibit DD ¶31. In shocking moments of candor, he admitted that "I hate Jews," and that his boss told him while he was serving as a juror that he wanted to see John fry "because he's a Jew." Nov. Tr. 71, 88. He noted that Jews had a lot of money, but he was not going to be fooled by that. Exhibit DD ¶32. Allo also made disparaging racial remarks about fellow jurors, but noted, "you have the right to be racist." Nov. Tr. 46, 81.

Allo knew members of GM, including the Wenzels, whose names were on the witness list, but remained silent when asked by the court if he recognized any of the names. Dec. Tr. 15; Exhibit DD ¶27; *see* Exhibit X. He admitted hearing pre-trial that the Wenzels had guns, shot them in the house, hosted GM meetings, and grew marijuana. Dec. Tr. 16. He claimed that his brother had been abused by GM members. *Id.* 14.

He proudly ignored the admonition of the court and read daily accounts of the trial coverage. Nov. Tr. 9, 29; Exhibit DD ¶¶29-30. He made observations which confirmed the devastating effect of the prosecutor's misconduct.[22]

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[21] Doreen was castigated by the trial court for her conduct. *See, People v. Giuca*, 23 Misc.3d 1104(a) (Kings Cty. Sup. Ct. 2009). Although her conduct was controversial and unconventional, nothing she did was unlawful. While we don't condone surreptitiously questioning jurors, Allo's horrific misconduct cannot be ignored as part of an overall analysis of whether John was wrongfully convicted and deprived of a fair trial.

[22] "John was the fucking big shot of the gang. They made him out to be Tony Soprano." Nov. Tr. 70; John was a "mob wannabe." Exhibit DD ¶28; Mark's shooting was a "mob initiation." Exhibit DD ¶34; John's counsel was a

Allo knew that he had engaged in serious misconduct because he had "inside information," but felt he was meant to serve on that jury and was eager to do so. Nov. Tr. 63, 86, 90. He admitted that he should not have been on the jury. Nov. Tr. 71.

Allo's misconduct deprived John of a fair trial. He was prejudiced against John. Even worse, his purported "inside information" about GM and its allegedly violent activities were significant and contested issues at trial. He callously disregarded the court's instruction and gained access to Russo information that the dual-jury trial was specifically designed to prevent John's jury from hearing. Under any interpretation of Allo's statements, he should have been dismissed for cause and would have been if he disclosed his "inside information" and his personal prejudice during voir dire.

CONCLUSION

The primary role of a prosecutor is to see that justice is done, not secure convictions of any particular defendant. *Connick v. Thompson,* 131 S.Ct. 1350 (2011); *People v. Pelchat,* 62 N.Y.2d 97 (1984). A prosecutor is obligated to prevent wrongful convictions with the same effort it uses to seek convictions. *Connick,* 131 S.Ct. at 1365.

Here, the DA abdicated its responsibility and instead focused on convicting John, despite the unreliability, inconsistency and poor quality of the evidence. In addition to the DA's failure to act properly, John was severely prejudiced by his own attorney's failure to investigate or expose the obvious weaknesses in the DA's case, and by juror misconduct.

John's trial and conviction have left a ten-year stain which justice demands be wiped clean. The conviction was secured though the use of perjured testimony, improper police tactics and

high-priced lawyer who danced around like he was in a circus. Nov. Tr. 7, 15-16; Allo's discussion of the inadmissible polygraph evidence. Nov. Tr. 90-91.

prosecutorial misconduct. The DA withheld favorable evidence from the defense until it unleashed it as an ambush at the end of trial. It concealed that the fugitive, jailhouse informant Avitto sought and received consideration in exchange for his testimony.

John was convicted as the result of three false and inconsistent "admissions" to three different people, each of whom has been thoroughly discredited. The DA presented five inconsistent theories, and its smearing of John as a "Mafia type" gang boss provided the glue which bonded its fractured case.

The DA shamefully ignored evidence inconsistent with its ultimate goal in the Fisher investigation: "get John Giuca." As opposed to the unreliable evidence against John, which was secured by threats and consideration and resulted in "what the DA wanted to hear" from intimidated witnesses or those with self-serving reasons to testify, the DA ignored reliable and unbiased earwitness evidence that a young woman and young man were present when Russo killed Mark, and eyewitness, earwitness and physical evidence that a vehicle also was there. The DA refused to consider the significance of the false and inconsistent statements made by Cleary and DiPietro in the first few hours after Mark's death.

The DA's failure to pursue leads inconsistent with John's guilt and rationally dismiss them before advancing a case against John compromised the integrity of the DA's decision to seek an indictment against John, let alone try him for Mark's murder.

Most significantly, the integrity of the verdict has been destroyed by the sworn recantations of three significant witnesses and the inescapable and disturbing conclusion that ADA Nicolazzi personally vouched for the truthfulness of witnesses which, at a minimum, she should have known gave perjured testimony.

The only remaining substantive witness, Cleary, repeatedly perjured himself and provided inconsistent and uncorroborated testimony. He was exposed as an extraordinarily manipulative liar who submitted a polygraph report to the DA in order to mislead the DA, and then months later testified contrary to its findings. Evidence suggested that he may have received a "pocket immunity" deal. His mother, who attempted to obstruct the police investigation and who misled the public about her son's whereabouts on the evening of the murder, was a member of the committee which endorsed DA Hynes only months after Cleary waived immunity before the grand jury.

We are mindful of the pain that vacating John's conviction will cause the Fisher family and those who loved Mark. They are entitled to justice. However, justice is not served by the continued incarceration of a man who did not receive a fair trial and who was convicted on false, flimsy, incompatible, and now thoroughly discredited, evidence.

All of the DA's evidence against John has been reduced to rubble. Sustaining the verdict against John and his continued incarceration will only add to the public's growing lack of confidence in the Brooklyn criminal justice system, which in recent years has suffered black eye after black eye as more wrongful prosecutions and convictions which occurred over the past several decades come to light.

A conviction whose foundation rested upon perjured testimony which was personally vouched for as truthful and significant evidence by the prosecutor offended due process and compromised John's right to a fair trial. Combined with all of the other misconduct and flaws which surrounded this case, each additional day that John Giuca remains wrongfully convicted and incarcerated will result in another black eye for Brooklyn's criminal justice system.

In these circumstances, justice compels the DA to act. We are confident that your review of this case will lead you to the conclusion that John Giuca has been wrongfully convicted and that his conviction must be vacated.

Dated: February 1, 2014
New York, New York

/s/ Mark A. Bederow

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