APL-2018-00123

Court of Appeals
of the
State of New York

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

– against –

JOHN GIUCA,

Respondent.

BRIEF FOR AMICI CURIAE IN SUPPORT OF RESPONDENT

BARRY C. SCHECK
CO-FOUNDER AND SENIOR COUNSEL
NINA R. MORRISON
SENIOR STAFF ATTORNEY
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, New York 10013
(212) 364-5340
bscheck@innocenceproject.org
nmorrison@innocenceproject.org

JOHN C. SCHOEFFEL
STAFF ATTORNEY
SPECIAL LITIGATION & TRAINING
THE LEGAL AID SOCIETY
Criminal Defense Practice
199 Water Street
New York, New York 10038
(212) 577-3367
jschoeffel@legal-aid.org

JOEL B. RUDIN*
VICE-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
152 West 57th Street, 8th Floor
New York, New York 10019
(212) 752-7600
jbrudin@rudinlaw.com

**Attorney of Record for Amici Curiae National Association of Criminal Defense Lawyers, Innocence Project, American Civil Liberties Union, New York Civil Liberties Union, New York State Association of Criminal Defense Lawyers, Legal Aid Society, Bronx Defenders, Center for Appellate Litigation, Office of the Appellate Defender, and Chief Defenders Association of New York*

(See inside cover for additional appearances)

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APPELLATE INNOVATIONS
(914) 948-2240

SOMIL TRIVEDI
STAFF ATTORNEY
AMERICAN CIVIL LIBERTIES UNION
915 15th Street, NW
Washington, DC 20005
(202) 715-0802
strivedi@aclu.org

PHILIP DESGRANGES
SENIOR STAFF ATTORNEY
CHRISTOPHER DUNN
LEGAL DIRECTOR
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300
pdesgranges@nyclu.org
cdunn@nyclu.org

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PRELIMINARY STATEMENT

Based upon the work of Chief Judge DeFiore's State Justice Task Force, last year New York required judges across the state to issue a "*Brady* order" in virtually every criminal case. *See* Model Order Pursuant to Administrative Order 291/17 of the Chief Administrative Judge of the Courts, available at https://www.nycourts.gov/press/pdfs/pr17_17.pdf. The new rule and accompanying Model Order require timely disclosure of various categories of exculpatory and impeachment information, "including (i) benefits, promises, or inducements, *express or tacit*, made to a witness by a law enforcement official, … [and] (iv) information that *tends to show* that a witness has a motive to lie … or a bias … in favor of the … prosecution." *Id.* (emphasis added). "Favorable information" must be disclosed "irrespective of whether the prosecutor credits the information." *Id.* The new rule is intended to reduce the risk of wrongful convictions which, the Task Force recognized, *Brady* violations all-too-often cause. *See* New York State Justice Task Force, *Report on Attorney Responsibility in Criminal Cases*, February 2017, at 3, available at http://www.nyjustice

taskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf ("Task Force Report").

Significantly, the Task Force Report and the Model Order break no new ground concerning the types of favorable information that must be disclosed, but merely implement "the prosecutor's constitutional obligations … under the United States and New York State constitutions…" Task Force Report at 7-8. The new model rule is intended to serve as a "useful educational tool," "create a culture of disclosure," and "serve as a reminder for more experienced prosecutors regarding their disclosure obligations…" *Id.* at 7.

In this appeal, the People's proposed application of *Brady* and its progeny would hobble the Chief Judge's new rule right out of the starting gate. The People contend, contrary to the rule's explicit text requiring disclosure of "information that *tends to show* that a witness has a motive to lie," that prosecutors need disclose only when (a) there is an "actual" agreement for a benefit or (b) the witness communicates to the authorities "an expectation or hope" for a benefit. People's Br. 37-39. Notwithstanding the rule's requirement of disclosure "irrespective of whether the prosecutor credits the information," the People contend

that prosecutors need not disclose evidence suggesting motive where the prosecutor believes such an inference would be "false[]." *Id.* at 41. And, contrary to *People v. Vilardi*, 76 N.Y.2d 67 (1990), the People advocate a "backwards-oriented" standard of review under which, in the rare case where they are caught having suppressed favorable evidence, they can rely upon still more information they never presented at the original trial to argue that the favorable information they suppressed wasn't "material." *See* People's Reply Br. 1-12. What the People advocate, in effect, is *trial by prosecutor* in place of *trial by jury*.

Shifting to the prosecutor the jury's function of assessing a witness's motive to lie is even more threatening to a defendant's right to a fair trial where, as here, the witness is a jailhouse informant. According to "[m]ost studies, nearly 50% of wrongful murder convictions involve perjury by someone such as a 'jailhouse snitch' or a witness who stood to gain from giving false testimony." New York State Bar Association, *Final Report of the New York State Bar Association's Task Force on Wrongful Convictions*, Apr. 4, 2009, at 114, available at https://www.nysba.org/wcreport/; *see also* Northwestern U. Sch. of Law,

Ctr. on Wrongful Convictions, *The Snitch System*, 2005, at 3, available at http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/SnitchSystemBooklet.pdf (finding that a staggering 45.9% of death row exonerations involved false testimony by an informant). The Second Circuit has noted that jailhouse informant testimony "is oftentimes partially or completely fabricated" and that its use "to obtain convictions may be 'one of the most abused aspects of the criminal justice system.'" *Zappulla v. New York*, 391 F.3d 462, 470 n.3 (2d Cir. 2004) (internal citations omitted); *see Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123-24 (9th Cir. 2001) (such testimony is "fraught with … peril"). Even the trial prosecutor in this case conceded her own general "skeptic[ism]" regarding such testimony and that her homicide bureau chief, as a matter of policy, wouldn't use it. A678.[1]

The symbiotic relationship that usually develops between jailhouse informants and their prosecutor-handlers makes particularly insidious the People's effort to claim an exclusive function to evaluate such informants' motives to lie. As one commentator has noted:

[1] References to the Appendix will be preceded by "A".

> [P]olice and prosecutors are heavily interested in using informants … to make their cases. As a result, they often lack the objectivity and the information that would permit them to discern when informants are lying. This gives rise to a disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it.

Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 108 (2006).

This Court, and others, as we discuss below, have made clear for decades that it is *the jury's* role—not simply the prosecutor's—to evaluate the truthfulness and the significance of evidence that favors the defense. "To allow otherwise would be to appoint the fox as henhouse guard." *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006). Our organizations, and our clients, know all too well what happens when the "fox" appoints herself "henhouse guard." If we as a society are to make further progress in remedying and preventing wrongful convictions, the People's appeal should be rejected and the Appellate Division's decision affirmed.

INTEREST OF AMICI CURIAE

Amici curiae National Association of Criminal Defense Lawyers, New York State Association of Criminal Defense Lawyers, Innocence Project, American Civil Liberties Union, New York Civil Liberties Union, The Legal Aid Society, Bronx Defenders, Center for Appellate Litigation, Office of the Appellate Defender, and Chief Defenders Association of New York are leading national, state, and local public interest organizations that defend civil liberties, the rights of persons accused of crimes, and the interests of wrongfully convicted persons in asserting their constitutional rights. We share a concern that the arguments made by the Brooklyn District Attorney's Office in this case would undermine the Chief Judge's new *Brady* disclosure rules as well as case law, spanning a half-century, that is intended to protect criminal defendants against unfair trials and wrongful convictions.

STATEMENT OF FACTS

The trial and 440 proceedings relevant to his appeal are set forth in the parties' merits briefs. Because the People's Brief obscures the most critical facts concerning the "cooperation" of the jailhouse informant-witness, John Avitto, we review those facts in detail.

Trial Testimony of John Avitto

John Avitto was on prosecutor Anna-Sigga Nicolazzi's witness list, but she did not mention him in her opening statement, did not decide to call him until the trial was almost over, and then disclosed only his conviction record. A663, 668. Defense counsel was able to secure a one-day continuance so that he could attempt to retrieve Avitto's available court files. A1690-91.

Avitto's testimony represented a significant change in theory from the People's opening statement and its witnesses' testimony. The People's theory was that Giuca gave Antonio Russo a gun which Russo used to rob and shoot Mark Fisher after Russo alone had accompanied Fisher to an ATM machine to withdraw money. Contrary to this story, however, Avitto claimed that Giuca, at Rikers Island, confessed that Giuca also went with Russo and Avitto to the ATM machine, also participated in punching and kicking Avitto, and also was present when Russo grabbed a gun from Giuca and shot Fisher. A1720-21.

During his direct testimony, Avitto testified that he was "doing really well" in a drug treatment program to which he had been "sentenced" for a recent burglary conviction. A1714, 1730. He testified

that he left the program on June 9, 2005, without authorization, but took care of the matter himself by calling his caseworker, voluntarily appearing in court on June 13 to answer a warrant, and obtaining his release to another program. A1731. Prosecutor Nicolazzi elicited his unequivocal denial that he was "ever given anything," "promised anything," or "asked for anything," "in exchange for" his testimony. A1731. Avitto testified he first spoke with police in "June," but Nicolazzi left unclear when this was in relation to his unauthorized departure from the program. A1752.

On cross-examination, defense counsel tried to demonstrate a connection between Avitto's fear of imprisonment for leaving the program and his cooperation in this case. Avitto acknowledged that, when he pleaded guilty, the judge told him that he faced 3 ½ to 7 years if he didn't stay in the drug program, A1745, but he denied that he contacted the police immediately after leaving the program on June 9, A1752, 1756, and denied that his release by the court on June 13 and 16, and September 2 and 6—each time after he had violated a condition of his release—had anything to do with his cooperation. A1746-49. He swore that "if the cops … or … the DA did anything, it was not [to] my

knowledge," and that his case had "nothing to do with why I went to the police or the DA." A1750.

On redirect, Nicolazzi drove home the lack of any relationship between Avitto's judicial treatment and his assistance in Giuca's prosecution. She elicited from Avitto that, after he left his drug program on June 9, he went to the office of his drug counselor, Sean Ryan, after which "*we* [Avitto and Ryan] walked over to the court," where "Ryan and *the DA* came up to the judge." A1758 (emphasis added). To emphasize the lack of connection to this case, Nicolazzi led Avitto to clarify that it was "not this judge" he appeared before, while never asking him for the identity of "the DA." A1758.

Following Avitto's testimony, defense counsel complained that he had received no *Rosario* material for this witness. Nicolazzi then affirmatively vouched there was none, representing to the court: "I was present for *all those interviews*, there was never anything documented, there [were] never any notes taken." A1761 (emphasis added).

When defense counsel asked for a charge that Avitto had gotten "consideration," Nicolazzi opposed it because there was "absolutely no evidence before this jury … that there was any consideration at all" and

"he [defense counsel] knows there hasn't been." A1876. The defense application was denied.

During his summation, defense counsel urged the jury to infer from the chronology of events that there was a relationship between Avitto's decision to come forward months after Giuca's alleged confession, Avitto's legal difficulties, and Avitto's successful avoidance of a remand in his own case. But the only supportive fact he could cite was that the police and some unidentified ADA were in court with Avitto on June 13. A1916-17. Otherwise, counsel's argument was pure conjecture.

Nicolazzi then devoted more than a third of her summation—17 out of 48 transcribed pages—to Avitto's substantive testimony accusing Giuca and what she repeatedly contended was Avitto's lack of any conceivable motive to lie. A1007-23. She vouched that he had been "very honest about his problems." A1957. She argued there was "no evidence" he got any type of "consideration" and exploited her credibility with the jury by "promising" that, if there had been any, she wouldn't have hidden it. A1966-67. She argued it was "not surprising" the judge gave Avitto multiple chances because he had "act[ed] responsibly" and

had a history of abuse as a child. A1967. To believe the defense argument that Avitto received consideration, she contended, the jury would have to conclude that "the DA …, the police … and even the judge" secretly conspired against the defense. A1968. No, she argued, "for once he [Avitto] tried to do something right and for that [defense counsel] wants you to condemn him." A1968-69. She denounced counsel for engaging in "wild speculations … based on no evidence … in the record…" A1969.

The jury convicted Giuca of felony-murder, he received a sentence of 25 years to life in prison, and his direct appeal was denied.

CPL 440 Hearing Regarding Avitto's Motive to Lie

In March, 2015, Giuca moved to vacate his conviction based upon new evidence of *Brady* violations, including newly-obtained transcripts from Avitto's case and newly-disclosed drug treatment ("EAC") records. A hearing was granted.

The hearing evidence included a contemporaneous EAC memorandum from June 13, 2005, which quoted ADA Nicolazzi telling Avitto's EAC case manager, Sean Ryan, that Avitto "had contacted detectives on Thursday, June 9, 2005 stating he had information on a

present murder trial" and that Nicolazzi met him that day. A500; *see also* A508. After detectives brought Avitto to *Nicolazzi's office,* she met with Avitto for the first time, and then she and the detectives (not simply his caseworker) walked Avitto to court. A371, 470, 704.

Hearing testimony showed that, notwithstanding Nicolazzi's argument at trial that it was a foregone conclusion the judge would release Avitto, Nicolazzi and police detective Byrnes discussed with Avitto on their way to court that there was a "good possibility" and "we thought he was going to be remanded," A374, and Avitto thus expected—before Nicolazzi interceded on his behalf—that this would occur. A548. While Nicolazzi, consistent with Office practice, had discretion to seek Avitto's remand, A394, 397, the evidence shows *she took the lead* to bring about his release.

The court transcript from June 13 shows that, although she was not assigned to Avitto's case, Nicolazzi appeared for the D.A.'s Office, told the court this was a "voluntary return on a warrant," and then asked to go "off the record." A2075. Nicolazzi admitted in her testimony that she then told the judge that Avitto was giving information on a homicide case she was handling and that it would be

easier for Avitto to find another program if he was out of jail. A552-55. The contemporaneous notes of Avitto's case manager show that when the case manager observed that placing Avitto in another program would take time, Nicolazzi "explained [to the court] that they wanted to have [Avitto] stay with his mother and report to [the program] and the [defense attorney] agreed." A2523. In other words, Nicolazzi advocated release rather than jailing and Avitto's own attorney merely consented to the relief the prosecutor was seeking. Back on the record, the court vacated the warrant, left Avitto at liberty, and adjourned the matter to the following Wednesday, noting this was what "everyone" was requesting. A2075-76.

Nicolazzi could think of "no reason" for her failure to inform the jury at Giuca's trial that *she* was "the DA" who appeared with Avitto in court to return him on the warrant for his arrest. A704.

The defense introduced another transcript, from June 17, 2005, in which Avitto acknowledged having tested positive for cocaine and the court released him with the warning that the next time he would go to jail. A2078-79. However, after he did test positively again, Avitto's ongoing assistance to the D.A.'s Office helped him, once more, avoid

imprisonment. On September 6, 2005, according to Avitto's case manager's contemporaneous notes, the court stated off-the-record that it would not remand Avitto because it "was unsure of the ADA [Nicolazzi's] stance on the case … [Avitto] is testifying in." A2547. Back on the record, the court allowed Avitto to go into a rehab program. A2083. When asked whether it "sounded like Avitto benefitted for being a witness in your case and that's why he was let go," Nicolazzi agreed to the obvious: "It sounds like the judge was unsure of my stance. She did leave him out for that so, yes, based on the judge's determination that may have been at least part of her reasoning. Again, based on those notes." A606.

The hearing evidence showed that Avitto's cooperation bore fruit a third time on September 19. As Nicolazzi acknowledged, drug program notes showed that Kingsbridge Hospital had told her that it had "discharged" Avitto after catching him trying to smuggle cigarettes into its rehab facility to distribute to other patients. A609. However, the notes showed that, when Avitto appeared in court on this violation, his case manager, accompanied by an ADA, told the court that Kingsbridge now was "willing to take the [defendant] back *due to the open case*."

A2085, 2549 (emphasis added). Back on the record, Avitto himself used his upcoming testimony to obtain leniency, telling the court that "*I'm supposed to be testifying … this week in a murder case*, so I was smoking a lot." A2086 (emphasis added). The court then again acquiesced to the wishes of the D.A.'s office, responding, "Well, *apparently, we're* going to give you another opportunity," and released him. A2086-87 (emphasis added). Program records showed that the case manager "then contacted … ADA Nicolazzi to explain what happened." A2549. In sum, Nicolazzi *knew,* but did not disclose, A475, 488, that Avitto had been kicked out of a drug program but then readmitted, and also that he had still again been released by the court, *solely because of his cooperation*.

The Hearing Court's Decision

Denying Giuca's 440.10 motion, the Supreme Court concluded the defense had failed to prove "there was any *understanding or agreement* between Avitto and the People about conferring any benefits." A14 (emphasis added). It found (contrary to the hearing record) that Nicolazzi did not ask the court to release Avitto on June 13, 2005. A15. Contrary to the hearing testimony that Nicolazzi herself, and Avitto, expected he might be jailed, the court reasoned that Avitto's release was

not a benefit because most defendants in Avitto's shoes are given additional chances. A16. Even if Avitto's release on June 13 is viewed as a benefit, it found, there is no "reasonable possibility" the failure to disclose this fact affected the verdict. A18. Notably, the court did not discuss any of the events subsequent to June 13 or whether there was evidence of a "tacit," as opposed to an explicit, agreement.

The Appellate Division's Decision

The Appellate Division reversed the hearing court on the law and "on the facts." *People v. Giuca*, 158 A.D.3d 642, 642 (2d Dep't 2018). Its factual findings, which are binding on this Court, included the following:

1) Avitto left the drug program on June 9, 2005, and contacted detectives *the same day* to provide information on Giuca's case;
2) Avitto met with detectives and the prosecutor (Nicolazzi) on June 13 and, after he informed them there was a warrant for his arrest, they accompanied him to court;
3) The prosecutor informed the court Avitto was "cooperating in a murder investigation";

4) The prosecutor spoke with the caseworker and the court about permitting Avitto to enter another drug program and reside with his mother, after which Avitto was released;

5) Contrary to his testimony that he had done "really well" in his drug program, Avitto "violated the conditions of his plea agreement on numerous occasions" and was discharged from one facility for smuggling in cigarettes and distributing them to other patients;

6) There were "several court appearances related to violations" by Avitto of the rules of his various drug programs and his conditions of release;

7) During "at least one" of these court appearances "the issue of Avitto's cooperation and upcoming testimony was mentioned";

8) The District Attorney's office emailed the agency overseeing Avitto's drug treatment requesting his case be marked "'for special attention'" and that the D.A.'s Office "be kept posted as to his progress";

9) Avitto managed to "remain out of custody despite poor progress in his drug treatment and numerous violations," and

10) None of the above information was disclosed to the defense even though it had made a specific request for such types of information.

Id., 158 A.D.3d at 644, 646.

Based on these facts, the court held that there was "'a strong inference' of an expectation of a benefit 'which should have been presented to the jury for its consideration.'" *Id.* at 646, quoting *People v. Cwikla*, 46 N.Y.2d 434, 442 (1979). "[T]he jury could have found that, despite Avitto's protestations to the contrary, 'there was indeed a tacit understanding' between Avitto and the prosecution that he would receive or hoped to receive a benefit for his testimony." *Id.* (quoting *Cwikla,* 446 N.Y.2d at 441).

The court further held that the prosecutor had failed her obligation to correct "misleading or false testimony given by Avitto at trial regarding his contact with detectives and the prosecutor and his progression in drug treatment" and instead "reiterated and emphasized

Avitto's misleading testimony during summation," thereby compounding the prejudice. *Id.* at 647.

While the court noted it was giving "proper" deference to the hearing court's credibility findings, it concluded, based upon its own factual determination, that there was a reasonable possibility that the prosecution's errors affected the jury's verdict, and it reversed the conviction. *Id.*

ARGUMENT

A PROSECUTOR MAY NOT WITHHOLD KNOWLEDGE FROM THE DEFENSE OF CIRCUMSTANTIAL EVIDENCE FROM WHICH A JURY MIGHT REASONABLY INFER THAT A PROSECUTION WITNESS HAS A MOTIVE TO LIE SIMPLY BECAUSE THE PROSECUTOR BELIEVES SUCH A DETERMINATION WOULD BE 'FALSE', NOR MAY IT EXCUSE ITS ERROR YEARS LATER BY CITING EVIDENCE THAT ALSO WAS NEVER PRESENTED OR VETTED AT THE TRIAL

A. Evidence of Motive Must be Disclosed So That Defense Counsel Can Investigate and Present that Evidence and *the Jury*—as Opposed to the Prosecutor—May Determine Its Significance

The Appellate Division's factual findings and the hearing record itself strongly support the Appellate Division's holding that the People deprived John Giuca of his constitutional right to due process and a fair

trial. The court correctly found that the People improperly withheld evidence from which a jury could have readily inferred that John Avitto had a strong motive to lie and then deceived that body by eliciting, failing to correct, and exploiting Avitto's false or misleading testimony. The D.A.'s Office repeatedly assisted Avitto in obtaining his release each time he faced an arrest warrant for leaving or violating the rules of his drug treatment program, including persuading one program that had expelled him to rescind its punitive action. These were valuable benefits, suggestive of a tacit agreement, which gave this drug-addicted, psychologically disturbed, manipulative young man ample reason to continue angling for future favors while repaying past ones.

The People acknowledge that a tacit agreement, no less than an express one, must be disclosed under *Brady,* and appear to concede that a witness's "expectation or hope … he would receive a benefit" must be revealed as well. People's Br. 37, 39. However, they argue that evidence implying a tacit agreement or that a witness expects or hopes for a benefit need not be disclosed where the prosecutor has personally concluded that no such agreement or expectation "actually" exists, for

such disclosure then would risk a jury finding that is "false" and thereby defeat the "truth-seeking process." *Id.* at 40-41.

The People's position is directly contrary to the plain terms of the Chief Judge's new "Brady order"—and the case law upon which it is based—requiring disclosure of "benefits, promises, or inducements, *express or tacit*, made to a witness by a law enforcement official, … [and] (iv) information that *tends to show* that a witness has a motive to lie to inculpate the defendants, or a bias … in favor of the … prosecution," "irrespective of whether the prosecutor credits the information." Model Order Pursuant to Administrative Order 291/17 of the Chief Administrative Judge of the Courts, available at https://www.nycourts.gov/press/pdfs/pr17_17.pdf. It is for a fully-informed jury to evaluate the witness's credibility, not just the prosecutor. More than a half-century of State and Federal case law refutes the People's contentions.

We start with this Court's seminal decision in *People v. Rosario*, 9 N.Y.2d 286 (1961). There, the Court abandoned the New York rule that the prosecution must disclose only those prior statements of a witness the prosecution believes are materially inconsistent with the witness's

trial testimony. In its place it held that *all* prior recorded statements relevant to the subject matter of a witness's testimony must be turned over because "single-minded counsel for the accused," not the trial court or the prosecutor, is the best judge of what information is useful for the defense "for impeachment purposes." *Id.* at 290.

Rosario was followed by *People v. Cwikla,* 46 N.Y.2d 434 (1979). In reversing the defendant's murder conviction, this Court reasoned that "the jury could have found that, *despite the witness' protestations to the contrary,* there was indeed a tacit understanding between the witness and the prosecution, *or at least so the witness hoped*." *Id.* at 441 (emphasis added). It rejected as misleading, and as "misconduct," the prosecutor's position at trial that *in fact* the witness "received no consideration from the Parole Board in return for his testimony." *Id.* at 442 (emphasis added). The Court reasoned that, even though there had been no "express promise, there is nonetheless a strong *inference,* at the very least, of an expectation of leniency which should have been presented to *the jury* for its consideration." *Id.* (emphasis added). This analysis exactly fits this case.

On the heels of *Cwikla,* in *People v. Geaslen,* the Court held that a document that is "*on its face* inconsistent with [evidence] adduced by the prosecution" at a suppression hearing must be disclosed, regardless of whether, "on further interrogation and clarification," it might be harmonized with the People's case. 54 N.Y.2d 510, 515 (1981) (emphasis added). How much weight to give the favorable evidence was for the fact-finder to determine.

Geaslen was followed by *Vilardi* itself. In applying against the People a more stringent materiality standard than under Federal law where the People have failed to comply with a defendant's specific request for *Brady* material, the Court rejected "a backward-looking, outcome-oriented standard of review that gives dispositive weight to the strength of the People's case" and provides "diminished incentive" for a prosecutor to make timely disclosure. 76 N.Y.2d at 77. The Court reasoned that the more lax federal standard it was rejecting would "significantly diminish[] the vital interest this court has long recognized in a decision *rendered by a jury*…" *Id.* at 77-78 (emphasis added). It held that the failure to disclose specifically-requested information will "seldom, if ever, be excusable." *Id.* at 77.

Soon after *Vilardi* came another crucially important case, *People v. Baxley*, 84 N.Y.2d 208 (1994). There, the People defended their failure to disclose a non-testifying witness's recantation because *the prosecutor "believed [it] was perjurious*." *Id.* at 212 (emphasis added). The Court firmly rejected this position, just as it should do now. "[N]ondisclosure," it held, "cannot be excused merely because the trial prosecutor genuinely disbelieved [the witness's] recantation." *Id.* at 213-14 (emphasis added). *See also People v. Behling*, 26 N.Y.2d 651, 652 (1970) (prosecutor required to disclose witness recantation regardless of prosecutor's opinion of its credibility).

People v. Wright, 86 N.Y.2d 591 (1995), reinforced the principle that *circumstantial evidence of motive* must be disclosed so that the defense may develop its argument that the witness's testimony is not credible. In that case, the People failed to disclose that a witness had a history of operating, in prior cases, as a police informant. In reversing the conviction, the Court reasoned that this evidence would have allowed the defense to argue that police officers who favored the witness's side of a dispute over the defendant's had an external motive

to do so. *Id.* at 596-97. In other words, whether to find motive, and what weight to give such a finding, was for the jury, not the prosecutor.

Also close to this case is *People v. Bond*, 95 N.Y.2d 840 (2000). There, the People defended their failure to disclose that the sole eyewitness to the murder had twice told police, the night of the shooting, that she had not seen it, on the basis of her 440 hearing testimony that she had been afraid to get involved and "*the statement was untrue*." Respondent's Brief, *People v. Bond*, 2000 WL 34065289, at *37 (May 17, 2000) (emphasis added). Applying the *Vilardi* standard, this Court unanimously reversed the conviction. It reasoned that the People had improperly "denied [the defense] the opportunity to challenge the credibility of the People's key witness as a liar" and there was a reasonable possibility that the undisclosed evidence would have affected the verdict of the jury. 95 N.Y.2d at 843.

In *People v. Colon*, 13 N.Y.3d 343 (2009), the defendant's homicide prosecutor failed to reveal that, like Ms. Nicolazzi, she had appeared for the People at an off-the-record bench conference and conveyed a favorable plea offer to resolve the witness's Special Narcotics case. The People argued that, because the homicide prosecutor had merely acted

as a conduit for another office's plea offer which she had no role in formulating, the witness's testimony, and the prosecutor's summation argument, that she didn't have "anything to do" with the plea offer, was truthful. However, this Court concluded that the People's position at trial had been "misleading" if not downright "false." *Id.* at 349-50. The events should have been revealed because there was "a basis for *the jury* to question the veracity of [the] witness *on the theory* that the witness may be biased in favor of the People." *Id.* at 350 (emphasis added).

In a significant footnote, the *Colon* Court reinforced that it was for *the jury* to decide how to construe underlying circumstances suggestive of a motive to lie. Despite the hearing court's finding "that *neither the police nor the prosecutor intended* to benefit [the witness]" when they decided not to arrest him for possessing a gun in his hotel room, such evidence should have been disclosed to the defense so that it could make argument before the jury. *Id.* at 350 n.4 (emphasis added).

Federal law regarding a prosecutor's subjective credibility assessment is the same as in the State. In *DiSimone v. Phillips*, 461 F.3d 181 (2d Cir. 2006), the Second Circuit granted habeas relief where a state prosecutor had failed to disclose in a murder case that a third

party had confessed to police that he had been the initial stabber. The court rejected, "as wholly without merit," the State's argument that the prosecutor acted properly after determining the statement was a "lie". *Id.* at 194-95. "[I]f there were questions about the reliability of the exculpatory information," the court reasoned, "it was the prerogative of the defendant and his counsel – and not of the prosecution – to exercise judgment in determining whether the defendant should make use of it. … *To allow otherwise would be to appoint the fox as henhouse guard*." *Id.* at 195, citing *Mendez v. Artuz*, 303 F.3d 411 (2d Cir. 2002) (citations omitted) (emphasis added). *See also Davis v. Alaska*, 415 U.S. 308, 320 (1974) (defense has constitutional right to impeach by showing circumstances implying witness was influenced by hope of immunity); *United States v. Padgent*, 432 F.2d 701, 705 (2d Cir. 1970) (although a government witness denied any agreement or benefit, the defense had a constitutional right to prove facts tending to suggest otherwise).

In sum, the People are wrong that ADA Nicolazzi was entitled to withhold the events surrounding Avitto's repeated release by the court, despite his multiple violations of his drug treatment program, because she believed Avitto lacked a motive to lie and he denied such a motive

as well. The test is whether there is a reasonable possibility that *the jury* would have reached a more defense-favorable outcome had it known the underlying circumstances, regardless of whether the prosecutor would have disagreed with any such judgment. Neither the defense nor, ultimately, the jury must accept the self-serving conclusions of a prosecutor or the denials of that prosecutor's jailhouse informant-witness.

B. The People Should Not be Permitted to Rely Upon Information They Never Used at Trial to Defeat the Materiality of Defense-Favorable Evidence They Suppressed

The People seek to save this conviction by weakening the materiality rules this Court and the federal courts have applied under *Brady* and *Vilardi*.[2] They excuse their withholding of motive evidence because of additional information they first disclosed ten years after

[2] The People contend that the more stringent federal materiality standard applies, denying that there was a "specific request" under *Vilardi*. This position would appear to be waived: following the evidentiary hearing, defense counsel pointed out that the People did not appear to dispute that there had been a specific request and that *Vilardi* applied, the People did not disagree, and the hearing court appeared to apply the *Vilardi* standard. A875-76, 883, 887. The Appellate Division briefs show that when the defense argued on appeal that *Vilardi* applied, the People again did not disagree. Whichever standard applies, the People's approach to materiality should be rejected.

trial that hypothetically would undercut the probative value of the withheld evidence. However, their position conflicts with state and federal law holding that the materiality of undisclosed *Brady* material must be determined by evaluating its potential effect on the *jury* in the context of *the trial record*—not additional evidence that the jury never considered. *See, e.g.,* Respondent's Br. 41 (and cases discussed therein).

The evidence upon which the People rely is the testimony at the 440 hearing of two police officers that Avitto first came forward and spoke with them about Giuca before he left his drug program on June 9, 2005. If Avitto came forward before he was facing imprisonment for leaving the drug program on June 9, the logic goes, the benefits he received afterwards are of diminished significance.

This argument is belied by the People's own conduct at trial. The defense *did* challenge Avitto's post-June 9 statement and testimony inculpating Giuca as recent fabrications, so if ADA Nicolazzi thought evidence predating June 9 diminished his alleged motive to lie, she would have introduced it. In fact, the Appellate Division found that it was "after Avitto left the drug program on June 9 … [that] he contacted

police." *People v. Giuca*, 158 A.D.3d at 644.[3] Since the People's argument rests on a rejection of the Appellate Division's factual finding, this Court lacks jurisdiction to review it.

Even if the Court elects to reach this issue, it should resoundingly reject the People's effort to water down *Brady* by erecting a new, retrospective excuse for non-compliance with that constitutional rule. *Vilardi* itself rejects "a backward-looking, outcome-oriented standard of review" that would provide "diminished incentive" for a prosecutor to make timely disclosure. 76 N.Y.2d at 77. It would be bad enough to apply such a standard based upon evidence presented at trial; it would be a lot worse to apply it based upon extra-record evidence, scrounged

[3] Ample evidence supports this finding. Vouching at trial for the non-existence of any interview notes regarding Avitto by *anyone,* ADA Nicolazzi represented that she had been present for *every* interview of this witness, *see* p. 9, *supra*, yet she testified at the 440 hearing, and told the EAC caseworker, that the first such interview occurred on June 13, that is, *after* Avitto had left his drug program. *See* pp. 11-12, *supra*. Had police officers interviewed such an important new witness for the first time, they would have prepared a DD5 or taken notes, but no such record exists. A361-62, 808, 810. Finally, there is Nicolazzi's failure to introduce Avitto's purported prior consistent statement to refute the defense argument of recent fabrication. The People's speculation that perhaps the officers working on this case didn't tell Nicolazzi about their bombshell new witness is not credible. *See* People's Reply Br. 8. Equally unreliable is the People's reliance on Avitto's out-of-court, unsworn statement to a defense investigator, during an initial interview, ten years after trial, when he was still defending his trial testimony, that he first came forward before June 9. *See id.* at 4-6.

up years later, which the People had every reason to use at trial but didn't.

Prosecutors already know that, if they suppress evidence that is facially favorable to the defense in order to enhance their chance to win the case, discovery by the defense of their misconduct is extraordinarily unlikely. Criminal defendants have no post-trial right to discovery and no right to counsel on collateral attack. For every John Giuca fortunate enough to be able to retain counsel to reinvestigate his case, there are dozens of inmates, untrained in the law, without counsel, lacking funds with which even to order old transcripts, and geographically isolated from the locus of their alleged crime, who must somehow reinvestigate their case from their prison cell. Add to this the ability to excuse non-compliance with new evidence that could have been used at trial but wasn't and prosecutors' incentive to comply with *Brady* would be reduced further still.

The central point of *Rosario,* the central point of *Vilardi,* and the central point of *Brady* and its progeny, is that information that favors the defense must be disclosed in a timely fashion *at trial* so that skilled defense counsel can present it to *the jury.* If the People believe that

evidence that facially favors the defense ultimately would not make a difference because of other evidence they possess, they should disclose or use everything. Any other rule would replace our system of trial by jury with an inquisitorial system of trial by prosecutor—contrary to our State and Federal Constitutions.

Also concerning to *amici is* the People's further materiality argument that the undisclosed motive evidence doesn't matter because the defense already had the opportunity to impeach Avitto's motive. This argument fails because of the evident harm the prosecutor's belated, incomplete disclosure caused the defense. The prosecutor told the defense nothing about Avitto until she called him to the stand, and then disclosed only a single page listing his criminal convictions. With more advance notice, any conscientious defense lawyer would have obtained Avitto's court transcripts and corrections, drug treatment, probation, and mental health records, but Nicolazzi's late disclosure made this impossible. *See DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006) ("The more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an 'opportunity for use'" [internal citation omitted]). *See also*

Leka v. Portuondo, 257 F.3d 89 (2d Cir. 2001) (granting habeas relief due to Brooklyn D.A.'s late *Brady* disclosure); *People v. Wagstaffe*, 120 A.D.3d 1361, 1363 (2d Dep't 2014) (vacating conviction because Brooklyn D.A.'s last-minute evidence dump prevented the defense from recognizing and utilizing impeachment material). Having prevented the defense from uncovering the motive evidence she had withheld, Nicolazzi then ridiculed defense counsel's summation argument about Avitto's motive to lie as speculative and unproven. The People's cynical argument that the defense did enough to impeach Avitto should be rejected.

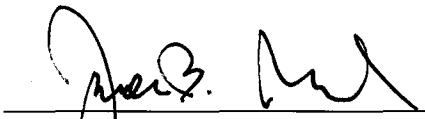
This Court has adopted a materiality rule under which, in a close case, a conviction will be reversed if the People have suppressed impeachment evidence that "would have added a little more doubt to the jury's view … and a little more doubt would have been enough," *People v. Hunter*, 11 N.Y.3d 1, 6 (2008); *see People v. Negron*, 26 N.Y.3d 262, 270 (2015) (same). That rule is a sound one, and there is no reason to depart from it now. The rule is wholly irreconcilable with the People's position that, so long as the defense has presented *some* evidence and argument, however weak, about a witness's motive to lie,

additional evidence that "would have added a little more doubt to the jury's view" is immaterial.

CONCLUSION

The People's arguments concerning their disclosure obligation and the materiality rule would, if adopted, undermine a half century of progress in this state to improve the fairness and accuracy of the criminal trial process. It is this danger that unites our organizations in urging this Court, for the reasons set forth above and in Mr. Giuca's brief, to affirm the Appellate Division's decision, reject the District Attorney's arguments, and grant Mr. Giuca a new trial.

Respectfully submitted,



JOEL B. RUDIN
Vice-Chair, Amicus Committee
National Association of Criminal
Defense Lawyers
Law Offices of Joel B. Rudin, P.C.
152 West 57th Street, 8th Floor
New York, New York 10019
(212) 752-7600
jbrudin@rudinlaw.com

Attorney of Record for Amici Curiae National Association of Criminal Defense Lawyers, Innocence Project, American Civil Liberties Union, New

York Civil Liberties Union, New York State Association of Criminal Defense Lawyers, Legal Aid Society, Bronx Defenders, Center for Appellate Litigation, Office of the Appellate Defender, and Chief Defenders Association of New York

BARRY C. SCHECK
Co-Founder and Senior Counsel
NINA R. MORRISON
Senior Staff Attorney
Innocence Project, Inc.
40 Worth Street, Suite 701
New York, New York 10013
(212) 364-5340
bscheck@innocenceproject.org
nmorrison@innocenceproject.org

JOHN C. SCHOEFFEL
Staff Attorney
Special Litigation & Training
The Legal Aid Society
Criminal Defense Practice
199 Water Street
New York, New York 10038
(212) 577-3367
JSCHOEFFEL@LEGAL-AID.ORG

SOMIL TRIVEDI
Staff Attorney
American Civil Liberties Union
915 15th Street, NW
Washington, DC 20005
(202) 715-0802
strivedi@aclu.org

PHILIP DESGRANGES
Senior Staff Attorney
CHRISTOPHER DUNN
Legal Director
New York Civil Liberties Union
Foundation
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300
pdesgranges@nyclu.org
cdunn@nyclu.org

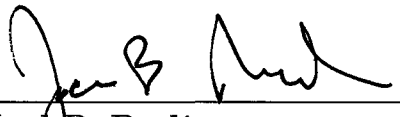
New York, New York
April 1, 2019

Joel B. Rudin
(On the brief)

Barry C. Scheck
Nina R. Morrison
John C. Schoeffel
(Of counsel)

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using Microsoft Word, using 14-point Century Schoolbook font. According to that software, this brief contains 6,635 words, not including the cover, corporate disclosure statement, table of contents, table of authorities, signature blocks, and this certificate.



Joel B. Rudin
Vice-Chair, Amicus Committee
National Association of Criminal
Defense Lawyers
Law Offices of Joel B. Rudin, P.C.
Carnegie Hall Tower
152 West 57th Street, 8th Floor
New York, New York 10019
(212) 752-7600
jbrudin@rudinlaw.com