UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE HOLWELL

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ANGELO DIPIETRO,

Petitioner,

-Against-

UNITED STATES OF AMERICA,

Respondent.

----------X

NOTICE OF MOTION

10 CIV 2585

Civ. No. _____

Related Case 02-CR-1237 (RHH)

PLEASE TAKE NOTICE that upon the attached affirmation of Joseph A. Bondy, Esq., the accompanying memorandum of law, the indictment, trial record, sentencing minutes, and all other prior proceedings, the Petitioner Angelo DiPietro shall move this Court, located at 500 Pearl Street, New York, N.Y. 10007, at a date and time convenient to the Court, for an Order:

1. Vacating his conviction pursuant to Title 28, United States Code, § 2255;
2. For any other relief that is necessary and proper.

Dated: New York, New York
March 22, 2010

Respectfully submitted,

Joseph A. Bondy

To: Clerk of the Court
Hon. Richard H. Holwell
AUSA Jennifer Rogers

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANGELO DIPIETRO,

Petitioner,

-Against-

UNITED STATES OF AMERICA,

Respondent.

----------X

AFFIRMATION OF COUNSEL

Civ. Dkt. _____

Rel. Crim. Dkt. 02-cr-1237 (RHH)

JOSEPH A. BONDY, an attorney duly licensed to practice law in the State of New York and a member of the bar of this Court hereby declares under penalties of perjury that the following facts are true:

1. I represent the Petitoner Angelo DiPietro in his current motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. § 2255.

2. I was trial counsel to the Petitioner, Angelo DiPietro, and as such I am fully familiar with my strategic decisions, defense strategy, and the evidence adduced and arguments made at trial.

3. The facts pertinent to resolution of Mr. DiPietro's § 2255 motion are set forth in the accompanying memorandum of law and supporting exhibits.

4. An evidentiary hearing is requested.

Dated: New York, New York
March 22, 2010

Joseph A. Bondy
Attorney for Angelo DiPietro

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
ANGELO DIPIETRO,

Petitioner,

-Against-

UNITED STATES OF AMERICA,

Respondent.
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MEMORANDUM OF LAW

Civ. Dkt. _____
Rel. Crim. Dkt. 02-cr-1237 (RHH)

INTRODUCTION

The following memorandum is submitted in support of Petitioner Angelo DiPietro's motion to vacate his conviction, pursuant to 28 U.S.C. § 2255.[1]

PROCEDURAL AND FACTUAL BACKGROUND

Angelo DiPietro was arrested on February 4, 2004. He was arraigned on a superseding indictment, charging him with Conspiracy to Commit Extortion, in violation of 18 U.S.C. § 1951, Extortion, in violation of 18 U.S.C. §§ 1951 & 2, Using and Carrying Firearms, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2, Attempted Extortion, in violation of 18 U.S.C. §§ 1951 & 2, Using and Carrying Firearms, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii), 924(c)(1)(A)(iii), 924(c)(1)(C)(i) & 2, Conspiracy to Commit Robbery, in

[1] § 2255 provides that:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

violation of 18 U.S.C. § 1951, Attempted Robbery, in violation of 18 U.S.C. §§ 1951 & 2, Conspiracy to Collect Extensions of Credit by Extortionate Means, in violation of 18 U.S.C. § 894, and Collection of Extensions of Credit by Extortionate Means, in violation of 18 U.S.C. § 894.

The extortion counts emanated from DiPietro's alleged efforts to recover monies owed by a Ponzi scheme operator named John Perazzo. The Government charged that DiPietro conspired to extort Perazzo, and, on June 29, 2001, conspired with others to kidnap him and bring him to DiPietro's basement, where he was restrained with ropes, threatened with a firearm and fireworks, and forced to make a payment on his Ponzi scheme debts. The only witness with alleged knowledge of these events was Maurizio Sanginiti, who testified pursuant to a cooperation agreement. DiPietro was also charged with attempted extortion of Perazzo later that summer, on July 9-10, 2001, and with a second § 924(c) count arising from the events of that evening. Mr. DiPietro was also charged conspiring to rob and attempting to rob a home in Eastchester, New York, with cooperating witnesses Din Celaj and Marc Nicholson, and others. Finally, DiPietro was charged with conspiring to collect credit by extortionate means, involving a gambling debtor-turned-cooperating witness named Richard Signore.

On July 12, 2005, after an eleven-week jury trial, DiPietro was convicted of all counts. His motions for a judgment of acquittal and new trial were denied. DiPietro was sentenced

principally to 59 years' imprisonment, given his conviction on the two § 924(c) counts, which, at the time, carried consecutive minima of seven and twenty-five years.[2]

DiPietro file a direct appeal, which was denied. *See United States v. DiPietro*, 274 Fed. Appx. 53, 56, 2008 U.S. App. LEXIS 8648 (2d Cir. 2008). On March 23, 2009, the Supreme Court denied DiPietro's petition for a writ of certiorari. *See Exhibit G.* DiPietro is currently incarcerated in federal custody, serving his sentence.

On July 11, 2008, DiPietro filed a pro-se motion for a new trial pursuant to Federal Rule of Criminal Procedure 33, which is still pending.

ARGUMENT

PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL

A. The Law

1. Withholding of *Brady/Giglio* Materials

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused...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." The prosecution has a general duty to disclose exculpatory information, even when there has been no request. *See United States v. Agurs*, 427 U.S. 97, 107 (1976). A prosecutor's *Brady* obligation extends to a duty to correct false trial testimony given by government witnesses. *See Paradise v. CCI Warden,* 1236 F.3d 331, 338 (2d Cir. 1998).

[2] On January 4, 2006, DiPietro was convicted after a different jury trial in *United States v. Rudaj, et. al.*, 04-cr-1110 (DLC), and sentenced principally to forty-four years' imprisonment, to run partially consecutive to the instant sentence.

Evidence that is "favorable to an accused" includes not only exculpatory material, but also information that can be used to impeach the credibility of the prosecution's witnesses. *See United States v. Bagley*, 473 U.S. 667, 676-77 (1985); *Giglio v. United States,* 405 U.S. 150, 154-55 (1972). "Witnesses" include hearsay declarants (and alleged co-conspirators), who are subject to impeachment under Federal Rule of Evidence 806. *See United States v. Jackson,* 345 F.3d 59, 70-71 (2d Cir. 2003).

Evidence that has incriminating parts as well as exculpatory or favorable parts is still *Brady* material. *See United States v. Rivas*, 377 F.3d 195, 199-200 (2d Cir. 2004); *see also DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006). Neither is exculpatory evidence's value negated by the prosecution possessing other contradictory evidence. *See United States v. Rittweger,* 524 F.3d 171, 181 (2d Cir. 2008).

Under *Brady*, evidence is suppressed if it was "known to the prosecution, but unknown to the defense." *Agurs,* 427 U.S. at 104. A prosecutor is not required to disclose information of which he is unaware. *See United States v. Tillem,* 906 F.2d 814 (2d Cir. 1990). Nevertheless, prosecutors are charged with affirmatively knowing information known to the law enforcement officers involved in the investigation or prosecution of the case. *See Kyles v. Whitley*, 514 U.S. 419, 438-39 (1995).

Generally, evidence is not suppressed under *Brady* if the defendant knew or should have known of the salient facts that would allow him to make use of any exculpatory evidence. *See United States v. Diaz,* 922 F.2d 998, 1007 (2d Cir. 1990). The defendant must still be given notice of exculpatory evidence sufficiently in advance of trial to allow its meaningful use. *See Leka v. Portuondo,* 257 F.3d 89, 103 (2d Cir. 2001) (disclosure of

exculpatory witness three days before trial provided inadequate opportunity to investigate the potential witness's evidence).

The prosecution's obligation to disclose *Brady* evidence extends only to information that is "material." *See United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001). Where there is a question about a potential piece of *Brady* evidence's materiality, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Agurs,* 427 U.S. at 108. Where, as here, "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony, and that the prosecution knew, or should have known, of the perjury," a "strict standard of materiality" should be applied. *Agurs,* 427 U.S. at 103-04. In such instances, a conviction must be reversed, "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103-04; *see United States v. Vozella*, 124 F.3d 389, 392-93 (2d Cir. 1997); *Perkins v. Lefevre,* 691 F.2d 616, 619-20 (2d Cir. 1982). Applying a strict materiality standard is proper in cases involving suppression due to prosecutorial misconduct, since such conduct "corrupt[s] the truth-seeking function of the trial process." *Agurs* at 104.

Undisclosed *Brady* material that does not demonstrate the falsity of the evidence offered by the prosecution is reviewed under the standard of whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley,* 473 U.S. at 682. This threshold is met where the evidence's suppression "undermines confidence in the outcome of the trial." *Id.* at 678.

Finally, where there was suppression of several pieces of *Brady* material, their materiality must be "considered collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. at 436.

2. False Testimony and Arguments

It is improper to obtain a conviction through the knowing use of false evidence. *See United States v. Wallach*, 935 F.2d 445, 473 (2d Cir. 1991). Use of false evidence is improper whether the prosecutor actively elicits it, *see Miller v. Pate*, 386 U.S. 1, 7 (1967), or only "allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In *Jenkins v. Artuz*, 294 F.3d 284, 295-96 (2d Cir. 2002), the Second Circuit reversed a conviction where the prosecutor had not corrected a witness's technically true but misleading testimony that suggested he had no cooperation agreement.

It is also wrong for a prosecutor to make an argument he knows to be factually untrue, even though it might be consistent with the trial evidence. Thus, in *United States v. Valentine*, 820 F.2d 565 (2d Cir. 1987), the Second Circuit reversed a conviction where the prosecution's argument was undercut by evidence in its files that had not been offered at trial.

B. The Facts

Newly Discovered Evidence and Suppressed Brady Material Warrant a New Trial

Petitioner DiPietro has discovered new evidence, including suppressed *Brady* evidence, which support his claims of innocence on the alleged June 29, 2001 extortion of John Perazzo, the § 924(c) firearm count from that date, and the conspiracy to commit robbery and attempted robbery of the Eastchester residence.

a. Private Investigator Bill Clutter

Mr. DiPietro retained a Private Investigator, Bill Clutter, who is the director of investigations for the Innocence Project in Springfield, Illinois, to investigate various aspects of the case. His report contains the summary of his findings, along with the notes from witness interviews that he has conducted through the course of his investigation. *See Exhibit A.* His report identifies a number of areas of trial testimony that appear to have been perjurious, including the testimony of Maurizio Sanginiti regarding the alleged kidnapping of John Perazzo on June 29, 2001, and the testimony of Din Celaj and Marc Nicholson regarding the Eastchester robbery. The Clutter Report also identifies a number of instances of *Brady* suppression by the prosecution. Investigator Clutter's work is ongoing, and DiPietro will apprise the court of any material developments.

b. Ded Nicaj

On November 11, 2009, Defense Private Investigator Bill Clutter interviewed Ded Nicaj. Nicaj had pled guilty in Westchester County Supreme Court to the Eastchester burglary charged against DiPietro, as did government cooperating witnesses Din Celaj and Marc Nicholson. *See Exhibit A, at ex. 2.* Nicaj denied having ever met Angelo DiPietro, or that DiPietro had any role in Celaj's plot to rob the Eastchester residence. He stated that DiPietro is innocent of the Eastchester robbery charge.

Nicaj informed another individual, Mary Vucsanaj, whom Clutter also interviewed, that Federal Bureau of Investigation ("FBI") agents interviewed him, and that he told the agents he did not know DiPietro, and that DiPietro had no role in the Eastchester robbery plot. *Exhibit A at ex. 4.* Nicaj's statements exculpated DiPietro on the Eastchester conspiracy

and robbery counts, and was material impeachment evidence as to Celaj and Nicholson. Neither the fact of Nicaj's interview, nor its substance, nor any notes or reports generated from it, was disclosed to the defense so that it could make meaningful use of this information at trial.

c. Bashkim Mustafaj

On November 21, 2009, Defense Investigator Clutter interviewed a friend of Maurizio Sanginiti and Din Celaj's, Bashkim Mustafaj. Mustafaj informed that Celaj's trial testimony claiming he had met DiPietro at the Raceway Diner in Yonkers and discussed burglarizing the Eastchester house and committing other robberies was false. Mustafaj said that he was present with Celaj on that occasion, and that no such discussion occurred. He also told Clutter that, "Celaj was able to get out of prison by making up lies, and he went on to commit other crimes." *Exhibit A at ex. 3.*

d. John Perazzo

The Clutter Report identifies a letter John Perazzo wrote to his former attorney, dated January 20, 2001, in which he claimed that he was incarcerated with two of the participants in the Eastchester robbery attempt, Din Celaj and Marc Nicholson, and that they had informed him that the person responsible for planning the robbery was Angelo Capalbo, not DiPietro. This document was contained in a Westchester County Court filing, and as such was known to the Westchester County District Attorney's Office ("WCDAO") at the time of DiPietro's joint investigation and prosecution by the SDNY and the WCDAO. It was never turned over to the defense. *Exhibit A at ex. 5.*

Similarly, although John Perazzo did not testify, the fact that Perazzo had a cooperation agreement with the WCDAO that was predicated upon his federal cooperation in the joint prosecution of DiPietro was never revealed to the defense. Rather, the prosecutor artfully dodged the question, by asserting that Perazzo had no agreement with "the federal government." (Tr. 6048-50). The modifier was apparently designed to avoid having to disclose the terms of the Westchester County District Attorney's Office agreement that contemplated Perazzo's federal cooperation in the prosecution of DiPietro and others, resulting in the court's allowing argument that Perazzo was equally available. (Tr. 6050). The court later gave jurors an equally available witness charge over defense objection.

e. Frank Taddeo

The Clutter Report also examines the prosecution's contacts with an individual named Frank Taddeo. *Exhibit A, ex. 6.* Purporting to satisfy its *Brady* disclosure obligation, on February 25, 2005, the prosecution notified defense counsel by letter that they may wish to interview Taddeo, who was present in the DiPietro basement on the evening of June 29, 2001. Taddeo claimed that there had been no kidnapping nor had there been threats or firearms and fireworks used during the meeting with Perazzo. The prosecution thereafter misinformed the court and counsel that aspects of Taddeo's proffer and telephone records corroborated Maurizio Sanginiti's testimony regarding the alleged kidnapping of John Perazzo that evening. (Tr. 4200). Despite a defense request, the prosecution refused to produce any notes or reports of its proffers with Taddeo, and instead left it with the impression that his testimony and records would corroborate key aspects of the prosecution's version of events. The defense relied upon this representation, and, concerned

about the impact of such corroboration, decided not to call Taddeo as a witness. It was not until February 16, 2010, when Taddeo requested that his attorney, Anthony Siriano, Esq., turn over the notes that he took of Taddeo's proffer with the prosecution, that DiPietro learned that there were no apparently corroborative statements made about him to the prosecution. *See Exhibit A, ex. 7.*

Taddeo's telephone records, which were not produced to the defense until June 13, 2005, after Sanginiti had concluded his testimony, undercut rather than corroborate Sanginiti's kidnapping story that Perazzo, Sanginiti, and others muscled Perazzo into one white van and then drove to DiPietro's. The telephone records reflect multiple calls between Taddeo and Sanginiti's cellular phones that are inconsistent with the men being together in the same vehicle as Sanginiti had testified. Had these records been timely produced, along with the prosecution's notes and reports of Taddeo's interviews, they could have been used with devastating effect in the cross-examination of Sanginiti on this count. Instead, the prosecutor's representations misled the court and counsel.

f. Manny Pereira; Carl Macchiarulo; Ralph Pizzuti; Rick Whalen

As with Frank Taddeo, prosecutors identified Ralph Pizzuti as possessing *Brady* evidence, without disclosing any of its notes or reports of such evidence. Other individuals, Carl Macchiarulo and Manny Pereira, apparently also possessed similar *Brady* evidence, in the form of their presence on July 9-10, 2001 at the alleged second attempt to kidnap John Perazzo, which they denied involved threats and force. The prosecution only disclosed these individuals' identities two weeks before trial.

Another individual, Rick Whalen, was purportedly interviewed telephonically by the FBI and also denied there having been any threats or force used during the alleged attempted extortion of Perazzo in July 2001. No notes, nor a report or even notice of this *Brady* evidence was ever disclosed to the defense.

g. *Anthony DiPietro*

Angelo DiPietro's son, Anthony DiPietro, was the subject of substantial tracts of testimony at trial. Prosecution witness Maurizio Sanginiti testified that Anthony was present in the basement of the DiPietro home on the night of July 29, 2001, when John Perazzo was allegedly threatened with a gun and fireworks. Sanginiti testified that Anthony retrieved money from Perazzo's parked car, while Perazzo was inside of the basement. Prosecution witnesses Din Celaj and Marc Nicholson alleged that Anthony participated in the planning and mapping out of the Eastchester robbery. Throughout the trial, whenever possible, the prosecution sought to link Anthony to the acts charged. Virtually without exception, the District Court allowed the evidence.

By the time of Angelo's trial, Anthony was also a defendant in a multi-defendant federal indictment, charging alleged members of an Albanian organized crime group with a variety of crimes. Anthony was charged with a gambling offense. Anthony has since pled guilty and been sentenced. He has executed an affidavit, *Exhibit B*, refuting the prosecution's evidence regarding his father's involvement in the Eastchester robbery and the alleged kidnapping, restraint, and threatening of John Perazzo with fireworks and firearms. Had the prosecutor not suppressed *Brady* evidence as to Din Celaj, Marc Nicholson, John Perazzo, Bashkim

Mustafaj, Ded Nicaj, and Frank Taddeo, the defense could have called Anthony DiPietro as a corroborating witness, rather than the uncorroborated son of the defendant.

B. The Law Applied to the Facts

1. *Brady/Giglio* Suppression

It is respectfully submitted that, viewing the favorable and exculpatory items that were known to the prosecution and not provided to the defense collectively, Mr. DiPietro's conviction should be vacated and a new trial ordered. Likewise, newly discovered evidence directly undermines the accomplice testimony presented at trial and supports DiPietro's innocence on those counts.

The failure to turn over FBI notes of interviews with Ded Nicaj was material suppression of directly exculpatory evidence on the Eastchester attempted robbery counts. Had these notes of interviews been turned over to the defense, there is a high probability that DiPietro would have called Nicaj, included the reports in his cross-examination of the FBI case agent, and been acquitted of those counts. Nicaj's assertion that he had never met Angelo DiPietro is significant, considering that both Sanginiti and Nicholson testified that Nicaj was present with Angelo DiPietro when the parties allegedly conspired to commit the Eastchester Robbery. Mark Nicholson had testified that, "Me, Din, Angelo, and some other white guy, and Dave [Nicaj] was in the car," to discuss the Eastchester Robbery. (Tr. 3770-3781, 3291). Maurizio Sanginiti had also claimed that Nicaj knew DiPietro, testifying that he called Nicaj the night before the robbery and told him not to participate in it, because "DiPietro would sell you down the river." (Tr.1658-1660).

Similarly, Bashkim Mustafaj, a friend of Celaj and Sanginiti's, has stated that there was no discussion about committing robberies during a meeting with DiPietro at the Raceway diner. Mustafaj's account provides additional evidence that Din Celaj testified falsely about having discussed robberies with DiPietro at that meeting. During trial, Celaj had claimed that DiPietro directed him to commit the Eastchester robbery at this meeting. (*See* Tr. 4294-4297) ("We discussed one specific burglary and four others...I remember discussing the Eastchester one and another.") Marc Nicholson had also testified that, at the diner, Celaj told him "Angelo [DiPietro] had other jobs for us—meaning burglaries." (*See* Tr. 3712).

Finally, the government's failure to turn over exculpatory documents that identified another individual as having planned the Eastchester robbery prejudiced DiPietro in pursuing investigative leads and presenting his defense. Perazzo's letter, claiming that Celaj and Nicholson (prior to their becoming cooperators against DiPietro) had admitted their involvement and told him that Angelo Capalbo had planned the robbery was exculpatory. The suppressed *Brady* evidence materially prejudiced DiPietro, undermines confidence in the verdict, and requires that his conviction be vacated.

The prosecution's failure to disclose the notes and reports generated by the Frank Taddeo proffers and misrepresenting the substance of Taddeo's proffers as partially inculpatory prejudicially induced DiPietro to not call Taddeo as a witness. Simply because the prosecutor claimed he did not credit Taddeo's proffer was not a reason to withhold the notes and reports from those meetings. *See United States v. Rittweger*, 524 F.3d 171, 181 (2d Cir. 2008). Disclosure of a mere summary of Taddeo's proffer was also insufficient to satisfy his *Brady* obligation. *See, e.g., United States v. Park,* 319 F.Supp.2d 1177 (D. Guam 2004)

("[W]here a prosecutor obtains exculpatory information from an interview with a government witness and where the prosecutor takes notes during the interview, the government is obligated under *Brady* to produce such notes.") The prosecutor's misrepresentation that Taddeo's undisclosed telephone records partly corroborated Maurizio Sanginiti's testimony regarding the events of June 29, 2001 was also prejudicial error.

Had the notes and/or reports of the government's interviews with Taddeo been produced as requested, they would have reflected that there were no incriminating areas that he had discussed with prosecutors but not disclosed to the defense. Disclosure would have allowed DiPietro to make meaningfully use of this information in his own defense, including calling additional witnesses to corroborate Taddeo's proffer that Perazzo was not kidnapped, nor threatened with fireworks and a gun on June 29, 2001. Timely production of Taddeo's phone records would have allowed DiPietro to effectively refute Sanginiti's claim that he, Taddeo, and others, had kidnapped Perazzo from the Applebee's parking lot and driven in a single white van to DiPietro's. The multiple calls between Taddeo and Sanginiti during this timeframe would have exposed the falsity of Sanginiti's testimony.

The suppressed evidence undermines confidence in DiPietro's verdict. The prosecution obtained DiPietro's conviction for the June 29, 2001 Perazzo extortion and first § 924(c) count upon the uncorroborated testimony of only one witness with alleged knowledge of the events of that night—Maurizio Sanginiti. The second § 924(c) count, stemming from the events of July 9, 2001, were derived solely from Din Celaj's testimony that DiPietro had aided and abetted his use of a gun that night. Given the importance of these witnesses, the prosecution's non-disclosure of key impeachment evidence such as

phone records and conflicting statements materially prejudiced DiPietro, and a new trial is warranted. *See Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (remanding for a new trial where government's case depended "almost entirely" on a witness as to whom impeaching evidence was not disclosed); *United States v. Badalamente*, 507 F.2d 12, 18 (2d Cir. 1974) (undisclosed impeachment evidence was material where witness's testimony bore directly on the jury's choice between the defendant's entrapment defense and the prosecution's conspiracy theory); *United States v. Sperling*, 506 F.2d 1323, 1334-40 (2d Cir. 1974) (remanding for a new trial those defendants as to whom a key witness's testimony was uncorroborated).

2. False Testimony and Arguments

a. Din Celaj's Deportation

The prosecution placed Din Celaj's deportation order—issued while he had been in state custody—into evidence as proof of the fact that was not going to receive any immigration benefits in exchange for his cooperation. The prosecution then argued during rebuttal summation that Celaj faced certain deportation, and reminded jurors of the deportation order by exhibit number. (Tr. 6427-8).

Celaj was subsequently sentenced. Rather than being deported, as the prosecution had argued to the jury was a certainty, Celaj was released to the streets of New York City, where he immediately continued his life of crime. He was arrested shortly after his release, and charged in the Southern District with conspiring to rob and robbing over $1.0 million from drug dealers, in drugs and money, and for the narcotics sales associated with these offenses. One of Celaj's co-conspirators included a police officer, from whom Celaj obtained confidential law-enforcement information. *See Exhibit C, DOJ Press Release.*

During the rebuttal closing argument, the prosecutor attacked DiPietro's claim in summations that Din Celaj was going to reap one of the benefits of his cooperation agreement and be returned to the streets of New York. He argued instead that Celaj faced absolutely certain deportation. During the re-direct examination of Celaj, the government had placed his deportation order into evidence. (Tr. 4868-72). The prosecutor elicited from Celaj that he was going to return to Albania pursuant to the court order and was not going to appeal the decision. The prosecutor reminded jurors of this exhibit and urged them to reject the inference that Celaj was going to be released to the streets. (Tr. 6427-28).

Petitioner DiPietro respectfully submits that the prosecutor's representations to the jury regarding the certainty of Celaj's deportation were knowingly false. Celaj's cooperation agreement contained a provision explicitly stating that his cooperation would be brought to the attention of the INS if requested; he faced deportation back to Albania as an informant, and therefore held a valid claim against deportation under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment ("CAT"). A CAT claim and/or a political asylum claim were both available bases for Celaj to avoid deportation. Some form of relief from deportation had to have been sought by Celaj following his testimony that he was not going to contest a judicial order of deportation and the prosecutor's false promise to jurors, which allowed him to remain in the United States and continue to commit crimes. This fact makes Celaj's trial testimony that he was going to be deported and was not appealing or seeking relief from the decision false. It also calls into question just what Celaj did to be afforded relief from deportation, and whether the prosecution was involved in his application. If it was, then when such a decision was made is

also relevant. Finally, it demonstrates the ultimate falsity of the government prosecutor's arguments to the jury.

The prosecutor's adducing false testimony, misleading the jury, and suppressing *Brady* evidence as to Din Celaj, warrants reversal and a new trial.

b. Erroneous "Missing Witness Equally Available" Jury Charge

In negotiating the jury charge, the prosecutor misled the court and counsel by stating that alleged victim John Perazzo had no agreement with "the federal government" (Tr. 6048-50), and was thus equally available to the defense as a witness. In fact, however, Perazzo had a cooperation agreement with the WCDAO, which extended him a sentencing benefit in exchange for his assistance in an "unrelated federal kidnapping matter"—namely DiPietro's instant case. *See Exhibit D, at A-171, fn. 3.*

In addition to thwarting a missing witness instruction, the prosecution won a charge that permitted a false inference against the defense, through concealing salient information. The District Court, unaware of Perazzo's cooperation agreement and the ensuing sentencing benefit that he received, erroneously charged jurors that Perazzo was an "equally available" witness. (Tr. 6491-2). The prosecution had previously misled jurors during summations by arguing that Perazzo was equally within both parties' subpoena power. (Tr. 6422-23).

The prosecution's representations to the court and the jury regarding Perazzo's "equally available" status were false. Evidence of Perazzo's cooperation should have been disclosed under *Brady*. *See United States v. Kojayan,* 8 F.3d 1315 (9th Cir. 1992)("Where government failed to disclose agreement with potential witness and later request for missing witness instruction was denied because counsel was unaware of the agreement, *Brady*

required disclosure.") The prosecutor's misleading argument that Perazzo had no "federal cooperation agreement," when Perazzo actually had an agreement with the WCDAO that covered their joint investigation and prosecution of DiPietro in the SDNY requires reversal. *See Jenkins v. Artuz*, 294 F.3d 284, 295-96 (2d Cir. 2002); *United States v. Valentine*, 820 F.2d 565 (2d Cir. 1987).

c. Maurizio Sanginiti's State and Local Cooperation

During trial, the prosecutor informed the court that Sanginiti was also giving testimony in a WCDAO case, involving the rape and murder of a twelve-year old boy. The prosecutor told the court and counsel that Sanginiti, who apparently knew where the body was buried, had agreed to cooperate in this case outside of his federal cooperation agreement and that he had agreed to reap no benefit from his assistance in that case. (Tr. 1796-9). This representation led the court to preclude cross-examination on the point. Sanginiti's sentencing transcript, however, reflects that the prosecutor argued that Sanginiti's willingness to cooperate in the rape and murder case should be considered in imposing a reduced sentence. *Exhibit E.* Sanginiti's cooperation in that case, and his knowledge of a raped and killed minor, was thus withheld from DiPietro's jurors, even though it ostensibly resulted in a benefit under *Giglio* that was a proper subject of cross-examination.

d. Cumulative Effect

Throughout trial, the prosecutor made a number of misleading statements to the court, defense counsel, and the jury. These misrepresentations, in conjunction with the prosecution's *Brady/Giglio* violations, prejudiced DiPietro, and require that his conviction be vacated and a new trial ordered.

The prosecutor mislead the parties as to the substance of Frank Taddeo's proffers, claiming falsely that his phone records corroborated Sanginiti's testimony on the June 29, 2001 Perazzo kidnapping, when in fact they did not. The prosecutor introduced Din Celaj's deportation order, and then falsely argued to jurors that it was certain that he was going to be deported to Albania at the end of his sentence, when he was not. The prosecutor misled the court and counsel that John Perazzo had "no federal cooperation agreement," when in fact he had a cooperation agreement with the WCDAO that was based upon his federal cooperation, thus persuading the judge to give a missing witness equally available charge to jurors. He then falsely argued to the jurors that Perazzo was equally within the defense's subpoena power. The prosecutor misled the court and counsel that Maurizio Sanginiti was not going to reap a benefit for cooperating in a state rape and murder investigation, but then argued at Sanginiti's sentencing that he should be credited for his assistance in that matter.

The prosecutor's intentionally misleading statements affected DiPietro's rights and the verdict. It should not be unreasonable to rely upon a government prosecutor's representations in setting strategy, making arguments, and deciding on whether to call witnesses or pursue lines of questioning. In *United States v. Banks,* 540 U.S. 668 (2003), the Court held that a rule of, "'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence'...is not tenable in a system constitutionally bound to accord defendants due process." (Internal citations omitted).

In relying upon prosecutorial falsehoods, DiPietro was prevented from effectively arguing against a pivotal jury charge, dissuaded from calling an exculpatory witness because of allegedly corroborating evidence that did not exist, and hamstrung in responding to false

arguments to the jury. Absent these misleading statements and arguments, which foreclosed jurors' hearing key impeachment evidence and favorable defense witnesses, there is a reasonable probability that the verdict would have been different. Given the materiality and scope of these misrepresentations, it is respectfully submitted that Mr. DiPietro's conviction must be reversed and, at a minimum, a new trial ordered. See *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Jenkins v. Artuz*, 294 F.3d 284, 295-96 (2d Cir. 2002) (reversing conviction where prosecutor had not corrected witness's technically true but misleading testimony that suggested he had no cooperation agreement).

DISCLOSURE OF OUTSTANDING BRADY MATERIAL IS REQUESTED

Pursuant to Rule 6(a) of the Rules Governing § 2255 Proceedings, Angelo DiPietro respectfully submits that he has shown good cause for the Court to order disclosure of all still-suppressed Brady items referred to herein. *See Bracy v. Gramley*, 520 U.S. 899 (1997). These include the notes and any reports of interviews of Manny Pereira, Carl Macchiarulo, Ralph Pizzuti, Frank Taddeo, and Rick Whalen regarding the conspiracy to extort John Perazzo.

Mr. DiPietro also respectfully requests that the Court order production of the Celaj MCC/MDC tapes, which were subpoenaed by the defense during trial but never turned over. The prosecution apparently obtained the recordings, listened to them, and decided not to disclose them. It then persuaded the court to preclude production of the prison tapes, which the defendants had argued would contain material impeachment evidence. During his cross-examination, FBI Special Agent Rico Falsone conceded having had and listened to several of these prison recordings. (Tr. 5977). Celaj's immediate return to violent crime upon