

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NEW YORK
 -----X
 VINCENT J. BASCIANO, :
 :
 Petitioner, :
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 - against - :
 :
 UNITED STATES OF AMERICA, :
 :
 Respondent. :
 -----X

FILED
 IN CLERK'S OFFICE
 U.S. DISTRICT COURT E.D.N.Y.
 ★ JUN 26 2017 ★

BROOKLYN OFFICE
 17 CV _____ (____)
 (05 CR 060 (NGG))

MOTION TO VACATE CONVICTION AND SENTENCE BY PERSON
IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2255

1. The judgment under attack was entered in the United States District Court for the Eastern District of New York, Hon. Nicholas G. Garaufis, U.S.D.J.

2. The judgment was entered on July 21, 2011.

3. Petitioner was sentenced to life imprisonment and is currently serving his sentence at a federal penitentiary: USP Big Sandy, 1197 Airport Road, Inez, KY 41224.

4. The nature of the offense of conviction was one count of conspiracy to murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count One), murder in aid of racketeering, in violation of 18 U.S.C. §§ 1959(a)(1) and 2 (Count Two), and using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2 (Count Three). Petitioner was convicted following a jury trial in 2011.

5. Petitioner did not testify at trial.

6. Petitioner raised a direct appeal in the United States Court of Appeals for the Second Circuit, Docket No. 11-2995.

7. The Court of Appeals affirmed the judgment by summary order. See *U.S. v. Basciano*, 634 Fed. App'x 832 (2d Cir. 2015).

The Petitioner raised the following grounds on appeal:

- A) PETITIONER'S STATEMENTS TO A COOPERATING WITNESS/INFORMANT, SOME OF WHICH WERE CONSENSUALLY RECORDED, FOLLOWING HIS ARREST ON ANOTHER OFFENSE WERE OBTAINED IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENT AND SHOULD HAVE BEEN SUPPRESSED;
- B) THE DISTRICT COURT ERRED WHEN IT DENIED PETITIONER'S REQUEST TO INSTRUCT THE JURY ON MULTIPLE CONSPIRACIES AND THE TERMINATION OF A CONSPIRACY; AND
- C) THE DISTRICT COURT ERRED BY SUBMITTING A SUPPLEMENTAL CHARGE TO THE JURY IN WRITING.

The Court of Appeals addressed and rejected each of these issues.

8. Petitioner unsuccessfully filed a Petition for rehearing and subsequently filed in the United States Supreme Court a Petition for Certiorari, which was denied on June 27, 2016. See *Basciano v. United States*, 136 S. Ct. 2529 (2016).

9. This *habeas* motion is being filed within one year of the denial of certiorari, and is thus timely pursuant to 28 U.S.C. § 2255(f)(1).

10. There are no other motions, petitions, or applications concerning this judgment of conviction pending in any other court at this time.

11. In the instant motion pursuant to 28 U.S.C. § 2255, Petitioner asserts that he is in custody in violation of the Constitution and laws of the United States on the following grounds:

- A. THE DISTRICT COURT'S RECUSAL WAS AND IS REQUIRED UNDER THE DUE PROCESS CLAUSE AND 28 U.S.C. § 455(A);
- B. MR. BASCIANO WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT PRESENT ANY EXPERT OR DIRECT EVIDENCE TO SUPPORT A CHALLENGE TO THE ADMISSION OF MR. BASCIANO'S INCRIMINATING STATEMENTS, OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT; FAILED TO PRESENT FAVORABLE DOCUMENTARY EVIDENCE AND WITNESS TESTIMONY NECESSARY TO REBUT THE GOVERNMENT'S CASE; AND PRESENTED A WEIGHTLESS DEFENSE THEORY, WHICH BOLSTERED THE GOVERNMENT'S CASE, AND CAUSED PREJUDICIAL

AND CONSTITUTIONALLY INADMISSIBLE EVIDENCE TO BE CONSIDERED BY THE JURY; AND

C. MR. BASCIANO IS ENTITLED TO HABEAS RELIEF BECAUSE COOPERATING WITNESS DOMINICK CICALE WAS INSTRUCTED BY THE GOVERNMENT TO PROVIDE FALSE TESTIMONY AGAINST MR. BASCIANO AND THE GOVERNMENT SUPPRESSED BRADY/GIGLIO EVIDENCE FROM MR. BASCIANO'S DEFENSE.

12. These grounds were not raised on direct appeal, because, among other reasons, each issue requires an examination of certain facts and evidence that were not contained in the trial record, and as a matter of law, ineffective assistance of counsel claims may always be litigated in the first instance under § 2255. *See e.g., Massaro v. United States*, 538 U.S. 500, 509 (2003).

13. Likewise, although it appears that none of the claims raised in this proceeding were ripe at the time of appeal, given that such claims require consideration of facts outside the trial record, any ground raised herein not raised by appellate counsel on direct appeal was the result of counsel's ineffectiveness, and therefore, properly set for review in this proceedings.¹

¹ It is well established that the court should consider and grant relief for such claims based upon appellate counsel's ineffectiveness. *See, e.g., Suggs v. United States*, 513 F.3d 675 (7th Cir. 2008)(granting habeas relief where appellate counsel failed to raise meritorious sentencing issue); *United States v. Bass*, 310 F.3d 321 (5th Cir. 2002) (granting habeas relief because appellate counsel was ineffective for failing to raise meritorious claim on appeal); *United States v. Philips*, 210 F.3d 345 (5th Cir. 2000) (same); *Brown v. United States*, 167 F.3d 109 (2d Cir 1999)(same).

14. The facts and legal arguments supporting the grounds for relief raised in this proceeding are set forth fully in the accompanying affirmation of counsel and memorandum of law with supporting exhibits and such filings are incorporated herein by reference.


15. The Petitioner requests, in the event that the Government opposes the instant motion for relief or disputes any material fact related thereto, that an evidentiary hearing be timely conducted. *See, e.g., Townsend v. Sain*, 372 U.S. 293 312-13 (1963).

16. Pursuant to the Rules Governing § 2255 Proceedings, the Petitioner reserves all rights permitting him to further perfect, amend, and supplement his motion. Likewise, the Petitioner reserves all rights permitting him to seek discovery, pose interrogatories, and expand the record as necessary.

WHEREFORE, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

Dated: White Plains, New York
June 26, 2017

Respectfully Submitted,



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Attorney for Petitioner
Vincent Basciano

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Affirmation of Counsel

Anthony DiPietro, Esq., an attorney 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 Petitioner Vincent J. Basciano in his current motion to vacate his sentence pursuant to 28 U.S.C. § 2255.
2. I am familiar with the facts and circumstances of Mr. Basciano's underlying criminal case, based upon, *inter alia*, review of relevant transcripts, pleadings, and conversations with Mr. Basciano.
3. The facts pertinent to resolution of Mr. Basciano's motion are set forth in the accompanying memorandum of law and supporting exhibits.
4. An evidentiary hearing is requested.


Anthony DiPietro, Esq.

*Attorney for Petitioner
Vincent Basciano*

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S
MOTION TO VACATE CONVICTION & SENTENCE UNDER 28 U.S.C. § 2255

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S
 MOTION TO VACATE CONVICTION UNDER 28 U.S.C. § 2255

PRELIMINARY STATEMENT

This memorandum of law is submitted in support of Petitioner Vincent J. Basciano's motion to vacate his conviction pursuant to 28 U.S.C. § 2255. Petitioner is serving a sentence of life imprisonment pursuant to a judgment of conviction entered on July 21, 2011.¹ He was convicted, after a jury trial, of conspiracy to murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count One), murder in aid of racketeering, in violation of 18 U.S.C. §§ 1959(a)(1) and 2 (Count Two), and using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2 (Count Three).

Petitioner timely appealed his conviction, alleging principally that: (1) statements he made to a cooperating witness following his arrest on another offense were obtained in violation of the Fifth and

¹ The Court ordered Mr. Basciano's sentence to run consecutively to his undischarged term of life imprisonment on a related case (E.D.N.Y. Criminal Docket No. 03-929).

Sixth Amendment and should have been suppressed; (2) the district court erred when it denied his request to instruct the jury on multiple conspiracies and the termination of a conspiracy; and (3) the district court erred by submitting a supplemental charge to the jury in writing.

The United States Court of Appeals for the Second Circuit affirmed the judgment by opinion dated December 23, 2015. By order of April 15, 2016, the Second Circuit denied a Petition for Rehearing. Petitioner timely filed a petition for a writ of certiorari to the United States Supreme Court. By Order of June 27, 2016, the Court denied certiorari.² (Exhibit 1).

The judgment of conviction was obtained in violation of Petitioner's constitutional right to effective assistance of counsel and a fair trial under the Due Process Clause. The Petitioner was denied the effective assistance of counsel, because his attorney: (1) did not present any expert or direct evidence to support a challenge to the admission of incriminating statements, obtained in violation of the Fifth Amendment, made by Mr. Basicano to Joseph Massino; (2) failed to present favorable documentary evidence and witness testimony necessary to rebut the Government's case; and (3) presented a weightless defense theory that not only bolstered the Government's case, but also caused prejudicial and constitutionally inadmissible evidence to be considered by the jury against Mr. Basciano.

² This Petition is being filed within one year of the denial of certiorari, and is thus timely pursuant to 28 U.S.C. § 2255(f)(1).

In addition, the Petitioner was denied a fair trial, because the trial court was constitutionally required to recuse itself from the underlying proceedings, and the prosecution knowingly suborned Dominick Cicale's perjurious testimony and withheld *Brady/Giglio* evidence from the defense.

FACTUAL BACKGROUND

The facts herein are derived from the trial and post-trial transcripts, motion papers and other documents submitted in this Court in the underlying criminal action, the papers submitted in connection with the direct appeal of the conviction, and the affidavits and other exhibits filed herein.³ Because this case has been before the Court and many of the facts were presented before the Court, they are stated here in summary fashion as they relate to the issues raised in this motion as follows:

The evidence presented by the Government at trial regarding the Pizzolo murder rested principally upon the testimony of incentivized cooperating witnesses and recordings of Mr. Basciano made by informant Joseph Massino.

³ The following short citations for trial transcripts, exhibits, and discovery will be used herein:

1. *United States v. Basicano*, 05-cr-060 (NGG) ("Tr.");
2. *United States v. Basciano*, 03-cr-929 (NGG) ("Trial I");
3. Government Exhibit 405-T and 406-T, Recorded Conversations between Joseph Massino & Vincent Basciano (Dated January 3, 2005 & January 7, 2005) ("Massino Tapes I & II");
4. *United States v. Massino, et. al.*, 02-cr-307 (NGG) ("Massino Trial"); and
5. Disc 1 of 4 at SE-Q310-56(Mancuso/Cetta Bug at FCI Edgefield, SC) (Jan. 16, 2010) ("Mancuso Tapes").

Through this evidence, the Government attempted to establish the following facts.

1. The Government alleged that Mr. Basciano was associated with the Bonanno organized crime family of La Cosa Nostra (the "Bonanno family") since the 1980s. See Tr. 5782; 6977.
2. In 2003, following the arrest of the official Boss, Joseph Massino, the Government claimed that Mr. Basciano became the acting boss of the Bonanno family. See Tr. 4853; 7078.
3. The Government claimed that Randolph Pizzolo was associated with the Bonanno Family. See Tr. 5790; 6165; 7100; 7101; 7107. Pizzolo had a reputation as a "wild kid," a troublemaker who was known for acts of violence. See Tr. at 4855; 7101-02; 7110-11. According to cooperating witnesses, Pizzolo "was a wild kid and a loose cannon." Tr. 7603, who engaged in numerous acts defying Mafia protocol, including his assault of an individual with a weapon while at a restaurant associated with organized crime. See Tr. 6243-45.
4. In regard to Pizzolo's association with Mr. Basciano, Dominick Cicale testified that, in early 2004:

Vinny Basciano informed me that he was placing Randy Pizzolo with me because he felt that I could control him, and if Randy--if I couldn't control him then we had a place for Randy, meaning that we will kill Randy, and it would set an example for the rest of the fellows in the Bonanno Crime Family, that Vinny Basciano don't play around.

Tr. 7103.

5. The Government claimed that Mr. Basciano directed Cicale to meet with Pizzolo and tell Pizzolo that "this was his last stop" and that he needed to stop running around wild, which Cicale did. See Tr. 7104.
6. Cicale also testified that, in the fall of 2004, Mr. Basciano was "fed up" with Pizzolo and ordered Cicale to have Pizzolo killed for several reasons: (1) to punish Pizzolo for his poor performance on construction sites and his refusal to move to Florida at Mr. Basciano's direction; (2) to set an example for other members as to how Mr. Basciano would deal with disrespectful behavior; and (3) to address a perceived challenge by another Bonanno member, who suggested that Mr. Basciano was unable to control Pizzolo, a low-ranking member of his former crew. See Tr. 7147; 7167-68.
7. Cicale claimed that Basciano directed him to assign the murder to various other co-conspirators. See Tr. 6520; 7107-08; 7168. Cicale testified that he had initial discussions with these co-conspirators about the plan to kill Pizzolo, and both agreed to participate in Pizzolo's murder. See Tr. 7175.
8. Basciano was arrested in November 2004 on an unrelated case. See Tr. 7177. The Government alleged that, prior to Basciano's arrest, Cicale participated in numerous discussions with Basciano and another co-conspirator, Michael

Mancuso, about what should happen to the management of the Bonanno family in the event that Mr. Basciano was arrested. The Government alleged that Mr. Basciano stated that Mancuso would lead the family in his absence so "nothing skips a beat." Tr. 7177.

9. According to Cicale, after Mr. Basciano's arrest, Cicale decided not to pursue the murder of Pizzolo. See Tr. 7186. A few days later, however, Cicale met with Mancuso, who told Cicale, "That thing with Randy, make sure it gets done and nothing skips a beat, and if anybody has anything to say, I gave you the order." Tr. 7186.
10. Pizzolo was killed on November 30, 2004. See Tr. 6890. On that day, the Government alleged that Cicale told Pizzolo to meet with another co-conspirator later that evening, and that he would meet Pizzolo for drinks in Manhattan after that. See Tr. 7195-96. To create an alibi, Cicale then directed that Pizzolo be killed while Cicale was attending a basketball game. See Tr. 7195. Cicale attended the game and received a page while on his way home indicating that Pizzolo was dead. See Tr. 7196; 7198. The next day, Cicale met the co-conspirator, who told Cicale that he had met Pizzolo and shot Pizzolo. See Tr. 7199-200.
11. After Pizzolo was murdered, Cicale claimed that he sent a message to Mr. Basciano in prison that Mancuso "had me take

care of the footings and foundations" [meaning that Pizzolo had been murdered]. See Tr. 7208.

At the time of Pizzolo's murder, the official boss of the Bonanno family, Joseph Massino was also incarcerated at the same prison as Mr. Basciano. See Tr. 4862-63. Unbeknownst to Mr. Basciano at the time, Massino was an informant who, while wired with a recording device, twice used his power to coerce Mr. Basciano into discussing the Pizzolo murder with him. Both encounters occurred in January 2005. In these tape-recorded conversations, Massino questioned Mr. Basciano about the Pizzolo murder and elicited incriminating statements from Mr. Basciano pertaining to his alleged role in the Pizzolo murder.

At trial, the Government offered, as the centerpiece of its evidence concerning Mr. Basciano's role in the Pizzolo murder, these recordings into evidence.⁴

⁴ As noted by Mr. Basciano during his sentencing, the recordings were the lynchpin of the Government's case. After trial, the "attorneys, the prosecutors and two of [the] court clerks met with the jury after the penalty phase verdict, the jury told everybody in that room that they completely disregarded every single cooperating witness, they didn't believe them, except for Joey Gambina." Sent. Tr. at 34 (July 20, 2011).

ARGUMENT

I. The District Court's Recusal Was And Is Required Under The Due Process Clause And 28 U.S.C. § 455(A).

A. Applicable Law

a. Due Process

The due process clause of the Fourteenth Amendment guarantees the right to an impartial judge. See *Williams v. Pa.*, 136 S. Ct. 1899, 1906 (2016) ("Due process guarantees an absence of actual bias on the part of a judge.") (internal quotations omitted). Indeed, "A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison*, 349 U.S. 133, 136 (1955). Moreover, due process requires the appearance of impartiality as "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Recent Supreme Court case law is instructive as to when an appearance of impartiality becomes constitutionally impermissible.

In 2016, the Supreme Court held that the test for judicial bias is not subjective, because the question of recusal is "not whether a judge harbors an actual...bias." *Williams*, 136 S. Ct. at 1906. Instead, the focus must be "whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id.* (internal quotations omitted) (emphasis added).

In *Williams*, the Court found a judge's failure to recuse himself from appellate proceedings violated defendant's due process where the judge had previously been the prosecutor seeking the death penalty in

the underlying criminal trial. *Id.* at 1907. The Court acknowledged prior case law citing a case, in which a judge effectively acted as a dual fact finder and prosecutor. *See Murchison*, 349 U.S. at 135. However, the Court concluded that “[t]hese factual differences notwithstanding, the constitutional principles explained in *Murchison* are fully applicable where a judge had a direct, personal role in the defendant’s prosecution.” *Williams*, 136 S. Ct. at 1906 (emphasis added). Thus, any analysis of recusal must focus on whether the judge’s prior actions amount to “significant, personal involvement in a critical trial decision.” *Id.* at 1907.

After the Court concluded that the judge’s prior involvement as a prosecutor on the defendant’s case constituted significant, personal involvement, the Court then held “that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.” *Id.* at 1909 (emphasis added). In reaching that determination, the Court stated,

[T]he appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

Id. at 1909-10 (emphasis added).

In 2017, the Supreme Court again addressed the issue of recusal in *Rippo v. Baker*, 137 S. Ct. 905 (2017). This time, the issue was whether recusal was warranted where the defendant alleged facts establishing a potential risk of judicial bias. In *Rippo*, the Supreme Court vacated the Nevada Supreme Court's holding that the defendant was not entitled to relief unless he could establish actual bias. *See id.* at 906 ("We vacate the Nevada Supreme Court's judgment because it applied the wrong legal standard. Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.'") (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (emphasis added)).

The Court held that the correct legal standard in addressing a recusal motion is whether an objective appearance of impartiality is present. The Court found that "[r]ecusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker [sic] is too high to be constitutionally tolerable.'" *Id.* (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

b. 28 U.S.C. § 455(a)

Under § 455(a), a judge must recuse himself "in any proceeding in which his impartiality might reasonably be questioned." § 455(a). In addition, a judge's recusal is required "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]" § 455(b)(1). Section 455(a) provides broader grounds for disqualification than § 455(b)(1).

See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988); *Apple v. Jewish Hosp.*, 829 F.2d 326, 333 (2d Cir. 1987).

In this regard, § 455(a) is not limited to a showing of actual bias. See *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000). Rather, as articulated in *Williams and Rippo*, § 455(a) focuses on “whether a reasonable person, knowing all the facts, [would] conclude that the trial judge’s impartiality could reasonably be questioned.” *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992).

B. The Court’s Recusal Was And Is Required As A Result Of Its Finding That The “Hit List” Was Reliable.

Despite numerous requests by the defense, the district court found that its recusal was not warranted, because it had not displayed “actual bias at any time” and it made no determination regarding the veracity of the Government’s claim that Mr. Basciano had created a “hit list” containing the names of the court, the lead prosecutor, and three cooperating witnesses involved in his trial.⁵ *United States v. Basciano*, Nos. 03-CR-929 (NGG), 05-CR-060 (NGG), 2006 U.S. Dist. LEXIS 86533, at *2 (E.D.N.Y. Nov. 30, 2006). The district court also found that its recusal was not required, because Mr. Basciano might have created the list as a thinly disguised effort to manipulate the judicial process and engineer the court’s recusal. *Id.* at *6.

⁵ At all times, Mr. Basciano did not dispute that he wrote the list, but he has steadfastly maintained that it was created solely for use in a Santeria ritual recommended by another inmate, who was acting as an informant at the time. See *United States v. Basciano*, 384 Fed. App’x 28, 33 (2d Cir. 2010).

The Second Circuit consistently upheld the district court's findings, because the "district court expressly found that one of Basciano's objectives appeared to be to manipulate the judicial process, regardless of whether the list was in fact intended as a hit list." *United States v. Basciano*, 384 F. App'x 28, 33 (2d Cir. 2010). The Circuit also found that recusal was not required in light of the district court's "careful eliding" of the question of whether Mr. Basciano truly created a "hit list" targeting the presiding judge. *Id.*; see also *In re Basciano*, 542 F.3d 950, 958 (2d Cir. 2008) (noting the court's refusal to decide whether the list of persons ostensibly identified as targets reflected a serious threat).

However, the Circuit left undecided whether the district court's recusal was necessary in the event that the list was ever admitted into evidence. *Id.* at 958 ("In the absence of a decision by the district court on this issue, there is no exercise of discretion before us that we may examine for abuse.").

Subsequent to these decisions, in 2011, the district court backtracked from its prior decisions and determined that the "hit list" met the highest standard of reliability to warrant a jury's consideration of its existence as a non-statutory aggravating factor in Mr. Basciano's death penalty eligibility. See *United States v. Basciano*, 763 F. Supp.2d 303, 354-57 (E.D.N.Y. 2011). The court rejected Mr. Basciano's request for a reliability hearing. It also found that the jury's consideration of the "hit list" was not outweighed by either

prejudice or, the alternative, of "striking the evidence altogether." *Id.* at 354.

As a result of this decision, the district court created an impermissible risk of bias requiring its recusal from Mr. Basciano's underlying proceeding. *See, e.g., Williams*, 136 S. Ct. at 1906 ("When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome."); *Rippo*, 137 S. Ct. at 906 ("[r]ecusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker [sic] is too high to be constitutionally tolerable.") (internal quotation marks omitted)).

Once the court determined that the hit list was reliable, the likelihood of bias on the part of the judge was too high to be constitutionally tolerable. *See, e.g., United States v. Greenspan*, 26 F.3d 1001, 1007 (10th Cir. 1994) ("[I]t is obvious to us that a reasonable person could question the judge's impartiality. Even if this judge were one of those remarkable individuals who could ignore the personal implications of such a threat, the public reasonably could doubt his ability to do so."). Indeed, the district court's recusal was no longer a discretionary question in this case, because "due process guarantees an absence of actual bias on the part of a judge," *Williams* 136 S. Ct. at 1905, and circumstances presented by the "hit list" gave rise to an unacceptable "risk of actual bias." *Id.*

The due process guarantee that “no man can be a judge in his own case would have little substance” if it did not disqualify a judge from sitting in judgment of a prosecution in which it considers evidence of its own victimization by the defendant to be reliable and a factor dispositive of whether the defendant should be sentenced to death. *See, e.g., Murchison*, 349 U.S. at 136 (“To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”).

Irrespective of the fact that the list was not submitted into evidence by the prosecution, the risk imposed by allowing a presiding judge, who considers evidence of his own victimization to be real and reliable, is too great to be constitutionally tolerable. This is especially true when the judge believes such evidence is so reliable that it can be used as an aggravating factor relevant to the defendant’s punishment. Thus to allow such judge to continue sitting on the case endangers any appearance of neutrality and the judge’s continued participation “must be forbidden if the guarantee of due process is to be adequately implemented.” *Williams*, 136 S. Ct. at 1908-09.

Significantly, the Supreme Court explains, it is not whether the judge is actually, subjectively biased, but whether recusal is necessary to “prevent even the probability of unfairness.” *Murchison*, 349 U.S. at 136 (noting that “to perform its high function in the best way justice must satisfy the appearance of justice”). *See also Rippo*, 137 S. Ct. at 906 (“Under our precedents, the Due Process Clause may sometimes demand

recusal even when a judge ha[s] no actual bias.") (internal quotation marks omitted)).

Thus, as here, the only question that remains is whether there exists a "risk that a judge would be influenced by an improper, [even] if inadvertent, motive to validate and preserve the result obtained through the adversary process." *Williams*, 136 S. Ct. at 1907.

The district court's recusal was, and is, constitutionally required. It is indisputable that its participation in Mr. Basciano's trial was an error affecting the entire adjudicatory process. *See id.* at 1902 (holding that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote).

Accordingly, Mr. Basciano must be granted a new trial before a court unburdened by any possible temptation "not to hold the balance nice, clear and true between the State and the accused." *Id.*

C. The Court's Recusal Was And Is Required As A Result Of Its Unprecedented Mitigation Of Cooperator Vitale's, Cicale's And Massino's "Sentence."

The district court's recusal is also required as a result of its finding that Mr. Basciano's conviction was a mitigating factor at the sentencing of cooperators Salvatore Vitale, Dominick Cicale, and Joseph Massino.

Due in large part to their assistance in obtaining Mr. Basciano's conviction, the court found that mitigation was warranted. Thus, cooperating witness Cicale, who faced life imprisonment, was sentenced

to a mere 120-months. More strikingly, the court also reduced cooperator Massino's sentence of two consecutive terms of life imprisonment to time served, after Massino served only ten and a half years of imprisonment for his admitted participation in twelve murders. Likewise, the court decided to free cooperator Vitale after his service of a nominal prison term for committing eleven murders.

In 2012, the media reported that the district court sentenced Cicale to a "break of a lifetime" for helping the Government convict Mr. Basciano. See, e.g., John Marzulli, *"Bonanno rat Dominick Cicale gets break of a lifetime for helping nail Vinny Gorgeous Basciano,"* N.Y. Daily News (Jan. 31, 2012) ("A murderous Bonanno mobster who helped put crime boss Vinny Gorgeous away for life hit the turncoat jackpot Monday: a reduced sentence that will have him back on the street next year.").

At Cicale's sentencing hearing, the district court stated:

Due in no small part to Cicale's cooperation, Vincent Basciano is now serving two consecutive life sentences...This cooperat[ion] comes at a great cost to society, to the government[,] and to Cicale himself.

In determining whether Cicale's case is proper for downward departure, this Court has considered his serious and extensive criminal history, his invaluable and protracted cooperation[,]

and his willingness to place himself at personal risk...In view of the extraordinary assistance that he has given to the government, I believe that he should have the opportunity to attempt to [turn his life into one that is productive and helpful].

Cicale Sent. Tr. 23-27.

Similarly, the media also reported that at Massino's resentencing, he obtained "a break of his lifetime" as the court reduced two

consecutive life sentences to ten and half years imprisonment. See John Marzulli, "Ex-Bonanno crime boss Joseph Massino wins release for role as informant," *N.Y. Daily News* (July 11, 2013). All in all, the court allowed Massino to not only serve less than one year for each of the twelve murders in which he admitted participation, but the court also permitted him to retain financial security:

Once known as the "Last Don," Massino will subsist on a monthly stipend from the government in addition to Social Security and rental income from commercial properties he was allowed to keep.

Id.

The court also gave another free pass to Massino's brother-in-law, eleven-time murderer and cooperator, Vitale who decided to cooperate against Mr. Basciano and others. Notably, the court's unprecedented leniency for repugnant serial killers who cooperated with the Government did not go unnoticed by the media:

In rewarding murderous mobster Salvatore (Good Looking Sal) Vitale with his freedom last week, Brooklyn Federal Judge Nicholas Garaufis paid the turncoat Bonanno underboss the ultimate informant's compliment, dubbing him 'the most important cooperator in the modern history of law enforcement's efforts to prosecute the Mafia.'

But the judge's words have made more than a few law enforcement experts scratch their heads. For starters, they say, ranking him as the 'most important' cooperator in modern times is certainly debatable, since 'modern history' presumably covers the last 25 years....

Vitale, who ended up serving less than eight years for a life of crime that included 11 murders....

Jerry Capeci, "Vitale May Have Earned His Reward; But Was He The Best?," *Gang Land News* (Nov. 4, 2010), <http://www.ganglandnews.com> (last visited June 23, 2017).

Indeed, even several members of law enforcement officials questioned the validity of the court's leniency, noting that the court engaged in flipped praise for these individuals and overstated the value of their cooperation in certain cases, including Mr. Basciano's, as an effort to justify the "sentences" imposed:

[W]hile Massino and his attorney convinced Judge Nicholas Garaufis that he deserved to be set free, several current and former law enforcement officials told Gang Land that the ex-mob kingpin gave the feds information of little value as part of a dandy scam he pulled on the government.

'I never believed that death threat story that he told,' said a long time federal mob buster who no longer works for the government. 'He knew he needed something special to get a deal and that's what he came up with, a murder plot against a prosecutor.'

Even some law enforcement officials who believed Massino's allegation that Vinny Gorgeous had plotted to kill prosecutor Andres, told Gang Land that the way Massino manipulated the system - serving about three years more than Vitale - sends the wrong message to mobsters.

Jerry Capeci, "Mob Busters: Massino's Sweet Deal Just Doesn't Smell Right," *Gang Land News* (July 18, 2013), <http://www.ganglandnews.com/members/column853.htm> (last visited June 23, 2017) (emphasis added).

Also, law enforcement officials emphasized that the court set a bad precedent by giving cooperators like Massino the upper hand and the ability to scam the system in future proceedings:

'The idea is to get them to cooperate before trial, not after they are convicted at trial and get sentenced to life,' said one. 'This decision says, 'Take a shot, what have you got to lose? A couple of years.'

Id.

Notably, renowned journalist and Mafia expert, Gerald Capeci, also questioned the court's flip-flopped claim that Massino, a twelve time murderer, deserved a free pass because he was "the most important cooperator in the modern history of law enforcement's efforts to prosecute the Mafia" as the court previously found that Vitale, an eleven time murderer, deserved the same exact accolade:

When Vitale came up for sentencing in 2010, Garaufis called Vitale 'the most important cooperator in the modern history of law enforcement's efforts to prosecute the Mafia.' Last week, Garaufis updated his opinion, using the same phrase to praise Massino at his re-sentencing, which was attended by Andres, other prosecutors and about a dozen FBI agents, including three current and former supervisors.

Id.

Notably, the media also took note of the fact that the only piece of "true" history left for the court to justify Massino's sentence is Mr. Basciano's conviction for the Pizzolo murder. And if Mr. Basciano's conviction were to be reversed, an objective viewer would find Massino's successful plight to freedom as the biggest flub committed by a judge and one of the greatest embarrassments in the modern era of our judicial system:

His [Massino's] accomplishments are also uneven. His testimony against a Genovese mobster last year ended in an acquittal. The jailhouse talks Massino taped with Vinny Gorgeous and his 2011 trial testimony did end in a guilty verdict and a life sentence for Basciano, but by then, Basciano had already been convicted of murder and sentenced to life without parole.

Id.

Overall, as a result of these "sentencing" decisions, the district court cannot preside over Mr. Basciano's constitutional claims challenging these cooperators' credibility. The district court would not

be able to grant Mr. Basciano relief based upon such claims, because to do so would require the court to admit that it personally failed in its prior finding that Vitale's, Cicale's, and Massino's value and veracity as a cooperators against Mr. Basciano warranted reduced sentences. See, e.g., *Liteky v. United States*, 510 U.S. 540, 563 (1994) (noting that a "judge may find it difficult to put aside views formed during some earlier proceeding. In that instance we would expect the judge to heed the judicial oath and step down.").

This is precisely the type of unconstitutional risk imagined by the Supreme Court where a judge may be "so psychologically wedded" to his previous decision that it would violate the Due Process Clause for the same judge to decide issues raised in a subsequent proceeding. See, e.g., *Williams*, 136 S. Ct. at 1906 (noting that certain circumstances create an unconstitutional risk that the "judge would be so psychologically wedded to his or her previous position.").

Although it is sometimes prudent to permit judges to preside over successive causes involving the same parties or issues, both the Constitution and 28 U.S.C. § 455(a) require recusal when judges are confronted with the impossible task of considering new issues that if true, cannot be reconciled with previous findings.

To grant Mr. Basciano's *habeas* claims thus would require the district court to denounce its findings that Mr. Basciano's conviction was a mitigating factor warranting a lesser sentence for the key cooperators, who are now free men, even though they cumulatively partook

in at least twenty-six murders. In light of these circumstances, an objective viewer would find it impossible for the district court to take positions that would "consciously or unconsciously avoid the appearance of having erred or changed position." *Williams*, 136 S. Ct. at 1906. See also *United States v. Herrera-Valdez*, 826 F.3d 912, 917 (7th Cir. 2016) ("The test for appearance of partiality is whether an objective, disinterested observer fully informed of the reasons that recusal was sought would entertain a significant doubt that justice would be done in the case.")

Indeed, the public may see the "sentence" imposed on the twelve-time serial killer, Massino, as a firm message from the court that cooperators within the Mafia can be easily absolved of their crimes by virtue of joining the prosecution in situations like Mr. Basciano's case. While there is nothing romantic or redeeming about organized crime killers, like Massino, it is indicative of these types of "sentencing decisions" that the court may be willing to provide such repugnant criminals a free pass solely in exchange for obtaining their cooperation.

For our judicial system to truly function for the pursuit of justice, there is simply no glory when a court sentences serial killers to time served simply because they cooperated. Indeed, there is no glory in such a justice system, no virtue in its morality of immorality, no love for the victims and their families, no solemnity in the oaths of its judges and officers who seek justice, and no honor in the blood that

it ignores. In whatever ways the court system may be portrayed at Bar banquets and in law school classrooms, the sentences imposed on these cooperators stand as proof to the public evincing the current reality of the justice system as it pertains to cases like Mr. Basciano's--a crumbling facade, beneath which lies a bleak truism that cooperators in Mafia cases are above the law. Cooperators serve little consequence for their lifetime of murder and mayhem, even though the debt they owe society is far greater.⁶

Given the fact that the district court used Mr. Basciano's conviction as a mitigating factor to warrant Vitale's, Cicale's and Massino's immediate and unimaginable release from prison, there is a risk that the same court would be unable to objectively decide the merits of Mr. Basciano's request to overturn his conviction. Accordingly, the due process clause prohibits the district court from presiding over Mr. Basciano's *habeas* proceeding.

D. The Court's Recusal Was And Is Required As A Result Of Its Extrajudicial Acts & Statements Demonstrating Bias Against Mr. Basciano.

Perhaps most troubling is the court's engagement in extrajudicial acts and statements that reflect actual bias against Mr. Basciano. Specifically, the court has engaged in several acts that not only

⁶ It may be time that the courts recognize this absurdity and abandon this system of providing absolution for murderous cooperators whose testimony are inherently tainted and unreliable. Until this unlikely epiphany, both society and the rule of law will continue to bear the true cost of these decisions.

indicate a real risk of actual bias, but also demonstrate that the court harbors a personal interest in Mr. Basciano's continued confinement.

First, the court sent, either through explicit or implicit direction to a colleague, an inappropriate message to Mr. Basciano while he was confined at the Florence ADMAX correctional facility, where he is serving two life sentences imposed by the court. See *Basciano Aff. I* (dated June 14, 2017) (Exhibit 2). In 2015, while Mr. Basciano "was in the step-down program" a "large group of individuals came into the J-unit," the unit in which Mr. Basciano was housed. *Id.* at ¶ 3. One of these individuals, of whom Mr. Basciano became aware, was a federal judge in the Eastern District of New York. This judge called out Mr. Basciano by his "first and last name and said 'Nicholas G. Garaufis sends his regards.'" *Id.* Upon receipt of this message, Mr. Basciano told the judge to send "Garaufis my love." *Id.*

Given that Mr. Basciano was designated to an extremely secure facility, serving two life sentences as a result of the allegations concerning the "hit list" and the proceedings held before the district court, Mr. Basciano reasonably "took the message [from Judge Garaufis] as an affront." *Id.* at ¶ 4. Even under the highest standard of deference, the court's improper acts of discussing Mr. Basciano behind closed doors and sending "his regards" through a colleague require recusal.

Moreover, preceding this improper incident, the presiding judge also explicitly admitted at Vitale's sentencing that it engaged in other

improper extrajudicial conversations with "one public official" who once told the judge "he didn't care what we were doing here today [Vitale's Sentencing], or in this courtroom over the last-seven-and-a-half years [Mr. Basciano's prosecution among others], because Organized Crime didn't really affect the government." The judge responded, "[I]t affects you in ways you have no appreciation of, but you should open your eyes to what it means to your city, to your state and to your country, when Organized Crime engages in its terrible pursuits." Vitale Sentencing Tr. at 41, *United States v. Vitale*, 03-cr-307 (NGG).

The presiding judge's extrajudicial conversation with a public official about these cases was not only also improper--reflecting the judge's personal and distained view of these types of cases--but it also illustrates that the judge believed he was handling these matter as if the court was an arm of the prosecution. The judge's claim that "we" [the Government] are engaging in important prosecutions to rid the country of organized crime cannot be reconciled with the judge's duty to remain an independent arbiter that ensures the accused is provided a fair proceeding; one that is untainted by the risk of judicial bias. The judge's explicit alignment with the prosecution, coupled with its extrajudicial conversations, provides more than ample evidence to require recusal. *See, e.g., Herrera-Valdez*, 826 F.3d at 917 ("Under § 455(a), all a party has to show is that a judge's impartiality might be questioned by a reasonable, well-informed observer.") (emphasis added)).

Compounding these explicit instances of impropriety, the presiding judge is also the responsible party for facilitating the cooperation of the key informant used against Mr. Basciano in this case. As history recalls, informant Massino sought the aid of the presiding judge, after being convicted of seven murders in a related case, in order to obtain "shadow counsel" for the sole purpose of cooperating with the Government. Although Massino was a multi-millionaire at the time and represented by counsel of record, the Court engaged Massino's ex-parte request by secretly providing counsel to Massino from a list of attorneys approved by the Government.⁷

The Court, thereafter, partook in proceedings concerning the Government's appointment of an attorney that was not a member of the CJA panel solely in order to facilitate Massino's quest to cooperate against Mr. Basciano.⁸ See Letter of Lawrence M. Stern, Esq., to Hon. Nicholas G. Garaufis, U.S.D.C.J., dated January 30, 2009 (counsel noting that "the government paid McDonald his fee to represent Massino as shadow counsel" and the "government's post-proffer death penalty announcement was made

⁷ Surely, no one would expect the same success for a cooperator who requests the court's aid in seeking "shadow counsel" because he no longer wants to cooperate and would like that fact to remain secret because he doesn't trust his lawyer of record and he fears retaliation by the Government.

⁸ The absurdity of this "cooperation system" is best illustrated by the fact that the Government had no issue with allowing taxpayer monies to be improperly used to aid convicted murderer Massino's quest to cooperate, but the Government was extremely concerned about whether CJA funds would be used to provide Mr. Basciano a lunch from the court cafeteria during his capital trial. See Tr. at 6622-23 (trial prosecutor inquiring, "Your Honor, the government would just like to note that Mr. Basciano is receiving CJA assistance and we just like to inquire as to whether the CJA panel is going to be billed for these lunches or is someone else going to.").

only to give Massino an incentive to give evidence against defendant [Basciano]."); see also *id.* at 2 (counsel noting that the district court's prior suppression ruling ignored the fact that "shadow counsel was not a member of the CJA panel and that the government paid him.."); *id.* at 4 (counsel noting that "[despite the statements of AUSA Andres on the record that McDonald had been retained, and that the government was paying McDonald, and despite the new evidence that McDonald was not CJA counsel, and the fact that all of Massino's assets had been forfeited by his conviction, the signatory on the January 23, letter. Cristina Posa, AUSA, makes the unsworn claim that she somehow knows Andres was joking...").

Notably, Massino's lawyer, Edward McDonald, testified in a related proceeding that the district court, after Massino was already convicted for seven murders, had facilitated his appointment as "shadow counsel" for the sole purpose of exploring Massino's cooperation with the Government:

Q: Let me direct your attention to August 2004. Did there come a time that you were appointed as shadow counsel for Mr. Massino?

A: Yes. Judge Garaufis asked me if I would accept an appointment to become what is frequently called shadow counsel for Mr. Massino.

Q: And what were your duties as shadow counsel?

A: To advise Mr. Massino in connection with his attempts to cooperate with the government.

Tr. at 149-150, *United States v. Basciano*, 03-cr-929 (January 17, 2006).

It is well established that the court's role in our judicial system is one that is independent from the parties to ensure fairness and

impartiality at all times; it is not the court's duty or right to secretly aid a millionaire defendant, who at such time was convicted of seven murders and was seeking to deceive an officer of the court [defense counsel of record], into obtaining a cooperation agreement with the prosecution.

Consequently, the court's improper facilitation of and stake in Massino's success as a cooperator foreclosed it from presiding over Mr. Basciano's trial once it received notice that Massino would be called to testify. See *Murchison*, 349 U.S. at 136 ("To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.").

Overall, there is abundance of evidence showing that the recusal of the district court was and is constitutionally warranted, as a reasonable person, knowing all the facts, would conclude that the trial judge's impartiality could reasonably be questioned in this case. Accordingly, Mr. Basciano is entitled to a new trial.

II. Ineffective Assistance Of Counsel

In *Strickland v. Washington*, 466 U.S. 668, 688 (1984), the Supreme Court established a two-prong test to determine when a defendant's right to effective assistance of counsel is violated. To allege a constitutional violation, the petitioner must show: 1) deficient performance by counsel, and 2) prejudice to the defendant. See *id.* An attorney's performance is deficient "when it falls below an objective standard of reasonableness, as determined by reference to prevailing

professional norms." *Morales v. United States*, 635 F.3d 39, 43 (2d Cir. 2011) (quoting *Strickland*, 466 U.S. at 488) (internal quotations omitted). Prejudice to the defendant is shown when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

A. Counsel Erroneously Failed To Present Definite, Specific, And Detailed Facts Proving That Mr. Basciano's Statements To Informant Joseph Massino Were Coerced And Obtained In Violation Of The Fifth Amendment.

While incarcerated pending trial, Mr. Basciano had several encounters with Massino, then official Boss of the Bonanno crime family, who was incarcerated at the same facility. Unbeknownst to Mr. Basciano, Massino was cooperating with the Government. On two occasions, Massino was wired with a recording device for the sole purpose of memorializing his encounters with Mr. Basciano and to capture any incriminating statements made by Mr. Basciano regarding the murder of Randy Pizzolo. Upon Massino's repeated urging during these encounters, Massino elicited incriminating statements from Mr. Basciano regarding Pizzolo's murder.

At trial, the Government successfully sought to offer the taped recordings of Mr. Basciano's statements into evidence as proof of his guilt. Although Mr. Basciano requested a *Massiah* hearing to determine the admissibility of these statements on coercion grounds, the district court found that its prior decision in *Basciano I* was dispositive of the issue. See Order at 37-39, Tr. at Docket No. 1018. Also, the Court found that Mr. Basciano failed to support his argument with any new evidence

showing that the investigative practices utilized by the Government caused a "coercive atmosphere." *Id.* at 38.

The Court found that the "facts do not indicate that Basciano, who was found in Basciano I to have also held a senior position in the Bonanno organized crime family and to have similarly acted ruthlessly, spoke to Massino under conditions which were sufficient to 'overbear [his] will to resist and bring about confessions not freely determined.'" *Id.* (quoting *Rogers v. Richmond*, 365 U.S. 534, 544 (1961)).

On appeal, Mr. Basciano unsuccessfully challenged the district court's decision. *See Basciano*, 634 Fed. App'x 832. The Government argued that the district court's decision should be affirmed because Mr. Basciano's defense counsel did not proffer "new evidence nor new argument that would compel a different result in the 03-CR-929 case [Trial I]." Gov't Appl. Br. at 41 in *Basciano*, (Aug. 19, 2015) (2d Cir.) (Doc. No. 135 in 11-2995)).

The Government also contended that there was "ample evidence in the record for the district court to determine that Basciano's statements to Massino were freely made, which evidence was not contradicted by any evidence offered by Basciano in support of his request for a hearing." *Id.* at 47 (emphasis added). The Government emphasized the lack of proof offered by the defense to support its Fifth Amendment coercion claim:

In *Basciano II*, Basciano did not file any further affirmations or affidavits by a person with knowledge in support of his Fifth Amendment coercion claim. Rather, he asserted that Massino was "a force to be reckoned with" who ordered underlings to be killed when they disobeyed him.

Id. at 58 (emphasis added).

The Government explained, "In support of his Fifth Amendment claim, Basciano incorporated the facts and legal arguments advanced in support of his Sixth Amendment argument but did not submit new evidence." *Id.* at n.11 (emphasis added). *See also id.* at 49 ("Basciano did not assert any fact or new affidavit that his will was, in fact, overborne. He thus failed to put any pertinent facts in dispute....").

The Government also claimed that the Supreme Court's decision in *Arizona v. Fulminante*, 499 U.S. 279, 286 (1991) did not warrant suppression of the tapes in Mr. Basciano's case, even though the Court in *Fulimante* found that "a confidential informant's use of credible threats of physical harm and an offer in exchange for a [defendant's] confession" constituted coercion in violation of the Fifth Amendment. Gov't Appl. Br. at 45 (Doc. No. 135 in 11-2995). The Government argued that *Fulimante* was distinguishable because "at no time did Massino imply or suggest that Basciano could be hurt or killed if he failed to answer Massino's questions." *Id.* at 46 (emphasis added).

Adopting these arguments, the Circuit explicitly found that "nothing in the record indicates that Basciano was fearful of jail generally or Massino in particular." *Basciano*, 634 Fed. App'x at 837. It explained, "There was nothing threatening in Masssino's manner when he discussed Pizzolo's murder with Basciano," *id.*, and his defense failed to allege "definite, specific, and detailed facts indicating his statements were coerced" to require further fact-finding at a hearing. *Id.* at 838.

Through no fault of Mr. Basciano, the lack of evidence offered in the underlying proceeding was solely due to trial counsel's inexcusable failure to present readily accessible evidence proving that Mr. Basciano's statements to Massino could only be the product of coercion under both Mafia protocol and the facts of this case.

Specifically, defense counsel failed to proffer evidence in the form of: 1) expert witness testimony establishing that only Massino could question Mr. Basciano about a murder and, as a member of the Mafia, Mr. Basciano *knowingly* had to answer Massino's questions under the penalty of death; 2) admissions by the Government proving that it knowingly created a atmosphere designed to coerce Mr. Basciano into making incriminating statements; 3) sworn declaration from Mr. Basciano establishing that he *knew* Massino could have him killed if he failed to answer his questions; 4) testimony from the Government's cooperating witnesses corroborating Mr. Basciano's coercion claim; and 5) Massino's testimony and the Government's argument that Mr. Basciano was required to answer Massino's questions and that Massino could have killed Mr. Basciano for disobeying his orders.

Overall, the denial of Mr. Basciano's coercion claim cannot be reconciled with the factual record. Thus, defense counsel's inexplicable lapse in not presenting this evidence, as explained *infra*, caused prejudice to Mr. Basciano, requiring reversal of his conviction.

a. Counsel failed to present an expert witness.

Counsel failed to proffer critical expert evidence proving that the Mafia's rules mandate that only an official Boss can question an underling about a prior murder and an underling must answer, under the possible penalty of death, an official Boss's demands in that regard.

This evidence was critical to the coercion issue in this case, because it established that Mr. Basciano knew that only Massino could question him about a prior murder and Mr. Basciano was aware, at the time of his statements, that his refusal to answer Massino's questions regarding the murder of Pizzolo could result in his death. Under those specific circumstances, Mr. Basciano's statements cannot be deemed freely made.

Notably, the need for expert evidence concerning these types of issues is well established because both the courts and juries are not equipped to understand the true operational structure of the Mafia. These include issues dealing with the absolute subordination that exists between an underling and a Mafia Boss. See *e.g.*, *U.S. v. Amuso*, 21 F.3d 1251, 1264 (2d Cir. 1994) ("Aside from the probability that the depiction of organized crime in movies and television is misleading, the fact remains that the operational methods of organized crime families are still beyond the knowledge of the average citizen.").

The interplay within this specific relationship can become quite complex, and it is common practice for the Government, when prosecuting an organized crime case, to offer expert witness testimony to provide

context for the jury on this subject. *See, e.g., U.S. v. Matera*, 489 F.3d 115, 121 (2d Cir. 2007) (testimony of expert witness was admissible); *Amuso*, 21 F.3d at 1263 (admitting expert testimony regarding “common cosa nostra terminology necessary to explain tape recorded evidence, and the existence and structure of New York crime families—topics we previously have held to be proper subjects of expert opinion.”).

In *Locascio*, the Second Circuit approved the testimony of a FBI agent, who “testified at great length on the nature and function of organized crime families, imparting the structure of such families and disclosing the ‘rules’ of the La Cosa Nostra.” *Locascio*, 6 F.3d 924, 936 (2d Cir. 1993). Significantly, this FBI agent “testified that a ‘boss’ must approve all illegal activity and especially all murders, and that the functions of the ‘consigliere’ [sic] and ‘underboss’ are only ‘advisory’ to the ‘boss.’” *Id.* (emphasis added).

Counsel’s lapse in not presenting expert testimony to support Mr. Basciano’s coercion claim was extremely prejudicial, as evidenced by the district court’s misguided reliance on facts that bear no relevance to whether an underling, like Mr. Basciano, could exercise free will when being questioned by the official Boss of the Bonanno family. Specifically, the district court’s apparent misunderstanding of the Rules of the Mafia led it to believe that Mr. Basciano could not have been coerced since he held a “senior position in the Bonanno organized

crime family" and engaged in acts similarly "ruthlessly" to those undertaken by Massino. See Order at 38 (Docket No. 1018 in 05-cr-060).

Notably, this finding is not only misplaced but, experts in this field dispute any claim that an underling could exercise free will when responding to the demands or questions of his official Boss. In this regard, expert witness Gerald Capeci [known as Jerry Capeci], whose background includes extensive studies and articles about the Mafia for the past four decades, has proffered in no uncertain terms that the district court's findings in this case were unfounded and irreconcilable when considered with clearly established Mafia protocol. See Affidavit of Gerald Capeci (Exhibit 3).

First, Capeci found that Mr. Basciano's senior position within the Bonanno family and his ruthlessness are irrelevant to whether Massino maintained complete dominance over Basciano, requiring him to comply, under the penalty of death, with Massino's demands:

Under Mafia protocol, Basciano was also required to answer Massino's questions without hesitation irrespective of Basciano's criminal background, ruthlessness, and stature within the Bonanno Family.

Id. at ¶ 42.

Under Mafia protocol, Basciano's position as an 'Acting Boss' and his alleged ruthlessness as a Mafioso were not relevant to his obligation to answer Massino's questions. Basciano's failure to follow any Massino order would have subjected him to a possible death sentence.

Id. at ¶ 44.

Second, Capeci also found that under Mafia protocol, while acting as a member of the Bonanno family,⁹ Mr. Basciano knew, under the possible penalty of death, that he had to answer Massino's questions about the Pizzolo murder:

Under Mafia protocol, Basciano was not permitted to disregard or refuse to answer Massino's questioning regarding any subject. In this regard, Basciano would have subjected himself to a possible punishment of death if he refused to answer Massino's questions.

Id. at ¶ 41.

Of critical importance, Capeci finds that in this specific case, Mr. Basciano, even if he was "Acting Boss," did not have the ability to exercise any free will in refusing to answer the questions presented by Massino regarding the Pizzolo murder:

Assuming Basciano became a member of the Mafia at some point before 2004, he would have to have known when Massino questioned him about the murder of Randy Pizzolo that he could either answer Massino's questions or face the very real prospect of being killed for refusing to do so. He could have chosen to speak truthfully, or to lie, or to do both, in responding to Massino's first question, and whatever followup questions he had. The one thing Basciano could not do was refuse to answer any questions that Massino posed. If he did that, he would have subjected himself to the possibility of death.

Id. at ¶ 45 (emphasis added).

Third, Capeci found further that in 2004, notwithstanding his incarceration, Massino remained the official Boss of the Bonanno family.

Id. at ¶ 43. In this regard, Capeci notes that "until Massino's cooperation with the Government was disclosed, Basciano was required to

⁹ As noted by the district court, Basciano was found "in Basciano I to have also held a senior position in the Bonanno organized crime family" when being questioned by Massino in 2004. See Order at 38 (Docket No. 1018 in 05-cr-060).

answer Massino's questions and remain subservient to him because Massino remained the official Boss of the Bonanno Family." *Id.*

While it is true that Basciano and Massino were close criminal confederates during these times, there can be no doubt that Massino was the Boss of the crime family, at least in Basciano's mind, since he had no idea that he was an agent of the government. To Basciano, Massino remained the leader of the crime family who had just been convicted of seven murders and was awaiting trial for the murder of an eighth mobster, for the flimsiest of reasons.

Id. at ¶ 46.

Pointedly, Capeci explains that the unequal dominance Massino held over Basciano at the time of these tape-recorded conversations was inherently coercive and a matter of life and death:

Massino was also the only person who could question an underling about a prior murder.

Id. at ¶ 31.

As Boss, Massino had much more clout and influence than Basciano, because there is only one Boss of a crime family and his rule is absolute. In this regard, Massino could officially order the murder of Basciano; Basciano held no such power over Massino.

Id. at ¶ 47.

Finally, Capeci states that a layperson is unlikely to understand the dynamic of the relationship that existed between Basciano and Massino at the time of these recordings:

While it may also appear to a layperson that Basciano was unafraid of Massino due to his own legacy of violent activity, there can be no doubt that Basciano understood the Rules of the Mafia and knew that Massino could have him killed if he didn't answer his questions.

Id. at ¶ 48.

This finding is significant where, as here, the court did not grasp the unique facts attendant to this case and was incorrectly requiring evidence of explicit threats when reviewing Mr. Basciano's coercion claim. *See, e.g., Basciano*, 634 Fed. App'x at 837 ("There was nothing threatening in Massino's manner when he discussed Pizzolo's murder with Basciano."). As Capeci articulates, however, the mandates imposed on Mr. Basciano as a matter of Mafia protocol inherently required him, under the penalty of death, to answer Massino's questions "without hesitation." Capeci Aff. at ¶ 42 (emphasis added). Moreover, "The one thing Basciano could not do was refuse to answer any questions that Massino posed," *id.* at ¶ 45, because "[t]here is no basis for any underling to circumvent or disregard answering Massino's questions, even if the underling is a more ruthless Mafioso...." *Id.* at ¶ 33.

Overall, it is indisputable that competent defense counsel would have consulted with an expert to ensure that his arguments were correct and that the district court fully understood that factors concerning Mr. Basciano's senior position and ruthlessness bore no relevance to the issue at stake. *See, e.g., Duncan v. Ornoski*, 528 F.3d 1222 (9th Cir. 2008)(noting that "it is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field"); *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) (noting that, in complex fraud case, "it should have been obvious to a competent lawyer that the assistance of an accountant [was] necessary."); *Knott v. Mabry*, 671 F.2d 1208, 1212-13 (8th Cir. 1982)

(noting that counsel may be found to be ineffective for failing to consult an expert where "there is substantial contradiction in a given area of expertise," or where counsel is not sufficiently "versed in a technical subject matter...to conduct effective cross-examination.");

In this regard, competent counsel would not have ignored the need to present expert witnesses to support Mr. Basciano's coercion claim. See e.g., *Strickland*, 466 U.S. at 690 ("[T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.") (emphasis added)).

Instead, Mr. Basciano's counsel offered conclusory assertions that Massino was "a force to be reckoned with" without explaining the inherent powers that Massino, as an official Boss, possessed and wielded over all other members. Defense counsel's meek and repeated assertion that Massino was merely "a force to be reckoned with" hardly captures the immense power a Boss has, as a matter of indisputable fact under the Rules of the Mafia, over other members and associates.

Notably, counsel, if properly exercising due diligence, would have been on notice regarding the importance of obtaining an expert's opinion, given that FBI agent, John Carillo previously avowed in Basciano I that a made member who is physically in the presence of his Boss understands, without the need to be explicitly threatened, that the Boss could order his murder at any moment:

Q: [F]or a violation of certain rules, depending on who was the boss, the individual could be murdered himself?

A: Yes.

Q: Now, we certainly are in agreement, are we not, Mr. Carillo, that only a boss can order a murder, correct?

A: That's correct.

Q: Indeed, you would agree with me that a boss has absolute authority over anyone involved with his family?

A: That's correct.

Q: Literally life and death?

A: Yes.

Q: You certainly would agree that members and associates of the family for many reasons must obey anything that the boss asks or demands of them, correct?

A: Yes.

Q: You would agree with this, that a made member who is physically in the presence of his boss understands that the boss could order his murder at any moment?

A: That's correct.

Q: Indeed, there is no question that the penalty for disobeying a direct order from a boss is death?

A: It could be death, yes.

Tr. 2350-51, *United States v. Basciano*, 03-cr-929 (Trial 1) (emphasis added).

Likewise, even a cursory search of case law by counsel would have shown the need to present expert testimony concerning the "operation, structure, membership, and terminology of organized crime families" as it related to Mr. Basciano's coercion claim.¹⁰ See, e.g., *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988), cert. denied, 488 U.S. 821 (1988). See also *United States v. Skowronski*, 968 F.2d 242, 246 (2d Cir. 1992) (upholding expert testimony of government agents explaining organized crime jargon); *United States v. Tutino*, 883 F.2d 1125, 1134 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990) (same); *United States v. Ardito*, 782 F.2d 358, 363 (2d. Cir. 1986), cert. denied, 475 U.S.

¹⁰ Notably, the district court itself found that there was also ample testimony in Massino's trial that a murder of a fellow member of the Bonanno crime family is not committed without the direct approval of the boss. See Doc. No. 389 in 03-cr-929.

1141 (1986) (same); *United States v. Gallo*, 118 F.R.D. 316, 317-18 (E.D. N.Y. 1987) (FBI agents could testify as experts as to methods of operation of organized crime).

By failing to provide any expert testimony whatsoever to support Mr. Basciano's coercion claim, counsel's representation fell below the standard of representation required under the constitution. See *Strickland*, 466 U.S. at 687 ("[C]ounsel's role...[is] to ensure that the adversarial testing process works to produce a just result under the standards governing decision.").

b. Counsel failed to present admissions by the Government.

Perhaps most probative of counsel's failure in perfecting Mr. Basciano's coercion claim was counsel's complete failure to present any evidence of the Government's own admissions indicating that it knew Massino exerted unencumbered power over his underlings, requiring their submission to his demands. Likewise, counsel neglected to offer scores of evidence proving that the Government knowingly created an atmosphere designed to coerce Mr. Basciano into making incriminating statements

In both Massino's criminal trial and Mr. Basciano's related criminal trials, the Government and the court documented the power that Massino possessed of his underlings, which was found to exist without the need for evidence of Massino's "explicit threats" or a showing of fear by the victimized underling. This evidence proved that the Government was well aware before wiring up Massino that he could and

did, without the need for explicit threats, successfully force Mr. Basciano into making statements against his freewill.

First, during Massino's trial, the prosecutor repeatedly noted that members of the Bonanno family faced, as a result of Mafia protocol and Massino's individual characteristics, dire consequences for failing to obey Massino's orders. During witness Frank Coppa's testimony, the trial prosecutor alerted the court that Massino was covertly attempting to influence the testimony of Coppa by ordering his son, under the penalty of death, to be present during the proceeding:

Frank Coppa, Junior is now in the courtroom. I would like to put on the record if there is going to be any cross examination about Frank Coppa, Junior, I ask that we do it at the time when he is not in the courtroom. It is torturing [Frank Coppa, Senior] to have his son here....There are people in the courtroom who we know and we've proved have passed messages for Mr. Massino, including his wife....I would just ask that that issue not be addressed on cross examination [as to the fact] that [Frank Coppa's] son is here, whether he thinks his son is in danger, anything relating to Frank Coppa, Junior.

Massino, Tr. 2445 (emphasis added).

In addressing this situation, the trial prosecutor explained in no uncertain terms that Coppa Jr. had no choice but to obey Massino's order that he be present during his father's testimony:

Mr. Massino is the boss of the Bonanno family. While he is in prison he passes messages through his wife and family members[,] and he is here[,] and frankly, Frank Coppa, Junior, is a soldier in the Bonanno family[] [and] has an obligation upon penalty of death to obey the orders of his boss.

Massino, Tr. 2446-47 (emphasis added).

Evidence documenting the Government's knowledge of Massino's ability to engage in acts of unspoken coercion was not relegated to Coppa's

testimony alone, but also extended throughout the entire proceedings. During witness Frank Lino's testimony, the prosecutor again elicited testimony showing that underlings were obligated to relinquish their free will, without showing explicit fear, when complying with Massino's demands. Lino testified that he continued to attend co-defendant meetings with Massino, even though Lino indicated he wanted to cooperate with the Government at such time. Notably, Lino did not show any emotion to Massino indicating that he felt coerced to attend these co-defendant meetings, although he feared for his life when being ordered by Massino to do so.

Responding to an inquiry by the court, the trial prosecutor explained,

[Lino] felt threatened by...the defense lawyers and the defendant because he thought the defendant was going to hurt his family and the defense lawyers kept trying to call him down, Judge.

Massino, Tr. 2368 (emphasis added).

Furthermore, trial prosecutors were also well aware of Massino's mastery of creating coercive atmospheres without the need for his explicit direction. Indeed, trial prosecutors were incensed by Massino's prowess to continue acts of covert coercion against a cooperating witness that were theoretically no longer under Massino's control. Trying to address Massino's engagement in these types of coercive acts, the trial prosecutor requested:

May we ask the witness to step out? This is a deliberate effort on the part of the defense to intimidate the witness whose son and brother have been brought to the courtroom sitting right next to Ms. Massino in the first row and his brother and his son are

sitting in the back...I would ask for a recess. It is not fair to have [Lino] sitting up there. Nothing is happening in the courtroom. [The defense attorney] has been gone for at least five minutes...[Lino] shouldn't be treated this way. It's ridiculous.

Massino, Tr. 691 (emphasis added).

In addition to these instances, prosecutors were also well aware of critical evidence proving that Mr. Basciano could not, at the time of his statements in 2004, refuse to attend or walk out of a meeting that Massino requested. At such time, prosecutors knew the details of Massino's prior participation in the killing of Cesare Bonventre, which occurred solely as a result of Bonventre's refusal to answer the former Boss's questions.

As explained during Mr. Basciano's trial, Massino believed that the Rules of the Mafia provided the Boss, including himself, the authority to kill someone for refusing to properly answer the Boss's questions. Massino testified that the reason Bonventre was murdered was because he disrespected the Boss by walking out of a meeting in which the Boss ordered:

Q: Now, regarding Cesare Bonventre, what did he do to justify or warrant death?

A: He [the Boss] questions him. 'Did you do this? Did you do that?' He said[,] '[A]bsolutely not.' With this, he got an attitude. He said, come on, John, let's get out of here, and they walked out and they left. That's what he died for.

Q: In a sense, a form of insubordination, is that correct?

A: Disrespectful of the boss. The boss didn't tell you to leave.

Tr. 5268-69.

Q: Now there was a man who was killed, literally killed for getting up and walking out of a room with the boss in the room. Right?

A: Correct.

Q: Because that was a sign of disrespect?

A: Correct.

Q: Which could be punishable at the boss' order by death?

A: Correct.

Tr. 5315.

Massino also testified in no uncertain terms that he also believed that he had the right to murder an underling who showed any disrespect to his rule as Boss:

Q: And the boss has it in his discretion to enforce the rules in any way he sees fit at any particular time?

A: Correct.

Q: If I violate one of Joe Massino's rules by showing him disrespect, Joe Massino could have me killed?

A: Correct.

Q: If I violate one of the rules, Joe Massino can give me a pass?

A: It all depends on the situation.

Q: But it's up to you?

A: Correct.

Tr. 5315-16.

Of significance, Massino testified that, even during his incarceration in 2004 at the time he questioned Mr. Basciano, he was still the official Boss and could have had Basciano killed for disrespecting his position:

Q: Is there any greater sign of disrespect for Joe Massino?

A: What he [Basciano] did to the Bonanno family? No.

Q: Than taking over your family?

A: Correct.

Q: And you say it was done without your approval?

A: Yes, it was.

Q: And you decided after many years, as the official boss, to do nothing about it?

A: I could have killed him. They wanted me to kill him and I gave him a pass. The west side come to me when I was on the floor. They said, "You need help? We'll get rid of him." I said, "Let him go. Let him do what he's doing."

A: I didn't. I didn't get into any conversation. I was cooperating at that point.

Q: When was that?

A: 2004.

Q: When?

A: I cooperated August 2nd, 2004, and I still was on the floor.

Tr. 5367-69 (emphasis added).

Notably, the recordings at issue also reflect that at least during one encounter with Mr. Basciano, the Government took advantage of this information and orchestrated the operation by forcing Mr. Basciano out of his cell so that he would be compelled to converse with and be questioned by the Boss, informant Massino; a situation in which the Government knew, or should have know, Mr. Basciano would be stripped of his free will to resist.

For example, during one exchange between the prison officials and Massino, one of the guards asked Massino, "Vinny wants to know if you know the rec [sic] officer?" See Tape One at 138. Massino replied, "Yeah, yeah." *Id.* Another official can be heard yelling, "Yo Bebo, tell him to get thirteen cell...thirteen...." *Id.* at 386. Notably, Cell thirteen was where Mr. Basciano was confined.

In addition, on January 4, 2005 during the first taped encounter, Massino explicitly invoked his position as Boss and his power to murder "every day" during these conversations to compel Basciano to discuss matters that only the Boss could inquire about:

Massino: I took twenty years to put this together. It's easy to take a life. I can take a life everyday [sic].

Basciano: I know that.

Massino: I'm, I'm the boss I could do what I want, and I

wouldn't do that.
Basciano: Okay.

Massino Tapes I at 13, 16 (emphasis added).

Moreover, the Government was well aware before it wired up Massino for a second time on January 7, 2005 that Massino not only already stated to Mr. Basciano that he "could take a life everyday [sic]" but that Massino had explicitly told Basciano that Massino's power as boss afforded him the exclusive right to inquire about Pizzolo's murder:

Massino: Yeah, but who gave who gave the okay to clip 'em? You did?
Basciano: Michael.
Massino: Oh.
Basciano: Yeah.
Massino: Aha.
Basciano: It wasn't me. You know what I'm saying?
Massino: What I'm what I'm trying to say is -- and -- when I ask you, there is only one person could ask you, and you know that?
Basciano: You.
Massino: Only a boss can ask.

Massino Tapes I at 51 (emphasis added).

MASSINO: Why didn't you mention about: Randy to me? You never said a word.
BASCIANO: I didn't think, well-.
MASSINO: You gotta tell me, bo. You're not the chief. I got, I'm responsible for everybody. And I know if I would have been out with you a couple of years, you would have been..

Massino Tapes I at 71-72.

Based upon all the available evidence, the Government thus knew, before wiring up Massino for a second time, that Massino already invoked his position as Boss to force Mr. Basciano to discuss Pizzolo's murder

again, although Mr. Basciano would not, or could not, be permitted nor compelled to discuss this matter with anyone else.

Overall, there was ample evidence for counsel to establish that Mr. Basciano was not only coerced into making statements to Massino, but also that the Government knowingly created a coercive atmosphere designed to overbear Mr. Basciano's will to resist Massino's questioning and bring about confessions not freely determined.

Accordingly, counsel was ineffective for failing to present this powerful evidence to the court when arguing Mr. Basciano's coercion claim.

c. Counsel failed to present Mr. Basciano's sworn account.

Counsel also failed to submit any information from Mr. Basciano regarding his encounter with informant Massino, notwithstanding the fact that such evidence was necessary and favorably dispositive of Mr. Basciano's coercion motion. Counsel failed to proffer such evidence even though it should have known that the court was required to review both the totality of the circumstances and the issue of compulsion from the defendant's perspective. *See, e.g., Fulminante*, 499 U.S. at 286; *Fikes v. State of Ala.*, 352 U.S. 191, 194 (1957); *Watts v. State of Ind.*, 338 U.S. 49, 52 (1949).

Here, counsel's neglect was prejudicial because Mr. Basciano's account of his encounters with Massino militated in favor of suppression. Indeed, Mr. Basciano's sworn rendition of these events provides proof that his statements to Massino were not only the product

of coercion, but also that the Government had directed and caused his encounters with Massino to occur under compulsion. See *Basciano Aff. II* at ¶ 3 (Exhibit 4) (Mr. Basciano recalls that on January 3, 2005, he "was summoned by Joe Massino to the recreation cages that were in the SHU [Special Housing Unit]."). At the time, as discussed *supra*, the Government already knew that Mr. Basciano, or any underling in the Bonanno family, had no choice but to obey Massino's order to attend meetings in which he directed.

In addition, counsel neglected the fact that, from Mr. Basciano's perspective, Massino made numerous threats to Mr. Basciano during their conversations not be identifiable to a layperson. *Id.* at ¶ 4. Mr. Basciano avows that "during my conversations with Massino on 1/2/05 and 1/7/05 I understood Massino's words to be threatening." *Id.* at ¶ 5 ("I was fully aware of Massino's mannerisms, characteristics, and colloquialisms during these conversations.").

Specifically, Mr. Basciano explains several examples in which Massino explicitly threatened him:

Massino admonished me that I was 'going to get second money' if I did something Massino did not approve. I understood that (second money) to mean Massino would/could do harm to me.

Id. at ¶ 4.

Massino told me during his quires about the Pizzolo homicide, to be 'honest with him and that the other day' (during the 1/3/05/ conversation) I played with him (lied to Massino) but he "let it go"....I understood that Massino spared me from whatever punishment he deemed appropriate[,] [i]ncluding being killed.

Id. at ¶ 5.

Of further significance, counsel neglected to alert the court of Mr. Basciano's understanding that he was required, under the penalty of death, to abide by Massino's orders at the time of these conversations; Mr. Basciano knew that "had I not responded to Massino's questions or, if I did not go to meet Massino at the recreation it could have had dire consequences for me, my family, or Cicale, so I thought." *Id.* at 6.

Overall, counsel's failure to present Mr. Basciano's sworn account was unreasonable under the circumstances, and, in conjunction with all other failures by counsel, caused Mr. Basciano's meritorious coercion claim to fail. Accordingly, because Mr. Basciano's statements would have been suppressed but for counsel ineptness, a new trial is required.

d. Counsel failed to present other corroborating testimony.

Counsel inexcusably failed to support Mr. Basciano's coercion claim with relevant trial testimony of other witnesses who testified about Massino's absolute control over all members of the Bonanno family. Counsel neglected to properly alert the court of testimony from cooperator Sal Vitale during Mr. Basciano's criminal trial and from Frank Lino during Massino's prior criminal trial, which supported the merits of Mr. Basciano's coercion claim. Specifically, Vitale and Lino testified about the subservient relationship held between Massino and his underlings, as well as the repercussions underlings faced in defying Massino's orders.

First, in Trial I, Sal Vitale provided testimony directly supporting Mr. Basciano's coercion claim. See Trial I, Tr. 384; 484-86;

2605. Yet, counsel failed to include this testimony in Mr. Basciano's suppression motion. Instead, counsel merely included citations to parts of this testimony in its reply brief, which the Government correctly noted was improper because "[c]ourts often do not consider, or find forfeited, arguments raised for the first time in reply briefs." Gov't Appl. Br. at 58 n.12 (Doc. No. 135 in 11-2995). Because defense counsel failed to properly include any highly probative testimony into the record initially, counsel failed to provide Mr. Basciano with competent counsel and contributed to the failure of his suppression motion.

The supporting testimony that counsel failed to provide also concerned Massino's influence and puppeteering of his underlings. Vitale's testimony indicates that a crime family member, irrespective of his ruthlessness, would never lie about committing a murder when questioned by Massino himself.

During the '03 trial, Vitale testified as to the following:

Q: In the Bonanno Crime Family, was it a serious matter to claim you had killed someone that you didn't?

A: Very serious.

Trial I, Tr. 384.

Q: So, you've also testified that murder was not something that got openly discussed, right?

A: That's true.

Q: And that was, I think, one of the things you told us was spoken about at an induction ceremony?

A: Yes.

Q: One of the 'I guess I don't's'?"

A: True.

Q: Because murder is a serious thing, right?

A: True.

Q: You could go to jail for life, right?

A: True.

Q: You could be put to death, right?

A: [I]f Joe [Massino] deems fit, yes.

A: Joe makes the rules. He could do anything he wants.

Q: So Joe Massino could kill you for a murder, right?

A: True.

Q: And if the government catches you, they could kill you for a murder, correct?

A: That's also true.

Q: So talking about a murder was off limits, correct?

A: It's supposed to be off limits.

Q: Well, you would agree that if you're going to discuss a murder with somebody and you're in organized crime, you would trust that person, right?

A: I wouldn't discuss any murders with anybody.

Q: That's because you didn't trust anybody, right?

A: No. That's the way I was brought up. When I kill somebody, that's between me and the individual that I do it with.

Q: And who raised you?

A: Mr. Massino.

Trial I, Tr. 484-86 (emphasis added).

If Vitale's testimony is not damaging enough, Frank Lino's testimony during Massino's trial provides even further evidence that no one within the Bonanno crime family contradicts, or fails to answer, orders which Massino issues. Lino testified as follows:

Q: Why wouldn't you cooperate [with the government]?

A: Because it was against my better judgment.

Q: Was it against the rules of the Bonanno Family?

A: Yes.

Q: What would have happened if you cooperated?

A: I would have got killed.

Massino Trial, Tr. 795 emphasis added).

Lino testified further:

Q: During the time you were before you were incarcerated, did you have a chance to see Mr. Vitale and Mr. Massino together?

A: Yes.

Q: And did you ever see them in conversation with one another, talking to each other?

A: Sure.

Q: And during that time did you ever see Mr. Vitale interrupt Mr. Massino?

A: No.

Q: Did you ever see Mr. Vitale give orders to Mr. Massino?

A: No.

Q: Have you ever seen anyone interrupt Mr. Massino?

A: No.

Q: Have you ever seen anyone give him any orders?

A: No.

Massino Trial, Tr. 2408-09.

Vitale's and Lino's testimonies make clear that Massino's presence was always contingent upon an understanding: that the underlying would perform, as expected, or face dire consequences.

Significantly, the district court recognized Massino's immense power over his underlings as a result of the testimony provided by Lino and Vitale. The district court stated that "[a]t Basciano's '03 trials and in other cases, cooperating witnesses testified that Massino had absolute authority in the Bonanno family; he was "God"; he made the rules; he gave the orders; he instilled fear; and all below him knew that they could be killed if they disobeyed him." Doc. No. 694 at 10 n.1 (emphasis added).

For the above reasons, the failure to provide such important and readily available supporting evidence constituted ineffective assistance of counsel.

e. Counsel failed to seek reconsideration of suppression and a mistrial when Massino testified and the Government argued that Basciano was required to answer Massino's questions concerning Pizzolo's murder.

Most strikingly, counsel failed to seek reconsideration of the district court's decision permitting the introduction of Mr. Basciano's statements to Massino, even though the Government presented evidence during trial proving that "Basciano knew that he had to tell the boss [Massino] the truth" when questioned about Pizzolo's murder. Tr. 8232 (emphasis added).

Counsel failed to alert the district court that the suppression of Mr. Basciano's statements was necessary, and thus a mistrial was required, in light of the Government's arguments and the extensive testimony it offered proving that Basciano was required, under the penalty of death, to answer the questions Massino asked about Pizzolo's murder.

Massino testified:

Q: Only a boss can ask you about a murder[,] is that correct?

A: That's correct.

Tr. 8832-33 (emphasis added).

Q: What is the penalty in organized crime with regard to lying to a boss about a murder?

A: You could get killed for that.

Q: In your years of experience as the underboss and the boss in the Bonanno Crime Family, did you ever learn somebody had personally told you that they did a murder that they did not do?

A: No.

Tr. 5596-97 (emphasis added).

Furthermore, Massino admitted that he deceived Mr. Basciano into believing that Massino was indeed still the official Boss of the Bonanno Family, despite the fact that Massino was a government cooperator during their prison encounters:

Q: You did everything in your power to create that impression to Mr. Basciano, to Vinny Basciano, that you were still the boss of the Massino family?

A: He knew I was the boss.

Tr. 5337 (emphasis added).

Q: While you were wearing the wire, you were still the boss of the Bonanno Family?

A: Correct.

Q: And prior to the time that you signed the cooperation agreement in June, what day was it?

A: It was June 23rd, 2005.

Tr. 5337.

Massino testified further:

Q: You knew you were wired, right?

A: Correct.

Q: And you didn't tell Basciano that he was wired, right?

A: Correct.

Q: As far as you believed, Basciano knew you were still the official boss of the Bonanno family?

A: Yes.

Q: And that's what you wanted him to believe?

A: He believed he was the boss.

Q: The official boss?

A: Acting boss.

Q: Okay. And you were the official boss?

A: Yes.

Q: And he believed he was the acting boss?

A: Correct.

Q: And you were in a position superior to him?

A: Correct.

Tr. 8832-33 (emphasis added).

Thus, when Massino demanded Mr. Basciano tell him what was going on outside the correctional facility, Mr. Basciano was under the belief that Massino still exercised complete control over his life: failure to answer Massino's questions, in Mr. Basciano's mind, would result in near-certain death. Mr. Basciano, then, was placed in double bind: he could either answer the boss as required or refuse to answer under the possible punishment of death.

Indeed, the district court recognized that during one of "the tape-recorded conversations with Basciano in January 2007, Massino assert[ed] his power as the boss as he ask[ed] Basciano questions about Bonanno family business...[Specifically], Massino sa[id], 'What's going with our people[?]' Tr., Doc. No. 694 at 11 n.1 (citing Draft Transcript of January 3, 2005, at 62) (emphasis added). Massino pushed further, demanding that Mr. Basciano "finish telling [him] what the family is doing." *Id.* (emphasis added).

Placed in context of a man [Mr. Basciano] who was standing in the presence of his Boss, who was just convicted of seven murders and awaiting trial for another murder and who had indoctrinated the entire Bonanno family for decades, it is blatantly clear that any underling would have felt coerced into answering Massino's questions under those conditions. See *e.g.*, *Blackburn v. State of Ala.*, 361 U.S. 199, 206 (1960) ("[C]oercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.").

Based solely on Massino's testimony, even lay observers unfamiliar with Mafia protocol understood that Massino held the power to order Mr. Basciano's death for failing to answer his questions. Specifically, Liz Robbins of the *New York Times* summarized Massino's testimony as follows:

Under questioning from Mr. Goltzer, Mr. Massino conceded that Mr. Basciano had shown disrespect by appointing himself acting boss, since Mr. Massino was technically still the boss even while in prison. He added that he could have ordered Mr. Basciano killed, but that by that time he was already cooperating with the government.

Liz Robbins, "Ex-Mob Boss Tells Jury, Calmly, About Murders," *The N.Y. Times* (April 14, 2011), <http://www.nytimes.com/2011/04/15/nyregion/ex-mob-boss-joseph-massino-details-a-few-murders.html> (last visited June 24, 2017) (emphasis added).

Thus, even a cursory review of the trial record provides more than ample evidence demonstrating that Massino, while acting as an informant, knowingly utilized his unique power as the official Boss of the Bonanno family to coerce Mr. Basciano into making incriminating statements. Regardless of whether Mr. Basciano was a particularly "ruthless" underling, or perhaps because of that, Mr. Basciano faced no choice but to answer Massino's questions. Failure to do so would place Mr. Basciano, and his family, in grave danger.

Defense counsel rendered ineffective assistance by failing to seek reconsideration of the district court's decision not to suppress Mr. Basciano's statements after the Government presented and argued the very facts proving that Mr. Basciano was coerced.

f. But for counsel's failures, Mr. Basciano's motion to suppress would have been successful.

The Supreme Court has held in no uncertain terms that "[t]he Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession." *Ashcraft v. State of Tenn.*, 322 U.S. 143, 155 (1944). A coerced, or involuntary, confession occurs where "the government's conduct causes the defendant's will to be overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973) (internal quotation omitted) (internal citations omitted).

In determining whether a confession was coerced, the court is required to view the confession within the totality of the circumstances, and from the perspective of the defendant. See *Fulminante*, 499 U.S. at 286 (finding coercion where undercover inmate offered protection from physical violence in exchange for Fulminante's confession); *Fikes v. Alabama*, 352 U.S. 191, 194 (1957) (requiring that determination of coercion must be viewed in light of the defendant's psychological background); *Watts v. State of Ind.*, 338 U.S. 49, 52 (1949) ("A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure...it does not issue from a free choice.").

Furthermore, the Supreme Court has explained,

A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Fulminate, 499 U.S. at 296 (emphasis added).

In *Pagan v. Keane*, the Second Circuit held that erroneous admission of a confession was not harmless error. See *Pagan*, 984 F.2d 61 (2d Cir. 1993). There, the Court found that

the State has failed to demonstrate beyond a reasonable doubt that the jury's verdict would have been the same without the confession. The only physical evidence connecting Pagan to the crime was that he had been shot (and his clothing showed bullet holes), but the State did not attempt to show that Pagan had been shot with Reed's gun.

Id. at 65.

Given the profound impact of confessions upon juries, defense counsel has a special duty to ensure that such evidence is not the product of coercion, and if so, that counsel successfully obtains its exclusion from trial. In this regard, it is counsel's duty to provide the court with the necessary facts and arguments to allow it to conduct a full inquiry and make findings worthy of confidence.

Here, counsel lapsed in his duty to ensure that the district court conduct this critical inquiry, having all the necessary facts, to determine whether Mr. Basciano would have made inculpatory statements at that moment, had he been questioned by anyone other than the Boss of the

Bonanno family. Counsel's failure is unexplainable given that the evidence proving that Mr. Basciano's inculpatory statements should not have been admitted was readily available.

There is no question that competent counsel would have found and presented such uncontroverted proof that there was coercion in this particular case given that all known evidence points to the fact that there was inherent coercion based on the totality of the circumstances and the context of the situation from the Mr. Basciano's point of view. See *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir. 1986) ("To decide [the coercion] issue, we must examine the statement from [the defendant's] viewpoint.").

Thus, competent counsel would have explained to the court that its analysis required not only a finding as to whether there was explicit threats by Basciano's interrogator, but also that this particular case required the exploration of facts pertaining to Basciano's knowledge that: 1) his interrogator held the highest position within the Mafia; 2) his interrogator had the exclusive right to question him about a prior murder; and 3) his interrogator had the power to authorize his death if he hesitated or failed to answer the questions presented.

Of significance, counsel would have also exploited the Government's admissions in related proceedings and at trial, because "[t]he burden is on the government to establish, by a preponderance of the evidence, that a challenged confession was voluntary." *Id.* Here, had counsel argued the facts properly, the Government would have been precluded from claiming

that Mr. Basciano's statements were voluntary, because it offered, as true, both testimonial evidence and arguments at trial directly inapposite to such conclusion.

Indeed, the Government would have been unable to backtrack from the arguments it made during summation in which it claimed that Mr. Basciano knew that he had no choice but to answer his Boss, Massino, when being questioned about a murder:

The boss asked Basciano about a murder. Basciano knew that he had to tell the boss the truth, the same way that he told Massino the truth in 2001 when he told Massino about his involvement in the murder of Frank Santoro.

Tr. 8232.

Likewise, the Government could not backpedal from Massino's sworn testimony that at the time of his questioning of Mr. Basciano, he retained a superior position over Mr. Basciano and that he could have ordered Mr. Basciano's death for showing disrespect to his authority:

Q: As far as you believed, Basciano knew you were still the official boss of the Bonanno family?

A: Yes.

Q: And that's what you wanted him to believe?

A: He believed he was the boss.

Q: The official boss?

A: Acting boss.

Q: Okay. And you were the official boss?

A: Yes.

Q: And he believed he was the acting boss?

A: Correct.

Q: And you were in a position superior to him?

A: Correct.

Tr. 8832-33 (emphasis added).

Overall, notwithstanding the Government's admissions at trial, there is an abundance of other evidence, readily available to counsel,

supporting this coercion claim. As explained *supra*, counsel could have provided firsthand evidence from Mr. Basciano along with the corroborating expert evidence, testimony proffered by the Government in related proceedings, and prior admissions by the very prosecutors involved in this case. From this type of evidence--adduced from expert witnesses, trial testimony, and the Government's own admittance--it is clear that counsel could have easily proven that Massino spoke to Mr. Basciano under conditions that were sufficient to "overbear [his] will to resist and bring about confessions not freely self-determined." *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

Accordingly, Mr. Basciano's conviction must be reversed. But for counsel's errors, he would have presented a clear case of coercion requiring the suppression of his incriminating statements.

B. Defense Counsel Failed To Present Favorable Witness Testimony That Would Have Rebutted The Government's Case And Supported Mr. Basciano's Defense Theory.

At trial, defense counsel opened by stating, "I am going to tell you about the evidence in this case right now that the government has left out. And then you will be begin to understand what these tapes [between Massino and Mr. Basciano] really mean...." Tr. 4592 (emphasis added). Counsel then proceeded to acknowledge the importance of the evidence that could be presented by certain defense witnesses--witnesses who counsel even promised to the jury would be called as part of the defense's case. Tr. 4605 (counsel stating to the jury that " if the government doesn't call him [Tommy Lee], I will..."). However, counsel

failed to call the witnesses necessary to rebut the Government's case, including the favorable witnesses counsel promised the jury would be presented on Mr. Basciano's behalf.

This level of advocacy was ineffective for several reasons: 1) these favorable witnesses would have provided testimony to rebut the Government's central theory of prosecution; 2) these witnesses would have supported the defense's theory that Mr. Basciano did not have motive to kill Pizzolo and that he lied to informant Massino concerning the events leading to Pizzolo's murder; and 3) these witnesses would have established that Cicale had a personal motive to kill Pizzolo without need for Mr. Basciano's direction.¹¹

Notably, the trial record indicates no strategic reason as to why these favorable witnesses were not called. Quite to the contrary, the record establishes that, following a 90-minute lunch break in which counsel unanimously decided, over the objections of Mr. Basciano, to rest its case, defense counsel informed the court it would not be the calling any of the witnesses counsel repeatedly represented would be part of the defense's case.¹² Tr. 7918. Because the record does not indicate any strategic decision on the part of counsel, the failure to

¹¹ These witnesses would have provided testimony tending to establish that Cicale had an independent motive to kill Pizzolo, because Pizzolo and Cicale had murdered Nicholas Cirillo and Pizzolo was caught discussing their involvement in such offense in violation of Cicale's trust.

¹² Of significance, during an ex-parte meeting with the judge, Mr. Basciano stated, "I think it's important to make a fulsome record of what I feel wasn't the best representation after I spoke to my lawyers about certain issues." Tr. 8333. Mr. Basciano repeatedly asserted that defense counsel's last minute decision not call favorable witnesses "don't make sense." Tr. 7918.

call such witnesses is presumptively unreasonable requiring reversal of Mr. Basciano's conviction or an evidentiary hearing is required to determine whether counsel's lapse violated Mr. Basciano's right to effective assistance of counsel.

a. Applicable law

The Sixth Amendment protects a defendant's right to call favorable witnesses. See *Pavel v. Hollins*, 261 F.3d 210, 217 (2d Cir. 2001). Defense counsel's actions are subject to a high degree of deference, and are presumed to be strategic unless the record indicates no such strategy. See *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987) ("The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial.").

Notwithstanding such deference, it is well established that counsel's decision not to present favorable witness testimony is unreasonable when such testimony supports a viable defense theory and is necessary to rebut the Government's case. See, e.g., *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) ("Under the circumstances, we conclude that counsel's overall performance, including his decision not to put on any witnesses in support of a viable theory of defense, falls outside the wide range of professionally competent assistance.").

Likewise, counsel's decision not to call favorable witnesses is not justified unless there are strategically sound reasons to forgo such testimony. *Bryant v. Comm'r of Corr.*, 964 A.2d 1186, 1202 (Sup. Ct.

Conn. 2009) (finding ineffective assistance where defense counsel failed to present evidence of relevant and plausible third party culpability and concluding "that but for the deficient performance of the petitioner's trial counsel, there was a reasonable probability sufficient to undermine confidence in the jury's verdict....").

In *Pavel*, the Second Circuit further explains that a court's "hesitation to challenge a lawyer's 'strategic' decisions has no place" where the circumstances reveal no legitimate reason for counsel's decision. 261 F.3d at 228. The Court found that counsel's failure to call a favorable witness was not attributable to any strategy where "[the attorney] opted not to prepare a defense...solely because he believed that the motion to dismiss would be granted." *Id.* at 217-18 (emphasis added). Notably, the Second Circuit stated,

It is apparent from this explanation that [the attorney's] decision as to which witnesses to call was animated primarily by a desire to save himself labor--to avoid preparing a defense that might ultimately prove unnecessary. [This] decision not to call any witnesses other than Pavel was thus 'strategic' in the sense that it related to a question of trial strategy--which witnesses to call. And it was 'strategic' also in that it was taken by him to advance a particular goal. That goal, however, was mainly avoiding work--not, as it should have been, serving Pavel's interests by providing him with reasonably effective representation. Therefore...it was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated 'strategic' and been especially reluctant to disturb.

Id. (emphasis added).

The Supreme Court has also explained, "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at

690. Thus, counsel's failure to call witnesses necessary to support a viable theory of defense or to rebut the prosecution's case, falls outside the wide range of professionally competent assistance. *See, e.g., Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005) (noting that "[c]ounsel has a duty...to investigate all witnesses who may have information concerning his or her client's guilt or innocence"); *Chambers v. Armontrout*, 885 F.2d 1318, 1323 (8th Cir. 1989) (counsel's decision not to interview and present witness supporting defendant's self-defense theory meets deficiency prong); *United States ex rel. Cosey v. Wolff*, 727 F.2d 656 (7th Cir. 1984) (defense counsel's out-of-hand rejection of potential witnesses and decision not to call witness because prosecution's case was so weak falls below the minimum standards of professional competence).

Furthermore, when the record does not indicate any strategic decision on the part of counsel, an evidentiary hearing is generally required to determine the reason for counsel's decision in not calling favorable witnesses to testify. *See, e.g., United States v. Holder*, 410 F.3d 651 (10th Cir. 2005) (remanding for an evidentiary hearing on whether counsel's failure to call only two witnesses to shooting was sound trial strategy); *Rivera Alicea v. United States*, 404 F.3d 1 (1st Cir. 2005) (remanding for an evidentiary hearing on whether counsel was ineffective in failing to call at trial two witnesses who would have testified that the government's key witness admitted to them that he was going to lie on the stand); *Bruce v. United States*, 256 F.3d 592 (7th

Cir. 2001) (remanding for an evidentiary hearing on whether counsel was ineffective in failing to adequately assess potential alibi witnesses).

b. Tommy Lee

Defense counsel made repeated assertions to the court, the jury, and Mr. Basciano that Tommy Lee, a "corrupt lawyer," would be called to testify on Mr. Basciano's behalf. Tr. 4605. However, at the eleventh hour, and without any apparent strategic reasoning, counsel opted not to call Lee or introduce excerpts of his sworn testimony from prior proceedings. *Id.* at 7918. Counsel's failure to utilize Lee's promised testimony, a favorable witness whose testimony would have rebutted several key aspects of the Government's case, constituted ineffective assistance of counsel.

Specifically, counsel's decision was erroneous, because the record overwhelmingly demonstrates that Lee's testimony would have crumbled the Government's claim that Mr. Basciano was motivated to kill Pizzolo in 2004 and undercut Massino's testimony that Mr. Basciano "ruthlessly" took control of the Bonanno crime family after Massino was arrested. In addition, Lee's testimony would have proven the defense's theory that Mr. Basciano was lying to Massino during their recorded jailhouse conversations regarding the events leading up to Pizzolo's murder. In this regard, counsel's failure to call Lee was inexplicable because the defense's case rested heavily on proving that Mr. Basciano's incriminating statements to Massino were false and should not be believed. *See, e.g., Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004)

(finding counsel ineffective for failing to interview victim, who an eyewitness to the crimes and necessary to prove counsel's theory that the defendant's incriminating statements to police regarding such crimes were false and should not be believed).

During opening statements, defense counsel told the jury, in no uncertain terms, that it intended to call Lee as one of the defense's key witnesses. Counsel stated, "Between the time that Basciano told Massino that he had okayed the murder [of Pizzolo]...Dominick Cicale sent a remarkable message to Vinny Basciano through a corrupt lawyer by the name of Tommy Lee--and if the government doesn't call him, I will-- Tommy Lee is a cooperator, too." Tr. 4605 (emphasis added). In addition, counsel repeatedly told the court that the defense would call "Tommy Lee" due to the necessity of his testimony. Tr. 7558-59. See also Tr. 6627 ("[W]e asked [the government] to produce Tommy Lee as our first witness...So we have, you know, a real case for the better part of a few days."); Tr. 6783 ("If the government doesn't call Mr. Cicale, we would like him rather than Mr. Lee as our first witness."); Tr. 7556-57 ("[The defense] received a letter from the attorney for Tommy Lee...intend[ing] to assert a Fifth Amendment privilege....[W]e would object to that...[and] ask the government to produce Mr. Lee"); Tr. 7770 (noting line up of defense witnesses, including Lee); Tr. 7775 (in confirming the line up of witnesses, AUSA Merkl asked, "Okay. So Vitale, Medina, Lee?" Defense counsel responded, "Yes."); Tr. 7777 ("I don't think [the

defense] will get through all of the witnesses tomorrow, the first three witnesses tomorrow, quite frankly.").

In this regard, counsel's conduct was extremely prejudicial. Counsel failed to fulfill promises to the jury that Mr. Basciano would present certain witnesses, and as result, prejudiced the credibility of all other defense arguments. Counsel's lapse cannot be deemed harmless, because "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988).

Moreover, counsel's breach serves to underscore the more important failure to investigate and call exculpatory witnesses that were necessary to prove counsel's promise of showing "what the government left out if its case." Tr. 4592. Counsel's unexplained failure to fulfill his promise to provide such evidence "may well have conveyed to the jury the impression that in fact there was no alternate version of the events that took place, and that the inculpatory testimony of the prosecution's witnesses was essentially correct." *Id.* at 258; *see also McAleese v. Mazurkiewicz*, 1 F.3d 159, 166-67 (3rd Cir. 1993) ("The rationale for holding such a failure to produce promised evidence ineffective is that when counsel primes the jury to hear a different version of the events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to which counsel referred in his opening statement were unwilling or unable to deliver the testimony he promised.").

Ultimately, counsel's failure to provide Lee's testimony cannot be reconciled with either his promise to the jury¹³ or the record in this case. Of significance, counsel knew that Lee's testimony was the only way to undercut key aspects of Massino's testimony regarding the events leading up to Pizzolo's murder. For example, Lee was the only available witness who could have testified that Mr. Basciano did not "ruthlessly seize[] power and control over the Bonanno crime family after the arrest of [Massino] in 2003." Tr. at 4585. Indeed, Massino's testimony denying that he sent a message "to Basciano through Attorney Tommy Lee, in words or substance 'Vinny to take the reins,'" *id.* at 5342, is directly in conflict with Lee's previously sworn testimony:

A: First illegal message I remember passing was the one where Joseph Massino indicated to me in the Metropolitan Detention Center Vinny should take the reins of the Bonanno crime family.

Q: What did you understand the reins to mean?

A: Assume the acting role as the boss of the Bonanno crime family.

Q: Did you pass that message to Mr. Basciano?

A: I did.

Q: What was his reaction?

A: He was excited.

Q: Did he say anything?

A: He asked me to repeat several times the exact words that were used by Mr. Massino.

Q: What did Mr. Basciano tell you to tell Mr. Massino in response?

A: I don't remember the exact words, but something to the effect I love him, I won't let him down, things aren't going to skip a beat with me out here.

Trial I, Tr. 6797-98, (emphasis added).

¹³ Thus, there exists an additional basis to illustrate counsel's ineffectiveness evidenced by the "broken promise as opposed to the decision not to pursue a particular line of testimony." *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003).

Moreover, counsel was also aware of Lee's prior interview with the FBI in which he reported facts indicating that, contrary to engaging in a "ruthless" takeover, Basciano continued to seek Massino's input. Lee also reported that Mr. Basciano told the members of the Bonanno family that Massino remained the final authority as official Boss:

Basciano requested that [Lee] ask Massino for his input on who should be placed in the underboss and consiglere [sic] positions. Massino advised that [Mr. Basciano] should pick who he wanted. Basciano sent word that he chose Mancuso, and FNU Roberto as consiglere [sic]. Massino responded that they would not be his choices, but [Mr. Basciano] should keep them. Basciano advised that this is still Massino's thing and that everyone is aware that they are in acting positions.

Interview of Lee, FBI Form 302.

Perhaps most critical to this issue, however, is counsel's awareness that Lee's testimony also proved that Mr. Basciano did not want to harm Pizzolo in 2004, that Mr. Basciano intended to induct Pizzolo into the Bonanno family at such time, that Mr. Basciano wanted everyone in the Bronx to "get along" with each other,¹⁴ and that Mr. Basciano never sent a message to Cicale through Lee directing Cicale to kill Michael Mancuso. See Trial I, Tr. 6797; 6910.

Significantly, the prosecution's entire case would have collapsed once Lee testified that Mr. Basciano was advocating for Pizzolo's induction into the Bonanno family at the time in which Cicale alleged

¹⁴ In this regard, counsel also neglected to introduce a conversation between Tony Urso and John Cammarono, Sr., both alleged panel members of the Bonanno family, which would have furthered the defense's case. In one exchange, Urso and Cammarono stated that Mr. Basciano is "a good kid who is not looking to take over [the family]," and that they "know everything that [Mr. Basciano] is doing." (Recording dated Oct. 26, 2003). This tape should have been introduced by counsel to rebut Massino's testimony and to corroborate Lee's testimony.

that Basciano had ordered Pizzolo killed. This evidence is so powerful because it undercuts the prosecution's central theory that Mr. Basciano ordered Pizzolo's murder as a result of being "fed up" with Pizzolo's shoddy construction work and his transgressions against the Bonanno family:

Q: The message that Mr. Basciano had sent through you to Joseph Massino was to have Randy Pizzolo inducted into the Massino family; is that a fair statement?

A: Yes.

Q: This was some time in '04?

A: Yes.

Q: You never sent a message to Mr. Massino from Mr. Basciano that Mr. Basciano wanted to hurt Randy Pizzolo, did you?

A: No, sir.

Trial I Tr. 6910 (emphasis added).

Likewise, Lee's potential testimony that he did not pass or receive messages regarding Pizzolo's murder would have helped prove the falsity of Mr. Basciano's incriminating statements to informant Massino:

Basciano: I told the lawyer--everybody. Sometimes you get a bad student because the teacher didn't teach him right. And I gave this kid the benefit of the doubt. And I, I told him, I said, "listen to me, I'm your last fuckin' stop. You fuck up with me...."

Massino Tapes at 22.

Notably, counsel emphasized the importance of Lee's testimony when it argued before the court that Lee's testimony, whether introduced through live testimony or introduced through his prior testimony, was necessary to the defense's case. Among other things, counsel explicitly told the court that Lee's testimony would establish that Basciano did not have a motive to kill Pizzolo, that Mr. Basciano did not send a

message to kill Mancuso, and that Massino lied when he testified that he never told Lee to let Mr. Basciano "take the reins." See Tr. 7813-14.

The following exchange provides ample evidence of counsel's knowledge that Lee's testimony was a necessity to the defense case's on these specific grounds:

The Court: So what is the purpose for calling Mr. Lee, let me ask you that.

Mr. Goltzer: Mr. Lee is in a position to testify that he never carried a message for Mr. Basciano to harm Mr. Pizzolo. That is number one. He is in a position to say he never carried a message Mr. Cicale to kill Michael Mancuso and he's also in a position to say that Mr. Massino sent Mr. Basciano a message that he was to take the reins of the family. That is for starters, Judge. I don't have the letter in front of me.

The Court: How does that come in as a coconspirator statement?

Mr. Goltzer: It doesn't. We are not offering the statements for the truth. There was testimony from Mr. Cicale that he received certain messages from Mr. Basciano. We are entitled to rebut that to the extent that Mr. Basciano sent messages that said...don't fight with Mr. Mancuso.... The issue that Mr. Cicale raised was he received certain statements that were made from Mr. Basciano, and our rebuttal to that was he received other messages that contradict what you say.

Mr. Goltzer: Mr. Massino denied under oath sending a message through Tommy Lee to Mr. Basciano that Mr. Basciano should take the reins. That's a critical piece in and of itself. That's certainly inconsistent with his prior sworn testimony but we are not offering it to impeach Mr. Massino. We are offering it to rebut the government's affirmative testimony that certain messages were sent out and certain import by Mr. Basciano to Mr. Lee. Mr. Lee contradicts it.

Mr. Goltzer: The government brought out messages to Mr. Basciano from Massino through Lee prior to the time that Mr. Basciano was arrested and it was prior to the time that Mr. Basciano was arrested that Mr. Lee carried a message to him to take the reins. As Your Honor recalls, Mr. Massino's testimony, he testified that he

never sent such a message to Mr. Basciano, and Mr. Basciano was taking over the family by force, and totally betraying him. So it is responsive to that and their theory.

Tr. 7813-15 (emphasis added).

Notably, counsel was also advised that there was no potential prejudice to Mr. Basciano's defense by offering Lee's testimony, because the Government explicitly represented that there was no evidence suggesting that Lee passed messages concerning Pizzolo's murder:

Mr. Lee had a visit with Mr. Basciano on the 20th and that is in the record. But we have never argued and do not plan to argue that that message was passed. Mr. Lee has never testified about that message being passed. We would not even have a good-faith basis for making that argument.

We have never represented and will not argue that any message of that kind was passed through Tommy Lee. We would not have a good-faith basis for that argument.

Tr. 7835-36 (emphasis added).

With that statement, the court then asked defense counsel, "[I]f the government is not asserting that Mr. Lee passed a message from Mr. Basciano to anyone on the outside between the time Mr. Basciano was incarcerated and the time of the murder, then what's left?" Tr. at 7837.

Counsel replied:

What's left is the fact that Mr. Lee brought a message to Mr. Basciano prior to the time that he was arrested that he took the reins. What's left is that Mr. Lee brought several messages to Mr. Basciano about having these guys, Cicale and Mancuso, get along....I also want to ask the jury to accept Mr. Lee's representation about messages that he brought out through Massino, most of which were about money. So there are other areas about which we would question Mr. Lee that I think we have a right to do for the reasons I've stated earlier.

Tr. 7837.

The court concluded that counsel had "until 2:00 o'clock[]" to "cull[] out portions of [Lee's] testimony...." Tr. 7911. When court reconvened at 2:00 o'clock, an unexplainable change had occurred. After counsel had "consulted amongst [themselves]," and over the objections of Mr. Basciano, it was decided that Mr. Basciano's defense "would be resting," without submitting Lee's prior testimony. See Tr. 7918 (emphasis added). The court responded with some surprise, having previously noted that "[f]our days of testimony has now turned into four hours of testimony?" Tr. 7896-97 (emphasis added). Instead of vigorously defending Mr. Basciano and taking the time to present readily available evidence to rebut the prosecution's case, defense counsel replied, "Thankfully, yes. I didn't think the court would be upset with us for being shorter." *Id.* (emphasis added).

Following the decision to rest, Mr. Basciano requested an ex-parte meeting with the judge wherein Mr. Basciano legitimately questioned counsel's failure to call, among other witnesses, Lee. Responding to the court's inquiry of potential "blow-back" from Lee's testimony, defense counsel began backpedaling from his prior position and offered the following unsubstantiated reasoning:

Mr. Jasper: Because right now there is nothing specifically that with the government as, they themselves, stated earlier can say that Tommy Lee specifically passed a message to anyone to harm Mr. Pizzolo and any message was specifically sent to Mr. Mancuso regarding that. However—
The Court: They've also agreed that they are not going to make any claims regarding Mr. Brafman, right?
Mr. Jasper: Correct.

The Court: So that's off the table.
Mr. Jasper: Yes, but if we inject Tommy lee [sic] in this now—he's better off being a vague shadowy figure than having him come in either live or through the [prior] testimony and then have the government cull through and pick to rebut us certain instances where messages were passed between Mr. Basciano sent to Mr. Cicale to give to Mr. Mancuso. Why even go there?
The Court: I think it was important that I hear from the defendant and that you put your rationale, at least, in large measure on the record and this is preserved for any appeal, should there be one.

Tr. 7925-7927 (emphasis added).

The reasoning offered by counsel not to call Lee was patently frivolous [i.e., "he's better off being a vague shadowy figure"] after it promised the jury that the defense would call Lee and counsel argued extensively throughout the trial about the significance of Lee's testimony in relation to the charged offense. In addition, counsel's alleged fear of the Government's "rebuttal" was meritless and wholly unsubstantiated as the Government had already assured counsel that it had "never represented and will not argue that any message of that kind was passed through Tommy Lee" concerning Pizzolo's murder. Tr. 7835-36 (emphasis added). Indeed, the Government told the court it "would not even have a good-faith basis for making that argument." *Id.*

Moreover, Mr. Basciano correctly points out the following:

There is nothing in the record that the government is going to now suggest on our case that Tommy Lee did something untoward.

We need a motive. We have no motive why Dominick Cicale wanted to kill Randy Pizzolo and that's a motive, and I'm being provided without a motive and furthermore, my lawyers' concerns are in a vacuum. They should have any concern because the government didn't introduce Tommy Lee in their case in chief.

Tommy Lee has testified in two previous trials, Judge, and has never testified under oath in this courtroom that I told him "Listen to me, I'm your last fuckin' stop." That message to the lawyer was supposed to go to Joseph Massino. He never testified to that.

If I had Tommy Lee testify, Tommy Lee, I submit to the court, would have said that I never gave him this message which would have been a lie to Joseph Massino. I would have then further argued that Dominick Cicale looked at my words on tape, picked up this sentence, knew how important it was and used them as my words. The government in their summation and rebuttal used this statement as the truth and it's a lie.

Tr. 8333-34 (emphasis added).

Counsel's flippant "advocacy" is even more disturbing in light of the fact that after Mr. Basciano was convicted, and during the penalty phase of litigation, counsel attempted to introduce Lee's prior testimony in support of Mr. Basciano's defense. See Tr. 8972. The following exchange demonstrates that the reasoning counsel offered at the eleventh hour not to include Lee's testimony during the guilt phase of trial was patently frivolous:

The Court: Why is it relevant?

Mr. Goltzer: I believe if memory serves me correctly, there is a statement in there about Tommy Lee taking a message from Mr. Massino to Mr. Basciano to take the reins.

Mr. Frank: How is that relevant to this penalty proceeding?

Mr. Goltzer: It is relevant to the penalty proceedings because the government asserted in its opening statements, and the trial record that has been incorporated in this proceeding, that Mr. Basciano through violence and a great deal of manipulation, has sought to take control of the Massino family without Mr. Massino's consent...Mr. Massino denied ever sending a message out to Mr. Basciano that he should take the reins of the family, and Tommy Lee directly contradicts him.

The Court: Tell me.

Mr. Frank: Portions of what Mr. Goltzer just said misstate the record. More particularly, arguably how Mr. Basciano came to control the Bonanno Crime Family as his acting

boss was relevant in the guilt phase of this trial. He has been convicted of the murder of Randy Pizzolo as acting boss of the Bonanno Crime Family. We are now in the penalty phase of this trial. It is unclear to me how any of this testimony...is relevant to the penalty phase.

Mr. Goltzer: The government said at the penalty phase opening statement that the jury had heard about Mr. Basciano's murderous rise to the tope of the Massino/Bonanno family. This directly rebuts it.

The Court: Okay. I agree with the government, the direct examination of Lee in [Trial I] is not relevant to the consideration of the jury in the penalty phase...."

Tr. 8972-73 (emphasis added).

Overall, the record clearly demonstrates that there is no legitimate reason for counsel's failure to introduce Lee's prior testimony nor is there any justification for counsel's impromptu decision, during a capital trial nonetheless, to reduce four days of potential defense witness testimony into four hours. Tr. 7896-97.

Accordingly, Mr. Basciano was deprived the effective assistance of counsel at trial requiring the reversal of his conviction.

c. Al Perna

Counsel was also ineffective for failing to offer the testimony of Al Perna, which would have directly undercut the Government's claim that Mr. Basciano wanted Pizzolo dead due to his shoddy construction work and failure to move to Florida. Counsel's failure to call Perna as a witness was unreasonable, because Perna was the key link to rebut the reasons offered by the Government as to why Mr. Basciano was motivated to kill Pizzolo. In this regard, Perna was, according to the Government, the

only person who 1) told Mr. Basciano that Pizzolo refused to move to Florida and 2) was a firsthand observant of Pizzolo's negligent construction work that allegedly caused Mr. Basciano to become infuriated.

At trial, the Government alleged, "Basciano [first] became 'fed up' with Pizzolo when Basciano learned that Pizzolo was stealing from Van Zandt, Basciano's partner in numerous construction projects." Tr. 7141-42. Mr. Basciano then allegedly called a meeting with Pizzolo's son-in-law, Sam Cordero, in which Mr. Basciano "advised Cordero that Pizzolo was no longer responsible for the construction sites, and Cordero would report to Pizzolo's partner on the project, Al Perna." Tr. 6833-34 (emphasis added). The Government contended that in addition to Pizzolo's construction failings, "Basciano was upset about the brick work on [Basciano's] house." Tr. 8079.

Of greater significance, the Government claimed that Mr. Basciano ultimately ordered the murder of Pizzolo as a result of "Pizzolo's refusal to move to Florida at Basciano's direction." Tr. 7147; 7167-68. The Government contented that Mr. Bascinao was outraged when learning from Al Perna that Pizzolo refused to move to Florida:

Dominick Cicale testified that Al Perna told Vinny Basciano over breakfast in a diner that Randy was not moving and Basciano was outraged.

Quote, he was furious. He turned beet red immediately. He looked over at me and I told him Vin, just relax. I spoke to Randy. Randy is going to Florida. Al doesn't know what he's talking about. I spoke to him. He's going. And Vin's words were well, he'd better fucking go.

Tr. 8081.

Although the Government explicitly contended that Mr. Basciano's motive to kill Pizzolo resulted from Perna's reporting of Pizzolo's refusal to move to Florida, counsel failed to present Perna's firsthand account to the contrary. Thus, due to counsel's ineptness, the jury failed to learn that Perna previously testified that he was never told by "anybody [about] the message or the information that [Pizzolo's] not going to Florida, he's staying in the New York area." Grand Jury Testimony (April 27, 2005), at 93-94.

Specifically, Perna previously testified as follows:

Q: Okay. Now, at any point before [Pizzolo] disappeared—I'm sorry, not disappeared, murdered—before [Pizzolo] was murdered, did he ever talk to you about moving to Florida?

A: No.

Q: Did anybody, as far as you know, either directly or indirectly, did anybody tell him that he should leave town and go to Florida? Did you ever hear that?

A: No, I never heard that. I heard it from the—from the agents.

Q: The agents asked you about that?

A: Correct.

Q: But before they asked you about it, you never heard it?

A: No.

Q: Did you ever tell anybody, the message or the information that [Pizzolo's] not going to Florida, he's staying in the New York area, or words to that effect?

A: Words to that effect? No.

Grand Jury Testimony at 93 (April 27, 2005).

Likewise, the jury was also left unaware, as a result of counsel's lapse, of Perna's sworn account that Pizzolo had not conducted shoddy construction work resulting in Mr. Basciano's displeasure:

Q: How did things go—generally how did things go on the [construction] site? Smooth? Rough?

A: No, it was smooth.

Id. at 39.

Q: Now, on the job site, were there ever any problems as far as people getting angry with somebody for doing bad work or being slow? Anything like that, did you ever observe any incidents where obviously people were unhappy with each other?

A: Arguments? No, there was no arguments.

Id. at 52-53.

Notably, the trial record demonstrates that counsel was well aware of Perna's importance as a witness concerning these central issues. During closing arguments, counsel alerted the jury that the Government's entire case hinged on the theory that "the straw that broke the camel's back, the reason that Randy Pizzolo had to die is that Al Perna told Vincent Basciano that Randy Pizzolo refused to move to Florida." Tr. at 8126. However, counsel, without offering any evidentiary support or Perna's testimony, weightlessly argued to the jury that it should summarily reject the Government's evidence as untrue:

When Dominick Cicale testified that Vincent Basciano turned beat red and wanted to kill Randy Pizzolo because he wouldn't go to Florida, it was absolutely false. It was no more true when Vincent Basciano said it to Joseph Massino on a tape.

Vincent Basciano wanted him alive, to get more bids from steel companies, to go to Florida, to build houses with Al Perna. For Dominick Cicale to say Vinny was furious, after all, there was a barrel sticking but of a piece of a footings and foundations. There was a piece of plywood sticking out of a wall. He didn't open or close a drain on time is preposterous.

Tr. 8126; 8135-36.

Clearly, the record demonstrates that counsel was aware of Perna's importance to substantiate the arguments presented by the defense and to rebut the Government's contention that Mr. Basciano harbored animus towards Pizzolo. Once again, there is no strategic reason in the record

as to why defense counsel would neglect to call Perna to testify, especially considering that counsel offered no other evidence to substantiate his arguments in summation. *See, e.g., Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003) (holding that, even if counsel had a strategic reason not to call a certain witness, it was an unreasonable strategy since counsel presented a theory of defense but did not adequately present the evidence supporting the chosen defense theory).

As with counsel's failing to call Lee, the decision not to call Perna was equally inexplicable because a central defense theory at trial was that Mr. Basciano's incriminating statements to Massino were false and should not be believed. Thus, Perna's testimony undercutting the veracity of Mr. Basciano's statements to Massino was also material to the defense's case. *See, e.g., Dretke*, 368 F.3d 441 (holding that defense counsel was ineffective for failing to interview the surviving victim, given the numerous conflicts between the victim's statements and the inmate's confessions).

Moreover, counsel's failure to call Perna is illogical given that counsel successfully obtained Perna's presence at the courthouse and told Mr. Basciano to anticipate Perna as a defense witness. *Id.* at 871 (finding that trial counsel failed to offer a strategic reason for failing to call a certain witness because the record shows that trial counsel identified such person as a trial witness and intended to call her). Of further significance, counsel was fully aware of the scope of Perna's exculpatory testimony when requesting Perna's presence at the

courthouse for the purpose of testifying. See Perna Affidavit at ¶¶ 1-2; 5 (Exhibit 5)(Perna stated that he was present at the courthouse in anticipation of testifying as a defense witness, but he was unexpectedly "told by Mr. Basciano's attorneys that they did not need [his] testimony" which "would have been consistent with [his] Grand Jury testimony which was given in 2005.").

In sum, counsel's failure to call Perna as a defense witness was unreasonable under these circumstances. There is simply no excuse for counsel not to have called Perna to testify in light of the exculpatory nature of his testimony and the direct conflict presented between Perna's firsthand account of the pertinent events and the Government's theory.

Indeed, Perna's account was the only firsthand evidence available to corroborate the defense's claim that Mr. Basciano had no motive to kill Pizzolo. See, e.g., *Workman v. Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992) (finding that the testimony of two defense witnesses, which would have corroborated the defense's version of events and contradicted police officers' testimony, was not merely cumulative); *Toliver v. McCaughtry*, 539 F.3d 766, 768 (7th Cir. 2008)(holding that counsel's performance fell below an objective standard of reasonableness because counsel failed to call two individuals who provided unique information, available from no other witnesses, that was corroborative of the defendant's claim that he had not urged the shooter to kill the victim).

Accordingly, Mr. Basciano was deprived the effective assistance of counsel at trial requiring the reversal of his conviction.

d. Joseph Barone

In addition, counsel failed to call Joseph Barone to testify, even though counsel was well aware that Barone's testimony was material to establishing that Cicale had 1) an independent motive to kill Pizzolo as a result their [Cicale and Pizzolo] involvement in the murder of Nicholas Cirillo and 2) engaged in other unsanctioned murders at the time of Pizzolo's murder.

Of further significance, counsel knew, through interviewing Barone, that if called to testify, Barone would be a "direct eye witness to certain factors involved in the case that relate to Dominick Cicale" and would provide "direct evidence that Mr. Cicale violated the terms of his cooperation agreement." See Ex-Parte Conf. at 4, March 2, 2011. According to counsel, Barone would also "contradict sworn testimony provided by Mr. Cicale with impeachment material in the nature of prior inconsistent statements" and establish that "Cicale lied at Mr. Basciano's prior trials when he told the jury under oath that he intended to use P.J. Pisciotto to kill Michael Mancuso." *Id.* at 5.

Likewise, as result of the Government's pre-trial *Brady* disclosures, counsel was also aware of Barone's potential to testify to the following facts critical to the defense's theory that Cicale had an independent motive to kill Pizzolo:

First, on May 24, 2004, Barone reported to the FBI that "two to three weeks earlier [Dominick Cirillo] sent his son Nicholas 'to relay a message to Cicale.'" Tr. Doc. No. 39, Order at 30, n.13. Barone reported that Cicale, insulted that Cirillo failed to send someone more important, slapped Nicholas and told him to tell his father to send someone else. *Id.* According to Barone, Nicholas went missing one week later. *Id.* Second, on June 9, 2004, "Barone reported that Cicale had an aunt who lived near the location where Nicholas's car was found." *Id.* Third, on July 12, 2004, Barone also reported that a Bonanno captain was told by a Genovese member close to Dom Cirillo that Cicale needed to be careful because people were looking to do him harm. *Id.* Fourth, on December 8, 2004, Barone reported that Pizzolo was murdered the previous week, and Pizzolo was "known to have 'scammed' a large number of people, and the speculation [was] that he was murdered as a result of such dealings." *Id.* at 29. Fifth, on March 11, 2005, Barone stated he "overheard a conversation between Louis DeCicco and Cicale's cousin" referring to "Pizzolo as 'no good' and as 'robbing everybody.'" *Id.* at 29-30. Finally, on October 6, 2005, Barone told the FBI that he believed "Dom Cirillo and Cicale acted together in Nicholas's disappearance." *Id.* at 30 n.13.

Barone's potential testimony was also critical because it significantly undercuts Cicale's credibility and establishes that Cicale previously committed perjury against Mr. Basciano:

Mr. Cicale lied at Mr. Basciano's prior trials when he told the jury under oath that he intended to use P.J. Pisciotto to

kill Michael Mancuso.

In fact, the person he solicited to kill Michael Mancuso was Mr. Barone.... He told Mr. Barone, 'I want you to do it the old-fashioned way, two in the coconut.'

See Ex-Parte Conf. at 5 (March 2, 2011).

This evidence is significant because it establishes that the Government knew that Cicale intentionally omitted and alleged false facts concerning the roles of others involved in the solicitation to murder Mancuso, and notwithstanding that fact, the Government continued to utilize Cicale as a witness in Mr. Basciano's case. Thus, by failing to call Barone as a witness, defense counsel neglected an opportunity to establish the unreliability of the Government's case as a whole. Counsel could have highlighted the Government's reckless use of Cicale as a witness, even though it knew of an ever-increasing quantum of evidence proving that Cicale committed perjury in prior proceedings against Mr. Basciano and that Cicale had violated the terms of his cooperation agreement.

Moreover, counsel's failure to call Barone is unreasonable because his account supports the defense's theory that Cicale had independently orchestrated the Pizzolo murder as result of Cicale's and Pizzolo's involvement in the Cirillo murder and/or because of Pizzolo's unauthorized bragging, whether true or untrue, about their involvement in such offense.¹⁵ See, e.g., *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th

¹⁵ See Ex-Parte Conf. at 5, March 2, 2011 (counsel stating, "Your Honor, I think it was confirmed that he was told by Mr. Cicale that Randy Pizzolo took care of Dominick Cirillo.").

Cir. 1992) (noting that "an attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it"); *Lindstadt*, 239 F.3d at 203 (describing, in a similar context, the "exceeding importance" in a "credibility contest" of "the testimony of neutral, disinterested witnesses").

Likewise, counsel's failure to call Barone was prejudicial to the defense because Barone's testimony would have provided evidence indicating that alternative suspects may have ordered Pizzolo's death other than Mr. Basciano. See Order at 29, *Basciano v. United States*, 12-cv-280 (Doc. No. 39) (Pizzolo was "known to have 'scammed' a large number of people, and the speculation [was] that he was murdered as a result of such dealings."). See, e.g., *Towns v. Smith*, 395 F.3d 251, 258-60 (6th Cir. 2005) (counsel ineffective for failing to call a witness who could have created an alternative theory of the case).

In this regard, counsel's failure to introduce evidence of alternate suspects was inherently unreasonable, because such evidence automatically provides jurors with reason to doubt the defendant's guilt. Cf. *Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001); *United States v. Jernigan*, 492 F.3d 1050, 1056-57 (9th Cir. 2007) (en banc) ("Withholding knowledge of a second suspect conflicts with the Supreme Court's directive that the criminal trial, as distinct from the prosecutor's private deliberations, be preserved as the chosen forum for ascertaining the truth about criminal accusations."); *Trammell v.*

McKune, 485 F.3d 546, 551 (10th Cir. 2007) (noting that suppressed evidence of alternative suspects "could also have been used to cast doubt on police officers decision to focus their attention...on [the defendant] rather than" the other suspects).

In addition, Barone's testimony would have proven that Cicale was engaging in murders without Mr. Basciano's authorization at the time of Pizzolo's murder. *Id.* at 29 (Barone reporting that "Dom Cirillo and Cicale acted together in Nicholas's disappearance"). *See also id.* at 30 (Barone reported that "Cicale had an aunt who lived near the location where Nicholas's car was found.").

In the context of this case, Barone's testimony concerning Cicale's engagement in unauthorized acts of murder is extremely important because such information provides credence to Mr. Basciano's central defense theory that his statements to Massino were made in order to protect Cicale for killing Pizzolo without any permission from the hierarchy of the Bonanno family. *See e.g.*, Tr. 8231 (Government noting that the "defendant has argued that the reason he confessed to Massino on tape is that he was trying to protect Cicale from Massino for committing an unsanctioned murder."); Tr. 8246 (Government arguing that "the defendant's claim that he was attempting to protect Cicale on those tapes doesn't hold water").

In addition, counsel could have used Barone's testimony to establish that Cicale would have, as evidenced in the Cirillo homicide, not been reluctant to commit an unsanctioned murder without Mr.

Basciano's approval. In this regard, the materiality of Barone's testimony on this point is best illustrated by the Government's chastisement of counsel for failing to proffer any evidence that Cicale ever acted without Mr. Basciano's approval when committing a crime. Specifically, the Government argued in summation that counsel did not present a single example showing that Cicale ever committed a crime without Mr. Basciano's "permission or okay":

But Basciano would believe, have you believe, that Cicale, his loyal, loyal dog, disobeyed a direct order not to kill Pizzolo within two weeks of Basciano's arrest. There is no evidence in this record that Cicale ever disobeyed a direct order of the defendant.

In the four plus years that Cicale committed crimes on the defendant's behalf, there is not one example in this record of Cicale defying the defendant, doing things without the defendant's permission or okay.

Not on an assault, not on an arson, not on a beating, and certainly not on a murder.

Tr. 8240.

Overall, counsel's failure to call Barone as a witness cannot be reconciled with the record, including the district court's March 2, 2011 decision denying a motion by Barone's attorney to quash a defense subpoena in this case. See Ex-Parte Conf., March 2, 2011. Notably, the court explicitly rejected the contention that Barone's account was simply "to rebut" Cicale's testimony, and it found that Mr. Basciano's defense made a plausible showing that "Barone's testimony would go to a material issue at trial." *Id.* at 10.

Notably, counsel's issuance of a subpoena seeking Barone's testimony, along with the numerous reasons proffered by counsel to contest the quashing of such subpoena, proves that counsel was well aware of the materiality of Barone testimony. Consequently, counsel's decision not to call him as a defense witness during trial can only be the product of neglect. See, e.g., *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (noting that the court's consideration of all relevant facts is required because the issue is "not whether counsel's choices were strategic, but whether they were reasonable").

Accordingly, Mr. Basciano was deprived the effective assistance of counsel at trial requiring the reversal of his conviction.

e. Frank Vasaturo

Counsel also failed to call Frank Vasaturo to testify, even though Vasaturo's testimony would also establish Cicale's independent motive to kill Pizzolo. Counsel was aware that Vasaturo had told the Government during a proffer session that Pizzolo confessed that he and Cicale were responsible for the murder of Nicholas Cirillo. Once again, this testimony was critical because it establishes an independent motive for Cicale to kill Pizzolo and supports the defense's theory that Cicale was committing unsanctioned murders at the time of Pizzolo's murder. Moreover, this type of evidence created an independent motive for Cicale to kill Pizzolo, even if Pizzolo and Cicale did not actually murder Cirillo. Indeed, Pizzolo's explicit bragging about a murder that he did

not commit would have provided motive for Cicale to kill Pizzolo under Mafia protocol.

First, counsel was provided, as part of the Government's Brady disclosure, an FBI 302 report indicating that Pizzolo had confessed to Vasaturo, while attending Frank Esposito's wedding, that he [Pizzolo] and Cicale were responsible for Nicky Cirillo's murder.¹⁶ According to the FBI 302:

Vasaturo and Pizzolo were discussing the recent disappearance of Quiet Dom's (Dominick Cirillo) son (Nicky Cirillo). Rumors had been circulating that the son had been using drugs and misusing his father's name. Pizzolo stated words to the effect, "Frank, when I get up thee, I'm taking you with me. Vasaturo understood this to indicate that Pizzolo believed that he was going to get made. Vasaturo asked him why and Pizzolo, in referring to the son, said that he would never be found. Vasaturo asked Pizzolo how he knew. Pizzolo smiled, pointed at himself, and gestured with his chin at Cicale, who was sitting across from them.

FBI 302 (May 6, 2005), at 4 (Exhibit 6).

The report went on:

After Pizzolo's murder, Vasaturo was with Esposito at his residence when Esposito confronted Vasaturo about the statement made to Vasaturo by Pizzolo at his wedding. Esposito stated that Ragano had told him that someone at the wedding repeated the story to Ragano and, when questioned about the source of the story, the individual said that it had been told to them by Vasaturo.

Vasaturo admitted that he had been drinking...and could not recall repeating the story to anyone else...Esposito just told Vasaturo not to worry about it. Vasaturo, on the other hand, became very scared because he believed that Pizzolo may have in fact been murdered to keep him quiet and was afraid that the same thing may happen to him.

Id. at 4-5.

¹⁶ Nicholas Cirillo was last seen on May 9, 2004. His car was later found on May 29, 2004. See Michele McPhee and Bob Kappstatter, "Car Found - Mob Son Isn't Missing Man Believed Whacked In Gang Feud," New York Daily News (Sunday, May 30, 2004)

Counsel knew the importance of Vasaturo's statements, as evidenced by counsel's argument to the district court that the FBI 302 report had been withheld during Mr. Basciano's previous trials, in violation of the Government's *Brady* obligation. Counsel attempted to use this alleged *Brady* violation to rebut the Government's prior claim that "there was no import, at all, to th[e] piece of cross-examination of Cicale about Cirillo and the murder of 'Quiet Dom[,]' Cirillo's son," in prior proceedings. Tr., Oral Argument (6/26/09), at 32. In this regard, counsel stated,

The Government introduced enterprise evidence and background evidence of the Pizzolo murder to convict [Mr. Basciano] in 2003 and didn't turn over the fact that there was a motive for other people to kill Pizzolo. That there was a motive for Cicale to kill Pizzolo independent of anything that ever happened concerning Mr. Basciano.

Id. at 32-33 (emphasis added).

Despite this admission, that Vasaturo's statements were exculpatory, counsel refused to call Vasaturo to testify as to the events that occurred at Esposito's wedding.

During an ex-parte conference, counsel claimed that the decision not to call Vasaturo was because Mr. Basicano's son was also in attendance at Epposito's wedding. Specifically, counsel contended:

One of the problems that we have with the potential testimony of Mr. Vasaturo is that at this particular wedding where this incident has allegedly occurred, Mr. Basciano[']s son, Vincent Basciano, Jr., is sitting at the table, and we have a concern about bringing the son into this in light of some of the other testimony that has existed about messages being passed back and forth between Mr. Basciano and his son.

Tr. 7925.

Nonetheless the reason submitted by counsel is meritless on two grounds. First, counsel did not investigate whether Basciano, Jr. was even present at the table during this exchange, and, if so, whether he overheard this confession. Second, even if Basciano, Jr. was present during this exchange, there is no criminal behavior attributed to him, and, most importantly as it should concern counsel, no prejudicial implication as to Mr. Basciano himself. *See, e.g., Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991) (holding that a purportedly strategic decision is not objectively reasonable when "the attorney has failed to investigate his options and make a reasonable choice between them"); *Lord v. Wood*, 184 F.3d 1083, 1095 (9th Cir. 1999) (holding that counsel's decision not to call certain witness was unreasonable because counsel's stated reasons for disputing the witnesses' credibility were not supported by objective evidence).

Thus, counsel's proffered reason does not indicate strategic decision-making for not using readily available and powerful exculpatory evidence. *See Warden*, 970 F.2d at 1358 ("[A]n attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it.") (emphasis added).

Accordingly, Mr. Basciano was deprived the effective assistance of counsel at trial requiring the reversal of his conviction.

f. Other Favorable Witnesses and Documentary Evidence

Counsel further neglected to call other readily available witnesses who could have provided evidence of Cicale's independent motive to kill Pizzolo. Counsel was provided scores of information that at least five individuals could provide information to establish the defense's claim that Cicale independently killed Pizzolo, but counsel did not offer even a single witness in support of this argument. *See, e.g., Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001) (finding counsel ineffective for failing to call two important fact witnesses, with the content of whose putative testimony the attorney was familiar); *Smith v. Dretke*, 417 F.3d 438, 439 (5th Cir. 2005) (finding counsel ineffective for failing to call any of the four witnesses who could have corroborated the defense's theory).

Specifically, counsel was advised of the following: 1) an FBI 302 report documenting an interview of Pizzolo's girlfriend, Roxanne Roman, in which Roman states that Pizzolo admitted to committing a murder [Nicholas Cirillo]; 2) statements from three prisoners claiming to have overheard two Bonnano members discussing that Pizzolo was murdered for killing Cirillo; and 3) statements of Andrew Watruba, who overheard Cicale admit that Pizzolo was killed for "running his mouth" about Cirillo's murder.

First, the FBI 302 indicated that on October 23, 2004, during Roman's baby shower, Pizzolo "pulled [Roman] to the side for a private conversation. At that time, Pizzolo stated, 'I did it. I did it.' In

response, Roman asked, 'What did you do?' To which Pizzolo replied, 'I killed him.'" FBI Report, at 1 (Dec. 12, 2006) (Exhibit 7). The report continues, "When Roman asked Pizzolo what was going on, Pizzolo responded, 'I can't get you involved, but it's done.'" *Id.* This statement by Roman was accessible to Mr. Basciano's defense. However, once again, counsel failed to call Roman on behalf of Mr. Basciano, despite the fact that Roman had information tending to support counsel's defense: that Cicale killed Pizzolo because Pizzolo and Cicale had murdered Nick Cirillo. There is no reasonable explanation for counsel's failure to call Roman, particularly in light of the fact that she had firsthand knowledge of Pizzolo's confession.

Second, in a letter dated June 12, 2009 from AUSA John Buretta to Mr. Basciano's defense counsel, Buretta disclosed the following information:

[Joseph Bonelli and Robert Benedetto] are incarcerated at Franklin Correctional Facility, Malone New York. According to an inmate at the facility, Bonelli and Benedetto have been overheard discussing, among other things, that the reason that "Ace" and "Chicale" [sic] killed [Pizzolo] is because [he] is the person that murdered "Quiet Dom's" son, and also stated that at an unspecified previous time Anthony Federici had given "Hippy" Zanfardino permission to kill Randy Pizzolo....

Letter of AUSA John Buretta, United States Attorney's Office, to George Goltzer, Esq., at 2 (June 12, 2009) (Exhibit 8).

These three additional witnesses provide further corroboration that Cicale had an independent motive for murdering Pizzolo. The fact that counsel failed to pursue these witnesses, despite knowledge of their existence, constitutes ineffective assistance of counsel. See

Strickland, 466 U.S. at 690 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

Third, Watruba attests that he “was in the law library with Dominick Cicale and Baldo Amatto sitting at a table. Amatto asked Cicale if it was true that Randy Pizzolo was running his mouth about killing Nicky Cirrillo [sic], Cicale replied yes.” Watruba Aff. at ¶ 19 (Exhibit 9). While the record reveals that counsel initially attempted to offer Watruba’s testimony through the cross examination of Cicale, Tr. 7481-88, counsel failed to properly corroborate Watruba’s account before doing so. Tr. 7486. Notably, the court scolded counsel for his eleventh hour attempt for discovery to corroborate Watruba’s account, noting that counsel’s request was unreasonable in light of the vast amount of resources and time that counsel was given before trial. Tr. 7486.

Moreover, counsel never alerted the court of Watruba’s account relevant to establishing a motive for Cicale to kill Pizzolo. Instead, counsel’s focus was ineptly sidetracked by Watruba’s potential testimony on impeachment grounds relating to Cicale’s use of a cellphone, thereby neglecting the other critical evidence Watruba’s testimony would provide to the defense. *See, e.g., Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (finding prejudice where counsel failed to adequately investigate witness that could have undermined the credibility of the prosecution’s eyewitness).

In addition, counsel also neglected to introduce powerful documentary evidence supporting the defense's theory that Cicale was the true culprit in Pizzolo's murder and that Pizzolo had no reason to fear Mr. Basciano. Specifically, counsel neglected to introduce evidence that Pizzolo had taken out a life insurance policy after Mr. Basciano was arrested. Such evidence would demonstrate that Pizzolo actually feared for his life in light of Basciano's absence, and by implication, the prospect of Cicale's free reign. *See, e.g., Stouffer v. Reynolds*, 214 F.3d 1231, 1232 (10th Cir. 2000) (holding that the record showed trial counsel was ineffective because it was conceivable that had counsel performed its duties regarding the introduction of evidence, reasonable doubt could have been created in the jury's minds).

Likewise, counsel also failed to introduce Pizzolo's phone records demonstrating that Pizzolo had called Jet Blue airline seeking a trip to Florida on the morning of Basciano's arrest. Pizzolo's phone records also reflect that Pizzolo was in Florida by that afternoon, even though Mr. Basciano was ordered detained by such time. These records were critical to Mr. Basciano's defense because they prove that no calls existed between Pizzolo and Cicale after Basciano's arrest, indicating that a rift between the two parties had formed. Indeed, such an absence of communication on Pizzolo's part in failing to contact his superior Cicale is significant in the context of this case; Cicale was a captain in the Bonanno family and Pizzolo, as an associate, was required to check in with Cicale regarding his whereabouts.

Similarly, the phone records were important to the defense because they reflect that Pizzolo never called Cicale upon his return from Florida, although Pizzolo had an obligation to report his return to Cicale. The absence of calls between Cicale and Pizzolo during this critical timeframe undercuts the Government's theory that Cicale was trying to mitigate the issues with Pizzolo while Mr. Basciano was persistent in seeking Pizzolo's demise. Indeed, as counsel neglected to point out, the falsity of such argument is evidenced by the lack of communication between Cicale and Pizzolo and the nonexistence of any call from Cicale alerting his alleged "friend," Pizzolo, that Basciano was arrested and detained without bail.

Notably, counsel was well aware of the importance of this documentary evidence. During a conference, counsel explicitly articulated that the life insurance policy and phone records constituted previously undisclosed *Brady* evidence because such records help exculpate Mr. Basciano of Pizzolo's murder:

MR. GOLTZER: There was an insurance policy on Mr. Pizzolo's life, telephone records, materials grand jury minutes involving Pizzolo's wife that were significant that were turned over much later than the trials. I want the record to reflect that.

It should also be stated that the U.S. Attorney's Office for the Eastern District of New York clearly had those documents and those records before that trial. The grand jury testimony, in fact, predates the trial. In the grand jury, they asked virtually every witness that they just told us about whether they knew Nicholas Cirillo, who has disappeared. So I just wanted the record to reflect that.

Tr. at 52.

In sum, counsel's failure to offer this important documentary evidence, coupled with counsel's failure call any one of the readily available, favorable, and even exculpatory witnesses discussed herein, establishes that Mr. Basciano was denied his Sixth Amendment right to effective assistance of counsel. *See, e.g., Harris*, 894 F.2d at 878 (7th Cir. 1990) ("Under the circumstances, we conclude that counsel's overall performance, including his decision not to put on any witnesses in support of a viable theory of defense, falls outside the wide range of professionally competent assistance.").

C. Counsel Presented An Unsupported And Prejudicial Defense Theory That Bolstered The Government's Case And Deprived Mr. Basciano A Fair Trial.

At trial, counsel advanced an unsupported and prejudicial theory of defense that Mr. Basciano could not be culpable for Pizzolo's murder, because Michael Mancuso had reordered Cicale to kill Pizzolo after Basciano was imprisoned on a related case. Counsel pursued this ill-advised theory of defense, even though it was not only unsupported but also prejudicial to Mr. Basciano in that it bolstered the Government's case and permitted otherwise inadmissible evidence of Michael Mancuso's guilty plea to be entered into the record for the jury's consideration.

To compound this error, counsel neglected to introduce evidence of Mancuso's post-plea statements that Cicale was lying about the events concerning Pizzolo's murder and that Mancuso was unaware of the plot to murder Pizzolo until after it occurred. This exculpatory evidence was significant to Mr. Basciano's defense because it 1) established the

termination of the original murder conspiracy once Cicale initially withdrew; 2) undercut Cicale's key testimony that Mancuso later reopened the plot by reaffirming Mr. Basciano's alleged order to kill Pizzolo; and 3) proved that Basciano did make false incriminating statements to informant Massino during the tape-recorded conversations.

A mere cursory review of the trial record reveals that counsel's line of defense and prejudicial introduction of Mancuso's guilty plea fell below a standard of reasonableness as contemplated by *Strickland*, because such pursuits worked to deny Mr. Basciano a fair trial and was the result of counsel's ignorance of law, inattention, and ineptitude. *See, e.g., Ward v. United States*, 995 F.2d 1317 (6th Cir. 1993) (finding that trial counsel was ineffective where, to the detriment of the defendant, counsel opened the door to the prosecution's introduction of otherwise inadmissible evidence and counsel made illogical and incomprehensible arguments on the record).

As the district court decided at trial, counsel had not provided any legal basis for a "multiple conspiracy" and "termination" instruction, because there were no facts to plausibly establish that Mr. Basciano's involvement in Pizzolo's murder ended as a result of Mr. Basciano's arrest and/or that a new conspiracy had arisen due to Mancuso's subsequent direction to Cicale to continue the plot to murder Pizzolo. *See Tr. 8012-13.*

In this regard, the district court emphasized that Cicale's temporary withdrawal from the conspiracy was legally inconsequential

because there was no proof that Cicale's withdrawal had been communicated to both Basciano and Mancuso, which effectively foreclosed counsel's argument that the original conspiracy terminated and was instigated by a new conspiracy upon Mancuso's direction:

First, defense counsel has represented...that it does not intend to argue at closing that defendant was ever a member of a conspiracy from which he and his alleged coconspirators could have withdrawn.

Second, the defense has not provided the court with any legal authorities according to the proposition that Cicale's actions could have removed Basciano's liability for the conspiracy since there's no evidence that Basciano was informed in prison of Cicale's contemplated withdrawal.

Third, the facts of the case are insufficient to support a finding that Cicale withdrew from the conspiracy, let alone that Cicale's actions were sufficient to terminate the conspiracy of which Basciano was allegedly a member.

Tr. 8012-13.

Of significance, the Second Circuit also agreed with this finding, explaining that "[n]othing in the record indicates that Cicale ever communicated his decision not to go through with the Pizzolo murder 'in a manner reasonably calculated to reach' Basciano." *Basciano*, 643 Fed App'x 832 at 838 (citing *United States v. James*, 712 F.3d 79,106 (2d Cir. 2013)). The Court continued, "[E]ven if Cicale withdrew from the Pizzolo murder conspiracy, that conspiracy itself continued so long as there were at least two remaining members....The evidence indicates that Basciano and Mancuso were still members of the conspiracy and...that Aiello had taken no affirmative steps to withdraw." *Id.* at 838-39. Thus, "[w]ithout record support for termination of the first conspiracy, Basciano cannot plausible assert a second conspiracy....Nor can Basciano

demonstrate prejudice in light of ample evidence--some from Basciano himself--of his leadership of the single Pizzolo murder conspiracy." Id. (emphasis added).

Here, as found by all reviewing courts, counsel's engagement in this line of defense was not supported by law or fact. Thus, counsel's pursuit of this line of defense can only be the result of counsel's ignorance concerning basic conspiracy law and inattention to the prejudicial effect presenting such a "defense" would cause to Mr. Basciano.

First, during trial, counsel erroneously argued that Mr. Basciano was not involved in the conspiracy murder of Pizzolo because Cicale's temporary withdrawal severed the conspiracy, thereby relieving Mr. Basciano of any culpability for the murder of Pizzolo.¹⁷ See, e.g., Tr. 8372 (defense counsel stating, "I'm raising the possible factual decision by the jury that Cicale withdrew. By virtue of his withdrawal, he took away sufficient people of an agreement to have a conspiracy still exist."). Counsel's pursuit of this defense was not indicative of any legitimate reasoning as further evidenced by the following exchange between the district court and Government addressing the futility of counsel's arguments:

The Court: And that the death of [Pizzolo] was the result of a different conspiracy.
Ms. Merkl: That seems to be part of what they're arguing.
The Court: I haven't heard that, but--

¹⁷ However, the evidence introduced by the Government demonstrated that an agreement existed among Mr. Basciano, Cicale, Mancuso, and Aiello to murder Pizzolo, and that there was not "separate agreements to effectuate distinct purposes." *United States v. Kendall*, 665 F.2d 126, 136 (7th Cir. 1981).

Ms. Merkl: In Mr. Goltzer's opening, he did not concede that Mr. Basciano had agreed to the murder prior to his going to jail, but then they requested a multiple conspiracy charge. So we don't really fully understand exactly what the defense is planning to argue. That being said, in a case such as this, where...there is evidence that the defendant became a member of the conspiracy prior to his incarceration, then this intervening event occurred, it's the government's view that Mr. Basciano is still culpable for the reasonably foreseeable consequences of the conspiracy he set into motion, regardless of whether he knows all of the details about how the murder was committed after he went to jail, regardless of whether he knows who the shooters are. All of those details are not relevant to his culpability under federal law....

Tr. 6764-65 (emphasis added).

The Government also exploited counsel's neglect in arguing a position that was contrary to the facts and controlling law:

The law presumes the participation in a conspiracy continues until the last overt act by a coconspirator.

The evidence in this case shows that the defendant instructed Cicale to do the murder. Cicale took affirmative steps to do the murder. He considered not doing the murder for a period of time and then reinvigorated the murder plot after he received an order from Michael Mancuso which Cicale understood to be a reaffirmation of the defendant's original order.

Under those circumstances, Mr. Basciano had no knowledge that Mr. Cicale was considering not doing the murder. He had no information that the conspiracy wasn't continuing. He did not withdraw.

Tr. 8360-61.

Second, perhaps most telling of counsel's ineffectiveness was the decision to support this baseless theory--that Mr. Basciano was no longer part of the conspiracy when he was arrested in a related matter--by offering into evidence the guilty plea of codefendant Mancuso, which

effectively proved the Government's theory that Mancuso reaffirmed Mr. Basciano's order to kill Pizzolo after Mr. Basciano went to jail.

Defense counsel entered Mancuso's guilty plea into evidence as follows:

Goltzer: You will see appearances for the government and a lawyer appearing for Mr. Mancuso. The Court—and I am quoting what the Court said to Mr. Mancuso at page 23 of the document: 'How do you plead to the charge contained in Count One of the superseding information, guilty or not guilty?'...[T]he defendant responded, quote: 'Guilty...As alleged in Count One of the superseding information, on or about November of 2004, in the Eastern District of New York, I conspired with others to murder Randolph Pizzolo...[f]or the purpose of my maintaining my position in an association in fact enterprise...I agree that I participated in the murder of Randolph Pizzolo.'

Tr. 7763-64 (emphasis added).

In this regard, counsel's ineptitude was further displayed when counsel was required to later backtrack its statement that the plea allocution "wasn't put into evidence by the government. It was put into evidence by the defense." Tr. 8133. As the Government correctly noted, it was "precluded under *Crawford v. Washington* from introducing [Mancuso's] plea allocution into evidence because it would be a violation of the Confrontation Clause." Tr. 8155.

Thus, counsel had to tell jurors--again highlighting this prejudicial evidence and implicitly conceding its inculpatory nature--that he "misspoke before" regarding the introduction of Mancuso's plea because "for legal reasons[,], the government wasn't entitled to put in Michael's plea allocution. I was allowed to put it in and I did." Tr. 8187. Thereafter, the Government seized upon counsel's incompetency

succinctly alerting jurors during rebuttal summation, “[Through defense counsel’s] own evidence, Michael Mancuso remained a member of the conspiracy throughout.” Tr. 8372.

Based upon these facts alone, it is clear counsel was ineffective because no attorney would even allow, let alone actively admit, evidence of Mancuso’s plea into the record without objection. Indeed the admission of Mancuso’s plea allocution automatically violated Mr. Basciano’s right to a fair trial, as articulated in *Crawford v. Washington*, 541 U.S. 36 (2004).

In *Crawford*, the Supreme Court held that the Confrontation Clause bars the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Id.* at 53-54. It is constitutional error, therefore, to admit “as substantive evidence a plea allocution by a co-conspirator who does not testify at trial unless the co-conspirator is unavailable and there has been a prior opportunity for cross-examination.” *United States v. Riggi*, 541 F.3d 94, 102 (2d Cir. 2008) (internal quotation marks omitted).

Here, it is incomprehensible as to why defense counsel would read into evidence a codefendant’s plea allocution admitting that he “conspired with others to murder Randolph Pizzolo.” Tr. at 1164. Such incompetency automatically violates the essential right provided by the Sixth Amendment that the accused be provided with counsel whose singular function “is to make the adversarial testing process work in the

particular case." *Strickland*, 466 U.S. at 690. Beyond dispute, counsel's conduct effectively transformed the trial from an adversarial process into a coddled spectacle, spoon-feeding the government's theory to the jury--all the while, the evidence counsel knowingly admitted into evidence corroborated Cicale's testimony and violated Mr. Basciano's right to a fair trial.

Third, counsel was well aware of recordings documenting Mancuso's subsequent denial of his involvement in the conspiracy to murder Pizzolo. Specifically, Mancuso stated during a taped conversation that he never told Cicale "a motherfucking thing" in regard to ordering Pizzolo's murder. See Mancuso Tapes. Mancuso continued,

After [Pizzolo] got killed [Cicale] called me.... I said, "What happened with [Pizzolo]?" [He said,] "I don't know, he didn't go home last night.... Did I do anything wrong?" "No," I said. "No, but why don't, why can't you let me know where you go? You did something wrong?"

[Cicale] just did this here because he wanted to show people he was doing [unintelligible] to keep away from me so they would listen to him.

Id.

In this regard, counsel's failure is even more inexcusable as evidenced by the fact that counsel undertook a line of "defense" to solidify Mancuso's involvement in the conspiracy by introducing Mancuso's guilty plea, all while having in its possession evidence indicating the contrary. Had counsel introduced Mancuso's exculpatory statements,¹⁸ counsel would have effectively impeached Cicale's

¹⁸ For a discussion of why people plead guilty for crimes they did not commit see Honorable Jed S. Rakoff, "Why Innocent People Plead Guilty," N.Y. REVIEW OF BOOKS (Nov. 20, 2014) (noting that "the prosecutor-dictated plea bargain system,

testimony, proved the theory that Basciano made false incriminating statements to Massino, and solidified the argument that the initial conspiracy terminated because Mr. Basciano clearly could not conspire alone once Cicale temporarily withdrew. See *Brown v. U.S.*, 167 F.3d 109, 110 (2d Cir. 1999)("[I]neffective assistance may be found where counsel 'omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker[.]'")(citing *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir.), cert. denied, 513 U.S. 820 (1994)).

Nonetheless, the Government reveled in each of counsel's omissions and failures. The Government argued in summation that counsel's introduction of Mancuso's guilty plea was direct proof of Mr. Basciano's guilt:

Just like you later learned that shortly before Basciano himself got arrested, he made plans with Dominick Cicale and Michael Nose Mancuso for what to do after his arrest.

You know that the defendant was arrested on November 19, 2004, before Cicale had carried out the Pizzolo murder...Cicale told you that the defendant directed that Mancuso...would have final word on the street but that Cicale was to back him and to collect all monies that were owed. The defendant instructed that nothing should skip a beat in his absence. With this plan in place...Vinny Basciano would still have control of the Bonanno Crime Family while he was in prison and once he got out.

by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed....The few criminologists who have thus far investigated the phenomenon estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent. The size of that range suggests the imperfection of the data; but let us suppose that it is even lower, say, no more than 1 percent. When you recall that, of the 2.2 million Americans in prison, over 2 million are there because of plea bargains, we are then talking about an estimated 20,000 persons, or more, who are in prison for crimes to which they pleaded guilty but did not in fact commit."(emphasis added)).

Cicale testified that at their next meeting, Mancuso directed him [to kill Pizzolo].... This was a reaffirmation of the order the defendant had already given out.

You know all this is true because you have Michael Mancuso's guilty plea in evidence and you can read it. Mancuso told the court under oath that "on or about November of 2004 in the Eastern District of New York I conspired with others to murder Randolph Pizzolo...."

Basciano is not charged with killing Randolph Pizzolo quickly. It's not an element. He's charged with killing Randolph Pizzolo in aid of racketeering, and Randolph Pizzolo is dead because Basciano told Dominick Cicale and Michael Mancuso to take care of it.

Tr. 8038; 8093; 8100-01; 8109; 8244.

Overall, the trial record provides numerous examples of counsel's omissions and prejudicial pursuits as a result of his utter lack of knowledge regarding conspiracy law. Counsel's ineptness is not only evidenced by the court's refusal to provide a jury charge on multiple conspiracies and termination; it is also evident by the fact that, but for counsel's error, the introduction of Mancuso's guilty plea would have never been introduced into the record as proof concerning Mr. Basciano's guilt. Thus counsel's pursuit not only prejudiced Mr. Basciano's defense, but it also bolstered, rather than undercut, the Government's case.

Accordingly, there is conclusive evidentiary support that counsel's performance was ineffective throughout the underlying trial, thus requiring the reversal of Mr. Basciano's conviction.

D. The Totality Of Counsel's Errors Demonstrates That Mr. Basciano Was Denied Effective Assistance of Counsel.

Based upon the record, it is clear that counsel provided ineffective assistance at every stage of Mr. Basciano's case. For the

above-alleged reasons, counsel failed to competently represent Mr. Basicano because counsel: (i) did not present any expert or direct evidence to support a challenge to the admission of incriminating statements, obtained in violation of the Fifth Amendment, made by Mr. Basicano to Joseph Massino; (ii) failed to present favorable documentary evidence and witness testimony necessary to rebut the Government's case; and (iii) presented a weightless defense theory that not only bolstered the Government's case, but also caused prejudicial and constitutionally inadmissible evidence to be considered by the jury against Mr. Basicano. Viewed within the totality of the circumstances, counsel utterly failed to provide Mr. Basicano with effective assistance as constitutionally required. *See Youngblood*, 547 U.S. at 870 ("The reversal of a conviction is required upon a showing 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.").

The Second Circuit has instructed that alleged errors by counsel must be considered "in the aggregate," because "*Strickland* directs [courts] to look at the 'totality of the evidence before the judge or jury,' keeping in mind that [s]ome errors...have...a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture" at trial. *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001) (quoting *Strickland*, 466 U.S. at 695-96)). *See also Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (noting that because a "claim of ineffective assistance of counsel can turn on the cumulative effect

of all of counsel's actions, all [of a petitioner's] allegations of ineffective assistance should be reviewed together").

Thus, "[i]n evaluating the prejudice suffered by a petitioner as a result of counsel's deficient performance, the court looks to the 'cumulative weight of error' in order to determine whether the prejudice 'reache[s] the constitutional threshold.'" *Bligen v. Burge*, No. 06 Civ. 1375(CM)(IIBP), 2008 WL 5336693, at *6 (S.D.N.Y. Oct. 20, 2008) (quoting *Lindstadt*, 239 F.3d at 202) *report and recommendation adopted in part*, 2008 WL 5351995 (S.D.N.Y. Dec. 22, 2008)).

The critical "touchstone here, as in all cases where ineffective assistance of counsel is alleged, is a fair trial. Where no single error or omission of counsel, standing alone, significantly impairs the defense, the district court may nonetheless find unfairness and thus, prejudice emanating from the totality of counsel's errors and omissions." *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979). *See also United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983) (noting that "a court may find unfairness--and thus prejudice--from the totality of counsel's errors and omissions").

Here, even if the court concludes that "no single error or omission...[]standing alone, significantly impair[ed] the defense," it is clear that, "from the totality of counsel's errors and omissions," including counsel's failure to: (1) adequately argue Mr. Basciano's suppression motion; (2) call favorable, exculpatory witnesses; and (3)

argue a defense theory grounded in fact and law, Mr. Basciano was denied his Sixth Amendment right to effective assistance of counsel.

III. Mr. Basciano Was Deprived Of His Constitutional Right To A Fair Trial As A Result Of The Government's Subornation Of Perjury And Withholding of Brady/Giglio Evidence.

A. Cicale's Post-Trial Statements Establishing, Inter Alia, That The Government Withheld Brady/Giglio Evidence And Instructed Cicale To Falsely Testify Requires Reversal of Mr. Basciano's Conviction.

Prior to Mr. Basciano's conviction becoming final, Cicale made numerous statements suggesting that he possessed information pertaining to his cooperation with the Government that, if revealed, would require the reversal of Mr. Basciano's conviction. Cicale also stated in no uncertain terms that the Government had "instructed him what to say" when testifying against Mr. Basciano. See Affidavit of Frank Villano (Exhibit 10).

Specifically, Cicale informed Frank A. Villano that he testified against Mr. Basciano because, "as a cooperator, the Government instructed him what to say." Villano Aff. at ¶ 8. Cicale also told Villano that he could guarantee that Mr. Basciano would "receive a new trial" as a result of the information he possessed and that he "spoke to his lawyers, and although they told me not to do it, [he thought] it's the right thing to do." *Id.* at ¶ 9. Cicale stated that his lawyers told him that Mr. Basciano would get a new trial if he revealed the information to Mr. Basciano's defense. *Id.* at ¶ 10.

Cicale also told Villano that he "never thought he would have to testify" against Mr. Basciano and he was compelled to testify by being

"put in a position to be a cooperator." *Id.* at ¶ 8. Cicale stated that he thought "Basciano would take a plea deal, but instead [he] went to trial." *Id.* Cicale stated that with his help Mr. Basciano "would be able to cop out to another ten years and be home." *Id.*

In addition to Cicale's statements to Villano, two online interviews of Cicale, conducted on December 22, 2014 and January 9, 2015, corroborate these facts. See "Dominick Cicale, a Former Capo in the Bonanno Crime Family, Answers Your Questions," *Cosa Nostra News* (Monday Dec. 22, 2014) ("Interview I") (Exhibit 11); "Bonanno Boss's Prison Letters Kick Off Second Dominick Cicale Forum," *Cosa Nostra News* (Jan. 9, 2015) ("Interview II") (Exhibit 12).

Specifically, Cicale's answers during these interviews provide further evidence indicating the following: 1) Cicale had an undisclosed motive to cooperate against Mr. Basciano, and Cicale was clearly biased against Mr. Basciano as a result of monies Cicale claimed were owed to him; 2) Cicale possesses evidence demonstrating that prosecutors engaged in misconduct during Mr. Basciano's case; 3) Cicale exaggerated the fear of retaliation and sacrifices he gave when cooperating with the Government, in order to enhance his credibility; 4) Cicale withheld information he was otherwise required to disclose pursuant to his cooperation agreement; and 5) Cicale sought to selectively disclose information to the Government.

In addition to these revelations, new evidence indicates that Cicale actively extorted Mr. Basciano's family following Mr. Basciano's

trial, but before Mr. Basciano's conviction became final. In 2015, Cicale informed Mr. Basciano's son, Joseph Basciano ("Joseph") that he possessed "information that could benefit your dad."¹⁹ Basciano, Jr. Aff. at ¶ 4 (Exhibit 13). Cicale told Joseph that "he could provide information that could possibly get [his] dad out of jail, or at least get him a new trial." *Id.* at ¶ 6. According to March 5, 2015 news article, Cicale attempted to extort \$200,000 from Mr. Basciano's family during the summer of 2014. See Jerry Capeci, "Mob Turncoat Who Sent Vinny Gorgeous Away For Life Allegedly Extorted Basciano Family for 200K," *Gangland News* (March 5, 2015). The article notes:

'I changed with the times,' is the song that singer Cicale croons on YouTube. 'That's why I cooperated. All the dinosaurs are going to die in jail. I chose a different path to rebuild myself. To rebuild my brand. To come out there and do good.'

Assistant U.S. attorney Laurie Korenbaum declined to discuss the case with Gang Land. But law enforcement sources say that after two criminal investigators looked into [the extortion] allegations, the case was referred to her counterparts in Brooklyn. That's where prosecutors sang Cicale's praises at his sentencing in 2012, and where Cicale, who professed he was a changed man, still has three years of strict post-prison supervised release to complete.

Id. at 4.

a. Applicable law

i. Subornation of perjury

It is well established that intentionally created errors, such as those caused by the Government's subornation of perjury of a key witness cannot be deemed harmless error. See *Napue v. Ill.*, 360 U.S. 264, 270

¹⁹ Cicale relayed this message to Villano, who then passed the message to Mr. Basciano's family. See Villano Aff. (Exhibit 10).

(1959) (noting "the principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction...[is] implicit in any concept of ordered liberty."). The prosecution's knowing presentation of materially false or instructed testimony automatically requires reversal when the witness's testimony may have influenced the jury's verdict. *See, e.g., Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991); *States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975).

When prosecutorial tactics interfere with the truth-seeking process, the Supreme Court has never held that a defendant's opportunity for cross-examination cures such prosecutorial misconduct. *See Napue*, 360 U.S. at 269-70 ("The taint of false testimony is not erased because his untruthfulness affects only his credibility as a witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. "). *See also United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975) (rejecting that evidence of perjury was inconsequential because it was merely cumulative); *Wallach*, 925 F.2d at 458 (observing that acts of perjury have a "different and more serious bearing..." and "cannot be said to constitute merely cumulative impeaching material.").

Rather, the Due Process Clause has always guaranteed the accused a fundamentally fair trial, and the "sine qua non" of such process is recognized as a "[c]ourt proceeding [that] [is] held for the solemn purpose of endeavoring to ascertain the truth." *Estes v. Texas*, 381 U.S.

532, 540 (1965); see also *Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (noting that the "central function of the trial...is to discover the truth."). Accordingly, the Due Process Clause implicitly directs many bedrock requirements concerning cooperating witness testimony that are necessary to thwart the "corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976). See also *Perry v. Leeke*, 488 U.S. 272, 282 (1989) (observing that the due process clause provides "rules that serve the truth-seeking function of the trial.").

ii. The Government's Brady/Giglio obligation.

Pursuant to *Brady v. Maryland*, the Government has an affirmative legal duty to provide favorable evidence, if material, to the defense. See *Brady v. Maryland*, 373 U.S. 83 (1963).

To be entitled to relief under *Brady* and its progeny, the petitioner must demonstrate that: 1) the evidence at issue is favorable to him, either because it is exculpatory or impeachment material; 2) the evidence was suppressed by the Government; and 3) prejudice ensued. See *Strickler v. Greene*, 527 U.S. 263 (1999). A determination of materiality "turns on the cumulative effect of all such evidence suppressed by the government," *Kyles v. Whitley*, 514 U.S. 419, 421 (1995), and "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* at 434. It is well established that

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but

whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Id. (citing *U.S. v. Bagley*, 473 U.S. 667, 676 (1985) (internal quotations omitted) (emphasis added).

Moreover, “[a] reasonable probability does not mean that the defendant would have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.” *Smith v. Cain*, 565 U.S. 73, (citing *Kyles*, 514 U.S. at 424 (1995) (emphasis added). Once a determination of reasonable probability is made, “[t]he reversal of a conviction is required.” *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

Thus, in reviewing multiple *Brady* claims, the court is required to view each claim individually, and then determine the cumulative impact such suppression had on the outcome of the trial. *See id.* at 420. If the court determines that this cumulative effect “undermines the confidence in the outcome of the trial,” *Bagley*, 473 U.S. at 678, the court is required to reverse the conviction. *See, e.g., Weary v. Cain*, 136 S. Ct. 1002, 1006 (2016) (holding new trial was warranted where witness’s “credibility, already impugned by his many inconsistent stories, would have been further diminished had the jury learned [of the suppressed favorable evidence].”); *Smith v. Cain*, 565 U.S. 73, 76 (2012) (requiring reversal of conviction where suppressed evidence contradicted key witness’s testimony, finding “the State’s argument offers a reason that

the jury *could* have disbelieved [the] undisclosed statements, but gives us no confidence that it *would* have done so.”) (emphasis in original); *Youngblood*, 547 U.S. at 870 (“The reversal of a conviction is required upon a showing 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.”).

It is also well established that for *Brady* “evidence known to the state at the time of the trial, the duty to disclose extends throughout the legal proceedings that may affect either guilt or punishment, including post-conviction proceedings.” *Steidl v. Fermon*, 494 F.3d 623, 630 (7th Cir. 2007). Essentially, a prosecutor’s duty under *Brady* does not end until the defendant’s conviction is final or the defendant has availed himself of all appeal process to which he is entitled. *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (“[A]fter a conviction, the prosecutor is also bound by the ethics of his office to inform the appropriate authority of after-acquired or other [material] information that casts doubt upon the correctness of the conviction.”).

When a defendant seeks a direct appeal, “the proceedings in the appellate tribunal are...part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment.” *Frank v. Magnum*, 237 U.S. 309, 327 (1915) (internal citations omitted); see also *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (“[I]f a State has created appellate courts as an integral

part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.”)(internal citations omitted)).

Therefore, “a defendant’s conviction is not final as a matter of law until he exhausts the direct appeals afforded to him, and, until that exhaustion, he is entitled to the full breadth of due process available.” *Fields v. Wharrie*, 672 F.3d 505 (7th Cir. 2012). See also *Skinner v. Switzer*, 131 S. Ct. 1289, 1303 (2011) (Thomas, J., dissenting)(explaining that “[t]rial procedures are used to initially convict a prisoner; appellate procedures review the validity of that conviction before it becomes final; and collateral review procedures permit challenge to the conviction after it is final”)(emphasis added)).

In this regard, “[w]hen the sovereign has decided that justice will be best served by qualifying the finality of a conviction so that a convicted defendant may yet prove his innocence, its attorney is not free to choose otherwise. And until fact-finding proceedings, or the possibility of them, is [sic] terminated, the State remains bound by the rules of simple fairness that *Brady* held to be of constitutional dimension.” *Monroe v. Blackburn*, 476 U.S. 1145, 1148-49 (1986)(Marshall, J., dissenting from denial of certiorari); see also *DA’s Office v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (distinguishing a defendant’s due process interest in his post conviction relief after he has received a fair trial from his interest before his conviction becomes final and

rejecting *Brady* and *Giglio* as continuing obligations on collateral challenge).

b. Mr. Basciano is entitled to a new trial because of Cicale's post-trial revelations.

Material evidence was withheld from Mr. Basciano's defense, indicating that Cicale was biased against Mr. Basciano, falsely testified at trial, fabricated his fears of retaliation for cooperating, testified selectively, and failed to disclose all past criminal activity, of which he was aware, in violation of his cooperation agreement.

First, pertaining to Cicale's motive to cooperate, Cicale now reveals that he felt personally attacked when Mr. Basciano robbed him of millions of dollars, and he sought to vindicate himself by testifying against Mr. Basciano. Specifically, Cicale felt that Mr. Basciano "threw [him] under the bus with his BIG MOUTH[.]" Interview I at 11. According to Cicale, "[Bullshit] started when Vinny was arrested, but I was ok with it. When I was arrested that's when everyone was taking everything." Interview II at 41 (emphasis added). Cicale continued, "I have Vinny and the rest of the Bonanno's back 1000% and was ready to do a life sentence. But after Vinny ordered me to testify at our trial and Vinny, Michael, and many more of my brother's [sic] rob me out of 7 million dollars, I decided to do the unthinkable [corroborate with the Government]." Interview II at 43 (emphasis added). Responding to a comment questioning Cicale's "tough guy" attitude, Cicale replied,

I had no intensions [sic] of ever cooperating until I was ordered by Vinny that I would be taking the witness stand in our case. YES!!!! That's correct, Vinny was going to place me on the witness stand. So my friend, either way I would have been labeled a RAT....STILL YOU ARE CORRECT.....NO EXCUSES.....

Interview I at 11 (emphasis added).

Cicale's intense belief that he had been "screwed" by Mr. Basciano is further indicated by Cicale's response to a question about loyalty: "Vinny, Michael, Vinny Jr., Vinny's wife...fucked me so bad before I cooperated that every high ranking Mafia in all the crime families were aware of it. Even Quite [sic] Dom said, "IT'S A FUCKING DISGRACE WHAT YOUR CRIME FAMILY IS DOING TO YOU!" Interview I at 25 (emphasis added).

Cicale's motivation was also attributable to a financial dispute between Mr. Basciano and himself. Specifically, Cicale was "hurt" when he "realize[d] my brother's [sic] turned on me by bankrupting me for over seven million dollars before I decided to cooperate." *Id.* at 18 (emphasis added). Moreover, in responding to a question about how much money Cicale was required to "kick up" to Mr. Basciano, Cicale answered, "Nothing.... However, Vinny could get whatever he wanted from me. Like I said before he owed me \$1,300,000.00." Interview II at 20 (emphasis added). Cicale repeatedly emphasized that Mr. Basciano owed him a significant debt for which Mr. Basciano failed to repay. See also Interview II at 35 ("Vinny did pay his debts, but I wish he paid what he owed me. It was only \$1,300,000.00."). Furthermore, responding to the

question, "If Vinny did not betray you, would you be taking it on the chin?"²⁰ Cicale replied,

Of course I would have taken it on the chin. It was a combination of Vinny, Michael, and Bruno. I would have to say Michael actually put the icing on the cake by sending me \$3,500 for Christmas, when the year before of [sic] my arrest I collected from all my guys well over \$300,000.

Id. at 20 (emphasis added).

Cicale concluded, "What Michael did was smack me in the face, so look who's laughing now." *Id.*

The co-author of Cicale's e-book summed up Cicale's financial motivations and feelings of betrayal succinctly, stating,

That is something I should've noted in the book...Christmas time is really really important to guys. In my first conversation with Dom [Cicale] he was bitching about Christmas money, only getting around 3 grand (I was like, shit, wtf!! I'll take 3 grand!) But this is DEFINITELY a sore spot for Dom—I am a firsthand witness. Honestly, I think this was a major reason why he flipped....

Id. (emphasis added).

Thus, it is clear from Cicale's unapologetic and unabashed statements that Cicale did not testify against Mr. Basciano because Cicale had a moral transformation and was seeking to rectify his past mistakes. Instead, Cicale was motivated by a personal vendetta against Basciano concerning financial reasons, which was a material fact concealed from defense counsel. Because Cicale was clearly prejudiced against Mr. Basciano, and he selectively testified about the facts leading up to Pizzolo's murder, Mr. Basciano, through no fault of his own, was

²⁰ "Take it on the chin" is defined as accepting unpleasant events bravely and without complaining.

deprived of a fair trial and his to right to explore Cicale's bias and motivations against him through proper cross-examination.

It is well established that cross-examination is the "greatest legal engine ever invented for the discovery of truth." *Cal. v. Green*, 399 U.S. 149, 158 (1970). The Supreme Court has consistently held that "[c]ross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Indeed, one of the primary, protected interests under the umbrella of the Confrontation Clause is the right to cross-examination. See *Douglas v. Ala.*, 380 U.S. 415, 418 (1965). The Second Circuit has also emphasized the importance of cross-examination, holding that a defendant must be permitted to cross-examine any witnesses to explore the "motivation of a witness in testifying, including her possible self-interest any bias or prejudice against the defendant." *Henry v. Speckard*, 22 F.3d 1209, 1214 (2d Cir. 1994) (emphasis added).

Here, Mr. Basciano's right to confront Cicale was impermissibly infringed upon, both by Cicale himself and by the prosecution, which sanctioned Cicale's false testimony and directly instructed him on how to testify. See Villano Aff. at 8 (Cicale was instructed what to say and "never thought he would have to testify" and he was compelled to testify by being "put in a position to be a cooperator."). Although the Confrontation Clause "guarantees an opportunity for effective cross-examination" and not "cross-examination that is effective in whatever

way....[,]" Mr. Basciano's constitutional rights were nonetheless violated because he was prevented from conducting a full cross-examination of Cicale's motives and biases, as well as a fair trial as a result of the nondisclosures and intentional acts of the Government.

Second, further corroborating Cicale's contention that the Government instructed his testimony, Cicale stated, "Keeping it real, I was the governments [sic] star until certain prosecutors took control...A tremendous amount of bullshit went on and there was time when I was strongly considering pulling my agreement, it's all going to come to light real soon..." Interview I at 23. Cicale later stated, "I hate to say this, but all the FBI agents I dealt with are great guys just doing their jobs. Now, some of the prosecutors are a different story...." Interview II at 49. These statements provide further evidence that the prosecution solicited false testimony from Cicale, either by coercion or by promise, and the Government withheld from the defense that Cicale was considering "pulling" his agreement as a result of the prosecutor's conduct.

Regardless of the means the Government employed, any tampering with Cicale's testimony is not only unethical and illegal, it is a deliberately created error of constitutional significance requiring reversal of Mr. Basciano's conviction. The Supreme Court has made clear that the prosecution's presentation of knowingly false or instructed testimony violates the Fifth Amendment of the United States Constitution. See *Napue*, 360 U.S. at 268 ("The principle that a State

may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.").

As the Second Circuit has correctly observed, "It was one thing for the jury to learn that [the witness] had a history of improprieties; it would be an entirely different matter for them to learn that after having taken an oath to speak the truth he made a conscious decision to lie." *Wallach*, 935 F.2d at 457. See also *id.* at 456 ("[I]f it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic.") (internal quotation marks omitted)); *Stofsky*, 527 F.2d at 243 (same).

Where, as here, the Government knew or should have known of the perjury committed by a key cooperating witness, a new trial should be granted if there is "any reasonable likelihood" that the false testimony influenced the jury's verdict. See *Wallach*, 935 F.2d at 456. A mere cursory review of the record reveals the importance of Cicale, as he was the only occurrence witness claiming to have direct and firsthand knowledge of Mr. Basciano's involvement in Pizzolo's murder.

Third, it is clear from Cicale's comments that his "fear" and sacrifice regarding his cooperation with the Government was exaggerated, if not entirely fabricated. Cicale admitted, "I could understand people being sore with my decision, I had two different crime bosses send word that they could never forgive me, but they understood and I did not have

to worry about anyone in their families coming for me...." Interview II at 47 (emphasis added). Moreover, those same individuals who Cicale originally stated he was so fearful of actually protected Cicale's father during his incarceration:

My father was always able to handle himself. Even when he was transferred to Fort Dix someone in the Bonanno crime family started talking shit. That person check [sic] HARD to shut his month by a Crime boss from a different family. I will not blow up that crime boss for the love I have for him till this day, but I will say this... THANK YOU!!!!

Id. at 50 (emphasis added).

From these statements, it is clear that Cicale's, and the Government's, reliance on its cooperator's fear and sacrifice when cooperating was grossly overemphasized to sway the jury into believing their stories. This overemphasis contributed to the jury's reliance on Cicale's testimony, which has been now proven to be false. See, e.g., Cicale Sent. Tr. 23-27 (court stating, "due in no small part to Cicale's cooperation, Vincent Basciano is now serving two consecutive life sentences" and "this cooperat[ion] comes at a great cost to society, to the government[,] and to Cicale himself.").

Fourth, pertaining to information Cicale was required to disclose when he cooperated, Cicale made several statements indicating that he withheld information to protect others and testified selectively according to his own interests. Cicale indicated he knew information about "[t]he most powerful and feared person in the Bronx[,]" but because he "is so undercover," Cicale "will not" nor "will ever expose him. I have much love for the man..." *Id.* at 19. See also Interview II

at 38 ("The person in charge there I do not want to blow up...People know but he is so undercover that I have to respect it."). Cicale not only protected this one individual, he also now reveals that he "tried to save [Aiello] but the government said no...." Interview II at 40. Cicale's selective testimony contributed to the factually inaccurate picture presented to the jury over the course of Mr. Basciano's trial, that Cicale was credible and abided by his agreement with the Government, resulting in prejudice to Mr. Basciano. Once again, this information was withheld from the defense.

Overall, this new information, released prior to Mr. Basciano's conviction being final, makes clear that Cicale's testimony during Mr. Basciano's trial was the product of Government instruction and that Cicale intentionally provided false testimony as to material issues decided in this case. Accordingly, the reversal of Mr. Basciano's conviction is required.

B. Cicale's Post-Trial Extortionate Acts Requires Reversal Of Mr. Basciano's Conviction.

Here, the Government's *Brady* obligation remained in full effect until, at least, June 27, 2016, the date Mr. Basciano's conviction became final. However, the Government has failed to disclose information it possesses regarding Cicale's perjured testimony, Cicale's extortion attempt, and Cicale's prior fabrications against Mr. Basciano.

The Government's failure to disclose information relating to Cicale's perjury and extortion effort--before Mr. Basciano's conviction became final--is material under *Brady*. Likewise, the Government's

failure to disclose information indicating that Cicale violated his cooperation agreement is also material warranting a new trial. Indeed, evidence of Cicale's post-trial statements--wherein he admits to committing perjury and selectively withholding information--and his continued criminality by trying to extort Mr. Basciano's family would have crumbled his credibility at trial. See Wallach, 935 F.2d at 457 ("Had it been brought to the attention of the jury that Guariglia was lying after he had purportedly undergone a moral transformation and decided to change his ways, his entire testimony may have been rejected by the jury.").

At trial, the Government claimed that Cicale, pursuant to his cooperation agreement, was required to testify truthfully to all he knew and was ordered not to commit further criminal activity. However, the evidence shows that Cicale neither testified truthfully nor abstained from his criminal lifestyle. Moreover a reasonable probability exists that the trial outcome would have been different, but for the Government's failure to disclose Cicale's multiple violations of his cooperation agreement. See *Kyles*, 514 U.S. at 434 (noting that a reasonable probability "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.").

First, the evidence establishes that the Government knew of Cicale's perjury and relied on his perjured testimony during its arguments to the jury. Specifically the Government told the jury that

Cicale was bound by his cooperation agreement; thereby implying that Cicale's testimony was credible. The Government even entered Cicale's cooperation agreement into evidence for the purpose of proving this point. Tr. 7257; Gov't Ex. 3500 DC 3-A. The trial prosecutor also elicited testimony from Cicale regarding his obligations under his cooperation agreement:

Q Have you entered into a cooperation agreement with the government?

A Yes, ma'am, I have.

Q What are your obligations under the cooperation agreement?

A To tell the truth, to testify in all proceedings, and to fully cooperate with the government.

Tr. 7256-57.

Second, the evidence also establishes that the Government failed to disclose to defense counsel that "after two criminal investigators looked into [the extortion] allegations, the case was referred to [district attorney] counterparts in Brooklyn." Capeci at 4. This indicates that the Government has knowledge of undisclosed information pertaining to Cicale's criminal activities in violation of his cooperation agreement. Moreover, pursuant to Cicale's post-prison supervised release, in 2016, he still had two years left to complete of his sentence. See *id.* ("Cicale...still has three years of strict post-prison supervised release to complete.").²¹

²¹ Once again, counsel could have undercut the credibility of the Government's case by highlighting the prosecution's continued use of Cicale as witness even though there was an ever-increasing quantum of evidence proving that Cicale committed perjury in prior proceedings against Mr. Basciano and that Cicale had violated the terms of cooperation agreement.

In the end, Cicale was the only witness to claim having firsthand knowledge of Mr. Basciano's involvement in Pizzolo's murder, and therefore, his testimony was clearly material to Mr. Basciano's conviction. The Government was required to turn over any information relating to Cicale credibility, and its failure to do so raises the reasonable probability that, but for the Government's failure to disclose, Mr. Basciano's criminal outcome may have been different.


Accordingly, the court should vacate Mr. Basciano's conviction and order a new trial.

CONCLUSION

The petition should be granted, the judgment of conviction vacated, or a hearing ordered.

Dated: White Plains, New York
June 26, 22017

Respectfully Submitted,



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*Attorney for Petitioner
Vincent Basciano*

CERTIFICATE OF SERVICE

I, Anthony DiPietro, Esq., being over eighteen and not a party to the action, affirm that on June 26, 2017, I served a copy, via United States Postal Service, of the Petitioner's Motion Pursuant 28 U.S.C. § 2255, Affirmation of Counsel, and Memorandum of Law with Supporting Exhibits on:

AUSA Taryn A. Merkl
United States Attorney's Office (E.D.N.Y.)
271 Cadman Plaza East
Brooklyn, NY 11201

Hon. Nicholas G. Garaufis
United States District Court
Eastern District of New York
225 Camden Plaza East
Brooklyn, New York 11201

Dated: White Plains, New York
June 26, 2017



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**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 27, 2016

Clerk
United States Court of Appeals for the Second
Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

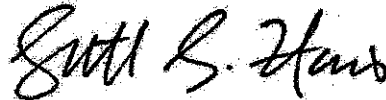
Re: Vincent Basciano
v. United States
No. 15-9463
(Your No. 11-2995)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

Sincerely,



Scott S. Harris, Clerk

2

-1-

- 1- My name is Vincent John Basiano. My date of birth is November 14, 1959. I am currently incarcerated at the federal facility in Inez Kentucky, United States Penitentiary, Big Sandy.
- 2- Prior to being transferred to Big Sandy I was housed at USP Florence Colorado ADMAX and then at USP Florence.
- 3- While I was in the "step-down" program at Florence ADMAX in 2015 a large group of individuals came into J-unit, the unit I was being housed in. One of those individuals, who I became aware was federal judge Sterling Johnson, called at my first and last name and said that "Nicholas G. Garofis sends his regards". I responded by telling the Honorable Johnson to send "Garofis my love". To which the entire group (which consisted of approx. 20 individuals) broke out in laughter.
- 4- I took that message as an affront due to the fact that Garofis sentenced me to two consecutive life sentences. Furthermore, one of the

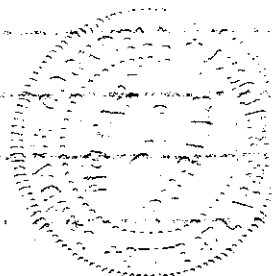
main reasons I was designated to Florence ADMAX was because of a list the government alleged was a "hit-list" which named Garavito among others.

5- From the out-set I have proclaimed those allegations were absolutely false and stated it was nothing more than an innocuous Santaria list.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 14, 2017

Vincent J. Basciano
- Vincent J. Basciano -

State of Ky. County of Nartin
Signed before me on this 14 day
of June, 2017 by Vincent Basciano
Notary Public C. Coakley
EXP 3/13/19
ID: 529859



3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
VINCENT JOHN BASCIANO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

**EXPERT DECLARATION OF
GERALD CAPECI**

Respondent.

-----X

GERALD CAPECI, known professionally as JERRY CAPECI, declares the following to be true under the penalties of perjury:

1. The statements and opinions in this declaration concerning the Mafia's rules, the reign of former Mafia Boss Joseph Massino, and the events pertaining to Massino's jailhouse questioning of Vincent Basciano about his involvement in a murder are based on my knowledge, experience, work as an investigative journalist covering the Mafia for the past four decades, and review of trial transcripts and records relating to the criminal proceedings of *United States v. Vincent Basciano*.

2. While working as a journalist, I have obtained and read scores of FBI documents and court records about the Mafia and have interviewed numerous persons with direct knowledge of the Mafia and its rules. I have interviewed both current and former members of the Mafia, and law enforcement and other personnel involved in prosecutions of Mafia members,

including FBI Agents, local police officers and detectives, as well as federal and state prosecutors, defense attorneys and judges.

3. I began working for the New York Post in 1966. I was a reporter for The Post from 1969 until 1986. Thereafter, I worked as a reporter and columnist for the New York Daily News until 1999.

4. During my 45 years as a news reporter, I have written numerous articles about Italian-American Organized Crime, which is officially known as Cosa Nostra by its members, and which is often referred to as the "Mafia".

5. Since 1996, I have worked as a reporter, columnist and publisher of a weekly online news column (ganglandnews.com), which focuses on the Mafia. My "Gang Land" column appeared in The Daily News from January 1989 through August 1995, and in The New York Sun from August 2002 until October 2007.

6. From October 11, 1999 until March 2004, I was Director of Communications for John Jay College of Criminal Justice, The City University of New York (CUNY). During my time at John Jay, I gave several "guest" lectures about organized crime, and I served on panel discussions about the Mafia.

7. Numerous times, I have been called a "Mafia expert" while appearing as a guest on network, cable television and radio news programs.

8. I have also been permitted by federal judges in New York, New Jersey, Connecticut, Florida, and Las Vegas to intervene in numerous prosecutions of Mafia members and associates in order to assert the public's First Amendment and common law rights of access to judicial documents.

9. I have written numerous books about the Mafia and scores of articles about organized crime that have appeared in magazines and newspapers in the United States, Canada, Europe, and Asia. The books I have written, or co-authored, include: (i) Mob Boss: The Life of Little Al D'Arco, the Man Who Brought Down The Mafia; (ii) The Complete Idiot's Guide To The Mafia; (iii) Mob Star, the Story of John Gotti; (iv) Gotti: Rise & Fall, (v.) Murder Machine.

10. In 2006, I received an award for media excellence for my weekly column work concerning the Mafia (ganglandnews.com) from the Criminal Justice Section of the New York State Bar Association.

11. In May 2001, The New York Times wrote a feature article about my GangLandNews.com column, and the same year GangLandNews.com won the Best Web News Story Award from the New York Press Club. People Magazine also ran a full-page feature of GangLandNews.com in June 2001.

THE POWERS OF A MAFIA BOSS

12. A Mafia Boss possesses absolute and unfettered power to control the affairs of all persons either associated with or serving as an official member of his "Family".

13. A Mafia Boss always retains the power to control and direct the activities of all the "Family's" members, including the Underboss, Consigliere, Captains, Soldiers, and Associates (hereinafter, both members and associates will be cited as an underling).

14. An underling is always subservient to the Boss. An underling also has no discretion when ordered to act or answer questions presented by the Boss, and the underling must, under the possible penalty of death, fulfill the Boss's request in all regards.

15. A Mafia Boss also retains absolute power over any underling acting on his behalf ("Acting Boss") during the Boss's absence, and the Boss can replace such person at any time. The Acting Boss is also subservient to the Boss, and must, under the possible penalty of death, follow the Boss's orders at all times.

16. A Mafia Boss also retains complete control over enforcing the rules of the Mafia in regard to his "Family", and in doing so, is the only official authority who can, either personally or through his appointment of specific

underlings, sanction the murder of an underling who has been found violating such rules.

17. A Mafia Boss retains unfettered discretion to determine whether an underling has violated the rules warranting his death or other punishment.

18. A Mafia Boss can impose the penalty of death upon an underling, even those appointed to act in his official capacity, for any reason whatsoever, even if such reason is personal, unverified, nonsensical, or even untrue.

19. In his testimony at the trial of Mafia Boss Vittorio Amuso, former acting boss Alfonso D'Arco testified that he had taken part in the murders of several members of his Family for reasons put forth by Amuso that were untrue.

20. A Mafia Boss is also the only person who can question an underling regarding a prior murder. No underling is permitted to discuss a murder other than with the Boss.

21. The rules of all the Mafia Families prohibit, under the possible penalty of death, an underling from discussing or questioning another underling about a prior murder.

22. The rules of all Mafia Families also prohibit, under the possible penalty of death, an underling from refusing to answer the Boss's questions concerning any matter, including the topic of prior murders.

23. In 1985, in a discussion that was tape-recorded by the FBI, longtime Gambino Crime Family underboss Aniello Dellacroce as well as then-capo John Gotti each stressed a Mafia Boss's absolute authority over his underlings. They did so in telling soldier Angelo Ruggiero that he had to follow a directive by then-Boss Paul Castellano to give him tape-recordings that the FBI had made of his conversations:

"While he's the boss, you gotta do what he tells you," Gotti stated, referring to Castellano.

"Cosa Nostra means the Boss is the Boss," said Dellacroce. "You understand!"

24. Four years later, in 1989, after Gotti had taken over the crime family, the FBI tape recorded him stating that he was going to order the killing of soldier Louis DiBono for not following his orders:

"He didn't rob nothing," Gotti stated. "Wanna know why Louie's dying? He's gonna die 'cause he didn't show up when I called."

25. There is no basis for an underling to circumvent or disregard answering the Boss's demands or questions, even if the underling is a more ruthless Mafioso, in both terms of his reputation and actual commission of violence.

THE REIGN OF MAFIA BOSS JOSEPH MASSINO

26. Joseph Massino served as the Boss of the Bonanno Family from 1991 through 2004.

27. As a Mafia Boss, Joseph Massino had absolute power and control over all persons either associated with or serving as an official member of the Bonanno Family (underlings).

28. Massino's power allowed him to control and direct the activities of all members of the Bonanno Family, including the Family's Underboss, Consigliere, Captains, Soldiers, and Associates of the Bonanno Family (underlings).

29. Massino retained absolute power over any underling, including those acting on his behalf as an "Acting Boss" during his leadership of the Bonanno Family. The Acting Boss at such time was subservient to Massino, and had to, under the possible penalty of death, follow Massino's orders at all times.

30. Massino retained complete control over enforcing the rules of the Mafia in regard to the Bonanno Family, and in doing so, was the only official authority who could, either personally or through appointment, sanction or authorize the murder or physical/monetary punishment of an underling who had been found violating such rules.

31. Massino was also the only person who could question an underling about a prior murder.

32. All underlings in the Bonanno Family were required, under the possible penalty of death, to answer Massino's questions concerning all matters, including prior murders.

33. There is no basis for any underling to circumvent or disregard answering Massino's questions, even if the underling is a more ruthless Mafioso, in both terms of reputation and actual commission of violence within the Bonanno Family.

34. As Boss, Massino could and did on occasion, impose the penalty of death upon certain underlings, even those who were equally ruthless, for any reason he deemed fit, even when his reason was personal, trivial, unverified, or potentially untrue.

MASSINO'S JAILHOUSE QUESTIONING OF BASCIANO

35. As of 2004, Massino was revered, and feared, by the underworld as a treacherous and well-established Boss. By that time, by his own admission, he had taken part in twelve murders, and as a Boss, had ordered some murders for both personal and official "Mafia" reasons.

36. Notwithstanding his history of treachery, Massino's power as a Boss and control over decisions pertaining to his underlings was absolute in 2004 as established by fundamental Mafia protocol. Massino possessed the power to control all facets of the Bonanno Family and remained the only official authority, either personally or through his appointment, who could sanction a murder with unchecked discretion.

37. Massino's power as the official Boss was also unrestrained by his imprisonment from 2002 through 2004.

Under Mafia protocol, Massino retained his position as Boss of the Bonanno family. During those years, he sent messages from his federal lockup to underlings who had not been arrested to run the crime family, according to court records.

38. As Boss, Massino's appointments were always subject to his control and discretion. At any time, Massino could remove any underlings from their appointed positions. And if he felt circumstances required, he could order the death of any underling who failed to remain subservient. Massino's power also remained absolute in this regard as it pertained to any official or unofficial Acting Boss.

39. In 2004, Massino also remained the only person within the Bonanno Family who could question an underling, like Mr. Basciano about a prior murder.

40. At such time, notwithstanding Basciano's own history and position within the Bonanno Family, he was required, under the possible penalty of death, to answer Massino's questions concerning any matter, including the topic of prior murders.

41. Under Mafia protocol, Basciano was not permitted to disregard or refuse to answer Massino's questioning regarding any subject. In this regard, Basciano would have subjected

himself to a possible punishment of death if he refused to answer Massino's questions.

42. Under Mafia protocol, Basciano was also required to answer Massino's questions without hesitation irrespective of Basciano's criminal background, ruthlessness, and stature within the Bonanno Family.

43. Until Massino's cooperation with the Government was disclosed, Basciano was required to answer Massino's questions and remain subservient to him because Massino remained the official Boss of the Bonanno Family.

44. Under Mafia protocol, Basciano's position as an "Acting Boss" and his alleged ruthlessness as a Mafioso were not relevant to his obligation to answer Massino's questions. Basciano's failure to follow any Massino order would have subjected him to a possible death sentence.

45. Assuming Basciano became a member of the Mafia at some point before 2004, he would have to have known when Massino questioned him about the murder of Randy Pizzolo that he could either answer Massino's questions or face the very real prospect of being killed for refusing to do so. He could have chosen to speak truthfully, or to lie, or to do both, in responding to Massino's first question, and whatever follow-up questions he had. The one thing Basciano could not do was refuse to answer any questions that Massino posed. If he did

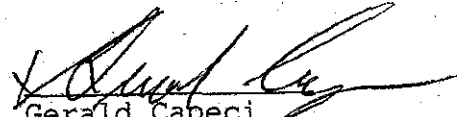
that, he would have subjected himself to the possibility of death.

46. While it is true that Basciano and Massino were close criminal confederates during these times, there can be no doubt that Massino was the Boss of the crime family, at least in Basciano's mind, since he had no idea that he was an agent of the government. To Basciano, Massino remained the leader of the crime family who had just been convicted of seven murders and was awaiting trial for the murder of an eighth mobster, for the flimsiest of reasons.

47. And while it is also true that Basciano and Massino held similar positions within the Bonanno Family (Acting Boss vs. the Boss), there can be no doubt that Basciano was subservient to Massino. As Boss, Massino had much more clout and influence than Basciano, because there is only one Boss of a crime family and his rule is absolute. In this regard, Massino could officially order the murder of Basciano; Basciano held no such power over Massino.

48. While it may also appear to a layperson that Basciano was unafraid of Massino due to his own legacy of violent activity, there can be no doubt that Basciano understood the Rules of the Mafia and knew that Massino could have him killed if he didn't answer his questions.

Dated:


Gerald Capeci

Sworn to before me this 15th day of June, 2017.


Notary Public

Gerald Capeci appeared
before me on this day

SUSAN L. GIRSCHICK
Notary Public - State of New York
No. 01G16197567
Qualified in Nassau County
My Commission Expires Dec. 01, 2020

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- 1 -

- 1- My name is Vincent John Basciano. My date of birth is November 14, 1959. I am currently incarcerated at the federal facility in Inez Kentucky; United States Penitentiary, Big Sandy.
- 2- On December 29, 2004 I was removed from my unit - 6-I - at the Metropolitan Detention Center in Brooklyn N.Y and put in the Special housing Unit (SHU) and placed in cell 13.
- 3- On January 3, 2005 I was summoned by Joe Massino to the recreation cages that were in SHU. (This is also reflected by conversations Massino had with the recreation officer, Tonari, and others, that could be heard on the 1/3/05 recording prior to me being placed next to Massino).
- 4- At certain points during my conversations with Massino on 1/3/05 and 1/7/05 I understood Massino's words to be threatening. For example: during one conversation on 1/3/05 Massino admonished me that I was "going to get second

money" if I did something Massino didn't approve.

I understood that (second money) to mean Massino would/could do harm to me.

5- During another portion of the 1/2/05 conversation Massino told me, during his queries about the Pizzolo homicide, to be "honest with him and that "the other day" (during the 1/3/05 conversation) I played with him (lied to Massino) but he "let it go"

I was fully aware of Massino's mannerisms, characteristics, capabilities, and colloquialisms during these conversations. I understood that to mean that Massino had spared me from whatever punishment he deemed appropriate. Including being killed.

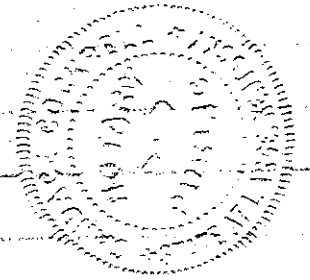
6- Had I not responded to Massino's questions or, if I did not go meet Massino at recreation it could have had dire consequences for me, my family, or Cicale, or so I thought.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 14, 2007.

-3-

Vincent J. Basciano
Vin J. Basciano

State of Ky. County of Martin
Signed before me on this 14 day
of June, 2017 by Vincent Basciano
Notary Public: [Signature]



EXP: 3/3/19
ID: 529859

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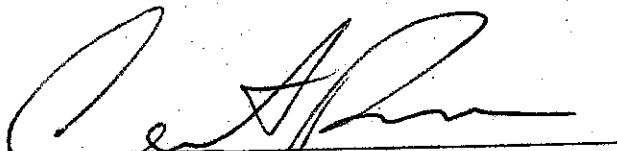
GENERAL AFFIDAVIT

STATE OF NEW YORK
COUNTY OF QUEENS

PERSONALLY came and appeared before me, the undersigned Notary, ALBERT PERNA who is a resident of Queens County, State of New York and makes this his statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his knowledge.

1. On or about April or May, 2011 I was waiting in the hallway outside a courtroom in the Eastern District Federal Courthouse in Brooklyn and prepared to testify for Vincent Basciano pursuant to a So Ordered Subpoena.
2. My testimony would have be consistent with my Grand Jury testimony which was given in 2005.
3. To the best of my recollection and knowledge, Vincent Basciano was unaware that I testified in the Grand Jury in 2006-2007 and I never made him or his defense team aware at that time that I had testified in the Grand Jury.
4. I was approached by an investigator who identified himself as working for Mr. Basciano and I referred him to my attorney Joel Winograd and I did not answer any questions on the advice of my attorney.
5. I was told by Mr. Basciano's attorneys that they did not need my testimony and therefore I did not testify in the Death Penalty hearings.


Dated: December 23, 2013



Albert Perna

Sworn to before me this 23rd
day of December, 2013

Antonieta De Rosa
Notary Public, State of New York
No. 01DE6186615
Qualified in Kings County
Commission Expires 05/05/2016


NOTARY PUBLIC



- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 05/06/2005

→ On May 5, 2005, FRANK VASATURO (protect identity) 153-17 82nd Street Queens, New York, dob 1/30/58, was advised of the identities of the interviewing agents and the nature of the interview. VASATURO provided the following information under the protection of a proffer agreement presented by AUSA Thomas Seigel. VASATURO was represented by attorney, LARRY SILVERMAN 26 Broadway New York, New York, who was present throughout the interview.

VASATURO has known FRANK ESPOSITO (FRANK ESPOSITO) for approximately 32 years, having grown up together in the Rosedale section of Queens. After getting married, VASATURO got into trouble and went to jail. As a result, he and ESPOSITO lost touch for several years. In or about July 2003, VASATURO was released from jail (a sentence unrelated to the earlier incarceration referenced above) and re-connected with ESPOSITO. By that time, ESPOSITO had developed a lucrative shylock and gambling operation. He gave VASATURO a job collecting from some of his customers. VASATURO estimated that ESPOSITO had between 150 and 200 customers, but VASATURO met only a few. He recalled making regular collections from "the pizza guy" from Broadway in Brooklyn, an unknown male from ALL AMERICAN MIRROR in Franklin Square, as well as another unknown male (unmale). He stated that on some weeks these individuals would owe as much as \$15,000 to \$20,000 which he would then deliver to ESPOSITO. Most of ESPOSITO's gambling business was overseas and conducted over the computer utilizing code names to identify the customers. VASATURO advised that ESPOSITO used a laptop to store some of his gambling records and saw him in possession of the laptop in both his home and his vehicle (a gold colored Lexus 430). VASATURO also observed hard copy gambling sheets in ESPOSITO's residence. VASATURO also collected from an individual referred to as "SCOOBY DOO". VASATURO stated that the man was called SCOOBY DOO based on his actual last name. The first time that ESPOSITO sent him to collect from SCOOBY DOO, VASATURO met him in a Burger King located across the street from a police station in or around Ozone Park Queens. VASATURO was surprised to see the man wearing the uniform of an NYPD sergeant. When he shook VASATURO's hand he passed him a large amount of cash which VASATURO in turn delivered to ESPOSITO. On another occasion, VASATURO met SCOOBY DOO with ESPOSITO, at a Howard Johnson's restaurant, where he observed several other police officers in the immediate vicinity. On that occasion, SCOOBY DOO delivered

Investigation on 5/5/05 at Undisclosed

File # 281A-NY-268104 SUB 302

Date dictated 5/6/05

by SA James J. DeStefano/jj [signature]
SA Jay F. Kramer [signature]

281A-NY-2001-1000

Continuation of FD-302 of

On 5/5/05

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approximately \$5,000 in cash. VASATURO believed that the money was generated by the gambling activities of several police officers. MASSINO stated that he was with SCOOBY DOO on at least one other occasion but no money was exchanged.

As stated above, in addition to his gambling interests, ESPOSITO also had a very lucrative shylock business. VASATURO also collected shylock payments for ESPOSITO and noted that he would get upset when VASATURO got violent with the customer. On one occasion, VASATURO approached a bouncer working at a club controlled by "JACKIE THE NOSE". The man had not paid what he owed to ESPOSITO, so VASATURO hit him in the mouth with a pipe. VASATURO believed that the man lost several teeth as a result of the beating. He later contacted ESPOSITO and agreed to pay but refused to deal with VASATURO any further.

ESPOSITO also used DANNY RAGANO (ph) to make collections for him. VASATURO had brought RAGANO around and ESPOSITO took a liking to him. VASATURO described RAGANO as being a white male approximately 58 years of age who was with ESPOSITO on a regular basis. VASATURO believed that RAGANO had been convicted of murder in the past but only served prison time on the weekends. He was aware that RAGANO had also done collections for JOE MASALA (ph) (JOSEPH MARSALA) MASALA was known to have owed BONNANO CRIME FAMILY (BCF) boss, JOE MASSINO (JOSEPH MASSINO) \$50,000. When MASSINO was arrested, MASALA began making payments on that debt to VINNIE BASCIANO (VINCENT BASCIANO) and DOM CICALE (DOMINICK CICALE).

VASATURO was at CASA BLANCA, a restaurant and catering hall in Queens, when he was introduced to ANTHONY MANNONE (ANTHONY MANNONE, aka ANTHONY ELMONT) by ESPOSITO. MANNONE welcomed VASATURO to the BCF and advised him that if he had any problems he was to report them to ESPOSITO who in turn would report to MANNONE. VASATURO was then brought to the rear of the restaurant to a large catering room where he was introduced to MASSINO. VASATURO observed several other wise guys in attendance and recalled that the meeting took place on New Year's Eve, 2001. Thereafter, VASATURO attended dinners at CASA BLANCA every Tuesday night.

ESPOSITO told VASATURO that when MASSINO was arrested, ESPOSITO was claimed by BASCIANO. ESPOSITO did not like dealing with BASCIANO and CICALE because he thought that they, and their crew were crazy. ESPOSITO was given a pager and told that whenever it activated, he was expected to meet with them. In addition,

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, On 5/5/05

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ESPOSTIO was expected to pay a large amount of cash to BASCIANO at Christmas time. VASATURO believed that the amount was at least \$50,000.

VASATURO recalled being at ESPOSITO's home when he observed CICALÉ and an individual in his crew known as ACE (ANTHONY AIELLO) arrive at the residence. VASATURO went out another door so as to avoid them. ESPOSITO later advised him that a customer by the name of ERIC LNU owed \$50,000 and was late with the payment. CICALÉ demanded that he come to the residence so that he could talk to him. When ERIC arrived, CICALÉ told him that he owed the money to him and that CICALÉ wanted it paid within two weeks. He further advised that if ERIC did not have the money by that time his hands would be crushed. ESPOSITO told VASATURO that ERIC did not make the payment and that ACE and another individual beat him and tried to crush his hands. As a result of the beating, ERIC went to the hospital. CICALÉ subsequently confronted ESPOSITO and wanted to know how ERIC looked. ESPOSITO advised VASATURO that CICALÉ seemed to enjoy knowing the details of the damage done to ERIC.

At some point, VASATURO put some of his own money out with ESPOSITO's shylock customers. One of the customers that they shared is NICK BUDIS (ph), a manager at a Honda dealership. BUDIS owed \$57,000, approximately \$13,000 of which belonged to VASATURO. VASATURO recently gave the entire loan over to ESPOSITO. VASATURO also had a customer of his own by the name of DINO LNU. DINO is currently employed as a chef at RAO's restaurant and pays approximately \$475 per week on a \$6400 debt.

VASATURO recalled that ESPOSITO had advised him that an unknown male (unmale), whom VASATURO believed to be of Colombian or Greek ethnicity, owed him money and was not paying. ESPOSITO directed VASATURO to find the unmale and to collect from him. ESPOSITO stated that VASATURO could keep half of whatever he collected from the unmale. During the course of VASATURO's efforts in that regard, he received a voice mail message from the unmale on his cellular telephone. According to VASATURO, the message was very insulting and resulted in a meeting. When VASATURO got there, unmale was accompanied by RANDY PIZZOLO (RANDOLPH PIZZOLO), who was there to represent unmale's interests. VASATURO explained the situation to PIZZOLO and played the voice mail for him. PIZZOLO sided with VASATURO and instructed unmale to make the payments. The following week unmale failed to pay. VASATURO advised PIZZOLO, who then made the payment out of his own pocket. According to VASATURO, he and PIZZOLO quickly became friends. They socialized

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, On 5/5/05

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and even considered going into business together. PIZZOLO told VASATURO that he wanted to start an excavation business and suggested that VASATURO utilize his credit to obtain the necessary equipment and PIZZOLO would do the actual work. He advised VASATURO that he had someone close to TOUGH TONY (ANTHONY FEDERICI, aka TONY PARKSIDE, aka TOUGH TONY) from PARKSIDE RESTAURANT who would give them work as would BASCIANO. Some of these conversations took place at ESPOSITO's residence when ESPOSITO was present. He later talked VASATURO out of going into business with PIZZOLO. Despite that decision VASATURO and PIZZOLO remained friends. In fact, VASATURO attended PIZZOLO's daughter's wedding in May of 2004, at LEONARD'S OF GREAT NECK. The following month, VASATURO and PIZZOLO attended ESPOSITO's wedding to his wife, KATHY, at a catering hall in Westbury, Long Island. During the reception, VASATURO and PIZZOLO were sitting at the same table as CICALA and VINNY BASCIANO jr. (VINCENT BASCIANO jr.). VASATURO and PIZZOLO were discussing the recent disappearance of QUIET DOM's (DOMINICK CIRILLO) son (NICKY CIRILLO). Rumors had been circulating that the son had been using drugs and misusing his father's name. PIZZOLO stated words to the effect, Frank, when I get up there, I'm taking you with me. VASATURO understood this to indicate that PIZZOLO believed that he was going to get made. VASATURO asked him why and PIZZOLO, in referring to the son said that he would never be found. VASATURO asked PIZZOLO how he knew. PIZZOLO smiled pointed to himself and gestured with his chin at CICALA, who was sitting across from them.

Some time before Thanksgiving of 2004, VASATURO called PIZZOLO on his cell phone. PIZZOLO sounded very cold and kept the conversation short. He subsequently called VASATURO back and told VASATURO to meet him at FIESTA CAFE. At that meeting, PIZZOLO explained that he had been with BASCIANO when VASATURO called. BASCIANO told PIZZOLO that he had heard that VASATURO was using drugs and directed PIZZOLO to stay away from him. PIZZOLO suggested that VASATURO reach out for someone that could speak on his behalf and then they could resume their association. Soon after Thanksgiving, ESPOSITO directed VASATURO's attention to the newspaper article about PIZZOLO's murder.

After PIZZOLO's murder, VASATURO was with ESPOSITO at his residence when ESPOSITO confronted VASATURO about the statement made to VASATURO by PIZZOLO at his wedding. ESPOSITO stated that RAGANO had told him that someone at the wedding repeated the story to RAGANO and when questioned about the source of the story, the individual said that it had been told to them by VASATURO.

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, On 5/5/05

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VASATURO admitted that he had been drinking as the night progressed and could not recall repeating the story to anyone else. Both RAGANO and ESPOSITO refused to identify the individual whom they had spoken to about the incident. ESPOSITO just told VASATURO not to worry about it. VASATURO on the other hand became very scared because he believed that PIZZOLLO may have in fact been murdered to keep him quiet and was afraid that the same thing may happen to him.

Administrative:

Names in bold appear as they are known to the FBI and not necessarily to the interviewee.

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FD-302 (Rev. 10-6-95)

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/12/2006

On 12/12/2006, ROXANNE ROMAN (protect identity), contacted SA Jay F. Kramer telephonically, and provided the following information. Also present for the conversation was SA Robert Ypelaar.

ROMAN advised that after her son's baby shower at Piccolo Venezia, a group of friends and family returned to the home she shared with RANDY PIZZOLO in Whitestone, Queens to continue the celebration. During the course of the celebration at the residence, ROMAN observed PIZZOLO leave the residence approximately three times. The first two times, PIZZOLO told ROMAN that he needed to pick up additional chips and beverages for the party.

At some point that evening, PIZZOLO left their residence a third time. Prior to his departure, PIZZOLO told ROMAN that he "had to go" this time. At approximately 10:00 p.m., PIZZOLO returned and pulled her to the side for a private conversation. At that time, PIZZOLO stated, "I did it. I did it." In response, ROMAN asked, "What did you do?" to which PIZZOLO replied, "I killed him." ROMAN noted that PIZZOLO had been drinking alcohol throughout the day, and that he was very emotional during this conversation. When ROMAN asked PIZZOLO what was going on, PIZZOLO responded, "I can't get you involved, but it's done." ROMAN advised that she did not take the conversation seriously, and that no further conversation occurred between PIZZOLO and ROMAN on the subject.

PIZZOLO changed his clothes, and returned to the party. At approximately midnight, ROMAN fell asleep. ROMAN does not believe that PIZZOLO left the residence again that evening.

Administrative: Records obtained from Piccolo Venezia Catering Hall indicate that a baby shower for ROMAN's child was held on the evening of 10/23/04.

Investigation on 12/12/2006 at New York, NY (telephonically)

File # 245A-NY-268104-SUB AA

Date dictated _____

by SA Jay F. Kramer/jfk

SA Robert Ypelaar/RJ

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U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

June 12, 2009

By Overnight Courier

George Goltzer, Esq.
200 West 57th Street, Suite 900
New York, New York 10019

Re: United States v. Vincent Basciano
Criminal Docket Nos. 05-060 (NGG)

Dear Mr. Goltzer:

Pursuant to Brady v. Maryland, and in an abundance of caution, the government provides the following information.

I. Reports and Grand Jury Testimony

Enclosed is grand jury testimony and/or reports as to the following individuals:

- Richard Adler
- Louis DeCicco
- Tarek Kotob
- Robert Marshall
- Dora Roxanne Roman
- Jason Smith
- Robert Van Zandt, Sr.
- Robert Van Zandt, Jr.
- Detective Vargas
- Frank Vasaturo

II. Summaries of Information

In addition, the government provides the following summaries of information:

- Richard Berte

In substance, Berte stated to government cooperating witness Richard Cantarella that, while Berte was housed with Vincent Basciano at the Metropolitan Correctional Center ("MCC"), Basciano stated that he wanted to beat Greg Andres's head in with a baseball bat, and further stated that Berte was also housed at the MCC with Joseph Massino, who allegedly indicated to Berte that it was Massino's original idea to kill Andres.

- Joseph Bonelli and Robert Benedetto

These individuals are incarcerated at Franklin Correctional Facility, Malone, New York. According to an inmate at the facility, Bonelli and Benedetto have been overheard discussing, among other things, that the reason that "Ace" and "Chicale" killed Randy is because Randy is the person that murdered "Quiet Dom's" son, and also stated that at an unspecified previous time Anthony Federici had given "Hippy" Zanfardino permission to kill Randy Pizzolo and Chris Castellano.

- Darren D'Amico

In substance, D'Amico stated that in or about 2002 Pizzolo shot D'Amico in the stomach, and that Joseph Cammarano, Sr. stated to D'Amico that "Uncle John" (believed to be John Palazzolo) and "Frankie" (believed to be Frank Borgongone) had it "all set up" to "go clip" Pizzolo, but that D'Amico believed this was untrue and that in fact D'Amico was being set up to be murdered. D'Amico further stated that he had no involvement in Pizzolo's eventual murder in 2004.

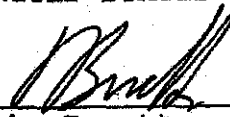
- Robert Sasso

In substance, Sasso stated to an individual that, at an unspecified time (possibly 2003), Dora Roxanne Roman stabbed Pizzolo. The government is attempting to identify an address for Sasso.

Sincerely,

BENTON J. CAMPBELL
UNITED STATES ATTORNEY

By:



John Buretta
Taryn Merkl
Nicole Argentieri
Cristina Posa
Assistant U.S. Attorneys

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09/01/09

I, ANDREW J. WATROBA, MAKE THIS STATEMENT TO PRIVATE INVESTIGATOR, RONALD J. DWYER, I SWEAR THE INFORMATION I AM PROVIDING IS TRUE AND ACCURATE.

- ① My NAME IS ANDREW J. WATROBA, My DATE OF BIRTH IS MAY 23, 1979 AND I AM CURRENTLY INCARCERATED AT THE NEW YORK STATE CORRECTIONAL FACILITY AT BOWANDA, UNDER DIN # 09R0847.
- ② DOMINICK CICALE WAS IN UNIT 643 IN EARLY 2005. IN AROUND / APPROXIMATELY MARCH OR APRIL 2005 I WAS MOVED TO UNIT 643 AT WHICH TIME CICALE HAD ANOTHER CELLMATE. AFTER A FEW DAYS I BECAME CICALE'S CELLMATE AND REMAINED HIS CELLMATE UNTIL HE WAS TAKEN OUT OF THE UNIT IN LATE 2005. I DON'T RECALL THE CELL NUMBER BUT IT WAS THE SAME CELL FOR THE ENTIRE TIME.
- ③ APPROXIMATELY TWO MONTHS AFTER I ARRIVED IN THE UNIT I BECAME AWARE THAT DOMINICK CICALE HAD A CELL PHONE.
- ④ DOMINICK CICALE WOULD USE THE PHONE AT NIGHT AFTER LOCK IN, 11:00 PM.

1066

- ⑤ I HAVE SEEN DOMINICK CICALE USE THE CELL PHONE ON ALMOST EVERY NIGHT TO CALL HIS GIRLFRIEND, LYNETTE, WHO JUST HAD A BABY AND CICALE WAS THE FATHER.
- ⑥ CICALE WOULD CALL LYNETTE AND AT LEAST ONCE EVERY WEEK CICALE WOULD SPEAK TO A MALE WHO WOULD BE DROPPING OFF \$500.00 TO LYNETTE. LYNETTE WOULD PUT THIS ON THE PHONE AND I COULD HEAR CICALE SPEAKING TO HIM.
- ⑦ CICALE WOULD ASK LYNETTE AND THIS MALE IF THEY MET WITH CERTAIN INDIVIDUALS OR IF CERTAIN INDIVIDUALS HAD STOPPED BY TO SEE THEM.
- ⑧ CICALE WAS VERY CAREFUL WITH THE CELL PHONE AND AT TIMES I ASSISTED HIM IN HOLDING THE PHONE BOTH IN THE CELL OR WITHIN THE UNIT. I ALSO HELPED CICALE CHARGE THE PHONE IN A SMALL REC ROOM ON THE SECOND FLOOR.

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- ⑨ THE CELL PHONE PROVIDED CICALE WITH THE ONLY OPPORTUNITY TO SPEAK TO HIS ONE FRIEND, LYNETTE, WHO WAS NOT ALLOWED TO VISIT HIM AT THE MDC.
- ⑩ CICALE HAD THE USE OF THE CELL PHONE FROM OTHER INMATES, SOME OF WHOM WERE COOPERATING WITH THE GOVERNMENT. HE ALSO KNEW THERE WERE CAMERAS IN THE UNIT BUT NOT IN OUR CELL, SO HE ONLY USED THE PHONE IN OUR CELL.
- ⑪ CICALE WOULD NOT ALLOW ANYONE TO USE THE CELL PHONE, INCLUDING ME, I NEVER USED THE CELL PHONE.
- ⑫ KENNETH McBRIDE, AN INMATE IN OUR UNIT, WAS AWARE THAT CICALE HAD THE CELL PHONE. I ALSO KNEW HOW McBRIDE HAD A PHONE AS WELL.
- ⑬ I BECAME AWARE FROM OVERHEARING CONVERSATIONS BETWEEN CICALE AND McBRIDE THAT CICALE OBTAINED THE CELL PHONE THROUGH McBRIDE'S CONTACT, A GUARD AT THE MDC.

- (14) I SAT AT A TABLE WITHIN THE UNIT with Dominic Cicale, Kenneth McBreiff and Dominic Corillo.
- (15) Cicale Told Me He Asked Vincent Basciano to have somebody out in the street finish a construction job on a house Cicale was building. I believe it was a guy named Russel who Cicale wanted Vincent Basciano to have finish this project. Basciano refused Cicale's request and this infuriated Cicale. I believe this occurred about two months before Cicale left the unit.
- (16) Cicale complained that Vincent Basciano was not providing him with money for a lawyer. This also infuriated Cicale. Cicale told me his monthly bills were approximately \$40,000.⁰⁰. Cicale said he made Basciano a fortune and he was very mad that Basciano would not pay for his lawyer.
- (17) While at the MCC Cicale was involved in a scam involving selling cigarettes to inmates for \$100-\$150 per pack. The money to purchase the cigarettes
- 4 of 6

Would Be Put into An Inmate's Commissary Account And Cicale Would then Be Able to Purchase Commissary from those Accounts, THAT IS HOW Cicale Profitted from this SCAM. Cicale Also had Inmates, through their Families, send People Money who were Not In Jail who were Friends or Family of Cicale.

(18) CICALE TOLD ME RANDY PIZZOLLO WAS KILLED FOR RUNNING HIS MOUTH. CICALE DID NOT EXPLAIN TO ME WHAT HE MEANT BY THAT.

(19) IN LATE 2005 I WAS IN THE LAW LIBRARY WITH DOMINICK CICALE & BALDO AMATTO SITTING AT A TABLE. AMATTO ASKED CICALE IF IT WAS TRUE THAT RANDY PIZZOLLO WAS RUNNING HIS MOUTH ABOUT KILLING NICKY CIRILLO, CICALE REPLIED YES. AT THIS POINT IN TIME IT BECAME AWARE TO ME THAT I SHOULD LEAVE THE TABLE.


(20) DOMINICK CICALE HAD BEEN INVOLVED IN THE CIGARETTE SCAM AND IT BECAME KNOWN TO CICALE THAT HE COULD ALSO OBTAIN LIQUOR THROUGH THE SAME MDC GUARD. CICALE ORDERED DOMINICK CIRILLO A BOTTLE OF GLEN FORTHEN SCOTCH. THE SCOTCH CAME 506

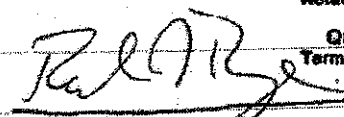
IN ABOUT A WEEK AFTER DOMINICK CIERILLO LEFT THE UNIT, I REMEMBER DOMINICK OBTAINED THE CELL PHONE AT THIS TIME AS WELL.

② A FEW WEEKS BEFORE DOMINICK CIERILLO LEFT THE UNIT HE WAS BROUGHT TO COURT TWO TIMES. CIERILLO TOLD ME ON THESE TWO OCCASSIONS THE GOVERNMENT SET UP A VISIT WITH LYNETTE AND HIS CHILD. CIERILLO TOLD ME LYNETTE BROKE HIS HEART ON THE SECOND VISIT BECAUSE SHE WAS SCREAMING AND CRYING.

③ I HAVE NEVER MET OR SPOKEN TO VINCENT BASCIANO AND I HAVE PROVIDED THIS AFFIDAVIT OF MY OWN FREE WILL. THE ITEMS DISCUSSED ABOVE DOES NOT REPRESENT EVERYTHING I KNOW ABOUT THESE MATTERS. I HAVE PROVIDED THIS AFFIDAVIT TO RONALD DWYER WHO WROTE THIS AFFIDAVIT FOR ME. I HAVE REVIEWED THE AFFIDAVIT FOR ACCURACY AND I SWEAR THAT THIS SIX PAGE AFFIDAVIT IS TRUE AND ACCURATE.

SWORN TO BEFORE ME THIS 1ST DAY OF SEPTEMBER, 2009.


ANDREW J. NATRUSA


NOTARY.

RONALD J. DWYER
Notary Public, State of New York
No. 010W6035573
Qualified in Suffolk County
Term Expires Jan. 10, 20 10

10

Exhibit A

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF THE BRONX
(Page 1 of 2)

I, FRANK A. VILLANO, BEING DULY SWORN, STATE THE FOLLOWING:

1. I am a resident of Bronx County and currently reside at 1541 Kennelworth Avenue, Bronx, New York 10465, and my date of birth is September 23, 1970.
2. That I own a florist business, American Floral Company, at 3750 Tremont Avenue in the Throgs Neck section of the Bronx and have known Vincent Basciano Jr. and his family for many years.
3. That on August 9th, 2014, at approximately 9:00am, I received a phone call on my business phone, 718-430-0024, from a person I know as Dominick Cicale.
4. My telephone identified the call as "no caller ID."
5. Cicale then asked if I could get in touch with Angela Basciano or one of the boys, and I responded by telling him that I would reach out to the boys and have one of them call him back at approximately 12:00pm.
6. At or about 12:00pm, Joseph Basciano (Joe,) was at my store when Cicale called back. After a brief conversation Joe hung up on him. At this point we were outside the store and Cicale called back and said "I know he's still standing there with you so tell him I'm willing to help his dad get a new trial."
7. Cicale then said that he would call me back later in the evening at around 7:00pm, which he did, but I then asked that he call me again at 7:30.
8. At or about 7:30pm, Cicale called back and stated "I can guarantee his father a new trial. I spoke with my lawyers, and although they told me not to do it, I think it's the right thing to do." He then went on to say he testified against his father because as a cooperator, the Government instructed him what to say.
9. Cicale then stated "I want to be compensated for this because I'm risking everything. I want \$200,000.00, with \$70,000.00 up front and delivered to my mom by tomorrow. As soon as my mom gets the money, I'll go to my lawyers and get the ball rolling. After that, we'll work the rest out"
10. I then asked Cicale how he could be sure that their father would get a new trial and he stated "I guarantee it, because my lawyers told him he would." He then stated

FV

"Vinnie (Basciano Sr.) put me in the position to be a cooperator, because I thought he would take a plea deal, but instead went to trial." Cicale then said I never thought I'd have to do it."

11. On August 10th, 2014, at or about 8:15am, he called me again on my cell phone and I told him that Vinnie Jr. wanted to speak with him and he stated "there's nothing to talk about, so if my mom doesn't get the money, I have the answer." He then added, that "maybe with my help he'll be able to cop out to another 10 years and be home." It should be noted that Vincent Basciano Jr. told P.I. James Dowd in our first meeting, that in no way was he going to entertain Cicale's offer, although wanted to make sure ~~he~~ that if Cicale's actions were criminal, he wanted to make sure he would be held accountable.

FV

12. In total I have received approximately 5 or 6 calls from Cicale, since August 9th, 2014, and each of his calls were identified as "No caller I.D."

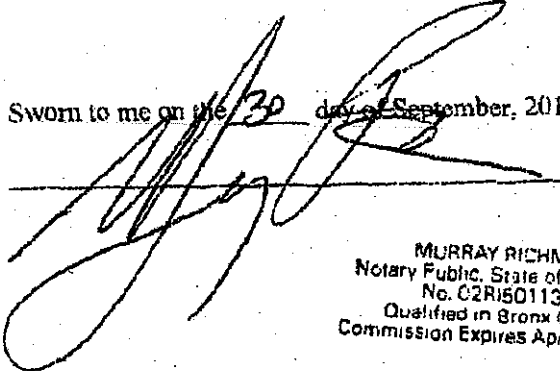


Frank A. Villano
1541 Kennelworth Avenue
Bronx, New York 10465

9/30/14
Date Signed

Affidavit prepared by: James B. Dowd, NYS Licensed Private Investigator

Sworn to me on the 30 day of September, 2014



MURRAY RICHMAN
Notary Public, State of New York
No. 02R15011303
Qualified in Bronx County
Commission Expires April 19, 2015

||

2/28/2017

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Monday, December 22, 2014

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Former Mafia Capo Dominick Cicale Answers Your Questions



DOMINICK CICALÉ, A FORMER CAPO IN THE BONANNO CRIME FAMILY, ANSWERS YOUR QUESTIONS

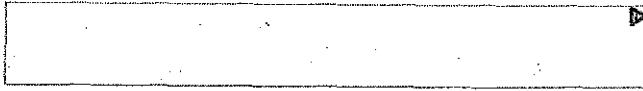


In 1999, Bronx-based Dominick Cicale finished his second years-long bit and hooked up with Vincent "Vinny Gorgeous" Basciano, then an up-and-coming member of the Bronx faction of the Bonanno crime family.

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Initially he'd been closely affiliated with "Big Ernie" in the Genovese family.



POST QUESTIONS BELOW IN THE COMMENTS SECTION.

The story was posted about three hours ago – and already we have far more comments than I anticipated, so which questions are answered is all up to Dominick: he is answering the questions as a favor to me – whether he writes a long, detailed answer or not is his decision and probably depends on a number of variables, including a.) what kind of day he's having. b.) whether he's pissed off at me about how many ads he has to watch to get to my website. c.) Whether he has had a few drinks and d.) I am just joking around with variables.

Be sure to upvote your question or the questions you'd like him to answer; I will vote for my favorite questions as well. Then again, Dom may answer more than three questions, he may reply, whatever. He will be on here Fridays to answer at least the three questions. Depends on how much time he has. My opinion ask one very specific question at a time, like I did...]

See, better still, buy our ebook!

Under Basciano's tutelage, Dominick rode the fast track: he was inducted into the American Cosa Nostra and swiftly rose from soldier to capo, amassing great wealth and power. Cicale befriended and associated with numerous figures within all of New York's Five Families as he plotted and schemed in a treacherous world where each day could be his last.

He testified in four major RICO trials, including one of John Gotti Junior's.

He can tell you the real stories about what happened on the street. Because he was there and played a part in those stories...

Yes, Dominick is a turncoat. He himself liberally describes himself as a "rat." To writers, insiders like Dominick offer gold. But the American public exhibits an odd dichotomy.

While citizens devour their stories as told in books, films and documentaries (without a rat, we wouldn't have *Goodfellas*) these same taxpayers cheer against them during trials. This sentiment was eloquently expressed on the Friends of Ours blog.

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Friends of Ours from November 2012: "Juries are sophisticated enough to understand that a rat carries baggage, and they aren't looking for boy scouts and choir boys. When the government tries the devil, the witnesses often come from hell. Indeed, a flipped witness is credible precisely because he's often a slimeball. Who else would be involved with the Mafia to know where the proverbial bodies are buried? The badder the rat, the more he knows. A witness is more credible on the stand based on the more "street cred" he has, and defense lawyers paradoxically are propping up the rat by empassizing how bad he is.

Although rats often are motivated by self-interest in their decisions to flip, the move also comes at great personal risk to themselves. After all, the criminal underworld doesn't look kindly on those who betray it. Moreover, whatever deal a rat obtains from prosecutors is conditioned upon his truthful testimony, and he risks losing the deal for any perjurious statements or other misconduct. Finally, it's the rare case which is predicated solely on rat testimony, and often there is other corroborating evidence.

Mob apologists may bemoan the loss of omerta but ordinary folk want career criminals to betray their once-held values, and rather than condemning rats we should encourage them..."

Post any questions for Dominick in the comment section below:

You Might Also Like

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you....when locked down, were so tough, yet face to face they would never bust a grape.
 If this is your picture, I wasn't so off, you do look like a cross between a woman and a man.
 At your age with one slap you could fall and hurt yourself. LOL life is short and too precious for me, to continue with responding on having to defend myself from punks like you who are only a smoke screen.
 I don't hide the murders I committed nor the many other acts of violence I did, but unless you were side by side with me and in my circle you would not be so quick to comment the stupidity you have.
 So grandpa/grandma??? Is your anger about me being a punk, because at your old age when do you mature in life???

1 ^ | v • Share >



djn • 2 years ago

Don't have to be a tough guy to beat a 100 pound junkie do ya ?? Old school means you do the crime, you do the time.. those are the real tough guys...Guy's that enjoy the perks of the life but cant do the time for their crimes and give up all their friends instead is hardly an old school tough guy...Just the opposite !!

5 ^ | v • Share >



DC → djn • 2 years ago

So true, but that junkie disrespected me. If he was a 100 lbs or 500 lbs I would of did the same thing.
 Old school is no longer in the life.
 I did a total of 20 years in prison and out of the 20, ten years for a crime I never committed.
 I had no intensions of ever cooperating until I was ordered by Vinny that I would be taking the witness stand in our case.
 YES!!!! That's correct, Vinny was going to place me on the witness stand. So my friend, either way I would of been labeled a RAT....
 STILL YOU ARE CORRECT.... NO EXCUSES....

3 ^ | v • Share >



djn → DC • 2 years ago

I'll give ya credit for coming on here and responding to most all of the posts, even the non brown nosing ones !!

1 ^ | v • Share >



DC → djn • 2 years ago

Thank you, but I love when people keep it real.
 Everyone is entitled to there feeling.

^ | v • Share >



JohnnyCrack → djn • 2 years ago

So very true. The only real tough guy is Vinny Gorgeous.

2 ^ | v • Share >



DC → JohnnyCrack • 2 years ago

Tough guy yes, but in the end he threw me under the bus with his BIG MOUTH....

2 ^ | v • Share >





Johnny D'Amico → DC • 2 years ago


Dominick. the real problem with Vinny was his


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 **Charlie Varrick** → Mongo75 • 2 years ago
Be quiet, Mongo.
^ | v • Share >


 **Mongo75** → Charlie Varrick • 2 years ago
Be quiet, what are we schoolboys
1 ^ | v • Share >


 **DC** → Charlie Varrick • 2 years ago
Thank you Charlie, but I want people to express themselves and speak about what's on their mind.
^ | v • Share >


 **Ronen** • 2 years ago
Dom, If Vinny did not betray you, would you be taking it on the chin? Does it also bother you that the bosses view guys like you as expendable assets?
2 ^ | v • Share >

 **DC** → Ronen • 2 years ago
Of course I would have taken it on the chin.
It was a combination of Vinny, Michael and Bruno. I would have to say Michael actually put the icing on the cake by sending me \$3,500 for Christmas, when the year before of my arrest I collected from all my guys well over \$300,000.
What Michael did was smack me in the face, so look who's laughing now.
^ | v • Share >

 **Ed Scarpo** Mod → DC • 2 years ago
That is something I should've noted in the book...
Christmas time is really really important to guys. In my first conversation with Dom he was bitching about Christmas money, only getting around 3 grand (I was like, shit, wtf!! I'll take 3 grand!) But this is DEFINITELY a sore spot for Dom -- I am a firsthand witness. Honestly, I think this was a major reason why he flipped -- Christmas money! Am I exaggerating? Yes -- but he has mentioned "Christmas money" a LOT....Merry Christmas Ronen....
1 ^ | v • Share >

 **Garrett** • 2 years ago
Since you flipped, how hard is going about your everyday life? Even though you did what you had to do, I know it must of killed to go against people you considered to be your brother. Has it gotten any easier for you? Or is it still unreal?
2 ^ | v • Share >


 **DC** → Garrett • 2 years ago
It hurt to realize my brother's turned on me by bankrupting me for over seven million dollars before I decided to cooperate.
1 ^ | v • Share >


 **Garrett** → DC • 2 years ago
yeah, you think people have your back no matter what like you have there's, then they do that..so fuck it, whats the point of protecting people that won't help protect you
^ | v • Share >


 **DC** → Garrett • 2 years ago


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Cosa Nostra News: Former Mafia Capo Dominick Cicale Answers Your Questions


 Garrett, the only true family is your biological family and one or two friends. That still have my back no matter what!!!
1 ^ | v . Share >


 Ed Scarpo Mod → Garrett • 2 years ago
Now he's gotta take bullshit from a guy like me! LOL!!
^ | v . Share >


 Garrett → Ed Scarpo • 2 years ago
Lol it could be worse right?
1 ^ | v . Share >


 JD • 2 years ago
Who were some of the heavy hitters in the bronx during the time of your reign? i have heard about Wahoo Mancuso holding weight but I'm not sure if he has any relation to Mikey the nose, do you have any info on him?
2 ^ | v . Share >


 DC → JD • 2 years ago
Wahoo made a name for himself in his heyday. The most powerful and feared person in the Bronx is so undercover that I am not nor will ever expose him. I have to much love for the man....
2 ^ | v . Share >


 AJ • 2 years ago
What the hell happened to you in Florida?
2 ^ | v . Share >


 Ed Scarpo Mod → AJ • 2 years ago
Dom will answer this one on Friday, AJ.
3 ^ | v . Share >

 AJ → Ed Scarpo • 2 years ago
Thanks Ed
1 ^ | v . Share >

 DC → AJ • 2 years ago
The murder case my father's friend ratted me out and the drug case I was set up by the DEA.
They offered me a deal to drop all the trumped up charges, but I would have to rat out my friends. I took it on the chin and did ten years for a crime I did not commit.
1 ^ | v . Share >

 AJ → DC • 2 years ago
Thanks man, I remember when you left the bronx and then we heard you got jammed up down there in a fucked up situation.
^ | v . Share >

 Mike Burch → AJ • 2 years ago
Interested in this one myself as I live in FL.
1 ^ | v . Share >

 Raf • 2 years ago
Dom, how many guys on crime families follow the old italian tradicion? Some man still shout "Vaffanculo!" or "Madonna!" when angry?

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Cosa Nostra News: Former Mafia Capo Dominick Cicale Answers Your Questions



Ronen • 2 years ago

Dear Dom, When you decided to cooperate, how did the federal government treat you? Considering that the next congress session will most likely be focused on criminal justice reform, what do you think should be changed about our criminal justice system here in the usa?

1 ^ | v • Share >



DC → Ronen • 2 years ago

Keeping it real, I was the governments star until certain prosecutors took control... A tremendous amount of bullshit went on and there was time when I was strongly considering pulling my agreement, it's all going to come to light real soon...

^ | v • Share >



sonny bklyn • 2 years ago

Was wondering if you knew my cousin silvio crazy sal salome from the colombos..he was in wild bill cutolos crew?

1 ^ | v • Share >



DC → sonny bklyn • 2 years ago

No, sorry but I do not recall.

^ | v • Share >



CI → DC • 2 years ago

Why did V B wanted to take out Patty from the Bronx

1 ^ | v • Share >



DC → CI • 2 years ago

Good question, Patty was always trying to make Vinny look bad.

^ | v • Share >



Chris I → DC • 2 years ago

How about Sammo or sammy is he the real deal?

^ | v • Share >



Dc → Chris I • 2 years ago

Sammy???

^ | v • Share >



CI → Dc • 2 years ago

He ran the jersey fraction joseph sammertino

^ | v • Share >




DC → CI • 2 years ago

Oh that Sammy, I did not care for him to much. He was a loud mouth.

^ | v • Share >


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 **CI** → CI • 2 years ago


I meet patty few times and he always had a tough crew around him I think he refused to see VB has boss and didn't want to answer to him

^ | v • Share >

 **DC** → CI • 2 years ago


Of course, but many years ago Patty mess up a hit and they were all arrested because of it. Actually Patty tried opening the rear door of the car so he could run, but the dummy forgot to disengage the child safety door latch. Lol That's a fact....

^ | v • Share >

 **CI** → DC • 2 years ago


Do u think italian mob is still the most powerful organization in nyc or the russian and Albanians past them

1 ^ | v • Share >

 **DC** → CI • 2 years ago


I would have to say the italians, but of course I would say that. lol

^ | v • Share >

 **CI** → DC • 2 years ago


The reason why I ask is bc my mom's cousin was Cesare Bonventre and that fat f-k had him killed bc of his up and coming in power I don't understand y would u kill loyal people that are good earners and not afraid to do dirty work! He was a true gangster

^ | v • Share >

 **DC** → CI • 2 years ago


Sorry about your lose.... I heard a ton of good things about Cesare, he was very well liked. YES, that fat FUCK, JM killed all the men in the Bonanno crime family. Joe was extremely insecure and felt threaten when someone was well respected and liked.

^ | v • Share >

 **mafiact** • 2 years ago


Who do you believe out of the list of current top guys (Mancuso, DiFiore, Santora, Rabito, etc.) has the ability to steer the Bonnanos back on track?

1 ^ | v • Share >

 **DC** → mafiact • 2 years ago


Mancuso, is a blow job.... DiFiore, don't know.... Santora, is a theif & scumbag... and Rabito, just wants to be around and enjoy life...

3 ^ | v • Share >

 **jaysalvatore** → DC • 2 years ago

Hey DC did you ever eat at Bamonte in Williamsburg?

^ | v • Share >

 **DC** → jaysalvatore • 2 years ago

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I really don't think so but I may have.

^ | v • Share >



Hearsay → DC • 2 years ago

Lmao...that's on the money, You can add Tommy D to the Nicky description, just add an extra scumbag to it.

^ | v • Share >



Johnny D'Amico • 2 years ago

Dominick, what time period, and why do you think more and more "guys" are turning their back on omerta, and going against their constituents, why and when did this fundamental breakdown happen? Also, how did your family and relatives feel about you rolling over for and going to Team America"

1 ^ | v • Share >



DC → Johnny D'Amico • 2 years ago

Johnny, good questions...

I cannot speak for others but I hate what I was forced to do. Loyalty is a two way street and me so called brothers that I killed for left me out to dry.

At the end of the day I have a lot of family members that do not bother with me. I am okay with that but when I was on top it was a different story.

I will add this note: Vinny, Michael, Vinny Jr., Vinny's wife, Robert Van Zandt and Bruno fucked me so bad before I cooperated that every high ranking Mafia in all the crime families were aware of it. Even Quite Dom said, "IT'S A FUCKING DISGRACE WHAT YOUR CRIME FAMILY IS DOING TO YOU!"

1 ^ | v • Share >



Johnny D'Amico → DC • 2 years ago

Thank you for answering the questions, and so well. I surely don't agree with what you did, but it was a decision you didn't make alone, you were pushed into by the "wrongs of your own guys" Admittedly, I don't know what I would have done under the same set of circumstances, but remember this "self-preservation is man's number one instinct" Surely, we both agree on that. Many people here on this blog have called you "names of negativity" Myself, I will not call you anything other than your real name, as respect is a two way street. Thank you for your time and candidness.

^ | v • Share >



DC → Johnny D'Amico • 2 years ago

Johnny, thank you much respected....

^ | v • Share >



Charlie Varrick → DC • 2 years ago

Was Vinny's wife a piece of ass or was she a piece of ass?

^ | v • Share >



DC → Charlie Varrick • 2 years ago

Charlie, please, Angelia was a true wife to her husband and has his back 1000%. I will and always have to respect that.

^ | v • Share >



Ed Scarpo Mod → Johnny D'Amico • 2 years ago

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2/28/2017

Cosa Nostra News: Bonanno Boss's Prison Letters Kick Off Second Dominick Cicale Forum

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Friday, January 9, 2015

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Bonanno Boss's Prison Letters Kick Off Second Dominick Cicale Forum



"Mikey Nose"

(Commenced 11am, Saturday, Jan. 10)...

We can thank Michael "Mikey Nose" Mancuso for our starting point....

I don't think any other blog or news organization on the planet has ever gotten such direct insight from the man widely considered to be the

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official boss of the Bonanno family.

The Nose is from the Bronx, where Vincent "Vinny Gorgeous" Basciano, either former acting boss or current official boss, hailed from.

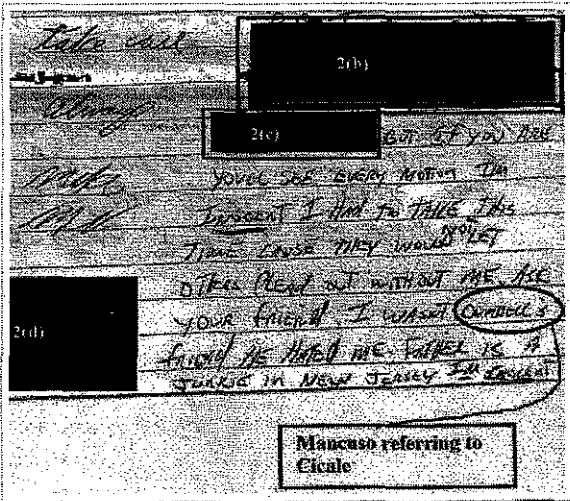
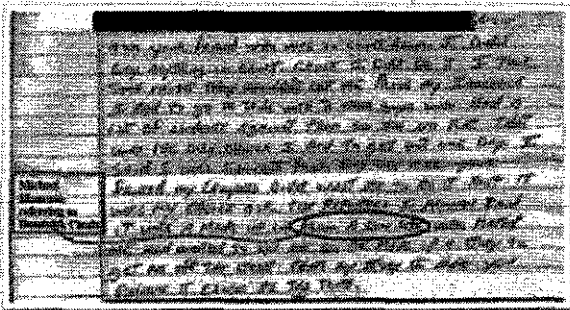


We're certain an interview with Mikey Nose won't be forthcoming, even in 2020, when he's slated for release.

Someone posted letters handwritten by Mancuso from his prison cell in which he used a variety of adjectives to refer to Dominick (including lowlife, dumbbell, lying fuck, etc.)

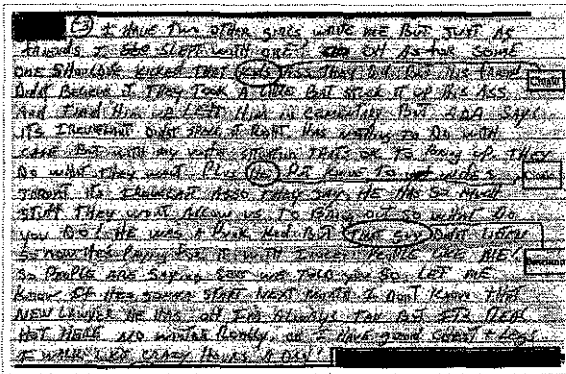
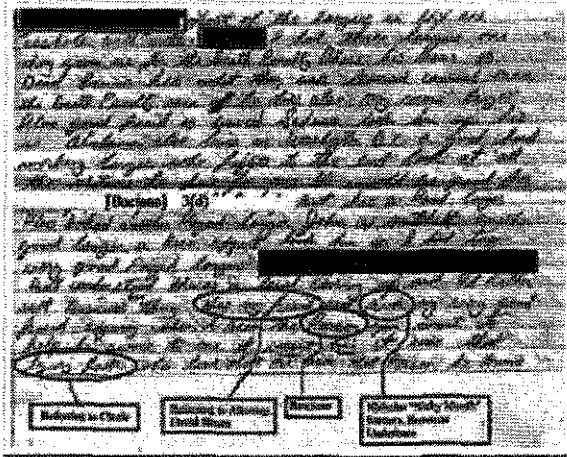
The issue is: Who wanted to kill Mikey Nose? Was it Dominick Cicale and/or Vincent "Vinny B" Basciano? Mancuso seems to want to believe it was not Basciano... (It's intriguing that the Nose would even doubt Vinny's word over Dominick's in the first place.)

Here are the letters; much thanks to whomever posted them....(click on each page to enlarge)....



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If you read our ebook, you know where Dominick stands on the situation.

From Inside the Last Great Mafia Empire:

"What a fucking punk," Dominick says in the book, referring to Michael Nose's decision to not show up as a backup shooter for a certain hit.

"That alone could have easily gotten the 'Nose' killed, but Fat Patty loved Michael and saved his ass ..."

Continuing, Cicale said, "Mikey Nose was always a punk. How could a made man walk around the neighborhood strutting his shit and say hello to the man who murdered his own father?"

Cicale was referring to old claims that Mancuso's father was gunned down by a Bronx street thug who "everyone knew."

Mancuso's father, Cicale related, "was with Arnold "Zeke" Squitieri and Alfonse "Funzi" Sisca, Gambino associates at the time, when Mancuso's father met his demise. The three had been partying one night, drinking and sniffing cocaine. What great pals [Zeke and Funzi were]... They watch their friend get killed and didn't do a fucking thing about it... Two more fucking punks."

2/28/2017

Cosa Nostra News: Bonanno Boss's Prison Letters Kick Off Second Dominick Cicale Forum



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Posted by Ed Scarpo at 14:35 352 Comments
 Labels: Bonanno family, Dominick Cicale, Michael "The Nose" Mancuso

Final Photo: What Happens Next Is Insane and Horrifying

These distressing instances shocked us though not all for the reasons you can imagine

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Featured Comment



DC • 2 years ago

For those of you whom read Michael Nose's letters... It is a complete joke and a total embarrassment!!! A boss writing about who he is having sex with, that he never told me "Dom" to go ahead with the Randy hit, and someone should of kicked my ass. Why didn't Michael kick my ass himself? I will tell you why he was too afraid of me. I confronted Michael and all he did was back down never said a word, lifted a hand, or asked anyone to kill me if he did I am still here writing. Michael was just a common drug addict so much so that he shot his own wife then dumped her lifeless body in the street outside the hospital emergency room. Michael is lucky to be alive as I had set up to kill him, but to his luck I was arrested two weeks prior to Michael's hit....

I will end on this note: I would rather be a rat over and over than to have had to answer to Michael then or now. Just for the record I have remorse with the choice I made of being a rat, but I know and so did the family that loyalty was a two way street.

9 ^ v • Share

Comments for this thread are now closed.

x

2/28/2017

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while we were locked up, even ordering me to testify.

Share



Ed Scarpo Mod R.I.C.O. • 2 years ago

Just like Big Joey.... Probably just like all mob guy! LOL!

Share



Ed Scarpo Mod • 2 years ago

Giants 858 • 13 hours ago

I saw him get spit at in mcc u cunt.

Share



DC Ed Scarpo • 2 years ago

That's not what I heard... Actually Vinny, YES VINNY made sure no one did anything to my father....

Share



Steve • 2 years ago

Hey Dom. I was wondering about the kick-ups with the associates. How does it work? Do they kickup a percentage of their directly to the captain or it goes to the made guy they do business with?

Share



Jord Steve • 2 years ago

How does the kick-up system work on that note... weekly, biweekly, monthly??

Share



DC Jord • 2 years ago

Usually it's ever month, it makes everyone's life much easier. Rule of thumb is 10% of illegal activity proceeds.

Share



Jord DC • 2 years ago

On average how much did you kick-up from the start all the way until you were finally made captain?

Share



DC Jord • 2 years ago

Nothing.... I made all my money from legal business and Vinny rule was the men that do work (Kill for the crime family) do not have to kick up.

However, Vinny could get whatever he wanted from me. Like I said before he owed me

\$1,300,000.00

Share



DC Steve • 2 years ago

Associates kick up to whomever they are around.

Share



Steve DC • 2 years ago

So if they do business or hang around mostly a made guy, they'll kick up to him and if they're around a captain the captain gets the share?

Share

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you did only a 1/3 of your time.

Share >



dominick → DC • 2 years ago

Thanks for the reply Dom. You should tell Destefano that then. His book about Vinnie should clarify that.

Share >



DC → dominick • 2 years ago

For the record... When I testified in the first Basciano trial, the first question was; did you ever cooperate... The answer was... NO

1 Share >



CleanBandit → DC • 2 years ago

Why exactly did Vinny tell you to co-operate? It doesn't really make sense.

Share >



DC → CleanBandit • 2 years ago

NO, Vinny never told me to cooperate.... Vinny ordered me to testify on our behalf... In the life that is a No No, but Vinny did not care because it would benefit Vinny and our peers would label me a RAT.

Share >



CleanBandit → DC • 2 years ago

How did it benefit him?

Share >



DC → CleanBandit • 2 years ago

All the cooperators in our case never had any illegal dealing with me, so Vinny felt that I will come off excellent and clear up a lot of things. Also show the jury all the legal businesses I had.

Share >



CleanBandit • 2 years ago

Do the Rizzutos still kick up to Bonannos? Or did they break off?

Share >



DC → CleanBandit • 2 years ago

I would have to say they broke off, especially after Sal the iron worker was killed.

Share >



CleaBandit → DC • 2 years ago

That was only 4 years ago, though. What about before? Some estimations say that Rizzuto's broke over 10-15 years ago.

Share >



DC → CleaBandit • 2 years ago

How if Vito was still sending down money to the Bonanno family up until 2006.

Share >



CleanBandit → DC • 2 years ago

As a regular kick up or on mutual businesses?

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Share



DC → CleanBandit • 2 years ago

Kick up

Share



CleanBandit • 2 years ago

Rumors spread that Vinny was a real stand up guy who always paid back his debt, even if it would mean for him to work 9-5. Is that true?

Share



DC → CleanBandit • 2 years ago

Vinny did pay his debts, but I wish he paid what he owed me. It was only \$1,300,000.00

1 Share



Ed Scarpo Mod → DC • 2 years ago

DOM, can I borrow some cash? Just \$100, 000 that's it....promise to pay you back!!!

Share



DC → Ed Scarpo • 2 years ago

SURE!!! Start collecting it from Vinny... Lol

Share



CleanBandit → DC • 2 years ago

Lawyer fees...what can you do!? Besides, if he told you to testify and not go on trial yourself, didn't he save you of time in jail?

Share



DC → CleanBandit • 2 years ago

No we were going to take our case to trial. During that trial I was ordered to take the witness stand on our behalf, so I would be labeled a RAT for the rest of my life because of it.

Share



CleanBandit → DC • 2 years ago

Yeah and the order came from Vinny(those are your own words), so essentially he saved you from time in prison. No money can buy you freedom.

Share



DC → CleanBandit • 2 years ago

I do not look at it in that sense, but I see your point. I am grateful for a clean slate with a fresh start in life, but I had to sell my soul to the devil.

Share

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15 Hollywood Celebrities You Didn't Know Went to Rehab

Below are some of the most beloved Hollywood stars that went to rehab for either drug or alcohol abuse


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no wrong person.
^ | v . Share >


 Jmm → DC • 2 years ago
When u say not the Chin but Genovese do u mean they were just best at concealing their boss the most over the years
^ | v . Share >


 DC → Jmm • 2 years ago
The person in charge there I do not want to blow up.
^ | v . Share >


 AJ → DC • 2 years ago
Good for you Dom no need to mention his name and props to you for coming on here.....take care Anthony
^ | v . Share >


 DC → AJ • 2 years ago
Thanks pal.
^ | v . Share >


 Jmm → DC • 2 years ago
So you mean the current one no one really knows.... Interesting
^ | v . Share >


 DC → Jmm • 2 years ago
People know but he is so undercover I have to respect it.
^ | v . Share >

 Jmm • 2 years ago
Could you describe your making ceremony?? Did Fat Rat prick ur finger?? Who else got made?? How was the party afterwards?? Was it the proudest moment of your life, at that point in time....
^ | v . Share >

 DC → Jmm • 2 years ago
Sorry, but that's info is coming in the next book... You will be shocked what happened...
4 ^ | v . Share >


 Jmm → DC • 2 years ago
And I do want to thank you for doing this Dom.... It's really cool
^ | v . Share >

 DC → Jmm • 2 years ago
You welcome, my pleasure...
^ | v . Share >

 Jmm → DC • 2 years ago
Ahh I see... Wiseguy always looking for a buck... Lol I understand. We will be shocked by what?? The after party? I'm picturing the Sopranos episode when Chrissy gets made and I'm guessing it involves you and multiple Bing Girls... Maybe some blow;)
^ | v . Share >


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 DC → ctmafia • 2 years ago


No, Electric... Ha Ha will be relaxing in the islands as he was for many years before his arrest.

^ v • Share >

 ont → DC • 2 years ago


was ace aiello a good soldier

^ v • Share >

 DC → ont • 2 years ago


The best... My heart broke for him... I tried to save him but the government said no....

^ v • Share >

 ont → DC • 2 years ago


did he get life

^ v • Share >

 Walter Chronkike → ont • 2 years ago


30 Years!!

^ v • Share >

 Walter Chronkike → Walter Chronkike • 2 years ago


How many people do you think Ace killed?
Was he an earner or just a shooter?
So young that guy..

^ v • Share >

 DC → Walter Chronkike • 2 years ago


This was Ace's first piece of work, till this day it breaks my heart with him. He has a lot of great qualities.

^ v • Share >

 Walter Chronkike → DC • 2 years ago


Did he scare people? Was he well liked?
What was he like? Do you think he could be boss when he gets out?
Thanks.

^ v • Share >

 DC → Walter Chronkike • 2 years ago


Our per sense scared people. i loved Ace, that was all that mattered. No absolutely not.

^ v • Share >

 DC → ont • 2 years ago


No he plead out to 30 years

^ v • Share >

 ctmafia → DC • 2 years ago

I see. Thanks for the info, nice to get firsthand insight.

^ v • Share >

 DC → ctmafia • 2 years ago

You welcome, my pleasure.

^ v • Share >

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anonymous • 2 years ago

So if u make a move on the acting boss while ur out with ur crew could this of been prevented or would that be a death sentence what im trying to say u would still be in the busdiness if mike gets whacked or was it to late phill

^ | v • Share >



DC → anonymous • 2 years ago

I actually had the green light from Vinny. If I didn't YES it can be a death sentence. Remember, I had a powerful crew.

^ | v • Share >



anonymous • 2 years ago

Also when it came time to do a piece of work mike always tried to wiggle out I know how my guy did things but did u get to pick who goes or did the boss say who he wanted i understand if u dont answer question. Philly

^ | v • Share >



DC → anonymous • 2 years ago

Of course the Boss can order a specific person, but usually the boss will give the work to one of his Captains and then that person will give it to he feels is best fit.

^ | v • Share >



anonymous • 2 years ago

I didnt read the book Dom so once u went in the joint that.s when the bullshit started or was it starting before u went in. Philly

^ | v • Share >



DC → anonymous • 2 years ago

It started when Vinny was arrested, but I was ok with it. When I was arrested that's when everyone was taking everything.

^ | v • Share >



Ancient Master • 2 years ago

When you say Mancuso was a drug addict...What drug specifically?

^ | v • Share >



DC → Ancient Master • 2 years ago

Cocaine & her ion when he was younger. From 2000 on I don't believe he was using any drugs.

1 ^ | v • Share >



anon → Ancient Master • 2 years ago

Also Dom, are the Bonnanos really that weak now that they elected Mancuso as boss? It doesn't seem right, it could be a facade but if that is the case...That would mean their power really really declined in the last 7-10 years. Isn't there anyone else on the street that would better lead the family? It really does seem like the Bonnanos and Colombos have barely any power anymore or is it possible they are pulling a Genovesè and a Joe Massino and rebuilding?

^ | v • Share >



DC → anon • 2 years ago

The two Crime families are definitely rebuilding, but I have to say that the Bonanno's still have power.

Before I cooperated Vinny Basciano was the official Boss and Michael was his acting. Michael went overnight from a soldier to acting boss but I strongly feel that as a

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enemies closer". There are no true friends in that life. Everyone looks out for their own ends.

^ | v • Share >



Vinny → Arthur Spooner • 2 years ago

Word is on the street that Anthony Chicchetti south Brooklyn boss the real one, and SKINNY JOEY MERLINO ARE gonna be united. A power house. Soon as Joey is released.

^ | v • Share >



anonymous → vinny • 2 years ago

Vincent i know Joey hangs with NY guys in Boca i don.t know who Anthony Chicchetti is or if he would want u to mention that if it was true. It would be disastrous for everyone involved Joey has enough on his plate at home. Im from phila area can.t see that one happening. Philly

^ | v • Share >



DC → Arthur Spooner • 2 years ago

That's true.... I have Vinny and the rest of the Bonanno's back 1000% and was ready to do a life sentence. But after Vinny ordered me to testify at our trial and Vinny, Michael and many more of my brother's rob me out of 7 millions dollars, I decided to do the unthinkable.

^ | v • Share >



DC • 2 years ago

Taking care of business... Be back in a few to answer some questions.

^ | v • Share >



Jereme • 2 years ago

David Jazewski did you fall asleep during English class? Every point you are trying to make just look more ridiculous than they already are due to your spelling alone. Nobody is taking you seriously.

^ | v • Share >



Mets 907 • 2 years ago

What do u mean u ratted get over it. No what u did was take men away from their wives kids and grand kids, u are the new Henry hill, can't get attention in the old neighborhood so now u act like a big shot to these clowns that stick up for a rat on the computer.

^ | v • Share >



DC → Mets 907 • 2 years ago

OK METS 907, sorry you prefer I was still in killing people... Smarten up...

2 ^ | v • Share >



Mets 906 → DC • 2 years ago

Don't know what that meant anyway, I'm smart enough to never embarrass my family and have them feel the least bit uncomfortable cause I made a thousand excuses to rat and not man up, they robbed me not loyal. Blah blah. Ur a big shot, u know 99 per of what ur saying about other people here is made up but whatever gets u threw the day garbage can. Take care.

^ | v • Share >



DC → Mets 906 • 2 years ago

I am not making excuses, but only explaining why

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DC → anonymous • 2 years ago

I am sure our paths will cross one day. I could understand people being sore with my decision, I had two different crime bosses send word that they could never forgive me, but they understood and I did not have to worry about anyone in their families coming for me... My only concern is the computer tough guys... lol

2 ^ v • Share >



anonymous • 2 years ago

Really Dave how many fathers and friends did they clip are u for real if ur mad at Dom because he became an informant fine These guys destroyed there own families when they chose crime and trying to beat the system like u instead of getting a J.O.B.They fucked themselves and there own families and anyone who thinks any different is a stone JERKOFF like ur self. Life is choices u makem and live with them that.s whats wrong with Society today everbody blames somebody for there mistakes. U have to be responsible for ur actions thats why ur ass will eventually end up back in the Joint because u Just dont get it ur a fuck up. Quit blaming others Dave and really look in the mirror and see the life u lead and tell me thats were u want that kid seated next u to be in twenty yrs and if the answers yes do him and ur self a favor and put a bullet in his head and urs. And if the answer is no then move on with ur stupid comments and start showing that kid direction today. Philly

^ v • Share >



DC → anonymous • 2 years ago

Dave,

Please, if you are going to post be a man... Stopping talking tuff behind door...

YES I RATTED!!!! Get over it.... I would bet all the money in the world if we were face to face you would never say shit... JUST SAYING.....

1 ^ v • Share >



AJ → DC • 2 years ago

Dom did you get along with Johnny Joe?

^ v • Share >



DC → AJ • 2 years ago

I love Johnny Joe.... Actually I was hanging with him when I was a teen. We did a lot of shit, calling it, MISSION OF god...

Great man.... And now he would try to kill me in a heartbeat, but I respect that....

1 ^ v • Share >



Ed Scarpo Mod → DC • 2 years ago

Mission of God?

1 ^ v • Share >



DC → Ed Scarpo • 2 years ago

YES, that what we would say when we were looking to hurt someone.... Mission of god...

2 ^ v • Share >



AJ → DC • 2 years ago

Yeah he has quite a rep in our neighborhood since he was a kid, always liked him too.....take care

^ v • Share >

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DC → AJ • 2 years ago

AJ, you as well...

1 ^ | v • Share >

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Ed Scarpo Mod • 2 years ago

I have to say not a lot of people in Dom's shoes would willingly subject himself to potentially widescale abuse... I honestly don't know why he does it... I've tried to talk him out of it! It was his idea for me to post Nose's letters and use them as a starting point for this Cicale forum... His idea to leave up all comments no matter how bad or ridiculous... I finally got it; I do leave all comments up. Everyone should have a voice even if it disagrees with you exponentially, to put it one way....

^ | v • Share >



DC → Ed Scarpo • 2 years ago

Exactly Ed... That's the way it should be... Always kept it real... Even as a RAT... But remember this, I'M NOT A PUNK!!! Take that to the bank... But even is entitled to their opinion... I DO RESPECT THAT....

2 ^ | v • Share >



Ed Scarpo Mod • 2 years ago

Anyone here belong to Gangster BB or Black Hand or Real Deal Forums? If you can, please sign in to the boards and invite them here?

^ | v • Share >



This comment was deleted.



DC → Guest • 2 years ago

YES David, I will start with, I how you had a wonderful holiday season... Now with that said, grow up tough guy... You are acting like a punk in your room behind your computer keys. I am not looking to fight just looking to educate people on the street life, how fake it really is...

1 ^ | v • Share >



Ed Scarpo Mod → DC • 2 years ago

Did you teach FBI agents how to play gin?? is that true?? Surprised they wouldn't know how to play a simple card game! LOL! You shoulda played poker and took all their cash....


^ | v • Share >





R.I.C.O. → Ed Scarpo • 2 years ago


2/28/2017


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 THEN they would've charged him with "illegal gambling" LOL
1 ^ v . Share >


 DC → R.I.C.O. • 2 years ago
Good one... Lol
^ v . Share >

 DC → Ed Scarpo • 2 years ago
Na, I hate to say this, but all the FBI agents I dealt with are great guys just doing their jobs. Now, some of the prosecutors are a different story....
^ v . Share >

 Ed Scarpo Mod • 2 years ago
anonymous • an hour ago
So what ur saying if 858 or mike if he kills u and vinny thats ok to protect his ass but somebody in the family would've wanted his ass for killing u two idiots who were higher on the ladder. Don.t know much about u guys but when u make up ur minds to set somebody up because the boss wants it that way even though the guys loyal but the boss wants it done u leave that individual no other choice and fuck that shit thats what i signed up for he did what he had to do to survive and has to live with it and with both u idiots out of the way it opens the door for somebody else. If i were the guys on the street i shoot ur ass soon as u got out and it would be bussiness as usual but thats me. Thats why im still doing my thing and u guys are doing time and chasing the same nickle looking over ur backs u can have it cuz. Philly
^ v . Share >

 Ed Scarpo Mod • 2 years ago
anonymous • 8 hours ago
I said it before and ill say it again most of these guys arent the sharpest tools in the shed some are good at intimidation others at pulling a trigger on orders. Most of them ride coat tails and cant think for themselves there biggest claim to fame doing a stretch in the Joint. Ill do time if i fuck up but im not doing time for idiots in my crew or Boss or Jesus christ himself period. Ill take my chances on the street let the chips fall where they may. But thats why its better today to be an associate today u kick up still do ur own thing make good money stay clear of the ones who wanna be made or noticed u.ll be ok. If ur good at what u do they.ll come to u. But the idea is to stay under the radar just saying most of u wont agree with that theory but then again im still here. Food for thought. Any way im not good at taking orders specially from people i have no respect for and know sooner or latter one of us gotta go not worth the headaches specially if the idiot is a nephew or cousin or god child of a connected guy. He.s gonna have more leverage than me because im the outsider therefore his word is golden over mine. Better to stay clear of the bullshit. just dont have the patience to play the game. Don.t know Dom if u agree with that or not. Its worked for me though. Philly
^ v . Share >

 DC → Ed Scarpo • 2 years ago
Philly, I agree 1000%
Vinny was my mentor, but I was always my own man. Guys like Michael nose??? I will leave it at this.... A BOSS... Look at his letters... need I say more....
^ v . Share >

 R.I.C.O. → DC • 2 years ago
Dominick, can you clarify what you mean by this? "I will leave it at this.... A BOSS... Look at his letters"

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I'm not clear on what you mean. Thanx.

^ | v • Share >



DC → R.I.C.O. • 2 years ago

A Crime Boss carrying on just do your time. Michael forgets he told me to go ahead and have Randy killed.

^ | v • Share >



anonymous → DC • 2 years ago

I had a boss can't go in to details so i get it Dom lived it and still do my own thing on a smaller scale but i hate the person who has a opinion and dont have a clue about the bussiness and deceitfulness that goes on everyday its a chess match and at any moment u can be check mated. Not a day goes by stand up or not in this bussiness that today could be your last day when u get up just for ur association and the common folks and common ass hole criminal hasnt got Welling clue.Philly

^ | v • Share >



DC → anonymous • 2 years ago

You are right, but I was will to do life until everyone screwed me over. REMEMBER... My entire case was based on Vinny's big mouth... The government never had a clue...

1 ^ | v • Share >



anonymous → DC • 2 years ago

most of the people who do turn usually get fucked by those close to them whether it be money or there Big mouths on tape.philly

^ | v • Share >



Ed Scarpo Mod • 2 years ago

hearsay214 Giants 858 • 4 hours ago

You think that's something funny or something to brag about, watching someone's Father get abused or spit at? That's a disgrace to abuse someone's Father who had nothing to do with his sons decisions. I'll tell you what, they wouldn't have done it in front of me, but they obviously did it in front of you, which tells me that you obviously are what you sound like...A MUTT!!!

^ | v • Share >



DC → Ed Scarpo • 2 years ago

Thank you... My father was always able to handle himself. Even when he was transferred to Fort Dix someone in the Bonanno crime family started talking shit. That person was check HARD to shut his month by a Crime boss from a different family. I will not blow up that crime boss for the love I have for him till this day, but I will say this... THANK YOU!!!!

2 ^ | v • Share >

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Ed Scarpo Mod • 2 years ago

Giants 857 hearsay214 • 2 hours ago

If the father is sticking up for the son he's a rat also, talk about mutt your on here sticking up for a rat family, look at all the people he hurt and put away, all the kids that had nothing to do w anything now missing their fathers, u rat sympathizer. Y don't u pick apart all the lies he writes instead of sticking up for a family wrecking snitch.

^ | v • Share >



DC → Ed Scarpo • 2 years ago

I am sorry... You rather I was still in the life killing people... BUT THAT'S NOTB WRECKING FAMILIES!!!!

1 ^ | v • Share >



DC → Ed Scarpo • 2 years ago

WOW... You have no clue. My father never stuck up for me in my entire life especially when I cooperated. So please get your fact straight...

My father did not speak or look to speak with me for years and just before he passed we finally passed and made peace with one another....

1 ^ | v • Share >



AJ → DC • 2 years ago

Sorry about your dad Dom did not know he passed

^ | v • Share >



DC → AJ • 2 years ago

That's ok... Thank you...

^ | v • Share >



Ed Scarpo Mod • 2 years ago

Giants 859 • 13 hours ago

Every thing he's says is a Lie. People ask him how is it for a wise guy to do time. What does he know. His first pinch he was a nobody and this last one he's in the rat wing of the prison. U say ur not hiding. Lol then where do u live big shot. Not a threat just calling this garbage pail out on his lies.

^ | v • Share >



DC → Ed Scarpo • 2 years ago

Come on please.... At least have some sense, I did close to 20 years in jails. Doing time is easy, but when your so called brothers are robbing everything because of their greed then all bets are off.

I will say this, I do not like what I did but I am not running from my actions...

1 ^ | v • Share >



philly → DC • 2 years ago

Thank you for your posts : I have the ebook. And just now read the questions. I enjoyed it.

^ | v • Share >



DC → philly • 2 years ago

Thank you

13

AFFIDAVIT

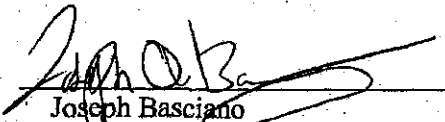
Exhibit B

STATE OF NEW YORK
COUNTY OF THE BRONX
(Page 1 of 2)

I, JOSEPH BASCIANO, BEING DULY SWORN, STATE THE FOLLOWING:

1. I am a resident of Bronx County and I am currently incarcerated at the Metropolitan Correctional Center, 150 Park Row, New York, New York 10007.
2. That at some point on either August 8th or 9th, 2014, I received a phone call from my mother, Angela Basciano, telling me that someone called my friend "Frankie the Florist" (Frank Villano) with information about my father Vincent Basciano Sr. My mom did not say who it was, but said that Frankie wanted me to be at the florist by 12 noon.
3. At approximately 11:45am, I arrived at the American Floral Company, located at 3750 Tremont Avenue, Bronx, New York, and met with Frankie who informed me that Dominick Cicale had called him earlier in the day asking to speak with his mother Angela, or one of the boys.
4. At or about 12:00 noon, while Frankie and I were standing on the sidewalk in front of his store, Cicale called Frankie's cell phone and Frankie told him "hold on, I'm here with one of his son's," and handed me the cell phone. At this point I said "who is this" but he wouldn't answer the question. Cicale then said, "I just wanted to make sure it was you" and then went on to say "I have some information that could benefit your dad - last winter you found some money in the snow." at this point I stopped him and said "I never found any money in the snow" and then hung up on him.
5. I know this was Dominick Cicale, because I know his voice and have known him for many years.
6. Cicale immediately called back and told Frankie that he knew I was standing there with him and to tell me that he was calling to try to help my father. He then said that he could provide information that could possibly get my dad out of jail, or at least get him a new trial.
7. Cicale then told Frankie to "have Joe think about it and I'll call you back tomorrow."
8. Although Cicale called Frankie back, I never spoke with him again.

9. The information I am providing in this affidavit is true and is to the best of my recollection.




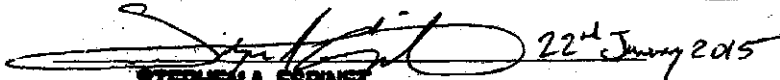
Joseph Basciano
Metropolitan Correctional Center
150 Park Row
New York, New York 10007

1/22/15

Date Signed

Affidavit prepared by: James B. Dowd, NYS Licensed Private Investigator

Sworn to me on the 22nd day of January, 2015
~~September, 2014~~ 



STEPHEN A. ESPINET
Notary Public, State of New York
No. 01ES6194593
Qualified in Kings County
Commission Expires October 6, 2016