SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : CRIMINAL TERM, PART 36

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JUNIOR MALDONADO,

Defendant.

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POST-HEARING MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE THE VERDICT

Indictment # 70208-20

JASON L. RUSSO, ESQ., respectfully submits this post-hearing memorandum on behalf of the Defendant, JUNIOR MALDONADO, following the defense's prior motions and the evidentiary hearing held in this case.

PRELIMINARY STATEMENT

Before this Court is the Defendant's motion to set aside the verdict and grant a new trial pursuant to CPL § 330.30. An evidentiary hearing was held upon the Defendant's motion on November 28, 2023. At the conclusion of the hearing, this Court directed the parties to submit arguments upon written submissions.

For the reasons set forth herein, the defense respectfully submits that this Court should grant the motion in its entirety due to the People's willful and deliberate suppression of Brady/Giglio material prior to trial. Additionally, this Court should impose a sanction pursuant to Article 245 of the Criminal Procedure Law based upon the People's failure to provide all mandatory discovery prior to trial and for falsely certifying compliance with mandatory discovery.

FACTS[1]

The evidence at the trial and the November 28, 203 hearing upon the Defendant's CPL § 330.30 motion established the following facts:

On August 15, 2020, Jerry Navarette attended a house party in Westbury, Nassau County, and saw his friend Alexis Gonzalez-Sanchez there. (T:115). He saw four young men at the party that he did not know, which he described as being in their early 20s, one wearing a black short with jeans, one wearing a black shirt with a hat turned backwards, and one whom he described as having a "little mushroom hair." (T:119).

At approximately 1:00 a.m., Gonzalez-Sanchez went to the bathroom, and Navarette noticed a crowd gathering outside of the house. (T:121-122). Both Navarette and Gonzalez-Sanchez exited the house, and Navarette saw two separate fights taking place outside, one near an adjacent parking lot. (T:122). In that second fight, which involved 10-12 people, one man had a gun, swinging it from side to side and warning anyone that got close would be shot. (T:124-126). Navarette described a chaotic scene involving a total of about 40 people fighting between the two fights, making it difficult for Navarette to identify who was doing what. (T:161). Navarette turned around to take his wife away from the scene, and heard two gunshots. (T:127).

Navarette did not witness the shooting itself and had no knowledge as to how it happened. (T:152, 164). Navarette assumed the same person he claimed to have seen waving the gun was the person who fired the shots, but was not sure. (T:176). At trial, Navarette identified the Defendant as the person waving the gun around threatening to shoot anyone who got close to him. (T:126-127).

[1] A copy of the trial testimony and the November 28, 2023 transcript is attached to this memorandum and made part of the record. References to the trial transcripts will be designated as "T" followed by the corresponding page number, , and references to the November 28, 2023 hearing will be designated "H" followed by the corresponding page number.

After hearing the gunshots, Navarette saw his wife run to a person who was lying on the ground, which was Gonzalez-Sanchez. (T:127). Navarette saw one of the men from the group of 10-12 people, who was wearing a red hooded sweatshirt, and ran after him. (T:129). He tried to grab the person but the other person got into the passenger seat of a car that drove away. (T:130). The person who wore the red hooded sweatshirt was not the same person waving a firearm. (T:171).

Four days after the shooting, a CrimeStoppers reward of $5,000.00 was advertised by the Nassau County Police Department on August 20, 2020 which promised money for information leading to the arrest and conviction of the perpetrator of the shooting. (H:39).

Six days after the CrimeStoppers award was publicly advertised, and ten days after the shooting, Navarette went to the Homicide Squad of the Nassau County Police Department after police called him and asked him to come in and "identify somebody." (T:174). Testimony at trial established that Navarette met with Detective James Malone of the Homicide Squad. (T:208). Upon his arrival, he was handed three envelopes containing photographs, and told by police to "pick one out." (T:137, 175). Navarette opened the first envelope, and the police asked him whether the shooter was in the photograph, and Navarette "identified him right away." (T:137-138).[2]

Defendant was subsequently arrested and indicted for the murder of Alexis Gonzalez-Sanchez in November, 2020. The case was initially assigned to either Assistant District Attorney Tracey Keeton, or Assistant District Attorney Stefanie Palma, before being transferred to the other. The exact order of events is unclear from the record.

[2] Testimony provided by police witnesses established that the photograph depicted Defendant.

In March, 2022, Assistant District Attorney Kirk Sendlein of the Homicide Bureau of the Nassau County District Attorney's Office began working at the Nassau County District Attorney's Office. Prior to that, he had worked for 13 years as an Assistant District Attorney at the Queens County District Attorney's Office. (H:6-10). While at the Queens County District Attorney's Office, he worked for 3 years as a prosecutor in that office's Homicide Bureau. (H:8). Before the instant case, he had conducted more than 30 criminal trials, and had handled numerous homicide cases. (H:37-38).

ADA Sendlein was familiar with the prosecutor's obligations under Brady v. Maryland, and understood the Supreme Court's mandate in that case is "[t]hat if there is material exculpatory evidence, that has to be turned over to the defense." (H:9).

When ADA Sendlein started working at the Nassau County District Attorney's Office in 2022, he was the third prosecutor assigned to the instant case. (H:9). However, he did not start reaching out to witnesses until approximately 1 year after he was assigned to the case – just a few weeks prior to the commencement of this trial. (H:9-10).

When asked whether he had reviewed the entire case file prior to reaching out to witnesses for the first time, ADA Sendlein testified that he "reviewed the majority of it." (H:10).[3] He spoke with witness Jerry Navarette for the first time several weeks prior to the trial by telephone, but testified he did not recall the details of the conversation. (H:11-12). That conversation took place in early February, 2023. (H:11). ADA Sendlein testified that the first conversation was mainly to introduce himself and inform the witness of the necessity of his testimony for the upcoming trial. (H:13).

[3] The People's file included a CrimeStoppers flyer advertising $5,000.00 for information concerning the shooting.

Several days after the initial call, ADA Sendlein called Navarette again, and this time Navarette asked if he was eligible for a $5,000.00 CrimeStoppers reward. (H:14-16). The record is clear that Navarette specifically asked about the $5,000.00 number, not just a reward in general. This second conversation took place approximately 3 weeks before the trial. (H:20). ADA Sendlein testified "I did not take his question to merit any significance at the time." (H:22). ADA Sendlein testified that either in the first call or in a subsequent phone call, Navarette related that his wife had given birth recently, and implied that he needed the money. (H:12-13).

It is undisputed that this conversation was not disclosed to the defense until after the trial and guilty verdict. (H:16).[4]

Immediately after the second telephone conversation with Navarette, ADA Sendlein contacted Detective James Malone, who had worked on the case, of the Nassau County Police Department and inquired about the $5,000.00 CrimeStoppers reward. (H:17, 20). Detective Malone confirmed that there was a $5,000.00 CrimeStoppers reward advertised. Id.

It is undisputed that ADA Sendlein did not disclose this conversation with Detective Malone to the defense prior to trial. Id.

After confirming the $5,000.00 reward with Detective Malone, ADA Sendlein called Navarette back, spoke with him a third time, and discussed the reward:

[4] As ADA Sendlein's testimony revealed, he never bothered to memorialize the conversation until the day after the verdict, March 17, 2023 – approximately 1 month later.

> Q. What did you tell Mr. Navarette regarding the $5,000 reward that he was questioning?
> A. Told him that it's handled by the police department and that these things are handled after trial. That there's no -- I don't know what will happen basically and that these things are determined by the police department. I don't know if he'll get it or not get it but these things are handled by the police department is the gist of what I conveyed.
> Q. Did you tell him that these things are handled after the case is closed?
> A. Yes.

(H:17-18).

It is also undisputed that this third telephone call was never disclosed to the defense prior to trial.

When pressed about these non-disclosures, ADA Sendlein gave the following excuses:

> Q. Didn't he tell you three weeks before that he was interested in getting the $5,000 reward because he just had a child and he spoke to his wife?
> A. Counsel, we had just finished a couple week long trial, I had been given over Brady disclosures regarding the cooperator throughout the course of the trial. I did not eat much, I did not sleep much. I had this conversation after a very emotional verdict an hour afterwards and when he's telling me this, my mind is not exactly harkening back to a conversation I had with him after I had a million conversations -- I'm exaggerating, I shouldn't say a million -- after I had dozens of conversations with many witnesses in preparation for this trial and while this trial was going on, so in that split second when he asked about it, I did not realize what he was talking about. Because that's where my mind was.

(H:25-26).

On a fourth occasion, on a Saturday in February, 2023, Navarette met with ADA Sendlein in person at the District Attorney's Office and again inquired about the reward money. (H:42, 58). At that time, ADA Sendlein informed him that the Police Department handled the reward money.

(H:42, 58). It is undisputed that this in-person visit and discussion about reward money was never provided to the defense.[5]

After these three phone calls and the in-person visit, ADA Sendlein made no effort to determine whether Navarette was promised the $5,000.00 reward he repeatedly asked about.

> Q. Did you ever inquire about how Mr. Navarette found out about the $5,000 reward posted that Malone told you was out there?
> A. **I never asked**.
>
> (H:26) (emphasis added)
>
> Q. And here, in this particular case, you made absolutely no efforts to determine whether or not Mr. Navarette was actually promised the $5,000 he was asking you about prior to the trial?
> A. To my knowledge the only conversation that he had was with me and I did not promise him anything. So the impression I was under was that there was no promise.
> Q. That wasn't the question.
> THE COURT: I just have a question. Is it accurate that a little while ago you testified that **you never asked Detective Malone if he had a conversation with Mr. Jerry Navarette**?
> THE WITNESS: **That's accurate**.
> ...
> Q. **When he told you about the reward or when he asked you about his $5,000 and you confirmed it with Malone, you just put it aside and never addressed anything with it?**
> A. **That's right**. As far as your definition of did anything with it, did I do anything with it? I did not inform you. That's why my answer is no. **No, I didn't do anything with it**.
> ...
> Q. **You took no steps to determine, prior to the trial, whether or not he was actually promised the $5,000 he was asking for**?
> A. **I had no reason to think that he had any conversations with anyone and the answer is no, I didn't follow-up, I didn't ask anyone else if they had conversations with Mr. Navarette regarding it**.
> …
> Q. **You took no steps to determine, prior to the trial, whether or not he was actually promised the $5,000 he was asking for**?

[5] ADA Sendlein omitted the fourth pr-trial conversation, in person, about the reward money from the subsequent March 17, 2023 email to the Court and his Affirmation in Opposition to the defense motion to set aside the verdict. (H:58). The Court and the defense learned about this in-person for the first time during his testimony at the November 28, 2023 hearing.

> A. I had no reason to think that he had any conversations with anyone and the answer is no, I didn't follow-up, **I didn't ask anyone else if they had conversations with Mr. Navarette regarding it**.
>
> (H:29-32) (emphasis added).

When asked point-blank whether Navarette was promised reward money, ADA Sendlein testified:

> Q. **Did you tell him that, sir, you're not getting money to testify? Did you clarify to him, sir, we're not paying you to testify. Did you tell him that?**
> A. **I don't know if I told him that**. I know that's the impression I was under. Given that he talked about how he had helped the police early on in the case. It was never about testifying. It was referenced in a way that, hey, I spoke to the police early on. **The implication being am I eligible for the reward money because I helped early on**. **So I never -- I don't remember ever saying listen, you know you're not getting it for testifying** but the reason why I don't think I ever said that is the conversation that was had prior to the question was about his early cooperation in the case which was all said and done.
>
> (H:61-62) (emphasis added).

Nor did ADA Sendlein contact either Ms. Keeton or Ms. Palma to ask them whether they had information regarding Navarette's expectation of reward money. (H:31-32).

ADA Sendlein did not believe any of the information regarding the three phone calls or the in-person conversation prior to trial constituted Brady or Giglio material that needed to be turned over to the defense prior to trial. (H:27).

ADA Sendlein filed a supplemental Certificate of Compliance pursuant to CPL § 245.50 on February 27, 2023 – approximately 1 week before the start of trial, and after the four conversations regarding the $5,000.00 reward. The February 27, 2023 certificate did not include any information related to ADA Sendlein' s conversations with Navarette or Detective Malone.

Over 1 week later, on March 6, 2023, ADA Sendlein filed a second supplemental Certificate of Compliance pursuant to CPL § 245.50, the same day trial commenced. The March 6, 2023 certificate did not include any information related to ADA Sendlein' s conversations with Navarette or Detective Malone.

After a jury was selected and sworn, the case proceeded to a jury trial on March 6, 2023, prosecuted by ADA Sendlein. The identity of the shooter was the contested, central issue at trial. Jerry Navarette was the sole witness that identified the Defendant as the alleged perpetrator. As the sole identifying witness, the People relied heavily upon Navarette's testimony in their opening argument and summation to the jury. During deliberations, the jury request Navarette's testimony to be read back several times. Following extended deliberations, the jury returned a guilty verdict on March 16, 2023.

The day after the verdict, March 17, 2023, ADA Sendlein called Navarette to inform him about the verdict. (H:18). Immediately, Navarette made two requests – one for the $5,000.00 reward and the return of some sneakers that had been taken into evidence by police. (H:18). ADA Sendlein responded:

> Q. What was your reaction when he first said, What about the $5,000?
> A. **At first I didn't know what he was talking about**. I laughed and then **he said, No. He said, What about the $5,000**?

(H:19).[6]

ADA Sendlein promised to "start filling out the paperwork and get that done for you." Id. He also assured Navarette that he would reach out to the Nassau County Police Department for him regarding the reward money. (H:33). ADA Sendlein then called Detective Malone to ask

[6] This was directly in conflict with his earlier testimony that he had two conversations about a $5,000.00 CrimeStoppers reward with Navarette prior to trial and confirmed the existence of the award with one of the case detectives.

about the $5,000.00 reward, and Detective Malone gave him the information to contact CrimeStoppers to collect the money. (H:32-33). ADA Sendlein was provided with the telephone number to CrimeStoppers, but did not make any calls despite his promise to Navarette. (H:32-33).

That same day, March 17, 2023, ADA Sendlein decided that "[g]iven the events of the 16th I then used my memory to the best of my ability to memorialize the contact that I had with him the second time [in February 2023] when he first mentioned the $5,000 reward." (H:14).

According to ADA Sendlein, there was a question in his mind that Navarette believed he was entitled to $5,000.00 for his testimony, and he "wanted that question answered by you [defense counsel] and the Court." (H:19).

ADA Sendlein then sent an email to the Court and copied defense counsel regarding the conversation with Navarette on March 17, 2023. (H:23). The email exchange is in evidence as People's Exhibit 1 and Defense Exhibit A from the November 28, 2023 hearing.

> In an abundance of caution, I write to inform the court and counsel of the following:
>
> In early February of 2023, approximately three weeks prior to trial, I called Jerry Navarette and had a telephone conversation with him. Mr. Navarette indicated that he would be able to come in to testify, that Alex had been a good friend, and he felt terribly for the family. He also stated that he had just had a child, and after speaking to his wife, wanted to know if he was entitled to reward money. He said that he remembered there was a $5,000 reward. I did not know if there was any reward money or how that worked, and I conveyed that to him. I also had only been in the NCDA's office for approximately 11 months. I also told him I would call someone from the Nassau County Police Department to find out. I called Detective James Malone, who informed me that a reward had been posted and that these things are handled after the case is over. I called Jerry Navarette back and informed him, in sum and substance, that those things are handled by the police department after the case is closed. I never made any promise of reward money. I did not take his question to merit any significance at the time.

> On March 16, 2023, at approximately 7:30 p.m., I called Mr. Navarette to inform him of the jury's verdict, that was reached approximately an hour before. He said that was great news and was happy for Alex's family. He then asked if he could get his sneakers back (his sneakers had been vouchered for evidence). I told him yes. He then asked if he would be getting $5,000. I did not know what he was referring to, so I laughed because I thought he was joking with me. Then he said, no, what about the $5,000? After a couple of seconds, it occurred to me that he was referencing the conversation from early February, prior to trial. I told him I would reach out to NCPD the following week.
>
> On March 17, 2023, I brought these conversations to members of my office immediately upon arriving to work and make these disclosures in an abundance of caution, given the below timeline, which illustrates how the defendant [sic] gave statements to the police prior to any reward ever being posted, and his statements have remained consistent.
>
> On August 16, 2020, Jerry Navarrette gave a statement to NCPD.
>
> On August 18, 2020, Jerry Navarrette gave another consistent statement to NCPD.
>
> On August 20, 2020, the Crimestoppers reward was posted.
>
> On August 26, 2020,Jerry Navarrette identified the defendant in a photo array.
>
> On September 25, 2020, Jerry Navarette testified m the grand jury consistent with his prior statements.
> On March 7, 2020, Jerry Navarette testified at trial consistent with his prior statements and testimony.
>
> Additionally, of note, the Crime Stoppers posting requests the information to "help solve this crime." There is no language regarding the necessity for the information to lead to an 'arrest' or a 'conviction.'"

(**Defense Exhibit A**).

The email omitted the in-person conversation with Navarette, and the third time Navarette asked him about the $5,000.00 reward money, from his email.

ADA Sendlein testified that his motivation in sending the email was to allow the defense to conduct its own investigation into a potential Brady claim:

> I wanted everyone to have this information in case it leads to something. I obviously thought that it would lead to an inquiry. That was my hope, that it would lead to an inquiry. I did not contact Mr. Navarette after that conversation. **I stayed back and I wanted you and your investigator to conduct your investigation**, which you did, and then he called me -- he texted me and then I called him back with another member of my office, Deputy Bureau Chief Daryl Levy, in the office. I did not let Jerry Navarette know anyone was there it was so he could be a witness to the conversation so if you ever wanted to question whether any shenanigans were going on there was a witness there. **I removed myself from the situation** and you could question as to where his mind was **so if you had any question in your mind you could have it answered**. And now we're eight months later.

(H:23-24) (emphasis added).[7]

Subsequently, the defense filed a motion pursuant to CPL § 330.30 to set aside the verdict, arguing that the withholding of this exculpatory material warranted a new trial.

ADA Sendlein submitted an Affirmation in Opposition to the § 330 motion. Like his email, the Affirmation in Opposition submitted by ADA Sendlein omitted any reference to the in-person conversation with Navarette, and the third time Navarette asked him about the $5,000.00 reward money.

In opposing the motion, the People take the position that "if the allegedly impeaching evidence had been turned over to the defendant, defense counsel would have been wise not to ask about it on cross-examination because it would have hurt the defendant, not helped." (People's Affirmation in Opposition, p. 13). The People also claim that "defendant have gained very little, if not nothing, by asking this question," claiming that the defense would have opened the door to

[7] ADA Sendlein repeated that reason in his testimony at the hearing, positing that he conducted no investigation regarding the witness' expectation of the reward because he wanted the defense team to conduct its own investigation and no do "anything to get in the way of **your** investigation." (H:33) (emphasis added).

"a series of consistent statements that would have only strengthened Mr. Navarette's identification."

The People further take the position that there was no prejudice from the Brady/Giglio violation because Navarette's testimony in the Grand Jury was consistent with his trial testimony and "were made prior to the witness's alleged reason to fabricate." (People's Affirmation in Opposition, p. 10).

This Court ordered a hearing to be held on the motion, which took place on November 28, 2023. At the hearing, ADA Sendlein was the sole witness to testify. The March 17, 2023 and subsequent email exchanges were received in evidence as Defense Exhibit A and People's Exhibit 1. At the conclusion of the hearing, this Court directed the parties to submit post-hearing memoranda.

This memorandum now follows.

ARGUMENT

POINT I – BECAUSE THE PEOPLE SUPPRESSED BRADY/GIGLIO MATERIAL PRIOR TO TRIAL AND PREVENTED THE DEFENSE FROM MAKING USE OF IT IN A ONE-WITNESS IDENTIFICATION CASE IN WHICH THE WITNESS HAD EITHER A FINANCIAL INTEREST IN THE OUTCOME OR THE BELIEF THAT HE HAD AN INTEREST, THE VERDICT MUST BE SET ASIDE AND A NEW TRIAL ORDERED

Approximately 60 years ago, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution determined that in criminal cases "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process **where the evidence is material** either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963) (citing United States Constitution, Fourteenth Amendment, § 1).

More than 50 years ago, the Supreme Court extended the rule enunciated in Brady to impeachment evidence. In Giglio v. United States, 405 U.S. 150, 154 (1972), the Supreme Court held that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within' the Brady rule." Giglio at 154 (1972), citing Napue v. Illinois, 360 U.S. 264, 269 (1959).

The New York Court of Appeals has expressly adopted the same Due Process principle, holding that it applies not only under the Federal Constitution, but the New York State Constitution as well. See People v. Simmons, 36 N.Y.2d 126 (1975). The Court has repeatedly held that where the reliability of a witness may be determinative of guilt or innocence, nondisclosure of evidence affecting their credibility falls within the general rule established in Giglio. See People v. Ulett, 33 N.Y.3d 512 (2019), People v. Rong He, 34 N.Y.3d 956, 958 (2019), People v. Fuentes, 12 N.Y.3d 259, 263 (2009), People v. Colon, 13 N.Y.3d 343 (2009).

In Strickler v. Greene, 527 U.S. 263 (1999), the Supreme Court summarized the three elements of a prima facie case of a Brady violation: (1) the material at issue must be favorable to the defense, (2) the prosecution willfully or inadvertently fails to turn over the material to the defense, and (3) prejudice to the defendant occurs as a result. Id.

A. The Suppressed Material is Favorable to the Defense

The definition of "favorable" material provided by the Supreme Court in Brady and Giglio, and by the Court of Appeals, is simple and clear. "Favorable" simply and broadly means evidence that is exculpatory or impeaching in nature. People v. Ulette, 33 N.Y.3d 512, 515 (2019).

A witness' motive to falsify is never collateral. See People v. Green, 156 A.D.2d 465 (2d Dept. 1989), Fisch, New York Evidence § 469. Inquiries regarding bias, interest, or motive to fabricate are always material and may be impeached or contradicted by extrinsic evidence. See People v. Chin, 67 N.Y.2d 22, 29 (1986); Dunbar v. Harris, 612 F.2d 690 (2d Cir. 1979); People v. Beavers, 127 A.D.2d 138 (1st Dept. 1987); People v. Hudy, 73 N.Y.2d 40 (1988); Richardson, Evidence § 491, at 477-478 (Prince 10th ed.). Nor is evidence collateral when it tends to impeach a witness' credibility with respect to the very issues the jury is asked to resolve. People v. Wise, 46 N.Y.2d 321 (1978). "(T)o deny a defendant an opportunity to contradict answers given by a previous witness to show bias, interest, or hostility may deny the defendant's right to confrontation." People v. Green, supra at 465.

People v. Cwikla, 46 N.Y.2d 434 (1979), decided by the Court of Appeals 45 years ago, is particularly instructive on this point. In that case, Cwikla was charged with co-defendant Ford and co-defendant Cox with felony murder, burglary, and related offenses. Cwikla and Cox were arrested but Ford remained at large. Cox pled guilty to Manslaughter in the First Degree prior to

trial Cwikla went to trial, but his conviction was reversed by the First Department as a result of prosecutorial misconduct in 1974. People v. Cwikla, 45 A.D.2d 584 (1st Dept. 1974).

After the conviction was reversed, Ford was apprehended and Ford and Cwikla proceeded to trial. The principal witness at the second trial was Cox, who was serving his sentence. During the course of his direct examination Cox testified that he had been given no promise in consideration for his testimony. On cross-examination he admitted that prior to testifying he had requested the Assistant District Attorney to write to the Parole Board on his behalf, but denied that he had been given any promise for his cooperation. Thereupon defense counsel made an application to the court for the production by the prosecution of any correspondence between the office of the District Attorney and the Parole Board concerning Cox. It was defense counsel's position that such material, if it existed, might be exculpatory as tending to show a motivation to lie on the part of the prosecution's chief witness. The Assistant District Attorney refused either to produce any such materials or to indicate whether or not any correspondence of this nature even existed.

After Cwikla and Ford were convicted a the second trial, the People turned over two letters from Cox's mother asking the District Attorney to intervene with the Parole Board on Cox's behalf, a letter from District Attorney to the Parole Board outlining Cox's cooperation and inviting them to take that into consideration, and a letter from the Parole Board acknowledging receipt of the letter from the District Attorney and expressing gratitude for providing relevant information regarding Cox and assisting the Parole Board in its determination, which it implied would be favorable for Cox.

The Court of Appeals reversed the convictions, finding that the failure to furnish the material concerning Cox was "particularly inexcusable." Id. at 442. Citing Giglio, the Court found

that the correspondence between the Parole Board and the District Attorney "were of such a nature that the jury could have found that, despite the witness' protestations to the contrary, there was indeed a tacit understanding between the witness and the prosecution, **or at least so the witness hoped.**" Id. at 441 (emphasis added). The Court determined this information "might be a strong factor in the minds of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony." Id. citing People v Savvides, 1 N.Y.2d 554, 557 (1956). In reversing, the Court of Appeals held that "in view of the significance which the jury might have attached to this evidence and in keeping with the principles enunciated in Brady v Maryland (373 U.S. 83, supra), and its progeny, we hold that the nondisclosure of this evidence denied defendant his right to a fair trial." Id.

Here, the material concerning Navarette's hope and apparent belief that he would realize a $5,000.00 benefit for his testimony was highly relevant and material to his credibility. Navarette apparently at least hoped, if not was promised, that he would receive a much-needed $5,000.00 reward **prior** to the trial, which is why he repeatedly asked ADA Sendlein about it. ADA Sendlein's conversations with Navarette apparently led him to believe that he would receive that benefit because ADA Sendlein actually took steps to make an inquiry on Navarette's behalf, and then communicated that information back to Navarette and told him he had to wait until after the trial. A reasonable person would interpret this to mean that Navarette expected he would receive his reward if the prosecutor – the head law enforcement agent in charge of the overall prosecution and the police – promised to make an inquiry on his behalf.

If that were not enough, Navarette obviously believed the reward was his to claim the day after the verdict when the first thing he asked ADA Sendlein about was the $5,000.00. When he was allegedly laughed off, Navarette repeated the request, clearly indicating he was serious. ADA

Sendlein then promised him Navarette would look into the matter for him, and actually took steps to help Navarette collect the reward by making inquiries.

In short, the defense was deprived of the opportunity to impeach Navarette about his $5,000.00 interest in the outcome of the case, which was clearly manifested **prior** to the trial. As the United States Supreme Court and the New York Court of Appeals have recognized, this would have been "a strong factor in the minds of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony."

Because it was impeachment evidence that the defense could have used to its advantage under Giglio and its progeny, the People were required to turn this material over prior to trial. The first prong of the Brady/Giglio violation has been established.

2. The People Wrongfully Withheld
Exculpatory Material from the Defense Prior to Trial

The law is well-settled that a prosecutor's good-faith belief that the exculpatory evidence is unpersuasive does not excuse its nondisclosure. Brady, supra at 87, People v. Baxley, 84 N.Y.2d 208 (1994). see also United States v. Beckford, 962 F.Supp. 804, 811 (E.D. Va 1997) (nondisclosure not justified by prosecutor's uncertainty as to sufficiency of evidence to establish a mitigating factor). The United States Supreme Court has held that a prosecutor should resolve close questions in favor of disclosure. United States v. Agurs, 427 U.S. 97, 108 (1976). Recent amendments to the New York Criminal Procedure Law discovery scheme **mandate** resolving close questions in favor of discovery. CPL § 245.20(7). In short, the governing body of law removes discretion from the District Attorney in withholding Brady/Giglio material from the defense; it is not for the prosecution to say that which is, or is not, exculpatory or impeachment evidence.

Here, there was no good-faith belief on the part of the Assistant District Attorney that this material did not constitute Brady/Giglio material. The prosecution was actually aware that Jerry

Navarette had, at a bare minimum, a potential financial interest in the outcome of the case and a motive to fabricate, **prior** to trial. If ADA Sendlein's testimony is to be believed, then Jerry Navarette asked ADA Sendlein repeatedly about the $5,000.00 – even after he was allegedly told that the District Attorney's Office had nothing to do with the reward. This would have created a question in any reasonable attorney's mind as to whether this witness expected to receive something in exchange for his testimony, or was possibly promised something.

After the the verdict, the first thing Navarette did was ask ADA Sendlein about the reward again. The fact that ADA Sendlein knew that this was Brady/Giglio material is established by his furnishing that information after trial in an "abundance of caution," in his own words.[8]

However, the inquiry does not end there. It is well-established that in order to comply with Brady, the Supreme Court and the New York Court of Appeals have both clearly held that the prosecution has a **duty** to learn of any favorable evidence known to others acting on the government's behalf, including the police. Kyles v. Whitley, 514 U.S. 419 (1995) (emphasis added), People v. Garrett, 23 N.Y.3d 878, 887 (2014), People v. Wright, 86 N.Y.2d 591, 598 (1995). This duty exists even if there has been no request from the accused. United States v. Agurs, 427 U.S. 97 (1976).

This Constitutional requirement is now codified as well. The New York Legislature has **mandated** that prosecutors "make a diligent, good faith effort to ascertain the existence of material or information discoverable" . . . and must "cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control." CPL § 245.20.(2).

[8] This begs the question that if he acted in an "abundance of caution" after trial, why didn't he act with the same "abundance of caution" before trial?

Here, the testimony adduced at the November 28, 2023 hearing establishes that ADA Sendlein engaged in willful blindness by deliberately closing his eyes to the possibility that Jerry Navarette had either been promised money for his testimony, or at the very least, expected to get paid for his testimony, and therefore had an interest in the outcome of the case and a motive to fabricate. ADA Sendlein consciously avoided making any further inquiries to the prior two Assistant District Attorneys, conducting any further inquiry to Jerry Navarette, conducting any inquiry to the Nassau County Police Department, or CrimeStoppers. The reason for his avoidance of his Constitutional and statutory duty was his expressed belief that it was this Court's job, and the Defendant's job, to investigate.

This expressed belief is not only unworthy of belief, it is completely contrary to more than 50 years of clearly-established Federal and State Constitutional law, the rules of ethics governing attorneys, and the clear mandate of the Legislature. It is contrary to common sense and experience, especially for a seasoned prosecutor who testified he knew his obligations under Brady and its progeny.

22 NYCRR 1200.0 Rule 3.4 generally prohibits a lawyer from suppressing any evidence that the lawyer has a legal obligation to reveal or produce. Rule 3.8 applies specifically to prosecutors and other governmental attorneys. It codifies the Brady/Giglio rule and mandates, under penalty of discipline, the furnishing of Brady/Giglio material to the defense in a criminal action.

In New York jurisprudence, more than one prosecutor has been disciplined for Brady violations. See Matter v. Stuart, 22 A.D.2d 131 (2d Dept. 2005) (three year suspension for falsely informing the court that prosecutor had not received a police report concerning a witness that contained exculpatory statements); Matter of Rain, 162 A.D.3d 1458, 1460 (suspension of two

years for prosecutorial misconduct, including nondisclosure of exculpatory evidence); Matter of Brophy, 83 A.D.2d 975, (3d Dept 1981) (censuring respondent for Brady violation).

One recent disciplinary case involving a prosecutor is highly similar to the instant case. In Matter of Kurtzrock, 192 A.D.3d 197 (2d Dept. 2020), the Respondent was a Suffolk County Assistant District Attorney assigned to prosecute a murder case. Prior to trial, Kurtzrock filed a sworn response to a motion to compel discovery, attesting that all discoverable materials in the People's possession required to be turned over had been furnished, which included two CrimeStoppers tips. Like the case at bar, that case involved a single identifying witness who placed the defendant at the scene of the murder.

During the course of trial, it became apparent to the defense through cross-examination of the final People's witness, a police detective, that Rosario and Brady materials had never been turned over. Those materials were highly exculpatory. The trial court held a hearing, and it became apparent that there had been a "surgical extraction of exculpatory evidence" from the case detective's materials that had been turned over. That material that was surgically extracted cast significant doubt on the identifying eyewitness' credibility and identified a third party as the perpetrator.

In the disciplinary proceeding that followed, Kurtzrock took essentially the same position that ADA Sendlein takes in this case – that he did not believe that the excluded materials were relevant because the police had ruled out the third party as the perpetrator.

In imposing a two year suspension, the Second Department faulted Kurtzrock "engaged in a deliberate pattern of avoidance, or willful blindness, in his handling of the documents in the police file." Id. at 215. The Second Department further held Kutzrock's acts and omissions

interfered with the administration of justice and committed the "grave violations" of knowingly withholding exculpatory material.

In this case, it is undisputed that Navarette's intention and efforts to collect the $5,000.00 reward were known to ADA Sendlein, and never disclosed prior to trial. Therefore, the second prong of a Brady/Giglio violation has been established.

3. Prejudice

In order to establish prejudice from a Brady/Giglio violation, the defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. Defendant need only show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." People v. Ulette, 33 N.Y.3d 512, 520 (2019), quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995).

While there is no specific time to disclose Brady material, the Federal Due Process guarantee requires that it must be provided in time for the defendant to use it effectively, i.e.; **prior** to trial or determination of guilt. United States v. Coppa, 267 F.3d 132, 144 (2d Cir. 2001); Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001), or at a plea proceeding, United States v. Persico, 164 F.3d 796, 804 (2d Cir. 1999) (Brady material must be provided prior to entry of a guilty plea); Tate v. Wood, 963 F.2d 20, 24 (2d Cir. 1992) (holding the same), see also Powell v. Quarterman, 536 F.3d 325, 335 (5th Cir. 2008); United States v. O'Keefe, 128 F.3d 885, 898 (5th Cir.1997), cert. denied, 523 U.S. 1078 (1998); United States v. Ellender, 947 F.2d 748, 757 (5th Cir. 1991); United States v. Campagnuolo, 592 F.2d 852, 860-61 (5th Cir.1979); see also United States v. Presser, 844 F.2d 1275, 1283-1284 (6th Cir. 1988); United States v. Higgs, 713 F.2d 39, 44 (3d Cir.1983) (holding no due process violation occurs if Brady material is disclosed **in time for its "effective**

use at trial")(emphasis added); United States v. Starusko, 729 F.2d 256, 262 (3rd Cir. 1984) (affirming the "longstanding policy" of "**prompt compliance with Brady**") (emphasis added).

The overwhelming weight of New York jurisprudence mirrors the Federal rule. '[T]he law … appears to be settled … [that] Brady material must be disclosed in time for its effective use at trial … or at a plea proceeding.'" People v. DeLaRosa, 48 A.D.3d 1098, 1099 (4th Dept. 2008), quoting People v. Reese, 23 A.D.3d 1034 (4th Dept. 2005), see also People v. Ortiz, (1st Dept. 2011) (prejudice necessarily results from withholding Brady material prior to trial and preventing the defense from using it to impeach a witness).

If there were any residual doubt from the overwhelming authority of decisional law, the Legislature has laid those to rest in enacting Article 245 of the Criminal Procedure Law, which places an undeniable requirement on the District Attorney to certify in writing through a Certificate of Compliance that all outstanding discovery obligations have been met prior to trial.

In this case, the People filed a Certificate of Compliance on November 30, 2020, certifying that all discovery obligations had been met. Since the Giglio information concerning Navarette did not come to light until early February, 2023, that original Certificate of Compliance is not significant.

What is of particular significance is that ADA Sendlein filed two supplemental Certificates of Compliance, one on February 27, 2023, and another on March 6, 2023 – the eve of trial. In both of those supplemental Certificates of Compliance, he certified to this Court that all discovery obligations had been met – including Brady/Giglio disclosures. These certifications were false. ADA Sendlein actually knew that impeachment material existed, and knowingly and intentionally omitted that from the supplemental Certificates of Compliance.

As the Court of Appeals has clearly held, prejudice from a Brady violation occurs when a Defendant is not provided "a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case." People v. Cortijo, 70 N.Y.2d 868, 870 (1987), see also People v. Brown, 67 N.Y.2d 555, 559 (1986); People v. Smith, 63 N.Y.2d 41, 68 (1984); People v. Stridiron, 33 N.Y.2d 287, 292-293 (1973).

Further, the Court of Appeals and the Second Department have repeatedly held that were the case turns on the jury's assessment of the credibility of the People's sole identification witness, any error in failing to provide Brady/Giglio material cannot be said to be harmless. People v. Steadman, 82 N.Y.2d 1 (1993); People v. White, 57 N.Y.2d 129 (1982); People v. De Jesus, 42 N.Y.2d 519 (1977); People v. Cook, 103 A.D.2d 751 (2d Dept. 1984), People v. Green, 156 A.D.2d 465, 466 (2d Dept. 1989).

Here, the People's case rose and fell on Navarette's testimony as the sole identifying witness. There were no other eyewitnesses who identified Defendant as the shooter. There was no forensic evidence tying Defendant to the actual shooting. Therefore, Navarette's credibility was of paramount importance, which is why the People relied so heavily upon his testimony in establishing their case. Apparently, the jury also believed Navarette was a critical witness because they requested Navarette's testimony to be read back during deliberations.

By deliberately withholding information that directly spoke to the witness' interest in the outcome of the case and his motive to fabricate, the People deprived the Defendant of the opportunity to meaningfully confront the witness through impeachment. This was a clear Due Process violation which mandates reversal.

The suppression of this evidence undermines confidence in the validity of the verdict because this impeachment evidence "reasonably be taken to put the whole case in such a different

light as to undermine confidence in the verdict." As a result, this Court should grant the instant motion.

4. The People Were Required to Turn Over This Information Pursuant to CPL § 245.20 Prior to Trial, Requiring the Imposition of a Sanction Pursuant to CPL § 245.80

The principle of automatic discovery in Article 245 of the Criminal Procedure Law is simple. The People are required to turn over all discovery prior to the start of trial. This specifically includes Brady/Giglio material. See CPL § 245.20(1)(k), (2). The People are also required to certify their compliance in writing pursuant to CPL § 245.50.

The Legislature has also mandated that there is a presumption of openness in Article 245. See CPL § 245.20(7). In short, the statutory scheme enacted in 2020 mandates that when in doubt, the prosecution must disclose.

Here, the People filed two supplemental Certificates of Compliance prior to trial that falsely certified that all outstanding discovery, including Brady/Giglio material, had been furnished to the defense. As later events established, these supplemental Certificates of Compliance were invalid.

CPL § 245.80 provides for sanctions for non-compliance with Article 245 required disclosures. Under CPL § 245.80(1), if material or information is discoverable under this article but is disclosed belatedly, the court shall impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure. Under CPL § 245.80(3), if the non-disclosure of a statement of a testifying witness creates a reasonable possibility that the undisclosed material contributed to the result of the trial, the court may set aside a conviction or reverse or modify a judgment of conviction.

Here, the defense has established all three prongs of a Brady/Giglio violation, including the prejudice prong. Because the People failed to honor their statutory obligations under Article

245, and given the prejudice sustained by the defense, this Court should set aside the verdict as a sanction pursuant to CPL § 245.80.

CONCLUSION

It is well settled that the prosecutor has a special duty to ensure that a trial is conducted fairly. In Strickler v. Greene, 527 U.S. 263, 281 (1999), the Supreme Court described the special role "played by the American prosecutor in the search for truth in criminal trials."

The United States Supreme Court has held

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. **But, while he may strike hard blows, 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, 88 (1935) (emphasis added).

This is not a case involving overwhelming evidence of guilt. This is a single-witness identification case. There were no forensics tying Defendant to the shooting. As the sole identifying witness, Jerry Navarette's credibility was the crux of the case.

The Nassau County District Attorney's Office was actually aware of the CrimeStoppers reward money. The flyer was in their file. ADA Sendlein specifically asked the case detective whether it existed, and was given an affirmative answer.

Navarette asked ADA Sendlein about the reward several times prior to trial. He did not ask about the reward in general, he specifically asked about $5,000.00, the advertised award amount in the same flyer in the District Attorney's file.

ADA Sendlein made several decisions that changed the entire trajectory of the case. When Navarette first asked him over the phone about a specific number - $5,000.00 – he made the decision to ask Detective Malone about the reward. After he learned that there was, in fact, a $5,000.00 reward, ADA Sendlein made the decision to call Navarette back and address the $5,000.00, telling him that the police department would handle that after the trial was over. When Navarette met ADA Sendlein in person prior to trial, he again asked him about the $5,000.00.

ADA Sendlein then made the conscious decision to avoid asking Navarette a simple, basic question: whether anyone had promised him $5,000.00 in exchange for his testimony. He also made the decision to avoid asking either of the two predecessor Assistant District Attorneys whether they had information regarding any promises made to Navarette. When he called Detective Malone to ask whether there was a $5,000.00 CrimeStoppers reward, that would have been the perfect and logical opportunity to tell Detective Malone that the eyewitness had asked him about the money, and whether anyone from the Nassau County Police Department had made any promises to the witness. Yet, he made the conscious decision to avoid asking that question and the most opportune moment.

ADA never told Navarette that he was not eligible for the reward. He made the decision to act as an intermediary between Navarette and the Nassau County Police Department regarding the $5,000.00 reward. This decision was made both before trial, and again after trial.

Critically, ADA Sendlein made the decision to withhold this information from the defense. Additionally, Instead, he provided Navarette with information that suggested that Navarette could receive the $5,000.00 – all had to do was wait until the end of the trial and go through the Police Department.

In their responsive papers, the People claim that there was never any promise or expectation in Navarette's mind that he would receive $5,000.00 as a reward. However, ADA Sendlein had at least a question in his mind, as he testified:

> Q. So when he asked for $5,000 you laughed at that comment?
> A. I did. Because I never thought that he was under the impression that he was getting money to testify. I never thought that he was under the impression that anything was guaranteed to him. I thought he was under the impression, okay, I helped the police early on, am I eligible, I just had a kid, $5,000 would be nice. **So I thought he was under the impression maybe it happens, maybe it doesn't**. When he asked what about the $5,000 I still hadn't given it any real mind. So that is why I laughed and he said no. **And that's when I realized maybe there's a question as to what his mindset was and that's when I contacted everyone**.
> Q. Did you realize at that point or come to believe maybe that Mr. Navarette believed he was entitled to $5,000 for his testimony?
> A. **I came to the point that there could be a question as to what his mindset was and I wanted that question answered by you and the Court**.
> Q. What was the question that you thought?
> A. What his belief was. If he thought he was promised something. **If anything ever happened to make him think that he was promised any money and that's why I -- because I was not under that impression. So that is why after that I made sure everyone knew as quickly as I could tell everyone so an inquiry could be made**.

(H:19-20) (emphasis added).

The decision to withhold this information from the defense had two consequences. First, it deprived the defense of an entire line of impeachment about Navarette's motive to falsify and interest in the outcome of the case in repeatedly demanding $5,000.00 prior to trial. Second, it gave the People distinct tactical, but unfair advantage, by permitting them to argue to the jury – effectively – that Navarette had no motive to falsify or interest in the case, and was therefore a credible witness.

It is clear that Navarette's credibility would have been severely compromised had the jury been informed that he demanded $5,000.00 several times prior to trial for his testimony, and that he had been told to wait until the trial was over. It is also clear that had the defense been apprised of this information prior to trial, it would have been used as strong impeachment material to the Defendant's advantage.

Whether ADA Sendlein's several decisions were intentional or a mistake is of no consequence. The next effect is exactly the same – Defendant's Due Process rights and Confrontation Clause rights were clearly violated and his defense severely prejudiced as a result.

The People take the position that "if the allegedly impeaching evidence had been turned over to the defendant, defense counsel would have been wise not to ask about it on cross-examination because it would have hurt the defendant, not helped." (People's Affirmation in Opposition, p. 13). The People also claim that "defendant have gained very little, if not nothing, by asking this question," claiming that the defense would have opened the door to "a series of consistent statements that would have only strengthened Mr. Navarette's identification."

This argument is absurd. The defense would likely have been that Navarette obtained a financial interest and motive to fabricate when the CrimeStoppers reward was posted – years before the trial. This would not have involved a claim of recent fabrication, it would have involved a claim of fabrication ab initio. Thus, the People's argument that his prior "consistent" statements – if they were consistent at all – would have been admissible is legally wrong.

Even if the People were correct, this was not the People's decision to make for the Defendant. That was a decision for defense counsel to make after consulting with the Defendant. By making this decision for the defense and withholding the evidence they were Constitutionally

and statutorily mandated to disclose, the People deprived the Defendant of his Constitutional rights.

For these reasons, this Court should grant this motion in its entirety.

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January 1, 2024

Respectfully Submitted,

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To:

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Nassau County Court
Criminal Term, Part 36

ADA Veronica Guariglia
Nassau County District Attorney's Office

Hon. Helene Gugerty, A.J.S.C.
Nassau County Supreme Court