MEMORANDUM

SUPREME COURT: KINGS COUNTY — CRIMINAL TERM, PART 35

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PEOPLE OF THE STATE OF NEW YORK, — BY: MARRUS, J.

vs

Dated: April 1, 2009
Indictment No. 8166/2004

JOHN GIUCA — DECISION and ORDER

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The defendant was convicted of murder in the second degree, robbery in the first degree and criminal possession of a weapon in the second degree on October 19, 2005, and was sentenced to a term of imprisonment of 25 years to life. Two separate juries convicted Giuca and co-defendant, Antonio Russo, of acting in concert to rob and murder college student Mark Fisher.

The defendant appealed the conviction and contended on appeal that the prosecutor engaged in misconduct at trial and that the trial court deprived the defendant of a fair trial. His claims on appeal centered mainly on evidence, arguments and rulings relating to gang activity. On January 20, 2009, the Appellate Division, Second Department, affirmed the conviction, rejecting the defendant's claims of error. The Appellate Division also determined that "there was overwhelming evidence of defendant's guilt." People v. Giuca, – AD3d –, 871 NYS2d 709, 712 (2d Dept. 2009).

By motion dated December 1, 2008, the defendant has moved for an order pursuant to CPL §§ 440.10 (1)(f)(h), the Sixth and Fourteenth Amendments to the U.S. Constitution, N.Y. Constitution Article 1, sections 6, 2 and CPL §§ 270.05 - 270.35 to vacate the judgment of conviction. By answer dated February 24, 2009, the District Attorney opposes the application. The defendant was allowed to reply to the District Attorney's answer on March 18, 2009.

The issue presented in this case is whether the defendant is entitled to any post-judgment relief based upon comments made by one of the jurors to the defendant's mother, who contacted the juror two years after the trial without information that juror had done anything improper, lied to him about who she was and why she was speaking to him, engaged in a long-term, quasi-romantic relationship with the juror during which she repeatedly manipulated their conversations to get him to speak about this case, and surreptitiously recorded some of their conversations. This court holds that the defendant is entitled to no relief from his judgment of conviction.

The motion is founded, in part, on tapes of selectively-recorded conversations with a juror, compiled and submitted to the court in a manner which casts grave doubt on their completeness and reliability. The motion contains no sworn statements from a juror or first-hand accounts from an eyewitness documenting any juror misconduct during the defendant's trial. The recorded conversations, moreover, reveal a juror who had distant relationships with certain associates of the defendant who never testified at trial and may have read a newspaper account of the case during the trial, but who decided the case solely on the evidence.

Most strikingly, however, the defendant's motion reveals extraordinary misconduct, not by a juror, but by the woman who generated the motion – the defendant's mother. Acting as a self-appointed juror misconduct vigilante, with the obvious intention to destroy the credibility of a jury verdict that went against her son, the defendant's mother violated the privacy rights of a juror and sought media coverage to support and glamorize her deceptive conduct before this motion was even filed in court.

The defendant contends that the jury verdict in this case was impeached by the conduct of juror number eight at the trial, who intentionally concealed before and during the trial personal knowledge of some of the central issues and people involved in this case and by violating the court's instructions not to read newspaper accounts of the trial. The defendant has submitted an affidavit from Doreen Giuliano, the defendant's mother, in

which she states that she met juror eight in October 2007, spoke to him without revealing her identity and secretly recorded several conversations with him. She claims that juror eight told her that he spoke to his cousin during the trial and that the cousin told him she knew members of the defendant's gang, that the defendant was a "big shot" known to her as "Slim" and that she had overheard "guys" who "hung out" with the defendant and his co-defendant talk about the homicide, opining, "they didn't believe it happened but in a sense they knew it did happen because of the way they are."

The defendant's mother also states that juror eight admitted disobeying court instructions not to read newspaper accounts during the trial, obtaining outside information that the defendant was guilty, that he would have been disqualified had he disclosed it and that he had known members of the defendant's gang, "Ghetto Mafia," two of whom, the Wenzels, he used to hang out with and one of whom, Wayne Wenzel, used to date his cousin Linda. The defense has submitted six compact discs which purportedly contain the secretly-recorded conversations between juror eight and the defendant's mother.

The defendant has also submitted an affidavit from a private investigator, Elizabeth Ghormley, which states that she spoke to Billy Wenzel and that he told her that he has known juror eight for a long time, they have attended parties together, that his older brother Wayne had dated juror eight's cousin for many years, and that juror eight and his cousin would party with members of the "Ghetto Mafia" at the Wenzel's home. The District Attorney opposes the application because: (1) it is not supported by sworn statements of anyone with personal knowledge tending to substantiate the existence of facts upon which the motion is based; (2) the defendant has provided no affidavits from juror eight or Billy Wenzel; and (3) the recorded conversations are insufficient to support the claims of juror misconduct.

Giuliano states that her investigation into juror eight began because she "heard a rumor" that he "lived near one of the witnesses in this case." She says she reported this rumor to her son's attorneys but they "were unable to uncover any useful information."

She then "became frustrated with the attorneys' efforts and decided to find [juror eight] and speak to him myself." Conspicuously missing from her affidavit is why she would want to contact a juror because of a rumor that he lived near one of the witnesses in the case, how she located the juror, and the circumstances under which she met with him.[1]

To corroborate the claims in her affidavit about what juror eight told her, Giuliano gave her son's appellate attorney the recordings she made of her conversations with juror eight. These recordings submitted to the court in support of this motion conspicuously lack the necessary foundation required by law for admissibility in a court proceeding. Nowhere in the defendant's motion is it asserted by affidavit or affirmation that the recordings provided to this court represent a complete and accurate reproduction of the conversations between Giuliano and juror eight. Nor is there any representation that the recordings have not been altered in any way. No affidavit from an expert who has analyzed the tape recordings and offered an opinion that the recordings have not been altered has been

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1 Prior to the filing of the defendant's motion, an article appeared in the January, 2009 edition of Vanity Fair magazine. The article entitled "Mother Justice" discusses the Giuca case and an alleged "sting" conducted by Giuliano. According to this article, she decided to "find something on the jurors." The article also indicates that she obtained the names and neighborhoods of all of the jurors and "through a contact . . . a list of some of the jurors' addresses." For a period of eight months, Giuliano reportedly "spied on jurors." She supposedly enlisted a male friend to flirt with one of the women jurors and started patronizing a grocery store in which another juror worked. Giuliano is quoted in the article as saying about this juror "I charmed him and gave him my number . . . and went out on two dates with him." It was only after these two jurors were contacted, that juror eight became her "Target." According to the article she had the "Target" under surveillance for an entire year before making contact, decided she would "have to move on this guy," transformed her appearance by going to a tanning salon, working out at a gym, dyeing her hair and purchasing a new wardrobe of "sexy clothes only." She reportedly went to an espionage supply store to purchase "the most expensive kind of hidden recording device she could find," created a fake ID and a fake cell phone account and rented an apartment, described in the article as "a playgirl's pad." Also according to the article, Giuliano, "dressed in her short - short shorts . . . bicycled up and down the target's block waiting to catch his eye." Once having reeled in the target, Giuliano cooked him dinner, drank wine and smoked marihuana with him. None of this information is contained in her affidavit submitted to the court. It is reasonable to infer, therefore, that either her affidavit in support of this motion is materially inaccurate and incomplete or the narrative in the Vanity Fair magazine article is a complete fiction.

provided to this court. Indeed, defendant's counsel has no way of knowing the genuineness, accuracy and chain of custody of these tapes because he did not oversee or participate in their compilation.

In fact, after the defendant submitted this motion and the District Attorney had answered it, defense counsel suddenly discovered additional tape-recorded conversations between Giuliano and the juror which were then supplied to the District Attorney and furnished to the court. This court can have no confidence in the completeness or accuracy of the recordings submitted by the defense in support of this motion.

When one listens to the recordings, it is evident that they randomly begin and end, are not date or time stamped, and contain gaps in the conversations. The conversations which took place over a one-year period between October 2007 and October 2008 are also not completely audible or decipherable.

"Admissibility of tape-recorded conversation requires proof of the accuracy or authenticity of the tape by 'clear and convincing evidence' establishing 'that the offered evidence is genuine and that there has been no tampering with it' (People v. McGee, 49 NY 2d 48, 59 cert. denied sub nom. Waters v. New York, 446 US 942)." People v. Ely, 68 NY 2d 520, 527 (1986). Because the defendant's motion contains insufficient sworn facts to supply the required foundation for the admissibility of the tape-recorded conversations, submitted in support of the motion, it would be an abuse of discretion as a matter of law for this court to rely on them in support of the motion. See People v. Ely supra at 528.

In addition to the recordings, the defense motion contains affidavits from Doreen Giuliano regarding her conversations with juror eight, from Elizabeth Ghormley, a private investigator regarding a conversation she had with Billy Wenzel, an affidavit from another private investigator, Andrew Repaninch, who attempted to speak to juror eight's cousin and affidavits from an attorney, Ira Mickenberg, concerning attempts he made to speak to juror eight. The first two affidavits constitute rank hearsay since they are offered to prove the truth of non-sworn, out-of-court statements. The remaining three affidavits

demonstrate merely that juror eight's cousin and juror eight had no desire to speak to representatives of the defendant.

Claims of juror misconduct predicated on hearsay allegations contained in affidavits of defense counsel, private investigators or others, not jurors, are not acceptable in New York to warrant a hearing on a motion to vacate judgment. People v. Friedgood , 58 NY2d 467, 462 NYS2d 406 (1983); People v. Kerner, 299 AD2d 913, 751 NYS2d 139 (4th Dept 2002); People v. Stevens, 275 AD2d 902, 713 NYS2d 606 (4th Dept, 2000); People v. Nolan , 268 AD2d 601, 702 NYS2d 851 (2d Dept 2000); People v. Cervantes, 242 AD2d 730, 662 NYS2d 802 (2d Dept 1997); People v. Boddie, 240 AD2d 155 (1st Dept 1997); and People v. Laguer, 195 AD2d 483, 599 NYS2d 859 (2d Dept 1993). It is not an abuse of discretion to summarily deny a defendant's CPL 440.10 motion to vacate a judgment on the ground of juror bias when that motion is made several years after the judgment and it is based on unsworn statements. People v. De Leo, 185 AD2d 374, 585 NYS2d 629 (3d Dept. 1992).

In People v. Covington, 44 AD3d 510, 843 NYS2d 606 (1st Dept. 2007), the Appellate Division upheld denial of a post-verdict motion based on juror misconduct founded upon an overheard juror conversation by an attorney because the allegations contained in the motion "were not supported with a sworn affidavit or affirmation from anyone, and hearsay statements will not suffice . . . ." In People v. Bellamy, 158 AD2d 525, 551, NYS2d 291 (2d Dept 1990), claims of juror misconduct made in an affidavit by the co-defendant's sister were insufficient to gain a hearing because they "contained only hearsay allegations." Id. at 526. In People v. Salaam, 187 AD2d 363, 590 NYS2d 195 (1st Dept 1992), summary denial of a post-verdict motion alleging that jurors had improperly read newspaper accounts of the trial was upheld by the Appellate Division because the source of the motion was a radio interview with one of the jurors which "was pure hearsay." Id at 364. These cases make it clear that absent affidavits from jurors or affidavits containing first-hand observation of juror misconduct, a motion to vacate a judgment of conviction based on juror misconduct has no merit and warrants summary denial.

Notwithstanding the blatant procedural deficiencies in the defendant's motion, this court has reviewed thoroughly the specific claims of juror misconduct in this case and finds them wholly without merit. In New York, "the trial judge is vested with broad discretion in ruling on the issue of juror prejudice . . . ." People v. Martin, 177 AD2d 715, 576 NYS2d 607, 608 (2d Dept 1991). "Generally a jury verdict may not be impeached by probes into the jury's deliberative process; however, a showing of improper influence provides a necessary and narrow exception to the general proposition . . . ." People v. Maragh, 94 NY2d 569, 573, 708 NYS2d 44, 46 (2000). "Each case must be examined on its unique facts to determine the nature of misconduct and the likelihood that prejudice was engendered . . . ." People v Clark, 81 NY2d 913, 914, 597 NYS2d 646, 647 (1993).

In reviewing the merits of a juror misconduct claim, the court must perform a balancing act. On the one hand, "[w]e do not wish to encourage the post-trial harassing of jurors for statements which might render their verdicts questionable." Indeed, "as a matter of policy, efforts to undermine a jury's verdict by systematically questioning the individual jurors long after they have been dismissed in hopes of discovering some form of misconduct should not be encouraged." People v. Friedgood, 58 NY2d 467, 473, 462 NYS2d 406, 409 (1983). On the other hand, these "public policy considerations must at all times be weighed against the defendant's fundamental rights." People v. De Lucia, 20 NY2d 275, 278, 282 NYS2d 526, 529 (1967). Due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effects of such occurrences when they happen." Smith v. Phillips 455 US 209, 217 102 S. Ct 940, 946 (1982). Extraneous influences which can impeach a jury verdict include juror exposure to prejudicial information not admitted into evidence, influence by outsiders such as improper comments by a bailiff or a bribe offer to a juror or even a situation in which a juror in a criminal trial had submitted an application for employment at the District Attorney's office. See Parker

v. Gladden 385 US 363 (1966); Remmer v. US, 347 US 227. (1954); and Smith v. Phillips, supra.

The defendant's claim that juror eight intentionally concealed before and during trial personal knowledge of some of the central issues and people involved in this case is rebutted by the record in this case and also by the recordings made by Giuliano, assuming their reliability and authenticity. The record of the voir dire establishes that this court read a witness list containing forty-seven names of potential witnesses and asked the jurors to raise their hands if any of the names "rang a bell" with them. Minutes of voir dire, pages 5-6. The court instructed jurors "if you have heard or read anything about this case that would create a problem for you to be a fair juror in this case, please raise your hand to let me know." Minutes of voir dire, p.15

Nothing in the recorded comments of juror eight indicates that he intentionally concealed from the court any personal knowledge of witnesses on that list or the defendant. Juror eight is heard on the recorded conversations telling Giuliano that he knew a juror has to let the court know if he recognized anyone who might be a witness but that he "didn't know any of their names." Recording dated November, 2007. He stated that his cousin's relationship with the Wenzel brothers, whose names were mentioned on the witness list, had occurred ten or twelve years before trial and that his cousin had only spoken of defendant as a person named "Slim," a nickname juror eight did not then know referred to the defendant. Recording dated November, 2007. Juror eight specifically told Giuliano that he had never met or even heard of the defendant before trial. Recording dated December, 2007. Moreover, it is important to note that neither of the Wenzel brothers ever testified as witnesses during the trial. There is thus no credible foundation for the defendant's assertion that juror eight intentionally lied during jury selection and that he had a prior familiarity with the defendant and witnesses which would have impacted his verdict.

Even assuming that juror eight had some past knowledge of the defendant's associates, "[i]t is not required however that the jurors be totally ignorant of the facts and issues involved . . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 US 717, 722 -3 (1961). Juror eight specifically told Giuliano that the prosecution had proved its case and that "the evidence was all there." Recording dated October, 2007. He also stated "I don't feel like I did anything wrong. I don't feel like anybody did anything wrong." Recording dated October, 2008.

The law in the State, moreover, is clear that a defendant is not entitled to a new trial upon a subsequent discovery that a juror had concealed information during the jury selection process. New York's highest court has declared "we have never held that a juror's concealment of any information during voir dire is by itself cause for automatic reversal." People v. Rodriguez, 100 NY 2d 30, 34, 760 NYS2d 74, 77 (2003). "Absent a showing of prejudice to a substantial right, . . . proof of juror misconduct does not entitle a defendant to a new trial." People v. Irizarry 83 NY2d 557, 561, 611 NYS2d 807 (1994). If the defendant's motion contained sworn facts which would indicate that the juror's prior associations, contacts or conversations prejudiced the defendant and impacted the verdict, then this court would conduct a hearing to investigate the alleged misconduct. As another court has noted, "a post-trial evidentiary hearing into alleged juror misconduct or extraneous influence is required only when a party comes forward with 'clear, strong, substantial and incontrovertible evidence . . . that a specific, non-speculative impropriety has occurred.' " United States v. Sattar, 395 F. Supp 2d 66, 73 (S.D.N.Y. 2005).

In fact, the remainder of defendant's claims lack any documented showing of prejudice to a substantial right. It is not clear when juror eight discussed this case with his cousin, that he improperly received any information which impacted his verdict, or that he ever communicated any extraneous information to others jurors. Nor does the defendant's motion document that juror eight received or relied upon any prejudicial information in a

newspaper article he may have read during the trial. The law in New York is clear "that mere exposure to accounts in newspapers pertaining to a defendant and his conduct, without more, is insufficient to rebut the presumption of a juror's impartiality and to warrant disqualification . . . ." People v Costello, 104 AD2d 947, 480 NYS2d 565, 566 (2d Dept 1984); see People v. Chapman, 202 AD2d 297, 609 NYS2d 177 (1st Dept 1994).

It is unreasonable to expect that the jurors, who were summoned and ultimately selected to hear this case, would have had absolutely no information or knowledge about this matter. The cold-blooded murder of a young college student whose bullet-riddled body was found on a public street in Brooklyn provoked widespread discussion and media interest in the community. The United States Supreme Court, long ago, recognized that:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, supra; see also Casey v. Moore, 386 F. 3d 896 (9th Cir. 2004). Jurors today are exposed to an even wider array of information disseminated almost contemporaneously with news events.

______ Nothing in the defendant's motion satisfies the two basic prerequisites for alleged actual prejudice by juror eight, first that he had an opinion before trial that the defendant was guilty, and second that he did not render a verdict based on the evidence presented in court. See Meeks v. Moore, 216 F. 3d 951, 961 (11th Cir. 2000). Thus, since the defendant's motion is predicated on tenuous hearsay allegations and fails to establish juror misconduct which prejudiced his right to a fair trial, a hearing is not warranted in this case.

Far more disturbing than the alleged misconduct of the juror is the conduct of the defendant's mother which generated this motion. Giuliano, acting solely on "a rumor that

one of the jurors . . . lived near one of the witnesses in this case," took it upon herself to track down this juror, deceive him by misrepresenting who she was, falsely claimed to be a student of the criminal justice system, and secretly recorded their conversations. During their conversations, she attacked the lawyer who she had retained to represent her son at trial as a "high-priced clown," who "didn't put on a defense" and was "on the take." She repeatedly disparaged the criminal justice system by claiming everyone involved in it "has a motive . . . the prosecutors and the defense are both trying to manipulate the jury," and told juror eight she had learned that "30 percent of inmates behind bars are wrongly convicted." Recording dated November 6, 2007. Rather than being a careful investigation into a meaningful report of juror misconduct, what took place here was a baseless, reckless disregard for the privacy of a juror, founded not upon the intention to exonerate her son, but upon the malicious intention of a convicted murderer's mother to discredit the verdict against her son.

Giuliano's conduct has exposed a gaping flaw in New York law regarding the protection of jurors after their trial service has been completed. New York has no statute or appellate decision which regulates post-trial juror misconduct investigation. While jurors' addresses are required by law to be kept confidential (Judiciary Law section 509[a]), and judges typically admonish jurors at the end of trial that they do not have to speak to anyone about their verdict, neither measure protects a juror from the type of conduct engaged in this case.

Other jurisdictions have instituted prophylactic procedures regarding post-trial juror misconduct investigations which New York would do well to consider. The United States Court of Appeals for the Second Circuit requires permission of the trial court before jurors may be interviewed following trial because "complicity by counsel in a planned, systematic broad scale, post-trial inquisition of the jurors by a private investigator . . . is reprehensible, to say the least . . . ." U.S. v. Brasco, 516 F. 2d 816, 819 n. 4 (2d Cir 1975), cert. denied, 423 U.S. 860, 96 S. Ct. 116 (1975). That "court has consistently refused to allow a defendant to investigate 'jurors merely to conduct a fishing expedition.' " U.S. v. Orjuela, LEXIS 16034

(E.D.N.Y. October 15, 1992) quoting U.S. v Moten, 582 F.2d 654, 667 (2d Cir. 1978). As the Second Circuit noted in the Moten decision, "[a] serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would serve only to decrease public confidence in verdicts." Moten, supra at 665. Not only is the defense attorney expected to notify the court before engaging in a post-verdict investigation of a juror, notice to opposing counsel is also required. Id at 666. There is no question, therefore, that regarding post-verdict investigations into juror misconduct, in the Federal court located across the street from this state courthouse in which the motion is brought, the trial judge "has the power and the duty to supervise and closely control such inquiries." U.S. v. Calbus, 821 F2d 887, 896 (2d Cir. 1987). In a recent decision, moreover, the Second Circuit declared that a lawyer's post-verdict contact with a former juror, without prior notice to either the court or opposing counsel, "was wholly inappropriate." U.S. v. Gagnon, 282 Fed. Appx. 39, 40, n.1 (2d Cir. 2008).

"Federal courts have generally disfavored post-verdict interviewing of jurors." Haeberle v. Texas International Airlines, 739 F. 2d 1019, 1021 (5th Cir. 1984). The policy of the federal courts is not to "denigrate jury trials by afterwards ransacking the jurors in search of some new ground . . . for a new trial." United States v. Riley, 544 F.2d 237, 242 (5th Cir. 1976), cert. denied, 430 US 932, 97 S. Ct 1554 (1977). The United States Supreme Court recognized long ago that "courts must take such steps by rule and regulation that will protect its processes from prejudicial outside interferences." Sheppard v. Maxwell, 384 US 333, 362, 86 S.Ct. 1507, 1522 (1967).

Most of the Federal district courts have, therefore, adopted rules regarding post-trial juror contact. Requiring litigants to follow these rules is not viewed as a burdensome requirement and, according to at least one appellate court "should be standard practice."

Cuevas v. United States of America, 317 F.3d 751, 753 (7th Cir. 2003). That court, in fact, has upheld a district court's decision to exclude any evidence from post-trial juror interviews obtained without permission of the court. Id.

Post-verdict interviews of jurors by counsel, litigants or their agents is also prohibited in the First Circuit "except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate." Buskin Associates Inc. v. Raytheon Company, 121 F.R.D. 5 (Mass. D.C. 1988). The district court there noted that the Massachusetts Supreme Court had warned counsel and litigants that anyone who independently contacts jurors without prior court approval, "acts at his peril, lest he be held as acting in obstruction of the administration of justice . . . ." Commonwealth v. Fidler, 377 Mass. 192, 202–03, 385 N.E. 2d 513, 519-20 (1979) quoting Rakes v. United States, 169 F. 2d 739, 745 (4th Cir. 1948) cert. denied 335 US 826, 69 S. Ct. 51 (1948).

Other states require judicial supervision of post-trial juror interviews. In Delaware, for instance, judicial approval will only be granted upon "an appropriate showing" that such contact is warranted. See Delaware v. Cabrera, 2008 Del. Super. LEXIS 288 (August 7, 2008).

Indiana is a state in which post-trial jury contact by attorneys is apparently a common practice. An appellate court there has declared, however, that "post-trial jury contact may not be employed as a fishing expedition in an effort to obtain evidence in an attempt to impeach the jury's verdict." Young Soo Koo v. Indiana, 640 N.E. 2d 95, 105 (Indiana Ct. App., 5th Dist. 1994).

California has enacted statutes to maximize juror privacy and safety. These laws "require that the personal information of jurors, such as their names, addresses and telephone numbers, be sealed automatically following the recording of the verdict in a criminal case," any person seeking such information "must petition the court and show good cause for disclosure," and attorney contact with jurors is permitted "subject to sanctions for non-consensual or unreasonable contact." California Code of Civil Procedure Sections 206 and 237. In addition to these statutory protections, the Supreme Court of California has declared

that trial courts there possess "the inherent power to protect jurors' physical safety and privacy." Townsel v. Superior Court of Madera County, 979 P. 2d 963, 964 (Ca. Sup. Ct. 1999). It is clear in the state of California that:

> The jurors have an absolute right to discuss or not to discuss the deliberation or verdict with anyone. The parties must obtain a juror's consent prior to discussing the case, and any unreasonable contact is to be immediately reported to the trial judge. Discussions with consenting jurors may occur only at reasonable times and places. The trial court must inform the jurors of these rights prior to discharge. People v. Benavides, 99 Cal. App 4th 100, 107 (2002).

California's appellate courts have declared in no uncertain terms that "[o]ur jury system . . . depends upon adherence to the public policy which discourages harassment of jurors by losing parties seeking to have the verdict set aside." People v. Rhodes, 212 Cal. App.3d 541, 548 (1989); People v. Duran, 50 Cal. App. 4th 103, 117 (1996).

As the above survey of the law in other jurisdictions relating to post-trial investigation of juror misconduct indicates, the actions of Giuliano in locating the address of a juror in her son's murder case, engaging him in a deceptive, quasi-romantic relationship, and surreptitiously recording some of their conversations would violate the statutes and court decisions in every one of these jurisdictions. Perhaps, because no one in New York has ever previously engaged in such manipulative and deceptive conduct, our state has no statute or appellate decision which addresses the scope of permissible contact with jurors after a trial.

Like New York, Connecticut has no statute or officially-reported appellate cases addressing this subject. When confronted with an application by an attorney to contact jurors after a verdict in a civil case, a Connecticut Superior Court judge surveyed the law in other jurisdictions, noted the absence of Connecticut law on the subject, observed that "[g]iving disgruntled, losing litigants and their attorneys unfettered access to jurors certainly raises significant concerns," but granted the application provided that any communication with a juror contain the following prefatory statement and be limited to the following questions:

> "My name is______ and I represent the defendant Big Y foods, Inc. in the case of Benjamin Struski v. Big Y Foods. Big Y Foods has received permission from the court to talk to you about the case. You are not required to speak to me if you do not want

to. You are not in any way obligated to speak to me. If you agree to speak to me, you may refrain from answering any specific question I may ask you just by saying so. You should be aware that anything you say to me might become the cause of further court proceedings concerning your verdict in this case.

QUESTIONS:

1. Are you willing to speak to me about the trial proceedings?
2. Did you or any of the jurors begin to discuss the case before the end of the evidence and the instruction from the judge to begin deliberations?
3. Did the jury base its decision solely on the evidence provided at trial and on the law as stated by the judge? And if not, what other information was the decision based upon?
4. Did the jury base its decision on any facts or information which the judge instructed the jury not to consider or to rely on? And if so, what was that information?
5. Were all jurors present for all discussions during the deliberations?
6. Are you satisfied that the jurors fully and fairly discussed the evidence and the issues to reach a unanimous decision? If not, please explain."

Struski v. Big Y Foods, Inc., 2000 Conn. Super. LEXIS 2444, appendix (2000),

It seems absolutely clear, therefore, that the courts in every jurisdiction which have confronted post-verdict juror investigations, disfavor post-verdict juror interviews, disallow "fishing expeditions" for the purpose of impeaching jury verdicts, and have specific rules which protect jurors who have rendered verdicts from deceptive inducements to speak about their deliberations.

While section 509 (a) of the Judiciary Law provides that juror background information must be kept confidential, section 270.15(1)(a) of the Criminal Procedure Law authorizes jurors to complete questionnaires containing personal background information and disclosure of that information to the attorneys for both sides. The Appellate Division is authorized to entertain applications for disclosure of the confidential juror records. Judiciary Law Section 509 (a). Although the Appellate Division, Second Department has denied access to a newspaper seeking jurors' names and home addresses and that decision was upheld by the New York Court of Appeals (Matter of Newsday, Inc. v. Sise, 71 NY2d 146, 524 NYS 2d 35 [1987]), the Appellate Division, Third Department has authorized defense counsel to secure the names and addresses of potential jurors several weeks before a trial to enable counsel to investigate the jurors and advance his clients' right to an impartial jury. People v. Perkins,

125 AD2d 816, 509 NYS 2d 441 (3d Dept. 1986). Any further discussion of what happens to the personal background information of jurors and how it can be exploited is conspicuously absent under current New York law. Thus, it is theoretically possible for a defendant who has committed a vicious murder to gain the home address of a juror who votes to convict him, share that information with a family member or associate who then contacts the juror under false pretenses, manipulates the juror to speak about deliberations, surreptitiously records the juror's comments, and then years after the verdict offers this information to impeach the jury's verdict. This theoretical possibility has now become a reality because of the actions of defendant Guica's mother in this case.

At the defendant's trial in this case, jurors did not fill out questionnaires and the attorneys did not have any information about the jurors' addresses. That the defendant's mother subsequently located the home address of juror eight and possibly other jurors who served on her son's case demonstrates a callous disregard for the privacy rights of jurors and highlights the need for our law to protect future jurors from such intrusion.

Several years ago, a defendant, who like the defendant in this case had substantial resources and the creativity to tax the boundaries of post-verdict juror contact, made available to each juror who was unable to reach a verdict in his tax fraud prosecution a gratuity of $2,500.00. "While that conduct plainly undermined the integrity of trial by jury, it was not illegal." Donnino, Practice Commentary, Penal Law §215.22. As a result of the egregious conduct by the defendant in that criminal case, the New York State Legislature enacted a new statute which prohibits such conduct. See Penal Law §215.22, L.2001, sec. 42. In this court's view, the actions by the defendant's mother in this case pose an even greater threat to the integrity of jury trials warranting enactment of a statute prohibiting such acts in the future.

Every juror who has served or will serve in a case should be alarmed by the conduct of the defendant's mother in this case. Years after rendering a verdict, any juror could be the subject of a "sting" operation by an associate of the party the juror voted against at the trial.

The extraordinary actions of Giuliano to invade the privacy of jurors require a decisive response which sends a clear message that New York courts will protect its jurors.

Unless and until New York's Legislature and appellate courts address this issue, it will be up to the trial courts of this state, on a case by case basis, to assess the actions of litigants who contact jurors after a verdict has been rendered. The instant application could not provide a clearer example of juror abuse by a litigant bent on impeaching a verdict. Several factors warrant this conclusion. First, the verdict sought to be impeached was rendered in a criminal trial involving a gang-related, vicious murder, the kind of case which can easily alarm any prospective juror. Second, the juror contact was not initiated by a juror reporting misconduct or any information of observed misconduct, but rather upon either a rumor regarding a single juror, or worse, a fishing expedition to locate and investigate all of the jurors to try to find some wrongdoing. Third, the juror contact was not initiated by an attorney, who must operate under disciplinary rules which inhibit attorneys from engaging in unethical conduct and who are also considered officers of the court, but instead, was conducted by a woman with a clear motive to generate a claim, not to exonerate her son, but to secure him a new trial. Fourth and finally, the juror contact was based upon a ruse with the juror totally unaware that he was being interviewed and recorded, as well as being manipulated by the mother of the defendant who, years earlier, the juror had voted to convict of the crime of murder.

A motion predicated on a post-trial juror investigation, under these circumstances, is totally lacking in reliability and represents a grave threat to the jury system. The motion is procedurally flawed, substantively without merit, and an insult to the judicial process. No hearing is required, therefore, and the motion is summarily denied.

Hon. Alan D. Marrus
J. S. C.