To be argued by: Lloyd Epstein, Esq.
Estimated Time for argument: 15 minutes

STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

People of the State of New York,

Plaintiff-Respondent

-vs-

JOHN GIUCA,

Defendant-Appellant

Docket № 2009-4130

REPLY BRIEF FOR APPELLANT JOHN GIUCA

EPSTEIN & WEIL
Attorneys for Defendant-Appellant
225 Broadway, Suite 1203
New York, NY 10007
(212) 732-4888

Table of Contents

Table of Authorities

Cases

Federal Cases

State Cases

Statutes

State Statutes

ARGUMENT

POINT I

THE PROSECUTION'S ARGUMENT THAT ALLO WAS NOT REQUIRED TO DISCLOSE HIS PRIOR KNOWLEDGE AS LONG AS HE SUBJECTIVELY BELIEVED THAT HE COULD REMAIN IMPARTIAL IS IRRATIONAL, HAS NO BASIS IN LAW, AND SHOULD BE REJECTED.

The prosecution argues now, as it did below, that Allo's failure to disclose his prior knowledge of Mr. Giuca and the Ghetto Mafia did not amount to misconduct because Allo *subjectively believed* that he could remain impartial and decide the case on its merits. This argument demands a radical and irrational departure from precedent which would eviscerate the role of the court in jury selection.

The prosecution argues:

> Here, the jurors were only instructed at *voir dire* to come forward if any of the names read to them 'rang a bell' with them, or if they had heard or read anything about the case that they thought 'would affect [their] ability to be fair" (*Voir Dire* transcript dated September 13, 2005 [hereinafter "VD"] at 5-6, 15-16). Under this instruction, if Allo did not believe that his conversation with his cousin would affect his ability to be fair, he was not even obligated to disclose it at voir dire – even if he recalled it at that time and knew that it related to defendant. Thus, *only if Allo believed that his conversation with his cousin would affect his ability to be fair* would Allo even arguably have had an obligation to report to the court, during trial, that he

recalled a conversation that took place before trial that involved defendant.

Respondent's Brief, p. 56 (emphasis furnished).

The notion that the juror, not the judge, is the ultimate arbiter of whether a juror can be impartial is at odds with the most basic premises of the American justice system. It a fundamental duty of the trial court, relying on objective criteria, to determine whether a juror can be impartial, regardless of what the juror says. *People v. Rentz*, 67 N.Y.2d 829 (1986)("The juror stated at the post trial hearing that he did inform, or would have informed, the Trial Judge that the relationship would not affect his impartiality, but such a statement is ineffective when a showing of implied bias has been made."); C.P.L. §§270.05, 270.35; *People v. Rodriguez*, 100 N.Y.2d 30 (2003); *People v. Rivera,* 304 A.D. 2d 841(2d Dept. 2003); *People v. Payton*, 279 A.D.2d 483, 719 N.Y.S.2d 103, 103-104 (2d Dept. 2001).

The prosecution's invocation of Allo's subjective belief in his own impartiality rings particularly hollow because Allo himself admitted that the court would certainly have removed him from the jury had he answered the court's questions as to knowledge and bias honestly.

1:05:51- Allo: *Technically by law if I knew that shit I shouldn't have*

even been in that jury.

1:05:56- Dee: Say that again you had food.

1:05:58- Allo: *I shouldn't have been in that jury.*

1:06:00- Dee: Why not! (inaudible)

1:06:04- Allo: *By law, you're not suppose to be.*

Respondent's Brief, p. 16.

POINT II

THE RECORDINGS SHOW THAT ALLO WAS PREJUDICED AGAINST MR. GIUCA BECAUSE OF INFORMATION THAT ALLO OBTAINED OUTSIDE OF THE COURTROOM AND AN ANTI-SEMITIC BIAS.

A. The Recordings Show that Allo Acquired Information About Mr. Giuca Prior to Trial

The prosecution's assertion that Allo possessed no prejudicial information prior to *voir dire* must be rejected. It is contradicted by the recordings and the opposite of the position taken by the prosecutor below.

The prosecutor now asserts that Allo could not have committed misconduct during *voir dire* because he did not know of Mr. Giuca, the Ghetto Mafia, or any of Ghetto Mafia's members prior to trial.

> Allo never admitted knowing defendant or persons involved in the case before the trial and intentionally concealing that information during voir dire. Rather, the conversations revealed that Allo consistently told Giuliano that he did not know defendant or the gang members before the trial.

Respondent's Brief, pp. 8.

In the motion court, the prosecutor asserted that the recordings showed that Allo's cousin told him that she had overheard gang members saying that they believed that Mr. Giuca was probably guilty *before* the trial .

> The balance of Allo's conversation with Giuliano . . . suggested that Allo's conversation with his cousin about what she overheard in her neighborhood *took place before the trial.* Allo told Giuliano that his cousin overheard the *gang* members talking 'shortly after' the murder happened. Allo explained that his cousin knew the defendant as 'Slim,' [or 'Slim Shady'] and always referred to him as such (District Attorney's *Memorandum of Law* in Trial Term, dated February 24, 2009 p. 18).
>
> * * *
>
> [My] cousin 'was really tight' with several members of the 'gang' [the GM members]...and 'overheard them talking like shortly after this happened...referring to the defendant's involvement in the Fischer homicide and saying ' they didn't believe that it happened, but in the same sense they knew it did happened, because of the way they are." (People's *Affirmation in Opposition* in Trial Term, dated February 24, 2009 p. 12).

The prosecution's current insistence that Allo had no prior knowledge or opinion of the case is not only disingenuous, in light of the position it took below, but demonstrably implausible. Mark Fisher's murder and the events surrounding Mr. Giuca's arrest received sensational and wide-spread media coverage. Allo's cousin told him that Ghetto Mafia members themselves believed that Mr. Giuca was guilty. Allo's boss, who himself was familiar with the case through the press, told Allo during jury selection that he supported Allo's jury service because he wanted "to see that fuckin' kid [Mr.

Guica] fry." These are conversations that Allo was unlikely to forget.

Any doubt that Allo was keenly aware of the case prior to the trial and actively concealed this knowledge during *voir dire* is belied by his eagerness to serve on this particular jury. Allo knew so much about the case before he was selected to serve, that he told his boss "this is something I gotta do!" (November 2007 transcript, p. 87; November 2007 recording, 1:20:18). He told Ms. Giuliano that "the case had been presented to him for a reason" (*Respondent's Brief*, p. 19).

B. Allo Harbored an Anti-Semitic Prejudice Against Mr. Giuca

Allo made multiple statements revealing a profound bias against Mr. Giuca based on a belief that Mr. Giuca was Jewish (*Respondent's Brief*, pp. 16, 17, 20, 63). Allo told Ms. Giuliano, "I hate Jews," and freely admitted that he concealed this hatred in order to avoid being dismissed from the jury (*Respondent's Brief*, p. 20).

Allo's anti-Semitism helps explain why Allo was so anxious to serve on the jury. Allo's eagerness to convict explains why he was so cavalier in deceiving the trial court during *voir dire* and disobeying the court's instructions during trial (See, sub-point I-C, *infra*). It also places into proper context Allo's boast that he was the first of the jurors to vote for a guilty

verdict (November 2007 transcript, pp. 73, 84; November 2007 recording, 1:07:03 - 1:07:12, 1:17:30 - 1:18:16).

C. The Taped Conversations Strongly Suggest That Allo Obtained Additional Outside Information and Spoke to His Cousin During the Trial

Allo never hid the fact that he actively disobeyed the court's instructions not to seek outside information concerning the case. He expressed his contempt for the rule that a juror should not speak about the case to anyone during the trial, describing the court's instruction as "bullshit" (November 2007 recording, 07:02). Allo spoke to his boss during *voir dire,* and read about a newspaper account of testimony that was presented to the Russo jury that was inadmissible against Mr. Giuca (November 2007 recording, 5:37-6:21).[1]

There is also considerable evidence that Allo again spoke to his cousin during the trial, and that she supplied him with additional information reinforcing his desire to convict. Billy Wenzel told a defense investigator that he met Allo's cousin during the trial and expressed the opinion that Mr. Giuca was probably guilty. Allo expressed concern that both he and his cousin "can get into a lot of trouble" because of their conversations (November 2007 recording, 1:18:06), a concern which would make little sense if in fact they

---

[1]Mr. Giuca and co-defendant Russo were tried jointly before separate juries.

had not spoken during the trial as well as before.

D. Allo's Failure to Disclose His Personal Knowledge of Mr. Giuca and the Ghetto Mafia Disqualified Him as a Juror Regardless of Whether He Acquired this Knowledge Before or During the Trial, or Both.

Allo claimed in the November 2008 conversations with Ms. Giuliano that he did not realize that Mr. Giuca was connected with the Wenzels until "the middle of the case." See *Appellant's Brief*, p. 17. This statement should be viewed with skepticism. It was plain from the context of the conversation that Allo had become suspicious of Ms. Giuliano, and was trying to protect himself. Allo complained that a defense investigator had contacted his cousin. Allo had reason to suspect that Ms. Giuliano had tipped off the defense, since he had told her that his cousin had provided him with confidential information prior to trial. By November 2008, Allo had reason to believe that his deceptive conduct during *voir dire* had been uncovered.

The lower trial court's failure to conduct an evidentiary hearing makes it difficult to determine with precision what portion of his outside knowledge Allo acquired before trial, during trial, or both. But the answer to this question is largely irrelevant. A juror who realizes in mid-trial that he may have outside knowledge concerning the trial, like a juror who understands this during *voir dire*, has a duty to report this to the court, and must be replaced if

the court finds that this knowledge disqualifies the juror. *People v. Tamayo*, 256 A.D.2d 98, 682 N.Y.S.2d 37 (1st Dept. 1998). There is no question that a juror who conceals either the type of bias or outside knowledge Allo possessed must be dismissed. *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989) (court will overturn conviction if evidence at post-conviction hearing shows that a juror concealed her knowledge that a locale at which the evidence placed the defendant was a "hang out for gangsters"); *People v. Blyden*, 55 N.Y.2d 73 (1982) (juror must be disqualified for racial prejudice); *People v. Rivera, supra* (same).

The prosecutor attempts to minimize the impact of the prejudicial information on Allo by asserting that Allo's cousin's relationship with the Wenzels ended "ten or twelve" years prior to trial (*Respondent's Brief,* pp. 37-38), and that "Allo never said that he had any personal contact with Ghetto Mafia members, including the Wenzels," (*Respondent's Brief*, p. 67). Both assertions are contradicted by the record, and contrary to assertions made by the prosecution elsewhere in its brief. As the prosecution acknowledges in its *Brief*, p. 53, Allo reported to Ms. Giuliano that his cousin overheard the conversation among Ghetto Members members *after* the Fisher murder, which was hardly 10-12 years before trial. According to Billy Wenzel, the cousin was still in close contact with his family and heard them offering their

opinion of Mr. Giuca's likely guilt during the trial. In December, 2007, Allo told Ms. Giuliano that he personally knew Ghetto Mafia members and their relationship to Mr. Giuca before the trial.

> 41:24- Allo: If anything I use (sic) to know these, *I used to hang out with these guys,* not these two exactly. But like the clique. I knew them since [junior?] high school.
>
> 41:34- Dee: The gang members. (laughs)The lower guys.
>
> 41:38- Allo: (inaudible) *Ghetto Mafia.*

See, *Appellant*'s *Brief*, pp. 6-7.

POINT III

MR. GIUCA'S MOTION PAPERS CONTAINED SWORN ALLEGATIONS SUFFICIENT TO WARRANT A NEW TRIAL OR AN EVIDENTIARY HEARING.

The People rely on *People v. Samandarov*, 13 N.Y.3d 433, 892 N.Y.S.2d 823 (2009) (*Respondent's Brief*, p. 41) to justify the lower court's denial of Mr. Giuca's motion without a hearing. This reliance is misplaced. To the contrary, *Samandarov* strongly suggests that the lower court's refusal to direct a hearing was incorrect both as a matter of law and of fact.

In *Samandarov*, the defense sought an evidentiary hearing on juror misconduct based solely on an attorney's affidavit citing a newspaper article and a conversation with an unnamed source recounting statements made by

jurors that they discussed a possible link between the charged shooting and organized crime during deliberations. The Court of Appeals sustained the summary denial of the motion because there was no sworn affidavit from anyone who had actually spoken to a juror and no admissible evidence that anything outside of the trial evidence prompted the alleged conversation about mob activities.

By contrast, Allo's recorded statements, authenticated by Ms. Giuliano's sworn affidavit and the implicit admission by Allo's attorney on *Nightline* that it was indeed Allo on the tapes, constitute direct proof of Allo's misconduct, admissible as declarations against interest. Further corroboration was provided by Billy Wenzel in his interview with the defense investigator.

Mr. Giuca's showing was plainly sufficient to warrant a hearing, if not the summary granting, of the motion. "When confronted with evidence suggesting possible juror misconduct, it is the better practice for the trial court to hold a hearing rather than to determine the issue on [papers]." *People v. Paulick*, 206 A.D.2d 895, 615 N.Y.S.2d 159 (4th Dept. 1994). "[A] movant who makes a sufficient showing of *McDonough*-type irregularities is entitled to the court's help in getting to the bottom of the matter." *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998).

CONCLUSION

This Court should remand this case to trial term for a hearing before a judge other than the trial judge, and hold the appeal in abeyance until the lower court issues a report on Mr. Giuca's motion to vacate his conviction.

Dated: June 10, 2010

Respectfully submitted,

LLOYD EPSTEIN, ESQ.
EPSTEIN & WEIL
225 Broadway, Suite 1203
New York, NY 10007
Ph: 212-732-4888

On the Brief:
Lloyd Epstein

Certificate of Compliance

Appellate Division - Second Judicial Department

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer word processor.

Type. A proportionally spaced typeface was used, as follows:

Name of Typeface:	Times New Roman
Point Size:	14pt
Line Spacing:	Double Space

Word Count. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any other authorized addendum containing statutes, rules, regulations, etc. is 2,316.

Lloyd Epstein

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

Eliezer Lehmann, being duly sworn, hereby deposes and states:

1. I am not a party to this action; I am over 21 years of age, and I reside in New York, New York.

2. On June 10, 2010, I served a copy of the foregoing Reply Brief for Appellant John Giuca on depositing a true and correct copy enclosed in a properly addressed wrapper in a depository under the custody of the United Parcel Service before the latest time designated for pick up for overnight delivery, addressed as follows:

Hon. Charles J. Hynes
District Attorney, Kings County
350 Jay Street
Brooklyn, NY 11201

Eliezer Lehmann

Sworn to before me, this 10th day
of June of 2010

Veronica Mora

Veronica Mora
Notary Public, State of New York
No: 01MO6038692
Commission Expires March 20, 2010