No. 4D12-1488

IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT
STATE OF FLORIDA

JOHN B. GOODMAN,

***Petitioner/Defendant*,**

v.

STATE OF FLORIDA,

Respondent/Plaintiff.

Circuit Court No. 2010CF005829AXXMB
Circuit Court of the Fifteenth Judicial Circuit
In and For Palm Beach County, Florida

APPENDIX

PETITION FOR A WRIT OF PROHIBITION AND A WRIT OF MANDAMUS

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IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO.: 2010CF005829AMB

STATE OF FLORIDA,

Plaintiff,

v.

JOHN B. GOODMAN,

Defendant.
_____/

DEFENDANT'S SWORN MOTION FOR A CHANGE OF VENUE AND INCORPORATED MEMORANDUM OF LAW

The Defendant, JOHN B. GOODMAN, through undersigned counsel, respectfully moves this Court, pursuant to sections 47.091 and 47.121 of the Florida Statutes (2011), Florida Rule of Criminal Procedure 3.240, Article I, Section 16 of the Florida Constitution and the Fifth and Sixth Amendments to the United States Constitution, for a change of venue in this case, preferably to Miami-Dade County. In support of this motion, Mr. Goodman states the following:

1. On February 12, 2010, Mr. Goodman's automobile was involved in an accident resulting in the death of the second car's driver, Scott Wilson. Mr. Goodman was subsequently arrested and charged with one count of DUI Manslaughter/Failure to Render Aid and one count of Vehicular Homicide/Failure to Render Aid.

2. Since the day of the accident, Mr. Goodman has been the target of an unrelenting media blitzkrieg led by the editorial staff of the *Palm Beach Post* and aided and abetted by the attorneys representing the family of Scott Wilson in civil litigation against Mr. Goodman and Palm

Beach County police and prosecutors. The media assault – magnified many times over by the hundreds of unfiltered, hate-filled reader "comments" posted indefinitely on the internet by the *Post* – has thoroughly poisoned the jury pool against him to such a degree that neither *voir dire* nor jury instructions will be sufficient to guarantee him a fair trial in Palm Beach County.

3. The Supreme Court in *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), discussed the need for courts to be able to rely upon an ethically responsible and objective press, as the best partner for a court trying to avoid pre-trial prejudice:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against he miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard, 384 U.S. at 350. Responsible newspapers adhere to the Society of Professional Journalists Code of Ethics, *see* **Exhibit 1**, which requires journalists to:

- Test the accuracy of information from all.
- Always question sources' motives before promising anonymity.
- Make certain that headlines, news teases ... sound bites and quotations do not misrepresent[,]... oversimplify or highlight incidents out of context.
- Never distort the content of news photos or video.
- Avoid stereotyping by ... social status.
- Distinguish between advocacy and news reporting.
- Recognize that gathering and reporting information may cause harm or discomfort. Pursuit of the news is not a license for arrogance.

- Show good taste. Avoid pandering to lurid curiosity.

- Balance a criminal suspect's fair trial rights with the public's right to be informed.

Since 1922, the American Society of Newspaper Editors has promulgated similar "Statement of Principles, *see* **Exhibit 2**, including:

- Article IV - Truth and Accuracy: "...Every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly. Editorials, analytical articles and commentary should be held to the same standards accuracy with respect to facts as news reports."

- Article V "- Impartiality: ... Sound practice ... demands a clear distinction for the reader between news and opinion."

- Article VI - Fair Play: "Journalists should respect the rights of people involved in the news, observe the common standards of decency and stand accountable to the public for fairness and accuracy of their news reports...."

4. As underscored by the reader comments quoted in the *Preface*, *supra*, the editors, reporters and columnists for the *Palm Beach Post*, by far the largest newspaper in Palm Beach County,[1] long ago discarded these principles when it came to reporting and editorializing about Mr. Goodman. While it is, fortunately, rare for a newspaper to take a formal position, *as an institution* in editorials and otherwise, about an ongoing criminal case, the *Post* has been shamelessly doing just that since February 2010. Through its tabloid-style reporting, biased editorials, the use of reader "opinion polls" on various aspects of the case and the apparently permanent on-line posting of

[1] The *Palm Beach Post* reaches 668,500 adult readers. In addition, it hosts a popular web page, www.palmbeachpost.com, which as discussed in the text and elsewhere in this motion has posted dozens of "comments" from its readership.

over1,000 reader "comments" – including many thinly veiled death threats, incitements to vigilante justice and even mob violence if Mr. Goodman were to be acquitted – the *Post* has irrevocably poisoned the jury pool against Mr. Goodman. Such biased reporting is especially pernicious because social science research shows that information from sources perceived as being "neutral," such as newspapers, has a greater prejudicial effect than other sources.[2]

5. The following memorandum and exhibits analyzes the media deluge and the parties responsible for it in detail. However, one recent *Post* editorial provides a telling window into the likely impact of the media-inflamed community on Mr. Goodman's ability to obtain a fair trial in Palm Beach County. Although nearly 23 months have elapsed since the fatal accident on February 12, 2010, and initial flurry of inflammatory publicity that followed, on Dec. 6, 2011, the *Post* issued an editorial (one of many since the crash) criticizing a motion filed by Mr. Goodman's civil attorneys in the lawsuit brought against Mr. Goodman by the Wilson family. *See blogs.palmbeachpost.com*, Dec. 6, 2011, Opinion Zone Section, "Should polo mogul get break on DUI death lawsuit." On its face, the topic of the editorial would hardly seem even newsworthy, much less significant enough to justify an editorial – a technical legal skirmish in a civil lawsuit about how to calculate damages. The Wilson family had sued the bar where Mr. Goodman had allegedly been drinking and the bar had reached a financial settlement with the Wilson family. The issue in the motion was a purely legal question – whether that amount should be deducted from any damage award obtained from Mr. Goodman by the Wilson family. According to the editors of the *Post*, this somehow meant –

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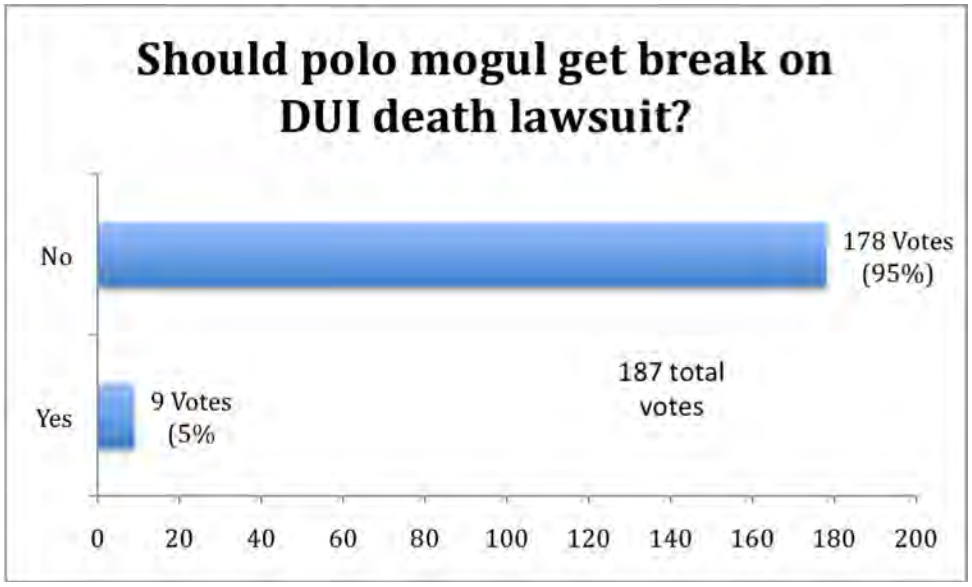
[2] *See* Christina A. Studebaker, Jennifer K. Robbenolt, Maithilee K. Pathak-Sharma & Steven D. Penrod, *Assessing Pretrial Publicity: Integrating Content Analytic Effects,* 24 L. & HUM. BEHAV. 317, 326 (2000).

> Goodman no doubt wants to shift responsibility to the bar. He could try to claim the bar served him when he obviously was drunk, or that the bar should have known he was an alcoholic.... Goodman has to take 100 percent responsibility for his own actions ... Goodman should pay 100 percent of any penalty the jury in his civil trial decides to impose.

6. Since Mr. Goodman, in fact, has never made this imaginary argument, the *Post* was using a straw man as a pretext for publishing an inflammatory, anti-Goodman editorial. However, the *Post* did not stop there. Posing the question "what do you think?," the *Post* invited its readers to cast on line votes on a question framed in the same loaded rhetoric as its headline: – "Should polo mogul get break on DUI death lawsuit?" As of December 23, 2011, the poll had received 191 total votes with 181 of them (95%) voting "no." The *Post* also solicited reader "comments." As it does in every such solicitation, the *Post* adds a disclaimer of sorts, promising to act as a gatekeeper in order to prevent the posting of comments that it considers "**obscene, hateful, racist or otherwise inappropriate**." As of December 23, 2011, the *Post* had published a total of 42 comments, only 2



of which could be construed as neutral. Among the comments that the *Post* did *not* find "obscene, hateful, racist or otherwise inappropriate" were at least three thinly and no so thinly veiled death threats (including the very first one posted)[3] as well as one posted on December 6th but still on line – that bluntly reads: "**Kill Goodman now!**" Another commentator suggested that Mr. Goodman be tortured *and then* killed, hoping that someone "**should nail this dork upside down by his nut sack and let the fire ants do the rest**."

7. Sending death threats through the mail or via email is a crime under both state and federal law. Yet, the *Post* apparently does not believe that comments urging that Mr. Goodman be killed – and many others like them, *see* pp. 18-19 *infra* – are even "inappropriate" to leave on line in perpetuity for its nearly 700,000-person audience.[4] Indeed, when a similar death threat was posted

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[3] The first comment posted by someone identified only as "legal eagle" wrote:

> **Settlement amounts aren't usually disclosed. Goodman (oxymoron name if I ever heard one) doesn't want to take responsibility for his own irresponsible actions. Isn't this guy with the egg-shaped dick who had underage girls give him "massages"? Isn't it the way it always is: the richer they are - the cheaper they become. He was drunk, hit the kid and left him to die in a canal. Mr. "Goodman": *be thankful this was not my son, you would have never made it to court.***

(Emphasis added). Comment No. 17 by "stu bum" similarly wrote:

> **A Men! *Mr. Goodman, you are also very luck[y] that you did not kill my son. You wouldn't have to worry about the judgment you are about to receive!* As a matter of fact, if you are of any good material, you should give every frigin dollar you (or you think you own) to the family of the KID YOU KILLED! That is the least you could do! *And heaven help you if we meet alone!***

(Emphasis added).)

[4] Under Fla. Stat. § 836.10, it is a second degree felony to send someone a letter or electronic communication, even anonymously, containing "a threat to kill or to do bodily injury" to that person. Similarly, 18 U.S.C. § 875(c) makes it a felony to "transmit[] in interstate ... commerce any communication containing any threat ... to injury the person of another." *See, e.g., United States v. Mabie*, No. 10-3526 (8th Cir. Dec. 2, 2011), *2011 U.S. App. LEXIS 23954* (affirming convictions under § 875(c) and § 876(c) where defendant sent threatening letters and emails to prosecutors, stating, among other things "A cornerstone of this society (for which countless have died) is a fair Justice system, honesty is

(continued...)

back in February 2011 in response to a story on *Page2live.com*, Feb. 27, 2011, entitled "Once again, Sunday is DUI killing suspect John Goodman's day" – "**I'm gonna get some friends together. Your [sic] dead you slimey [sic] bastard**," posted by "Goodman Die" at 10:23 PM on February 27, 2011 – Mr. Goodman filed a criminal complaint and undersigned counsel sent the prosecutors emails requesting an investigation. *See* **Composite Exhibit 3**. The response from the prosecutors and law enforcement? Nothing. The response from the *Post*? The death threat remains on line to this day.

8. Another reader commenting to the December 6th editorial graphically fantasized about Mr. Goodman being raped in prison by "some big Haitian" who would "stick him in the corn hole." While that posting would seem to satisfy all four of the *Post*'s criteria for deletion – it is obscene, hateful, racist and inappropriate – both the editorial staff of the *Post* and its readership (who are invited to complain about offensive postings) apparently disagree. The posting remains.

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[4](...continued)
essential, correct your mistakes without delay or suffer the consequences" and "If I don't hear from you, I'll stop by some evening, so we can work toward justice"); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997) (finding evidence sufficient to convict a disgruntled citizen who sent an FBI agent an email stating "[t]he silver bullets are coming" but reversing based on evidentiary errors); *United States v. Clemens*, No. 10-10124-DPW (D. Mass. April 22, 2011), *2011 U.S. Dist. LEXIS 43728* (affirming conviction under §875(c) where citizen, after losing two civil cases against a town, sent emails to the town's attorney stating, among others, "[o]ne way or another, I will have my day in court or the back alley [hint hint, veiled threat potential here]," that he was "looking forward to putting" the attorney in his place, that he wished "a 10-ton I-beam would fall on you ... Splat! Boy, would I love to see that!" and "You, at this point, I assure you, will get what you deserve. Pow! Bang! Splat! I really, truly and sincerely wish you were dead"). *See also United States v. White*, 610 F.3d 956 (7th Cir. 2010) (per curiam) (affirming conviction for soliciting a crime of violence under 18 U.S.C. §373, in part, based on defendant's website posting that "everyone associated with the Matt Hale trial has deserved assassination for a long time" and posting name and identifying information of a juror); *United States v. Hanna*, 293 F.3d 1080 (9th Cir. 2002) (although reversing for trial error, holding that defendant's distribution of leaflets about President Clinton that read "KILL THE BEAST" and "WANTED FOR MURDER, DEAD OR ALIVE" stated an offense under 18 U.S.C. § 871(a), despite the fact that he did not send it to the President); *United States v. Turner*, No. 09-00650 (E.D.N.Y. Oct. 5, 2009), *2009 U.S. Dist. LEXIS 131244*, at ** 6-8 (rejecting First Amendment challenge to an indictment charging defendant under 18 U.S.C. §115(a)(1)(B) for placing a post on a blog that called for the killing of three judges to prevent other judges from "act[ing] the same way," recognizing that "[p]ublic discourse must mean something more than threats and rants"). *But see United States v. Bagdasrian*, 625 F.3d 1113 (9th Cir. 2011) (reversing defendant's conviction under 18 U.S.C. § 879(a)(3) for posting message boards referring to presidential candidate Barack Obama "shoot the nig" and Obama "will have a 50 cal in the head soon").

9. Most of the other comments to the December 6th editorial either call Mr. Goodman names (*e.g.* "low life garbage," "scum of the earth," "punk" etc.) or rail about his wealth, his lawyers and/or the "corrupt" court system – "corrupt" because Mr. Goodman has not been locked up yet. One reader actually commented on the comments and had no trouble interpreting their collective message: "**Hmmm, by the sounds of the comments here, Goodman might be better off in jail, for his own protection.**"[5] The *Post*'s December 6th editorial, skewed "polling" and *ongoing* publication of citizen outrage – implicitly endorsed by the *Post*'s failure to find such the postings sufficiently offensive to remove – is not an isolated incident but rather the culmination of similar hatemongering that the *Post* has been fomenting on a continuing basis for the last 23 months (with much of it repeated in stories picked up by other media outlets such as the *Sun Sentinel*).

10. As demonstrated in the following Memorandum of law, the damage to the jury pool caused the *Post* with the assistance of both the Wilson family's attorneys and Palm Beach law enforcement is both demonstrable and irreparable by any measure this Court has the power to employ.

a. Part I sets forth the legal standard governing change of venue motions and the factors courts have used to assess the likelihood of both empaneling an impartial jury and keeping that jury free of taint throughout the proceedings.

b. Part II summarizes the media coverage, addressing the factors discussed in Part I, using the results of a *Media Coverage Analysis* conducted by Dubin Research & Consulting.

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[5] Whether a statement is considered a "true threat" for criminal prosecution under federal law, one factor courts have looked at is how others perceived them. *See Bagdasrian*, 625 F.3d at 1129 (Wardlaw, J., concurring in part, and dissenting in part).

See **Exhibit 4**. The articles and broadcasts have been separately reproduced in full in *Media Coverage Supplement*, attached hereto as **Exhibit 5a-e.**[6]

c. Part III demonstrates how this deluge of inflammatory material has infected the jury pool, summarizing the results of a *Public Opinion Survey* that Dubin Research and Consulting conducted with residents of Palm Beach County from October 5-26, 2011. *See* **Exhibit 6**. The survey was conducted under rigorous polling standards, with a margin of error of only plus or minus 5 percent. *See* Affidavit of Amy Shields, **Exhibit 7**. The survey's results closely correlates with the impression obtained from the publicity itself, various polls taken by the *Post* and "comments" to the *Post*'s publications. The expert Dubin researchers have concluded that at the very least, Palm Beach County citizens categorically believe that John Goodman was under the influence of alcohol (and possibly drugs) on the night of the accident, that he ran a stop sign, hit another car (pushing it into a canal), caused the death of a young man, and that he fled the scene, leaving the other driver to drown. *See* **Exhibit 6**.

d. Part IV demonstrates that based on the review of the media and polling to date and the likelihood that a trial held in Palm Beach County would generate an even greater media frenzy, Mr. Goodman is entitled to a presumption of prejudice, mandating a change of venue. Part IV also demonstrates that under these conditions – and the fact that in the internet age publications, televisions broadcasts and the vicious rants of bloggers are permanently stored and accessible to jurors with the click of a mouse – even the extensive use of individualized *voir dire* and jury instructions cannot be trusted to ensure Mr. Goodman a fair trial in Palm Beach County.

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[6] In addition, counsel will be submitting CDs containing these materials to the Court and the prosecutor which contain these same materials along with hyperlinks directly to the articles and broadcasts on the internet.

MEMORANDUM

I. CHANGE OF VENUE STANDARDS AND FACTORS

A. Any Doubts About the State's and the Court's Ability to Furnish Mr. Goodman a Trial By a Fair and Impartial Jury Must Be Resolved In Favor of Mr. Goodman

"The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907) (opinion for the Court by Holmes, J.). Criminal defendants especially have the right to be tried in a forum "free of prejudice, passion, excitement, and tyrannical power." *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). When prejudicial publicity and an inflamed community atmosphere coalesce, a defendant is entitled to a change of venue in order to ensure his Sixth Amendment right to an impartial jury and Fourteenth Amendment due process right to a fair trial. *See Estes v. Texas*, 381 U.S. 523, 85 S.Ct. 1628, 14 L.Ed. 2d 543 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Coleman v. Zant*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986); *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir. 1983).

In "[o]rdinar[y]" cases, trial courts need not grant a change of venue motion "until an attempt is made to select a jury." *Serrano v. State,* 64 So.3d 93, 112 (Fla. 2011) (per curiam). However, in "extreme or unusual situation[s]," trial courts "may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process....'" 64 So.3d at 112, quoting *Manning v. State,* 378 So.2d 274, 276 (Fla. 1979). Indeed, so dangerous is the subconscious

and conscious effect of pervasive pretrial publicity on a potential juror's mind that when pretrial publicity approaches the saturation level, courts must disregard prospective jurors' assurances of impartiality and *presume* prejudice. *See Mu'Min v. Virginia,* 500 U.S. 415, 429-30, 111 S.Ct. 1899, 114 L.Ed. 2d 493 (1991) (recognizing that when pretrial publicity is pervasive within a community, a "juror's claims that they can be impartial should not be believed" and *voir dire* is an inadequate curative). *See also Sheppard,* 384 U.S. at 355; *Estes*, 381 U.S. at 551; *Rideau*, 373 U.S. at 727; *Irvin*, 366 U.S. at 722-723; *Coleman*, 778 F.2d at 1489-90, 1538; *Pamplin v. Mason*, 364 F.2d 1 (5th Cir. 1966). Therefore, while the defendant bears the burden of proof on a change of venue motion, the Court is "bound to grant" it "when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." *Manning,* 378 So.2d at 276. Moreover, any doubts about potential impact of negative pretrial publicity should be weighed "liberally" in Mr. Goodman's favor:

> We take care to make clear . . . that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the state to furnish a defendant a trial by a fair and impartial jury. Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is a reasonable basis shown for a change of venue, a motion therefore properly made should be granted.
> A change of venue may sometimes inconvenience the state, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly re-trial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant change of venue.

Singer v. State, 109 So.2d 7, 14 (Fla. 1959).

B. The Multi-Factor Test

The oft-repeated "test" for determining when a change of venue is warranted "is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom." *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla. 1977) (citation omitted). *Accord Serrano*, 64 So.3d at 112; *Hooks v. State*, No. 4D08-4729 (Fla. 4th DCA June 29, 2011), *2011 Fla. App LEXIS 10159*, at *7. To guide trial courts in exercising their discretion, the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit and the Supreme Court of Florida have recognized a non-exhaustive list of factors to consider, including–

(1) The size/saturation level of the publicity;

(2) The source(s) of the publicity, especially when it is law enforcement;

(3) The inflammatory nature of the publicity and whether it is balanced or one-sided;

(4) The continuity of the publicity and whether it could be expected to dissipate by the time trial commences;

(5) The size of the community (and expected jury pool); and

(6) The likelihood that voir dire and jury instructions will be successful in ameliorating the prejudice.

Skilling v. United States, ___ U.S. ___, 130 S.Ct. 2896, 2916, 177 L.Ed. 2d 619, 644-45 (2010); *United States v. Campa*, 459 F.3d 1121, 1144 (11th Cir. 2006) (en banc); *Coleman*, 778 F.2d at 1438; *Rolling v. State*, 695 So. 2d 278, 284 (Fla. 1997) (citing *Manning*, 378 So. 2d at 276); *Hooks*, *2011 Fla. App LEXIS 10159*, at *7. If the Court decides to wait until *voir dire* to decide the motion,

the Court then must evaluate the difficulty in selecting an impartial jury. *Ibid.* And, even then, the Court should be wary of blindly accepting jurors' assessments of their own ability to be fair. As, the *Rolling* Court teaches, "such assurances are not dispositive." *Rolling*, 695 So. 2d at 285.

As demonstrated below, this case is "extreme and unusual" in both the pervasiveness and viciousness of the publicity. The examples listed below are but a very, very, small sampling of stories and bylines incessantly reported since the case's inception. Moreover, the advent of the internet and it's potential for interactive communication with the public has catapulted already negative and pervasive coverage to an entirely new level:

> One reason threats are more menacing on the Internet is their ability to reach a much larger and more widespread audience. Town criers are no longer constrained by the volume of their voice. Before the Internet, it was difficult for a speaker's message to spread throughout a small community, much less to the rest of the world. Now, the same message posted on a web page is available twenty-four hours a day, seven days a week in almost any country in the world.

Scott Hammack, *The Internet Loophole; Why Threatening Speech On-line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 81 (2002). As highlighted in the *Preface* above, a great deal of media coverage consists of prejudicial comments published on the *Post*'s internet blogs by members of the public. In *Rolling*, 695 So. 2d at 286, public commentary was part of the court's analysis. However, the manner in which the public comments were gathered and presented when *Rolling* was decided was completely different than today. Whereas in *Rolling*, 695 So. 2d at 286, the newspaper gathered comments which had been mailed in, and then published comments on both sides of the issue (in that case the death penalty), here, the *Post* has performed no such moderating or gatekeeper function, despite its promise to do so.

II. THE MEDIA BLITZKRIEG

A. Palm Beach County Has Been Saturated With Negative Publicity

By any measure, this case has generated, and continues to generate, an avalanche of negative publicity. As summarized in the accompanying *Media Coverage Analysis*, **Exhibit 4**, as of December 9, 2011, there had been 213 reports in 12 media outlets relating to the case. Additionally, the Dubin researchers found a 1998 profile of Mr. Goodman in the *Houston Press* – "*Money can't buy love. But it can buy polo*" – which was also included in the analysis since it is available on-line. The 12 outlets include four (4) local newspapers (*The Palm Beach Post*, the *Sun-Sentinel*, the *Broward-Palm Beach New Times* and *The Miami Herald*), one (1) local blog (Page2Live.com), four (4) local TV stations (NBC/WPTV, ABC/WPBF, FOX/WFLX and CBS 12), and three (3) non-local newspapers (the *Houston Press*, the *Houston Chronicle* and the *Orlando Sentinel*). *See* Table 1, *Media Coverage Analysis*, **Exhibit 4**.

The analysis further reflects that the *Palm Beach Post* is responsible for nearly all of the publicity – 76 publications (available through *Palmbeachpost.com*) and 17 other reports on the *Post*-sponsored gossip blog (*Page2live.com*). In addition, the vast majority of the stories published by the *Sun Sentinel*, *Miami Herald* and *Orlando Sentinel* were taken directly from the *Post.* *See* **Exhibit 8**. Television coverage has also been extensive with at least 57 total broadcasts. *See* **Exhibit 4**.

However, the number of original publications represents only the tip of the iceberg. As noted above, many of the editorials and stories published on *Palmbeachpost.com* and *Page2live.com* invite "comments" from readers, allowing them to spout off – usually anonymously or with pseudonyms – about the stories, the people in them and each other. The online media coverage of Mr. Goodman's case has yielded over 1,000 reader/viewer comments – the vast majority of them hostile

to Mr. Goodman. For instance, the 17 columns collected from *Page2Live* generated a whopping 934 user comments alone.

Although, as previously noted, each time the *Post* solicits comments it states that it will screen for and delete comments it considers "obscene, hateful, racist or otherwise inappropriate" and invites bloggers to report such comments, in fact, the *Post* has ignored this obligation. Counsel could find evidence of only *one* comment having been deleted, although the anti-semitic content of the original comment remains on-line through the still on-line complaint posted by another blogger:

> Why hasn't sk's moronic anti-semitic comment posted at 8:15 pm been removed yet? It has nothing whatsoever to do with this news article! "**roy black works for jews only, thats where the moneys attttttttttttttttt**."

See Palmbeachpost.com, May 21, 2010, "Lawyers on both sides of Goodman case are formidable" (posted by "sk" at 8:14 p.m., May 22, 2010) (emphasis added).[7]

Still on-line also is a story featured in a *Broward-Palm Beach New Times* piece called "The Dirty Dozen: 2010's Most Despicable People."[8] The piece presents as a foregone conclusion that Mr. Goodman, the "polo mogul," was a "coke addict and an alcoholic" who "ran a stop sign" colliding with Mr. Wilson's car and then "made no attempts to flag down any vehicles for help."

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[7] The *Post* has yet to remove other anti-semitic postings, such as:

> "...**I was told he was just late for Midnight Services at the Sin-a-gogue,..**"
> Posted by "checks and balances" at 12:57 p m., March 9, 2010, as a comment to *Page2live.com*, March 9, 2010, "Source: Polo boss John Goodman passed out at the wheel."

> "**[Goodman is] another rich jew who will spend whatever it takes to stay out [sic] jail. Sad part he will get away with it**."
> – Posted by "rickmac37" at 3:23 p.m. on July 27, 2010, as a comment to *Palmbeachpost.com*, July 24, 2010, "Friends of Scott Wilson cleaning crash site: 'We just want Wellington to remember.'"

[8] *See Browardpalmbeach.com*, Dec. 30, 2010, "The Dirty Dozen: 2010's Most Despicable People."

The article is accompanied by a cartoon depiction of Mr. Goodman riding a polo horse dressed as a smiling, black-robed grim reaper holding a sickle in one hand and a polo stick in the other.

As a result of the *Post*'s reckless behavior, Mr. Goodman has been given the type of "limitless and eternal notoriety, without any controls" that violates any sense of decency and due process. *See Bursac v. Suozzi*, 22 Misc. 3d 328; 868 N.Y.S.2d 470, 481 (2008) (finding that Nassau County violated the due process rights of a resident by posting his name and photograph on an internet "Wall of Shame" after he was arrested for drunk driving).

The *Post*'s still on-line comments to its many stories are riddled with vicious personal attacks, calling Mr. Goodman *inter alia*: "monster," "coke fiend," "cockroach," "rich power hungry pig," "entitled sociopath," "spoiled, rich, self-centered MAN-child," a "dirt bag ... utterly without a shred of human decency," "slimy maggot," "mercenary, self-centered, unsympathetic, pretentious,

pompous, plastic, pointless human terd[],"and "complete degenerate."[9] Numerous others contain direct or implicit death threats, especially if he were to be acquitted,[10] or state that if they were the parents of Scott Wilson they would have killed Mr. Goodman by now themselves.[11] Others only

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[9] *See Page2live.com*, Feb. 12, 2010, "Sources: Wellington polo bid John Goodman was at party before deadly crash" (posting comment by "carl" at 1:02 a m., 2/21/2010 ("**why shouldn't we vilify a monster?. cause that's what he is!**"); *Palmbeachpost.com*, Feb. 14, 2010, "Polo fans say game not tainted by fatal crash") (posting comment by "Ms. Taylor" at 2:23 p.m., 2/15/2010 ("**....mercenary, self-centered, unsympathetic, pretentious, pompous, plastic, pointless human terds**...") and comment by "Peter Golding" at 8:22 p.m., 2/15/2010 ("**...complete degenerate**"); *Page2live.com*, Feb. 19, 2010, "Report: Wellington polo boss John Goodman allegedly a coke fiend" (posting comment by "Js" at 9:49 p m., 2/19/2010 ("**... all he really amounts to is equivalent [sic] of a Cockroach**" and comment by "VENA" at 9:53 p m., 2/19/2010 ("**You are an evil person not even qualified to be called a human being**"); *Palmbeachpost.com*, Feb. 26, 2010, "Court filing: Wellington polo club founder Goodman failed to comply with cocaine tests" (posting comment by "Wow" on 02/26/2010 ("**...rich power hungry pig**"); *Page2live.com*, March 10, 2010, "Mother of victim in polo boss John Goodman's crash lawyers up" (posting comment by "carlos" at 9:42 p.m., 3/11/2010 (**"Goodman is super GUILTY!!"**); *Palmbeachpost.com*, May 20, 2010, "Cerabino: Woman has nightmare encounter with Wellington polo mogul Goodman" (posting comment by "Yusuf Alkindi" at 5:06 p m., 5/21/2010 ("**...Goodman is a bit of an entitled sociopath**"); *Palmbeachpost.com*, Aug. 23, 2010, "Was polo club founder's phone working?" (posting comment by "Oh Jesus!," at 4:15 p.m., 8/24/2010 ("**...spoiled, rich, self-centered MAN-child**"); *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case" (posting comment by "Buddy," 10:58 p.m., 10/25/2010 ("**Goodman is a dirt bag; a man utterly without a shred of human decency**"); *Page2live.com*, Feb. 27, 2011, "Once again, Sunday is DUI killing suspect John Goodman's day" (posting comment by "Al Neuharth" at 11:04 p.m., 2/27/2011 ("**slimy maggot...**").

[10] *See, e.g., Page2live.com*, Feb. 12, 2010, "Sources: Wellington polo bid John Goodman was at party before deadly crash" (posting comment by "Yassar Arafat" at 8:48 p.m., 2/16/2010 ("**If Goodman gets off the hook on this one ... he better watch his back**"); *Page2live.com*, Feb. 19, 2010, "Report: Wellington polo boss John Goodman allegedly a coke fiend" (posting comment by Denise, 10:00 p.m., 2/19/2010, "**...Watch out PBC we are watching....closely... Those that turn away from justice will answer dearly for this atroscity [sic].... I would glady [sic] put this guy out of his misery....Can anyone say FIRING LINE!!!!!**"); *Page2live.com*, March 1, 2010, "Let's get drunk: Roy Black, polo boss John Goodman's lawyer, hosts yearly shindig" (posting comment by "nemo"at 6:39 p.m., 3/1/2010, "**Rot Black, Goodman, OJ ... kill them, kill them all**"); *Page2live.com*, March 9, 2010, "Source: Polo boss John Goodman passed out at the wheel" (posting comment by "The Equalizer" at 1:13 p.m., 3/9/2010, "**Remember the TV series? That's who is needed in Florida... especially South Florida. Someone to do what the cops and judge will not do. Equalize the situation for the people.**"); *Page2live.com*, March 19, 2010, "Sly Stallone's dad jumps in John Goodman fray, asks forgiveness for Goodman" (posting comment by "Ed" at 11:57 a m., 3/21/2010, "**Someone should run him into a canal and let him experience what it's like to die alone in the dark water**"); *Palmbeachpost.com*, May 25, 2010, "Cerabino: Goodman's defense can't rely on gap in tragic night"(publishing comment by "Growly Bears" at 3:20 p m., 1/27/2011, "**This piece of trash needs to have his eyes **** out of his head, skull raped, head unscrewed and spat down his neck!!!!!! I'll do it ..... for Lilly!!**").

[11] *See, e.g., Palmbeachpost.com*, Feb. 17, 2010, "Mother of Wellington college grad killed in crash: 'He died with a pure heart" (posting comment by "Yvonne," 6:54 a.m., 2/18/2010 ("**...My husband would have killed Goodman by now if that was our child... It would be better for my conscience to be clear that the man who killed my child paid the ultimate price for his actions with the same results then to walk this earth and know I could have done more....**"); *Page2live.com*, Feb. 27, 2011, "Once again, Sunday is DUI killing suspect John Goodman's day" (posting comment

(continued...)

wish that Mr. Goodman was dead, usually in various horrific ways, including drowning, hanging, electrocution, being drawn and quartered, publicly whipped and then drawn and quartered, shot in the head, hung beside the road with his body left to rot, stomped on by a 100 horses and "[p]ut ... in jail w/'Bubba'" and "[t]hen h[u]ng ...by his balls with high pitch piano wire."[12]

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[11](...continued)
by "Wishing Goodman Away To Jail" at 10:38 p m., 2/27/2011 ("**...If it happened to my child, lets just say I would not be able to see this man happy in this photo and not go to his house and do him harm**"); *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case" (posting comment by Lennyais at 5:29 p.m., 10/25/2010, "**This man will pay for his actions one way or another as I believe in an eye for any eye. hes just lucky it wasnt one of my kids he did this to...**"); *Palmbeachpost.com*, Dec. 6, 2011, "Should polo mogul get break on DUI death suit?" (posting comment by "legal eagle" at 5:04 p.m., 12/6/2011 ("**Mr. 'Goodman': be thankful this was not my son, you would have never made it to court**").

[12] *See, e.g., Palmbeachpost.com*, Feb. 17, 2010, "Mother of Wellington college grad killed in crash: 'He died with a pure heart" (posting comment by "T" at 9:19 a.m., 2/21/2010, "**Goodman deserves to suffer "a fate worse that Mr. Wilson's**"); *Palmbeachpost.com*, Feb. 21, 2010, "Wellington Polo mogul Goodman faces scrutiny after fatal wreck" (posting comment by "Ric," 6:24 p m., 2/22/2010, "**Put him in jail w/'Bubba'! Then hang him by his balls with high pitch piano wire**"); *Browardpalmbeach Newtimes*, Feb. 23, 2010, "Polo was his life," (Comment by HEHOWKNOWS: "**Yeh, He's 'innocent' all right. He does deserve the 'bedrock of the criminal justice system.' A ROPE FROM THE NEAREST TREE!**"); *Page2live.com*, March 9, 2010, "Source: Polo boss John Goodman passed out at the wheel" (posting comment "Author" at 10:32 p m., 3/9/2010 ("**When he was found the cops should've just kneeled him down in a ditch and put a bullet in his head**...."); *Palmbeachpost.com*, May 20, 2010, "Goodman seeks to postpone parent's wrongful-death suit in fatal crash, saying it would jeopardize defense in criminal case" (posting comment by "john" on 5/20/2010 ("**Let him be tossed upside down into a canal and then fill it with water and let him watch everyone see him drown**") and "Zunny" on 5/20/2010 ("**...I say 'FRY THE BASTARD'**"); *Palmbeachpost.com*, May 21, 2010, "Lawyers on both sides of Goodman case are formidable" (comment by "Jupiter" on 5/21/2010 ("**Personally, I'd like to see him drawn and quartered outside of city hall, but that's me**"); *Palmbeachpost.com*, July 24, 2010, "Friends of Scott Wilson cleaning crash site: 'We just want Wellington to remember'" (posting comment by "s' on 7/24/ 2010, "**That drunk should be hung beside the road and his body left to rot!!!!!!!!**"); *Palmbeachpost.com*, Aug. 23, 2010, "Was polo club founder's phone working?" (posting comment by "Jim Campbell" at 12:30 p m., 8/24/2010, "**How do people get to be such trash. He should be publicly whipped and then drawn and quartered. More of the elite trash!**"); *Sun Sentinel.com*, Jan 26, 2011, "Polo club founder's drops claim victim may have shared blame for fatal crash" (via the Palm Beach Post) (posting comment by "DavidFromdelraybeach" at 12:09 p m., 1/27/2011, "**This guy should get stomped on by 100 horses! White trash scumbag!**"); *Page2live.com*, Feb. 27, 2011, "Once again, Sunday is DUI killing suspect John Goodman's day" (posting comment by Abe Silverstein, 6:07 p m. 2/28/2011, "**As far as 'JUSTICE': what they should do with this arrogant animal GOODMAN ...is lock him in an old car and chain all the doors shut and then push it into a canal and let him feel what it was like for his VICTIM who he never even had the decency to try and help. Let him sit there shackled inside as the water starts to fill up that car upside down and really feel just EXACTLY what his victim felt! ... And announce it – let the whole public and all his polo idiot drunks & druggies come out and watch it take place....**"). *See also See also Page2live.com*, Feb. 16, 2010, "Will justice prevail in Welly polo boss John Goodman's crash?" (comment #36 by "Carmine": "**This guy Goodman should have one of his relatives strapped in a car and have a truck broadside it while he is forced to watch**"; *Sen Sentinel.com*, Feb. 20, 2010, "Before involvement in fatal crash, polo patron built legacy in Wellington," (comment by (continued...)

As the latter posting also illustrates, many of the postings are both obscene and racist, with readers gleefully envisioning Mr. Goodman being raped or gang raped in prison by "big black dudes" to become their "pussyboy."[13] Even those members of the public who might otherwise still try to be fair and impartial would likely fear for their own safety if they did not convict Mr. Goodman. The comments are replete with the threat of protests and even mob violence if the jury does not convict. The following are some representative examples:

> ● **"This case will be very interesting, and from the posts on here there will be a total outrage from the public if this guy gets off."**[14]

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[12](...continued)
"Lambchop 123" at 9:54 a m., 2/21/2010: "**Off to jail with you. Better yet, bring out the guillotine.**").

[13] *See, e.g., Palmbeachpost.com*, Feb. 21, 2010, "Wellington Polo mogul Goodman faces scrutiny after fatal wreck" (posting comment by "peekaboo" at 10:09 a m., "**He doesn't quite look like a manly man. Maybe he'll be the right fit for 'bubba' knocking at his back door**") ; *Palmbeachpost.com*, Feb. 26, 2010, "Court filing: Wellington polo club founder Goodman failed to comply with cocaine tests" (posting comment by "sapo" at 6:35 p m., 2/26/2010, "**You are going to prison for sure. Let me know how that first love encounter goes? I hear hair gel works great and it wont hurt that much**"); comment by "joe six pack" at 6:45 p m., 2/26/2010, "**...I hope he bunks with one of the biggest brothers out there who has a fondness for middle aged guys....**"); and comment by "barber" at 12:59 a m., 2/27/2010, "**...This guy really needs to meet his new jail cell mates (new wives), they will properly handle this coke head love machine**"); *Sun Sentinel.com*, April 29, 2010, "Dad man's parents sue Goodman, polo club and bar in fatal Wellington crash" (via the Palm Beach Post) (publishing comment by "franko" at 5:08 a m., 4/30/2010, "**Put this murderer behind bars and maybe his new cellmate of a 'husband' will show him the finer social graces of prison life!**"); *blogs.browardpalmbeach.com*, May 19, 2010, "Polo Club Founder Arrested, Charged With DUI" (publishing comment by "Joel Goodman" at 5:21 p.m., 5/20/2010,"**I would sentence him to 20 years in one of our worst state prisons where he can be some big black dudes pussy boy**"); *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case" (posting comment by "Billy Clinton" at 7:26 a.m., 6/28/2011, "**I hope he gets 30 plus years in a cell with Bubba**"); *Page2live.com*, Feb. 27, 2011, "Once again, Sunday is DUI killing suspect John Goodman's day" (posting comment by "Al Neuharth" at 11:04 p m., Feb. 27, 2011,"**Goodman is going to prison and they will love to bend him over in the showers and make him their b----, oh yeh–you better lube up and practice taking that sausage before they put you away Big John! You got it COMIN'...!!!!!**"); comment by "Woody Johnson" at 3:02 p.m., 2/28/2011, "**Rot in Hell, or Raped in Prison. Not sure what would be worse. But a good daily gang rape of the chubby rich guy in prison, well, I can almost guarantee that**"); and comment by "What success???" at 5:48 p m., 2/28/2011, "**I hope he rots in jail and gets gang-raped every single day and night**").

[14] Comment by "Sam" at 11:18 p m., 2/16/2010, responding to *Page2live.com*, Feb. 12, 2010, "Sources: Wellington polo bid John Goodman was at party before deadly crash."

- **"If he is found innocent, the masses should take to the streets.... We should organize demonstrations."**[15]

- **"FACT: The public outrage is at a boiling point with the speculation that he will get off."**[16]

- **"Why are not thousands of Citizens Marching on City hall and this guys mansion. This is called RICH JUSTICE."**[17]

- **"The riots in LA? If this guy walks, people are going to come unglued."**[18]

- **"We should all show up at the courthouse and stage a united front."**[19]

- **"Either he goes down in the courts of our land, or maybe he will be taken down by the justice of the people who are over these kinds of pos's ... no fat body guard will stop the revenge of the people!"**[20]

Judge Kelly recently came under attack for having granted the motion discussed at pp. 5-6 *supra* and that was only in the civil case.[21] All 13 comments posted on-line to date criticize the

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[15] Comment by "T" at 9:19 a m., 2/21/2010, responding to *Palmbeachpost.com*, Feb. 17, 2010, "Mother of Wellington college grad killed in crash: 'He died with a pure heart."

[16] Comment by "Lou" at 2:58 p.m., 3/5/2010, responding to *Page2live.com*, March 4, 2010, "Polo boss John Goodman shuns Welly, lands in luxury beachside retreat."

[17] Comment by "american patriot" at 8:27 a.m., 3/8/2010, responding to *Palmbeachpost.com*, March 7, 2010, "Scene of polo club owner's fatal crash not dangerous enough for traffic signals, officials say."

[18] Comment by "Chris" at 11:21 a m., 9/7/2010, responding to *Palmbeachpost.com*, May 21, 2010, "Lawyers on both sides of Goodman case are formidable." This comment is also noteworthy in that it was posed in September about an article originally published some four months earlier.

[19] Comment by "Ann C" at 7:08 p.m., 10/25/2010, responding to *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case."

[20] Comment by "what the f----" at 9:15 p m., 6/24/2011, responding to *Page2live.com*, Feb. 27, 2011, "Once again, Sunday is DUI killing suspect John Goodman's day."

[21] *See Palmbeachpost.com*, Dec. 21, 2011, "Judge rules Goodman can get credit for money Players Club paid to

(continued...)

ruling and either call Judge Kelly names (“”an idiot,” “another moron”), suggest that he had been bribed by Mr. Goodman (“[t]he millionaire paid off the judge for this ‘ruling’”) and/or threaten to have him “removed from the bench” if Mr. Goodman was acquitted or received a “light sentence.” One arguably threatens to kill both Mr. Goodman *and* the judge: “**Daddy, Get yuurself a problem solver and send this a hole and the judge on a happy trails vacation**.”

A small minority of the bloggers have dared to voice concerns about the “‘lynch mob’ mentality” in Palm Beach County and have expressed concerns that “the public” might “take matters into their own hands.”[22] Some perceptively blamed the *Post* for the hostility: “Trial by newspaper should send a chill up your spine.”[23] And, several more openly called for a change of venue.[24] Such

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[21](...continued)
Wilson’s family”; *Sun Sentinel.com*, “Judge: Millionaire DUI manslaughter suspect can get credit in lawsuit” (from the *Post*).

[22] *See Palmbeachpost.com*, Feb. 21, 2010, “Wellington Polo mogul Goodman faces scrutiny after fatal wreck” (posting comment by EBK, 6:13 p m., 2/23/2010, “**Reading the ‘lynch mob’ mentality comments really makes me worry.... Don’t turn this into a class war...**”); and posting comment by “Joe” at 12:55 a m., 3/9/2010, “**...I pray to God that Goodman is quickly apprehended before the public take matters into their own hands**”); *Palmbeachpost.com*, July 24, 2010, “Friends of Scott Wilson cleaning crash site: ‘We just want Wellington to remember’” (posting comment by nemo on 7/24/2010, “**Goodman deserves a fair trial, not a lynch mob run by a mad mother.....**”).

[23] *See Palmbeachpost.com*, Aug. 23, 2010, “Was polo club founder’s phone working?” (posting comment by “ThePollEtc.” at 7:45 a.m., 8/30/2010.

[24] *See, e.g., Palmbeachpost.com*, Feb. 26, 2010, “Court filing: Wellington polo club founder Goodman failed to comply with cocaine tests” (posting comment by “Rodney” on 02/26/2010,“**...How about a change of venue from PB County”**); *Page2live.com*, March 9, 2010, “Source: Polo boss John Goodman passed out at the wheel” (posting comment by “Nori” at 12:36 p m., 3/9/2010,“**It’s now getting where the media is ‘implanting’ erroneous information.... maybe a change of venue to allow for clear heads**”); *Palmbeachpost.com*, April 27, 2010, “Grief of crash victim’s parents lead them to brink of suit against Wellington polo tycoon” (posting comment by “pete” at 12:01 a.m., 4/28/2010, “**a change of venue is needed**”); *Palmbeachpost.com*, July 21, 2010, “Friends of Wellington crash victim to clean up roadside near site of collision” (posting comment by “Lady Justice” at 10:30 a m., 7/23/2010, “**Isn’t all this pandering press coverage destroying his right to a fair trial**”); *Palmbeachpost.com*, July 24, 2010, “Friends of Scott Wilson cleaning crash site: ‘We just want Wellington to remember’”(posting comment by “The Lord God” at 9:35 p.m., 7/24/2010, “**...Stop milking all this. Your [sic] turning you own son’s death into a media circus**”); *Palmbeachpost.com*, Aug. 23, 2010, “Was polo club founder’s phone working?” (posting comment by “Pam Lan” at 3:21 p.m., 8/26/2010, “**He clearly can not get a fair day in court with all the jealous [sic] haters out there**”);
(continued...)

dissidents, however, were shouted down as heretics by other bloggers, some of whom were thrilled that the *Post* was trying to guarantee Mr. Goodman's conviction. As one blogger wrote: "**The pretrial publicity should assure Goodman is convicted and goes down .... after all the PBP tried and convicted him for over three months**."[25]

B. The Trifecta: The Three Main Sources For the Negative Publicity

The hostility and bias so openly expressed in the blogosphere has not been an accident. Three sources of publicity have combined to make this case untriable in Palm Beach County: (1) the Palm Beach Post's editorial staff, (2) the conduct of law enforcement and (3) the attorneys representing members of the Wilson family in civil litigation against Mr. Goodman.

1. The bias and on-going hate-mongering of the Palm Beach Post

One of the most disturbing aspects of the media deluge in this case has been the conduct of the *Palm Beach Post*. As its most recent editorial on December 6, 2011 – discussed at the beginning of this motion – underscores, the *Post* long ago abandoned any pretense of being neutral, issuing periodic editorials and conducting patently loaded "polling" of public opinion on various aspects of the case that has helped fuel the venomous on-line postings. There is virtually no empirical research

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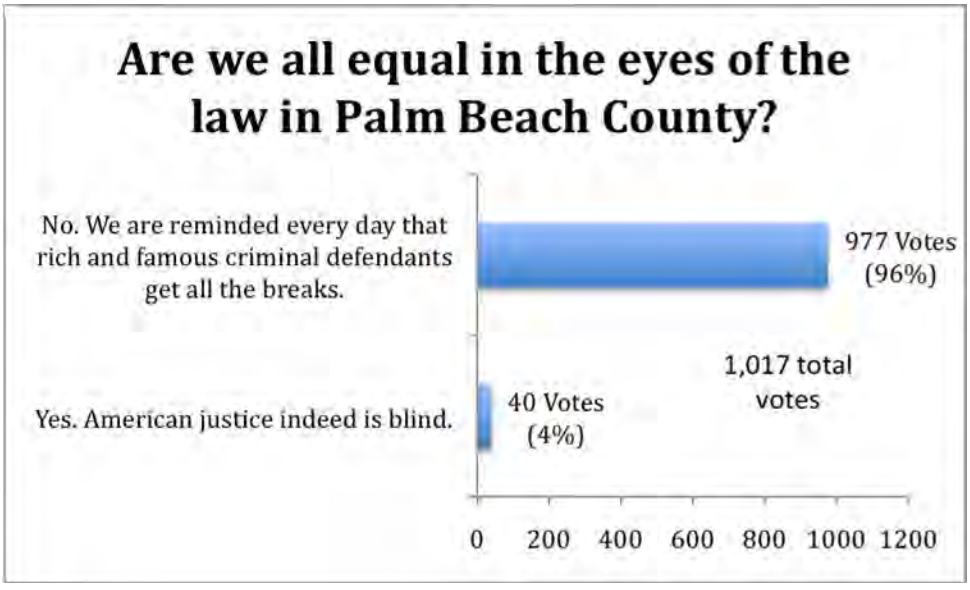
[24](...continued)
Palmbeachpost.com, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case" (posting comment by "Grounds for an Appeal" at 8:29 a.m., 10/27/2010, "**A prejudice [sic] populace without a change of venue will also give Goodman an appeal. The Post Times is contributing to this matter**"); *Palmbeachpost.com*, Feb. 12, 2011, "Family, friends gather on one-year anniversary of polo club founder's crash that killed 23-year-old in Wellington" (posting comment by "Rob" at 1:30 p.m., 2/13/2011, "**The jury pool is tainted in PBC. Trial should be held elsewhere, though don't think the verdict will be different in other venues**").

[25] *Palmbeachpost.com*, May 19, 2010, "Polo Club founder Goodman could face up to 30 years in prison if convicted" (comment by "OBIWAN" at 8:01 p m., 5/20/2010). *See also Sun Sentinel.com*, Feb. 20, 2010, "About 300 pay final respects to Wellington man killed in crash," posting comment by "andylewis" at 11:35 a m., 2/21/2010, "**LET THE BAD PUBLICITY BEGIN!!! You deserve it JOHN GOODMAN!!!**"); *Page2live.com*, March 4, 2010, "Polo boss John Goodman shuns Welly, lands in luxury beachside retreat" (posting comment by "Justice 4 ALL" at 4:41 p.m., 3/4/2010, "**Palm Beach Post – keep at it! Don't let this important story fade away**.").

studying the effect of a newspaper's endorsement of a particular verdict in a criminal case on a jury pool – no doubt because the phenomenon is too rare to warrant such a study. However, research on the impact of endorsements on voting in political campaigns clearly shows that "endorsements are influential in the sense that voters are more likely to support the recommended candidate after publication of the endorsement." *See* Chun-Fang Chiang and Brian Knight, *Media Bias and Influence: Evidence From Newspaper Endorsements*, The Review of Economic Studies Limited, Oxford Univ. Press, Feb. 16, 2011, in *Review of Economic Studies* (2011), at p. 1, available at http://restud.oxfordjournals.org/content/78/3/795.full.pdf+html (last visited Dec. 13, 2011).

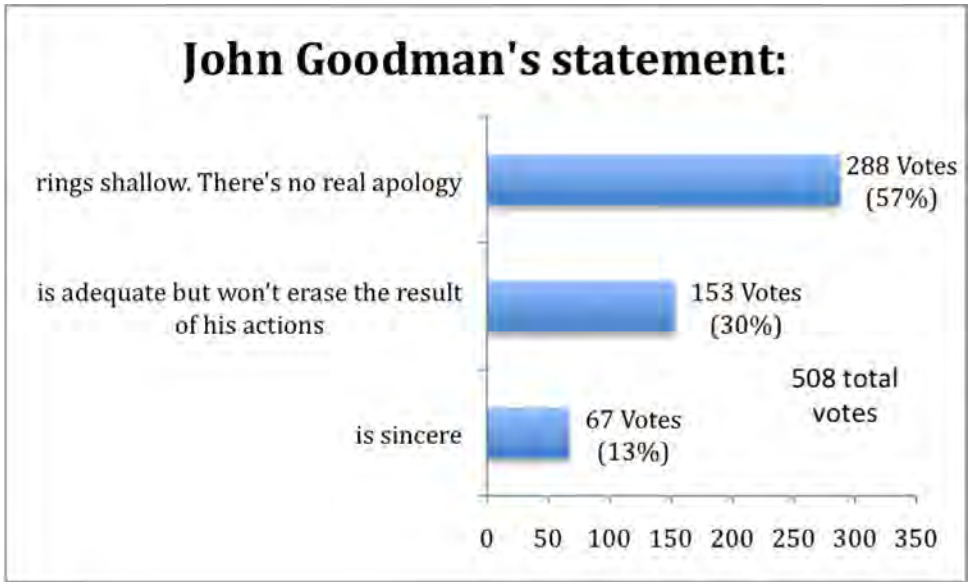
The editorial staff of the *Post* has been lobbying for Mr. Goodman's conviction since at least as early as February 2010, when the *Post* – through its gossip page on *Page2Live.com* – posed the question in its headline, "Will justice prevail in Welly polo boss John Goodman's crash?" and suggested that prosecutors were concealing information to protect Mr. Goodman.[26] The *Post* then conducted a poll on the question: "Are we all equal in the eyes of the law in Palm Beach County?"



[26] *See Page2live.com*, Feb 16, 2010, "Will justice prevail in Welly polo boss John Goodman's crash?"

The poll drew votes from 1,017 residents with 977 of those (96%) checking the box: "No. We are reminded every day that rich and famous criminal defendants get all the breaks." Only 40 votes (4%) believed "American justice indeed is blind." Accusations of an unlevel playing field were bolstered by a series of quotes from former prosecutor Paula Russell, whom the article paraphrased as stating that the justice system "already has treated Wellington polo boss John Goodman differently than the Average Joe." [27]

A few days later, February 20, 2010, the *Post* – again through a Jose Lambiet column on *Page2live.com* entitled "Polo boss John Goodman expresses 'sympathy and regret' as crash victim is buried" – asked readers whether they believed a statement of "sympathy and regret" that Mr. Goodman released before Scott Wilson's funeral. After reminding readers – as it does in nearly every piece it has published – that Mr. Goodman (the



[27] *See Page2live.com*, Feb 16, 2010, "Will justice prevail in Welly polo boss John Goodman's crash?"

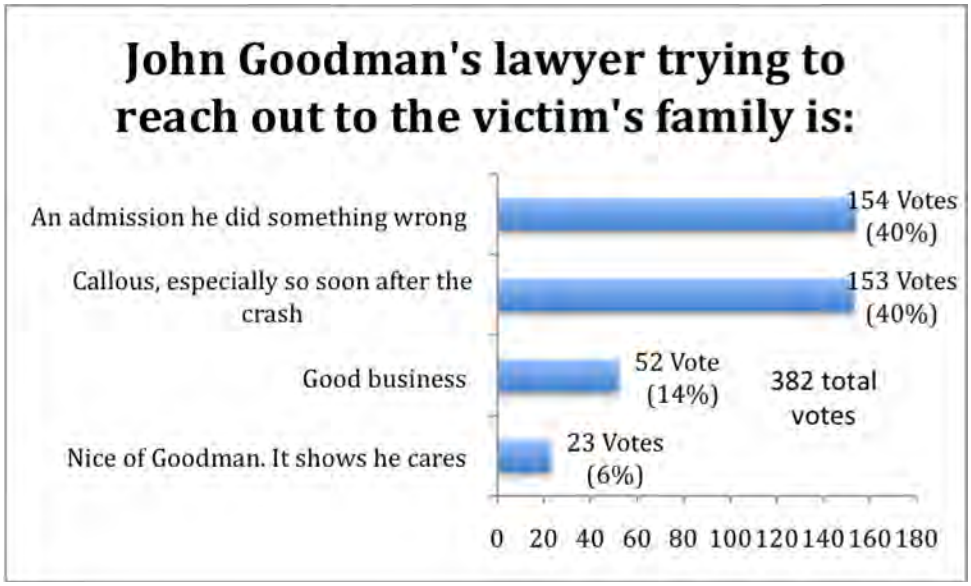
"Polo boss") was the founder of the Palm Beach International Polo Club, Lambiet invited readers to vote on whether they believed Mr. Goodman's statement – which Lambiet emphasized had been issued "through his lawyer's publicist."[28] Over 500 readers voted in this second poll, with the majority agreeing that Mr. Goodman's statement "rings shallow." Below the column, the *Post* printed (and still on line) 17 comments from readers. At least two picked up on the "lawyer's publicist" remark in the article to doubt Mr. Goodman's sincerity and accuse him of "hid[ing] behind your lawyers." Others called him ("coward" and "scumbag").

Three days later, February 23, 2010, Lambiet wrote another column, this time reporting that Mr. Goodman's civil attorneys were "discreetly" reaching out to the Wilson family to reach a financial settlement.[29] The piece prominently displays a photograph of Mr. Goodman with his arm around "Lizzie McGuire star Hillary Duff and a circus elephant at the polo club" and contains a hyperlink (Lili and William Wilson) directly to an earlier piece in the *Post* showing a photograph of Scott Wilson when he was

[28] *See Page2live.com*, Feb. 20, 2010, "Polo boss John Goodman expresses 'sympathy and regret' as crash victim is buried."

[29] *See Page2live.com*, Feb. 23, 2010, "Polo boss John Goodman's attorney working on settlement for crash victim's family."

2-3 years old.[30] Although no one mentioned in the column suggested that the seeking of a civil settlement either (1) constituted an admission of guilt, (2) was a "callous" act by Mr. Goodman or (3) was motivated by selfish business practices, Lambiet conducted another poll asking readers to vote on these questions. With nearly 400 votes cast, 307 (80%) agreed that seeking the settlement was either "[a]n admission he did something wrong" or "[c]allous, especially so soon after the crash." Another 52 (14%) said that Mr. Goodman was only making the inquiry because it was "[g]ood business" to do so. In light of the loaded questions and article featuring Mr. Goodman as a spoiled playboy, the sentiments in the 23 comments following the article (and still on line for viewing by jurors) were predicable. Readers accused Mr. Goodman trying to buy his way out of trouble and of being "callous," a "dirt bag," "disgusting," "a piece of schizz" and a "Party Boy." Still others spread vicious rumors about Mr. Goodman, including that he "loves cocaine," that "[h]is



[30] *See Palmbeachpost.com*, Feb. 17, 2010, "Mother of Wellington college grad killed in crash: 'He died with a pure heart." The same photo of Mr. Goodman with Hillary Duff and the circus elephant also appears in numerous *P2live.com* stories, including the ones on March 4. 9, 11, 2010.

own wife feared for her children's safety in his care" and criticizing a family court judge in his divorce for allegedly not requiring him to submit to "random drug testing" and keeping "appointments with the therapist."

In May 2010, the *Post* escalated the war by releasing two *editorials*. The first responded to criticisms about the Palm Beach County Sheriff's Office and State Attorney for allegedly taking too long to charge Mr. Goodman. After opining that law enforcement needed to be thorough and not give Mr. Goodman an advantage by triggering speedy trial rules, the *Post* stated what it viewed as "the evidence":

> With Mr. Goodman, founder of the international Polo Club Palm Beach, the evidence is that just after 1 am on Feb. 12 his blood-alcohol level was twice the legal limit when he ran a stop sign in Wellington and broadsided the car carrying 23-year-old Scott Wilson, sending it into a canal. Mr. Goodman, the investigator wrote, "left Scott Wilson to drown ... belted in the driver seat of his vehicle." Mr. Goodman called his girlfriend before he called 911. Investigators matched Mr. Goodman's boots to footprints at the scene, and sand in the boots to sand at the scene. Mr. Goodman faces 30 years in prison. A trial will sort out the evidence. That evidence was worth the wait.[31]

The second May editorial, authored by Randy Schultz, editor of the editorial staff, was designed to simultaneously stoke class bias against Mr. Goodman and undermine his Sixth Amendment right to counsel. Entitled "The Bentley and the Sonata," the theme for the piece was the "stark[] contrast between the accused and the victim."[32] Schultz drew this contrast in two ways. First, he contrasted Mr. Goodman's wealth and "$175,000" Bentley with Scott Wilson's $15,000" Hyundai and disclosed that when Mr. Goodman was not immediately arrested "[f]or weeks readers

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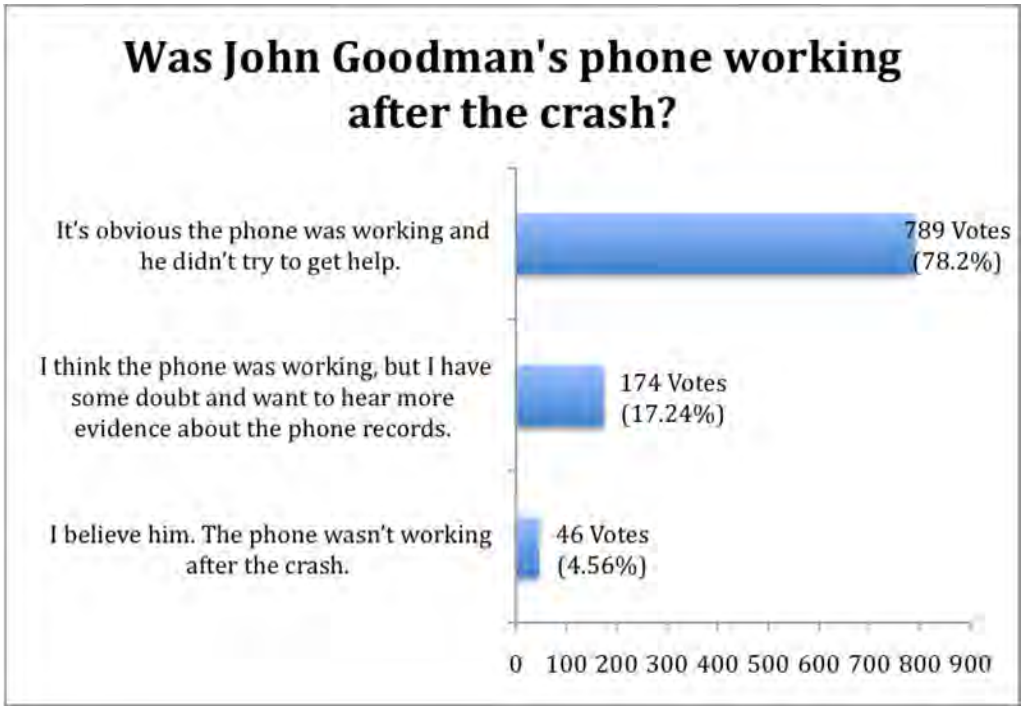
[31] *See Palmbeachpost.com*, May 19, 2010, "What took so long to charge Goodman? Evidence."

[32] *See Palmbeachpost.com*, May 21, 2010, "Schultz: The Bentley and the Sonata,"

called to complain" that his wealth must have been interfering with the investigation. Second, he attacked undersigned counsel for allegedly "relish[ing]" representing guilty, high-profile clients." He then argued that Mr. Goodman fit counsel's supposed "love of publicity and clients who can afford the best" because Mr. Goodman was "one of the most hated defendants this areas has seen." Schultz concluded the smear job by claiming that all he really cared about was that "the system ... get[s] it right" and that "[t]here will be no extra points if the smug Mr. Black gets his clock cleaned" because counsel will simply "go on to another client who can afford the best."

A few months later, on August 23, 2010, the *Post* published an editorial[33] whose sole purpose was to suggest that any claim by Mr. Goodman that his cell phone was not working the night of the



[33] *See Palmbeachpost.com*, Aug. 23, 2010, "Was polo club founder's phone working?"

accident was false. After ridiculing the alleged defense, the *Post* invited the readership to vote in a poll about whether they believed Mr. Goodman's alleged story. The results of the poll are still available on line. The poll attracted an enormous number of voters, 1,009 readers. Of those only 46 people (4.56%) believed the defense, as characterized in the slanted editorial. In contrast, 789 voters (78.2%) said it was "obvious the phone was working and he didn't try to get help" and another 174 (17.24%) "think the phone was working" but harbored at least some doubt.

In addition to the poll results, the editorial drew 77 mostly anonymous comments. While the majority were submitted on or shortly after the editorial was published, the editorial continued to draw comments in September and even November 2010. Only 12 of the comments were supportive or neutral. The rest assumed Mr. Goodman was guilty, hoped he would "rot in jail" and "suffer a long time" or railed about his wealth and his "high priced lawyer." Others called him names, such as "wealthy scumbag," "sorry ass character," "drunk millionaire," "arrogant, uncaring self-serving ego maniac," "a**h***," "spoiled, rich, self-centered MAN-Child" and "elite trash." As previously discussed, several suggested that he be executed in various graphic ways. When one reader tried to defend Mr. Goodman, the commenters started attacking *him*, calling him "stupid," a "loser" and an "a** clown."

The next *Post* editorial occurred on Nov. 5, 2010, when the editorial staff implied that Mr. Goodman was trying to bribe potential fire rescue witnesses by somehow arranging for "several high-ranking officials" to play golf for free at The Wanderers Club in Wellington.[34] And, as noted

[34] *See Palmbeachpost.com*, Nov. 5, 2010, "Fire-rescue blew call: Staffers should not have played free golf at Goodman's club."

at the outset, the most recent editorial was on December 6, 2011, and it too included a poll and lengthy comments from readers which were just as vitriolic as those in early 2010.

2. State Sponsorship of Negative Publicity

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court criticized the trial court for failing to control the conduct of both attorneys and police officers involved in the case, noting in particular that "[t]he prosecution repeatedly made evidence available to the news media which was never offered in the trial." 384 U.S. at 360. Indeed, the Court found that the volume of publicity in that case was at least in part the direct result of public "disclosures" by state officials. *Id.* at 362. *See also Irvin*, 366 U.S. at 730 (Frankfurter, J., concurring); *Rideau*, 373 U.S. at 725; *Delaney v. United States*, 199 F.2d 107, 114 (1st Cir. 1952); *State v. Wilson*, 202 S.E.2d 828, 831 (W. Va. 1974); *State v. Bonner*, 587 P.2d 580, 582, 585 (Wash. App. 1978); *Commonwealth v. Frazier*, 369 A.2d 1224, 1226 (Penn. 1977). *See also Williams v. Griswald*, 743 F.2d 1533, 1539 (11th Cir. 1984) (noting that the "credibility of the source to which the information is attributable may influence the validity of the claim"). As in *Sheppard*, the prejudicial nature of the publicity in this case was compounded because it has been fomented, at least in part, from the very beginning by prosecutors and other law enforcement officials.

a. Statements by police about suspected intoxication and drug abuse

Immediately after the accident, news outlets were reporting that police suspected alcohol or drug use had contributed to the crash. For instance, the very first article in the *Post*, initially posted less than five hours after the crash, stated, "Deputies reported that alcohol or drugs may have played

a role."[35] Later that day, two television news reports – one from FOX/WFLX and the other from CBS 12 – reported that "Alcohol or drugs are suspected factors,"[36] and a WPTV newscast said, "Investigators suspect John B. Goodman was drinking when he ran a stop sign and plowed into Scott Wilson's car." The following day, an article published in the *Sun-Sentinel* and in the *Orlando Sentinel* confirmed, based on "Initial Sheriff's Office reports," that "investigators suspect[ed] alcohol

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[35] *See Palmbeachpost.com*, Feb. 12, 2010, "Car driven by International Polo founder kills 23-year-old in Wellington crash; alcohol suspected." Rumors of cocaine use continued to spread based, in part, on a blog post on the *Houston Press* website. *See Houstonpress.com*, Feb. 19, 2010, "The Billionaire, The Bentley And The Body, Part III: Divorce And Cocaine." That post reported that Mr. Goodman's ex-wife had made a motion to suspend his visitation rights until he submitted to drug tests, as agreed upon in their original divorce settlement. The motion, according to the *Houston Press* report, claimed that Mrs. Goodman was "fearful for the safety and well-being of her children while they are in the possession of Respondent because of his history of substance abuse and his refusal to submit himself for drug screening." This generated a flurry of reports in the *Post* about Mr. Goodman's alleged history of cocaine abuse, which included such salacious headlines as "Court Records: Billionaire Bentley Driver Goodman Has History of Cocaine Abuse" and "Report: Wellington polo boss John Goodman allegedly a coke fiend." *See blogs.browardpalmbeach.com*, Feb. 19, 2010, "Court Records: Billionaire Bentley Driver Goodman Has History of Cocaine Abuse"; *Page2live.com*, Feb. 19, 2010, "Report: Wellington polo boss John Goodman allegedly a coke fiend." At least 18 other reports later referenced the allegations included in the motion. *See www.chron.com*, Feb. 22, 2010, "Millionaire draws scrutiny, outrage after fatal crash."; *WFLX.com*, Feb. 22, 2010, "Family awaits info on son's fatal crash."; *CBS 12.com*, Feb. 22, 2010, "Victim's family learns more about millionaire in fatal crash."; *Palmbeachpost.com*, Feb. 23, 2010, "Wellington Polo mogul Goodman faces scrutiny after fatal wreck."; *Sun Sentinel.com*, Feb. 23, 2010, "Polo's John Goodman doesn't live in the spotlight."; *Palmbeachpost.com*, Feb. 26, 2010, "Court filing: Wellington polo club founder Goodman failed to comply with cocaine tests."; *Sun Sentinel.com*, Feb. 26, 2010, "Goodman failed to submit to drug tests, psychiatrist wrote."; *Sun Sentinel.com*, March 4, 2010, "Polo club founder's legal team likely preparing defense for fatal Wellington crash."; *Page2live.com*, March 11, 2010, "John Goodman crash victim's family 'pleased' with probe, but Goodman was 'reckless'."; *WPBF.com*, March 11, 2010, "Parents Of Canal Crash Victim Launch Investigation." ; *Palmbeachpost.com*, April 29, 2010, "Parents' lawsuit: Polo club founder Goodman was drunk, taking drugs before causing fatal crash in Wellington."; *blogs.browardpalmbeach.com*, April 29, 2010, "Suit: Polo Owner Was Falling Down Drunk Night of Fatal Crash."; *WFLX.com*, April 30, 2010, "Lawsuit filed against John Goodman."; *blogs.browardpalmbeach.com*, June 3, 2010, "Was John Goodman Using Cocaine the Night Before Fatal Crash?"; *WPTV.com*, June 21, 2010, "New information released in Goodman discovery: Goodman reportedly asked for tequila, vodka."; *WPBF.com*, June 21, 2010, "Tequila, Vodka On Goodman's Tab Before Fatal Crash."; *Houstonpress.com*, June 22, 2010, "John Goodman: More Details Emerge From Bar Where Polo Patron Spent Last Hours Before Fatal Crash."; *Browardpalmbeach.com*, July 8, 2010, "Will a Multimillionaire Polo Mogul Be Punished for a Fatal Drunken Accident?"

[36] *See WFLX.com*, Feb. 15, 2010, "Coroner: College grad drowned after accident"; *Orlandosentinel.com*, Feb. 16, 2010, "Investigation into polo owner's crash that killed man, 23, may take months." (via Palm Beach Post)

or drugs played a role [in causing the crash]."[37] These early reports appear to have resulted from the release of information by Palm Beach County law enforcement.

b. Statements alleging significance of cell phone record

During the summer after the crash, the *Post* published and *The Sun-Sentinel* reprinted an extremely damaging article headlined, "Goodman called aide, not 911, around time of fatal Wellington collision, cellphone records show."[38] Included in this piece was the following biased statement attributed to Palm Beach County Sheriff Department's Sgt. John Churchill: "You do have evidence suggesting the phone was operational during or after the crash.... In one case it could be a contributor to the crash. In another case it could be much worse." Later in the article, the *Post* stated, "Law enforcement officials say Goodman's single phone call could strengthen their accusation that Goodman willfully ignored his legal obligation to help the crash victim, Scott Wilson, or call for help after sending him careening into the water." While the article stated that the paper obtained the phone records through a public information request, the officer(s) gave the piece greater weight by providing further comment.

c. Statements made by prosecutors suggesting unfair advantage

In May 2010, prosecutor Ellen Roberts gave an inflammatory quote to the *Post*, which suggested that Mr. Goodman would use his wealth to evade punishment. In the article, "Lawyers on both sides of Goodman case are formidable," which was republished in *The Sun-Sentinel*, Roberts

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[37] *See Sun Sentinel.com,* Feb. 16, 2010, "Investigation into polo owner's crash that killed man, 23, may take months." (via The Palm Beach Post); *Orlandosentinel.com*, Feb. 16, 2010, "Investigation into polo owner's crash that killed man, 23, may take months" (via Palm Beach Post).

[38] *Palmbeachpost.com*, Aug. 19, 2010, "Goodman called aide, not 911, around time of fatal Wellington collision, cellphone records show" (also featured in Sun-Sentinel).

was quoted as follows: "'The more money they have, the more experts they can hire and the more depositions I'll have to go to,' she said dismissively. 'The only difference between them and me is they make a lot more money.'" Elsewhere in the article, *Post*'s staff writer conveyed this inflammatory sentiment even more explicitly: "There seems to be little question that Goodman, 46, the multimillionaire owner of Wellington's International Polo Club Palm Beach, will bring to court all the advantages money can buy. His deep pockets can assure that Black's firm can hire any number of private investigators and experts to probe for weaknesses in the state attorney's office's case...." This article, fueled by Ms. Robert's participation, demonstrated a clear bias against Mr. Goodman and is likely to have inflamed hostility towards him.

Another person tied to the State's Attorney's office, Paula Russell, who reportedly worked there for 23 years, precipitated an earlier series of highly inflammatory articles, which suggested that Mr. Goodman was already receiving preferential treatment from law enforcement:

> "They won't admit it, of course," said Russell, who unsuccessfully ran for state attorney in 2008, "but when deputies saw a Bentley, they told themselves they'd better dot every i and cross every t. That's human nature…
>
> "When it comes to rich and/or famous defendants, the facts speak for themselves," Russell said. "I believe that the state attorney's office over the years has given significant breaks to people with a lot of money. Is it political or psychological? Are prosecutors in a panic when Roy Black shows up? I don't know. But the facts are there."[39]

[39] *See* Page2live.com, Feb. 16, 2010, "Will justice prevail in Welly polo boss John Goodman's crash?"

These statements provided the basis for a slew of extremely negative reports which appeared in *The Sun-Sentinel*,[40] *The Orlando Sentinel,*[41] on the website Page2Live[42] and on *The Houston Press*'s Hairball's blog.[43]

d. The inflammatory Arrest Affidavit and release of the 911 call

Many of the most inflammatory articles that have been written about Mr. Goodman's case stemmed from the arrest affidavit that was submitted by police in May 2010 and subsequently made available to the press. This affidavit, described by the *Post* as "strongly worded,"[44] also appears to have included statements made by several witnesses to police investigators. The report was directly quoted in at least three articles on the day of Mr. Goodman's arrest[45] and provided the basis for at least ten other extremely inflammatory pieces.[46]

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[40] *See Sun Sentinel.com*, Feb. 16, 2010 , "Investigation into polo owner's crash that killed man, 23, may take months" (via The Palm Beach Post).

[41] *See Orlandosentinel.com*, Feb. 16, 2010, "Investigation into polo owner's crash that killed man, 23, may take months" (via Palm Beach Post).

[42] *See Page2live.com*, Feb. 16, 2010, "Will justice prevail in Welly polo boss John Goodman's crash?"

[43] *See Houstonpress.com*, Feb. 16, 2010, "More On The Billionaire And The Bentley: The Coroner's Report Is In, The Lawyer Is A Star, And Why Hasn't Goodman Been Charged?"

[44] *See Palmbeachpost.com*, May 19, 2010, "Polo Club founder Goodman could face up to 30 years in prison if convicted."

[45] *See Palmbeachpost.com*, May 19, 2010, "Polo Club founder Goodman could face up to 30 years in prison if convicted"; *Sun Sentinel.com*, May 19, 2010, "Polo club founder charged with DUI manslaughter in fatal Wellington crash"; *www.chron.com*, May 19, 2010, "Houston millionaire charged in deadly Florida crash."

[46] *See WPBF.com*, May 20, 2010, "Witness Recounts Goodman's Actions After Crash"; *blogs.browardpalmbeach.com*, May 20, 2010, "Witness Account of Polo Mogul's Crash: "He Did Not Want to Get Into Trouble"; *blogs.browardpalmbeach.com*, June 3, 2010, "Was John Goodman Using Cocaine the Night Before Fatal Crash?"; *nl.newsbank.com*, June 22, 2010, "CRIME: Woman told investigators polo mogul wanted cocaine night of fatal crash" (via Sun-Sentinel); *WPBF.com*, June 21, 2010, "Tequila, Vodka On Goodman's Tab Before Fatal Crash"; *blogs.browardpalmbeach.com*, June 22, 2010, "Possible John Goodman DUI Defense: A Barn Drink After Fatal Crash"; *blogs.browardpalmbeach.com*, June 23, 2010, "Weeks After Fatal Crash, John Goodman Attended Lakers Game in

(continued...)

Tapes of 911 calls reporting the accident, including the one made by Mr. Goodman, also appear to have been released to the media directly from law enforcement officials. The recordings were featured on the *Post*'s website[47] in a video that featured graphic images from the crash along with images of the two men involved. This combination made for an compelling presentation that is likely to have inflame emotions regarding the case for anyone who watches it. A transcript of the call was also posted to the CBS 12 website.[48]

e. Information leaked by "unnamed" sources

Finally, there were at least two extremely biased stories that appear to have been leaked by law enforcement officials. The first story was broken by *Page2Live* in an article headlined, "EXCLUSIVE! Prosecutors seize John Goodman's $200-Ladies' Night booze bill." This highly inflammatory article was reportedly based on information provided by "a source close to the criminal investigation into the accident." Published only eight days after the crash, it was later referenced in at least three other articles.[49]

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[46](...continued)
Miami"; *blogs.browardpalmbeach.com*, June 24, 2010, "John Goodman Offered to Pay Post-Accident Witness"; *blogs.browardpalmbeach.com*, June 29, 2010, "Polo Mogul John Goodman's Concern for Crash Victim: 'Somebody's Dead.'"; *blogs.houstonpress.com*, June 22, 2010, "John Goodman: More Details Emerge From Bar Where Polo Patron Spent Last Hours Before Fatal Crash."

[47] *See* link.brightcove.com.

[48] *See Www.cbs12.com*, June 25, 2010, "Exclusive: 911 call from Goodman Crash."

[49] *See nl.newsbank.com*, June 22, 2010, "CRIME: Woman told investigators polo mogul wanted cocaine night of fatal crash" (via Sun-Sentinel); *blogs.browardpalmbeach.com*, June 24, 2010, "John Goodman Offered to Pay Post-Accident Witness"; *www.browardpalmbeach.com*, July 8, 2010, "Will a Multimillionaire Polo Mogul Be Punished for a Fatal Drunken Accident?"

A second article based on the claims of an unnamed source – "Source: Polo boss John Goodman passed out at the wheel"[50] – was also published to *Page2Live* in the month following the accident. This time the *Post* claimed, based on information provided by "a source familiar with the hush-hush investigation into the crash," that investigators believed Mr. Goodman passed out at the wheel when the two cars collided. "There's no way that, at that speed, he could have taken the turn on Lake Worth Road," the source reportedly told Page2Live. "He must not have been conscious." This prejudicial speculation could only have been made by a law enforcement official.

The State, having chosen to feed the flames of public hysteria over this case, must bear the consequences of this tactic. "We think that the [State] is put to a choice in this matter: If the [State] ... chooses to ... [generate] damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the [State] must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury...." *Delaney v. United States*, 199 F.2d 107, 114 (1st Cir. 1952). *See also State v. Woodington*, 31 Wis. 2d 151, 142 N.W.2d 810 (1966) (right of Attorney General to issue public statements about matters of great public concern "should be exercised with circumspection so as not to prejudice or impair the rights of a defendant in either prospective or pending litigation").

3. Inflammatory publicity fomented by the Wilson family attorneys

A unique factor at play in the Court's analysis of this motion should be the role that the civil attorneys retained by the Wilson family have played in fomenting both hostile publicity about Mr. Goodman and sympathetic publicity about the family. Unlike representatives of the State who are constitutionally bound to ensure Mr. Goodman a fair trial and who are directly responsible to the

[50] *See Page2live.com*, March 9, 2010, "Source: Polo boss John Goodman passed out at the wheel."

Court for their conduct, the Wilson family attorneys have neither that responsibility nor anyone directly refereeing their behavior.[51] They have been a repeated source of photographs for the media and in "press conferences" and interviews they have constantly vilified Mr. Goodman in a campaign patently designed to increase the likelihood of both Mr. Goodman's conviction and a large financial payout by tainting the jury pool in both venues.

For example, just one month after the accident, Mr. Smith and Christopher Searcy, the attorney for Mr. Wilson's mother, held a "press conference" at his office, announcing that they were

[51] Private attorneys are limited only by Rule 4-3.6(a) of the Rules Regulating the Florida Bar, which provides:

> **(a) Prejudicial Extrajudicial Statements Prohibited.** A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

However, due in part to the "substantial likelihood" requirement, motions seeking gag orders are rarely successful in preventing attorneys from violating the rule. *See, e.g., D.L v. Slattery*, Case No. 10-61902-Civ-Moore (S.D. Fla. March 31, 2011), *2011 U.S. Dist. LEXIS 39799*); *E.I. Dupont de Nemours & Co. v. Aquamar, S.A*, 33 So.3d 839 (Fla. 4th DCA 2010); *Rodriguez ex rel. Posso Rodriguez v. Feinstein*, 734 So.2d 1162 (Fla. 3d DCA 1999).

launching their own investigation into the accident. A clip of the press conference is still a featured video on Youtube.[52] The Wilson family and both attorneys are all seated around a conference table in what appears to be their law library, which is seen filled with poster-size photographs of the crash site. As the attorneys give essentially a closing argument to the cameras, in the background they staged an "exhibit" – a white-clothed table with eighteen shot glasses filled with a dark liquid – which was presumably meant to symbolize the number of drinks Mr. Goodman allegedly consumed before the accident. The video then does a close-up of the shot glasses so that the viewer gets the message. This extravaganza – staged by the Wilson family attorneys entirely for press consumption – was and will continue to be extremely damaging to Mr. Goodman's public image for at least three reasons: (1) it contributes to the insidious perception that he has been receiving preferential treatment from authorities (thus necessitating a private investigation), (2) it showcases the family's grief (thus inflaming negative sentiment against Mr. Goodman), and (3) it gives the attorneys an opportunity

[52] *See* "Wilson Family Wants Answers From John B. Goodman! Part 3."

to accuse Mr. Goodman of being reckless and impaired at the time of the accident and to suggest to the public that there were "confidential informants" who could testify to these claims.[53]

In late April, the Wilson family attorneys instigated another rash of negative media attention for Mr. Goodman, when they filed a sensationally worded lawsuit against him. On April 27 and 28, 2010, the attorneys were quoted at length in a story covered in both Palm Beach and Orlando in which they juxtaposed statements about the grief and sorrow of the Wilson family with unproven factual assertions concerning the speed at which Mr. Goodman allegedly struck Scott Wilson's car after allegedly running a stop sign.[54]

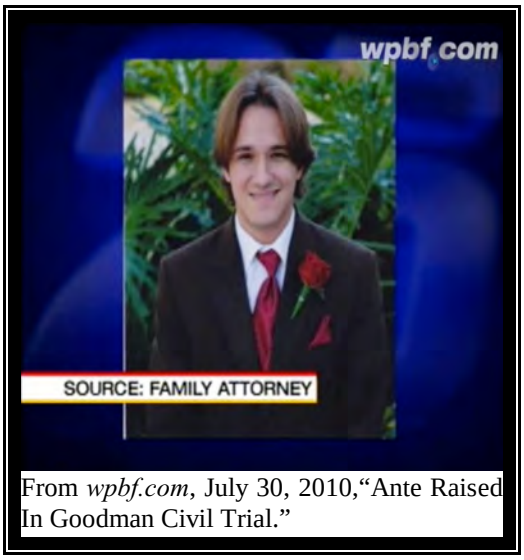
Youtube video: "Attorneys Argue Goodman's Worth." Uploaded by WPBF on Jan. 20, 2011.

[53] This press conference was covered by all media outlets. *See, e.g., Palmbeachpost.com*, March 10, 2010, "Parents to open own probe into son's fatal accident with polo mogul Goodman"; *Page2live.com*, March 10, 2010, "Mother of victim in polo boss John Goodman's crash lawyers up." *Palmbeachpost.com*, March 11, 2010, "Attorneys seek information, witnesses to crash; consider suing Polo club founder"); *Page2live.com*, March 11, 2010, "John Goodman crash victim's family 'pleased' with probe, but Goodman was 'reckless'"; *WPTV.com*, March 11, 2010. For example, in the March 11, 2010 Page2Live.com report, attorney Scott Smith is quoted as saying that: "'They (the Wilsons) are simply 100 percent convinced that the only reason that Scott's car ended up upside down and underwater in a cold, dark canal is the reckless and outrageous actions of John Goodman,'" and that Mr. Goodman "'drove at a high rate of speed and blew through a stop sign.... The damages to Scott's car were horrific ... probably the worst I've seen in a two-car collision.'" The March 11th Palmbeachpost.com story about the press conference added that a civil suit against the "polo mogul" was imminent and based in part on "information from 'confidential informants.'" It also quoted Mr. Searcy directly: "We want to know why John Goodman ran a highly visible stop sign at a high rate of speed..." In the broadcast on *WPTV.com*, Mr. Searcy also talked about their "investigation" and suggested that Mr. Goodman had been using cocaine and wanted his blood tested.

[54] *See Palmbeachpost.com*, April 27, 2010, "Grief of crash victim's parents lead them to brink of suit against Wellington polo tycoon"; *Sun Sentinel.com*, April 28, 2010, "Parents of crash victim to file wrongful death lawsuits against Wellington polo tycoon (via The Palm Beach Post)"; *Orlandosentinel.com*, April 28, 2010, "Parents of crash victim to file wrongful death lawsuits against Wellington polo tycoon."

The next day, April 29, 2010, the attorneys filed the lawsuit along with a press release. Both were loaded with inflammatory accusations and rhetoric that they assumed, correctly, would be picked up by the media, including allegations that Mr. Goodman was "so obviously drunk that he fell down for no apparent reason," that he had been using "controlled substances," that he was "habitually" addicted to alcohol and had attended Alcoholic Anonymous meetings, that he "made no effort whatsoever to come to the aid of Scott Patrick Wilson," that he had "fled the scene" and "sought to hide at nearby structures" and that after the crash he called friends "and lawyers to protect himself from prosecution."[55]

To make matters worse, Mr. Searcy's law firm web site, www.searcylaw.com, contains a link directly to the press release. Federal prosecutors in *United States v. Carmichael*, 326 F. Supp. 2d 1267 (M.D. Ala. 2004), sought a protective order to compel the defendant to remove material from a web site he sponsored (www.carmichaelcase.com), arguing, among other things, that the web site "will taint the jury pool." 326 F. Supp. 2d at 1295. While the court recognized that "[t]he nature of Carmichael's site distinguishes this case from cases involving 'gag orders' directed against general pre-trial publicity," it denied the government's motion, holding that the site itself was "virtually impossible to find on the internet without knowing the exact internet address. A



From *wpbf.com*, July 30, 2010,"Ante Raised In Goodman Civil Trial."

[55] *See Palmbeachpost.com*, April 29, 2010, "Parents' lawsuit: Polo club founder Goodman was drunk, taking drugs before causing fatal crash in Wellington"; *Sun Sentinel.com*, April 29, 2010, "Dead man's parents sue Goodman, polo club and bar in fatal Wellington crash (via The Palm Beach Post)."

'Google' search for 'Carmichael case,' 'Leon Carmichael,' and the names of the witnesses and agents pictured on the site does not produce the site." *Id.* at 1295, 1299. In the instant case, if a curious member of the jury pool were to conduct an internet search (whether it be on Google, Yahoo! or bing) using as search terms "John Goodman and Scott Wilson" or "John Goodman and DUI," a link directly to the press release routinely appears on the first three "pages" of the search results under the headline "International Polo Club Owner John Goodman Arrested on Charges of." *See* **Exhibit 9**. The press statement contains additional quotes from Mr. Searcy and Mr. Smith and ends with a request to the public for "information as to Mr. Goodman's prior or habitual use of alcohol and/or cocaine."

On June 3, 2010, Wilson family attorney Chris Searcy gave a quote to the *Broward-Palm Beach New Times* for a story headlined, "Was John Goodman Using Cocaine the Night Before Fatal Crash?," claiming that he has a witness who was with Mr. Goodman before the accident who has confirmed that Mr. Goodman was on his way to buy cocaine when the accident occurred: "We have information from some sources that, in their opinion, he had been using cocaine that evening."[56] The attorneys also attempted to obtain access to Mr. Goodman's medical records believing that this would provide evidence of his alleged history of cocaine abuse.[57] While the motion was denied, it did have the devastating effect of suggesting to the public that Mr. Goodman *did* have such a history. Although several of the allegations made by the Wilson family's attorneys have since been shown to be completely without merit (such as the claim that he was abusing cocaine and was falling-down

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[56] *See blogs.browardpalmbeach.com*, June 3, 2010, "Was John Goodman Using Cocaine the Night Before Fatal Crash?"

[57] *See Palmbeachpost.com*, Oct. 26, 2010, "Judge: Polo mogul allowed to argue crash victim partially at fault - for now."

drunk on the night of the accident), they were included in the attorneys' complaint and in numerous public statements to the press as part of their smear campaign to deprive Mr. Goodman of fair trials.

Youtube video: "New Details Released in Goodman Investigation." Uploaded by WPBF on June 11, 2010.

In addition to falsely accusing Mr. Goodman of abusing cocaine, the attorneys have treated the charge that Mr. Goodman was drunk at the time of the accident as a foregone conclusion and encouraged the public to do that same. Consider the following statement given by Mr. Smith to WPBF: "'Whether he has cocaine in his system or not, the fact that his blood alcohol level was 0.177 at the time of this crash makes it reckless and unlawful and unacceptable,' Wilson family attorney Scott Smith said.... 'Their 23-year-old son was struck down and left to drown by John Goodman in an instant,' Smith said."[58]

Then, on July 29, 2010, the *Palm Beach Post* reported that the Wilson family would be seeking over $100 million in punitive damages because Mr. Goodman had been "grossly impaired" and had driven in "a homicidally reckless manner when he drove at a very high rate of speed and ran through a

Youtube video: "Wilson Family Can Seek Punitive Damages Vs. Goodman." Uploaded by WPBF on July 30, 2010.

[58] *See WPBF.com*, June 21, 2010, "Tequila, Vodka On Goodman's Tab Before Fatal Crash."

visible stop sign without stopping."[59] The next day, ABC/WPBF television quoted Mr. Smith again, this time bemoaning the fact that, to the Wilson family, "[t]he pain is as strong as it ever was. The suffering is as great as it ever was. They lost their child."[60] While it is, of course, appropriate for the Wilson family to be grieving the loss of their son, their attorneys' conduct in continually emphasizing this fact in the press, along with attacks on Mr. Goodman, appears to be part of a concerted effort to rouse negative sentiment towards Mr. Goodman. Among other themes pursued by the attorneys, they have accused Mr. Goodman of (1) attempting to "blame the victim,"[61] (2) hiding his wealth[62] and (3) seeking unreasonable delays in the trial, furthering the pain felt by Scott Wilson's parents in the process.[63]

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[59] *See Palmbeachpost.com*, July 29, 2010, "Wellington polo magnate John Goodman's attorneys agree to let dead man's family seek punitive damages in fatal Bentley crash."

[60] *See WPBF.com*, July 30, 2010, "Ante Raised in Goodman Civil Trial."

[61] *See WPTV.com*, Oct. 26, 2010, "Polo mogul's attorney blaming victim in fatal DUI crash"; *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case"; *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case"; *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case; *WPTV.com*, Oct. 26, 2010, "Polo mogul's attorney blaming victim in fatal DUI crash"); *Palmbeachpost.com*, Oct. 26, 2010, "Judge: Polo mogul allowed to argue crash victim partially at fault - for now"); *Palmbeachpost.com*, Jan. 26, 2011, "Polo club founder Goodman drops claim victim may have shared blame for fatal crash" (also featured in *Sun Sentinel*)).

[62] *See Palmbeachpost.com* (also in the *Sun Sentinel* and *Orlando Sentinel*), Aug. 22, 2011, "Polo mogul is hiding wealth, attorney says"). *See also Orlandosentinel.com*, August 22, 2011, "Attorneys battle over Polo Club founder's level of wealth" (via The Palm Beach Post); *Palmbeachpost.com*, Jan. 10, 2011, "How much is Goodman really worth? Parents of Wellington man killed in crash seek answer in court"; *blogs.browardpalmbeach.com*, Jan. 10, 2011, "Is Polo Mogul John Goodman Hiding His Vast Wealth?" (claiming that Mr. Goodman had a "sophisticated ... system" for hiding his "wealth"); *Wpbf.com*., Jan. 10, 2011, "How much is Goodman really worth? Parents of Wellington man killed in crash seek answer in court" (quoting Searcy as saying that "all of this money is hidden in businesses and trust and corporations in this country and in Bermuda and Liechtenstein").

[63] *See, e.g., Palmbeachpost.com*, May 20, 2010, "Goodman seeks to postpone parents' wrongful-death suit in fatal crash, saying it would jeopardize defense in criminal case"; *WPBF.com*, Jan. 14, 2011, "Victim's Family Eager For Goodman Trial To Begin"; *Palmbeachpost.com*, Jan. 14, 2011, "Goodman's DUI manslaughter case could be ready for trial this year"; *Palmbeachpost.com*, June 27, 2011, "Oct. 24 trial date set for polo mogul in fatal Wellington crash." For (continued...)

These types of statements by the Wilson family's attorneys are extremely prejudicial because: (1) they portray Mr. Goodman as victimizing the Wilson family, (2) they contribute to the impression that Mr. Goodman must be guilty (otherwise, why would he want to avoid trying the case?) and (3) they further the notion that Mr. Goodman is using his wealth and status to manipulate the system, a theme Mr. Smith has gone out of his way to promote:

> "We are very close to the one-year anniversary of Scott's death," Wilson family attorney Scott Smith said. "Mr. and Mrs. Wilson are still grieving the loss of their only son while Mr. Goodman is making a decision whether or not he's going to play on and fund a professional polo team. I think that puts it into perspective how they're doing right now."[64]

Perhaps the most prejudicial conduct of the Wilson family's attorneys has been their repeated statements to the media – on August 17, 2010, October 25, 2010, June 27, 2011 – that Mr. Goodman refused to testify in civil depositions because he had invoked his Fifth Amendment right against self-incrimination.[65] Although it is rare for clients to attend civil depositions – and even rarer for them

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[63](...continued)
example, in its article on May 20, 2010, the *Palm Beach Post* article quoted Mr. Smith's response in opposition to Mr. Goodman's motions to stay the civil case pending the outcome of the instant case as "nothing more than a weak attempt ... to avoid legal responsibility and accountability," and arguing that "Goodman's motion infringes on his client's constitutional right to use the Florida court system...." Mr. Smith continued this theme in his remarks to the *Post*, quoted in the June 27th story, where he again bemoans the delay complaining that "[e]ach day is agony" for the Wilson family.

[64] *See WPBF.com*, Jan. 10, 2011, "Goodman Fatal Crash Case Back Before Judge." *See also Page2live.com*, Feb. 27, 2011, "Once again, Sunday is DUI killing suspect John Goodman's day" (attorney Smith quoted as saying that "[w]hile Mr. Goodman is free on bail attending polo matches and continuing to wine and dine the rich and famous ... Mr. and Mrs. Wilson continue to suffer from the loss of their only son."

[65] *See WPBF.com*, August 17, 2010, "Polo Founder Appears For Deposition" (quoting Searcy); *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case"; *Palmbeachpost.com*, June 27, 2011, "Oct. 24 trial date set for polo mogul in fatal Wellington crash" ("Goodman has invoked his right to remain silent during two civil depositions, Smith said, and refused to answer questions about the accident or his alcohol consumption that night"). Several other articles also reported that Mr. Goodman invoked his Fifth Amendment rights without mentioning the source. *See Palmbeachpost.com*, Oct. 26, 2010, "Polo mogul allowed to argue crash victim partially at fault - for now"; *Wptv.com*, Oct. 26, 2010, "Polo mogul's attorney
(continued...)

to receive live television coverage – the attorneys had the Wilsons personally attend the August 17, 2010 deposition, even though they knew that Mr. Goodman was not going to testify about the night of the accident. However, it was only by having them attend the deposition that sufficient "drama" would be created to attract the press. The television video clip of this staged event shows the Wilsons entering the law office. Mr. Searcy then speaks to the cameras outside, discussing how the Wilsons finally had their chance to "confront [their son's] killer" – which, of course, was false because Mr. Searcy knew Mr. Goodman was not going to testify about the night of the crash. The clip then shifts back to a television reporter who states that "we have learned" – obviously either from the Wilsons or their attorneys – that while the "polo mogul did answer questions about his wealth and properties," he had refused to say anything about the night of the crash "saying that it might incriminate himself in the criminal case against him." The clip closes with Mr. Searcy again addressing the reporter, stating that the deposition gave the Wilsons the feeling that "at last we're beginning to move in the direction of justice." The clip is still prominently featured on Youtube. *See* screen shot above.

Youtube video: "Wilson Family Attends Goodman Deposition." Uploaded by WPBF on Aug. 17, 2010.

The jury, of course, should never be allowed to know about, or to draw any negative inferences, from, Mr. Goodman's exercise of this constitutional rights. As the United States

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[65](...continued)
blaming victim in fatal DUI crash"; *Palmbeachpost.com*, Jan. 10, 2011, "How much is Goodman really worth? Parents of Wellington man killed in crash seek answer in court."

Supreme Court stated in *Johnson v. United States,* 318 U.S. 189, 196-97, 87 L. Ed. 704, 63 S. Ct. 549 (1943) (citation omitted), explained:

> If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.

See also United States v. LaCouture, 495 F.2d 1237, 1240 (5th Cir. 1974) ("[A] claim of Fifth Amendment privilege is likely to be regarded by the jury as high courtroom drama and a focus of ineradicable interest, when in fact its probative force is weak and it cannot be tested by cross-examination.").

A final aspect of the campaign by the Wilsons' attorneys is their possible role in contaminating the *Post*'s blog with self-serving "comments." For example, in response to the February 27, 2010, article (which included a posed portrait of Mrs. Wilson holding a including a framed photograph of her dead son) entitled "Mother of Wellington college grad killed in crash: 'He died with a pure heart," the following comment was posted by someone claiming to be a Florida attorney speaking on behalf of the "PBC Justice Project":

> As a member of the FL Bar, I will pay close attention to this case until Mr. Goodman is brought to justice and will work with other members of the FL Bar and media to uncover any corruption that allows him to escape. His generic expressions of 'sympathy and regret' and his

> 'thoughts and prayers' are worthless. If he is truly a 'good man' he will issue a statement admitting that he was under the influence and accepting full blame for his reckless actions instead of hiding behind his attorneys. PBC Justice Project, 1:33 PM, 2/21/2010

According to the Mr. Searcy firm's website, Mr. Searcy was "featured in the summer/fall edition of *Civil Justice Project News* in an article spotlighting his long-time advocacy of consumer rights and causes." *See* **Exhibit 10**. The website for that organization, the Public Citizen Civil Justice Project, also lists Mr. Searcy as one of its "Leadership Supporters." *See* **Exhibit 11**.

The prejudice caused by the Wilson family's attorneys continues to snowball on the internet, as their press conferences and media interviews continue to featured on Youtube. For example, a search for "John Goodman and Scott Wilson" produces a total of 20 videos on its first page, 8 of which were as "featured." Attached hereto as **Exhibit 12**, is the first page and individual screen shots of some of the videos themselves. Of the 8 "featured" videos, at least 4 featured live interviews and/or press conferences with either Scott Smith or Chris Searcy and usually both.[66]

C. The Biased and Inflammatory Nature of the Publicity

"[L]egal trials are not like elections to be won through the use of the meeting-hall, the radio, and the newspaper." *Sheppard*, 384 U.S. at 350. The *Post*, through its stories, columns, editorials, readership polls and unfiltered internet blogs, has been ceaselessly trying to do just that, first, by circulating false accusations of Mr. Goodman's alleged cocaine use, his invocation of the Fifth Amendment, his lack of remorse and the ridiculousness of his alleged defenses and, second, by allowing to remain on-line for months on end vitriolic, *ad hominem* personal attacks, outright and probably criminal death threats, graphic calls for Mr. Goodman (the alleged "rich Jew" and "cubby

[66] Those four were entitled "Wilson Family Can Seek Punitive Damages Vs. Goodman," "New Details Released in John Goodman Investigation," "John Goodman civil trial to continue" and "Attorneys Argue Goodman's Worth."

rich guy") to be tortured and then killed and, if not that, then "gang raped every single day and night" in prison by some "big black dudes" or "some big Haitian." At common law, libel was defined as speech "designed to expose a person to hatred, contempt, or ridicule." *Black's Law Dictionary*, 9th Ed. (West 2009), at p. 999. The *Post*'s conduct has not only done that but it has created a circus atmosphere and lynch mob mentality that the Supreme Court has repeatedly found deserving of a change of venue.[67] This atmosphere stems primarily from two insidious themes that permeate both the publicity and internet blogs: (1) efforts by the media in general and the *Post* in particular to stoke "class bias" against Mr. Goodman; and (2) vicious attacks – in many instances as vicious as many of the ones about Mr. Goodman – on undersigned counsel.[68]

1. The Stoking of "Class Bias" Against Mr. Goodman

Since Mr. Goodman is not "'charged ... with being wealthy," his "station in life" has, or should have, no legitimate bearing to his guilt or innocence. *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990), *quoting v. Commonwealth*, 44 S.W.2d 306, 308 (Ky. Ct. App. 1931). Therefore, "[t]he general rule is that during trial no reference should be made to the wealth or poverty of any party, nor should the financial status of one party be contrasted with the other's." *Batlemento v. Dove Fountain, Inc.*, 593 So.2d 234, 241 (Fla. 5th DCA 1991) (citation omitted). If adopted as a trial

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[67] *See Sheppard*, 384 U.S. at 340 (a circus like atmosphere when court could not control press coverage); *Estes*, 381 U.S. at 550 (pretrial and trial media coverage resulted in a disruptive circus atmosphere that deprived the defendant of the solemnity and sobriety to which a defendant is entitled and emphasized the "notorious" character of the defendant); *Irvin*, 366 U.S. at 727 (reasoning that jury pool's exposure to unfettered prejudicial news coverage certainly biased against defendant); *Daniels v. Woodford*, 428 F.3d 1181, 1211-12 (9th Cir. 2005) (emphasizing prejudice presumed because of extensive and continuous publicity about crime and prejudicial information about defendant, and majority of potential and actual jurors exposed to publicity).

[68] As discussed in detail in the *Media Coverage Analysis*, the publicity has been prejudicial in several other respects, including (1) spreading rumors that Mr. Goodman fell down at the Players Club, (2) reporting on alleged alcohol consumption, (3) speculation by and about Lisa Pembleton, (4) prejudging Mr. Goodman's credibility and defenses, (5) allegations that Mr. Goodman is hiding his true wealth from the Wilson family.

strategy by the State, "[a]rgument directly contrasting the poverty of one of the parties with the wealth of the other is especially apt to prejudice the jury" and the admission of evidence in pursuit of such a strategy would constitute reversible error in Florida. 593 So.2d at 241 & n. 15 (citations omitted). *See also Ryan v. State*, 457 So.2d 1084, 1088-89 (Fla. 4th DCA 1984) (holding that it was "unfair and improper for the prosecutor" to characterize the defendant as "rich" who "fitted into that jet-set scene" and is a liar "because she's rich and will thumb her nose" at the community).

Trial courts are entrusted with a gatekeeping function to prevent juries from being exposed to any suggestion that a verdict can or should be influenced by the financial status of the parties. "[A]ppeals to class prejudice are highly improper and cannot be condoned *and trial courts should ever be alert to prevent them*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (emphasis added). "[S]uch appeals ... have no place in a courtroom...." *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980) (finding prejudicial error in prosecutor's attempts at trial to incite class prejudice against wealthy defendant and remanding for a new trial). "Unfortunately, inherent in our system of trial by jury is always a danger the jury will be influenced by the wealth or power or one party or another or sympathy for a party's weakness, poverty or misery.... It is essential to avoid this risk." *Batlemento*, 593 So.2d at 242.[69]

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[69] *See also United States v. Bill Harbert Int'l Constr., Inc.*, No. 95-1231 (RCL), 2007 WL 842077, at *2 (D.D.C. Mar. 16, 2007) (Lamberth, J.) (denying motion to exclude evidence of civil defendants' financial condition or wealth as premature, but noting: "The Court is hard pressed to imagine how such evidence could be relevant, or how any relevance could help but be substantially outweighed by the undue prejudice and confusion likely to ensue from a discussion of defendants' wealth."); *United States v. Cassese*, 290 F. Supp. 2d 443, 457 (S.D.N.Y. 2003)(granting conditional motion for new trial under Rule 29(d) where government's theory "enabled the introduction of highly prejudicial and inflammatory evidence and arguments in front of the jury regarding Cassese's wealth, salary, and stock holdings. This evidence played into a bias against people of wealth."), *aff'd on other grounds*, 428 F.3d 92 (2d Cir. 2005); *Silbergleit v. First Interstate Bank of Fargo*, 37 F.3d 394, 398 (8th Cir. 1994) ("References to Silbergleit as a millionaire and to his receipt of unemployment compensation benefits were also highly prejudicial.");; *United States v. Cooper*, 286 F. Supp. 2d 1283, 1291 (D. Kan. 2003) (excluding evidence of extravagant expenditures for plastic surgery, gambling and strip

(continued...)

While the Court would be in a position to prevent the *prosecutors* from making an appeal to the jury's class bias if such a tactic were to be attempted inside the courtroom at trial, the Court has no power to curb the media's attempt to poison the jury pool by the incessant attacks on Mr. Goodman because of his alleged wealth. The "class-bias" attack has had several distinct features.

a. Pitting Mr. Goodman against Scott Wilson

***Page2live.com*, Feb. 27, 2011.**

Astonishingly, virtually every single article that collected – including the recent December 6th editorial and opinion poll fomented by the editorial board of the *Post* – alludes to the fact that Mr. Goodman's has a lot of money, and it is largely this fact that accounts for the case's perceived news value. There are 80 instances of the word "millionaire" in the 213 articles collected, 15 instances of the word "billionaire," and 102 instances of the word "mogul."[70] The term "patron"

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[69](...continued)
clubs because" the particularly limited probative value of this evidence is substantially outweighed by the unfair prejudice related to class and inflammatory moral issues"). *United States v. Payne*, 2 F.3d 706, 715 (6th Cir. 1993) (holding that the prosecutor's remarks during trial of the defendant for bribery and obstructing the mails "were part of a calculated effort used to evoke strong sympathetic emotions for Christmas-time activity, the poor, pregnant women, diaperless children and laid-off employees," prejudiced the defendant and required reversal); *Brown v. United States*, 766 A.2d 530, 546 n. 21 (D.C. App. 2001) (reversing obstruction of justice conviction, in part, due to prosecutor's "focus on the wealth and social status of the defendants" that "[came] across as an undisguised appeal to class prejudice against the powerful and privileged defendants"); *United States v. Terzado Madruga*, 897 F.2d 1099, 1020 (11th Cir. 1990) (holding that trial court improperly admitted evidence that the defendant wore gold jewelry, boasted of his financial worth and drove a luxurious automobile without showing that these items were derived from legitimate sources); *Read v. United States*, 42 F.2d 636, 645 (8th Cir. 1930) (setting aside convictions of officers of a failed bank where the prosecutor repeatedly referenced the defendants' "very substantial fortune" and jewels, at a time of "intense" prejudice against the defendants in the context of the bank failures of the Great Depression).

[70] *See also Stahl*, 616 F.2d at 33 (reversing defendant's conviction for bribery where, during trial, the prosecutor referred to the defendant's as "a multi-millionaire businessman in real estate" and repeatedly referred to his "Park Avenue offices"). *Cf. Socony Vacuum Oil Co.*, 310 U.S. at 237-239 (although not reversing, finding improper prosecutor's attacks on defendants as "millionaires and billionaires" and "malefactors of great wealth").

occurs 52 times, "magnate" 13 times and "heir" 23 times. And, the pieces almost never fail to connect Mr. Goodman to polo, usually with shots of the polo club that Mr. Goodman founded. These ubiquitous references seem to elicit hostility against Mr. Goodman by both the authors of the articles and by readers, as is evidenced by the editorial content of the articles and readers' comments. Any objective review of the published articles makes it clear that Mr. Goodman has become a target for the resentment that many people already feel towards the rich. One way that this hostility is invoked is by juxtaposing Mr. Goodman's wealth with the comparatively "modest" circumstances of Scott Wilson and his family.[71] This, in turn, leads to a David vs. Goliath, Rich vs. Poor, Good vs. Evil narrative. Consider, for instance, the opening sentences of the *Sun-Sentinel*'s first article about the crash: "They met at a crossroad, both literal and figurative. One was an engineering grad struggling to find his first job. The other, the multimillionaire founder and owner of the International Polo Club, who had just left a swank restaurant and bar… The Hyundai sank into the canal and Goodman's $200,000 Bentley came to a stop on a nearby sidewalk.[72] The authors' use of modifiers like "struggling" and "swank," as well as their decision to include "$200,000" before Bentley works to caricature the two

***Page2live.com*, Feb. 12, 2010, "Wellington Polo boss John Goodman involved in deadly crash; booze could have been a factor."**

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[71] *See Beck v. United States*, 33 F.2d 107, 114 (8th Cir. 1929) (reversing conviction where prosecutor portrayed the crime victims as the "widows and the orphans" and the defendant as someone who had "luxuriantly furnished offices" and who used the crime proceeds to purchase automobiles). *Cf. Brought v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1179-80 (11th Cir. 2002) (in a civil case, finding improper, but not plain error since there was no objection, the plaintiff attorney's argument contrasting the defendant's "one hundred million dollar company" who and who "has at least three lawyers in place" to the plaintiff who was "simply an employee trying to make a living down in Florida").

[72] *Feb. 13, 2010, "International Polo Club founder hurt, UCF grad killed in Wellington car crash."*

individuals, painting Wilson as a hardworking, innocent young man and Goodman as a reckless playboy. The use of Mr. Goodman's Bentley and Mr. Wilson's Hyundai as proxies for their respective economic statuses is also common throughout the coverage. The tabloid narrative that is created through the inclusion of these details not only invites readers to resent Mr. Goodman for his wealth, it also invokes an in-group/out-group bias against him, by contrasting the (for most people) unfamiliar occasion of a "society fundraiser" with the relatable activity of a "flag-football game with friends."[73]

Beyond simply alluding to Mr. Goodman's privileged lifestyle, at least three blatantly inflammatory articles were devoted to criticizing him for participating in expensive or upscale activities after the crash. Two of these pieces – "Once again, Sunday is DUI killing suspect John Goodman's day,"[74] which castigated him for attending a polo match, and "EXCLUSIVE: Polo

***Page2live.com*, March 4, 2010, "EXCLUSIVE: Polo boss John Goodman shuns Welly, lands in luxury beachside retreat."**

[73] Other expensive or upscale activities performed by Mr. Goodman have also been given undue attention by the media because they helped feed the depiction of him as an uncaring millionaire. For instance, seven (7) of the articles noted that Mr. Goodman had been arrested at the Four Seasons Hotel – a well-known symbol of wealth. *See Sun Sentinel.com*, May 19, 2010, "Polo club founder charged with DUI manslaughter in fatal Wellington crash." *Palm Beach Post*, May 19, 2010, "Polo Club founder Goodman could face up to 30 years in prison if convicted; *Broward Palmbeach.com*, May 28, 2010, "Polo Mogul's Tactic in Crash Case: Delay, Delay, Delay"; *Broward Palmbeach.com*, July 8, 2010, "Will a Multimillionaire Polo Mogul Be Punished for a Fatal Drunken Accident?" *Broward Palmbeach.com*, Dec. 30, 2010, "The Dirty Dozen: 2010's Most Despicable People."; *Broward Palmbeach.com*, Jan. 10, 2011, "Is Polo Mogul John Goodman Hiding His Vast Wealth?" Another article referred to it as a "a posh hotel in Miami." WPBF.com, May 19, 2010, "International Polo Club Founder Arrested."

[74] *Page2.live.com*, Feb. 27, 2011, "Once again, Sunday is DUI killing suspect John Goodman's day."

boss John Goodman shuns Welly, lands in luxury beachside retreat"[75] – were posted to *The Palm Beach Post*'s now-defunct gossip blog *Page2Live.com*. A third – "Weeks After Fatal Crash, John Goodman Attended Lakers Game in Miami"[76] – was featured on the *Broward-Palm Beach New Times* website. Each of these articles was premised on the notion that it was inappropriate for Mr. Goodman to carry on with his opulent lifestyle in the wake of the accident. This point was made in particularly inflammatory terms by Wilson family attorney Scott Smith in a quote to *Page2Live*: "'While Mr. Goodman is free on bail attending polo matches and continuing to wine and dine the rich and famous,' said attorney Scott Smith, 'Mr. and Mrs. Wilson continue to suffer from the loss of their only son.'"

b. Suggestions that Mr. Goodman is being given preferential treatment

Again referencing Mr. Goodman's wealth, several publications have suggested that he has already or will in the future receive preferential treatment from authorities. In a strongly biased blog post on the *Broward-Palm Beach New Times*, written just two days after the accident and excerpted on the *Houston Press* website,[77] author Bob Norman accused police of giving Mr. Goodman special treatment:

> And I believe the Palm Beach County Sheriff's Office is already handling Goodman – who has a net worth suspected to be in the hundreds of millions of dollars – with kid gloves. I've seen a whole lot of fatal car crashes like this, and usually you'll see the driver go to jail and a mug shot in the next day's newspaper. PBSO let

[75] *Page2live.com*, March 4, 2010, "EXCLUSIVE: Polo boss John Goodman shuns Welly, lands in luxury beachside reteat."

[76] *Blogs.Broward Palmbeach.com*, June 23, 2010, "Weeks After Fatal Crash, John Goodman Attended Lakers Game in Miami."

[77] *See blogs.houstonpress.com*, Feb. 16, 2010, "John Goodman, Bazillionaire Polo Patron, Awaits Possible Charges In Fatal Palm Beach Bentley Wreck ."

> Goodman, who suffered minor injuries and has hired big-name Miami attorney Roy Black, go free.[78]

In addition to these general allegations of preferential treatment, several outlets have suggested the possibility of corruption by questioning specific aspects of the investigation and prosecution. For instance CBS12 and FOX WFLX both aired reports questioning the fact that Mr. Goodman was not given a Breathalyzer test after the accident.[79] "It may surprise you that police did not give Goodman a Breathalyzer test that night," FOX stated. "Investigators say in many cases where DUI is suspected, a driver is given a Breathalyzer test at the scene. But that did not happen in Goodman's case." Other outlets questioned why prosecutors did not charge Mr. Goodman sooner, again suggesting that his wealth and stature played a role in the delay of his arrest. "It only took about three months," read a post on the *Houston Press* website, "but John Goodman, the Houston-bred multi-millionaire playboy air conditioning heir and Palm Beach polo patron, is finally behind bars."[80] NBC WPTV[81] and ABC WPBF[82] both aired reports prior to the arrest, questioning why Mr. Goodman hadn't yet been charged and noting public outrage about the delay. Another NBC WPTV report suggested wrongdoing by alleging that police had refused to speak with a post-accident witness who came across the damaged Bentley after the crash. That report, which featured an

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[78] *See blogs.browardpalmbeach.com*, Feb 13, 2010, "Polo Was His Life."

[79] *See CBS12.com,* Feb. 23, 2010, "Millionaire didn't take Breathalyzer test after fatal crash"; *WFLX.com*, Feb. 23, 2010, "Millionaire didn't take Breathalyzer test after fatal crash."

[80] *See blogs.houstonpress.com*, May 19, 2010, "John Goodman, Bazillionaire Polo Patron, Finally Arrested In Connection With Fatal February Crash."

[81] *See 2.WPTV.com*, Feb. 15, 2010, "Questions surrounding Wellington fatal car accident."

[82] *See WPBF.com*, April 15, 2010, "Prosecutor: No Delay In Goodman Case."

anonymous interview with the witness, used the incident to suggest that police were ignoring evidence to protect Mr. Goodman.[83]

c. Suggestions that Mr. Goodman will buy his way out of punishment

There is also a prevalent theme across the reporting on the case that Mr. Goodman will somehow use his wealth to evade justice.[84] For instance, several articles have suggested that Mr. Goodman has already used his "high-powered legal team, led by celebrity defense attorney Roy Black"[85] to delay his prosecution. This theme appeared as early as May 2010 in a *Palm Beach Post* article headlined "Goodman seeks to postpone parents' wrongful-death suit in fatal crash, saying it would jeopardize defense in criminal case."[86] The author quoted Wilson family attorney Scott Smith saying, "The motions to stay amount to nothing more than a weak attempt ... to avoid legal responsibility and accountability." The on-line version of this story includes a photograph of Mrs. Wilson trying to hold back her tears. Later that month, an article appeared on the *Broward-Palm*

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[83] *See WPTV.com*, Feb. 17, 2010, "Wellington car accident witness speaks out."

[84] This type of accusation, if made by a prosecutor in closing argument, would be blatantly improper. *See State v. Norris*, 874 S.W.2d 590, 598 (Tenn. Crim. App. 1993) (where defendant was charged with aggravated assault based on a car accident, finding prosecutor's argument "improper and intemperate" when he stated sarcastically: "Maybe we should just let you buy your way out of it if you can"); *Mitchell v. State*, 28 Ala. App. 119, 123; 180 So. 119, 122-23 (1938) (reversing grand larceny and stolen property conviction, in part, because prosecutor, pointing to the defendant, argued: "You thought you could take your money and beat the case"); *Kennamer v. State*, 28 Ala. App. 317; 183 So. 892 (1938) (reversing burglary conviction because the prosecutor prejudiced the defendant by arguing that the defendant's family was "'willing to plank down a lot of money to get him out of it'"); *State v. Netherton*, 128 Kan. 564, 279 P. 19 (1929) (reversing murder conviction of prominent doctor, in part, because prosecutor in closing asked the jury" "Can a Johnson County jury convict a man accused of murder when that man is worth one hundred thousand dollars?"); *State v. Powell*, 120 Kan. 772, 245 P. 128 (1926) (reversing bank officer defendants, in part, because the prosecutor made an impassioned argument to the jury as to whether there was on law for the rich and another for the poor).

[85] *See Palmbeachpost.com*, May 19, 2010, "Polo Club founder Goodman could face up to 30 years in prison if convicted."

[86] *See Palmbeachpost.com*, May 20, 2010, "Goodman seeks to postpone parents' wrongful-death suit in fatal crash, saying it would jeopardize defense in criminal case."

Beach New Times website with the headline: "Polo Mogul's Tactic in Crash Case: Delay, Delay, Delay."[87] After reporting that a judge had denied the defense's request to postpone the civil trial, the author wrote:

> But Palm Beach Circuit Judge Glenn Kelley's ruling is small consolation in a case that has been marked by repeated delays and eyebrow-raising treatment for the multimillionaire founder of the International Polo Club, who is accused of driving drunk, crashing into Wilson's car, then leaving the scene. I can't even understand how we have to wait all this time to get answers," said Lili Wilson, Scott's mother, who was choking back tears after the ruling yesterday. "Every day, I keep thinking I'm gonna wake up. This is a nightmare."

In addition to accusing Mr. Goodman of evading accountability, this excerpt suggests that the delays are further victimizing the Wilson family. This idea appeared again in a *Palm Beach Post* article after the original trial date was set for the criminal trial. In that piece, Mr. Smith and prosecutor Ellen Roberts were quoted making statements that furthered the theme that Mr. Goodman's case was unusually delayed and that the prolonged process was causing grief for the family:

> Outside the courtroom, veteran traffic homicide prosecutor Ellen Roberts said to the family, "See, I told you we'd get there. It just takes awhile." It's been nearly a year and a half since sheriff's investigators say that a drunken Goodman crashed into 23-year-old Wilson early on a February morning.[88]

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[87] *See blogs.browardpalmbeach.com*, May 28, 2010, "Polo Mogul's Tactic in Crash Case: Delay, Delay, Delay."

[88] *See Palmbeachpost.com*, June 27, 2011, "Oct. 24 trial date set for polo mogul in fatal Wellington crash."

Mr. Smith contributed to these themes by emphasizing the emotional toll that the delays were taking on the family:

> Smith said the Wilsons are pleased that a criminal trial date has been set and hope that their civil lawsuit will soon be scheduled for trial. The lawsuit and criminal trial must be done before the Wilsons' healing can begin, he said. "Each day is agony for them," Smith said.[89]

Yet another *Post* article – "Polo magnate Goodman waives right to speedy trial in DUI manslaughter case" – made reference to the theme of Mr. Goodman delaying his prosecution in July 2010. "The road to justice for John Goodman, the Wellington polo boss accused of DUI manslaughter, could be a lot longer now," the article, which was reprinted in *The Sun-Sentinel*,[90] began.[91] And in January 2011, an NBC WPBF segment, titled "Victim's Family Eager for Goodman Trial to Begin," featured an interview with Wilson family attorney Chris Searcy in which he spoke of his clients' desire to see the case brought to trial.[92]

Finally, the list of reports suggesting that Mr. Goodman will buy his way out of punishment also includes a *Broward-Palm Beach New Times* blog post, headlined "For Polo Mogul John Goodman, Other Celebrity DUI Cases Offer Hope of Minimal Punishment,"[93] which compared Mr. Goodman to rich and famous defendants who received lenient punishments for DUI offenses, and

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[89] *Id.*

[90] *See Sun Sentinel.com*, July 21, 2010, "Polo magnate Goodman waives right to speedy trial in DUI manslaughter case."

[91] *See Palmbeachpost.com*, July 21, 2010, "Polo magnate Goodman waives right to speedy trial in DUI manslaughter case."

[92] *See WPBF.com*, Jan. 14, 2011, "Victim's Family Eager For Goodman Trial To Begin."

[93] *See blogs.browardpalmbeach.com*, July 9, 2010, "For Polo Mogul John Goodman, Other Celebrity DUI Cases Offer Hope of Minimal Punishment."

another, headlined "John Goodman Offered to Pay Post-Accident Witness,"[94] which accused him of attempting to bribe Lisa Pembleton during their encounter after the accident.

d. The blogosphere

The comments posted by readers to the *Post*'s articles and editorials both documents the impact of the class warfare on the jury pool and magnifies the prejudice of it by filling the internet with wave after wave of incendiary class-based rhetoric. The vast majority of the hundreds of posted comments evidence this theme.

The *Post*'s campaign to inflame the community through class-based appeals started as early as February 12, 2010, with the publication of a piece entitled "Wellington polo boss John Goodman involved in deadly crash; booze could have been factor." Among the comments were: "Another rich a** hole believing the rules don't apply to him. This young man died for no reason and this guy wont even go to jail Money talks in this town...." and "The rich & famous seem to think they are above the law! Let's hope this guys [sic] money & connections don't let him get away with it!" A full year later, community passions had not diminished. Commenting to the February 12, 2011, article in the *Palm Beach Post* marking the one-year anniversary of the accident, blogger "ELC" wrote:

> I recently had jury duty, but boy would i love to be on the jury when this piece of human garbage goes before a judge. You could say I already passed judgment-but that's ok. I hate when people think they are above the law and this jerk thinks he's one of the chosen. People like him have no conscience-its how this event affects him not how he destroyed lives. I would love to destroy his life like he destroyed

[94] *See blogs.browardpalmbeach.com*, June 24, 2010, "John Goodman Offered to Pay Post-Accident Witness."

> that of the Wilson's I believe in the death penalty but I would settle for life.[95]

Two days later, the *Post* published a piece entitled "Polo fans say game not tainted by fatal crash." *See Palmbeachpost.com*, Feb. 14, 2010, "Polo fans say game not tainted by fatal crash." Typical of the still on-line postings is the following by "Kkay":

> The whole Polo community knows what kind of person Mr. Goodman is. He's rich they are rich and they don't have to live by our rules. Drinking, drugs, using people and animals as disposable playthings are what they excel at. Their money makes them special... the lower class folks are to bend and bow to their wealth... Living in Palm Beach County gives us all the privilege of interacting with these selfish people. Please lock up Goodman for a long time.

Other similar comments included ones posted by Blogger "JEM" ("He is a rich fat cat who thinks rules do not apply to him") and "Amazed" ("John Goodman is a Billionaire drug addict whose resources afford him the luxury of untold amounts of Cocaine and legal representation to go along with it").

A frequent theme among the comments has been the belief that Mr. Goodman has been treated preferentially by authorities. A comment by "corruption1" posted to an article on *Page2Live* made this point in March 2010:

> Just another example of WPB corruption. What a cover up! Let's get real. If this were any other human being, they would be hanging by now. Where is the corruption task force when you need them ?? This crap makes me SICK ![96]

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[95] *See Palm Beach Post*, Feb. 12, 2011, "Family, friends gather on one-year anniversary of polo club founder's crash that killed 23-year-old in Wellington."

[96] *See Page2live.com*, March 9, 2010, "Source: Polo boss John Goodman passed out at the wheel."

Similarly, many commenters predicted that Mr. Goodman would buy his way out of trouble, as in the following comments, both posted to *Page2Live* just hours after the accident:

> Looks like he is in big trouble. He tried to flee the scene. Don't worry, he will pay off the family. He is rich. – Tommy
>
> Another rich a**hole believing the rules don't apply to him. This young man died for no reason and this guy wont even go to jail. Money talks in this town. – Devils Advocate[97]

The extreme and hostile nature of many of these remarks may be seen as evidence of bias within the larger community. Indeed, many of the comments explicitly contained reference to class, such as "[t]he attorney's [sic] and the rich OWN this country, and we peasants are the 'help'..."[98] and "Guilty until proven rich. The rule of law is for the peasants, not the ruling class. Now back to work Proles."[99] One reader, having perused the comments, saw the pattern and asked: "Why all this 'class' warfare[?]...."[100]

2. Undermining Mr. Goodman's Sixth Amendment Right to Counsel

"[T]he right to be represented by counsel is among the most fundamental of rights." *Pension v. Ohio*, 488 U.S. 75, 84, 109 S.Ct. 346, 102 L.Ed. 2d 300 (1988); *see also United States v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980) ("The right to counsel is so basic to all other rights that

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[97] *See Page2live.com*, Feb. 12, 2010, "Wellington polo boss John Goodman involved in deadly crash; booze could have been factor."

[98] *See Palmbeachpost.com*, March 7, 2010, "Scene of polo club owner's fatal crash not dangerous enough for traffic signals, officials say" (comment by "danno" at 2:45 p.m., 3/8/10).

[99] *See Page2live.com*, Feb. 27, 2011, "Once again, Sunday is DUI killing suspect John Goodman's day" (comment by "Charles Sheen" at 11:59 p m., 2/27/2011.

[100] *See Page2live.com*, March 10, 2010, "Mother of victim in polo boss John Goodman's crash lawyers up" (comment by "holyballs" at 11:02 p.m. 3/11/2010.

it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial...."). The fact that a criminal defendant may have the financial means to retain highly qualified counsel is not fair game for prosecutorial attacks. "Lawyers in criminal cases are necessities not luxuries, and even the most innocent individuals do well to retain counsel." *Bruno v. Rushen*, 721 F.2d 1193, 1194-95 (9th Cir. 1983), *cert. denied*, 469 U.S. 920, 105 S.Ct. 302, 83 L.Ed. 2d 236 (1984). Moreover, the Sixth Amendment right to counsel encompasses more than the right to some representation and more even than effective representation; it also includes the right to counsel of one's choice. *Wheat v. United States*, 486 U.S. 153, 159 (1988). "[L]awyers are not fungible, as are eggs, apples and oranges." *United States v. Laura*, 607 F.2d 52, 56 (3rd Cir. 1979). Therefore, the denial of the right to counsel of choice is considered a "structural" error that is automatically reversible. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

In a trial, attacks on privately retained defense counsel would obviously be prohibited. It is "an impermissible strike at the very fundamental due process protections of the Fourteenth Amendment" to allow representatives of the State to prejudice juries by focusing closing arguments on a defendant's ability to retain private counsel. *Bruno*, 721 F.2d at 1194-95. And, such attacks frequently result in the reversal of convictions.[101]

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[101] *See, e.g., Ryan v. State*, 457 So.2d 1084, 1089 (Fla. 4th DCA 1984) (reversing conviction, in part, because prosecutor portrayed defendant's lawyer "as a fancy attorney and out-of-towner); *Sizemore*, 921 F.2d at 670-71 (improper for prosecutor to comment on "Sizemore's consultation with seven attorneys"); *United States v. Friedman*, 909 F.2d 705, 708-09 (2d Cir. 1990) (reversing conviction because of the prosecutor's improper statements, including that defense counsel "try to get [defendants] off, perhaps even for high fees" and that defense counsel "will make any argument he can to get that guy off"); *Goff*, 241 Ky. at 430-31 (reversing conviction where prosecutor in closing that defense counsel was fighting so hard so that he could earn "a big, fat fee" and criticizing defendant for being "able to pay fat fees," holding that "the reference to his ability of the defendant to ay a fee was improper"); *Howard v. Comm.*, 24 Ky. 91, 67 S.W. 1003 (1902) (reversing conviction where prosecutor in closing stated that defense counsel "was a high-priced

(continued...)

In violation of these principles, many reports have propagated the notion that Mr. Goodman will buy his way out of punishment by focusing on his hiring of undersigned counsel. These articles paint counsel as a celebrity miracle worker, capable of successfully defending even the most guilty clients. The *Houston Press* contributed to this theme in a highly inflammatory blog post, headlined "More On The Billionaire And The Bentley: The Coroner's Report Is In, The Lawyer Is A Star, And Why Hasn't Goodman Been Charged?" shortly after the accident:

> While Miami's rich drug-trafficking milieu has provided him with more than a few clients, [Roy Black] has also defended the likes of accused rapist William Kennedy Smith, accused sodomite Marv Albert, and OxyContin-poppin' Rush Limbaugh. Black also defended Girls Gone Wild founder Joe Francis on charges of first-degree douchebaggery.[102]

In a *Page2Live* post that was already noted – "Will justice prevail in Welly polo boss John Goodman's crash?" – Paula Russell, a former employee of the State Attorney's office, predicted that the office would spare Mr. Goodman a vigorous prosecution because of his wealth and his representation by undersigned counsel.

> What's more, Goodman's hiring of high-profile Miami attorney Roy Black could expose yet again the state attorney's office as "accommodating" to rich defendants, Russell added. And she should know. She worked there for 23 years. "When it comes to rich and/or famous defendants, the facts speak for themselves," Russell said. "I believe that the state attorney's office over the years has given significant breaks to people with a lot of money. Is it political or

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[101](...continued)
lawyer, and was never employed unless in bad cases...."). *Cf. State v. Thomas*, 750 So.2d 1114 (La. App. 1999) (mistrial not warranted where trial court sustained counsel's objection to prosecutor's comments about "high-priced" defense attorney's "gimmicks and tactics"); *Raffaelli v. State*, 881 S.W.2d 714 (Tex. App. 1994) (improper but harmless for prosecutor to state that the defendant was represented by "some well-paid, well-compensated counsel").

[102] *See Houstonpress.com*, Feb. 16, 2010, "More On The Billionaire And The Bentley: The Coroner's Report Is In, The Lawyer Is A Star, And Why Hasn't Goodman Been Charged?"

> psychological? Are prosecutors in a panic when Roy Black shows up? I don't know. But the facts are there."[103]

The story even went so far as to suggest that the State Attorney would be influenced in his decisions regarding Mr. Goodman's case by the fact that undersigned counsel of one of counsel's partners had contributed to his campaign:

> PBSO is expected to present its investigative report to the office of State Attorney Mike McAuliffe for review and, if warranted, prosecution. But the case could be a challenge for a state attorney whose office traditionally has had difficulties making the rich and/or famous pay for crimes – especially when they're defended by Roy Black. Black, by the way, contributed a total $1,000 to McAuliffe's campaign, as did Black's law partner, Scott Kornspan, according to campaign records. [104]

Short of outright bribery, *The Palm Beach Post* has accused Mr. Goodman's legal team of securing an unfair advantage for their client by vastly outspending the prosecution on experts and investigators and exhausting their resources through unnecessary depositions:

> On one side of the criminal case against him is famed defense attorney Roy Black and his powerhouse Miami law firm - a stable of aggressive, impeccably mannered counsels to the troubled rich and famous. There seems to be little question that Goodman, 46, the multimillionaire owner of Wellington's International Polo Club Palm Beach, will bring to court all the advantages money can buy.
>
> Roberts, who started and now runs the state attorney's office's traffic homicide division, acknowledges that her team will be outgunned financially. "The more money they have, the more experts they can hire and the more depositions I'll have to go to," she said dismissively. His deep pockets can assure that Black's firm can hire any number of private investigators and experts to probe for weaknesses in the state attorney's office's case, which alleges Goodman was drunk in February when he crashed 23-year-old Scott

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[103] *See Page2live.com*, Feb. 16, 2010, "Will justice prevail in Welly polo boss John Goodman's crash?"

[104] *See Page2live.com*, Feb. 16, 2010, "Will justice prevail in Welly polo boss John Goodman's crash?"

> Wilson's car into a canal and then ran off, leaving the recent college graduate to drown.[105]

This highly biased and inflammatory article was also published in the *Sun-Sentinel*.[106] The effect of these attacks on counsel can be graphically seen in the blogosphere. Counsel has been variously described as "a scumbag," a "leach," the "devil" and "piece of garbage."[107]

Another series of articles have similarly focused on Mr. Goodman's civil attorneys. At least 5 news stories have alleged that the civil defense team's was trying to blame Scott Wilson for the accident.[108] Although Mr. Goodman's attorney in that matter, Dan Bachi, told the *Post* that the defense was simply being included in court filings as a legal precaution while the discovery process was ongoing and that they were likely to drop it once discovery had concluded, they and other media

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[105] *See Palmbeachpost.com*, May 21, 2010, "Lawyers on both sides of Goodman case are formidable."

[106] *See Sun Sentinel.com*, Date not listed, "Lawyers on both sides of Goodman case are formidable."

[107] *See, e.g., Page2live.com*, Feb. 12, 2010, "Wellington polo boss John Goodman involved in deadly crash; booze could have been factor" (posting comment by "Liam" at 11:15 p m., 2/13/2010, "**Roy Black is a scumbag who will stop at nothing to get his client off**"); *Palmbeachpost.com*, Feb. 14, 2010, "Polo fans say game not tainted by fatal crash" (posting comment by "Louanne" at 8:41 a.m., 2/15/2010, "**...that leach Roy Black!**"); *Palmbeachpost.com*, Feb. 17, 2010, "Mother of Wellington college grad killed in crash: 'He died with a pure heart" (posting comment by "Riv Goshen" at 8:56 a.m., 2/18/2010, "**...devil Roy Black...**"); *Sun Sentinel.com*, March 4, 2010, " Polo club founder's legal team likely preparing for fatal Wellington crash" (posting comment by "langryfriend" at 9:56 a.m., 3/15/2010, "**This guy is a piece of garbage and Roy Black is even more of a piece of garbage for defending people like this. May they both rot in hell**"); *Palmbeachpost.com*, March 9, 2010, "Authorities: Polo club owner Goodman was found a quarter-mile from fatal crash, seeking help" (Posting comment by "A" on 3/8/2010, "**...high-priced scumbag lawyer**"); *Palmbeachpost.com*, May 20, 2010, "Goodman seeks to postpone parent's wrongful-death suit in fatal crash, saying it would jeopardize defense in criminal case" (posting comment by "Sink This Money Machine" on 5/5/2010, "**Your lawyers are nothing but a bunch of sneaky, lizard, slimy type that wallow in there [sic] own filth....**"); *Palmbeachpost.com*, May 21, 2010, "Lawyers on both sides of Goodman case are formidable" (posting comment by "Hugh Johnson on 5/21/2010, "**In my opinion Roy Black is scum and the worst kind of lawyer for taking this case**").

[108] *See Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case"; *Palmbeachpost.com*, Oct. 26, 2010, "Judge: Polo mogul allowed to argue crash victim partially at fault - for now"; *WPTV.com,* Oct. 26, 2010, "Polo mogul's attorney blaming victim in fatal DUI crash"; *Palmbeachpost.com*, Jan. 26, 2011, "Polo club founder Goodman drops claim victim may have shared blame for fatal crash"; *Sun Sentinel.com*, Jan. 26, 2011, "Polo club founder Goodman drops claim victim may have shared blame for fatal crash."

outlets continued to characterize the maneuver in biased and inflammatory terms. Consider the opening paragraphs of an October 2010 article in *The Palm Beach Post*, headlined "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case":

> Scott Wilson was wearing his seat belt, had no alcohol or illegal drugs in his system, was driving below the speed limit and had the right of way on Lake Worth Road on Feb. 12 when he was hit by polo club owner John Goodman and thrown into a canal, where Wilson drowned, authorities have said. But Goodman has argued in his defense in a wrongful-death lawsuit that Wilson, a 23-year-old civil engineer who was on his way to his mother's house, may be partially at fault for his own death.[109]

Another of the reports, a segment by NBC WPTV headlined "Polo mogul's attorney blaming victim in fatal DUI crash," claimed that the defense had leveled a "startling accusation" and featured an interview with Wilson family attorney Chris Searcy, who called the defense's actions "insensitive at best."[110]

D. The Continuity of the Publicity & Size of Palm Beach County

As the Court can see from the foregoing and accompanying exhibits, the publicity has not significantly lessened in the last 22 months. Indeed, as documented in **Exhibit 13**, virtually every court appearance, release of discovery, "press conference" and substantive court-filing in both the instant case and the parallel civil suit has produced a spike in the publicity. The fact that the media has been closing following status hearings about the *potential trial date* is particularly telling, as a

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[109] *See Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case."

[110] *See WPTV.com*, Oct. 26, 2010, "Polo mogul's attorney blaming victim in fatal DUI crash."

forecast of the surge of publicity that would likely envelop jury selection and the trial if held in Palm Beach County.

The print media, however, is only the tip of the iceberg. With the internet, stories never fade away. People no longer need to wade through microfiche in a library to find month-old stories about a case. The *Post*'s on-line version contains archived material and each new story usually contains hyperlinks to that archived material, both in written and video form, which allows the viewer to access original broadcast footage and previously posted reader comments, including all the unfiltered comments and threats previously discussed. The *Post* helps fan the flames by allowing readers to post comments anonymously.[111] Thus, while the Internet is "freedom enhancing ... there is a harsher reality to virtual reality." Heather Berger, *Note and Recent Development: Hot Pursuit: The Media's Liability for Intentional Infliction of Emotional Distress Through Newsgathering*, 27 CARDOZO ARTS & ENT. L.J. 459, 474 (2009). "Our proliferating use of the Internet poses a potential threat of damaging reputations more permanently and vastly than ever before...." *Id.* As author Daniel J. Solove notes:

> The Internet allows information to flow more freely than ever before. We can communicate and share ideas in unprecedented ways. These developments are revolutionizing our self-expression and enhancing our freedom. But there's a problem. We're heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search. We will be forced to live with a detailed record beginning with childhood that will stay with us for life wherever we go,

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[111] "While anonymity often facilitates greater exchange of ideas and more robust debate, it also allows people to make anonymous threats and to menace their targets behind a mask of namelessness. Not only does this mask protect them from liability, but it also makes a threat itself more frightening. When a threat comes from an unknown source, the victim is unable to assess the threat accurately." *See* Hammack, 36 COLUM. J.L. & SOC. PROBS. at 83-84. Moreover, "speakers using the Internet are willing to say more than they otherwise might if their identities were known." *See* Katelyn Y. A. McKenna & John A. Bargh, *Coming Out in the Age of the Internet: Identity "Demarginalization" Through Virtual Group Participation*, 75 J. PERSONALITY & SOC. PSYCHOL. 681, 692 (1998).

> searchable and accessible from anywhere in the world. This data can often be of dubious reliability; it can be false and defamatory; or it can be true but deeply humiliating or discrediting. We may find it increasingly difficult to have a fresh start, a second chance, or a clean slate. We might find it harder to engage in self-exploration if every false step and foolish act is chronicled forever in a permanent record. This record will affect our ability to define our identities, to obtain jobs, to participate in public life, and more. Ironically, the unconstrained flow of information on the Internet might impede our freedom.

The Future of Reputation: Gossip, Rumor, And Privacy on the Internet, Yale Univ. Press (2007).

Pre-trial publicity jurisprudence has yet to take into account the impact of the digital age on previous conceptions about the effectiveness of time/delay to "soften[] ... community sentiment." *Patton v. Yount*, 467 U.S. 1025, 1032, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Anyone in Palm Beach County with a computer terminal or I-phone can instantly access the publicity, whether it be written, visual or digital. Using the powerful search engines of internet services providers and YouTube, anyone can type in any number of keyword entries and be directed immediately to the *Post*'s publications and television broadcasts. "The Internet has no sunset and postings on it will last and be available until some person purges the Web site, perhaps in decades to come." *See Bursac*, 22 Misc. 3d at 339; 868 N.Y.S.2d at 479.

Youtube video, "New Details Emerge In Goodman Case." Uploaded by WPBF on May 20, 2010.

Exhibits 10 and **12** are printouts of the first few "page" of searches conducted on three popular internet service providers (Google, Yahoo! and Bing) and Youtube using the three searches

terms: "John Goodman and Scott Wilson," "John Goodman and DUI" or "John Goodman and Polo." The first "pages" of the stories on each internet service provider, as well as Youtube, display stories from as early as February 2010 and at various random times between then and now. Most also provide hyperlinks to other stories and broadcasts, as well as to the "press release" issued by Mr. Searcy's law firm.

Youtube video: "Wellington Crash Victim's Family To File Lawsuit." Uploaded by WPBF on Apr. 28, 2010

The Youtube searches are especially prejudicial. As previously noted, a search using the phrase "John Goodman and Scott Wilson" instantly produced a total of 20 videos, many featuring the choreographed "press conferences" performed by the Wilson family attorneys, as well as shots of the roadside memorial (with a cross and flowers) that was erected by Wilson family supporters.[112]

The remaining 12 videos include:

● One devoted entirely to a live interview of Mr. Wilson, including shots of Mr. Wilson displaying photographs of his son at various ages.

[112] These three were entitled "New Details Released in John Goodman Investigation," "John Goodman civil trial to continue" and "Wellington Crash Victim's Family To File Lawsuit."

Youtube video: "Scott Wilson's Father Speaks 6 Months After Son Dies." Uploaded by WPBF on Aug. 12, 2010.

●Two showing Mr. Goodman behind bars and being led in handcuffs into the courtroom under guard; one of which also includes Mr. Goodman's mugshot under the caption "BOOKED."

Youtube video: "Polo billionaire booked." Uploaded by WPTV on May 20, 2010.

Youtube video: "Goodman Bonds Out of Jail After Arrest." Uploaded by WPBF on May 19, 2010.

Youtube video: "Goodman Bonds Out of Jail After Arrest." Uploaded by WPBF on May 19, 2010.

●One devoted to reporting live at Scott Wilson's funeral, with shots of the roadside memorial, interviews with friends and Wilson's mother speaking at the podium.

Youtube video: "John B. Goodman Billionaire Involved in Fetal [sic] Wellington car crash. Part 2." Uploaded by jasontman36 on Feb. 16, 2010.

Youtube video: "John B. Goodman Billionaire Involved in Fetal [sic] car crash. The Scott Wilson memorial. Part 4." Uploaded by jasontman36 on Feb. 22, 2010.

- Numerous videos including live statements from Mrs. Wilson, usually including shots of her in tears and/or closeups of the roadside memorial.[113]

- One discussing the fact that Mr. Wilson invoked his Fifth Amendment right not to testify at the civil deposition, along with an interview with Mr. Searcy. *See* p. 46 *supra.*

The concept of "continuity" of publicity takes on a whole new meaning in the Youtube age. As one commentator has described it:

> A benefit of the traditional news media of television and print, is that they abide by essentially standard cycles of publication, allowing the court to review accurately when information was presented to the potential jury-pool. However, there is no similar news cycle for reports and coverage based on YouTube. Once a user posts content on the site it is essentially permanently stored, and due to Google's purchase of YouTube in 2005, the content is constantly accessible through any Google keyword search. Further, unlike traditional commercial broadcast or print media, YouTube can *narrow cast*, allowing any user at any time access content on a pending case, without the court being able to know or predict. While a court may assume that even large criminal trials only have a shelf-life of a few months in television and print, the court may not assume this when it comes to YouTube. Also, unlike the traditional news media, which may refrain or be barred by court order from reporting heavily on a case or on particular aspects of the case during critical time stages, the YouTube poster has neither incentive to limit his or her postings, nor is he under the jurisdiction of a court gag order as a private individual.

Matthew Mastromauro, *Pre-Trial Prejudice 2.0: How YouTube Generated News Coverage Is Set to Complicate the Concepts of Pre-trial Prejudice Doctrine and Endanger Sixth Amendment Fair Trial Rights*, 10 J. HIGH TECH L. 280, 339 (2010) (footnotes omitted).

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[113] *See* "Goodman Bounds Out of Jail After Arrest"; "John B. Goodman Billionaire involved in fetal [sic] Wellington car crash (part 2); "Billionaire John B. Goodman arrested!" and "Goodman in Court For Status Hearing."

The author's observation about the uncontrolability of contributors to Youtube is underscored in this case. Each Youtube video indicates who posted the video and when. Several of the videos about the instant case were posted, not by the media directly, but by someone identified only as "jasontman36," who seems to have posted dozens of videos on a wide range of topics. Similarly, the searches on Google routinely produce an "editorial" posted by a blogger identified only as "tenaweek.org." *See* **Exhibit 14**. The 2-page blog, originally posted on March 11, 2010, is entitled "John Goodman gets away with murder in Florida?" and bitterly forecasts that Mr. Goodman is going to buy his way out of trouble ("And what does the Bentley imply? MONEY"... No one should get away with this. But John Goodman has something the average American doesn't – MONEY!"). At the end of the rant, the blogger lists 5 hyperlinks to publications and broadcasts selected, of course, by the blogger. Bloggers like tenaweek.org are particularly dangerous since they are not obliged to adhere to any journalistic standards for either factual accuracy or objectivity and are not subject to the jurisdiction of the Court to restrain through a gag order.

Under these circumstances, neither the time between the accident and trial nor the size of Palm Beach County can be expected to significantly diminish the prejudice from the pervasive coverage. As one commentator has correctly perceived, "[t]he Internet is more conducive to sustaining interest in a case over longer periods of time than traditional media because of the unique self-selected nature of the information the public gathers on-line.... This allows constant access to the full range of past and present information about a case." Erika Patrick, *Protecting the Defendant's Right to a Fair Trial in the Information Age*, 15 Cap. Def. J. 71, 81 (Fall 2002). With outlets such as Youtube the problem is even greater because the presentation of videos creates a more indelible impact on a jury, lengthening the possible effect. *See* . *Estes,* 381 U.S. at 542; *Belo*

v. Clark, 654 F.2d 423, 430 (5th Cir. 1981); *United States v. Sanders*, 611 F. Supp. 45, 49 (S.D. Fla. 1985).

"The riots in LA? If this guy walks, people are going to come unglued."

Palmbeachpost.com, May 21, 2010, "Lawyers on both sides of Goodman case are formidable" (comment posted by "Chris" at 11:21 a.m., Sept. 7, 2010).

To be sure, jury pools in other cities would have the same ready access to this material as residents of Palm Beach County. However, people in other regions of the state are far *less* likely to be as inquisitive as those in Palm Beach County and far *more* likely to adhere to the Court's instructions. In contrast, the community in Palm Beach County has become so inflamed that even if jurors chosen from there honestly believe they can objectively hear the evidence before trial, they may come to fear "return[ing] to [their] neighbors" with anything other than a guilty verdict. *Estes,* 381 U.S. at 545; *see Turner v. Louisiana,* 379 U.S. 466, 472 (1963). It should not take courage for a juror to vote to acquit. Yet, a juror here who reads about this case may very well fear for their own safety. A *Palm Beach Post* article from May 2010 called the case "a lightning rod for community outrage" and reported that it had "ignited furious debate in and around Wellington about class and privilege."[114] In addition to these general observations, an NBC WPBF segment from April 2010 noted that the station had received inquiries on Facebook from people wondering why Mr. Goodman had not yet been charged in Scott Wilson's death.[115] And in July 2010, a blog post on the *Broward-Palm Beach New Times* speculated that a political ad baring

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[114] *See Palmpeachpost.com,* May 19, 2010, "Polo Club founder Goodman could face up to 30 years in prison if convicted."

[115] *See WPBF.com,* April 15, 2010, "Prosecutor: No Delay In Goodman Case."

the name "Goodman" had been knocked down in anger at "the constant reminder" of Mr. Goodman and because of the sign's proximity to the crash site.[116]

E. The Totality of the Circumstances

As Oliver Wendell Holmes noted over 80 years ago, "[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason." *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). While hardly "eloquent," the *Post*, the Wilson family attorneys and representatives of the State have joined forces to "set fire to reason" in this community and, as the internet insures, their unbridled "enthusiasm" to see Mr. Goodman convicted is unlikely to abate. The totality of the circumstances necessitates a change of venue in order to guarantee Mr. Goodman a fair trial.

III. THE PUBLIC OPINION SURVEY

A. Introduction

Numerous courts and commentators have recognized the value of a scientifically valid public opinion survey as a means of detecting bias in connection with a motion for a change of venue.[117] Since such surveys are "'conducted in an atmosphere free from the pressure and regimentation of the jury selection process,'" people are much more inclined to be honest "when questioned by unintimidating, unnamed and relatively unintrusive, neutral researchers, in the comfort of their home, and where there is no 'wrong' answer that will lead to dismissal." Rich Curtner and Melissa Kassier,

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[116] *See Browardpalmbeach.com*, July 24, 2010, "Tropical Storm -- or Hater -- Demolishes "Goodman" Sign Near Scott Wilson Crash Site."

[117] *See, e.g. United States v. Maad*, 75 Fed. Appx. 599 (9th Cir. 2003); *State v. Baumruk*, 85 SA.W.3d 644 (Mo. 2002); *State v. Erickstad*, 620 N.W.2d 136 (N.D. 2000). In *Erickstad*, the court went so far as to hold that "[m]ere quantity of media coverage is not the focus; rather, ... defendants [need to] submit qualified public opinion surveys, other opinion testimony, or any other evidence demonstrating community bias caused by the media coverage." 620 N.W.2d at 140.

"Not in Our Town Pretrial Publicity, Presumed Prejudice, and Change of Venue in Alaska: Public Opinion Surveys as a Tool to Measure the Impact of Prejudicial Pretrial Publicity, 22 ALASKA L. REV. 255, 289 (Dec. 2005), quoting Peter O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls: A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 183 (1988). The accompanying *Public Opinion Survey* confirms what the publicity itself strongly suggests – the jury pool in Palm Beach County has been tainted beyond repair.

B. <u>The Findings of the Public Opinion Survey</u>

The *Public Opinion Survey* was conducted with residents of Palm Beach Country from October 5, 2011 to October 26, 2011. Based upon the sampling method used(*random stratification*) and survey size (400), the survey has a margin of error of plus or minus 5% at a 95% level of confidence. The survey was designed to gauge the following:

1. The extent to which residents of Palm Beach County who are eligible for jury service ("Residents") have been exposed, through media accounts or other means, to information related to this case.
2. Whether the information Residents have been exposed to has resulted in any opinions, biases or perceptions about the cause of the accident that led to Scott Wilson's death, Mr. Goodman generally, Mr. Goodman's guilt or innocence and/or the punishment he should receive.
3. Whether any additional factors (in addition to, or independent of, media accounts) have caused Residents to form an opinion, bias, or

perception about the facts and circumstances of the case, or other issues closely related to the case.

The survey found that the overall impression of Mr. Goodman, by all Residents, was negative. Additionally, Residents who were aware of Mr. Goodman and had a positive impression of him prior to this case, no longer hold the same view of him based upon the publicity of the case. Some 65% of participants (261 of the 400 polled, less one resident who personally knew Mr. Goodman) were aware of the case.[118] Later in the survey, when asked about their overall impression of Mr. Goodman, based on the publicity of the case, 159 Residents indicated that they had formed an opinion about Mr. Goodman. Of those, 87% (or 138 of 159 Residents) had a predominately negative impression of him. *Cf. Skilling*, 130 S.Ct. at 2915 n. 15 (holding that the record did not support a finding of presumptive prejudice from the publicity where only 12.5% of those surveyed believed Enron executives were guilty and 2/3 of respondents "failed to say a single negative word" about him or had never heard Skilling's name).

Delving even deeper, it became clear that the publicity of this case has negatively impacted positive feelings that previously existed towards Mr. Goodman. All survey participants (400) were asked if they had heard of Mr. Goodman prior to this case. Those who responded affirmatively were then asked what their impression of him was prior to this case, followed by what their impression is now, based upon the publicity of the case. Of the 400 Residents polled, 13% (52 less one that personally knows him) had previous awareness of Mr. Goodman.

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[118] This conclusion was learned through a series of questions which asked Residents to name any recent criminal trials they have heard or read about, followed by a question which asked if they had read or heard anything about John Goodman, and finally with a question which asked if they had read or heard anything whatsoever about a car accident involving John Goodman, the owner of the Palm Beach International Polo Club.

These questions reveal a staggering negative shift in opinion among those who had heard of Mr. Goodman before the incident. While only 6 of the 51 Residents who knew of Mr. Goodman before the incident professed a "mostly negative" impression of him at that time, 21 of those same 51 professed a "mostly negative" impression of him *after* being exposed to publicity about the case. That is an increase of 71% (or 15 of 21 Residents). Additionally, of the people who had a "mostly positive" impression of Mr. Goodman prior to the current criminal case, 43% say they changed their view as a result of the publicity of this case.

Residents also overwhelmingly believed that Mr. Goodman was at fault and that the publicity of this case has favored the prosecution's side of the story. As mentioned above, 65% of Residents were aware of the case involving Mr. Goodman. Based upon what they have heard or read about this case so far, 71% (or 261 of 400 Residents aware of the incident) believed that Mr. Goodman was most likely guilty of a crime. This was more than double the 26% that had no opinion. A mere 3% believed that he was most likely not guilty of a crime. These findings clearly indicate a presumption of guilt.

Those who were aware of Mr. Goodman or the case were also asked to provide details about what they have read or heard, in their own words. The Court can readily see from the responses listed in the *Survey*, they were remarkably similar in nature to the on-line comments following the *Post*'s publications – *i.e.*, they reflect that the Residents categorically believe that Mr. Goodman was under the influence of alcohol (and possibly drugs) on the night of the accident, that he ran a stop sign, hit another car (pushing it into a canal), caused the death of a young male, and that he fled the scene, leaving the other driver to drown.

The effect of the *Post*'s campaign to stoke class bias was also glaringly evident throughout

the responses, with specific references to Mr. Goodman's wealth and the notion that he will somehow buy his way out of punishment, hints that he has been given preferential treatment, suggestions that Lisa Pembleton verified his drunken state after the accident, and implications that he has been hiding his assets from the Wilson family. When asked whether they agree or disagree that wealthy people seem to be treated more favorably than others by the criminal justice system, 68% (or 271 Residents) agreed that they are. This opinion was rooted in the beliefs that "they can afford better legal representation," "they get away with things normal people can't," "they have the money to get out of trouble," and "I see/read about it in the news," and "they have the power of influence – a higher position in society." In addition, 31% (or 124 Residents) believed that wealthy individuals seem to be more inclined to engage in irresponsible or harmful behavior than others. There were three primary beliefs that lead to the respondent's agreement of this statement (in order of relevance): "they have the money to do so - more opportunities to get into trouble"; "they believe they can get away with it"; and, "they do whatever they want – are not concerned with consequences." Further, 29% (or 117 Residents) had some negative opinions about wealthy individuals. The following statements were offered in connection with this admission: "they feel above everyone else," "they think they can get away with anything," "because I'm not rich (am jealous)," "they feel entitled," and "they are selfish."

The *Survey* also showed that Residents have continued to be exposed to negative media coverage about the case. Respondents who earlier stated they were aware of the case were asked, "When was the last time you read or heard anything about this case?" The most significant response, "more than one month ago but less than 3 months ago," is cited by 30% (or 79 of 261 Residents), while the next closest ("within the last month") is chosen by 25 (or 65 of 261 Residents).

Additionally, 11% (or 29 of 261 Residents) specified that it had been within the last week, compared to 17% (or 46 of 261 Residents) for whom 'it has been more than three months ago but less than 6 months, 11% (or 28 of 261 Residents) for whom "it has been more than 6 months ago but less than 12 months" and 5% (or 14 of 261 Residents) for whom "it has been more than 12 months." These results offer substantial proof that the jury pool in Palm Beach County is still being exposed to media coverage about the case. In further support of this point, very few Residents reported a belief that there has "not been a lot of media coverage" about the case when directly asked.

As to the sources of the exposure, the *Survey* revealed that Residents were obtaining information about the case from a variety of sources, including reading the newspaper, watching television news, listening to radio talk shows, surfing the Web, and using electronic communications. However, of no surprise, the internet was the information source that was most utilized by respondents, with 92% (or 368 Residents) making use of it. Some 69% (or 25 Residents) visited the Web on a regular basis. The most commonly mentioned sites were facebook.com, google.com and yahoo.com and others. A significant 84% (or 334 Residents) affirmed their use of email, social networking sites, etc. Of these, 66% (or 263 Residents) used email and 29% (or 117 Residents) used Facebook. Another large percentage of respondents, 69% (or 274 Residents), read at least one newspaper on a regular basis. The vast majority of Residents, 55% (or 220 Residents), were reading the *Post*, while another 15% (or 59 Residents) were reading *The Sun Sentinel*, which, as previously noted, largely reprinted verbatim stories originally published by the *Post*.

When pointedly asked if they agreed or disagreed that local current affairs and media coverage was important to them, the preponderance of people viewed both as very important. In stark contrast to the 9% who disagreed, an astounding 91% (or 364 Residents) agreed that local

current affairs was important to them. Likewise, when asked about the importance of media coverage of current affairs, 84% (or 335 Residents) agreed that it was important, with only 16% (or 65 Residents) disagreeing.

The poll thus demonstrates that the *Post* has been remarkably successful in developing a hostile and biased attitude toward Mr. Goodman based largely on the class-bias theme. It also demonstrates that attitudes in the community have not lessened in the 22 months since the accident and suggest that the internet has played prominent a role in keeping the case alive.

IV. PREJUDICE SHOULD NOW BE PRESUMED AND A CHANGE OF VENUE ORDERED

The community passion surrounding Mr. Goodman's prosecution has been as dramatic as any in Florida criminal trial history. If a presumption of juror prejudice applies in any case, it should apply here. And, if an exercise of the Court's power to transfer cases to escape such prejudice is warranted in any case, it is this one. Under the circumstances, there is no valid justification for refusing to transfer venue to a locale untainted by pervasive community hostility and media vitriol, from which no juror residing in Palm Beach County could possibly escape.

A. The Prejudice Cannot Be Rebutted Through Voir Dire

The Supreme Court has long and consistently held that a change of venue is required when "the community and media reaction" is "so hostile and so pervasive as to make it apparent that even the most careful *voir dire* process would be unable to assure an impartial jury." *Flamer v. Delaware,* 68 F.3d 736, 754 (3d Cir. 1995) (Alito, J.) (en banc) (quotation omitted). That is, when "adverse pretrial publicity" combines with the "added pressure" of a "huge wave of ... public passion" to create an "atmosphere corruptive of the trial process," the Supreme Court "will presume a fair trial could not be held, nor an impartial jury assembled." *Mu'Min,* 500 U.S. at 448-50 (Kennedy, J.,

dissenting). Since that is precisely what has occurred here, *voir dire* can no longer be expected to perform its usual function of securing a fair and impartial jury. *See Mu'Min,* 500 U.S. at 429-30; *Patton,* 467 U.S. at 1031-33, 1040; *United States v. Murphy,* 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Sheppard,* 384 U.S. at 362-63; *Estes,* 381 U.S. at 550-51; *Rideau,* 373 U.S. at 726-27; *Irvin,* 366 U.S. at 725-28.

In *Irvin,* the defendant was charged with six murders in a small Indiana town, and police press releases announcing Irvin's confession – functionally equivalent to the Wilson family attorneys' fomenting of publicity about Mr. Goodman's refusal to testify in a civil deposition because it might incriminate him – were "intensively publicized." 366 U.S. at 719-20. Although each juror gave assurances of fairness to the trial court in *voir dire*, the Supreme Court examined the "popular news media" surrounding the trial and the four-week, 2,738-page *voir dire* record to test whether these assurances were legally adequate. *Id.* at 720, 724-28. The Supreme Court concluded they were not. The "build-up of prejudice" in the media was "clear and convincing"; the jury pool was overrun with scores of jurors with disqualifying biases; and 8 seated jurors came to *voir dire* believing Irvin was guilty. *Id.* at 725-27. Even though those jurors promised they could be fair, the Supreme Court held their statements could not be believed under the circumstances. *Id.* at 727.

While *Irvin* may be understood as a case addressing the actual prejudices of a particular jury, the Supreme Court generalized the presumed prejudice rule in a trilogy of cases starting with *Rideau.* In that case, the Supreme Court held that "only a change of venue was constitutionally sufficient" to ensure "an impartial jury," because the jurors' community "had been exposed repeatedly and in depth to the prejudicial pretrial publicity there involved." *Groppi v. Wisconsin,* 400 U.S. 505, 510-11, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971) (describing *Rideau*). The defendant in *Rideau* gave a filmed

confession to murder, which was broadcast on local television stations. 373 U.S. at 723-25. The Supreme Court presumed potential jurors were prejudiced by the publicity, and therefore reversed the convictions "without pausing to examine a particularized transcript of the *voir dire*" to see whether it actually produced impartial jurors. *Id.* at 727. The Supreme Court did so even though *voir dire* showed that only 3 of the 12 jurors had seen the broadcast; none of the 3 "testified to holding opinions of [defendant's] guilt"; and all three testified they could "give the defendant the presumption of innocence" and "base their decision solely on the evidence." *Id.* at 731-32 (Clark, J., dissenting). As the Supreme Court explained: "*Any* subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at 726.

The Supreme Court again followed a categorical approach in *Estes,* which involved a defendant charged with financial frauds. His case attracted intense media scrutiny pretrial, including a disruptive televised pretrial hearing that was seen by much of the venire; and press coverage continued during trial. 381 U.S. at 534-38. The Supreme Court reversed the convictions. Although conceding that "there was nothing so dramatic as the home-viewed confession" in *Rideau,* the Supreme Court reasoned that the jury pool had been "bombard[ed]" with publicity about the case and Estes had been subjected to "minute electronic scrutiny." *Id.* at 538. The state argued the Estes could point to no "isolatable prejudice" among jurors or at trial and that any prejudice was, therefore, merely "hypothetical." *Id.* at 541-42. The Supreme Court disagreed. Recognizing that "[t]he television camera is a powerful weapon" that can "[i]ntentionally or inadvertently ... destroy an accused and his case in the eyes of the public, the Court held that the case was one "in which a showing of actual prejudice is not a prerequisite to reversal." *Id.* at 542, 549. The internet and

Youtube are far more "powerful weapons" in 2012 than was television back in 1962 when Estes' trial took place.

The Supreme Court applied the categorical approach again in *Sheppard.* There, the Cleveland media launched a *Post*-like "editorial artillery" against a doctor accused of murdering his wife. 384 U.S. at 335-42. The media wrote articles critical of his defense to which jurors were exposed and the jurors' identities were published. *Id.* at 342-49. The Supreme Court held that such circumstances required reversal, again without regard to proof of actual juror prejudice: "Since the state trial judge did not fulfill his duty to protect Sheppard from the *inherently* prejudicial publicity which *saturated the community* and to control disruptive influences in the courtroom," *id.* at 363 (emphasis added), the Supreme Court granted Sheppard's habeas petition without inquiring into any individual juror's bias, and despite juror assurances of impartiality. *Id.* at 351-52.

Subsequent Supreme Court decisions have consistently read the foregoing precedents as establishing a *per se* rule of transfer or reversal where the community passion or trial taint is severe enough to warrant a presumption of juror prejudice. Thus, the Supreme Court in *United States v. Gonzalez-Lopez,* 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), confirmed that exposure to prejudicial publicity "require[s] reversal of the conviction because the effect of the violation cannot be ascertained." 548 U.S. at 149 n.4; *see Mu'Min,* 500 U.S. at 429 (when a "presumption of prejudice in a community" arises from the "wave of public passion" surrounding events of trial, "the jurors' claims that they can be impartial should not be believed"); *Vasquez v. Hillery,* 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("when a petit jury has been ... exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Patton,* 467 U.S. at 1031, 1038 & n.13 (while *voir dire* "usually identifies

bias," in certain situations it is "inadequate," because prejudice can be such that "jurors' claims that they can be impartial should not be believed").

Conversely, in *no* case has the Supreme Court indicated that, where community passion is severe enough to raise doubts about the impartiality of jurors drawn from that community, those doubts can be overcome merely by trusting the answers given in *voir dire*. The Supreme Court's decisions uniformly hold the opposite.

The Supreme Court's precedents recognize several reasons why even a careful *voir dire* cannot ensure an impartial jury when the community is so thoroughly soaked with hostility and prejudicial publicity. First, potential jurors in such circumstances can become infused with biases they cannot recognize or will not disclose. *See Estes,* 381 U.S. at 545; *Irvin,* 366 U.S. at 727-28. A "juror may have an interest in concealing his own bias," or "may be unaware of it." *Smith v. Phillips,* 455 U.S. 209, 221-22, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring). Several studies have shown that jurors are likely to exhibit either conscious or unconscious dishonesty during open court questioning.[119] This is unsurprising, as "practically speaking[] it is rare to find a juror willing to openly and honestly discuss his or her beliefs and biases."[120] Juror responses during *voir dire* are influenced by numerous social factors – for example, the need to

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[119] Newton Minow & Fred Cate, *Who is an Impartial Juror in an Age of Mass Media?,* 40 AM. U. L. REV. 631, 650 (1991); Richard Seltzer, Mark A. Venuti & Grace M. Lopes, *Juror Honesty During Voir Dire,* 19 J. CRIM. JUSTICE 451, 452, 460 (1991)(citing studies, and concluding from independent study of jurors in District of Columbia that "to a significant degree, [] jurors withhold information or lie during voir dire."); Dale Broeder, *Voir Dire Examinations: An Empirical Study,* 38 S. CAL. L. REV. 503, 506 (1965)("The data contain numerous instances of conscious concealment and lack of candor.").

[120] Minow & Cate, 40 AM. U. L. REV. at 650 n.123.

conform to a group dynamic[121] or the desire to present themselves as "good citizens" and, as a result, minimize personal bias. In particular, jurors are much less candid when they are questioned by judges rather than attorneys – often out of a response to authority and a desire to provide answers they believe the judge wants to hear.[122] The "psychological impact" of requiring each potential juror to declare his fairness "before [his] fellows" can engender bias, provoke false assurances, or result in sincere expressions of impartiality that are fleeting at best. *Irvin,* 366 U.S. at 728; *see United States v. Dellinger,* 472 F.2d 340, 375 (7th Cir. 1972) ("natural human pride" may compel juror to assert his fairness).

"It will be a jury trial.... John...if your [sic] smart you'll demand trial by judge. You don't want a trial by jury.... WE consist of the jury. I listen very carefully and stay very quiet during 'Voir Dire'... I know exactly what it takes to get on a jury... So do a lot of bored people just like me... Pray I don't get a summons John ... PRAY...."

On-line comment to *Palmbeachpost.com*, July 24, 2010, "Friends of Scott Wilson cleaning crash site: 'We just want Wellington to remember,'" by "Halliburton STILL owns the rig"at 9:04 a.m., 7/25/2010.

These risks are particularly acute in high-profile cases where jurors may believe they can achieve notoriety based on their jury service, or they wish to punish a particular defendant; such "stealth" jurors purposefully dissemble to get seated on a jury.[123] *See also Miller-El v. Dretke,* 545

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[121] Minow & Cate, 40 AM. U. L. REV. at 650 n.123 (citing David Suggs & Bruce D. Sales, *Juror Self Disclosure in Voir Dire: A Social Science Analysis,* 56 IND. L. J. 245, 259 (1981)).

[122] Susan E. Jones, *Judge versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor,* 11 L. & HUM. BEHAV. 131, 143-45 (1987); Minow & Cate, *supra* note 122 at 651 (citing Neal Bush, *The Case for Expansive Voir Dire,* 2 L. & PSYCHOL. REV. 9, 17 (1976)).

[123] Jerry Markon, *Jurors with Hidden Agendas,* Wall St. J., July 31, 2001.

U.S. 231, 267-68, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (Breyer, J., concurring); *Pennekamp v. Florida,* 328 U.S. 331, 359, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946) (Frankfurter, J., concurring).

There is also substantial evidence that *voir dire* generally cannot distinguish between jurors who are prejudiced by pretrial publicity and those who are not. Studies confirm that voir dire is "grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'"[124] One prominent experiment found that "[c]hallenged jurors exposed to the publicity were just as likely to convict as those not challenged, but both were more likely to convict than those never exposed to pretrial publicity," and that, as a result, "the net effect of judges', defense attorneys', and prosecutor's combined challenges was effectively *nil.*"[125] Notably, this proposition has been shown to be true even where voir dire is extensive.[126] Indeed, querying jurors about their exposure to pretrial publicity actually increases the prejudicial effects of that publicity.[127] In other words, the empirical evidence suggests that the very mechanism of *voir dire* may actually undermine its fundamental purpose.

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[124] Broeder, 38 S. CAL. L. REV. at 505. *See also* Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors,* 37 Psychol. Reps. 1299, 1301 (1975) (jurors who claimed they could disregard publicity were far more likely to convict than jurors not exposed); Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity,* 40 AM. U.L. REV. 665, 695 (1991) (jurors who claimed they could be impartial after being exposed to publicity were as likely to convict as jurors who doubted impartiality); Dexter et al., *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity,* 22 J. APPLIED SOC. PSYCHOL. 819, 839 (1992) ("publicity increased perceptions of defendant culpability and a proposed remedy, extended voir dire, failed to qualify the effect of pretrial publicity"); Studebaker et al., *Pretrial Publicity,* 3 PSYCHOL. PUB. POL'Y & L. 428, 449 (1997).

[125] Kerr et al., 40 AM. U.L. REV. at 687-88 (emphasis added).

[126] Hedy R. Dexter, Brian L. Cutler & Gary Moran, *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity,* 22 J. APP. SOC. PSYCH. 819, 830 (1992).

[127] Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence,* 6 PSYCH., PUB. POL. & L. 677, 682 (2000) (citing study).

In short, scholars of pretrial publicity broadly agree that *voir dire* is a woefully inadequate remedy for pretrial prejudice and fails in its core function of filtering biased jurors from unbiased ones. A meta-analysis conducted of several pretrial publicity studies concluded that expanded *voir dire* – along with other remedies to pretrial publicity such as continuances, judicial instructions, trial evidence and jury deliberation – "do[es] not provide an effective balance against the weight of [pretrial publicity]." It noted further that "even the smallest effect contradicts our legal presumption of innocence."[128] This problem is exacerbated under circumstances of extremely widespread and entrenched adverse publicity – circumstances plainly present in this case. As the author of one study demonstrating the ineffectiveness of *voir dire* has commented, "it is not disturbing that voir dire accomplishes so little. What is disturbing is that we expect voir dire to accomplish so much."[129]

Given the problem of unrecognized or undisclosed juror prejudice, the *per se* transfer/reversal rule articulated in the Supreme Court's precedents cannot be seriously questioned. And cases in which the Supreme Court held that the rule did not apply – because the presumption did not arise – only confirm the importance of applying the rule here, because those cases involved far less inflammatory publicity.[130] Conversely, there is no empirical evidence showing that a change of

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[128] Nancy Mehrkens Steblay, Jasmina Besirevic, Solomon M. Fulero, & Belia Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta Analytic Review,* 23 L. & HUM. BEHAV. 219, 229 (1992).

[129] Kerr et al., 40 AM. U.L. REV. at 699.

[130] *See Skilling*, 130 S.Ct. at 2916 (no presumption of prejudice, in part, because the new stories did not contain "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"); *Mu'Min,* 500 U.S. at 418-21 (defendant submitted 47 articles in support of venue motion; no actual juror had formed opinion of defendant's guilt based on publicity); *Patton,* 467 U.S. at 1032-33 (news coverage of case had dissipated by time of trial and "community sentiment had softened"); *Dobbert v. Florida,* 432 U.S. 282, 302-03, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (defendant did not exercise all peremptory challenges; pointed to "no specific portions of record" to show why prejudice should be presumed); *Murphy,* 421 U.S. at 802, 801 (most articles about defendant appeared 7 months before trial and were factual; jurors had only vague recollection of publicity, believed it to be irrelevant, and

(continued...)

venue prejudices the prosecution. Changing venue does not affect the trial's truth-seeking function, like the exclusion of evidence--to the contrary, by eliminating inevitable prejudice, changing venue encourages more accurate results.

B. The Inadequacy of Jury Instructions

Judicial admonitions to ignore pretrial publicity are frequently regarded as sufficient to counter the damaging effects of that publicity. In reality, instructions from a judge to ignore pretrial publicity in high-profile cases do not affect verdicts or the propensity of jurors to contest references to pretrial publicity during jury deliberation.[131] In a study of whether voir dire could work effectively when nearly everyone in the community had been exposed to pretrial publicity, the authors concluded that "reliance on standard cautionary instructions as a remedy for prejudicial pretrial publicity appears to be unwarranted."[132]

Indeed, judicial admonitions to ignore pretrial publicity may actually accomplish the reverse – *heightening* the effect of pretrial publicity by reinforcing the very bias they counsel against.[133] Researchers have suggested that admonitions designed to remove bias in fact spur reactance or draw

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[130](...continued)
expressed no colorable indicia of bias).

[131] *See* Geoffrey P. Kramer, Norbert L. Kerr, & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias,* 14 L. & HUM. BEHAV. 409, 430 (1990).

[132] Kramer, *et al.,* 14 L. & HUM. BEHAV. at 430. *See also* Minow and Cate, 40 AM. U. L. REV. at 648 ("there has not been a single study which indicates that judicial instructions limit the effects of jury bias."); Kerr et al., 40 AM. U.L. REV. at 675 ("Judicial admonitions had no effect on individual jurors or jury verdicts.").

[133] Kramer, *et al.,* 14 L. & HUM. BEHAV. at 430; *see also* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence,* 6 PSYCH., PUB. POL. & L. 677, 691 (2000)(discussing studies).

jurors' attention to the material they should be disregarding.[134] The study described above found that, "with respect to jurors' evaluation of the defendant, such instructions were counter-productive, actually strengthening the impact of factual publicity."[135] This effect is particularly pronounced with respect to emotionally arousing publicity, where the impact is "primarily affective and cannot be deliberately disregarded."[136]

Justice Jackson recognized half a century ago that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States,* 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (internal citations omitted). Nowhere is this more true than under circumstances of presumed prejudice, where a barrage of constant and hostile media coverage is likely to make judicial instructions ineffective at best, and counter-productive at worst.

C. When There is Strong Community Reaction in Favor of a Particular Outcome, Jurors Feel Compelled to Reach That Result

Finally, even if a juror honestly believes he can objectively hear the evidence before trial, he may come to fear "return[ing] to his neighbors" with anything other than a guilty verdict. *Estes,* 381 U.S. at 545; *see Turner,* 379 U.S. at 472. Empirical evidence on the subject of jury bias confirms the effect of community pressure on jury verdicts. Defined as "conformity prejudice," these studies show that "when the juror perceives that there is such strong community reaction in favor of a particular outcome of a trial [] he or she is likely to be influenced in reaching a verdict consistent

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[134] Kramer, *et al.,* 14 L. & HUM. BEHAV. at 412 (citing studies).

[135] Id. at 430.

[136] *Id*. at 412 (citing studies).

with the perceived community feelings rather than an impartial evaluation of the trial evidence."[137] As the reader "comments" in this case underscore, in high-profile cases, the media often not only reports details of the incident, but also responses from the community, "creat[ing] perceptions that there is a community consensus about what the verdict should be."[138] If jurors believe that there is consensus as to the "correct" verdict, and that there are expectations that the "correct" verdict will be reached – and threats of mob action if it is not – jurors will feel pressure to reach that verdict before reentering the community once the trial ends. As previously noted, it should not take courage for a juror to vote to acquit.

This principle was illustrated by the trial of the individuals accused of the Oklahoma City bombing. The district court in that case recognized that community pressure can adversely affect the ability of individual jurors to act impartially when "there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience." *United States v. McVeigh,* 918 F.Supp. 1467, 1473 (W.D. Okla. 1996). It then granted the defendant's motion for change of venue, reasoning that "the entire state had become a unified community, sharing the emotional trauma of those who had been directly victimized." *United States v. McVeigh,* 955 F.Supp. 1281, 1282 (D. Colo. 1997). When there is a strong community reaction in favor of a particular outcome – as there was in the Oklahoma case, and as there also is in this case – jurors feel compelled to reach that result, notwithstanding their promises to the contrary.

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[137] *See* Neil Vidmar, *Case Studies of Pre and Midtrial Prejudice in Criminal and Civil Litigation,* 26 L. & HUM. BEHAV. 73, 81-82 (2002). *Id.* 81-82.

[138] *Id.* at 86.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that this Court will enter an Order changing venue in this case. Given the unique situation presented by Mr. Goodman's case, if it remains in Palm Beach County, his Sixth Amendment right to a trial by a fair and impartial jury will undoubtedly be violated. Therefore, the Court should transfer venue to Miami-Dade County.

Respectfully submitted,

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_____
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RULE 3.240(b)(2) CERTIFICATE

Pursuant to Rule 3.240(b)(2) of the Florida Rules of Criminal Procedure, the undersigned certifies that this motion is made in good faith.

By: _____
MARK A.J. SHAPIRO, ESQ.

AFFIDAVIT OF JOHN B. GOODMAN

I, John B. Goodman, being of sound mind, after being properly sworn, state that I have read the foregoing and, under penalty of perjury, I swear that the factual assertions contained therein are true and correct.

JOHN B. GOODMAN

SWORN TO AND SUBSCRIBED before me this 4th day of January, 2012, at Miami, Dade County, Florida.

THELMA WILCOX
MY COMMISSION #DD906036
EXPIRES: AUG 21, 2013
Bonded through 1st State Insurance

NOTARY PUBLIC, STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January __, 2012, my office mailed a true copy of the foregoing to:

Ellen Roberts
Assistant State Attorney
West Palm Beach State Attorney's Office
Traffic Homicide Unit
401 North Dixie Hwy.
West Palm Beach, FL 33401

By: _____
Mark A.J. Shapiro, Esq.

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO.: 2010CF005829AMB

STATE OF FLORIDA,

Plaintiff,

v.

JOHN B. GOODMAN,

Defendant.
_____/

JUDGE JEFFREY COLBATH

DEFENDANT'S MOTION FOR NEW TRIAL
AND INCORPORATED MEMORANDUM OF LAW

The Defendant, JOHN B. GOODMAN, through undersigned counsel, respectfully moves this Court for a new trial, pursuant to Fla. R. Crim. P. 3.600(a)(2), (b)(6), (b)(7) and (b)(8). In addition, Mr. Goodman requests an evidentiary hearing on this motion, as well as pre-hearing discovery concerning the full circumstances surrounding: (1) the funding of an attorney for government witness Lisa Pembleton by the attorneys representing the Wilson family; (2) the prosecutors' conduct in releasing Ms. Pembleton from a trial subpoena knowing that they were going to ask this Court the next morning to reconsider its initial ruling barring the introduction of her taped statement; (3) the hiring of the State's rebuttal expert, Thomas Livernois; (4) the role of the "Volkswagen Group" (including the Bentley Corporation) in staging the secretive tests Mr. Livernois conducted on the "exemplar" Bentley; and (5) the suppression of evidence that would have impeached Mr. Livernois' testimony about the purported infallibility of the "fail safe" software used in cars manufactured by the Volkswagen Group. In support of this motion, Mr. Goodman states the following:

1. It is even more clear now than it was when Mr. Goodman sought a change of venue that he could not and certainly did not receive a fair trial in Palm Beach County. The integrity of the proceedings were threatened from the beginning by the pervasive prejudicial pretrial publicity, much of which appeared to be deliberately aimed (by both the staff of *The Palm Beach Post* and the attorneys representing the Wilson family) at stoking the community's hatred of Mr. Goodman, not just because of the crimes charged but because of his wealth.

2. After, in our view, improperly denying Mr. Goodman's motion for a change of venue, the Court failed to take adequate steps to prevent the atmosphere at trial from devolving into a circus. By permitting the trial to be televised, the Court all but guaranteed that the media and the community would remain inflamed throughout the proceedings. There jurors were thus well aware that the community was watching. What limited measures the Court did take proved too little too late. After the media leaked the identities of two jurors to the public, the Court still allowed the filming to continue and did little to halt the intimidating throng of reporters and riled up citizenry that freely stalked the courthouse, both inside and out. The Court also did little to prevent Mr. Goodman and his counsel from being assailed on a daily basis by the loud, expletive-ridden taunts of the "sign man" – all

From Jose Lambiet's *GossipExtra*, "Goodman Trial: Circus? What Circus," March 8, 2012

within the sight and earshot of the jurors. Mr. Goodman was even threatened in the lobby of the courthouse itself.[1]

3. With this as the backdrop, at trial, Mr. Goodman faced not one adversary but three: (a) prosecutors who, throughout the trial, continuously fanned the wealth bias flames;[2] (b) the Wilson family's attorneys who assisted the prosecutors by poisoning the jury pool and controlling Ms. Pembleton through the "free" counsel who used to work for them; and © the attorneys for the Volkswagen Group who supplied and handsomely paid a surprise "rebuttal" witness, Thomas Livernois, and then orchestrated secret tests on both Mr. Goodman's 2007 Bentley and a mysterious, allegedly matching "exemplar" Bentley that appeared out of thin air on March 20, 2012.

4. While the Court, we respectfully submit, committed numerous other errors that singly or together would warrant a new trial,[3] we limit the remainder of this motion to three groups of issues: (a) errors committed with respect to Ms. Pembleton's testimony; (b) errors committed with respect to Mr. Livernois' testimony; and © the Court's rulings limiting Mr. Goodman's testimony that was aimed at ameliorating the prejudice from the constant focus on his wealth by the media, the Wilson's attorneys and the prosecutors.

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[1] *See* Draft Transcript, Vol. 26, March 14, 2012, at pp. 21-22. The Court indicated at one point that it was "taking the jurors out the back way" in an attempt to avoid the sign man but he frequently moved his position around the courthouse, limiting the effectiveness of this tactic. And, of course, his screaming could be heard from a long distance.

[2] For example, the prosecutors continuously referred to Scott Wilson's car as the "little" Hyundai and Mr. Goodman's car as the "quarter of a million dollar" Bentley (in fact, they were almost the same size) and introducing irrelevant evidence about Mr. Goodman's real estate holdings and tipping habits.

[3] For example, the Court denied Mr. Goodman's theory of defense/affirmative defense instruction regarding his concussion and overruled his objections to the pattern instructions on the statutory enhancements which, unconstitutionally, impose strict liability. We intend to revisit these issues at sentencing.

MEMORANDUM OF LAW

I. THE CIRCUIT COURT VIOLATED FLA. STAT. § 90.801(2)(b) AND THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS BY ALLOWING INTERESTED THIRD PARTIES TO INFLUENCE LISA PEMBLETON AND BY ALLOWING THE PROSECUTORS TO INTRODUCE HER TAPED STATEMENT AFTER MAKING HER UNAVAILABLE FOR CROSS-EXAMINATION

A. Introduction

The rights guaranteed by the Confrontation Clauses of the Sixth Amendment and Article I, § 16 of the Florida Constitution are secured primarily through cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). Cross-examination ensures "the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 3162, 111 L.Ed.2d 666 (1990). Indeed, the Supreme Court has characterized cross-examination as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 157, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970). Full cross-examination is particularly important "[w]hen the witness the accused seeks to cross-examine is the 'star' [prosecution] witness, providing an essential link in the [prosecution's case." *United States v. Calle*, 822 F.2d 1016, 1020 (11th Cir. 1981). *Accord Gorham v. State*, 597 So.2d 792 (Fla. 1992); *O'Reilly v. State*, 516 So. 2d 106 (Fla. 4th DCA 1987); *Kelly v. State*, 425 So.2d 81, 84 (Fla. 1st DCA 1983).

Lisa Pembleton plainly qualified as a "star" witness. The Court nonetheless and inexplicably violated Fla. Stat. § 90.801.(2)(b), as well as Mr. Goodman's constitutional rights, by changing an exclusionary ruling *that counsel had relied upon* to allow the State to introduce a statement Ms.

Pembleton gave to the police as a "prior consistent statement" without affording Mr. Goodman a meaningful opportunity to cross-examine her about the statement. In doing so, the Court also rewarded the prosecutors for their misconduct in deliberately releasing Ms. Pembleton from a subpoena so that she could leave the jurisdiction before she could be cross-examined on the previously barred statement.

B. The Court's Rulings

Ms. Pembleton testified on direct examination on the morning of March 14, 2012. Prior to the commencement of cross-examination, undersigned counsel filed a trial memorandum concerning their right to cross-examine Ms. Pembleton on the fact that the Wilson family (through their attorneys) had supplied her with an attorney and then used the fact that she was "represented" by counsel to bar the defense from even attempting to interview her prior to her depositions in this case and the parallel civil lawsuit brought by the Wilson family against Mr. Goodman. As became obvious during jury selection, the prosecutors have been "coordinating" their strategies with the Wilson's attorneys throughout these proceedings. Therefore, the tactic of giving Ms. Pembleton "free" counsel – when she needed no counsel – and then using the Florida Bar's anti-contact rule[4] to prevent the defense from questioning her, standing alone, violated Mr. Goodman's constitutional right to equal access to essential witnesses, as guaranteed by the Fifth and Sixth Amendment rights of confrontation, due process and effective assistance of counsel. *See* pp. 9-12 *infra*.

The Court did, at least, allow Mr. Goodman to expose Ms. Pembleton's bias to the jury on cross-examination. Over the prosecutors' objections (including patently false accusations that the

[4] Rule 4-4.2 of the Rules Regulating the Florida Bar prohibits attorneys or their agents from communicating with a party he knows to be represented by counsel about a matter in controversy between them, absent consent from opposing counsel.

defense had been harassing her),[5] Ms. Pembleton admitted that the law firm representing the Wilson family supplied her with an attorney, Harry Shevin, who – not coincidentally – had previously worked for that same law firm. *See* Draft Transcript, Vol. 24, March 14, 2012, at pp. 13, 27-30.[6] Ms. Pembleton admitted that she did not pay Mr. Shevin and claimed, incredibly, that she did not know who did and never asked. *Id.* Mr. Shevin, in turn, allowed the Wilsons' attorneys (Christopher Searcy and David Kelly) to prepare her for the civil and criminal depositions, while barring the defense from approaching her. *Id.* at pp. 14-15. As the Court correctly perceived: "It seems like the plaintiffs' lawyers wanted her to have a lawyer so that that lawyer could insulate the witness from the defense...." *Id.* at p. 20.

On redirect, the prosecutors attempted to question Ms. Pembleton about a tape recorded statement that she had given to a police investigator. *See* Draft Transcript, Vol. 25, March 14, 2012, at pp. 17-18. When defense counsel objected, the Court, after conducting a sidebar, sustained counsels' objection. *Id.* at pp. 22-23. Relying on the Court's exclusionary ruling, counsel did not seek to question Ms. Pembleton about the statement.

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[5] In an effort to dissuade the Court from allowing the cross-examination, the prosecutors falsely told the Court that "[s]he needed a lawyer *because [the defense] investigator kept harassing her, I feel confident of that*.... She is a scared little girl is what she is, and *she's been bombarded*...." *See* Draft Transcript, Vol. 24, March 14, 2012, at pp. 7-8 (emphasis added). However, when asked about the prosecutors' accusation, Ms. Pembleton denied *ever* being contacted by the defense. *Id.* at p. 17.

[6] At the end of Ms. Pembleton's civil deposition, Mr. Shevin announced:

> As everybody knows, I represent this witness. Mr. Goodman knows that. His representatives know that. His investigators know that in every aspect, as do all the defendants. I will notify every single person in this room if I no longer represent her or if someone else represents her. Otherwise, everyone can assume that I represent her and will continue to represent her and no one will communicate with her.

Id. at p. 16. As discussed in the text, although Mr. Shevin stated that "no one" could communicate with her, he allowed the Wilson family attorneys to question her at will. *Id.* at pp. 32-33.

At the end of the day, when Ms. Pembleton was long gone, the prosecutors began re-arguing the issue and asked permission to introduce the statement itself. *See* Draft Transcript, Vol. 28, March 14, 2012, at p. 71. The prosecutors claimed that there was no confrontation clause issue because "[s]he was available for cross-examin[ation.]" *Id.* The Court indicated that it would "give you a ruling tomorrow." *Id.* at p. 75.

Knowing full well that the Court was reconsidering its prior ruling and that they had assured the Court and Mr. Goodman that Ms. Pembleton "was available," the prosecutors deliberately released her from her subpoena, knowing she would then board a plane that evening to California. *See* Draft Transcript, Vol. 29, March 15, 2012, at pp. 20-21. The next morning, the Court indeed did reconsider its ruling, holding that the State could admit the taped statement as a "prior consistent statement." *Id.* at pp. 5-6. Counsel objected, arguing that admitting the statement would violate the confrontation clauses of the Florida and United States constitutions since the prosecutors had made her unavailable for cross-examination. *See* Draft Transcript, Vol. 30, March 15, 2012, at p. 32. The prosecutors shamelessly argued that there was no confrontation problem because Ms. Pembleton had *previously* been available for cross-examination about the statement even though, at the time, the Court had sustained counsel's objection to the statement being admitted. *Id.* at pp. 32-33. The Court overruled the constitutional objection without explaining its reasoning. *Id.*

In light of that ruling, counsel argued that the Court should also reconsider another prior ruling that had prevented counsel from questioning Ms. Pembleton about a statement she had published on an internet blog, around the same time as the taped statement, in which "[s]he said one week before [the accident] she had a dream that a man was going to come to her trailer and barge in and ask for a phone." *See* Draft Transcript, Vol. 25, March 15, 2012, at pp. 8-9; Draft Transcript,

Vol. 29, March 15, 2012, at pp. 14, 18.[7] The Court, however, ruled that the defense would have to call Ms. Pembleton as a defense witness later and then and only then could they ask her about the blog. *See* Draft Transcript, Vol. 29, March 15, 2012, at p. 18.

C. Argument

The prosecutors' conduct and the series of conflicting rulings by the Court denied Mr. Goodman of a fair trial in numerous respects. While we treat each segment of these events separately below, the Court ultimately should view the cumulative prejudice suffered by Mr. Goodman as a result. *See, e.g., Goldman v. State*, 57 So.3d 274 (Fla. 4th DCA 2011) (reversing based on cumulative error); *United States v. Baker*, 432 F.3d 1189, 1223, 1229-31 (11th Cir. 2005) (same).[8]

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[7] In pertinent part, Ms. Pembleton wrote:

> ....You can read about it [the accident] on The Palm Beach Post .org or google John Goodman accident in Wellington. If you think of it, keep it in your prayers. He is a billionaire and I am the only post accident witness. By the way ... I did not get scared at all, that is God's peace. You want to know something else*? I had a dream the week prior of a guy coming into my camper, saying he was in an accident and needed a phone...the difference? In my dream I found my mace and told him ne needed to get out and after he left I felt really bad*...so by God's grace my response was different....

See **Exhibit 1**(emphasis added).

[8] The cumulative error doctrine was succinctly explained by the court in *United States v. Sarracino,* 340 F.3d 1148, 1169 (10th Cir. 2003):

> A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Unless an aggregate harmless-ness determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. The harmlessness of cumulative error is determined by conducting the same inquiry as for individual error–courts look to see whether the defendant's substantial rights were affected.

1. The Prosecutors Violated Mr. Goodman's Constitutional Rights By Colluding With the Wilson Family's Attorneys

In a criminal case, "[b]oth sides have the right to interview witnesses before trial." *United States v. Murray*, 492 F.2d 178, 194 (9th Cir. 1973) (citation omitted), *cert. denied*, 419 U.S. 854 (1974). *See generally United States v. Fischel*, 686 F.2d 1082, 1092 (5th Cir. 1982); *United States v. Opager*, 589 F.2d 799, 804 (5th Cir. 1979). While potential witnesses may decline to be interviewed, prosecutors may not advise them not to do so. *See United States v. Clemones*, 577 F.2d 1247, 1251-52 (5th Cir. 1977), *modified on other grounds*, 582 F.2d 1373 (1978), *cert. denied*, 445 U.S. 927 (1980); *Gregory v. United States*, 369 F.2d 185, 187-88 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969). Nor may a prosecutor impinge on a defendant's right of access to prospective witnesses in more subtle ways "by words, implications or non-verbal conduct ... either intended or unintended." *United States v. Peter Kiewit Sons' Co.*, 655 F. Supp. 73, 77 (D. Colo. 1986). *See also Clark v. Blackburn*, 632 F.2d 531 (5th Cir. 1980); *Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *Lockett v. Blackburn*, 571 F.2d 309 (5th Cir.), *cert. denied*, 439 U.S. 873 (1978).

In the instant case, the prosecutors repeatedly coordinated their actions with and reaped the benefits from the Wilson's attorneys. The prosecutors did nothing to prevent Mr. Searcy from poisoning the jury pool through his unethical (*see* Rule 4-3.6(a) of the Rules Regulating the Florida Bar) "press conferences" in which he

essentially gave closings argument to the cameras, complete with prejudicial props. *See* Motion For a Change of Venue. The prosecutors and Mr. Searcy also adopted a tag team approach to oppose Mr. Goodman's pretrial motion to conduct tests on the Bentley. *See Plaintiffs' Amended Objection to Defendant's, John B. Goodman's, Motion To Transport Evidence For Inspection and Plaintiff's Motion For Protective Order To Ensure Evidence Preservation*. Mr. Searcy, quite openly, even assisted the prosecutors during voir dire and even sought permission to personally attend sidebars.[9]

While a full evidentiary hearing will be necessary to establish the full parameters of this symbiotic relationship,[10] prosecutors cannot use private parties to do their dirty work without consequences. Through agency principles, the State became responsible for the actions of the Wilsons' attorneys. *See generally Dobyns v. E Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982)(acts of a private citizen attributable to the government where officials create "symbiotic relationship" with the citizen or where the government "so far insinuates itself into a position of interdependence [with

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[9] On March 7, 2012, the prosecutors informed the Court that Mrs. Wilson was upset that she or her attorneys were not allowed to attend sidebars, when Mr. Goodman was allowed to do so. *See* Draft Transcript, Vol. 6, March 7, 2012, at p. 1. When the Court announced that it was not going to allow it, Mr. Searcy stood up and argued:

> MR. SEARCY: If I may, Judge Colbath. I was the one that mentioned that to Ms. Roberts. I do think that having a party approach the bench when the victims themselves are unable to approach is what causes them to feel secluded. Mrs. Roberts' client is the State of Florida. Of all of the representative members of the State of Florida, there are none more representative than the parents of Scott -- representative than the parents of Scott Wilson. And I know that it's the policy of the Court to not exclude the victims, having something where only counsel are asked to approach the bench is an understandable exclusion, where the defendant is approaching the bench, they're not understanding their own inability to then approach the bench as well.

Id. at p. 3.

[10] *See, e.g., United States v. Brink*, 39 F.3d 419, 42-243 (3d Cir. 1994) (evidentiary hearing required to determine whether informant was an "agent" of the government, notwithstanding that the informant "maintained he was not instructed to question [the defendant] about the robbery," because there was also "evidence suggesting that Scott may have had a tacit agreement with the government") (footnotes omitted).

the citizen] that it must be recognized as a joint participant in the challenged activity"). Prosecutors frequently become responsible for the acts of their informants under these principles. *See Ayers v. Hudson*, 623 F.3d 301, 312 (6th Cir. 2010) (holding that an agency relationship between an informant and the government may be "implied" or "'tacit'" and "[t]o hold otherwise would allow the State to accomplish 'with a wink and a nod' what it cannot do overtly.") (citation omitted).[11] A similar rule exists for determining when the State is deemed responsible for "private" searches.

> "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of [civil liability under 28 U.S.C. § 1983]. To act 'under color' of law does not require that the accused be an officer of the State. *It is enough that he is a willful participant in joint activity with the State or its agents.*

Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (emphasis added; citation omitted).[12]

As this Court noted, the cross-examination of Ms. Pembleton established, or at least strongly suggested, that "the plaintiffs' lawyers wanted her to have a lawyer so that that lawyer could insulate the witness from the defense...." The prosecutors could not have gotten away with such a ploy if *they*

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[11] *See, e.g., United States v. Sampol*, 204 U.S. App. D.C. 349, 636 F.2d 621, 638 (D.C. Cir. 1980) (government responsible for actions of "an informant at large" who the government set loose to "troll[]" for information from the "unwary" and "whose reports about any criminal activity would be gratefully received"); *Comm. v. Moose*, 529 Pa. 218, 229; 602 P.2d 1265, 1270 (1992) (holding Commonwealth accountable for conduct of inmate whose sentencing was delayed each time he provided information about other inmates, despite the fact that the informant "was not planted for the purpose of gaining information from a targeted defendant," holding that the Commonwealth's intent to leave him in jail "to harvest information from anyone charged with a crime is the villainy"). *See also United States v. York*, 933 F.2d 1343 (7th Cir.), *cert. denied*, 502 U.S. 916 (1991), *overruled on other grounds Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999).

[12] *See also Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (government responsible for acts of private citizen acting as "an 'instrument' or agent of the state"); *Glasser v. State*, 737 So.2d 597, 599 (Fla. 4th DCA 1999) ("'when a law enforcement officer directs, participates, or acquiesces in a search conducted by private parties," it loses its private character and "must comport with usual constitutional standards'"), quoting *Elson v. State*, 688 So.2d 465 (Fla. 4th DCA 1997); *Pomerantz v. State*, 372 So.2d 104, 109 (Fla. 3rd DCA 1979) ("'[w]here a government agent participates in a lawless private search or where the individual perpetuates a lawless search at the suggestion, order or request of police such as to make him their agent, the evidence produced may be excluded as in derogation of the constitutional mandate against unreasonable searches and seizures by governmental action'") (citations omitted).

had *directly* provided Ms. Pembleton with a free attorney. However, the prosecutors cannot insulate themselves from the conduct of their agents – the Wilsons' attorneys.

2. The Unconstitutional "Free" Representation

The appropriate remedy for the discovery that a "fact" witness has been paid to testify by anyone other than the State is not merely cross-examination. Ms. Pembleton should never have been allowed to testify in the first place, and the Court abused its discretion in refusing to grant Mr. Goodman's motion to strike her testimony.

As a threshold matter, the Wilsons' attorneys' use of pecuniary inducements to procure the testimony Ms. Pembleton – whether the testimony was supposed to be truthful or untruthful – was a violation Rule 4-3.4(b) of the Rules Regulating the Florida Bar, which provides, in pertinent part: "A lawyer shall not ... (b)... offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings, ... for attending, or testifying at proceedings...." The Supreme Court of Florida has condemned such conduct in no uncertain terms: "Offering financial inducements to a fact witness is extremely serious misconduct.... We condemn the practice of compensating fact witnesses in violation of rule 4-3.4(b) in no uncertain terms." *Florida Bar v. Wohl*, 842 So.2d 811, 816 (Fla. 2003) (affirming 90-day suspension). *See also Florida Bar v. Machin*, 635 So.2d 938 (Fla. 1994); *Florida Bar v. Jackson*, 490 So.2d 935 (Fla. 1986).

The gift of free legal counsel to Ms. Pembleton by the Wilsons' attorneys was not for "reasonable expenses." It was essentially a payment intended to induce testimony from Ms. Pembleton that would be simultaneously favorable to the Wilsons in their civil suit and to the State in this criminal prosecution. "Ethical considerations warn against an attorney accepting fees from

someone other than her client" because "the acceptance of such 'benefactor payments' 'may subject an attorney to undesirable outside influence' and raises an ethical question 'as to whether the attorney's loyalties are with the client or the payor.'" *United States v. Locascio*, 6 F.3d 924, 932-33 (2d Cir. 1993) (citation omitted), *cert. denied*, 511 U.S. 1070 (1994). In criminal cases, the gratuitous payment of a witness' attorney's fees implies that the payor intends to corruptly influence the testimony of the witness. *See United States v. Abbell*, 271 F.3d 1286, 1291-93 (11th Cir. 2001) (per curiam) (evidence relevant to show that the payors were enforcing a "code of silence"), *cert. denied*, 537 U.S. 813 (2002), at 1291-93, 1299.[13]

In this case, the "free" representation was similarly motivated – to "silence" Ms. Pembleton from talking to the defense and to permit the Wilsons' attorneys to influence her testimony through their surrogate. The prosecutors knew Ms. Pembleton was being given free legal representation in a situation that did not call for any, knew the relationship between Messrs. Shevin and Searcy and, therefore, knew (or reasonably should have known) that the Wilson family was responsible for that representation.

To be sure, the State's violation of ethical rules may not "alone" be grounds for the exclusion of evidence. *See Suarerz v. State*, 481 So.2d 1201, 1206 (Fla. 1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986); *State v. Yatman*, 320 So.2d 401 (Fla. 4th DCA 1975). *But*

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[13] *See also United States v. Padilla Martinez*, 762 F.2d 942, 947 (11th Cir.) ("Miami attorneys" hired by owner of seized vessel to represent arrested crew members were properly disqualified by the district court, suggesting that they "in all probability were retained, not to fully and fairly represent the eleven defendants, but rather the ship or the party or parties who owned the marijuana -- or both"), *cert. denied*, 474 U.S. 952 (1985); *United States v. Orgad*, 132 F. Supp. 2d 107, 125 (E.D. N.Y. 2001) (disqualifying attorney Richards, in part, because jury would be justified in inferring that Richard's "efforts to arrange for an attorney for Leary," a government witness, were for the purpose of "keep[ing] her from cooperating against" the defendant). *Cf. United States v. Rogers*, 636 F. Supp. 237, 251 (D. Colo. 1986) (quoting from obstruction of justice indictment which alleged that companies endeavored to obstruct justice by, among other things, "paying witnesses' attorneys fees"), *aff'd on other grounds*, 960 F.2d 1501 (10th Cir.), *cert. denied*, 506 U.S. 1035 (1992).

see United States v. Hammad, 858 F.2d 832, 842 (2d Cir. 1988), *cert. denied*, 498 U.S. 871, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990). However, the conduct of the Wilsons' attorneys was at least condoned, if not actively encouraged, by the prosecutors and, therefore, should not be dismissed as solely the conduct of others. *See State v. Clark*, 737 N.W.2d 316, 340-41 (Minn. 2007) (rejecting bright light rule concerning ethical violations in criminal cases, noting that "we have taken a case-by-case approach to determining whether the state's conduct is so egregious as to compromise the fair administration of justice" and "where the state's conduct is sufficiently egregious, we may determine that suppression is warranted"). Moreover, a violation of ethical rules against paying witnesses is far more egregious than merely violating "anti-contact" rules. As the Florida Supreme Court eloquently stated in *Jackson*:

> The very heart of the judicial system lies in the integrity of the participants ... Justice must not be bought or sold. Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of testimony before courts of justice. It is clear that the actions of the respondent in attempting to obtain compensation for the testimony of his clients ... violates the very essence of the integrity of the judicial system and the disciplinary rule and code of professional responsibility, the integration of the Florida Bar and the oath of his office.

Jackson, 490 So.2d at 936. *See also In re: Telcar Group Inc.*, 363 B.R. 345, 354 (E.D. N.Y Bankr. 2007) ("The payment of a sum to a witness to 'tell the truth' is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.")(citation omitted).

3. The Prosecutors Deliberately Assisted Ms. Pembleton In Becoming "Unavailable" For Cross-Examination

In addition to improperly using the Wilsons' attorneys as surrogates to obstruct Mr. Goodman's access to a key witness, the prosecutors later helped orchestrate Ms. Pembleton flight

from this jurisdiction in order to prevent cross-examination about her prior statement. Although only this Court had the authority to release Ms. Pembleton from the trial subpoena, *see* Fla. Stat. § 914.03, the prosecutors released her, also with the knowledge that Ms. Pembleton planned to board a plane for California that very evening.[14] "'The state is ... responsible for the absence of witnesses (if) it ... wrongfully causes them to become unavailable... If the state is to blame for the absence of a witness, it must bear the consequences of the loss.'" *Singleton v. Lefkowitz*, 583 F.2d 618, 624 (2d Cir. 1978) (citation omitted). The prosecutors were plainly "to blame for the absence of a witness" when they unlawfully released Ms. Pembleton from a trial subpoena so that she could leave the jurisdiction and become unavailable in the morning when they hoped to convince this Court to change its ruling. *See Ashley v. State*, 433 So.2d 1263, 1268-69 (Fla. 1st DCA 1983) (holding that the State violated defendant's constitutional rights by sending a witness from Florida to California "with full knowledge that he was a material witness," explaining that "[w]here the unavailability of a witness who is material to the defendant's case is shown to have been procured or caused by the state's intentional conduct or its failure to use reasonable care, the state may well be guilty of having deprived an accused of his right to compulsory process if the trial proceeds without such witness," citing *Singleton*); *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006) (holding that prosecutors "substantially interfered" with defense by warning witness that he could be prosecuted for perjury and then releasing witness from a trial subpoena).

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[14] Section 914.03 provides:

> A witness summoned by a grand jury or in a criminal case shall remain in attendance until excused by the court. A witness who departs without permission of the court shall be in criminal contempt of court. A witness shall attend each succeeding term of court until the case is terminated.

The prosecutors' conduct herein is similar to the conduct that doomed the prosecution of Alaska Senator Ted Stevens. Following the government's dismissal of all charges against the Senator, the Hon. Emmet G. Sullivan ordered an independent investigation of the prosecutors' conduct. Among the many instances of impropriety documented in the recently released, 525-page report was the prosecutors' effort to conceal exculpatory testimony of a government witness by "sen[ding] him from D.C. to Alaska on the first day of trial." *See* Excerpts, Report To Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, March 15, 2012, at pp. 177-180, attached hereto as **Exhibit 2.**

The prosecutors' misconduct in this case was far worse, since they first benefitted from Ms. Pembleton's testimony before rendering her "unavailable." They then cynically argued that the defense was somehow to blame for not being clairvoyant enough to foretell that the Court would reverse its exclusionary ruling and question Ms. Pembleton about a "prior consistent statement" that the prosecutors had, at the time, been barred from introducing.

4. The Court Violated Mr. Goodman's Constitutional Rights By Admitting the Statement After the Prosecutors Made Her Unavailable For Cross-Examination

The confrontation clause of the Florida and United States Constitutions prohibit the admission of hearsay testimonial evidence unless the declarant is unavailable to testify and the defendant had a previous opportunity to cross-examine the declarant." *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 158 L.E.3d 177 (2004). Similarly, under § 90.801(2)(b), a prior statement of a witness is admissible as non-hearsay *only* where, among other things, "the declarant is present at trial" and "subject to cross-examination." The statute plainly means that the witness be present for the purposes of cross-examination "*concerning that statement* ***when the statement is***

offered...." *Rodriguez v. State*, 609 So.2d 493, 499 (Fla. 1992) (emphasis added). *Accord Chandler v. State*, 702 So.2d 186, 198 (Fla. 1997).

The fact that counsel had the opportunity to cross-examine Ms. Pembleton *before* the Court reversed itself is not sufficient, either for § 90.801(2)(b) or the Confrontation Clause. This is so, even if the Court is inclined to follow the Second District Court of Appeal's erroneous decision in *Ross v. State*, 993 So.2d 1026, 1028-29 (Fla. 2d DCA 2008) (holding that the admission of prior consistent statements did not violate the confrontation clause even though the witnesses who made the statements had already testified when the prior statements were admitted and no longer available for cross-examination). This is so, because the prior opportunity for cross-examination must be a meaningful one. For that reason, the Supreme Court of Florida has repeatedly rejected the argument that pretrial depositions provide an adequate opportunity to cross-examine a witness. Among other things, at a deposition "the defendant is 'unaware that this deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements.'" *Corona v. State*, 64 So.3d 1232, 1241 (Fla. 2011), quoting *Blanton v. State*, 978 So.2d 149, 155 (Fla. 2008).[15] *Accord State v. Belvin*, 986 So.2d 516, 525 (Fla. 2008). *See also People v. Fry*, 92 P.3d 970, 977-78 (Colo. 2004) (holding that preliminary hearings do not satisfy *Crawford*'s prior opportunity requirement) (citations omitted); *Beasely v. State*, 370 Ark. 238, 258 S.W.3d 728 (2007) (opportunity to cross-examine witness at a bond reduction hearing insufficient).

Mr. Goodman did not have an adequate opportunity to cross-examine Ms. Pembleton about her taped statement on March 14, 2012, because the Court had sustained counsel's objection to the

[15] The Supreme Court of Florida in *Blanton* squarely rejected the trial court's criticisms of defense counsel for having "squandered" his chance to cross-examine the witness with "vigor" at the deposition. 978 So.2d at 155.

introduction of the statement. Counsel was entitled to rely on that ruling (as well as the prosecutors' representation that she "was available) and, therefore, was *justifiably* "unaware" that his remaining cross-examination "would be the only opportunity he would have to examine and challenge" the circumstances surrounding the statement. Litigants, especially during a trial, have the right to rely on a court's rulings in making tactical decisions on the fly. While a court may sometimes have the discretion to reconsider prior rulings, if a "'trial judge decides to change or explain an earlier ruling, he should ... 'take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling.'" *Bellevue Drug Co. v. Caremarks PCS*, 582 F.3d 432, 439 (3d Cir. 2009) (citation omitted). This Court took no such steps, thereby effectively rewarding the prosecutors for their own misconduct.[16] The Court's rulings thus not only violated the confrontation clause(s) but also Mr. Goodman's right to due process.

5. If Ms. Pembleton's State of Mind Was Relevant At the Time of Crash, Then the Court Also Abused Its Discretion In Barring the Defense From Introducing Her "Dream"

Under the prosecutors' own argument, the relevance of Ms. Pembleton's taped statement was to show her state of mind (*i.e.*, her alleged absence of bias) at the time she made it. If Ms. Pembleton's mental state was relevant at that time, then Mr. Goodman had the concomitant right to

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[16] Even if counsel had had the time in the middle of trial to issue and serve a new subpoena on Ms. Pembleton, they had no duty to do so. As the Supreme Court of Florida recognized in *Belvin*, the right to issue a subpoena for –

> – an adverse witness at trial ... does not adequately preserve the defendant's Sixth Amendment right to confrontation. Importantly, the burden of proof lies with the state, not the defendant. "Not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, but he has the right to stand silent during the state's case in chief, all the while insisting that the state's proof satisfy constitutional requirements."

Belvin, 986 So.2d at 525, quoting *Contreras v. State*, 910 So.2d 901, 908 (Fla. 4th DCA 2005), *approved in part and quashed in part*, 979 So.2d 896 (Fla. 2008).

show the jury that her mental state was unreliable for independent reasons – her belief in a dream premonition about her meeting Mr. Goodman that differed from both her statement and trial testimony. Mr. Goodman had the right to confront Ms. Pembleton about whether she was confusing dreams with reality. As the Supreme Court of Florida noted in barring hypnotically refreshed testimony, that type of testimony is subject to a phenomenon known as "confabluation":

> The hypnotic suggestion to relive a past event, particularly when accompanied by questions about specific details, puts pressure on the subject to provide information for which few, if any, actual memories are available. This situation may jog the subject's memory and produce some increased recall, but it will also cause him to fill in details that are plausible but consist of memories or fantasies from other times. It is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects have been confabulated . . . . Subjects will use prior information and cues in an inconsistent and unpredictable fashion; in some instances such information is incorporated in what is confabulated, while in others the hypnotic recall may be virtually unaffected.

Bundy v. State, 471 So.2d 9, 15 (Fla. 1985) (citation omitted).

The effect of Ms. Pembleton's dream premonition on her perception of reality was directly relevant to her state of mind, especially at the time she gave her first statement. Accordingly, the Court compounded the Confrontation Clause and Due Process violations by barring Mr. Goodman from exposing the reliability of Ms. Pembleton's prior consistent statement.

II. THE COURT SHOULD CONVENE AN EVIDENTIARY HEARING ON THE CIRCUMSTANCES SURROUNDING THE TESTIMONY OF THOMAS LIVERNOIS AND THE SECRETIVE, DESTRUCTIVE TESTS CONDUCTED ON THE VEHICLES

A. Introduction

In permitting the prosecutors to introduce the testimony of Thomas Livernois, the Court committed a cascading series of evidentiary and constitutional violations which deprived Mr. Goodman of his right to due process. As the controversy over whether Mr. Livernois should have been allowed to testify unfolded, Mr. Livernois revealed that he had been sent to testify and was being paid to do so by yet another third party with interests *other than* seeing that Mr. Goodman receive a fair trial – a New York law firm that represents the Volkswagen Group, including Bentley, Audi and their parent company Volkswagen, in design defect litigation around the country. Mr. Livernois' testimony also revealed that the prosecutors had allowed him to secretly conduct new tests on both Mr. Goodman's 2007 Bentley GTC and an "exemplar" vehicle – another 2007 Bentley GTC – that miraculously appeared out of thin air at the Palm Beach Bentley dealership on March 20, 2012. The circumstances surrounding these tests raise a host of additional issues, including prosecutorial misconduct, the spoliation of evidence and discovery violations, that were not fully addressed during the hectic last days of Mr. Goodman's trial. And, now that Mr. Goodman has had time to conduct a preliminary investigation into Mr. Livernois' testimony, it is clear that the State concealed evidence that would have undercut the lynchpin of that testimony – that the "fail safe" Bosch system used by the Volkswagen Group has been accused of the same type of "sudden acceleration" defects that have plagued a wide range of vehicles manufactured by Toyota, Ford and General Motors.

B. The Court's Rulings

1. The State's Opposition To Defense Tests On the Bentley

In August 2010, Mr. Goodman filed a motion seeking permission to conduct tests on his 2007 Bentley GTC, which was being held at the Palm Beach County Sheriff's Office impound lot. On September 2, 2010, the prosecutors filed an objection to the motion, insisting that the vehicle was "critical evidence whose integrity must be maintained." *See State's Response To Defendant's Motion To Transport Evidence*, September 2, 2010, at p. 1. The prosecutors represented to the Court that information obtained from the on-board diagnostic or "OBD" system could be "altered" and objected to the vehicle being moved "to another location and secretly take[n] apart...." *Id.* at pp. 3-4. Indeed, they claimed that *"[t]he mere moving of these vehicles could compromise the integrity of the evidence in that the vehicle has to be loaded onto a flat bed and then unloaded at the site and then once again loaded onto a flat bed and then unloaded at the impound lot.... The risk of evidence spoliation is great*. Moving said vehicle could result in additional damage that was not caused by the crash." *Id.* at p. 4 (emphasis added). They prosecutors also objected to allowing the defense to conduct tests outside their presence, bragging that their expert's testing had been videotaped and provided to counsel. *Id.* The prosecutors were "perplexed as to why such secrecy is necessary.... Why must the imaging of the OBD system be cloaked in secrecy?" *Id.* The prosecutors closed their

> "**The mere moving of these vehicles could compromise the integrity of the evidence in that the vehicle has to be loaded onto a flat bed and then unloaded at the site and then once again loaded onto a flat bed and then unloaded at the impound lot... The risk of evidence spoliation is great. Moving said vehicle could result in additional damage that was not caused by the crash**."
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> ASA Ellen D. Roberts, *State's Response To Defendant's Motion To Transport Evidence*, Sept. 2, 2010, p. 4.

opposition by reiterating that "it is essential that the State be present at any evidence view so that the integrity of the evidence is preserved. The evidence sought to be transported is subject to damage and/or alteration and therefore must remain where it is." *Id.* at p. 6. As previously noted, the Wilsons' attorneys filed their own opposition to the motion, arguing that the Court should not allow the Bentley to be "poked and prodded by a 'consultant' of only the defendant's choosing" and that to allow such testing would be "highly prejudicial to all involved." *See Plaintiffs' Objection To Defendant's John B. Goodman's Motion To Transport Evidence For Inspection*, August 13, 2010, at p. 6.

The Court accepted the prosecutors' representations concerning the threat of damage to the Bentley if it was loaded and unloaded on a flatbed truck and denied the defense motion. S*ee Order Denying In Part the Defendant's Motion To Transport Evidence*, September 7, 2010. In addition, while the order allowed the defense to conduct tests on the vehicle at the impound lot, the Court ordered that "[a]ny testing to be performed by the defense may be objected to by the State due to degradation of the automobile/evidence and/or damaging evidence. If an objection occurs, the inspection and/or testing shall cease, and the parties may seek redress with the Court." *Id.* at p. 1.

2. The State Seeks Permission To Transport the Vehicles For Jury Viewing

On January 13, 2012, the State filed a motion requesting that the jury be taken to the impound yard for a "viewing" of the two vehicles involved in the crash. Mr. Goodman opposed the motion on various grounds, including that viewing the vehicles at the impound lot would be extremely prejudicial. In addition, Mr. Goodman complained that the State had frequently moved the vehicles, possibly damaging them, and had left them outside, uncovered and exposed to the elements for two years, resulting in significant rust and mildew. *See Defendant's Reply In Opposition To State's*

Motion For Jury View of the Vehicles, January 24, 2012, at p. 4. On January 27, 2012, the Court granted the State's motion for a jury viewing but ordered that the viewing take place at an "area adjacent to the Courthouse" instead of at the impound lot. *Agreed Order For Jury View of the Vehicles*, January 27, 2012.[17]

3. The State Deposes Defense Expert Luka Serdar

On February 3, 2012, the prosecutors deposed the defense expert Luka Serdar. Mr. Serdar put the prosecutors on notice about all material aspects of Mr. Goodman's trial defense as it related to the operation of the Bentley. Indeed, it was during the deposition that the prosecutors themselves coined the term "the runaway vehicle" to describe the defense. *See* **Exhibit 3,** Deposition of Luka Serdar, Feb. 3, 2012, at p. 20. Mr. Serdar announced that the Bentley's diagnostic codes would be a critical part of that defense,[18] that error codes in the vehicle's computer system verified a mechanical malfunction in the throttle,[19]that the malfunction was possibly caused by an increase in fuel or fuel leak to the engine[20] which, in turn, caused an unexpected acceleration in the vehicle[21] that

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[17] The title to the Court's order was somewhat of a misnomer as the only issue upon which the parties "agreed" was the location of the viewing, not whether it should have occurred at all.

[18] *See id.* at pp. 6-7 ("What I did was I accessed - I have an official Bentley diagnostic computer tool, and I connected that to the vehicle. That allowed me to check numerous systems in the car for any kind of internal self diagnostic messages or default codes, that sort of thing.").

[19] *Id.* at p. 9 (Mr. Serdar testifying that "[t]here were three codes triggered in the engine control system, and those were preexisting to the crash.... There was a mechanical malfunction on the bank two electronic throttle control modulate, that was one. The second one is an adaptation fault code between the left and right electronic control throttle module synchronization. And the third one is a crash shutoff code."); *Id.* (Ms. Roberts confirming that Mr. Serdar was talking about "the mechanical malfunction, the throttle control").

[20] *Id.* at p. 10 ("In other words, if the plate is perfectly flat and closed there's little air or air and fuel mixture that can get through the boar [sic]. Once the motor opens this flap, this plate, more fuel/air mixture can get through.").

[21] *Id.* at p. 11 ("[I]f you accelerate to certain speed and as you get to that speed you get off the accelerator because you think at the speed you're at, in this drivability mode with this fault code, the car wouldn't do that. The car would actually

(continued...)

required extra braking to control.[22] Although the prosecutors later represented to the Court that they had no notice that Mr. Goodman's defense would claim"sudden acceleration," they themselves elicited testimony from Mr. Serdar that as a result of the fault code "the driver would experience kind of an abnormal, unexpected behavior.... The car would actually accelerate to a higher speed than you wanted." Their later claimed surprise about the brakes possibly being involved in the malfunction was also belied by testimony from Mr. Serdar that the prosecutors themselves elicited: "So to overcome that lack of deceleration, the engine keeps supplying power even though you don't want it. So it's separate from the brake system, but you may have to use more brake to overcome this."

4. The Prosecutors Enlist Bentley Into Their Team After the Deposition, Not After Counsel's Opening Statement

In her news conference after the verdict, ASA Roberts informed the media that it was Mr. Serdar's deposition testimony that prompted her to approach the Bentley company for help, although that help did not arrive immediately: "When we first took that expert's deposition, I said 'you can't tell me this car is gonna malfunction three times before the light comes on and stays on' and I just thought it was really unreasonable, *so we eventually looked into it and we were able to convince Bentley that they*

The Prosecutors' Post Verdict News Conference

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[21](...continued)
accelerate to a higher speed than you wanted. And if you then get completely off the gas peddle, it may keep that speed for some time before it reduces it. So there's a time lag in response, and that's a very abnormal, unexpected thing for a driver to experience.").

[22] *Id.* at p. 12 ("So to overcome that lack of deceleration, the engine keeps supplying power even though you don't want it. So it's separate from the brake system, but you may have to use more brake to overcome this.").

needed to step in and give us input." (Emphasis added.) Counsel will separately submit a video copy of ASA Robert's press conference.

5. Opening Statements and Bentley's Response: March 13-14

Opening statements occurred on March 13, 2012. Anticipating counsel's reliance on Mr. Serdar's deposition testimony, ASA Roberts' informed the jury that "[a] Bentley mechanic inspected the vehicle and determined there were no problems with the Bentley that could have caused or contributed to the cause of this crash." Draft Transcript, Vol. 17, March 13, 2012, at p. 29.

Counsel's opening later included a short, narrative paraphrasing of Mr. Serdar's deposition:

> MR. BLACK: A Bentley is coming down 120th Avenue approaching the stop sign at Lake Worth Road. You see it slowing as it reaches the stop sign. John Goodman is in the car. As it gets close to the stop sign, all of a sudden the car surges forward. You see him trying to control this enormously powerful car. It is a car that has a eight-cylinder engine, 650 horsepower, turbocharged. Unbeknownst to John Goodman, the throttles that run the fuel into the engine are not working properly. They're operated by a computer, and it's not done mechanically, such as from the accelerator or directly to the throttle, but it's all done by electronics.
>
> For some reason there's a fault in the computer or in the throttles and the throttle will not close. The throttle is a circular steel cover that opens and closes and allows the fuel to go into this engine.
>
> Since the throttle won't close, the fuel keeps pumping into this enormous monster of an engine. So while the miles per hour are dropping when the brake comes, the rpms are still way up there, because this engine is getting more and more gas.
>
> Goodman is trying to control the car. It surges forward, he panics, and it shoots into the intersection and hits Scott Wilson"s car.

Id. at pp. 35-36.

Due to the live feed in the courtroom, counsel's opening was immediately broadcast to the media and the accusation that the "Bentley badly malfunctioned" appeared on the *Sun-Sentinal.com* web site almost immediately (10:18 a.m.). *See* **Composite Exhibit 4**. A video clip from counsel's opening, including the accusation that the Bentley of malfunctioned, appeared that evening on Channel 5, WPTV News (a clip that is still available on YouTube) and a similar story appeared later that evening in the *Palmbeachpost.com*. *Id.* On the morning of April 14, 2012, numerous additional stories about counsel's accusation about the Bentley appeared in both the news media, both locally and nationally, including ABC's *Good Morning America*. *Id.* Over the next two days, Bentley's longtime spokesperson in the United States, Valentine O'Connor, was doing "damage control," releasing a statement falsely claiming that "[w]e don't have any such incidents (sudden acceleration)" due to their "smart-pedal technology, meaning the 'brake pedal wins' over the accelerator whenever the throttle and brake are depressed together." *See* **Composite Exhibit 5**.

The prosecutors "reached out to law enforcement, and law enforcement reached out to the community...." Draft Transcript, Vol. 55, March 21, 2012, p. 79 (quoting ASA Roberts). They received Mr. Livernois' name by the evening of March 14, 2012. *Id.* at p. 79; Draft Transcript, Vol. 43, March 19, 2012, at p. 41; **Exhibit 6**, Deposition of Thomas Livernois, March 20, 2012, at pp. 45-46. During Mr. Livernois' deposition, the prosecutors insisted that they had *not* obtained Mr. Livernois through any "civil attorneys." *See id.* at p. 47. Rather, according to ASA Roberts, Agent Snelgrove "took it on his own that morning to go back to the Bentley place, and other than being reluctant to help us, [as] they initially were to all of us, they agreed to reach out to someone." *Id.* This time, the State had no trouble "convin[ing] Bentley that they needed to step in...." As Mr. Livernois was about to board an airplane leaving Los Angeles on the evening of March 14, he

received a telephone call, not from Agent Snelgrove or the prosecutors, but from Ian Ceresney, a partner in the New York law firm, Herzfeld & Rubin P.C. S*ee* Draft Transcript, Vol. 59, March 22, 2012, at pp. 23-24; Deposition of Thomas G. Livernois, March 20, 2012, at pp. 7, 44. Mr. Ceresney told Mr. Livernois to expect a call from the State Attorney's Office and he received that call as soon as he landed. Livernois Depo., at pp. 44-45.

As Mr. Livernois acknowledged at trial, that New York law firm represents both Bentley and its parent company Volkswagen, on product liability matters. Draft Transcript, Vol. 59, March 22, 2012, at p. 24. According to Herzfeld & Rubin's web site, they represent many other automobile manufacturers as well, including Toyota. S*ee* **Exhibit 7**. The firm has been defending automobile manufacturers in "sudden acceleration" cases since at least the late 1980's.[23] Their firm's website even contains an article authored by a partner in the firm, Michael Hoenig, entitled *Screening Experts on Sudden Acceleration and Other Issues* (republished from *The New York Law Journal*, May 10, 2012), which blames the plaintiffs' bar for "instigat[ing]" the "legal tsunami" of "class actions, individual lawsuits, congressional hearings, agency inquires and media reporting" about sudden acceleration design defects in Toyotas, Fords and other vehicles.

Toyota has been sued all over the United States for accidents caused by sudden acceleration problems,[24] resulting in a recall of over 14 million cars and a $16 million fine by the Department of Transportation ("DOT"). *See* **Exhibit 8**, Summary, Congressional Research Service ("CRS"), *Unintended Acceleration in Passenger Vehicles*, April 26, 2010. Both Congress and the DOT began

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[23] *See, e.g., Jarvis v. Ford Motor Co.*, No. 92 Civ. 2900 (NRB) (Sept. 13, 2000), *2000 U.S. Dist. LEXIS 13217*, *reversed*, 283 F.3d 33 (2d Cir. 2002); *Weinstein v. Volkswagen of America, Inc.*, 163 A.D.2d 576, 559 N.Y.S.2d 30 (1990).

[24] Many of the cases have been consolidated in *Donahue v. Toyota Motors Manufacturing U.S.A., Inc.*, Case No. 8:10-cv-00579-JVS-FMO (C.D. Cal.). The first trial was recently scheduled to being in February 2013.

investigating the matter in early 2010. Among other things, the DOT looked into whether defects in Toyota's electronic throttle control system were to blame for the sudden acceleration crashes. *Id.* at pp. 20-22.[25]

Contrary to both Bentley spokeswoman O'Connor's press release and Mr. Livernois' trial testimony in this case, the supposedly fail safe "smart-pedal technology" used by the Volkswagen Group has not protected their vehicles from sudden acceleration problems. In a 2010 study by National Public Radio that the prosecutors failed to turn over to the defense, Volkswagens and Audis were among the vehicles that the National Highway Traffic Safety Administration found were responsible for 15,000 sudden acceleration and related consumer complaints between 2008-2010. *See* **Exhibit 11**, National Public Radio, All Things Considered, *Unintended Acceleration Not Limited To Toyotas*, March 3, 2010.[26] As discussed *infra*, the prosecutors' failure to disclose evidence that would have refuted Mr. Livernois' testimony about this supposedly "fail safe" system constitutes a *Brady* violation and, of course, underscores the prejudice Mr. Goodman suffered from the Court's ruling that permitted Mr. Livernois's testimony in the first place. No doubt fearing that the "media tsunami" caused by Mr. Goodman's case would cause a new "legal tsunami" of lawsuits, this time engulfing the Volkswagen Group, if Mr. Goodman's defense were to prevail,[27] Herzfeld

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[25] Herzfeld & Rubin were also undoubtedly aware of CNN's March 1, 2012, expose entitled *Experts: Translated Toyota memo shows electronic acceleration concern*. *See* **Exhibit 9**. The expose concerned the recent discovery of internal Toyota documents from 2006, revealing that "Toyota engineers had found an electronic software problem that caused 'sudden unintended acceleration' in a test vehicle during pre-production trials." *Id.* They also were probably aware of reports circulating around the country on March 12-13 that the National Highway Traffic Safety Administration was conducting an investigation of 1.9 million Fords for sudden acceleration problems. *See* **Composite Exhibit 10**.

[26] In 2008 alone, the NHTSA received 67 sudden acceleration complaints about Volkswagen-Audi vehicles, across a broad spectrum of models.

[27] The blogosphere soon picked up on this theme. "What this case really says to Toyota owners is here we go again. The

(continued...)

& Rubin wasted no time in paying Mr. Livernois $10,000 plus expenses to immediately fly to Florida from Los Angeles to help salvage this prosecution.[28]

6. "Compromising the Integrity" of the Bentley on March 15, 2012

On March 15, two relevant events occurred. First, the prosecutors disclosed that they planned to call Mr. Livernois as a purported "rebuttal" witness. Second, the "viewing" that Mr. Goodman had vigorously opposed took place. Pursuant to the Court's prior order, both vehicles were moved to the courthouse by precisely the method that the prosecutors had, in 2010, claimed – successfully – would "compromise the integrity of the evidence." The vehicles were loaded onto a "flat bed and then unloaded at the site," as the ever-present cameras recorded in detail. *See* Draft Transcript, Volume 31, March 15, 2012, pp. 35-39. After the viewing occurred during the lunch break, the vehicles were loaded back onto the flatbed truck and transported back to the lot.

KnightNews.com, March 15, 2012, *John Goodman Trial Update: Jurors See Bentley, Hyundai Wrecked Vehicles*

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[27](...continued)
'unintended acceleration' issue that still plagues Toyota's from time to time ... is now rearing its head in other ways such as a criminal's defense in a manslaughter trial." *See* **Exhibit12**, *Another Unintended Acceleration Case Shocker Not a Toyata*, March 21, 2012, www.tundraheadquarters.com. 2

[28] Ignoring their obligations under *Giglio,* the prosecutors never disclosed the third-party fee payment to counsel who, instead, only learned about it when cross-examining Mr. Livernois at trial. *See* Draft Transcript, Vol. 59, March 22, 2012, at pp. 25, 70-71. Instead of sanctioning the prosecutors, the Court shifted the blame to counsel for having not asked the right questions during Mr. Livernois' mid-trial, after hours deposition. *Id.* at p. 46. As discussed *infra*, however, under *Brady/Giglio*, the prosecutors had a constitutional duty to disclose this information.

7. The Secret Spoliation of Evidence on March 18, 2012

Mr. Livernois arrived in Palm Beach on Sunday, March 18, 2012, and was met at the airport by Investigator Snelgrove who apparently drove him directly to the Sheriff's impound lot where the now "compromised" Bentley again resided. *See* Draft Transcript, Vol. 59, March 22, 2012, at p. 23. Despite the prosecutors' successful argument in 2010 that secrecy in testing the vehicle was unnecessary (along with the implicit suggestion that the only reason the defense would want to do tests in secret was to conceal "damage and/or alteration" of the vehicle), the prosecutors gave no notice to the defense that they were going to allow Mr. Livernois to conduct destructive tests on the Bentley in secret, did not seek permission from the Court in order to conduct tests that ended up destroying key portions of the vehicle, did not have the destructive testing videotaped and had no independent observer present to witness the testing. The only observers were the prosecutors. *See* Draft Transcript, Vol. 60, March 22, 2012, at p. 22.[29]

Mr. Livernois then proceeded to, among other things, stick his finders into the "throttle body" to "see if that little butterfly would turn." *Id.* at p. 20. By his own admission, in order to get his fingers into the throttle body, he had to *"remove some aspect of this throttle...."* *Id.* at p. 24 (emphasis added). At trial, Mr. Livernois explained that

> **"The State is perplexed as to why such secrecy is needed. Why must the imaging of the OBD system be cloaked in secrecy? ... The State videotaped its expert [Marcus Tuerk] as he inspected the vehicle... and then provided a copy of the tape to the defense.... The evidence sought to be transported is subject to damage and/or alteration...."**
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> ASA Ellen D. Roberts, *State's Response To Defendant's Motion To Transport Evidence*, Sept. 2, 2010, p. 5.

[29] As previously noted, although Mr. Goodman objected to having a member of the prosecution team present to view testing, he agreed to have it videotaped and witnessed by a law enforcement officer unconnected to the case.

he removed an "air hose" with his hand. *See* Draft Transcript, Vol. 57A, March 21, 2012, at p. 12; *see also* Livernois Depo., March 20, 2012, at pp. 11-12 (indicating that he "removed the intake hose and I put my hand in and I felt that the ... [bank one] throttle valve would not move.... I also verified that the other side [bank two throttle] did move. So I took both off and verified it both sides").[30]

8. The Preliminary Richardson Hearing on March 19, 2012

Counsel appeared in court on Monday morning, March 19, 2012, for an initial hearing on whether Mr. Livernois should be allowed to testify. Contrary to what ASA Roberts later told the media at her post-verdict press conference, the prosecutors claimed that it was counsel's opening statement (not their deposition of Mr. Serdar) that had prompted them to reach out to Bentley for help, claiming that they had never heard "this runaway car theory; this rapid, sudden acceleration of gas pouring into the monster." Draft Transcript, Vol. 43, March 19, 2012, pp. 40, 49. *See also* Livernois Depo., at p. 46 (ASA Collins claiming that counsel's opening statement "was the first we heard of sudden acceleration in this case"); *id.* at p. 48 (ASA Roberts stating that "we let it go until Roy got up there in his opening and said how this black monster surged through the intersection and he was fighting to keep it under control"). Counsel disagreed, arguing that Mr. Serdar's testimony was going to be essentially the same as his deposition and that counsel's opening was no different than the deposition. *Id.* at pp. 42-43. After hearing initial arguments from counsel, the Court reserved ruling so that the defense could depose Mr. Livernois.

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[30] Mr. Livernois indicated that a cover to the throttles was "sort of bent down and deformed a little bit, *and in these types of systems, the tolerances are reasonably tight*, so that if you bend it a little bit, as might occur in a high speed crash, *it doesn't take much for it not to move*." *Id.* (emphasis added). For all we know at this point, the transportation of the vehicle to the courthouse and back on the flatbed truck may have been responsible for the lack of movement, not the crash.

9. The Miraculous Appearance of An Exemplar Vehicle on April 20

Sometime on the afternoon of Tuesday, April 20, 2012, Mr. Livernois went to the Palm Beach Bentley dealership where there just so happened to be, in 2012, a 2007 Bentley that was purportedly *identical* to the crash vehicle. Also already present was a Bentley mechanic named Paul Heenan whose presence had been arranged by "the [Bentley] attorney in New York." Draft Transcript, Vol. 59, March 22, 2012, at pp. 25-26. Mr. Livernois had been given Mr. Heenan's telephone number by the New York attorney. *Id.* at p. 27. When Mr. Livernois arrived, Mr. Heenan knew he was coming because he had been "given the word by the New York attorneys" to expect him. *Id.* at p. 27. Mr. Heenan then brought Mr. Livernois to an "exemplar" vehicle, of the same year, make and model as Mr. Goodman's vehicle. How the "exemplar" vehicle got there, who arranged for it to appear, where it came from, whether the vehicle had been manipulated in any way by Bentley before the test are all questions that are yet to be answered. Certainly, the prosecutors did not disclose them. Indeed, Mr. Livernois claimed to not even know what Mr. Heenan's role was. *Id.* at p. 28. All he knew was that Mr. Heenan met him at the dealership and took him directly to the "exemplar" vehicle to conduct tests.

10. The Deposition of Thomas Livernois on March 20, 2012

Mr. Livernois was not deposed until after court adjourned on March 20, 2012, *i.e.*, after he had finished the reports on his secret experiments.[31] And, it was not until the deposition itself that counsel were handed a stack of approximately 100 pages of new discovery containing his opinions. It was during the deposition itself that counsel first learned that (1) Mr. Livernois had been sent by

[31] Counsel did not receive a transcript of the deposition until approximately 1 a m. *See* Draft Transcript, Vol. 55, March 21, 2012, at p. 1.

the New York law firm representing the Volkswagen Group, (2) that he had conducted secret tests on the crash vehicle in which portions of the throttle mechanism had been removed, and (3) that he intended to testify at trial that all vehicles in the Volkswagen Group had a supposedly "fail safe" Bosch electronic system. He also disclosed, also for the first time, that he had been involved with 20-30 unidentified "sudden acceleration" cases, including at least one brought against Volkswagen.[32] However, he claimed (falsely according to the NPR report) that the suits against Volkswagen only involved "stuck pedals from mats and things like that" and not "electronics" which he claimed were "bullet proof." *See* Livernois Depo., at pp. 34-40. Adopting the stock defense of the automobile manufacturers in virtually every sudden acceleration lawsuit, Mr. Livernois claimed that none of the vehicles were to blame for the accidents, which he insisted were always caused by "driver error" or "medical condition[s]" of the driver. *Id.* at pp. 36-37.

11. The Second Richardson Hearing on March 21, 2012

In light of Mr. Livernois' surprise testimony, counsel filed a motion to exclude his testimony as a violation of Florida Rule of Criminal Procedure 3.220 and for a full hearing pursuant to *Richardson v. State*, 246 So. 2d 771 (Fla. 1971). On the morning of March 21, 2012, the Court convened that hearing. Counsel argued in both the motion and at that hearing that the prosecutors had been on ample notice of the "runaway vehicle" defense theory since Mr. Serdar's deposition and that their claim of surprise was a pretext. Counsel also argued that it was impossible, in the middle of trial, to digest the stack of new documents in order to effectively use them to cross-examine Mr. Livernois. Draft Transcript, Vol. 55, March 21, 2012, at p. 72. In addition, counsel proffered that

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[32] *See* Livernois Depo., at pp. 32-34. Mr. Livernois refused to identify the other manufacturers and stated that he had only been deposed in one case and that one involved a woman who's "foot slipped" and "hit the wrong pedal." *Id.* at p. 42.

they would have done additional tests on the Bentley in light of Mr. Livernois' opinions. *Id.* at pp. 72-74.

The prosecutors continued to assert that counsel's opening constituted a material departure from their prior understanding of the defense, falsely representing that Mr. Serdar had not testified that "the brakes were affected" by the problem. *Id.* at p. 78. The prosecutors also argued that no *Richardson* violation occurred because they had given counsel Mr. Livernois' name shortly after finding him and that counsel were to blame for waiting "almost a week" to depose him. *Id.* at pp. 78-80.[33] Finally, the prosecutors claimed that "[a]ny prejudice that may have existed by this late witness has been cured by their ability to take the deposition." *Id.* at p. 88.

The Court accepted the prosecutors' excuses, holding that "there is no Richardson violation in the classic sense, in that the [prosecutors], as soon as they came into the name of the witness they wished to present, they turned it over promptly to the defense." *Id.* at p. 92. The Court further held that the prosecutors had not received "an unfair advantage" because "the defense has had adequate consultation with their own expert with regard to this person testifying and that they've had a week and that they've been able to depose him, and the deposition took place before their own expert took the stand, and he was able to modify or tailor or testify in the knowledge of what Dr. Livernois may testify to." *Id.* at p. 92. The Court also blamed the defense for not conducting a mid-trial investigation of Mr. Livernois, claiming that "there's banks and banks of depositions that you lawyers have access to." *Id.* at p. 93.

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[33] This argument, of course, totally ignored the fact that Mr. Livernois did not complete his opinions and turn over the stack of written materials until the evening of March 20, 2012 and that it was not until Mr. Livernois testified that counsel were informed about the secret tests he had performed or that he had been sent by the law firm representing the Volkswagen Group in, among other things, sudden acceleration litigation.

12. Mr. Livernois Trial Testimony on March 21-22, 2012

After the Court's rulings, Mr. Livernois testified and, consistent with his deposition, claimed that the accident was responsible for the throttle malfunction readings and not the vehicle itself. *See* Draft Transcript, Vol. 57, March 22, 2012, at p. 53. He told that jury that the "Bosch system" used by all vehicles in the Volkswagen Group had a "fail-safe" mode that would have "shut off" and prevented any sudden acceleration of the vehicle. *Id.* at p. 55. "It won't happen." *See* Draft Transcript, Vol. 58A, March 22, 2012, at p. 7. Mr. Livernois also relied heavily on tests he conducted on the mysterious "exemplar" Bentley which allegedly confirmed his opinion about the cause of the malfunction codes. *See* Draft Transcript, Vol. 58A, March 22, 2012, at p. 5.

Cross-examination began on the morning of March 22, 2012. As previously noted, it was during cross-examination that counsel first learned that Mr. Livernois was being paid $10,000 plus expenses for his testimony, not by the State, but by a third-party benefactor, the law firm representing the Volkswagen Group. *See* Draft Transcript, Vol. 59, March 22, 2012, at pp. 25-27. When counsel asked for specific disclosures about "who was paying him and what the arrangements" were," the Court denied the request, again blaming counsel for not asking him about the fee payments they knew nothing about during his deposition. *Id.* at p. 46. The prosecutors then claimed that they had not bothered to ask Mr. Livernois who was paying him either: "I don't know what the arrangements are. I frankly just said, Do we have to pay for it and we were told no. I never asked anything further." *Id.* at p. 47. Counsel objected on constitutional grounds that it was not the defendant's burden to obtain *Giglio* material and moved to strike the testimony. *Id.* at 47.

The Court acknowledged that the automobile manufacturers were not volunteering Mr. Livernois' services to the State for altruistic purposed:

> THE COURT: ... I get the gist that the people that are paying for Dr. Livernois to be here are not aiding the prosecution, although it might feel like *that from your client's perspective, but defending their automobile. They don't want their automobile to be assailed in a public forum.... It might be a* difference without a distinction.

Id. at pp. 47-48 (emphasis added), However, the Court denied the motion, holding that the information about who was paying Mr. Livernois was not "in the state's possession."

While the Court at least allowed counsel to cross-examine Mr. Livernois about the fee payment (although he too claimed he did not know the identity of the ultimate benefactor), when counsel tried to question him about the suspicious circumstances under which the "exemplar" car suddenly appeared at the Bentley dealership, the Court cut off the questioning, claiming that the questions were "leaving a lot of inappropriate innuendo" and lacked "professionalism." *See* Draft Transcript, Vol. 60, March 22, 2012, at p. 29.

C. Argument

1. The Richardson Violation

The Court should reconsider its rulings concerning Mr. Livernois' testimony. The prosecutors' arguments, which the Court adopted, were contrary to Florida law in numerous respects.

First, the fact that Mr. Livernois was being used as a "rebuttal" witness did not excuse the prosecutors' conduct. The prosecutors' arguments ran counter to all the reported authority in Florida. "The identify of rebuttal witnesses is not excepted from the state's discovery obligation." *Sharif v. State*, 589 So.2d 960 (Fla. 2d DCA 1991). *See also Ratcliff v. State*, 561 So.2d 1276 (Fla. 2d DCA 1990) (state's failure to disclose rebuttal witness was discovery violation); *Hatcher v. State*, 568 So.2d 472 (Fla. 1st DCA 1990)(Rule requiring State to disclose identity of witnesses applied to rebuttal witnesses).

Second, the Court erred in accepting the prosecutors' erroneous arguments about allegedly being "surprised" by counsel's opening statement. As a principled examination of Mr. Serdar's deposition demonstrates (especially when compared to his later trial testimony), the prosecutors were aware of Mr. Goodman's "runaway vehicle" defense and even labeled it as such during the deposition. Their quibbling over minute differences in the phraseology used by counsel in his opening statement in an attempt to justify their "surprise" was entirely semantic. And, any doubt about their lack of "surprise" was dispelled after the guilty verdict when ASA Roberts told the media that it was immediately after *Mr. Serdar's deposition* that the State reached out to Bentley for help. The only relevance of counsel's opening statement is simply that it took the publicity generated by the opening for Bentley and its counsel to realize the potential significance of an acquittal based on the theory that the Volkswagen Group's "fail safe" system was not so "fail safe" after all would likely unleash a new "tsunami" of class action litigation.

Third, the fact that counsel were given the opportunity to depose Mr. Livernois in the middle of trial was not sufficient to excuse the discovery violation. The Fourth District Court of Appeal in *Casica v. State*, 24 So.3d 1236 (Fla. 4th DCA 2009), explicitly rejected that very argument. In that case, the State's DNA expert changed his testimony at trial from his deposition testimony based on recalculations of data conducted after the deposition. The trial court offered the defense to redepose the expert during the trial but defense counsel argued that such a step would be futile since the trial strategy to date had been based on the expert's original opinion and he would now need to hire an expert to "effectively challenge" the changed version. 24 So.3d at 1240. However, the trial court rejected the argument and denied counsel's motion for mistrial. The Fourth District Court of appeal subsequently reversed, holding that offering a mid-trial deposition was patently insufficient: "Re-

deposing Dr. Tracey in the middle of trial, the trial court's proposed solution, would not have been adequate to resolve the State's discovery violation" since the defendant "still would have been without an expert witness to rebut [the expert's] testimony." *Id.* at 1241.

Mr. Goodman was prejudiced in precisely the same way. Deposing Mr. Livernois about his opinions was insufficient because he had conducted two new tests – one on the crash vehicle and one on the "exemplar" vehicle – that Mr. Goodman could not analyze or rebut without conducting new, independent tests on both vehicles through his own experts. Moreover, deposing Mr. Livernois was of little value since he claimed not to know anything about how the exemplar vehicle got there, who chose it, how and why it was selected, how it suddenly appeared at the dealership and who was paying for all of this. Mr. Goodman would also need to re-examine the crash vehicle to inspect the damage caused by Mr. Livernois' secret, unrecorded testing, as well as any potential damage caused by the State's decision to truck the vehicle to and from the courthouse earlier in the week.

Fourth, any in any event, the Court erred as a matter of law in placing the burden on Mr. Goodman to establish prejudice. In reversing the defendant's conviction in *Cliff Berry, Inc. v. State*, Nos. 3D09-389 & 3D09-473 (Fla. 3d DCA Jan. 4, 2012), *2012 Fla. App. LEXIS 37*, the Third District Court of Appeal recognized that "even assuming that the [*Richardson*] inquiry was timely, the inquiry was inadequate and insufficient because the trial court did not require the State to demonstrate the lack of procedural prejudice. Instead, the trial court shifted the burden to the defense to demonstrate prejudice." *Cliff Berry, Inc.*, *2012 Fla. App. LEXIS 37*, at *55, citing *Thomas v. State*, 63 So.3d 55, 59 (Fla. 4th DCA 2011) ("[I]mposing the burden on the defense to demonstrate prejudice instead of determining the circumstances of the discovery violation and requiring the State

to demonstrate lack of prejudice to the defendant, does not satisfy the procedure contemplated by *Richardson*"). *See also In Interest of J.B.,* 622 So.2d 1175 (Fla. 4th DCA 1993).

"[T]he defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." *State v. Schopp,* 653 So.2d 1016, 1020 (Fla.1995). In other words, an analysis of procedural prejudice "considers how the defense might have responded had it known about the undisclosed piece of evidence and contemplates the possibility that the defense could have acted to counter the harmful effects of the discovery violation." *Scipio v. State*, 928 So.2d 1138, 1149 (Fla. 2006). It is immaterial whether the discovery violation would have made a difference to the fact finder in arriving at the verdict. *Id.* at 1150. Indeed, "[a] discovery violation is harmless only if an appellate court can determine beyond a reasonable doubt , that the defense was not procedurally prejudiced." *Casica,* 24 So.3d at 1240 (citation omitted).

In this case, it was impossible for the defense to properly prepare in the middle of trial to analyze and attempt to rebut the complex testimony of an engineer, who whose opinions were based on secret tests not conducted and/or disclosed until the day before he was scheduled to testify. "[A] party can hardly prepare for an opinion that it doesn't know about . . . ." *Scipio*, 928 So.2d at 1145, quoting *Office Depot, Inc. v. Miller*, 584 So.2d 587, 590 (Fla. 4th DCA 1991). Exclusion was the only adequate remedy. *See Thomas v. State*, 63 So.3d 55 (Fla. 4th DCA 2011); *Casica*, 24 So.3d at 1241.

2. Due Process/Confrontation Violations Regarding the Benefactor Support

The State violated Mr. Goodman's right to due process by allowing a private party with an enormous financial motive in sabotaging Mr. Goodman's design defect defense – the Volkswagen

Group through their New York counsel – to, first, "buy" an expert witness for the State and, second, to create evidence for the State in the form of entirely unmonitored tests conducted on an exemplar vehicle that was mysteriously supplied by Bentley for the sole purpose of undermining Mr. Goodman's defense. The Court then compounded that due process violation with a confrontation clause violation when it precluded counsel from even attempting to expose Bentley's ploy to the jury.

If defense counsel in a criminal case was discovered paying $10,000 for a witness to testify, counsel would likely be prosecuted for witness tampering, *see* Fla. Stat. § 914.22, and the witness would likely be prosecuted for accepting a bribe, *see* Fla. Stat. § 914.14. Prosecutors, however, are normally allowed to play by different rules because their role in the criminal justice system is more complex. A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially ... and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is for this reason that prosecutors are free to confer financial and other benefits on witnesses without violating witness bribery statutes and related bar rules. *See generally United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc), *cert. denied*, 527 U.S. 1024 (1999).

A prosecutor's unique right to, in effect, purchase testimony on behalf of the State, however, is not a right that can be delegated to a private party, much less blindly delegated to a private party such as the Bentley Corporation whose interest in the outcome of the prosecution had nothing whatsoever to do with "justice" being done. Bentley's sole interest was in protecting its own pocket book which would be threatened if Mr. Goodman's Bentley design defect defense prevailed in this highly publicized case. The prosecutors obviously knew what Bentley's motivation was and deliberately exploited it after counsel's opening statement by reaching out to Bentley. They then

deliberately kept themselves in ignorance of what benefits Bentley conveyed to Mr. Livernois to buy his opinions. Whether it was $10,000 or $10 million, the prosecutors did not want to know. Even apart from the *Brady* implications of the prosecutors' conduct, *see infra*, the Court should hold that allowing third parties with conflicts of interest to bestow huge financial rewards on State witnesses violates due process. The Court erred in not striking Mr. Livernois' testimony.

3. The Brady/Giglio Violations Require an Evidentiary Hearing

The prosecutors committed at least three distinct violations of their constitutional discovery obligations. First, they failed to disclose the full financial and other circumstances behind the retaining and appearance of Mr. Livernois. Second, they failed to disclose the circumstances behind the sudden appearance of the exemplar vehicle and the "experiment" that Bentley had staged for Mr. Livernois at the dealership. Third, they failed to disclose evidence that conflicted with Mr. Livernois' claim that the Volkswagen Group's "fail safe" system was infallible. All three issues require a full airing at the requested evidentiary hearing.

a. The Benefactor Payments To Mr. Livernois

Contrary to the prosecutors' cavalier attitude toward the implications their solicitation of a self-interested automobile manufacturer to find and ultimately pay a key witness, the prosecutors had a constitutional duty to both investigate and disclose the full circumstances surrounding Mr. Livernois' hiring and the true motivations for it. *See generally Guzman v. Sec. Dept. of Corrections*, 663 F.3d 1336, 1350-51 (11th Cir. 2011) (state prosecution's failure to disclose a $500 payment to a crack addict witness was material). And, it was improper for the Court to, in effect, foist these obligations onto Mr. Goodman by suggesting that he start issuing State of Florida subpoenas, minutes before the end of the trial, to a law firm in New York. *See generally United States v.*

Rodriguez, 496 F.3d 221, 227 (2d Cir. 2007) ("at least in some circumstances, telling the defendant that a witness lied, but leaving it for defense counsel to find out what the lies were by questioning the witness before the jury, might as a practical matter foreclose effective use of the impeaching or exculpatory information").

Under *Brady v. Maryland,* 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), the failure to disclose evidence "favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Impeachment evidence falls within the *Brady* rule. *United States v. Bagley,* 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985); *Giglio v. United States,* 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972); *Mordenti v. State,* 894 So.2d 161 (Fla. 2004). Evidence is material under *Brady* if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682. *Accord Mordenti*, 894 So.2d at 170.

The fact that prosecutors may not currently have personal possession of such evidence does not mean that they can keep themselves deliberately ignorant. In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the United States Supreme Court rejected the "hear no evil, see no evil, speak no evil" view of a prosecutor's discovery obligations, the approach adopted by the prosecutors in this case. Since the "prosecution ... alone can know what is undisclosed," the prosecutors had a corresponding duty "to learn of any favorable evidence known to others acting on [their] behalf in the case...." *Id.* at 1567. Prosecutors "may not 'avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of [others]....'" *United States*

v. Brazel, 102 F.3d 1120, 1150 (11th Cir. 1997) (citation omitted). *See also Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("a prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case"). Indeed, "[i]t should never be the law that by maintaining ignorance, [a prosecutor's office] can fulfill [its] due process obligation when the facts known not only warrant disclosure but should prompt further investigation." *United States v. Burnside*, 824 F. Supp. 1215, 1257-58 (N.D. Ill. 1993). Therefore, "[t]he 'prosecution team' concept does not ... relieve the government of its duty to inquire about *Brady* information when the known facts warrant further inquiry into facts readily available." *Id. See also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) ("We suspect the courts' willingness to insist on an affirmative duty of inquiry may stem primarily from a sense that an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure"); *United States v. Auten*, 623 F.2d 478, 481 (5th Cir. 1980) ("[i]f disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government").

Contrary to their constitutional obligations to seek out and disclose *Giglio* information about Mr. Livernois, the prosecutors deliberately "kept [themselves] in ignorance," *Carey*, 738 F.2d at 878, failed "to turn over an easily turned rock," *Brooks*, 966 F.2d at 1503, and engaged in "conduct unworthy of" their office, *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991), by not demanding answers from Bentley and its New York Law firm. After all, it was the prosecutors who asked them (apparently repeatedly) for help. They knew Mr. Livernois had been summoned from Los Angeles by (presumably) Bentley and that the State had not been "asked" to pay for anything, either

for Mr. Livernois' expenses or for his time. Since deliberate ignorance is the equivalent of knowledge,[34] the Court should find, at the very least, that the prosecutors had constructive knowledge of these still undisclosed circumstances. *See United States v. Hector*, Case No. CR 04-00860 DDP (C.D. Cal. 2008), *2008 U.S. Dist. LEXIS 38214*, at *39 (government cannot engage in "willful blindness"); *Burnside*, 824 F. Supp. at 128 ("Allowing the government to absolve itself on the basis of its counsel's asserted ignorance of facts – ignorance prompted by the government lawyers closing their eyes to facts which should have prompted them to investigate – would be akin to allowing criminal defendants to avoid guilty knowledge by means of the 'ostrich' defense"). *See generally* Bennett L. Gershman, *Symposium: Prosecutorial Ethics and the Right to a Fair Trial: The Role of the Brady Rule in the Modern Criminal Justice System: Litigating Brady v. Maryland: Games Prosecutors Play,* 57 CAS. W. RES. 531, 551-552 (Spring 2007) ("[I]f a prosecutor believes that there is a high probability *Brady* evidence exists and deliberately chooses to be indifferent to finding it, it would not seem unreasonable to charge a prosecutor with constructive knowledge of its existence").

At trial, the prosecutors tried to excuse their ignorance by pointing out that Mr. Livernois was not a government employee but was being supplied and paid for by their parties. However, that is a distinction without a material difference. The "prosecution team" for *Brady* purposes includes "anyone over whom" the prosecutor "has authority," *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir.

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[34] *See* Committee On Pattern Jury Instructions, District Judge's Association, Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)*, 2003 Edition, Special Instruction No. 8.

2002), and anyone "acting on the government's behalf in the case." *United States v. Reyeros*, 537 F.3d 270, 281 (3rd Cir. 2008) (citing *Kyles*). This includes expert witnesses.[35]

In the instant case, the prosecutors drafted *Bentley* into becoming a member of the "prosecution team." Therefore, any knowledge *Bentley* had was attributable to the State. *Cf. generally Arnold v. Secretary, Department of Corrections*, Case No. 09-11911 (11th Cir. Feb. 8, 2010) (per curiam), *2010 U.S. App. LEXIS 2590*, adopting *Arnold v. McNeil*, 622 F. Supp. 2d 1294, 1314-16 (M.D. Fla. 2009) (finding a *Brady* violation where a police officer who "was clearly a key member of the prosecution team" withheld evidence about "his own contemporaneous illegal involvement with local drug dealing" and "imput[ing]" his knowledge to the prosecution). It is now incumbent upon the Court to order a hearing to fully develop the circumstances behind Mr. Livernois' retention, including Bentley's motivations for paying him to testify. *See Cf. Rodriguez*, 496 F.3d at 228-29 (remanding for district court to determine whether withholding the disclosure of impeaching information until trial required a new trial); *United States v. Fernandez*, 136 F.3d 1434 (11th Cir. 1998) (remanding for evidentiary hearing over belated mid-trial disclosures by the media of CIA involvement in drug conspiracy); *Rivera v. State*, 995 So.2d 191, 197 (Fla. 2008)

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[35] *See, e.g., Schledwitz v. United States*, 169 F.3d 1003, 1014-15 (6th Cir. 1999) (reversing conviction for cumulative error, including the government's concealment of information that showed that its financial expert, Horne, was not "neutral and disinterested" but had a reason to be biased for the government); *People v. Fogle*, Case No. C033334 (Cal. App. July 5, 2002) (unpublished), *2002 Cal. App. Unpub. LEXIS 6236*, at *22-23 (holding that a pathologist was part of the prosecution team for *Brady* purposes because his "working relationship was closely aligned with the investigative team"); *Harridge v. State*, 243 Ga. App. 658, 659-661, 534 S.E.2d 113 (2000) (holding that a forensic toxicologist was part of the "prosecution team" because his "laboratory was fully involved in the investigation of this case" and both the prosecutor and medical examiner "were completely dependent on the crime lab for determining the amount of drugs and alcohol present" in two individuals' bodies); *Tuffiash v. State*, 878 S.W.2d 197 (Tex. App. 1994) (attributing knowledge that the chief forensic serologist, a medical examiner, had given perjured testimony to the prosecution). *Cf. Avila v. Quarterman*, 560 F.3d 299, 308 (5th Cir. 2009) (adopting a case-by-case analysis for determining whether an expert witness is a state actor for *Brady* purposes); *United States v. Stewart*, 433 F.3d 273, 297-99 (2d Cir. 2006) (rejecting categorical approach for determining whether a person is a state actor for *Brady* purposes and adopting a fact-specific approach and stating that "the relevant inquiry is what the person *did*, not who the person is").

(reversing for an evidentiary hearing on defendant's *Brady* claim, holding that under post-conviction rules "we must accept Rivera's claims as true and direct an evidentiary hearing on their validity unless the record *conclusively* demonstrates that Rivera is not entitled to relief") (emphasis in original, citations omitted).

b. The Experiment on the Bentley-Supplied "Exemplar" Vehicle

The Court should also convene a hearing on the circumstances surrounding the test conducted by Mr. Livernois on the "exemplar" Bentley that mysteriously appeared at the Bentley dealership for him to test. It became clear from the limited cross-examination that the Court permitted. that this test was completely staged. Bentley desperately wanted Mr. Goodman's "runaway Bentley" defense to fail in order to squash potential products liability law suits. After the prosecutors asked no questions when it supplied Mr. Livernois to them as a witness, Bentley took full advantage. It defies belief to think that an identical 2007 Bentley Continental convertible would just so happen to be on the Bentley dealership's lot in 2012. It is obvious that the vehicle was chosen by Bentley for the specific purpose of disproving Mr. Goodman's defense. However, the prosecutors disclosed nothing about how the vehicle got there, who paid for it, why it was chosen and whether the vehicle had been pre-screened by Bentley engineers. Nor was anything disclosed about the Bentley mechanic, Paul Heenan, who apparently orchestrated the test for Mr. Livernois. The prosecutors disclosed nothing about his role in staging the test, who was paying him, how he got there, what his instructions were and who he was reporting back to. The Court's blunt, accusatory ruling that prematurely barred counsel from exploring these issues compounded the *Brady* violation and independently violated Mr. Goodman's due process and confrontation rights.

c. The Suppressed Evidence Sudden Acceleration Cases

To establish a *Giglio* claim, a defendant must prove: "'(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material, i.e., that there is any reasonable likelihood that the false testimony could ... have affected the judgment.'" *Guzman*, 663 F.3d at 1348 (citation omitted). For *Giglio* violations, a defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (citation omitted). "'The could have standard requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt.'" *Id.* (citation omitted). In addition to a witness' false testimony, the "explicit factual representations by the prosecutor at side bar and implicit factual representations to the jury during cross-examination," when knowingly false, are subject to the same standard. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995).

Since the prosecutors persuaded Bentley to become part of the "prosecution team," information known to Bentley about "sudden acceleration" cases against the Volkswagen Group was constructively in the prosecutors' control. Yet, they did nothing to correct Mr. Livernois' false deposition and trial testimony claiming that the Bosch system used by the Group was infallible. As previously noted, in 2010, National Public Radio conducted an expose based on statistics gathered by the National Highway Traffic Safety Administration reflecting dozens of "sudden acceleration" complaints against the Volkswagen Group between 2008-2010. *See* **Exhibit 11**. The prosecutors' failure to correct Mr. Livernois' false testimony constituted a clear violation of *Giglio*. *See United States v. Catton*, 89 F.3d 387, 389 (7th Cir. 1996) (reversing conviction and criticizing prosecutor for

sitting "by in silence" as witness lied, despite the fact that the government's expert witness ***must have known*** the falsity of the testimony).

4. The Results of the Exemplar Testing Were Inadmissible

With no notice to the defense and no video-taping to record what Mr. Livernois did, the prosecutors allowed him to conduct tests on a supposedly identical Bentley that, as noted above, was chosen and produced entirely by Bentley under unknown circumstances. The prosecutors then introduced evidence of those tests for the purpose of proving that Mr. Goodman's Bentley would have responded in exactly the same way. There are several evidentiary reasons why this evidence should have been excluded.

First, the tests were not performed by an independent expert but by a conflict-ridden one, bought and paid for by a biased and powerful private party, the Volkswagen Group, in an effort to prevent a new "tsunami" of products liability litigation. And, the prosecutors neither invited counsel nor a defense expert to be present to monitor the tests nor video-taped them. Such highly suspicious, secret experiments should have been excluded. "Test results should not even be admissible as evidence, unless made by a qualified, *independent* expert or *unless the opposing party has the opportunity to participate in the test*." *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 966 (2d Cir. 1972) (emphasis added).

Second, the alleged tests performed on the exemplar vehicle in the Bentley dealership's garage would only be admissible to prove that Mr. Goodman's vehicle performed in a similar manner if the State established that there was a "substantial similarity in conditions." *Ford Motor Co v. Hall-Edwards*, 971 So.2d 854, 859 (Fla. 3d DCA 2007) (citation omitted). *Accord Meadows v. Anchor Longwall and Rebuild, Inc.*, 306 Fed. Appx. 781, 790-91 (3d Cir. 2009). "[W]here testing

is offered as evidence, the conditions in an experiment must be substantially similar to those at the time of the occurrence for evidence of the experiment to be admitted." *General Motors Corp. v. Porritt*, 891 So.2d 1056, 1058 (Fla. 2d DCA 2004) (citation omitted). "'In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful.'" 891 So.2d at 1059 (citation omitted). "Moreover, failure to lay a sufficient predicate establishing substantial similarity between the accidents renders the evidence irrelevant as a matter of law." " *Ford Motor Co.*, 971 So.2d at 859. Although the standard of review is abuse of discretion, "'[a] judge cannot simply use his discretion to decide that despite a plain lack of substantial similarity in conditions, he will, nevertheless, admit the evidence.'" *Id.* (citations omitted). Florida courts have repeatedly reversed verdicts in design defect cases where these strict foundation requirements were not met. *See, e.g., Ford*, 971 So.2d at 860; *General Motors Corp.*, 891 So.2d at 1059. Indeed, even in civil cases, the improper admission of such evidence has been characterized as "a miscarriage of justice." *General Motors Corp.*, 891 So.2d at 1059 (citation).

As in *Ford Motor*, the State in this case "at no time" even attempted to "lay a sufficient foundation to establish substantial similarity between the evidence" relating to the exemplar Bentley and the "accident at issue in this case." *Id.* The fact that the vehicle may have been the same year, make and model as Mr. Goodman's car does not establish "substantial similarity." *See id*. (evidence that Ford Explorers had been involved in hundreds of rollover accidents insufficient to establish substantial similarity for admission in trial of a specific Ford rollover accident). The fact that Mr. Goodman's Bentley had been sitting in an exposed lot for two years and potentially damaged by the State's insistence on having the jury view the vehicle is enough, standing alone, to show that the

vehicles were presumptively *dissimilar*. *See Bogosian v. Mercedes-Benz of N. Am. Inc.*, 104 F.3d 472, 480 (1st Cir. 1997). Nor did the State establish that there had been no undisclosed modifications to the exemplar vehicle before Bentley produced it for the staged testing. *See Hall v. General Motors Corp.*, 647 F.2d 175, 181 (D.C. Cir. 1980) (affirming trial court's exclusion of test car evidence for "insufficient comparability); *Fortunato*, 464 F.2d at 966 (criticizing similarity of test conducted on exemplar vehicle where "we know nothing of the condition of the test car other than that it was a 1967 Mustang," such as "[t]he distances driven, the type and amount of gasoline in the tank....").

Third, the prosecutors also never gave Mr. Goodman a chance to examine the exemplar vehicle. Instead, the test was conducted in secret sometime on March 20 and not disclosed to the defense until Mr. Livernois was deposed that evening with the *Richardson* hearing scheduled for the next morning. *See Bryant v. State*, 810 So.2d 532, 537 (Fla. 1st DCA 2002) (reversing conviction where trial court's inability to compare the State's edited "enhanced" videotape with the original "can be traced to the state's springing it on the defense at trial, which also led to the defense's inability to have it examined by an expert"). Even if counsel had not been sandbagged, the testimony should have been inadmissible. *See Johnson v. State*, 280 So.2d 673 (Fla. 1973) (reversible error to permit the State to admit testimony of a ballistics expert on markings on the bullet that killed the victim where the State could not produce the bullet for examination by the defendant's expert, thereby effectively preventing the defendant from rebutting the state's conclusion concerning the bullet); *Hutchinson v. State*, 580 So.2d 257 (Fla. 1st DCA 1991) (per curiam) (reversing cocaine conviction where State was improperly allowed to introduce photocopy of money where there was

insufficient proof that the photocopy of the money offered in evidence was the same money given to Hutchinson during the drug deal).

5. The Results of the Destructive Tests on the Real Bentley Were Inadmissible

The Court also committed reversible error in allowing Mr. Livernois to testify about the secretive tests he conducted on Mr. Goodman's Bentley which included manipulating/dismantling some of the parts. It was "fundamentally unfair, as well as a violation of Rule 3.220, to allow the state to negligently dispose of critical evidence and then offer an expert witness whose testimony cannot be refuted by the defendant." *Louissaint v. State*, 576 So.2d 316, 318 (Fla. 5th DCA 1990), citing *Stipp v. State*, 371 So.2d 712 (Fla. 4th DCA 1979) ("It is wrong for the state to unnecessarily destroy the most critical inculpatory evidence in its case against an accused and then be allowed to introduce essentially irrefutable testimony of the most damaging nature against the accused."). Moreover, any testing on the vehicle was unreliable anyway because, according to the prosecutors' own prior arguments, it was likely that vehicle had been damaged by taking it back and forth to court on a flatbed truck after spending two years rusting and moldering on the impound lot (over defense objections). The State had the burden of proving that the vehicle had *not* been materially changed by one or both of these intervening circumstances. *See Bogosian v. Mercedes-Benz of N. Am. Inc.*, 104 F.3d 472, 480 (1st Cir. 1997) (excluding testing evidence performed on the same car when the parties were unable to show that the car had not been materially changed in the two years since the accident and after that car had been examined by numerous experts in the intervening period). The

Court compounded the prejudice to Mr. Goodman by then refusing to issue his requested jury instruction on spoliation.[36]

III. THE COURT VIOLATED MR. GOODMAN'S RIGHT TO TESTIFY FULLY IN HIS OWN DEFENSE TO COUNTER THE PROSECUTORS' WEALTH BIAS STRATEGY

A. The State's Adoption of a "Wealth Bias" Strategy

Taking their cue from the media, the prosecutors went out of their way to stoke the jury's "wealth bias" by repeatedly cross-examining Mr. Goodman about various aspects of his wealth, such as his property ownership and even his tipping habits. They also incessantly referred to Scott Wilson's vehicle as the "little" Hyndai, while referring to Mr. Goodman's Bentley with phrases meant to underscore how expensive it was.[37] This evidence and these tactics were totally irrelevant to the issues and were patently designed to impugn Mr. Goodman's character by casting him as a spoiled playboy who would allegedly be the *type of person* who would not care about either his own actions or the injured victim of the crash. Since Mr. Goodman was not "'charged ... with being wealthy," his "station in life" had, or should have had, no legitimate bearing in this trial. *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990), *quoting Goff v. Commonwealth*, 44 S.W.2d 306, 308 (Ky. Ct. App. 1931). Therefore, "[t]he general rule is that during trial no reference should be made to the wealth or poverty of any party, nor should the financial status of one party be contrasted with

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[36] *See State v. Davis*, 14 So.3d 1130, 1133 (Fla. 4th DCA 2009), citing *State v. Leslie*, 147 Ariz. 38, 708 P.2d 719, 728 (Ariz 1985) (en banc); *Golden Yachts, Inc. v. Hall*, 920 So.2d 777 (Fla. 4th DCA 2006); *Martino v. Wal Mart Stores, Inc.*, 835 So.2d 1251 (Fla. 4th DCA 2003); *American Hospitality Management Company of Minn. v. Edwards,* 904 So.2d 547 (Fla. 4th DCA 2005); *Safeguard Management, Inc. v. Oceanview/Lakeview Trust*, 865 So.2d 672 (Fla. 4th DCA 2004).

[37] *See, e.g.,* Draft Transcripts, Vol. 17 (pp. 18, 28-29); Vol. 21 (pp. 46, 49-50), Vol. 31 (pp. 26-27), Vol. 50 (pp. 13, 27, 37), Vol. 55 (pp. 1, 6-7); Vol. 62 (p.2); Vol. 63 (pp. 8-10, 14-16, 30).

the other's." *Batlemento v. Dove Fountain, Inc.*, 593 So.2d 234, 241 (Fla. 5th DCA 1991) (citation omitted). The pursuit of such a strategy is, and rightfully so, reversible error. 593 So.2d at 241 & n. 15 (citations omitted). *See also Ryan v. State*, 457 So.2d 1084, 1088-89 (Fla. 4th DCA 1984) (holding that it was "unfair and improper for the prosecutor" to characterize the defendant as "rich" who "fitted into that jet-set scene" and is a liar "because she's rich and will thumb her nose" at the community). Trial courts are entrusted with a gatekeeping function to prevent juries from being exposed to any suggestion that a verdict can or should be influenced by the financial status of the parties. "[A]ppeals to class prejudice are highly improper and cannot be condoned *and trial courts should ever be alert to prevent them*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (emphasis added). "[S]uch appeals ... have no place in a courtroom...." *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980) (reversing defendant's conviction for bribery where, during trial, the prosecutor referred to the defendant's as "a multi-millionaire businessman in real estate" and repeatedly referred to his "Park Avenue offices"). "Unfortunately, inherent in our system of trial by jury is always a danger the jury will be influenced by the wealth or power of one party or another or sympathy for a party's weakness, poverty or misery.... It is essential to avoid this risk." *Batlemento*, 593 So.2d at 242. We respectfully submit that the Circuit Court erred in allowing the prosecutors to get away with their wealth bias strategy.

B. The Circuit Court's Rulings Barring Mr. Goodman's Rebuttal Testimony

Mr. Goodman sought to at least partially nullify the prejudice from the prosecution tactic by explaining his background to dispel the spoiled playboy image. However, the Court sustained the prosecutors' objections. Since the State itself chose to inject Mr. Goodman's wealth into the trial,

the Court abused its discretion, and violated Mr. Goodman's constitutional rights, by preventing him from at least attempting to undo the damage through his own words.

"[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." *Masaka v. State*, 4 So. 3d 1274, 1284 (Fla. 2009) (citation omitted). That right includes, of course, Mr. Goodman's right to testify on his own behalf. *See Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *Morris v. State*, 931 So. 2d 821, 833 (Fla. 2006). While that right is not boundless, a procedural or evidentiary rule may not be applied in a manner so as to arbitrarily exclude material portions of a defendant's testimony. *Bowden v. State*, 588 So. 2d 225, 230-31 (Fla. 1991) (quoting *Rock*, 483 U.S. at 55). A trial court may bar completely irrelevant testimony. However, the court's discretion on evidentiary matters must also be constrained by a criminal defendant's constitutional right to testify. *Cf. McDuffie v. State*, 970 So. 2d 312, 324 (Fla. 2007) ("A trial court's discretion [in the limitation on cross-examination of witnesses], however, is constrained by the rules of evidence and by recognition of a criminal defendant's Sixth Amendment rights.") (citation omitted).

"To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice." *United States v. Scott*, 909 F.2d 488, 491 n. 1 (11th Cir. 1990) (citation omitted). The right of Mr. Goodman to "tell his story" was particularly strong here in light of the State's improper tactic of using Mr. Goodman's wealth as a way to demean his *character* before the jury. Once the Court allowed the prosecutors to make the topic of how Mr. Goodman's wealth related to his character relevant, Mr. Goodman had the complementary right to confront the tactic and try to

government unnecessarily injected irrelevant issue into criminal antitrust case, trial court committed reversible error in barring defendants from refuting the evidence).

CONCLUSION

For all of the foregoing reasons, the Court should grant Mr. Goodman an evidentiary hearing and a new trial thereafter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 2, 2012, my office mailed a true copy of the foregoing to:

Ellen Roberts
Assistant State Attorney
West Palm Beach State Attorney's Office
Traffic Homicide Unit
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By: _____
Mark A.J. Shapiro, Esq.

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO.: 2010CF005829AMB

STATE OF FLORIDA,

Plaintiff,

v.

JOHN B. GOODMAN,

Defendant.
_____/

JUDGE JEFFREY COLBATH

DEFENDANT'S MOTION FOR NEW TRIAL AND/OR TO VACATE HIS CONVICTION BASED ON JURY MISCONDUCT AND INCORPORATED MEMORANDUM OF LAW

The Defendant, JOHN B. GOODMAN, through undersigned counsel, respectfully moves this Court either for a new trial pursuant to Rule 3.575 of the Florida Rules of Criminal Procedure or to vacate his conviction pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and the due process and impartial jury clauses of Article I, Section 16 of the Florida Constitution and the Fifth and Sixth Amendments to the United States Constitution. As described more fully below, the Defendant bases these requests on several strains of jury misconduct that were recently reported to counsel, unsolicited, by an alternate juror, including allegations that:

(1) The jurors repeatedly disobeyed their oaths and instructions from the Court to not discuss the evidence until the end of the case;

(2) The jurors made derogatory comments throughout the trial about Mr. Goodman's wealth which showed that they were not being impartial;

(3) The jurors disobeyed the Court's instructions not to read or view the media reports about the case;

(4) Two jurors, Nos. 5 and 6, made false statements to the Court in order to cover up the fact that Juror No. 6, Dennis DeMartin, had made a prejudicial gesture during counsels' cross-examination of the State's rebuttal expert and then conversed with Juror No. 5 about it; and

(5) Mr. DeMartin improperly began writing a book about the case during the trial, told the other jurors that he was doing so and then misrepresented what he was going to the Court in an attempt to conceal his misconduct.

In addition, and as a preliminary matter, the Defendant moves this Court, pursuant to Rule 3.575, for the Court to preside over interviews with the jurors in order to ascertain the full scope of the jury misconduct.[1] In support of these requests, the Defendant states the following:

1. As described more fully below, on March 27 and 28, 2012, an alternate jury, Juror No. 8, telephoned the Court's chambers, wishing to report the various forms of misconduct she had witnessed during the trial. When the Court did not respond to Juror No. 8's inquiries, on the morning of April 4, 2012, she telephoned undersigned counsels' law office and left a message indicating that she wished to talk to counsel for the same purpose. After seeking and obtaining

[1] Mr. Goodman is separately filing a "Notice of Intention To Conduct Jury Interviews," pursuant to Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar. That rule permits lawyers to interview jurors themselves based only on "reasonable grounds to believe" that jury misconduct may have occurred. As discussed in *DeFrancisco v. State*, 830 So.2d 131 (Fla. 2d DCA 2002), once such a notice is filed and served, if the State does not object within a "reasonable time," the interviews may be conducted. If an objection is filed, the Court would be required to hear the objection to determine whether Mr. Goodman has additional reasons to believe that grounds exist for a legal challenge to the verdict.

advice from the Florida Bar through the Florida Bar's Ethics Line that it was permissible to return the call, counsel did so.[2]

2. After interviewing Juror No. 8 by telephone, counsel memorialized her statements in a draft affidavit which, after making some changes, she signed on March 11, 2012. *See* **Exhibit 1**. After explaining her prior attempts to contact the Court, Juror No. 8 indicated in the affidavit that, contrary to the Court's repeated instructions, the jurors often discussed witness testimony and other evidence throughout the trial.[3] As examples, she indicated that there were discussions about how anyone could have an accident and then go and drink, about why Mr. Goodman did not call 911 immediately, about why he did not stop at the stop sign, about who took the videotape of the drive from the Players' Club and how Mr. Goodman could have passed his own driveway on 120th

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[2] Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar provides that after dismissal of the jury lawyers may not "*initiate* communication with ... any juror regarding the trial except to determine whether the verdict may be subject to legal challenge...." (Emphasis added.) Counsel were advised that since Juror No. 8 "initiated" the contact, counsel could return the call.

[3] When the jury was sworn in, the Court specifically instructed:

> ... You can't talk about, as the case unfolds, what did you think about this witness or what did you think about that witness? As tempted as you might be, you're not permitted to do that. Even if all six of you are in the jury room at the same time, until everybody rests, it's inappropriate to talk about what you think about the evidence or the witnesses, that type of stuff.

Draft Transcript, Vol. 16, March 8, 2012, p. 22. Prior to opening statements, the Court reiterated:

> ... After these instructions are given, you will then retire to consider your verdict. Until that time, you should not form any fixed or definite opinions on the merits of the case until you have heard all the evidence, the arguments of the attorneys, and the instructions on the law from me. Until that time, you should not discuss this case among yourselves.... During these recesses, you will not discuss this case with anyone, nor permit anyone to say anything to you or in your presence about this case.

Draft Transcript, Vol. 17, March 13, 2012, at pp. 12-13. The Court gave similar reminders throughout the course of the trial. *See, e.g.,* Draft Transcripts, Vol. 19, March 13, 2012, p. 78; Vol 37, March 16, 2012, p. 45; Vol. 63, March 22, p. 43.

Avenue. "We all had things to say about the trial as it progressed each day." Affidavit, p. 2, ¶ 8. When Juror No. 8 reminded the other jurors that the Court had instructed them not to discuss the case, she was "teased" by another juror that she must have a crush on Mr. Goodman. *Id.*

3. Not surprisingly, in light of the pretrial publicity, Juror No. 8 disclosed that "[o]n many occasions" the jurors talked about Mr. Goodman's wealth. *Id.* at p. 3, ¶ 9. "Most of the conversations about money [were] in the context of Mr. Goodman probably being guilty but getting away with it because he has a lot of money. Although no one specifically used the word 'guilty.'" *Id.*

4. Juror No. 8 also stated that before the end of the trial, it was clear that many of the jurors had already decided how they were going to vote, vowing to finish the case by Friday, March 23. "Based on the negative talk about Mr. Goodman's wealth and the issues discussed about the case, it was clear to me that these jurors had already made up their minds before Thursday, March 22nd." *Id.* at p. 3, ¶ 10.

5. Juror No. 8 further reported how Juror No. 6, Dennis DeMartin, lied to the Court about his conduct on March 22. As the Court will recall, and as is set forth in greater detail below, Mr. DeMartin was spotted making a dismissive-appearing hand gesture during counsels' cross-examination of the State's rebuttal expert (Thomas Livernois). He then immediately turned and spoke to Juror No. 5. When questioned by the Court about his conduct, Mr. DeMartin claimed that the gesture was about a lost button that had allegedly just been found by Juror No. 5. Juror No. 5 later agreed with that story. According to Juror No. 8, Mr. DeMartin's explanation "was not true" since, in fact, Mr. DeMartin had lost and found the button earlier. *Id.* at pp. 3-4, ¶¶ 11-12. "I believe that Mr. DeMartin's gesture was an expression of his disdain for Mr. Goodman and the defense

team." *Id.* Juror No. 8 also reported that Mr. DeMartin was already writing a book about the trial and "would frequently tell us that he wrote down what happened in court each day, and all the jurors knew about it." *Id.* at p. 4, ¶ 13.[4]

6. Juror No. 8 believed that the "pre-deliberation discussions" about the case "were wrong" and wanted to inform the Court but did not come forward immediately because "everyone on the jury was telling me that I was an alternate. As an alternate, I did not believe I had as much a right as the other jurors to bring this to the Court's attention." *Id.* at p. 4, ¶¶ 14-15. The only way the jurors could have known that Juror No. 8 was an alternate before the end of the case was by disobeying the Court's instructions not to view the media about the case. *See* **Composite Exhibit 2**, *The Palm Beach Post*, March 8, 2012, *Jurors seated in Goodman trial; possible defense strategy* (reporting that the two alternates were two women, one of whom "directs field trips for a preschool for low-income families and another woman who spends her time volunteering").[5]

7. In the following Memorandum, Mr. Goodman demonstrates that based on Juror No. 8's allegations, the Court is required by Rule 3.575 to conduct interviews of all the jurors. If the interviews confirm the jury misconduct reported by Juror No. 8, the Court "***must*** order a new trial, unless the State proves that the defendant was not prejudiced by the jurors' misconduct." *Gray v. State*, 72 So.3d 336 (Fla. 4th DCA 2011) (emphasis added).[6]

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[4] As discussed *infra*, during the trial, Mr. DeMartin wrote the Court a letter claiming that he was writing a book but *not* about the trial. Rather, he claimed the book was about dating as a senior citizen.

[5] As part of its initial instructions, the Court instructed the jury not to read the newspaper, not to watch the television and not to use the internet or electronic devices to learn about the case. *See* Draft Transcript, Vol. 16, March 8, 2012, at p. 21. These instructions were also repeated prior to opening statements. *See, e.g.,* Draft Transcript Vol. 17, March 13, 2012, p. 13.

[6] Alternatively, Mr. Goodman would be entitled to the same relief pursuant to Rule 3.850(a)(1). "The standard for (continued...)

MEMORANDUM

I. PRELIMINARY STATEMENT OF THE FACTS

A. Jury Selection and the Jurors' Conduct During the Trial

Before trial, Mr. Goodman filed a motion for a change of venue, arguing that the community had been so saturated with prejudicial pretrial publicity that neither *voir dire* nor instructions from the Court would be adequate to safeguard his constitutional rights. *See generally Mu'Min v. Virginia,* 500 U.S. 415, 429-30, 111 S.Ct. 1899, 114 L.Ed. 2d 493 (1991) (recognizing that when pretrial publicity is pervasive within a community, a "juror's claims that they can be impartial should not be believed" and *voir dire* is an inadequate curative). *See also Serrano v. State*, 64 So.3d 93, 112 (Fla. 2011) (per curiam); *Manning v. State,* 378 So.2d 274, 276 (Fla. 1979). A "juror may have an interest in concealing his own bias" or "may be unaware of it." *Smith v. Phillips,* 455 U.S. 209, 221-22, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring).[7] Mr. Goodman warned about the potential for one or more "stealth" jurors who, in addition to simply wishing to punish a notorious defendant, may believe they could achieve notoriety based on their jury service and purposefully contrive to get seated. *See Miller-El v. Dretke,* 545 U.S. 231, 267-68, 125 S.Ct. 2317,

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[6](...continued)
granting a new trial under rule 3.600 and rule 3.850 is the same." *Showers v. State*, 778 So.2d 424, 425 (Fla. 1st DCA 2001), citing *Totta v. State*, 740 So.2d 57 (Fla. 4th DCA 1999).

[7] Mr. Goodman's fear that he could not trust *voir dire* was corroborated by the media itself. For example, the *Palmbeachpost.com* published the following comment from one blogger: "It will be a jury trial.... John...if your [sic] smart you'll demand trial by judge. You don't want a trial by jury.... WE consist of the jury. I listen very carefully and stay very quiet during 'Voir Dire'... I know exactly what it takes to get on a jury... So do a lot of bored people just like me... Pray I don't get a summons John ... PRAY...." On-line comment to *Palmbeachpost.com*, July 24, 2010, "Friends of Scott Wilson cleaning crash site: 'We just want Wellington to remember,'" by "Halliburton STILL owns the rig"at 9:04 a m., 7/25/2010.

162 L.Ed.2d 196 (2005) (Breyer, J., concurring); *Pennekamp v. Florida,* 328 U.S. 331, 359, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946) (Frankfurter, J., concurring).[8]

The Court denied the venue motion and proceeded to select a six member jury and two alternates. *None of the eight jurors chosen where informed about which two were the alternates.* The media, however, disclosed that the alternates were two women, one of whom "directs field trips for a preschool for low-income families and another woman who spends her time volunteering." *See* **Composite Exhibit 2**. Although, as previously noted, the Court had instructed the jurors to scrupulously avoid the media and the jurors repeatedly assured the Court that they were following its instructions, in fact, they did not do so. As indicated in Juror No. 8's affidavit, the jurors knew she was an alternate throughout the proceedings.

In addition to disregarding the Court's instructions about the media, it is now clear that there was at least one "stealth" juror – Juror No. 6, Dennis DeMartin. During *voir dire*, Mr. DeMartin admitted to having followed the media's version of the case pretrial. *See* Draft Transcript, Vol. 4, March 6, 2012, p. 12 (admitting that "I've read the paper and I saw it on television...."); *id.* at p. 18 (admitting that he read the paper, including the Palm Beach Post, "mostly every day and I do watch the news at night"). However, he claimed in elaborate detail how he could be an honest and fair juror. *Id.* at pp. 13-19.

During the trial, Mr. Goodman and counsel began to question whether Mr. DeMartin had been candid. On March 20, 2012, he presented the Court with a letter stating that the had been writing a book for over a year about "The Trials and Tribulations of a Senior Citizen getting a Date without a Car." *See* **Exhibit 3**. In the letter, Mr. DeMartin claimed he was informing the Court

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[8] *See generally* Jerry Markon, *Jurors with Hidden Agendas,* Wall St. J., July 31, 2001.

about his book plan because he had been in contact with "a few publishing companies for my dating book" and had also told the other jurors "that I am writing my book on dating without a car..." *Id.* The only hint that Mr. DeMartin was even thinking about writing something about being a juror in this case was a vague statement that *if* he was successful with his dating book, "I would consider using the process to writing about the experience being a juror." *Id.* Since Mr. DeMartin's letter falsely disclaimed any connection between his *current* writing and Mr. Goodman's case, neither counsel nor the Court had any reason to question him further about the book. This Court acknowledged that if he was writing about this case while it was going on it would be "inappropriate on a juror's part." Draft Transcript, Vol. 60, p. 34.

Two days later, a second incident involving Mr. DeMartin occurred. During Mr. Shapiro's cross-examination of the State's rebuttal expert, Mr. Livernois, another member of the defense team, Mr. Dubin, saw Mr. DeMartin wave his hand dismissively and then turn and speak to Juror No. 5, suggesting Mr. DeMartin was making a derogatory comment to Juror No. 5 about counsel's cross-examination in violation of the Court's daily instructions not to discuss the case. *See* Draft Transcript, Vol. 60, March 22, 2012, at pp. 30-33. After a break and at counsels' request, the Court summoned Mr. DeMartin for questioning about the incident. Mr. DeMartin falsely claimed that the hand gesture had nothing to do with the testimony:

> JUROR NO. 6: I lost the button off my shirt yesterday. She found it on the floor today, and I said, this place don't even clean up at night. (Laughter) .... The button was still here from yesterday when I lost it off my shirt.

Id. at p. 37. When the Court asked him directly whether the gesture had anything to do with the testimony, Mr. DeMartin stated: "No way. That's the big joke back there because they said I ate too many of those donuts and that's why the button popped." *Id.*

After Mr. DeMartin returned to the jury room, the Court decided to question Juror No. 5, who was then summoned.[9] Juror No. 5 corroborated Mr. DeMartin's account: "I found his button he lost the other day ... Because I didn't know he lost one. So I just said, did anybody lose a button? He said, that's my button from yesterday." *Id.* at p. 40. With that testimony, the issue seemed resolved.

Later that day, following closing arguments, the Court dismissed the two alternates and informed them that they were free to talk to the press about the case if they wished to do so. The Court then added: "The lawyers aren't allowed to approach you and initiate conversation, *but you can approach* ***anybody*** *you want to* ***to initiate*** *conversation*...." *See* Draft Transcript, Vol. 63, March 22, 2012, at p. 36 (emphasis added).

On March 23, 2012, the jury returned its guilty verdicts after only a few hours of deliberation. That same day, Mr. DeMartin gave live interviews to ABC news and apparently other news outlets. *See* **Composite Exhibit 4**. Among other things, Mr. DeMartin stated that the jury had little trouble convicting Mr. Goodman.

[9] Before the Court summoned Juror No. 5, Mr. DeMartin would have had plenty of time to inform her about the explanation he gave for the incident.

B. Juror No. 8's Attempts To Report the Misconduct To the Court

At 8:19 a.m. on March 27, 2012, Juror No. 8 telephoned the Court's chambers, wishing to report the aforementioned jury misconduct. She left a message but did not receive a return telephone call. The next day, March 28, 2012, she called again. This time, she left a message with a secretary or clerk but, again, did not receive a return call from the Court. If the Court had returned the calls – or, at the very least, reported Juror No. 8's complaints to Mr. Goodman – Mr. Goodman would have had time to include a jury misconduct claim in his motion for new trial under Fla. R. Crim. P. 3.600(b)(4) before the 10 day period in Rule 3.590(a) expired.

Mr. Goodman filed his motion for new trial on the 10th day permitted by the rule, April 2, 2012. With no knowledge of the information described below or of Juror No. 8's attempt to contact the Court, his motion did not include any jury misconduct claim.

C. Juror No. 8 Initiates Contact With Counsel

At approximately 9:30 a.m. on the morning of Wednesday, April 4, 2012, Juror No. 8 telephoned undersigned counsel's office and left a message that she wanted to discuss what went on with the jury during Mr. Goodman's trial. Upon learning of the message, counsel double checked the trial transcript concerning the Court's comments to the alternates when they were dismissed and researched whether it was permissible to return the call. Consistent with what the Court told the alternates, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar only prohibits lawyers from "initiating" post-verdict communications with jurors. *See* p. 3, n. 2 *supra*. Since Juror No. 8 had "initiated" the contact, counsel believed it was probably permissible to return the call. However, before doing so, counsel checked to see whether there were any reported court decisions or

professional ethics opinions from the Florida Bar. Finding nothing on point,[10] counsel (Mr. Dubin) called the Florida Bar's Ethics Line and spoke with Bar Attorney Jeff Hazen. Mr. Hazen advised that counsel could return the call to Juror No. 8 and provided counsel with a call Record Number 302437 as proof that the Bar had been consulted.

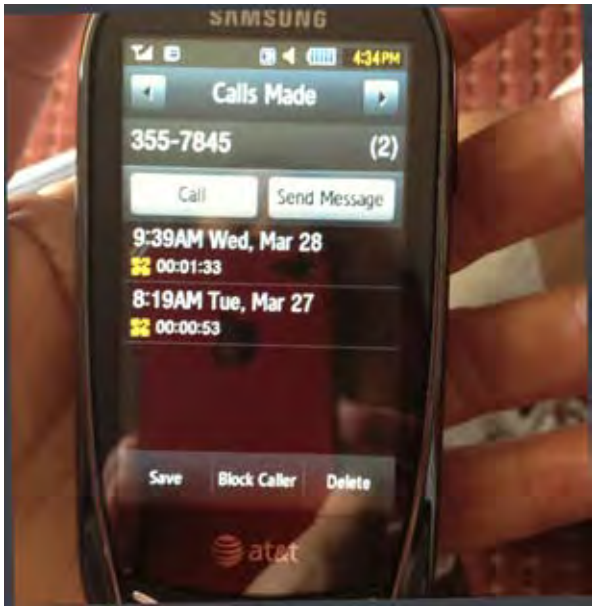
At approximately 11:30 a.m., Mr. Dubin returned the call and spoke with Juror No. 8. She began by indicating that she wanted to discuss some things that had happened during the trial that had bothered her. After disclosing various types of jury misconduct to Mr. Dubin, Juror No. 8 indicated that Mr. Black could call her himself that evening.

In an abundance of caution, at 2:32 p.m., Mr. Dubin again contacted the Florida Bar Ethics Line and this time spoke with Florida Bar ethics attorney Yen Cam who advised that it would be permissible to call Juror 8 back a second time, since she had initiated the call. For identification purposes, Ms. Cam recorded the solicitation of advice as call Record Number 302513. At approximately 8:00 p.m. that evening, Messrs. Black and Shapiro called Juror No. 8. Juror No. 8 then further elaborated on the statements previously made to Mr. Dubin. At the end of the call, Juror No. 8 again indicated that counsel were free to contact her in the future with any additional questions.

By Monday, April 9, 2012, counsel had compared their notes of their conversations with Juror No. 8 and prepared a draft affidavit. At approximately 8:00 that evening, Mr. Black telephoned Juror No. 8 and asked if she would agree to a meeting. She did so and met with counsel two days later, on April 11, 2012. At the meeting, she reiterated that she had wanted and tried to present this

[10] The few opinions issued by the Florida Bar concerning contacts with jurors all pre-date Rule. 4-3.5(d)(4). *See* Opinion 66-47 (Aug. 15, 1966); Opinion 69-17 (May 23, 1969); Opinion 70-45 (Dec. 3, 1970).

information to the Court and had left two messages with the Court's chambers. With her permission, counsel took a photograph of her cell phone record, showing the two calls to the Court: (1) a 53 second call at 8:19 a.m. on March 27 and (2) a 1:33 minute call at 9:39 a.m. on March 28. *See* **Exhibit 5** (the adjacent photograph). Juror No. 8 indicated that she felt it was her "duty as a juror" to bring these matters to the Court's attention and believed that what took place "was wrong."



Counsel then presented Juror No. 8 with the draft affidavit and asked her to review it carefully. Counsel explained that since the affidavit would be going to the Court, it was very important to be accurate. Juror No. 8 agreed and understood. After reading the draft, she requested a few changes and gave some additional details that were then added to the draft. Counsel made the changes (through a staff member who attended the meeting with a computer and portable printer) and, after Juror No. 8 reviewed the revised draft, she signed it. *See* **Exhibit 1**.

II. THE MULTIPLE FORMS OF JURY MISCONDUCT REQUIRE A NEW TRIAL

A. Jurisdiction and the Governing Legal Standards

Under Rule 3.600(b)(4) of the Florida Rules of Criminal Procedure, a trial court "shall" grant a new trial if "[a]ny juror was guilty of misconduct" and the defendant's "substantial rights ... were prejudiced thereby." However, motions for new trial under Rule 3.600 must be filed within 10 days of the verdict under Rule 3.590(a). This time limit is considered jurisdictional. *See Showers v. State*, 778 So.2d 424 (Fla. 1st DCA 2001). As noted above, the Court's failure to disclose Juror No. 8's calls effectively prevented Mr. Goodman from being able to file a timely Rule 3.600 motion on this issue. However, Rule 3.575 provides an alternative vehicle for obtaining a new trial based on jury misconduct that is not, or at least not always, confined to the 10 day time frame. Rule 3.575 provides that "[a] party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine." Such a motion must be made within 10 days of the verdict "***unless good cause is shown*** *for the failure to make the motion within that time*." Fla. R. Crim. P. 3.575 (emphasis added). Upon "a finding that the verdict may be subject to challenge," the trial judge "*shall* enter an order permitting the interview . . . ." *Id.* (emphasis added). If the interviews establish jury misconduct, the Court "***must*** order a new trial, unless the State proves that the defendant was not prejudiced by the jurors' misconduct." *Gray v. State*, 72 So.3d 336 (Fla. 4th DCA 2011) (emphasis added).[11]

In *Gray*, the Fourth District Court of Appeal clarified the standards governing the granting of jury interviews under Rule 3.575, as well as when new trials must be granted thereafter. After

[11] Alternatively, Mr. Goodman would be entitled to the same relief under Rule 3.850(a)(1), since "[t]he standard for granting a new trial under rule 3.600 and rule 3.850 is the same." *Showers*, 778 So.2d at 425 (citation omitted).

reviewing the synthesizing the holdings in *Williams v. State of Florida*, 793 So.2d 1104, 1107 (Fla. 1st DCA 2001)*, Ramirez v. State of Florida*, 922 So.2d 386, 390 (Fla. 1st DCA 2006), and *Reaves v. State*, 826 So.2d 932 (Fla. 2002), the Fourth District in *Gray* held as follows:

First, in order to *require* the trial court to conduct jury interviews under Rule 3.575, the defendant has a limited threshold burden to present allegations that "rise to a *prima facie* case" of jury misconduct, which in *Gray* was premature deliberations. *See Gray*, 72 So.3d at 338. This initial burden includes a requirement that the defendant show *either* "prejudice" *or* that the misconduct was "of such character as to raise a presumption of prejudice." *Id*. at 338, citing *Ramirez*, 922 So.2d at 390. While this minimal showing is frequently met through the submission of one or more affidavits, *see Ramirez*, 922 So.2d at 389 & n. 1 (citations omitted), *Gray* and *Ramirez* both held "Rule 3.575 does not require the filing of sworn affidavits in order to interview a juror." *Gray*, 72 So.3d at 337. *Accord Ramirez*, 922 So.2d at 389.[12] In *Gray*, the defendant met the *prima facie* standard merely by showing that multiple jurors were conversing about the case before the case was concluded. *Id.*

Second, if the defendant satisfies the initial showing, then "the burden will shift to the State to rebut the resulting presumption of prejudice." *Id*. at 338, citing *Ramirez*, 922 So.2d at 390. *Accord Johnson v. State*, 696 So.2d 317, 323 (Fla. 1997) (citation omitted), *cert. denied*, 522 U.S. 1120 (1998). In the context of premature deliberations, this means that "[i]f the trial court finds that premature deliberations took place, it must order a new trial, unless the State proves that the defendant was not prejudiced by the jurors misconduct." *Ibid.*

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[12] The *prima facie* standard appears to be slightly higher than the "reason to believe" standard set forth in Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar. *See Ramirez*, 922 So.2d at 389.

The State's burden is a heavy one. Under the Supreme Court of Florida's decision in *Wilding v. State of Florida*, 674 So.2d 114, 118 (Fla. 1996), "[the defendant] was entitled to a new trial unless the state could demonstrate that there was *no reasonable possibility* that the misconduct affected the verdict." 674 So.2d at 118 (emphasis added). Moreover, the State may not attempt to prove this negative by inquiring into the decision-making process the jurors. *Id.* at 117. "An inquiry into juror misconduct must be limited to objective demonstration of overt acts committed by or in the presence of the jury or jurors which reasonably could have affected the verdict." *Id.*

Juror No. 8's affidavit is more than sufficient to establish a *prima facie* case of jury misconduct for at least four reasons, discussed individually below. The motion is also timely. Although more than 10 days have elapsed, there is "good cause ... for the failure to make the motion within that time." Juror No. 8 did not initiate contact with counsel until after the 10 day period had lapsed and before then Mr. Goodman had no basis to invoke Rule 3.575. The Court's failure to disclose or respond to Juror No. 8's March telephone calls – which were both *within* the 10 day period – also prevented Mr. Goodman from learning about her accusations in time to seek relief within the 10 day period.[13]

B. <u>The Premature Deliberations</u>

Both the Florida and United States Constitutions guarantee that criminal defendants will be tried by impartial jurors. Defendants are also entitled to a presumption of innocence that can only be overcome by proof beyond a reasonable doubt. To ensure that jurors remain impartial and afford

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[13] This motion is also timely under Rule 3.850. Indeed, challenges to juror misconduct have been deemed to be cognizable under Rule 3.850 even if not discovered or raised for years after a verdict. *See, e.g., Marshall v. State*, 854 So.2d 1235 (Fla. 2003); *Kelley v. State*, 569 So.2d 754 (Fla. 1990). *See also United States v. Jackson*, 209 F.3d 1103 (9th Cir. 2000) (noting that the defendant did not learn of the factual predicate for his juror misconduct claim until three years after the trial).

defendants their right to a presumption of innocence until all of the evidence has been introduced and the jury has been properly instructed on the law, courts in virtually every jurisdiction – and as the Court did in this case – admonish jurors to refrain from engaging "in discussions about the case before they have heard both the evidence and the court's legal instruction and have begun formally deliberating as a collective body." *United States v. Resko*, 3 F.3d 684, 688 (3rd Cir. 1993) (collecting cases and treatises). Courts have emphasized four reasons for the prohibition against premature deliberations:

- Premature deliberations are overwhelmingly likely to be unfavorable to defendants, since the prosecution is allowed to present all its evidence before the defendant.
- Premature deliberations would allow a misbehaving juror (one who prematurely determines guilt) to unfairly influence other jurors.
- Once a juror has openly expressed his or her views in the presence of other jurors, that juror is likely to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion.
- Premature deliberations undermine the goal of collective decision-making in the deliberative process that is a key component of the jury system.

See generally United States v. Dominguez, 226 F.3d 1235 (11th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001); *United States v. Yonn*., 702 F.2d 1341, 1345 n. 1 (11th Cir. 1983); *Resko*, 3 F.3d at 689-90; *State v. Cherry*, 341 Ark. 924, 927, 20 S.W.3d 354 (2000).

In violation of these principles and the Court's specific instructions, multiple jurors repeatedly engaged in discussions about the evidence – and Mr. DeMartin was seen doing so in open

court. Therefore, under *Gray*, *Williams* and *Ramirez*, the Court is now required to preside over jury interviews using the procedure set forth in Rule 3.575.

In *Gray*, the Fourth District held that the trial court abused its discretion in not conducting jury interviews where the defendant's showing was both far less detailed than Mr. Goodman's showing and not supported, as is Mr. Goodman's, with a juror's affidavit. In *Gray*, defense counsel moved for a post-trial interview of the jurors based on a conversation that he had with an alternate juror in the hallway after she was dismissed just before deliberations began. *See Gray*, 72 So.3d at 337. In this conversation, the alternate juror said the following: (1) that several members of the jury felt "'extremely strong" that the defendant was guilty; (2) that one juror shared with other jurors his focus on the fact that the defendant possessed a gun while walking around early in the morning; (3) and that other jurors shared their focus on the fact that there was a lack of physical evidence in the case. *See id.*[14] Given the timing of the conversation between the alternate juror and the defense attorney, simultaneous with the commencement of deliberations, the alternate juror obviously heard the jurors discussing aspects of the trial and the issue of the defendant's innocence or guilt before they were instructed to commence deliberations. Nonetheless, the trial court denied defense counsel's motion for post-trial interviews of jurors. *Id.* at 337.

In reversing, the Fourth District held that the defense showing amply met the *prima facie* standard, citing *Williams* and *Ramirez* with approval. The lesson that the *Gray* court derived from its analysis of Florida precedent was that any discussions amongst *multiple* jurors about trial proceedings that also include opinions regarding the defendant's guilt before official deliberations

[14] The lack of physical evidence, of course, could hardly be considered prejudicial to the defendant.

commence would raise the presumption of prejudice that the Sate must rebut. *See Gray*, 72 So.2d at 338.[15]

In *Williams*, the defendant filed a timely motion for post-conviction relief based on juror misconduct where he alleged that "two jurors had engaged in deliberations before hearing all the evidence." *Williams*, 793 So.2d at 1105. The trial court denied his request without a hearing but the appellate court reversed and remanded for further proceedings consistent with the holding that Williams had alleged a *prima facie* case of juror misconduct. In *Williams*, the affidavits supporting the allegation of juror misconduct described conduct similar to that described by Juror No. 8. For example, there were two jurors that did not want to serve because they felt that the trial was a waste of time and money because the defendant was obviously guilty. *Id.* at 1106. These sentiments were heard by the affiant and were made by the two jurors while the State was still putting on its case. *Id.* Further, the sentiments of these two jurors were indicative of the overall "atmosphere of the jury." *Id.* Thus, in *Williams*, premature deliberations rises to the level of juror misconduct where: (1) two jurors; (2) discuss trial proceedings before official deliberations commence; (3) in a manner that indicated that they had arrived at a decision regarding the defendant's guilt.

Juror No. 8's description of Mr. Goodman's jury was virtually the same as in *Williams.* She described a jury that had made up its mind about Mr. Goodman's guilt before jury deliberations commenced. And, just as the jury in *Williams*, where jurors expressed impatience to complete deliberations so they could get on with their personal lives, jurors in Mr. Goodman's case were insistent that deliberations would be concluded by Friday, March 23rd.

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[15] The *Gray* court distinguished *Reaves v. State*, 826 So.2d 932 (Fla. 2002), which involved only a *single* juror's *unsuccessful* attempt to discuss the defendant's guilt before deliberations.

In *Ramirez*, defense counsel moved for a new trial based on premature jury deliberations. *See Ramirez*, 922 So.2d at 387. Defense counsel alleged that an alternate juror told a bailiff in the courtroom that the jury "was split as to the defendant's guilt until after they heard his testimony." *Id.* at 388. Thus, in *Ramirez*, the alternate juror made a statement that implied that members of the jury were sharing opinions with each other as to the defendant's innocence or guilt before official deliberations commenced. The trial court denied the motion because, among other reasons, it claimed that any such allegation "inhere[s] in the verdict" and therefore cannot be a basis for a new trial. *See id.* However, the appellate court reversed to allow defense counsel the opportunity to pursue interviews of jurors and an evidentiary hearing in order to show that "[premature deliberations or conversations] were of such character as to raise a presumption of prejudice." *Id.* at 390 (citation omitted). In remanding the case to the trial court, the appellate court noted that "[d]eciding a case before hearing all of the evidence is antithetical to a fair trial." Id. at 390. Thus, *Ramirez*, like *Gray* and *Williams*, supports the proposition that any discussion by jurors as to the guilt of the defendant before deliberations commence is misconduct and triggers a shift in burden to the State which must "rebut the resulting presumption of prejudice." *Id.*

In the instant case, Juror No. 8 tried to inform the Court directly and has now filed an affidavit describing how *multiple* other jurors repeatedly discussed the facts of the case in violation of their oaths as jurors and the Court's explicit instructions. She also gave several specific examples of the evidence that they were discussing, all of which questioned the credibility of Mr. Goodman's defense. On these allegations alone, it is clear that *Gray*, *Williams* and Ramirez support a finding of juror misconduct and require a thorough investigation.

But there is more. Juror No. 8's affidavit also reveals that Mr. DeMartin's dismissive hand gesture and comment to Juror No. 5 where *not* about the button episode. In other words, both Mr. DeMartin and Juror No. 5 lied to the Court in order to conceal their misconduct in the courtroom. These troubling allegations cannot simply be swept under the rug. Indeed, Mr. DeMartin's alleged mendacity would, standing alone, be enough to warrant a new trial. *See Young v. State*, 720 So.2d 1101, 1103 (Fla. 1st DCA 1998) (reversing Circuit Court for refusing to conduct an inquiry into whether a juror lied during voir dire, holding that "[a]ny juror who conceals a material fact that is relevant to the controversy is guilty of misconduct," remanding for a hearing and holding that "[i]f the court finds that the juror did conceal this information, then appellate is entitled to a new trial").

C. The Biased Deliberations Due To Mr. Goodman's Wealth

Both the Florida and United States Constitutions guarantee a criminal defendant the right to a "fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (internal citations omitted). The touchstone of a fair trial is an impartial trier of fact – "'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (citation omitted). "The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require." *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (reversing jury verdict based on a voir dire of deliberating jurors where the "religious prejudice displayed by the jurors . . . is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible harmful effects on this

appellant"); *see also United States v. McClinton*, 135 F.3d 1178, 1185 (7th Cir. 1998) ("The Fifth and Sixth Amendments protect a criminal defendant from a jury's lynch mob mentality through the guarantees of due process of law and trial by an impartial jury.").

Mr. Goodman's motion for a change of venue thoroughly documented how the pretrial publicity in this case created a "lynch-mob mentality" against him primarily because of his wealth. In addition to documenting the dozens of media references to Mr. Goodman as a "millionaire," a "billionaire" and "polo mogul," the motion recounted numerous articles and hundreds of "blogger" comments revealing that the community believed Mr. Goodman would somehow use his wealth to evade justice. Typical of the prejudice displayed by these comments include: "Another rich a** hole believing the rules don't apply to him. This young man died for no reason and this guy wont even go to jail Money talks in this town...." and "The rich & famous seem to think they are above the law! Let's hope this guys [sic] money & connections don't let him get away with it!" *See* Motion For Change of Venue, at p. 59.

During *voir dire*, the jurors in this case were questioned about their potential bias because of Mr. Goodman's wealth. All assured the Court that they could be fair and impartial. *See, e.g.,* Draft Transcripts, March 8, 2012, Vol. 10, pp. 73-74 and Vol. 11, pp. 1-2. However, even the prosecutors knew better. Ass explained in Mr. Goodman's motion for new trial, they repeatedly played the "wealth card," correctly perceiving the impact of such a tactic on a media-primed jury. As the Eleventh Circuit commented under analogous circumstances, "[a] wolf in sheep's clothing is, despite clever disguise, still a wolf." *Heller*, 785 F.2d at 1527 (condemning the prosecutor's attempt to excuse the antisemitic statements of jurors as "teasing" or "jest[ing]"). The jurors' assurances of impartiality were false and it took very little from the prosecutors to remove their

"sheep's clothing" and trigger open discussions of Mr. Goodman's wealth in the jury room. Thus, according to Juror No. 8, "[o]n many occasions" the jurors talked about Mr. Goodman's wealth and "[m]ost of the conversations about money [were] in the context of Mr. Goodman probably being guilty but getting away with it because he has a lot of money." *See* **Exhibit 1**, at p. 3, ¶ 9.

While most statements by jurors during the course of deliberations inhere in the verdict and are not subject to exposure thereafter, comments displaying racial, religious or ethnic bias are not, at least under Florida law, immune. To the contrary, "[w]hen appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct." *Powell v. Allstate Insurance Co.*, 652 So.2d 354, 357-58 (Fla. 1995). Such conduct also violates "the guarantees of both the federal and state constitutions which ensure all litigants a fair and impartial jury and equal protection of the law." *Marshall v. State*, 854 So.2d 1235, 1241 n. 7 (Fla. 2003) (per curiam), citing *Powell*, 652 So.2d at 358. And, a trial court's failure or refusal to investigate juror bigotry when it comes to light is also reversible error, even when it is not discovered for many years.

For example, in *Marshall*, a prisoner sentenced to death for murder of another prisoner filed a motion for post-conviction relief several years after his conviction, based, in part, on jury misconduct. The motion recited a telephone call that Marshall's attorney received from an unidentified woman "who claimed" that she had been on Marshall's jury. 854 So.2d at 1239. The woman told the attorney that "(1) some jurors decided Marshall was guilty before the trial was over; (2) some jurors told racial jokes about Marshall; (3) some jurors announced during the guilt phase that they were going to vote for a guilty verdict and life sentence because they wanted Marshall to return to prison to kill more black inmates; and (4) some jurors, despite the trial judge's orders forbidding it, read and discussed articles concerning the trial." *Id.* Although the unidentified woman

caller did not supply an affidavit, 11 years after the conviction, the Supreme Court of Florida found the attorney's allegation sufficient to reverse the trial court's summary denial of post-conviction relief. *Accord Powell*, 652 So.2d at 358; *Wright v. CTL Distribution, Inc.*, 650 So.2d 641, 643 (Fla. 2d DCA 1995). *See also Turner v. Stime*, 153 Wn. App. 581, 222 P.3d 1243 (2009) (affirming new trial order where jurors reportedly made anti-Japanese comments about party's attorney); *State v. Santiago*, 245 Conn. 301, 715 A.2d 1, 22 (Conn. 1998) (requiring "an extensive inquiry" when reports of jurors making racial epithets are made); *Comm. v. Laguer*, 410 Mass. 89, 97, 571 N.E. 2d 371, 376 (1991) (requiring a hearing about ethnic slurs against Hispanics to determine whether the defendant received a trial by an impartial jury).[16]

While these cases involved juror prejudice based on race, religion or ethnicity, permitting a verdict to stand that is tainted by class or wealth bias is equally reprehensible – and unconstitutional. "[A]ppeals to class prejudice are highly improper and cannot be condoned *and trial courts should ever be alert to prevent them*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (emphasis added). If "such appeals ... have no place in a *courtroom*," *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980) (emphasis added), they certainly have no place in the *jury room*. Since Mr. Goodman was not "'charged ... with being wealthy," his "station in life" should have had no bearing on his guilt or innocence. *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) (citation omitted). "Unfortunately, inherent in our system of trial by jury is always a danger the jury will be influenced by the wealth or power or one party or another or sympathy for

[16] Although the federal courts are split on the issue, several circuits adhere to the views of the Supreme Court of Florida in *Marshall* and *Powell*, requiring hearings into these types of allegations. *See United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009); *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001); *Heller*, 785 F.2d at 1527; *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983); *Tobias v. Smith*, 468 F. Supp. 1287, 1289-90 (W.D.N.Y. 1979). *Contra United States v. Benally*, 546 F.3d 1230, 1236-37 (10th Cir. 2008).

a party's weakness, poverty or misery.... It is essential to avoid this risk." *Batlemento v. Dove Fountain, Inc.*, 593 So.2d 234, 242 (Fla. 5th DCA 1991). The Court did not take adequate steps to "avoid this risk" before or during the trial.

Although the outcome in this case was, unfortunately, predictable, it is not too late for the Court to do something about it. The Court must now, as in *Marshall*, permit a thorough airing of this matter. If what Juror No. 8 reports is true, "the jury's verdict would be an affront to our system for the administration of justice. The people cannot be expected to respect their judicial system if its judges do not, first, do so." *Heller*, 785 F.2d at 1529.

D. The Jury's Disobedience About Avoiding the Media

Yet another strain of jury misconduct exposed by Juror No. 8 was the jury's apparent disobedience of the Court's repeated admonitions to avoid the media. The only plausible explanation for how the jurors all knew that Juror No. 8 was an alternate was that they were reading about the case in *The Palm Beach Post* and/or other media outlets.

As the Supreme Court of Florida established in *Marshall*, "an allegation that jurors read newspapers contrary to the court orders [does] not inhere in the verdict" but rather constitutes the "receipt by jurors of prejudicial nonrecord information" which "constitutes an overt act subject to judicial inquiry." *Marshall*, 854 So.2d at 1241-42, citing *Sentinel Communications Co. v. Watson*, 615 So.2d 768, 772 (Fla. 5th DCA 1993), and *Baptist Hosp. v. Maler*, 579 So.2d 97, 100-01 (Fla. 1991). *See also Simmons v. Blodgett*, 910 F. Supp. 1519 (W.D. Wash. 1996) (noting that state court had held an evidentiary hearing on juror misconduct based on a statement by a juror that she had read numerous newspaper articles about the case during the trial), *aff'd*, 110 F.3d 39 (9th Cir. 1997).

Accordingly, this proof of misconduct is an independent basis for the Court to conduct jury interviews.

E. Juror DeMartin's Concealed Conflict of Interest

The Sixth Amendment to the United States Constitution requires jurors to both impartial and "indifferent" about the outcome. *See* . *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). For this reason, a juror's deliberate failure to disclose a potential source of bias is itself grounds for disqualification. *See McDonough Power Equip.*, 464 U.S. at 554; *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984)(internal citations omitted). Although neither the prohibitions against juror bias nor the procedures designed to eliminate it are new, the form of bias exhibited by Mr. DeMartin is a recent phenomenon, and it has yet to spawn many precedents.[17] However, in the wake of highly publicized trials, including those of Rodney King, Amy Fisher, the Menendez brothers and O.J. Simpson, the problem of "juror journalism" has begun to attract the attention of commentators, *see* Marcy Strauss, *Juror Journalism*, 12 YALE L. & POLICY REV. 389 (1994) (hereinafter "STRAUSS"), and state legislatures.[18] As Strauss warns, "[t]he expanding practice

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[17] In *United States v. Abbell*, 271 F.3d 1286, 1301 (11th Cir. 2001), the court held that a juror's mere "plan" to write a book in the future was not an "outside influence" that constituted misconduct. And, in *State v. Smart*, 136 N.H. 639, 622 A.2d 1197, *cert. denied*, 510 U.S. 917 (1993), the defendant alleged that a juror had made audiotapes of her recollections of a trial for the purpose of selling them after trial for profit. Her claim was rejected after an evidentiary hearing revealed that the tapes "became the subject of possible sale only after offers *by the defendant's attorneys* to buy them." 622 A.2d at 1211 (emphasis added). Mr. DeMartin's conduct cannot be similarly excused.

[18] *See also* James Cady, *"Checkbook Journalism": A Balance Between the First and Sixth Amendments In Highprofile Criminal Cases*, 4 WM. & MARY BILL OF RTS. J. 671 (1995); Brent Ashby, *Juror Journalism: Are Profit Motives Replacing Civic Duty*, 16 PEPP. L. REV. 329 (1989); Kenneth Jost, *The Dawn of Big Bucks Juror Journalism*, LEGAL TIMES, July 20, 1987, at p. 15; Michael Freitag, *In the Right Case, Jury Duty Can Pay*, *New York Times*, Nov. 22, 1987, at pp. 4, 9; Marcia Chambers, *Little Room on Juries for Profit Motive*, NAT'L L. J., Jan. 25, 1988, at p. 13; Alex S. Jones, *Juror's Attempt to Sell Story Raises Ethics Issues*, *New York Times*, Dec. 24, 1987, at p. B3.

New York, New Jersey and California all now prohibit jurors from entering into contracts with the media to sell their stories about cases in which they have served for various periods of time after their service has concluded. *See* N.Y.

(continued...)

of cameras in courtrooms, the public's voracious appetite for crime stories and real-life dramas, the proliferation of talk shows encouraging jurors to reveal the inside details about sensational trials – all these operate to ensure an ever-expanding number of persons seeking to use their jury experience for personal gain." STRAUSS, 12 YALE L. & POL'Y REV. at 394 (footnotes omitted).

While counsel have found few reported decisions in which *a juror* sought to exploit his or her service for personal financial gain by writing a book or movie about the case in which he or she has served, in the analogous context of attorney conflicts, the law is settled. Courts,[19] scholars[20] and bar organizations[21] have uniformly denounced the execution of literary and media rights fee

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[18](...continued)
Penal Law § 215.28 (McKinney Supp. 1998); N.J. Stat. Ann. 2C:29-8.1 (West 1998); Cal. Pen. Code § 116.5 (1997).

[19] *See, e.g., United States v. Hearst*, 638 F.2d 1190, 1197-98 (9th Cir. 1980) ("all courts before which the issue has been raised have disapproved the practice of attorneys arranging to benefit from the publication of their clients"), *cert. denied*, 451 U.S. 938 (1981); *People v. Corona*, 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894, 915 (Cal. Ct. App. 1978) (ordering retrial of mass murderer, where the "literary rights contract [resulted in] trial counsel [who] was devoted to two masters with conflicting interests – [the attorney] was forced to choose between his own pocketbook and the best interests of his client, the accused").

[20] *See, e.g.,* Mark R. McDonald, *Literary Rights Fee Arrangements in California: Letting the Rabbit Guard the Carrot Patch of Sixth Amendment Protection and Attorney Ethics?*, 24 LOY. L.A. L. REV. 365 (1991); Note, *Publication Rights Agreements In Sensational Criminal Cases: A Response To the Problem*, 68 CORNELL L. REV. 686 (1983); Note, *Conflict of Interests When Attorneys Acquire Rights to the Client's Life Story*, 6 J. LEGAL PROF. 299, 306 (1981) (discussing several cases in which, with only one exception, courts have recognized the Code of Professional Responsibility's prohibition against publication rights agreements).

[21] For example, Rule 4-1.8(d) of the Rules Regulating the Florida Bar provides:

> **(d) Acquiring Literary or Media Rights**. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Accord American Bar Ass'n Standards for Criminal Justice, Standard 4-3.4 (2d ed. 1980); American Bar Ass'n, Model Code of Professional Responsibility, DR 5-104(B); American Bar Ass'n, Model Rules of Professional Conduct, Rule 1.8(d). The Texas Bar Association views media contracts as being so rife with conflict that even client consent will not cure a violation of the prohibition against them. Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27 HOUS. L. REV. 133, 134 (1990).

arrangements between attorneys and their clients during the pendency of the representation and even after the representation.[22]

Such agreements are "offensive" because they "encourage counsel to misuse the judicial process for the sale of his personal enrichment and publicity-seeking, and [they] necessarily trade[] on the misery of the victim and his family." *Beets v. Scott*, 65 F.3d 1258, 1273 (5th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1157 (1996). In other words, such agreements create "a conflict between the interests of the client and the personal interests of the lawyer." Comment, *Literary Rights*, Rule 4-1.8(d), Rules Regulating the Florida Bar, THE FLORIDA BAR JOURNAL, September 1998. *See also Beets v. Scott*, 65 F.3d at 1285-86 (King, J., dissenting) (citations omitted).

"Juror journalism" threatens the criminal justice system in much the same way as "attorney journalism" does, and both are likely to occur only in criminal cases already exposed to intense publicity. *See* STRAUSS, 12 YALE L. & POL'Y REV. at 390 ("the cases where jurors are most likely to attempt to profit from their service are the most visible, and thus the ones most likely to influence the public's perception of the justice system"). However, *juror* journalism poses the greater danger, because of the secrecy surrounding the deliberative process. A defense lawyer's representation is open for all to see and evaluate;[23] a juror's conduct in fulfilling his or her obligations of service are hidden even from the Court. Moreover, a juror with a "hidden agenda" of profiting from the experience can disrupt the process in at least four insidious respects.

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[22] *See Neelley v. Nagle*, 138 F.3d 917, 926 (11th Cir. 1998) (attorney's plan to write a book about client's case during trial and execution of media contract three months after trial "represent a serious violation of Alabama's ethics rules"). *Cf. Zamora v. Dugger*, 834 F.2d 956, 961 n. 4 (11th Cir. 1987) (no violation where attorney did not negotiate book contract until one year after trial).

[23] For this reason, ineffective assistance claims based upon the conflict of interest presented by an attorney's media contract frequently fail on the merits due to an inability to show prejudice from the conflict. *See, e.g., Beets v. Scott*, 65 F.3d at 1266, 1273-74.

First, a juror desiring to serve on a particular jury "because he or she believes it may be financially profitable" may, when questioned during *voir dire*, be less than candid in an effort to maximize "his or her chances of being selected for the jury." STRAUSS, at 395. "Thus, the profit motive may cause potential jurors to evade or deceive to get onto a high profile jury." *Id.* at 396 (footnote omitted).

Second, a juror's profit motive may "distort the juror's perception of the testimony during the course of the trial." *Id.* at 399. Consciously or subconsciously, a juror may hear and remember testimony, not for its value in determining the defendant's guilt or innocence, but for its "dramatic" value. *Id.* "Instead of participating in the trial only as a juror sworn to fairly and unbiasedly listen to all sides," such a juror is "in the role of a journalist and profiteer, seeking the 'truth' that most effectively sells a story." *Id.* at 400. There is probably no method for objectively evaluating, in any particular case, how the existence of such conflicting motives warps a juror's ability to serve and, hence, should simply be presumed.[24]

Third, the juror journalist may "attempt, consciously or subconsciously, to manipulate the deliberations and the verdict to ensure an outcome most conducive to the selling of the story." *Id.* at 401. In cases involving sensational criminal cases, the most profitable verdict – the one most likely to appease the public, please the media, maximize potential profits and elevate the juror to "talk show" status – requires that the defendant be convicted, not acquitted. Columnist Art

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[24] In *Estes v. Texas*, 381 U.S. 532, 547 (1965), the Supreme Court denounced the use of televised trials for similar reasons:

> The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement.... Embarrassment may impede the search for truth, as may a natural tendency toward overdramatization.... There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience they exist.

Buchwald accurately captured this concept in his comical description of an attorney's conflict of interest due to a media contract:

> This fictitious conversation could take place in many states where a canon forbidding a defense lawyer from sharing in literary rights does not exit:
>
> "Lefty, as you know, we're in the second week of the trial, and I think I've made a pretty strong case for you."
>
> "I ain't complaining. You gave the D.A. a run for his money. I got a feeling the jury is going to come back with a not guilty verdict."
>
> "That's what my editor thinks, too, Lefty. Originally, when we worked out the outline of the book, we thought it would make a better story if I got you off at the end. But now that the press keeps referring to our case as the 'Crime of the Century,' we believe it would be better if you got the electric chair."
>
> "Are you crazy or something? Why would it be better if I got the chair?"
>
> "It's more dramatic if, after a great defense, the jury still finds you guilty. A 'Not Guilty' verdict makes the book anti-climatic and a big letdown, particularly if we're going for a 'Book-of-the-Month' deal."
>
> "Wait a minute. I don't mind you taking your fee out of the literary rights to my trial, but I don't want to fry for it."
>
> "Listen, Lefty, when you came to me, you didn't have a dime. You chose me because I was the best criminal lawyer in the country. But I'm not in this business for my health. I don't want you to go to the chair any more than you do. But if I don't make any money out of this book, I'll have wasted six months of my time."
>
> "Can't you figure out some other way of ending the book without me going to the chair?"
>
> "I could get you life, but every major Hollywood studio is interested in making a movie from the trial. We can't make a big deal unless you get capital punishment. My agent said the difference between you getting life and the chair is worth half a million bucks."
>
> "So what are you going to do?"
>
> "I've got to persuade the jury in my summing up that all our witnesses have been lying through their teeth, and society would be much better off if you paid the ultimate price for your heinous crime. But I have to be subtle about it. I don't want to hurt my reputation in the legal profession."

> "I think the whole thing stinks."
>
> "Look, Lefty, I'll even throw in an appeal to the Supreme Court for nothing for you. But my first obligation is to my publishers. After all, they're the ones who are paying me."
>
> "I could have done better with a public defender."
>
> "You know you don't honestly believe that, Lefty. Have you ever heard of a public defender who has won a Pulitzer Prize?"

Buchwald, *Defense for Dollars*, THE WASH. POST, April 14, 1981, at B1, col. 1.

We respectfully submit that the evidence suggests that Mr. DeMartin may have engaged in similarly cynical reasoning in this case. A verdict of "not guilty" would hardly have endeared Mr. DeMartin to the public or, more importantly, to Simon & Schuster. However, even if it might be hard to assess whether a "guilty" or "not guilty" verdict would be more profitable,[25] "it is fairly obvious ... that a hung jury would not be very saleable. Thus, a juror might decide to go along with one side or another simply to ensure that some resolution is reached for the sake of the story." STRAUSS, 12 YALE L. & POL'Y REV. at 402.

Fourth, a juror with a literary conflict poses the additional danger of spreading the taint to other members of the jury:

> Juror journalism risks not only the integrity of the juror seeking profit; it may also impose on the other jurors as well. Most significantly, the knowledge (or even belief) that a member of the jury is writing or planning to write about the trial may inhibit the frank and open exchange of ideas in deliberations. Jurors may be reluctant to express minority or unpopular views if they believe that such opinions will be aired to the public.

[25] Ultimately, the critical issue is "not whether the juror might correctly assess the most profitable verdict" but whether the juror "believes one [verdict] is more likely than the other to be profitable." STRAUSS, 12 YALE L. & POL'Y REV. at 402.

Id. at 402. *See generally Clark v. United States*, 289 U.S. 1, 13 (1933) ("freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world").

It now appears that Mr. DeMartin's conduct was not motivated by his civic duty but to secure the outcome he desired for his book – a vision he apparently shared with other jurors during the trial itself. In Mr. DeMartin's view, a vote for acquittal would have meant a vote for the "unpopular view" that Mr. Goodman might escape or buy his way out of trouble. Of course, no juror would have wanted such a view exposed in Mr. DeMartin's book. Accordingly, even if Mr. DeMartin never wins a publisher for his book, his conflict of interest distorted the truth-seeking process.

Mr. DeMartin's conflict of interest, therefore, is an independent basis for granting a new trial. The Court should convene an evidentiary hearing concerning Mr. DeMartin's conduct prior to sentencing. *See Buenoano v. Singletary*, 963 F.2d 1433, 1438-39 (11th Cir. 1992) (remanding for evidentiary hearing in death penalty case on whether fee arrangement that gave first $250,000 of book and movie contract to the attorney created an actual conflict and an adverse effect); *Hearst*, 638 F.2d at 1193-94 (remanding for a hearing on whether F. Lee Bailey's book contract with Patty Hearst created an actual conflict of interest).[26]

[26] In *Buenoano*, the Eleventh Circuit actually remanded for a *second* evidentiary hearing, finding that the district court had improperly denied the defendant's ineffectiveness claim after an initial hearing where only the testimony of defense counsel was entertained. Counsel had testified that "he did not conceive of the contract idea until after the guilt phase of the trial and shortly before the penalty phase." *Buenoano*, 963 F.2d at 1439. Despite this testimony, the Eleventh Circuit held that "a full evidentiary hearing" was required. *Id.*

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that this Court convene a hearing to interview the jurors under Rule 3.575 and, thereafter, order a new trial.

Respectfully submitted,

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By:
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Florida Bar No. 897061
Counsel for John B. Goodman

AFFIDAVIT OF JOHN B. GOODMAN

I, John B. Goodman, being of sound mind, after being properly sworn, state that I have read the foregoing and, under penalty of perjury, I swear that the factual assertions contained therein are true and correct, that there has not yet been a direct appeal of my conviction, that there has not been any previous post-conviction motions filed – other than the motion for new trial that the Court recently denied and, for the reasons set forth in the instant motion, the claims presented herein could not have been raised in my original motion for new trial.

JOHN B. GOODMAN

SWORN TO AND SUBSCRIBED before me this 15th day of April, 2012, ~~at Miami, Dade~~ Palm Beach County, Florida.

NOTARY PUBLIC, STATE OF FLORIDA

NOTARY PUBLIC-STATE OF FLORIDA
Guy P. Frenstin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2012, my office hand-delivered a true copy of the foregoing to:

Ellen Roberts
Assistant State Attorney
West Palm Beach State Attorney's Office
Traffic Homicide Unit
401 North Dixie Hwy.
West Palm Beach, FL 33401

By: _____
Mark A.J. Shapiro, Esq.

EXHIBT 1

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR PALM BEACH COUNTY

STATE OF FLORIDA, Plaintiff,	:	Case No. 2010CF005829AMB JUDGE JEFFREY COLBATH
v.	:	
JOHN GOODMAN, Defendant.	:	

AFFIDAVIT OF [redacted]

1) My name is [redacted] I was alternate juror number 8 in the case of State of Florida v. John Goodman.

2) Following my service from jury duty, I wanted to expose some things about specific jury conduct that I believe were wrong.

3) My first thought was to contact Judge Colbath's office. I made two attempts to speak with Judge Colbath by leaving a message, but to my knowledge, neither of my calls was returned. I did leave a message with a woman who answered the phone in his office on one of the two occasions.

4) On April 4, 2012, not having heard back from Judge Colbath's office, I contacted the attorneys for Mr. Goodman and left a message for them that I wanted to discuss what went on with the jury during the trial.

5) At approximately 11:30 a.m. on April 4th, I spoke with Mr. Joshua Dubin, one of Mr. Goodman's attorneys. I told Mr. Dubin the reason for my call. After discussing the details with Mr. Dubin, I told him that I could be reached later that evening if Mr. Black wanted to speak with me. Later that evening, I received a call from Mr. Black and Mr. Shapiro. I told them the details of what occurred during the trial.

6) Even though we were told not to discuss the case between ourselves until the end of the trial, the jury often discussed witness testimony and other evidence throughout the trial.

7) Specific issues in the trial were discussed openly prior to deliberations. For example, there were discussions about how anyone could have an accident and then go and drink. There were discussions about why Mr. Goodman did not first call 911, and questions about why he did not stop at the stop sign. There were also questions and comments about who took the videotape of the drive from the Players' Club and how Mr. Goodman could have passed his own driveway on 120th Avenue.

8) We all had things to say about the trial as it progressed each day. On one occasion I reminded the jury that we had been instructed by the Court not to discuss the case until the end. In reply, I was teased by being asked by another juror if I had a crush on Mr. Goodman.

9) On many occasions, members of the jury would make mention of Mr. Goodman's wealth. Some of the comments were in the context of having enough money to hire good lawyers. I do not remember specifics about other comments about Mr. Goodman's wealth, but his money was mentioned several times in discussions between jurors. Most of the conversations about money was in the context of Mr. Goodman probably being guilty but getting away with it because he has a lot of money. Although no one specifically used the word "guilty."

10) Before the end of the trial, some of the jurors were saying that they had to finish this case by Friday, March 23rd, because they did not want to return the following Monday. The jurors said that we were not going to go into the next week. One of the jurors said he had a boating trip planned for the weekend and had to be finished by Friday. Based on the negative talk about Mr. Goodman's wealth and the issues discussed about the case, it was clear to me that these jurors had already made up their minds before Thursday, March 22nd.

11) During the afternoon break on Thursday, March 22nd, juror number 6 (Dennis DeMartin) was called back into court while the rest of us were in the jury room. When he returned, he told all of us that he was asked about waving his hand during the testimony of the State's Bentley expert. He told us that he told the Court that he waived his hand because he found his button that he had lost the day before. Mr.

DeMartin told juror number 5 what he told the judge prior to her coming in and reporting the same thing after the break.

12) Mr. DeMartin's explanation to the Court was not true. Mr. DeMartin lost his button the previous morning and found it early the next day. He showed me his button when he found it. He found the button well in advance of his waiving gesture. Mr. DeMartin's waiving gesture had nothing to do with his button. I believe that Mr. DeMartin's gesture was an expression of his disdain for Mr. Goodman and the defense team.

13) Mr. DeMartin also told us that he was writing a book about the trial. He would frequently tell us that he wrote down what happened in court each day, and all the jurors knew about it.

14) I knew that the pre-deliberation discussions the jury was having about the trial, and Mr. DeMartin's story to the Court were wrong. I wanted to tell the Court but did not want to be the one to tell. We had an understanding that whatever we discussed in the jury room during the trial would remain between us.

15) I also did not come forward immediately because everyone on the jury was telling me that I was an alternate. As an alternate, I did not believe I had as much a right as the other jurors to bring this to the Court's attention.

16) After discussing the details given above with Mr. Black and Mr. Shapiro, they prepared this affidavit, and reviewed it with me for accuracy.

Further Affiant sayeth not.

I, [redacted] to swear that the foregoing statements are true and correct to the best of my knowledge and belief.

[redacted]

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, did appear [redacted] who first being sworn did thereafter attest that the foregoing statements in this affidavit are true and correct to the best of her knowledge and belief.

Witness my hand and seal in the State and County aforesaid, this 11th day of April, 2012.

Wanda Gomez
Notary Public

My Commission Expires:

WANDA GOMEZ
MY COMMISSION # EE 115012
EXPIRES: November 22, 2015
Bonded Thru Budget Notary Services

___ Personally known
✓ Produced Identification D450 753 47 927 0

EXHIBT 2

The Palm Beach Post

Jurors seated in Goodman trial; possible defense strategy revealed

Reporter Daphne Duret's live updates from Day 3:

John Goodman trial - Day 3 (03/08/2012)

Thursday March 8, 2012

8:35  **Daphne Duret:** Back in court for day three of jury selection in the Goodman case. Defense has asked to question the 38 remaining jurors individually.

Share

8:37  **Daphne Duret:** "There is a circus atmosphere developing outside this courtroom," said attorney John Dubin. "It's difficult to avoid. And I don't think we're going to get to some of these latent biases until we go through the jurors one by one."

Share

8:39  **Daphne Duret:** CIrcuit Judge Jeffrey COlbath denies the request for now. "If it gets to the point where it becomes problematic I'll revisit your request," he said.

Share

8:42  **Daphne Duret:** Change in seating arrangement at the defense table. Attorney Roy Black is now at the head of the table Josh Dubin and Mark Shapiro are in the middle and GOodman is seated at the end of the table closest to the gallery. Attorney Guy Fronstin is still seated near the door leading to tthe court holding cell.

Share

8:42 **Comment From John**

is this because the potential Jurors are waiting outside the courtroom & anyone in the

COVER IT LIVE

See trial chat archives, more

By**DAPHNE DURET**

Palm Beach Post Staff Writer

Updated: 10:56 a.m. Friday, March 9, 2012
Posted: 7:23 p.m. Thursday, March 8, 2012

Wellington polo magnate John Goodman's Bentley convertible could have malfunctioned just before the crash that killed 23-year old Scott Wilson.

He could have suffered a concussion, other brain injury or amnesia that caused him to leave the scene of the crash and start drinking afterward to soothe his pain before he called 911 nearly an hour later.

These scenarios have surfaced as possible defenses his team will argue to the five men and one woman who on Tuesday will begin hearing testimony in Goodman's trial for DUI manslaughter and leaving the scene of an accident in Wilson's February 2010 death.

Prosecutors and Goodman's lawyers picked the panel - along with two female alternates - at the end of three days of jury selection Thursday in the trial of the Texas heir, who founded Wellington's International Polo Club. Questions to prospective jurors from Goodman's famed Miami attorney Roy Black provided a glimpse into his team's strategy.

"[illegible] with the term 'sudden acceleration' in cars?" Black asked the prospective jurors Thursday.

"Do you think that the more expensive a car is, the less chance there could be for a malfunction?" he continued.

Prosecutor Sherri Collins objected. She and prosecutor Ellen Roberts joined Black, Goodman, and the rest of Goodman's legal team at Circuit Judge Jeffrey Colbath's bench to argue the issue. Colbath ultimately sided with prosecutors, and Black eventually abandoned the question.

Black continued by asking the jurors if they were familiar with the idea of someone having a few drinks to relieve pain. A few hands went up this time.

Collins continued to object to Black's questions, and in most cases Colbath agreed and told Black to move on.

By afternoon's end the lawyers had picked a jury panel that includes two construction managers, an electrician whose wife is a school principal, a South Florida Water Management District worker and two retirees – a former accountant who boasted he's only received three speeding tickets in more than 50 years as a driver and a retired biology teacher who also coached football.

The two alternates are a woman who directs field trips for a preschool for low-income families and another woman who spends her time volunteering.

Black renewed his request for a change of venue after they picked the jury, but Colbath again denied the request.

During the two week trial the jury will hear testimony about how Goodman spent his time both before and after the crash. Prosecutors will likely say that Goodman partied with friends at the Players Club following a charity event at the White Horse Tavern, buying rounds of expensive tequila shots and other drinks he shared before he climbed into his Bentley.

The car eventually collided with Scott Wilson's Hyundai, flipping it into a canal where the University of Central Florida engineering grad died.

According to reports in the case, Goodman said he went to the barn of friend Kris Kampsen after the accident. Goodman's defense team could argue that he had drinks there after the crash to calm his nerves or to soothe the pain from a concussion or other injury. Among those on the defense witness list is a hand and wrist orthopedic surgeon from Miami.

Defense attorney Gregg Lerman, who was in the courtroom briefly during jury selection Thursday, said if the defense wants to prove that Goodman drank after the crash, they would have to show that he had been drinking quite a bit to explain his blood alcohol level being at .177 percent - twice the level at which a driver is legally presumed to be impaired - when his blood was drawn some three hours after the crash.

But Lerman pointed to Black's reputation as one of the best criminal defense attorneys in the country.

"If anyone can win this case, Roy Black can," he said.

Black and Roberts, a veteran homicide prosecutor who also was part of a team that faced off against Black in the 1990s rape trial of Kennedy cousin William Kennedy Smith, will deliver their opening statements to jurors on Tuesday.

The panel could decide the case in two weeks. If convicted, Goodman faces up to 30 years in prison. A trial in the wrongful death suit Wilson's parents filed against Goodman is expected to begin at the end of the month.

Jurors seated in Goodman trial; possible defense strategy revealed

Reporter Daphne Duret's live updates from Day 3:

John Goodman trial - Day 3 (03/08/2012)

Thursday March 8, 2012

8:35 **Daphne Duret:** Back in court for day three of jury selection in the Goodman case. Defense has asked to question the 38 remaining jurors individually.

8:37 **Daphne Duret:** "There is a circus atmosphere developing outside this courtroom," said attorney John Dubin. "It's difficult to avoid. And I don't think we're going to get to some of these latent biases until we go through the jurors one by one."

8:39 **Daphne Duret:** Circuit Judge Jeffrey COlbath denies the request for now. "If it gets to the point where it becomes problematic I'll revisit your request," he said.

8:42 **Daphne Duret:** Change in seating arrangement at the defense table. Attorney Roy Black is now at the head of the table Josh Dubin and Mark Shapiro are in the middle and GOodman is seated at the end of the table closest to the gallery. Attorney Guy Fronstin is still seated near the door leading to tthe court holding cell.

8:42 Comment From John

See trial chat archives, more

ENLARGE PHOTO

John Goodman listens to Judge Jeffrey Colbath speak to the jury selected to serve on the his DUI manslaughter trial on Thursday, March 8, 2012.

ENLARGE PHOTO

Defense attorney Roy Black speaks to potential jurors during the third day of jury selection in John Goodman's DUI manslaughter trial onThursday, March 8, 2012.

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John Goodman faces uphill appeal fight

Goodman attorney's strategy included putting others on trial

Jurors find Goodman guilty of DUI manslaughter; Wellington polo mogul taken into custody

► Attorney's eloquence couldn't beat evidence in Goodman case

By DAPHNE DURET
Palm Beach Post Staff Writer

Updated: 10:56 a.m. Friday, March 9, 2012
Posted: 7:23 p.m. Thursday, March 8, 2012

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WEST PALM BEACH — Wellington polo magnate John Goodman's Bentley convertible could have malfunctioned just before the crash that killed 23-year old Scott Wilson.

He could have suffered a concussion, other brain injury or amnesia that caused him to leave the scene of the crash and start drinking afterward to soothe his pain before he called 911 nearly an hour later.

These scenarios have surfaced as possible defenses his team will argue to the five men and one woman who on Tuesday will begin hearing testimony in Goodman's trial for DUI manslaughter and leaving the scene of an accident in Wilson's February 2010 death.

Prosecutors and Goodman's lawyers picked the panel – along with two female alternates – at the end of three days of jury selection Thursday in the trial of the Texas heir, who founded Wellington's International Polo Club. Questions to prospective jurors from Goodman's famed Miami attorney Roy Black provided a glimpse into his team's strategy.

"Is anyone familiar with the term 'sudden acceleration' in cars?" Black asked the prospective jurors Thursday.

About nine hands went up.

"Do you think that the more expensive a car is, the less chance there could be for a malfunction?" he continued.

Prosecutor Sherri Collins objected. She and prosecutor Ellen Roberts joined Black, Goodman, and the rest of Goodman's legal team at Circuit Judge Jeffrey Colbath's bench to argue the issue. Colbath ultimately sided with prosecutors, and Black eventually abandoned the question.

Black continued by asking the jurors if they were familiar with the idea of someone having a few drinks to relieve pain. A few hands went up this time.

Collins continued to object to Black's questions, and in most cases Colbath agreed and told Black to move on.

By afternoon's end the lawyers had picked a jury panel that includes two construction managers, an electrician whose wife is a school principal, a South Florida Water Management District worker and two retirees – a former accountant who boasted he's only received three speeding tickets in more than 50 years as a driver and a retired biology teacher who also coached football.

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- Goodman's testimony aimed at reducing potential prison time, experts say

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Search for crimes in your neighborhood, find registered sex offenders living near your home

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Defense strategy previewed in selecting jury for Goodman manslaughter trial

March 08, 2012 | By Peter Franceschina, Sun Sentinel

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Prosecutors repeatedly objected to Black's line of questions. They objected to the car-crash questions and when Black asked if anyone had suffered a concussion and memory loss.

Black's questions also suggest one defense for Goodman may be that he suffered a concussion in the crash and did not have his wits about him afterward. Black also asked if jurors ever had suffered "temporary amnesia."

Palm Beach Circuit Judge Jeffrey Colbath cut off that line of questions after prosecution objections. The judge told Black he was improperly trying to "condition" jurors. "That's where I lose my patience," Colbath said.

By the end of the day, a jury was seated — five men and one woman, all middle-age or older. The two alternates are women. The judge has largely shielded their personal information because of heavy media coverage.

Opening statements are set for Tuesday morning, and prosecutors have said they expect their case to take up to five days. The defense plans to put on several days of testimony.

The focal point of the trial will be how much Goodman had to drink and when, with competing experts testifying to his blood-alcohol level at the time of the crash.

A wrongful-death suit filed against Goodman by Wilson's parents, William and Lili Wilson, is scheduled to begin in late March, after the conclusion of the criminal trial.

Several prospective jurors said they were familiar with media coverage of that case, including recent reports concerning Goodman's adoption of his 42-year-old girlfriend, making her a beneficiary of a $300 million trust for his two minor children.

pfranceschina@tribune.com, 561-243-6605 or Twitter @pfranceschina

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Defense strategy previewed in selecting jury for Goodman manslaughter trial

March 08, 2012 | By Peter Franceschina, Sun Sentinel

The first hint of polo mogul John Goodman's defense to a DUI-manslaughter charge emerged Thursday in the third and final day of jury selection.

Miami defense attorney Roy Black repeatedly quizzed prospective jurors on their attitudes about drinking and then driving immediately afterward, whether they had heard of a car malfunctioning while being driven and made reference to "sudden acceleration in cars."

Black also asked jurors about "temporary amnesia" and if they ever had suffered a concussion and, afterward, did not know what they were doing.

"What if you have a couple of drinks right before you drive and you're not impaired or above the lawful limit," Black asked one prospective juror.

A number of prospective jurors agreed that it was not illegal for them to drive after a few drinks if they were not impaired or above the legal blood-alcohol limit of .08 percent.

Black also asked if anyone would call a loved one after an emergency rather than call 911.

All of those questions reflected on aspects of the Goodman case.

Prosecutors say Goodman, 48, was driving his Bentley convertible at 63 mph south on 120th Avenue in Wellington and ran a stop sign at Lake Worth Road, smashing into a Hyundai driven by Scott Wilson, 23, who was on his way home from Orlando to visit family.

The crash happened around 1 a.m. Feb. 12, 2010. Prosecutors allege that in the hours before the crash Goodman — the founder of Polo Club International Palm Beach — had been drinking at two Wellington watering holes that cater to the polo community.

The impact flipped Wilson's car upside down into a canal and he drowned. Goodman was charged with DUI-manslaughter and vehicular homicide while failing to render aid. He faces up to 30 years in prison if convicted.

After the crash, Goodman left the scene. He ended up at a nearby trailer, where he used a woman's cell phone to call his girlfriend in Atlanta before calling 911, about an hour after a passerby first reported the crash, according to court records.

Three hours after the crash, Goodman's blood-alcohol level was measured at .177 percent, more than twice the legal limit to drive.

In his questions, Black suggested that Goodman may only have had a few drinks before the crash. The defense has a blood-alcohol expert who could testify that Goodman's blood-alcohol level was on the rise in the hours following the crash.

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Legal wrangling continues over polo mogul's wealth, adoption of girlfriend

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Jurors chosen for Houston millionaire's DUI trial

Jurors have been chosen for the Florida DUI manslaughter trial of Houston millionaire John Goodman, reports the SunSentinel.

During the last day of jury selection on Thursday, the polo mogul's defense team hinted at what might be used at his trial.

> Miami defense attorney Roy Black repeatedly quizzed prospective jurors on their attitudes about drinking and then driving immediately afterward, whether they had heard of a car malfunctioning while being driven and made reference to "sudden acceleration in cars."
>
> Black also asked jurors about "temporary amnesia" and if they ever had suffered a concussion and, afterward, did not know what they were doing.
>
> "What if you have a couple of drinks right before you drive and you're not impaired or above the lawful limit," Black asked one prospective juror.

Goodman, who faces up to 30 years in prison if convicted, is accused of driving drunk in the early hours of Feb. 12, 2010, and crashing his Bentley into a Hyundai sedan after running a stop sign. The sedan was driven by 23-year-old Scott Wilson, who was headed back home after visiting family in Orlando.

The impact of the crash flipped Wilson's car upside down into a canal, where he drowned, still strapped to his seat.

Goodman

Goodman allegedly fled the scene to a nearby trailer and used a woman's cell phone to call his girlfriend before calling 911 nearly an hour after a witness reported the accident, the SunSentinel reported.

> Black's questions also suggest one defense for Goodman may be that he suffered a concussion in the crash and did not have his wits about him afterward.

Five men and one woman were selected as jurors. Two additional women will serve as alternates for the trial, which is

Deisy Enriquez
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EXHIBT 3

Dennis DeMartin
1101Cactus Terrace #102
Delray Beach, Fl 33445
Cell: **561-248-0873** Email: **DEND3114@Yahoo.com**

March 20, 2012

Judge Colbath,

I have been writing a book, "The Trials and Tribulations of a Senior Citizen getting a Date without a Car." for about a year and a half. I have been looking for a publisher to help me and suggest a shorter title as this one is too long and no one would read it except my family and close friends. I have asked many people for help and how to get with a publisher. I finally got someone to help me send emails to publishers.

Two pages of my book are **attached** and the other pages deal with each girl in each chapter and the sometimes funny and sometimes sad story that I went through.

For the longest time, I did not receive any replies When I received the jury notice in the mail, I had no idea that I was going to be picked for the John Goodman trial, so after receiving the attached emails yesterday, I sent the responses attached back to them that I could not get back to them for 2 or 3 weeks because I was on jury duty.

When I got home, and checked my phone messages, there were also calls from these companies, but I DID NOT RETURN THEM.

You will also recall that I called family, friends from Highland Beach to ask if they recalled my giving a statement to police in 2001 regarding a motor cycle accident that I saw and forgot about. I DID tell them that I might be picked to be on the John Goodman trial and that the prosecutor's attorneys had found that out in checking on the prospective jurors. They confirmed that while walking in Highland Beach, we did see an accident which I forgot about over the years as I did not know the cyclist and as guess it was forgotten in my mind over the past 10 years.

They new of my stories regarding dating as some of them set me up on the dates. They asked me if I was still trying to get my book published and if I got on the jury, I could write another book. One of them told me that a friend of theirs at Church told them that a cousin of the friend worked in a

publishing company and the friend would give the cousin my name.

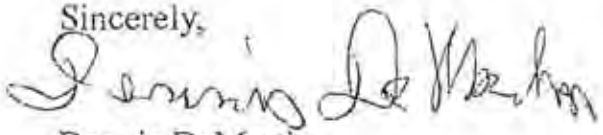
I told them that I would continue on my dating book and I would use the dating book as a leader to follow the process of getting it published. If I was successful, with that book, I would consider using the process to writing about the experience of being a juror.

I NEVER talked to anyone in person, but did tell the cousin in an email that I was on the jury for the John Goodman trial in hopes that it would give me a lead in for my dating book.

The jury is aware that I am writing my book on dating without a car as they tease me on breaks when I tell them the story on some of the girls.

I am writing you to let you know that I have now received messages on my phone, which I did not return yesterday and did send and receive emails from a few publishing companies for my dating book in case you feel that the prosecutors and defense attorneys should be aware of.

Sincerely,



Dennis DeMartin

Life is to short to be anything but
HAPPY-- So kiss slowly, Love Deeply,
Forget the past and'
Forgive Everything

I am compassionate
I am gracious
I am friendly
I am loving
I am courteous
I am considerate
I am cordial
I am good hearted
I am hospitable
I am merciful
I am polite
I am tender
I am sociable
I am kind
I am respectable
I am devoted
I am generous
I am giving
I am thoughtful
I am sympathetic
I am tolerant
I am understanding
I am congenial
However, I don't have a car

Searching for a new girlfriend that IS **Revised 3-1-12**
as loving as---------- WAS

Name	Age	1st Date	2nd Date	3rd Date	4th Date	5Th Date
J	52	Turned me down for a date			Said no you don't have a car	
K	64	Turned me down for a date			Said no you don't have a car	
D	53	Movies	Dinner	Dinner at my house	Double Dating	

Afectionate and Caring, but I can't communicate with her Spanish and my English

G	36	Dinner	Very loving, but I didn't know she was that young!			

Greencard--she is separated and husband says she will be deported if divorsed
She was looking for an American to marry her so she could divorce her husband and stay here

L	68	Dinner				

She looks more like 80 and likes to drink

R	63	Dinner and walk Atlantic Ave.		Dinner and walk green cave		

Loving, but she does not want to be with one person And she is rich and likes to gamble

K	57	Dinner and drinks	at irish Bar			

Very Loving and Very Caring, but she is married and smokes and can drink me under the table

K	50	Theater	Dinner	Dinner and show	Cocktail Party	

She is my ex boss--Just Friends, but I feel so at ease with her and enjoy being with her

L	48	Dinner	Stood me up the 2nd time because I asked her co nurse friend out			
S	53	Dinner at my house				

I was going to give up on her but 2 days later a card arrives saying what a good time she had

B	67	Church, Dinner at Lions Club installation, long walks on beach with her and her 3 dogs.				

She can be loving. But she is Bi-Polar and has to take a lot of medicine And mod changes can make heer mean
I know I may be sorry, but I feel needed by someone and
She is so loving and caring and she told me that everyday since we met, so thanks GOD
for me coming into her life.

M	58	She is 1st date that has never been divorced and her husband died 4 years ago				

I scared her when I asked her to come home to see my condo after dinner!
She also likes her Vodka--I don't think I will be seeing her again

My friends told me to stop comparing the girls to D
The girls I will keep for a date when I need one are:
D. R. S. and B

Mr. Chandler,

I will get back to you in 2 or 3 weeks. If you don't hear from me in 3 weeks, please call me again

Dennis DeMartin

From: Christine Chandler <cchandler@friesenpress.com>
To: dend3114@yahoo.com
Sent: Monday, March 19, 2012 6:04 PM
Subject: Thank you for contacting FriesenPress

Dear Dennis DeMartin,

Allow me to briefly introduce myself. My name is Christine Chandler and I am a Publishing Consultant. As I mentioned in my voice mail, I would appreciate the opportunity to talk with you in the near future about your book project. Is there a date and time that is good for you?

FriesenPress is a subsidiary of Friesens Corporation, an employee-owned printing company that has been in business for over 100 years. Books such as Harry Potter and the Oxford Dictionary have been on the printing presses at Friesens. We have built a tradition of integrity and trust in the publishing industry throughout the decades and hope to collaborate with you on your book project.

Please take a look at our Author's Guide, which will answer many of your questions. I am also available to answer any questions that you may have. My contact details are below. I look forward to hearing back from you!

Thank you for contacting FriesenPress. Please click on the following link:

http://friesenpress.com/downloads/documents/fp-authors-guide.pdf

to download more information about our publishing packages.

Best regards,

Christine Chandler
Publishing Consultant

FriesenPress
Tel: 1-888-378-6793 ext. 116
Fax: 1-888-376-7026
Email: cchandler@friesenpress.com
Web: www.friesenpress.com
Suite 300 - 852 Fort Street
Victoria, BC, V8W 1H8

Follow us on:
http://blog.friesenpress.com/

Mr. Farlow,

I will get back to you in 2 or 3 weeks. Please call me again in 3 weeks. Please call me again in 3 weeks if I have not contacted you.

Dennis DeMartin

From: Will Farlow <jfarlow@createspace.com>
To: "dend3114@yahoo.com" <dend3114@yahoo.com>
Sent: Monday, March 19, 2012 4:39 PM
Subject: Publishing with CreateSpace, a part of the Amazon.com Group of Companies

Hello Dennis,

Thank you for expressing interest in independent publishing with CreateSpace.

We partner with authors to help them create the books they envision. As one of the premier independent publishing companies in the industry, and the largest online retailers of books in the world, we offer high royalties and on-demand printing in-house.

Below I have included some introductory questions which help me to better assess your publishing needs. I kindly ask that you take a moment to answer them, as your responses help me to determine which publishing program is right for you.

1. Is your manuscript complete? If not, about how far along are you in the writing process?

2. What is the name of the software you used to type your manuscript into your computer (i.e. Microsoft Word, In Design, etc.)?

3. Will your book include photos, images, or graphs? If so, how many total?

4. Do you plan for your book's interior to be black and white or full-color?

5. Are you interested in having a professional editor review your work? If so, what is the word count of the manuscript?

6. What, if any, ideas do you have for your cover?

7. What kind of budget have you set aside to invest in the publishing of your book?
a) $499-$1,000
b) $1,000-$2,000
c) $2,000-$3,000
d) $3,000+

8. Are you 18 years old or older?

9. What is a good time for us to reach you for a phone consultation to discuss your project (please note [illegible] time, Monday-Friday)?

EXHIBT 4

Polo Tycoon's Story Wasn't Credible, Juror in DUI Manslaughter Case Says

Polo Tycoon Found Guilty of DUI Manslaughter

By YUNJI DeNIES and CHRISTINA NG (@ChristinaNg27)
March 24, 2012

A juror who helped convict Florida polo tycoon John Goodman of DUI manslaughter and vehicular homicide said the defendant's testimony, including the argument that he got drunk only after a fatal February 2010 crash, simply wasn't credible.

In fact, Dennis DeMartin, juror number five, told ABC News, Goodman's testimony was "pitiful."

"I really felt sorry for him," said DeMartin, a retired accountant who plans to write a book about the experience. "I didn't think they should have put him on up there. I think that was a mistake."

Goodman, 48, and his defense said he wasn't drunk at the time of the accident in Wellington, Fla., but that his $200,000 Bentley malfunctioned, slamming into Scott Wilson's Hyundai with fatal results, that he hit his head and didn't realize Wilson's car was sinking in the canal nearby.

Goodman's defense told jurors he wandered away, dazed and with a broken wrist, fractured chest and back injuries, and stumbled upon a barn with a second-floor office that was described during the trial as a "man cave," where he tried to call for help and found some alcohol.

"I grabbed a bottle of liquor, thinking it would help with my pain," Goodman testified.

Goodman's blood alcohol level was more than twice the legal limit when police tested him hours after the crash.

ABC News

John Goodman, left, adopted his longtime... View Full Size

Polo Tycoon John Goodman Found Guilty Watch Video

Polo Tycoon DUI Trial: John Goodman Testifies Watch Video

Polo Tycoon Testifies at His Murder Trial Watch Video

"They proved that he had a .177 alcohol in his system plus some drug, but it was prescribed by a doctor," DeMartin said. "So that was the proof he had been drinking."

DeMartin said jurors believed the story about drinking in the "man cave" was "unsubstantiated," and felt, "He must have been drunk [before the crash] because he went through a stop sign."

DeMartin believed Goodman must have run a stop sign near the crash site for the accident to have caused the damage it did.

"You can't start up and just take off and hit the car over there at 60 mph or 30 mph," DeMartin said. "He had to go right through [the stop sign] is what I thought."

Goodman could be given 30 years in prison when sentenced on April 30.

The judge Friday denied defense attorney Roy Black's request for Goodman to be released on bail and Goodman was taken into custody.

DeMartin said jurors had little trouble agreeing on the verdict although they did go back and review the 911 tapes.

"I wanted to be sure that Mr. Goodman admitted that he had a few drinks," DeMartin said. "And I wanted to be sure, because he said, at first, he stopped at the stop sign, looked and then went."

Goodman, the multi-millionaire founder of the International Polo Club Palm Beach, denied being drunk at the time of the crash that killed Wilson, although other testimony contradicted him.

"I think that justice was served. I think [jurors] were very careful," prosecutor Ellen Roberts said at a news conference Friday. "They went over a lot of evidence and I think they probably returned the only verdict they could."

Roberts said she would not know what sentence she planned to recommend to the judge until she spoke with the Wilson family.

Defense attorney Black issued a statement saying that Goodman will appeal the conviction.

"It is our belief that multiple errors were committed during and before the trial that, in effect, denied our client's ability to get a fair trial," Black said. "We intend to file an appeal so that our client can receive the just and fair proceeding to which he is entitled by law."

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DeMartin was juror number six. He is a retiree doing part time work now at a funeral home. DeMartin said he and the other jurors wanted to focus on the facts.

Just hours before delivering their guilty verdicts, they listened for a second time to the 911 tapes from the night of the crash that claimed Scott Wilson's life. Goodman's actions after the crash played an important part in their deliberations.

"He called his employees first, then he called his girlfriend. And then the girl in the trailer finally talked him into calling 911. I thought (it was) there he evaded his responsibility," said DeMartin.

Goodman's lawyers said he became intoxicated only after the fatal accident. DeMartin said the jury was never convinced of that. It was a pivotal moment in the case.

"We knew he had been drinking, but there was no proof he did it after at this man cave because nobody could substantiate he was there," said DeMartin.

DeMartin said jurors concluded Goodman drank before getting behind the wheel of his Bentley that fateful night of February 12, 2010. It was a decision DeMartin and his fellow jurors said makes Goodman responsible for a Wilson's death and their verdict could put Goodman in prison for decades.

"So glad I don't have to worry about that. That's the judge's doing, he's got to worry about that," said DeMartin.

The juror said he was honored to serve as a juror and now relieved that the pressure of a long trial is behind him.

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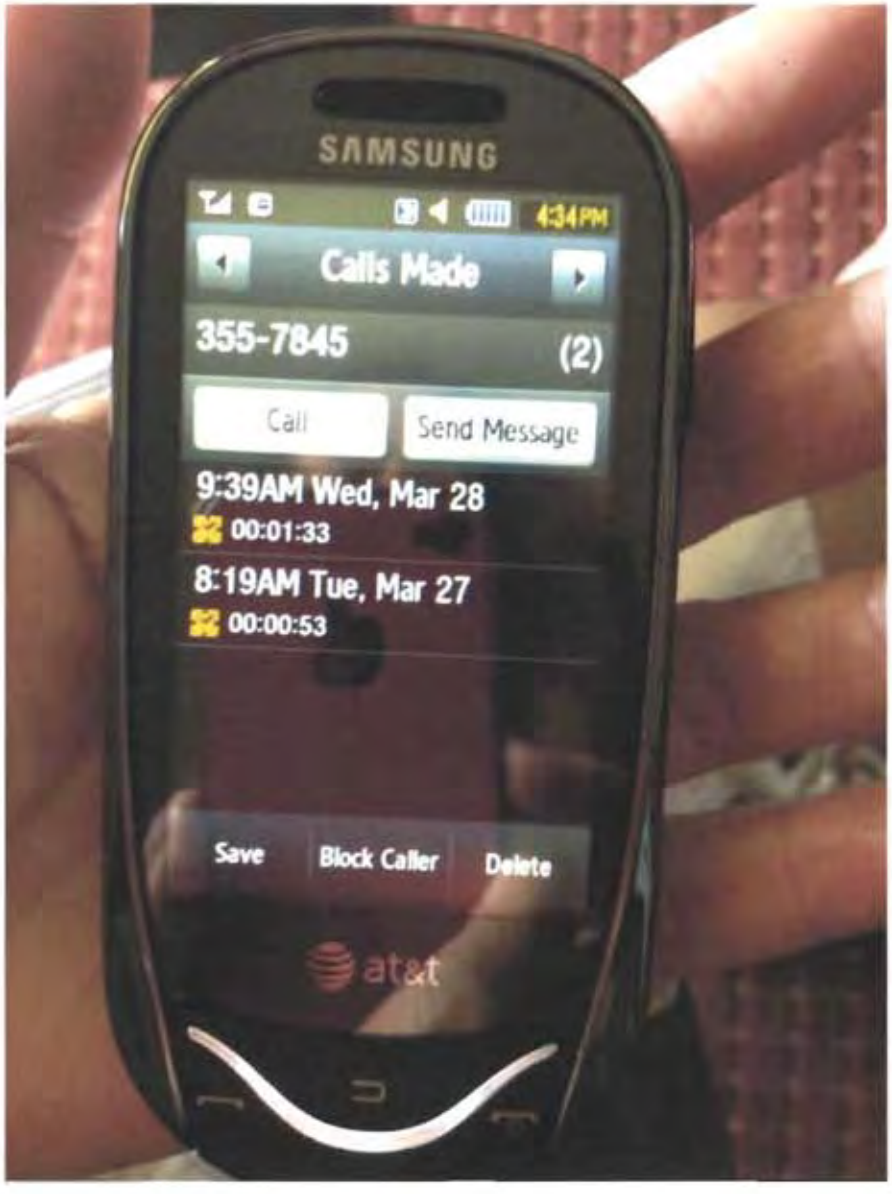
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

STATE OF FLORIDA,

CRIMINAL DIVISION "W"
CASE NO. 502010CF005829AXXXMB

v.

JOHN B. GOODMAN,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND/OR TO VACATE HIS CONVICTION BASED ON JURY MISCONDUCT AND GRANTING, IN PART, A LIMITED JURY INTERVIEW

THIS CAUSE came before the Court on the Defendant, John B. Goodman's ("Defendant"), Motion for New Trial and/or to Vacate His Conviction Based on Jury Misconduct and Incorporated Memorandum of Law, filed on April 16, 2012. The State submitted an Objection to Defense Counsel Interviewing Jurors and Request for Juror Interviews Pursuant to F.R.C.P. 3.575 which was received in Chambers on April 17, 2012. After carefully examining and considering the Defendant's Motion, the Memorandum of Law in Support of the Motion, the State's Objection, and the argument of the parties at a hearing, it is hereby

ORDERED AND ADJUDGED as follows:

Defendant presents this Court with a Motion for New Trial and/or to Vacate His Conviction based on an affidavit attached thereto. The affidavit is a memorialized statement of one of the alternate jurors in Defendant's criminal trial, Ms. Ruby Delano. Ms. Delano relays that after she was released from her jury service, she wanted to expose certain things regarding jury conduct that she believed were wrong. In her affidavit, Ms. Delano attests that she attempted to reach the Court, by phone, on two occasions, once on March 27, 2012 and once on March 28, 2012. (Mot. 10.) Ms. Delano states that on April 4, 2012, when her calls to the Court

were not returned, she contacted Defendant's counsel and left a message indicating that she wished to speak with them. Ultimately, Ms. Delano met with defense counsel and executed the above-mentioned affidavit.

As a preliminary issue, this Court notes that although Defendant's Motion is styled as a Motion for New Trial and/or to Vacate his Conviction, the relief Defendant seeks, as he states in his Conclusion, is for the Court to "convene a hearing to interview the jurors under Rule 3.575 and, thereafter, order a new trial." In this respect, Defendant's Motion for New Trial is time-barred.[1] However, Fla. R. Crim. P. 3.575 permits a party to move the Court for an Order permitting interview of a juror or jurors within ten days after the rendition of the verdict, *unless good cause is shown for the failure to make motion within that time.*[2]

The verdict in this case was rendered on March 23, 2012. As Defendant states in his Motion, Defendant was unaware of the issue that comprises the basis for this Motion until April 4, 2012, outside the ten-day period contemplated by the rule and two days after Defendant had already submitted his first Motion for New Trial. Additionally, Defendant's lack of awareness of this issue was not a failure of due diligence on Defendant's part. This Court finds, therefore, good cause shown for Defendant's failure to Move for a Court Order to permit interviews of jurors within the ten day time period. This Court now considers Defendant's Motion pursuant to Rule

[1] *See* Fla. R. Crim. P. 3.590 ("A motion for new trial or in arrest of judgment, or both, in cases in which the state does not seek the death penalty, may be made within 10 days after the rendition of the verdict or the finding of the court.") This Court notes that Defendant previously filed a Motion for New Trial on April 2, 2012 which this Court denied on April 13, 2012.

[2] "A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview."

Fla. R. Crim. P. 3.575

3.575 as well as Defendant's Notice of Intent to Interview Jurors pursuant to R. Regulating Fla. Bar. 4-3.5(d)(4).

Turning to each of the allegations alleged in Ms. Delano's affidavit, the Court shall consider each individually in order to determine whether such allegations warrant interviews of the jurors. Ms. Delano attested to the following:

1. that although the jurors were told not to discuss the case between themselves until the end of the trial, the jury often discussed witness testimony and other evidence throughout the trial;

2. that specific issues were discussed openly prior to deliberations:

   --there were discussions about how anyone could have an accident and then go and drink;

   --there were discussions about why Mr. Goodman did not first call 911;

   --there were discussions about why Mr. Goodman did not stop at the stop sign;

   --there were also questions and comments about who took the videotape of the drive from the Player's Club and how Mr. Goodman could have passed his own driveway on 120th Avenue;

3. Ms. Delano states that "we all had things to say about the trial as it progressed each day," and on one occasion when Ms. Delano reminded the jury that they had been instructed by the Court not to discuss the case until the end, she was teased by being asked by another juror if she had a crush on the Defendant;

4. that on many occasions jurors would "make mention of" Defendant's wealth. Ms. Delano explained these comments as mention of the fact that Defendant had enough money to hire good lawyers. She further states that she cannot remember specifics about any other comments about wealth, simply that Defendant's money was mentioned. She also says that most of the conversations about money were in the context of the Defendant probably being guilty but getting away with it because he had a lot of money, clarifying that no one specifically used the word "guilty;"

5. Ms. Delano says that some of the jurors said they had to finish the case by Friday, March 23, because they did not want to return the following Monday and that they weren't going to "go into the next week." She says one juror mentioned a trip he had planned and stated that he had to be finished by Friday. Ms. Delano says that based on negative talk about Defendant's wealth and issues discussed about the case, it was "clear to me these jurors had already made up their minds before Thursday, March 22nd;"

6. Ms. Delano says that one of the other jurors, Mr. DeMartin, told the other jurors that he was asked by the Court about waiving his hand during the testimony of the State's Bentley expert and that he told the Court he was waiving his hand because he had found a button he had lost the day before. She then goes on to state, "Mr. DeMartin told juror number 5 what he told the judge prior to her coming in and reporting the same thing after the break." She goes on to say that Mr. DeMartin's statement to the Court about the button was untrue because he had already shown Ms. Delano the recovered button prior to the waving gesture. She says the waving gesture had nothing to do with the button and that she believes that Mr. DeMartin was instead expressing his disdain for the Defendant and the defense team;

7. Ms. Delano also states that Mr. DeMartin told the other jurors that he was writing a book about the trial and that he would frequently tell the other jurors that he wrote down what happened in Court each day;

8. Ms. Delano states that the jurors had an understanding that whatever they discussed in the jury room during the trial would remain between them and that although she believed pre-deliberation discussions were wrong, and she believed Mr. DeMartin had lied to the Court, she did not immediately come forward because the other jurors told her she was an alternate and she did not believe she had the same right to bring these issues to the Court's attention as an alternate juror.

As recently as 2011, the Florida Supreme Court, in denying a motion for post-conviction relief, expressed the following statement with regard to instances in which juror interviews are appropriate:

> "[w]e also note that 'juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would *require the court to order a new trial* because the alleged error was *so fundamental and prejudicial as to vitiate the entire proceedings*,' *Green v. State*, 975 So. 2d 1090, 1108 (Fla. 2008) (quoting *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001))."

Crain v. State, 78 So. 3d 1025, 1045 (Fla. 2011) (emphasis added). Previously, in 2007, in another Florida Supreme Court case denying a motion for post-conviction relief, the Court stated the standard in a similar fashion when discussing Rule 3.575:

> "the rule provides a mechanism for defendants to interview jurors when there are good faith grounds for a challenge. Before an attorney will be allowed to interview any member of the jury, the moving party must make sworn allegations that, if true, would require a new trial. *Johnson*, 804 So. 2d at 1225."

Kormondy v. State, 983 So. 2d 418, 440 (Fla. 2007). Further, in 2002,[3] ruling on another post-conviction motion, the Court found that juror interviews were not permissible where the defendant had not "sufficiently alleged any fact which involves an overt prejudicial act that would necessitate a new trial." *Reaves v. State*, 826 So. 2d 932, 943-944 (Fla. 2002).

Pursuant to the Florida Supreme Court in these cases then, before this Court can permit juror interviews, the Court must establish that the sworn information presented in Ms. Delano's affidavit alleges fundamental and prejudicial error or, facts which involve overtly prejudicial acts such that they vitiate the entire proceedings and necessitate a new trial. This Court therefore, assumes that Ms. Delano's allegations are true, and explores whether any of these allegations contain such an overt prejudicial act and necessitate a new trial.

Issue One: Jury Often Discussed Witness Testimony and Other Evidence Throughout the Trial

Defendant argues that pre-deliberation discussions of witness testimony and other evidence took place during the trial, pursuant to Ms. Delano's affidavit. This pre-deliberation issue, as stated *supra*, includes discussions about how anyone could have an accident and then go and drink, discussions about why Defendant did not first call 911, why Defendant did not stop at the stop sign, who took the videotape of the drive from the Player's Club and finally, how Defendant could have passed his own driveway on 120th Avenue on the night of the crash.

This Court repeatedly instructed members of the jury not to discuss this case prior to their deliberations. "It is axiomatic that jurors should not discuss a case among themselves prior to deliberations." *Johnson v. State*, 696 So. 2d 317, 323 (Fla. 1997). The *Johnson* court went on to say that "[t]he fact that discussions did, in fact, take place clearly indicates an impropriety." *Johnson*, 696 So. 2d at 323. *Johnson* was decided in 1997, approximately seven years before

[3] Florida Rule of Criminal Procedure 3.575 was promulgated in 2004. *Amendments to the Florida Rules of Criminal Procedure*, 886 So. 2d 197 (Fla.2004).

Rule 3.575 was implemented. Therefore, while *Johnson* does not specifically invoke Rule 3.575, it provides a framework for this Court to determine what type of improper conduct rose to a level of prejudice that, in that case, would or would not have warranted reversal on direct appeal.

One area of pre-deliberation in *Johnson* was juror discussion of the nature of testimony from doctors in the case. *Id.* at 324. Jurors indicated that they discussed the traumatic nature of the wounds suffered by the victim and the explanation given by the doctors of those wounds. *Id.* One juror explained that he found the doctor's testimony to be impressive. *Id.* In the case at bar, all of the pre-deliberation discussion that is mentioned by Ms. Delano, is likewise discussion of the nature of the presented testimony—Defendant's explanation as to why he drank alcohol after the crash, the Defendant's explanation as to why his first call was not to 911, the reason why Defendant did not stop at the stop sign, and the reason why Defendant passed his own driveway on the night of the crash. This Court recognizes, as did the *Johnson* court, that jurors saw the witnesses testify and reacted to the testimony. *Id.* There were no claims in *Johnson*, nor are there any here, that extrinsic information was imparted to the jury. *Id.* The Florida Supreme Court determined that:

> "[i]t is simply unrealistic to imagine that this limited conversation between [two jurors] indicates that either had formed a premature opinion about the case. While we must recognize that the jurors' conduct in this case was improper, we must stop short of finding all human errors to be prejudicial to the defendant."

Id. Additionally, juror discussion of who took the videotape of the drive from the Player's Club is almost precisely the type of conduct discussed in *Johnson* when one juror asked another to clarify multiple witness nicknames:

> "[The juror] was not even commenting or asking for comment on evidence. She was simply asking for the information provided by [a police officer's] clarification. While still improper, it is incredible to assert that such a question could influence the outcome of the trial . . . . The appropriate nickname for [the defendant], from among the many heard by the jury, was not contested and did

not directly affect any decision the jury was faced with."

Id. at 323-24. Likewise the identity of the person who videotaped the drive from the Player's Club was not a comment on evidence nor did it directly affect any decision with which the jury was faced.

Ms. Delano gives no indication that the jury made any predeterminations as to Defendant's guilt in discussing these issues. Instead, most of these issues involve off-hand comments of jurors or questions about interpreting evidence. In *Estate of Stuckey v. Brown*, 688 So. 2d 438, 440 (Fla. 1st DCA 1997), the District Court of Appeal noted that:

> "[t]he court stated during the hearing on the motion for new trial that the testimony of the jurors did not raise the court's concern that there were any substantial violations of the court's instructions. The only misconduct found by the trial court concerned predeliberation discussion of the case; however, the evidence does not demonstrate extensive discussion or that the jury actually had begun to deliberate. There is no evidence that the few off-hand comments which were made materially affected the verdict."

Likewise in the case at bar, these comments by jurors are not pre-deliberation discussions of Defendant's guilt or innocence. Nor are they allegations that, if true, would warrant a new trial. *Kormondy*, 938 So. 2d at 440. None of these comments by jurors are overt prejudicial acts that vitiate the entire proceedings. This Court does not find that any of these comments warrant further juror inquiry.

Issue Two: *Ms. Delano's Statement That "we all had things to say about the trial as it progressed each day" and Being Teased*

For the same reasons as explained in *Issue One*, Ms. Delano's statement that jurors had "things to say about the trial" does not make out a prima facie allegation of juror misconduct. Further, jurors teasing Ms. Delano about possibly having a crush on Defendant, while certainly offensive, is not an overt prejudicial act.

Issue Three: *Ms. Delano's Statement that Jurors Discussed Defendant's Wealth*

Ms. Delano explains that on many occasions, jurors would "make mention of" Defendant's wealth. Ms. Delano explained these comments as mention of the fact that Defendant had enough money to hire good lawyers. Ms. Delano further states that she cannot remember specifics about any other comments about wealth, simply that Defendant's money was mentioned. She also says that most of the conversations about money were in the context of the Defendant probably being guilty but getting away with it because he had a lot of money, and then she clarifies that no one specifically used the word "guilty."

In *Ramirez v. State*, 922 So. 2d 386, 387-88 (Fla. 1st DCA 2006), allegations arose of premature deliberations. One alternate juror informed a bailiff that "the jury was split as to the defendant's guilt until after they heard his testimony." *Ramirez*, 922 So. 2d at 388. Defendant's request to interview jurors was denied by the trial court. The First District Court of Appeal, in reversing the trial court, determined that a prima facie showing of juror misconduct *had* been alleged, and ordered the trial court to conduct juror interviews. *Id.* at 390.

Ms. Delano is clear that no one used the word guilty in their conversations. And she does not allege that jurors took a preliminary poll of their opinions or that any juror or jurors articulated an agreement to disregard their oaths and ignore the law. In *Reaves v. State*, 826 So. 2d 932, 943-44 (Fla. 2002), an allegation arose that one juror attempted to discuss guilt prematurely. The Florida Supreme Court, agreeing with the trial court that juror interviews were properly denied, explained the following:

> [t]his contention does not involve any agreement among the other jurors to disregard their oaths and ignore the law, nor does it imply that the jury was influenced by external sources or improper material. Reaves' assertion, which involves a lone juror's understanding of the jury instructions, is a matter which essentially inheres in the verdict itself; hence, juror interviews are not permissible.

Reaves, 826 So. 2d at 943.

It is unclear to this Court, however, to what extent, if any, members of the jury may have considered Defendant's guilt or innocence in their discussions. Following the rationale of *Williams v. State*, 739 So. 2d 1104, 1106-07 (Fla. 1st DCA 2001) (interviews warranted when affidavits alleged that jurors expressed an opinion as to guilt before the close of the evidence) and *Gray v. State*, 72 So. 3d 336, 338 (Fla. 4th DCA 2011) (interviews warranted when allegations that multiple jurors improperly discussed the case during trial and were expressing opinions as to the defendant's guilt before the close of the evidence), this Court will conduct limited jury interviews on this issue. After jury interviews, the initial burden will be on the defense to either show that prejudice resulted or that the premature deliberations or conversations were of such character as to raise a presumption of prejudice. *Ramirez v. State*, 922 So. 2d 386, 390 (Fla. 1st DCA 2006).

Issue Four: *Ms. Delano's Comments as to Jurors Wanting to Finish the Trial*

Ms. Delano states that some of jurors commented that they had to finish the case by Friday, March 23, 2012, because they did not want to return the following Monday and that they weren't planning on going "into the next week." She says one juror mentioned a trip he had planned and stated that he had to be finished by Friday. Ms. Delano asserts, presumably based on these comments, as well as negative talk about Defendant's wealth and issues discussed about the case, it was "clear to me these jurors had already made up their minds before Thursday, March 22nd."

Ms. Delano does not say that any juror told her they had already made up their mind about Defendant's guilt. She does not say she overheard anyone make a claim about Defendant's guilt, she simply *assumes* that the jurors had already made up their minds. Clearly, Ms. Delano was not in the jury room when the jurors conducted their deliberations and cannot

portend to know what the jurors discussed and how they reached their verdict.

It would absolutely be error for this Court to now allow interviews of Ms. Delano or any member of the jury wherein jurors would be questioned as to how they reached their verdict on the day they did indeed reach it. Defendant argues that because deliberations were completed in only a few hours, the Court should interpret this to mean the jurors had predetermined Defendant's guilt, purposefully overlooking the opposite conclusion that can be drawn—that the jurors simply did not find Defendant's account of the events to be credible. The Court is not permitted to interrogate the jurors as to how they arrived at their verdict. *Short v. Abukhdeir*, 738 So. 2d 408, 410 (Fla. 2d DCA 1999). Indeed, the Court declines the invitation to do so.

It should come as no surprise to Defendant, nor to the public generally, that jurors often look wistfully to the day when their service ends and they can return to their jobs, families and day-to-day lives. If the Court began admonishing jurors who expressed their antipathy toward returning for a second, third or fourth week of trial, it would have time for little else. Jurors expressing their desire to finish a trial by a certain day or, that they do not want to return the following week, is not a discussion of evidence, guilt, testimony, or the substance of the trial itself. *See Johnson v. State*, 696 So. 2d 317 (Fla. 1997).

Issue Five: *Ms. Delano's Belief that Mr. DeMartin Lied to Obscure His Disdainful Gesture Toward the Defense Team's Witness Examination*

Ms. Delano explains that one of the other jurors, Mr. DeMartin, told the jury panel that he was asked by the Court about waiving his hand during the testimony of the State's expert and that he told the Court he was waiving his hand because he had found a button he lost the day before. Ms. Delano goes on to say that Mr. DeMartin's statement to the Court about the button must have been untrue because he had already shown Ms. Delano the recovered button prior to the waving gesture. She says his waving gesture had nothing to do with the button and that she

believes Mr. DeMartin was instead expressing his disdain for the Defendant and the defense team.

Ms. Delano assumes that Mr. DeMartin was making a disdainful gesture. She offers no allegations that he said anything to this effect, to either herself or any other juror. She makes absolutely no allegation that Mr. DeMartin ever made any negative or pejorative comment about defense counsel. Further, even if Mr. DeMartin's waving gesture was a disdainful indication as to the defense team, such a gesture is not the type of overtly prejudicial act that would warrant a new trial. There is no reason to believe that Mr. DeMartin's hand gesture would subject the verdict in this case to challenge. *See Israel v. State*, 985 So. 2d 510, 522 (Fla. 2008). Allowing attorneys to begin questioning jurors as to physical gestures they make throughout the trial and what they intend to communicate by those gestures is unworkable, unwarranted and would create an unnecessarily antagonistic atmosphere toward citizens who are unfamiliar with a courtroom environment and whose only failing is in their attempt to perform their civic duty. It is inappropriate for this Court to question jurors as to the veracity of this incident because the gesture, if it was a showing of disdain, does not subject the verdict in this case to challenge.

Issue Six: *Ms. Delano's Statement that Mr. DeMartin Was Writing a Book about the Trial*

Defendant also refers to Ms. Delano's statement that Mr. DeMartin told the other jurors that he was writing a book about the trial and would share with the other jurors that he was writing down what had happened in Court each day.[4] Defendant presents no authority for the proposition that this allegation, taken as true, is in any way grounds to interview Mr. DeMartin, or any of the other jurors, to further inquire as to this matter. Defendant seems to concede that Mr. DeMartin's literary exploits, in and of themselves, are not improper. Likewise, the Court

[4] Clearly, Defendant is aware that jurors are provided notebooks and writing implements to take notes throughout the trial should they chose to do so.

mentioned to jurors that at the close of trial that jurors were free to discuss the trial as they saw fit, speak to media, or, if for some reason they should be so inclined, write a book about the trial.

Instead, Defendant argues that jurors who intend to memorialize their experiences for profit might a) be less candid during voir dire in an attempt to maximize their chances of being seated; b) consciously or subconsciously distort testimony not for its weight in determining defendant's guilt but for its dramatic value; c) consciously or subconsciously attempt to manipulate deliberations and the verdict to ensure an outcome conducive to the salability of the story;[5] d) taint other members of the jury pool by inhibiting their open and candid deliberations. Defendant bases these conclusions on what Ms. Delano relayed to Defendant's counsel about Mr. DeMartin informing the jurors that he wanted to write or had begun to write a book about the trial. Indeed, Defendant states:

> "[i]t now appears that Mr. DeMartin's conduct was not motivated by his civic duty but to secure the outcome he desired for his book—a vision he apparently shared with other jurors during trial itself. *In Mr. DeMartin's view*, a vote for acquittal would have meant a vote for the 'unpopular view' that Mr. Goodman might escape or buy his way out of trouble. Of course, no juror would have wanted such a view exposed in Mr. DeMartin's book. Accordingly, even if Mr. DeMartin never wins a publisher for his book, his conflict of interest distorted the truth seeking process."

(Mot. 31.) (emphasis added). This Court finds Defendant's conclusions as to the inner thought process and personal motivations of a juror imprudent and inappropriately speculative. Defendant concludes his argument by stating that Mr. DeMartin's alleged conflict of interest is an independent basis for granting a new trial.

Juror interviews are not permitted based upon allegations that one juror influenced another juror. *Laflipe v. State*, 888 So. 2d 104, 106 (Fla. 3d DCA 2004). Defendant cites to no

[5] Defendant argues that he believes the evidence suggests Mr. DeMartin engaged in "similarly cynical reasoning in this case." (Mot. 30.)

controlling caselaw on this subject nor does he offer any support for his belief about Mr. DeMartin's purported frame of mind other than mere speculation of bias. This Court declines to allow the Defendant to invade the province of the jury based on this speculation. The Florida Supreme Court is clear:

> "Florida's Evidence Code, like that of many other jurisdictions, absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of jurors. § 90.607(2)(b), Fla.Stat.Ann. (1987) (Law Revision Council Note-1976). Jurors may not even testify that they misunderstood the applicable law. *Id.*; *Songer v. State*, 463 So. 2d 229, 231 (Fla.), *cert. denied*, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985). *This rule rests on a fundamental policy that litigation will be extended needlessly if the motives of jurors are subject to challenge. Branch v. State*, 212 So. 2d 29, 32 (Fla. 2d DCA 1968). The rule also rests on a policy 'of preventing litigants or the public from invading the privacy of the jury room.' *Velsor v. Allstate Ins. Co.*, 329 So. 2d 391, 393 (Fla. 2d DCA), *cert. dismissed*, 336 So. 2d 1179 (Fla. 1976).

Baptist Hosp. of Miami, Inc. v. Maler, 579 So. 2d 97, 99 (Fla. 1991). The *Baptist* case further distinguishes between overt prejudicial acts and the subjective impressions or opinions of jurors, finding the latter to be outside the scope of permissible post-verdict inquiry:

> "[i]n the present case, Baptist Hospital alleges that the affidavits disclose a possibility of juror misconduct consisting of (a) an agreement by jurors to return a verdict out of sympathy for the brain-damaged child no matter what the evidence showed, and (b) the improper reliance on nonrecord evidence that Baptist Hospital had insurance covering the present liability.
>
> The affidavits, quoted in pertinent part above, do not support these conclusory statements. The factual matters in the affidavits allege nothing more than the *purported opinions of two jurors about the reason the verdict was reached*, not statements by jurors that any type of agreement was reached to disregard their oaths and ignore the law. Both sympathy for a child and the reasons why jurors reached a particular verdict clearly are subjective impressions or opinions that are not subject to judicial inquiry."

Baptist, 579 So. 2d at 99-100. (emphasis added.)

In the case at bar, this Court is not presented with the purported opinion of any jurors as to why the verdict was reached. We are presented with the purported opinion of the *Defendant*

as to why the verdict was reached—Mr. DeMartin's alleged conflict of interest. Such speculation is not a colorable demonstration of prejudice such that this Court must permit jury interviews.

Issue Seven: Ms. Delano's Belief That She Was an Alternate Juror During the Trial

Ms. Delano states in her affidavit that she was told by other jurors that she was an alternate juror. Defendant extrapolates from this statement that the jury panel was "reading about the case in *The Palm Beach Post* and/or other media outlets." (Mot. 24.) The reason for Defendant's belief stems from the fact that the jurors were not told, prior to the alternates being dismissed, which jurors were the alternate jurors and which jurors would actually deliberate. Defendant argues that the only way jurors could have known this information was due to the media's coverage of the fact after it was disclosed in open court (outside the jury's presence). In support of Defendant's argument, he cites to *Marshall v. State*, 854 So. 2d 1235, 1241-42 (Fla. 2003) wherein a juror indicated to an attorney that:

> "despite the trial judge's orders, [jurors] read and discussed outside articles concerning the trial. In *Sentinel Communications Co. v. Watson*, 615 So. 2d 768 (Fla. 5th DCA 1993), the court recognized that an allegation that jurors read newspapers contrary to court orders did not inhere in the verdict. *See id.* at 772. Indeed, this Court has stated that any receipt by jurors of prejudicial nonrecord information constitutes an overt act subject to judicial inquiry. *See Baptist Hospital*, 579 So. 2d at 100-01."

This Court finds Defendant's authority distinguishable. In *Marshall*, the Court discussed an *allegation from a juror herself* stating that jurors had read and discussed media during the trial. The Florida Supreme Court recognized an allegation in *Marshall*, by a juror, that the panel had received prejudicial, nonrecord information. There is no such allegation by Ms. Delano in this case. Ms. Delano simply states that other jurors told her she was an alternate. She does not give any accounts of jurors relaying stories from print, television, or any other media outlet.

Defendant's claim amounts to speculation, at best. Permitting interviews of one or all of the jurors to inquire as to whether they had been exposed to media throughout the trial when they had repeatedly been asked this question during the trial, and instructed not to do so throughout the trial, is improper:

> [e]ven though juror misconduct may be a proper basis for a juror interview, there is a strong public policy against jury interviews. The policy is essential to the jury system and to protect jurors from undue harassment. We held in *Cummings v. Sine*, 404 So. 2d 147 (Fla. 2d DCA 1981), that courts have traditionally been reluctant to allow jurors to be questioned concerning jury verdicts. An interview of jurors is proper only in those limited situations involving matters extrinsic to the verdict, such as arrival at the verdict by lot or quotient, improper contact with a juror, or misconduct of a juror. *See also Phares v. Froehlich*, 582 So. 2d 683 (Fla. 2d DCA 1991); *Velsor v. Allstate Insurance Co.*, 329 So. 2d 391 (Fla. 2d DCA 1976), *cert. dismissed*, 336 So. 2d 1179 (Fla. 1976). Furthermore, interviews which inquire into the individual thought processes, calculations, motives, or influences of a juror are prohibited. *This is true even where there is some evidence on the face of the verdict that the jury failed to follow the court's instructions. See Velsor*, 329 So. 2d at 392.

Nationwide Mut. Fire Ins. Co. v. Tucker, 608 So. 2d 85, 87 (Fla. 2d DCA 1992) (emphasis added). Accordingly, Defendant's Motion for New Trial and/or to Vacate His Conviction Based on Jury Misconduct and Incorporated Memorandum of Law is hereby **DENIED IN PART AND GRANTED IN PART**. Pursuant to Fla. R. Crim. P. 3.575, this Court finds that the verdict in this case may be subject to challenge. This Court will conduct jury interviews on the limited issue as it is presented in paragraph 9 of Ms. Delano's affidavit.[6] Prior to interviews being conducted, the State and counsel for the Defendant may provide, for the Court's consideration, written questions to be posed to jurors.

[6] *See Marshall v. State*, 976 So. 2d 1071, 1080 (Fla. 2007).

DONE AND ORDERED, in Chambers at West Palm Beach, Palm Beach County, Florida this 20 day of April 2012.

JEFFREY COLBATH
CIRCUIT JUDGE

Copy provided to:

Roy Black, Esq. & Mark A.J. Shapiro, Esq., Black, Srebnick, Kornspan, & Stumpf, P.A., 201 South Biscayne Boulevard, Suite 1300, Miami, Florida 33131

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J. Dubin, Dubin Consulting

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO.: 2010CF005829AMB

STATE OF FLORIDA,

Plaintiff,

v.

JOHN B. GOODMAN,

Defendant.

_____/

JUDGE JEFFREY COLBATH

DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF ALL COMMUNICATIONS BETWEEN JURORS AND THE COURT

The Defendant, JOHN B. GOODMAN, through undersigned counsel, respectfully moves this Court, pursuant to Rule 3.575 of the Florida Rules of Criminal Procedure and the due process and impartial jury clauses of Article I, Section 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, for full and complete disclosures of all communications the Court and its chambers have had with or received from any juror or alternate juror in this case, including but not limited to:

(1) Telephone calls from (alternate) Juror No. 8;

(2) Telephone calls and written correspondence with Juror No. 6, Dennis DeMartin, including but not limited to copies of all correspondence and book chapters that Mr. DeMartin reports that he sent to the Court; and

(3) Any communications with or from any other jurors since the verdict was rendered in this case.

In support of these requests, the Defendant states the following:

1. During the trial, on March 20, 2012, Juror No. 6, Dennis DeMartin, wrote a letter to the Court in which he stated that he had been writing a book for over a year, but not about the trial. Rather, the only book he revealed in his letter was already at least partially written and entitled "The Trials and Tribulations of a Senior Citizen getting a Date without a Car."[1] In the letter, Mr. DeMartin claimed he was informing the Court about his book plan because he had been in contact with some publishing companies "for my dating book" and had also told the other jurors "that I am writing my book on dating without a car..." *Id.*

> "I told them [friends] that I would continue on my dating book and I would use the dating book as a leader to follow the process of getting it published. ***If*** I was successful, with that book, ***I would consider*** using the process to ***writing about the experience of being a juror***."
>
> Dennis DeMartin, Letter to the Court, March 20, 2012 p. 2 (emphasis added).

2. Mr. DeMartin did *not* reveal – and, therefore, by implication denied – that he was writing a book *about the trial.* Indeed, he said only that "if" he was successful in publishing his "dating book" he "would consider using the process to writing about the experience of being a juror." *Id.* In truth and in fact, Mr. DeMartin had already decided to write a book about the trial, had been taking daily notes during the trial for that purpose, had been inputting them into his home computer each night and had informed the other jurors about his plans.

3. On March 23, 2012, the jury returned its verdict against Mr. Goodman. As discussed in Mr. Goodman's Motion For New Trial And/Or to Vacate His Conviction, that same day, Mr.

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[1] A copy of the March 20, 2012, letter was attached as Exhibit 3 of Mr. Goodman's April 16, 2012, Motion For New Trial.

DeMartin gave live interviews to numerous television stations and news outlets. However, only portions of these interviews were broadcast, none of which included anything about Mr. DeMartin writing a book about this case.

4. On April 16, 2012, Mr. Goodman filed his Motion For New Trial And/Or to Vacate His Conviction Based On Jury Misconduct. In that motion, counsel recited allegations from one of the alternate jurors, Juror No. 8, concerning numerous forms of jury misconduct, including that Mr. DeMartin had been writing a book about the case during the trial and had informed the other jurors about that fact.

5. As has every other event in this case, Mr. Goodman's motion spawned considerable publicity. In response, Mr. DeMartin gave at least one lengthy televised interview on April 16, 2012. Screen shots of that interview are attached hereto as **Composite Exhibit 1**, and a video version is being submitted along with this motion. Although Mr. DeMartin claimed that he had not "start[ed]" the book during the trial, he admitted that he had been taking daily notes on the trial ***for that purpose*** "and ***I told them [the other jurors] about the notes that I was making every night***." (Emphasis added.) He also admitted that he was "writing ***now*** about his trial experience." *Id.* (emphasis added). Sitting at his computer screen, Mr. DeMartin then showed the cameras some of his notes which reflected some undecipherable comments about "Defendant's Attorneys" on Day 4 of the trial.

6. On April 17, 2012, CBS12.com broadcast a story about the controversy, entitled *Could Juror Misconduct Hand John Goodman a New Trial? See* **Exhibit 2**. In the article accompanying the broadcast, the station indicated that Mr. DeMartin "is writing the book" about the case. The article elaborated as follows, apparently referring back to the interviews Mr. DeMartin gave to the media immediately after the verdict on March 23, 2012: "We spoke with him after the

> "The juror who is writing the book is Dennis DeMartin. We spoke with him ***after the trial.*** He told us ***then he's writing a book about his experience on the jury and showed us his daily notes.***"
>
> Cbs12.com, *Could Juror Misconduct Hand John Goodman a New Trial?*, April 17, 2012.

trial. ***He told us <u>then</u> he's writing a book about his experience on the jury and showed us the daily notes.***" *Id.* (emphasis added). In other words, contrary to Mr. DeMartin's interviews on April 16, 2012, by the end of the trial he had already "started" writing the book on the trial. It is patently obvious from this sequence of events and shifting statements from Mr. DeMartin that he was concerned about Mr. Goodman's accusations that he had acted improperly in writing the book during the trial and was falsely attempting to portray his decision as post-dating the verdict.

7. That same day, April 17, 2012, the Court convened a telephonic hearing in which the Court indicated that it might summon the jurors for interviews. During that hearing, the Court seemed to already have concluded that there was nothing wrong about Mr. DeMartin writing a book about the case. "I mean, lots of jurors write books about their trial experience, so what? That's not grounds to excuse him...."[2] *But see* **Exhibit 3**, The Miami Herald, August 12, 2005, *Our Opinion: Courts, Lawyers Should Weed Out Profit-Minded Jurors* ("The odds of someone with a personal

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[2] A transcript has not yet been ordered of the hearing. However, the Court's comments were captured by the live television feed and broadcast on the evening news. The Court did not cite any sources for its statement that "lots of jurors write books about their trial experience." However, most of the juror-written books counsel have found were written about cases where the defendants were not convicted, such as O.J. Simpson, Michael Jackson and the Menendez brothers. *See, e.g.*, Hazel Thornton, *Hung Jury: The Diary of a Menendez Juror*, Temple University Press (1995); Michael Knox and Mike Walker, *The Private Diary of an O.J. Juror: Behind the Scenes of the Trial of the Century*, Dove Entertainment Inc. (July 1995); Armando Cooley, et al., *Madam Foreman: A Rush To Judgment?*, Newstar Pr. (January 1, 1996). Two books written by jurors in Michael Jackson's case – *see* Eleanor Cook, *Guilty As Sin, Free as a Bird*, and Ray Hultman, *The Deliberator* – apparently were never published. Jurors did write a book about Scott Lee Peterson's murder of his wife, *see* Greg Beratlis, et al., *We, The Jury*, Phoenix Books, Jan. 1, 2007, but it does not appear that Peterson ever challenged their conduct in doing so.

agenda getting on a jury may be slim, but the risk of tainting a jury is real. It's up to defense lawyers, prosecutors and judges to weed out the opportunists through voir dire hearings. The integrity of our justice system depends on impartial juries willing to give both sides a fair hearing and equal consideration.").

8. The hearing drew considerable media attention, which prompted Mr. DeMartin to write the Court the following day. *See* Letter, April 18, 2012, **Exhibit 4**. Counsel learned about the existence of this letter *from the media*, not from the Court. *See* **Exhibit 5,** WPTV.com, April 18, 2012, *Only on 5: Goodman juror accused of misconduct fires back at polo mogul's attorney, alternate juror - Accused Juror files letter with judge, clears air.* Counsel only received a copy from the Court after calling the Court's chambers.

9. Mr. DeMartin's letter began by stating: "***I had sent you the first and last chapters of a book I have been writing*** on how I was chosen for the jury and what had happened since it was over." *Id.* (emphasis added). He also indicated that along with the book chapters he asked the Court for advice about whether he "should wait to try to publish a book on the trial until after sentencing and/or appeal." *Id.* Although he did not provide a precise date for this communication with the Court, he stated that he was going to give an interview with Court TV on April 4, 2012, but "**canceled that April 4, interview when you did not respond.**" *See* **Exhibit 4** (emphasis in original). Accordingly, it appears that Mr. DeMartin corresponded with the Court about the book sometime *before* April 4. Yet, the Court informed no one at the time or even after Mr. Goodman's motion challenging Mr. DeMartin's book writing conduct. Instead, as noted above, the Court defended Mr. DeMartin's conduct on April 17 without even disclosing that Mr. DeMartin had sought the Court's advice about how to proceed.

10. In his April 18th letter, Mr. DeMartin also emphatically denied discussing his daily notes with other jurors: "The contents of these work sheets **WERE NOT DISCUSSED** with any juror." (Emphasis in original.) This assertion is difficult to square with what he told the cameras on April 16 ("I told them about the notes that I was making every night"). We, frankly, are not sure what is worse – (1) telling the jurors that he was taking notes about the trial every night but *not* telling them about the "contents" and thereby leaving them to speculate what he was saying *about them* in the book or (2) sharing the "contents" of his notes with the jurors.

11. On April 20, 2012, the Court denied the motion for new trial and ordered that the jurors be questioned only about their comments about Mr. Goodman's wealth, holding that questions about Mr. DeMartin's book (as well as his mendacity about it) would be off limits.[3] The Court's order acknowledged Juror No. 8's allegation about calling the Court twice in March but did not affirm, deny or elaborate upon that allegation.

12. On April 21, 2012, The Palm Beach Post published a story about the Court's order and its aftermath. *See* **Exhibit 6**, The Palm Beach Post, *'Rogue juror' in John Goodman DUI manslaughter case defends his vote, book writing*. Mr. DeMartin, apparently interviewed yet again for the story, reiterated: "'***I am writing a book now that I won't publish until all the dust is settled***,' DeMartin said." *Id.* (emphasis added). He then added that "***during the trial he worked at night on a book about the trial, a manuscript he has named Believing in the Truth***."

> "I am writing a book now that I won't publish until all the dust is settled...."
>
> Dennis DeMartin, quoted in The Palm Beach Post, *'Rogue juror' in John Goodman DUI manslaughter case defends his vote, book writing*, April 21, 2012.

[3] During its discussion of the book-writing allegations, the Court stated that "Defendant seems to concede that Mr. DeMartin's literary exploits, in and of themselves, are not improper." Order, April 20, 2012, at p. 11. The Defendant has not made and does not make any such concession.

Id. (emphasis added). Mr. DeMartin, however, continued to deny that he discussed this book with the other jurors.

13. Before Mr. Goodman can assess whether to seek additional relief based upon the Court's unreported contacts with the jury, all the facts need to be disclosed. Communications of any kind between jurors and the trial judge during the course of a case, especially a criminal case, are serious matters. Under Rule 3.410 of the Florida Rules of Criminal Procedure, if a juror contacts the Court while the jury is still deliberating, the Court may not respond until it notifies and obtains the views of the prosecutors and defense counsel.[4] In *Ivory v. State*, 351 So.2d 26 (Fla. 1977), the Supreme Court of Florida held that a court's failure to strictly comply with Rule 3.410 constitutes *per se* reversible error, explaining:

> We now hold that it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on the record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

351 So.2d at 28. *See United States v. Scisum*, 32 F.3d 1479, 1481-83 (10th Cir. 1994) (juror's question to marshal about whether she had to be present in the courtroom when the verdict was announced constituted a contact with the court requiring input by defendants and counsel).

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[4] Rule 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

14. The Supreme Court in *Ivory* then went on to hold that "[a]ny communication with the jury outside the presence of the prosecutor, the defendant, and the defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless." *Id.* The Supreme Court has repeatedly reiterated that violations of Rule 3.140 are *per se* reversible. *Johnson v. State*, 53 So.3d 1003, 1008 (Fla. 2011); *State v. Merricks*, 831 So.2d 156, 161 (Fla. 2002) (per curiam); *Mills v. State*, 620 So.2d 1006 (Fla. 1993); *Bradley v. State*, 513 So.l2d 112 (Fla. 1987). *See also O'Keefe v. State*, 47 So.3d 937 (Fla. 4th DCA 2010); *Natan v. State*, 58 So.3d 948 (Fla. 2d DCA 2011).

15. To be sure, the communications in the instant case do not appear to have occurred *during* the jury's deliberations. Therefore, they would not be covered by Rule 3.140. However, the Supreme Court of Florida has already repeatedly held that the same rules of notice and participation occur to *all* judge-jury communications and that "communications outside the express notice requirements of rule 3.410 should be analyzed using harmless-error principles." *Mendoza v. State*, 700 So.2d 670, 674 (Fla. 1997), *cert. denied*, 525 U.S. 839 (1998). *See also Merricks*, 831 So.2d at 159 n. 2; *Williams v. State*, 488 So.2d 62, 64 (Fla. 1986). Moreover, since Mr. Goodman has not yet been sentenced, he has a continuing right to be present at all critical stages of his case.[5]

16. The harmless error rule also applies in civil cases. *See Sears Roebuck & Co. V. Polchinski*, 636 So.2d 1369 (Fla. 4th DCA 1994) (Pariente, J.). Due to the inherent difficulty in proving harm, however, "prejudice is presumed and the burden is on the party seeking to uphold the jury's verdict to demonstrate the ex parte communication was harmless." 636 So.2d at 1370

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[5] Pursuant to the Sixth and Fourteenth Amendments of the Constitution, a criminal defendant has the right to be personally present at all critical stages of his trial. "[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). *See Scisum* 32 F.3d at 1482-83.

(citations omitted). If the reviewing court is "unable" to assess the harm, then reversal "is required." *Id.* at 1371 (citation omitted). *See also Scisum*, 32 F.3d at 1484 (placing the "heavy burden" of proving harmless error on the government).

17. Absent full disclosure of the jury's communications with the Court, it is impossible to fully assess the harm. *Cf. United States v. Smith*, 31 F.3d 469, 473 (7th Cir. 1994) (district court's decision to respond to juror's inquiry not harmless, in part, because judge's communications with jurors not "available for review" and, therefore, "we cannot say that the record completely negates any possibility of prejudice" to the defendant) (citation omitted).

CONCLUSION

Jurors, unlike lawyers and judges, directly control a trial's outcome. The system depends upon their impartiality. Therefore, it was bad enough that Mr. DeMartin served on Mr. Goodman's jury with a hidden agenda – a motive to use his civic duty as a platform for profit and celebrity.

> "The odds of someone with a personal agenda getting on a jury may be slim, but the risk of tainting a jury is real. It's up to defense lawyers, prosecutors and judges to weed out the opportunists through voir dire proceedings. The integrity of our justice system depends on impartial juries willing to give both sides a fair hearing and equal consideration."
>
> The Miami Herald, *Our Opinion: Courts, Lawyers Should Weed Out Profit-Minded Jurors*, Aug. 12, 2005.

Even worse, Mr. DeMartin's conflict led him to mislead the Court and the parties during voir dire and in his March 20 letter to the Court. Had Mr. DeMartin been candid then about his book writing, counsel would have moved to replace him then. Mr. DeMartin's deliberately concealed conflict has violated Mr. Goodman's Sixth Amendment right to an impartial jury and undermined the appearance of justice. *See generally Steinhorst v. State*, 636 So.2d 498, 500-01 (Fla. 1994) (recognizing that "one of the most important dictates of due process" is that "proceedings

involving criminal charges ... must both be and appear to be fundamentally fair") (citation omitted); *Cravens v. Smith*, 610 F.3d 1019, 1031 (8th Cir. 2010) ("'A district court is required to strike for cause any juror who is shown to lack impartiality or the appearance of impartiality....'") (citation omitted). While the Court may disagree with that legal conclusion, it should not compound Mr. DeMartin's acts of concealment by keeping its own communications with him secret. For the foregoing reasons, the Court should fully disclose all communications it has had with any of the jurors since the verdict, especially Mr. DeMartin.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 24, 2012, my office hand-delivered a true copy of the foregoing to:

Ellen Roberts
Assistant State Attorney
West Palm Beach State Attorney's Office
Traffic Homicide Unit
401 North Dixie Hwy.
West Palm Beach, FL 33401

By: _____
Mark A.J. Shapiro, Esq.

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO.: 2010CF005829AMB

STATE OF FLORIDA,

JUDGE JEFFREY COLBATH

Plaintiff,

v.

JOHN B. GOODMAN,

Defendant.

_____/

DEFENDANT'S MOTION TO DISQUALIFY THE COURT AND INCORPORATED MEMORANDUM OF LAW

The Defendant, JOHN B. GOODMAN, respectfully moves this Court, for an order disqualifying the Court, pursuant to Section 38.10, Florida Statutes, Rule 2.330 of the Florida Rule of Judicial Administration 2.330, and Canon 3(B)(7) of the Florida Code of Judicial Conduct. This motion is based upon the Court's repeated failure to disclose to Mr. Goodman and his counsel a series of communications it has had with or about former jurors in which several strains of jury misconduct were reported to the Court.

First, on March 27 and 28, Alternate Juror No. 8, Ruby Mei Delano, called the Court's chambers directly to report jury misconduct but the Court did not return her calls or notify counsel about the attempted communication. Mr. Goodman only learned about the contact with the Court and the misconduct allegations when Ms. Delano called counsel directly.

Second, at some still undisclosed time before April 4, 2012, Juror No. 6, Dennis DeMartin, apparently sent the Court a letter, along with two chapters of a book he was writing about the trial. The Court has yet to disclose that material to Mr. Goodman and counsel and counsel only learned

about the contact when Mr. DeMartin wrote another letter to the Court, on April 18, 2012, discussing the earlier communication. And, the Court did not disclose Mr. DeMartin's letter of April 18th until it was reported by the media and undersigned counsel then requested a copy from the Court.

Third, and by far the most egregious, on April 18 or 19, 2012, the Court received a letter from a prominent citizen of Palm Beach County, Toni May, who reported to the Court that she had overheard statements by Juror No. 4, Teresa Lewis, which corroborated Ms. Delano's affidavit and contained additional allegations of misconduct. Instead of disclosing that communication to Mr. Goodman and counsel, the Court, on April 20, 2012, denied in substantial part Mr. Goodman's motion for full jury interviews, finding that Ms. Delano's affidavit was insufficient – an alleged insufficiency which would have been cured by the concealed letter from Ms. May.

As demonstrated below, this pattern of concealing evidence of jury misconduct requires the Court's disqualification and a reassignment of this case so that the allegations of jury misconduct can be fully and fairly exposed. The Court's concealment of evidence supporting his allegations of jury misconduct "create[s] in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Kates v. Siedenman*, 881 So.2d 56, 75 (Fla. 4th DCA 2004), *citing MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1334 (Fla. 1990). *Accord Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983); *State v. Thompson*, 79 So.3d 933, 933-34 (Fla. 1st DCA 2012) (per curaim); *Salters v. State*, 857 So.2d 977 (Fla. 4th DCA 2003); *Siegel v. State*, 861 So.2d 90, 92 (Fla. 4th DCA 2003); *Peterson v. Asklipious*, 833 So.2d 262 (Fla. 4th DCA 2002).

1. During the trial, on March 20, 2012, one of the jurors – Juror No. 6 Dennis DeMartin – wrote the Court a letter claiming that he was writing and apparently had substantially written, a book entitled "The Trials and Tribulations of a Senior Citizen getting a Date without a Car."[1] In the letter, Mr. DeMartin claimed he was informing the Court about his book plan because he had been in contact with some publishing companies "for my dating book" and had also told the other jurors "that I am writing my book on dating without a car..." *Id.* Mr. DeMartin did *not* reveal – and, therefore, by implication denied – that he was writing a book *about the trial.* Indeed, he said only that "if" he was successful in publishing his "dating book" he "would consider using the process to writing about the experience being a juror."

2. On March 23, 2012, the jury returned its verdict. As discussed in *Defendant's Motion For New Trial And/Or to Vacate His Conviction*, that same day, Mr. DeMartin gave live interviews to numerous television stations and news outlets. However, only portions of these interviews were broadcast, none of which included anything about Mr. DeMartin writing a book about this case.

3. As discussed in prior pleadings herein, on March 27 and 28, 2012, Alternate Juror No. 8, Ms. Delano, telephoned the Court's chambers, wishing to report the various forms of misconduct she had witnessed during the trial. When the Court did not respond to her inquiries, on the morning of April 4, 2012, she reported the misconduct directly to undersigned counsel.

4. As discussed *infra*, sometime before April 4, 2012, Mr. DeMartin wrote the Court a letter, attached the first and last chapters of a book he was writing about the trial. Despite the fact that the letter contradicted Mr. DeMartin's representations back on March 20, 2012, the Court did not disclose the letter or book chapters to Mr. Goodman or counsel.

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[1] A copy of the March 20, 2012, letter was attached as Exhibit 3 to Defendant's April 16, 2012, Motion For New Trial.

5. On April 16, 2012, counsel filed *Defendant's Motion For New Trial And/Or to Vacate His Conviction Based On Jury Misconduct.* In that motion, counsel recited the allegations from Ms. Delano concerning numerous forms of jury misconduct, including that Mr. DeMartin had been writing a book about the case during the trial and had informed the other jurors about that fact. Despite the fact that Mr. DeMartin's book-writing was being actively contested, the Court ***still*** did not disclose that it had in its possession prior correspondence from Mr. DeMartin about the book and two chapters of that book.

6. In response to the publicity generated by the motion, that evening, Mr. DeMartin gave televised interviews with the media. Although Mr. DeMartin claimed that he had not "start[ed]" the book during the trial, he admitted that he had been taking daily notes on the trial ***for that purpose*** "and ***I told them [the other jurors] about the notes that I was making every night.***" (Emphasis added.) He also admitted that he was "writing ***now*** about his trial experience." *Id.* (emphasis added).

7. On April 17, 2012, CBS12.com broadcast a story about the controversy, entitled *Could Juror Misconduct Hand John Goodman a New Trial?* In the article accompanying the broadcast, the station indicated that Mr. DeMartin "is writing the book" about the case. The article elaborated as follows, apparently referring back to the interviews Mr. DeMartin gave to the media immediately after the verdict on March 23, 2012: "We spoke with him after the trial. ***He told us <u>then</u> he's writing a book about his experience on the jury and showed us the daily notes.***" *Id.* (emphasis added). That same day, the Court convened a telephonic hearing in which the Court indicated that it might summon the jurors for interviews. During that hearing, the Court seemed to already have concluded that there was nothing wrong about Mr. DeMartin writing a book about the

case. "I mean, lots of jurors write books about their trial experience, so what? That's not grounds to excuse him...."[2]

8. The hearing drew considerable media attention, which prompted Mr. DeMartin to write the Court the following day. *See* Letter, April 18, 2012.[3] Mr. Goodman and counsel learned about the existence of this letter ***from the media***, not from the Court. *See* WPTV.com, April 18, 2012, *Only on 5: Goodman juror accused of misconduct fires back at polo mogul's attorney, alternate juror - Accused Juror files letter with judge, clears air.* Mr. Goodman and counsel only received a copy from the Court after calling the Court's chambers.

9. Mr. DeMartin's letter began by stating: "***I had sent you the first and last chapters of a book I have been writing*** on how I was chosen for the jury and what had happened since it was over." *Id.* (emphasis added). He also indicated that along with the book chapters he asked the Court for advice about whether he "should wait to try to publish a book on the trial until after sentencing and/or appeal." *Id.* Although he did not provide a precise date for this communication with the Court, he stated that he was going to give an interview with Court TV on April 4, 2012, but "**canceled that April 4, interview when you did not respond.**" (Emphasis in original). Accordingly, it appears that Mr. DeMartin corresponded with the Court about the book sometime ***before*** April 4. Yet, the Court informed no one at the time or even after Mr. Goodman's motion challenging Mr. DeMartin's book writing conduct. Instead, as noted above, the Court defended Mr.

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[2] A transcript has not yet been ordered of the hearing. However, the Court's comments were captured by the live television feed and broadcast on the evening news.

[3] A copy of this letter was attached to Defendant's recently filed motion to compel.

DeMartin's conduct on April 17 without even disclosing that Mr. DeMartin had sought the Court's advice about how to proceed.

10. In his April 18th letter, Mr. DeMartin also emphatically denied discussing his daily notes with other jurors: "The contents of these work sheets **WERE NOT DISCUSSED** with any juror." (Emphasis in original.) This assertion is difficult to square with what he told the cameras on April 16 ("I told them about the notes that I was making every night"). We, frankly, are not sure what is worse – (1) telling the jurors that he was taking notes about the trial every night but *not* telling them about the "contents" and thereby leaving them to speculate what he was saying *about them* in the book or (2) sharing the "contents" of his notes with the jurors.

11. On April 18 or 19, 2012, Ms. May hand-delivered to the Court a letter in which she described overhearing statements from Juror No. 4, Ms. Lewis which, as discussed below, both corroborated Ms. Delano and reported additional forms of jury misconduct. The Court did not disclose the letter or attempted communication, despite the material nature of the allegations made by Ms. May.

12. On April 20, 2012, the Court denied the motion for new trial and ordered that the jurors be questioned ***only*** about their comments about Mr. Goodman's wealth, holding that questions about Mr. DeMartin's book (as well as his mendacity about it) would be off limits.[4] The Court based its refusal to conduct questions about the book writing on a finding that Mr. Goodman did not "offer any support for his belief about Mr. DeMartin's purported frame of mind other than mere speculation

[4] During its discussion of the book-writing allegations, the Court stated that "Defendant seems to concede that Mr. DeMartin's literary exploits, in and of themselves, are not improper." Order, April 20, 2012, at p. 11. The Defendant has not made and does not make any such concession.

of bias." Order, at p. 13. The Court's order acknowledged Ms. Delano's allegation about calling the Court twice in March but did not affirm, deny or elaborate upon that allegation.

13. On April 24, 2012, counsel filed *Defendant's Motion To Compel All Communications Between Jurors and the Court*, seeking the disclosure of the letter and book chapters Mr. DeMartin had apparently sent to the Court weeks earlier, as well as any other communications the Court may have had with the jury.

14. At approximately 11 a.m. on April 25, 2012, defense counsel received a telephone call from Ms. May, Director of Community Relations/Communications at the Quantum Foundation in West Palm Beach. Ms. May is a former Emmy Award-winning host and executive director of South Florida Today, which airs on WXEL, a public television station. Ms. May informed counsel that she was at a restaurant on Saturday, March 24, 2012, and had overheard a juror sitting next to her at the restaurant's bar discussing the case and rampant jury misconduct that occurred. Ms. May also had apparently had a short conversation with the juror. Ms. May indicated that sometime after hearing about the Defendant's April 16th motion, she called the Court's chambers in an effort to report the misconduct but was told by the Court's staff that she could not speak to the Court or send an email about the misconduct but would have to send a letter. Following that conversation, Ms. May drafted a letter to the Court and personally hand-delivered it directly to the Court's mailbox on April 18 or 19, 2012, *i.e.*, before the Court entered its Order on April 20.

15. Ms. May informed counsel that she assumed that the juror she overheard was the same juror who had reported similar misconduct to counsel and was the basis for the April 16th motion for new trial. However, counsel asked Ms. May if the juror she overheard was of Asian descent (Ms. Delano being Asian). Ms. May responded that the juror she overheard was not Asian

but had identified herself as having worked for 20 years for the South Florida Water Management District. Therefore, the juror matches the description of Juror No. 4, Teresa Lewis.

16. Counsel asked Ms. May if she would telefax a copy of the letter she had written to the Court. She agreed and copies of the letter and telefax cover sheet are attached as **Exhibit 1** hereto.

17. The contents of the letter are, to say the least, startling. Ms. Lewis confirmed and elaborated upon the disclosures of jury misconduct previously made by Ms. Delano, including:

a. "[O]ther jurors talked about ***Goodman's money*** and ... ***they believed he was guilty before the trial ended***...." (Emphasis added.)

b. A juror named "Mike" was "'bullying' two other jurors" who disagreed with him and that "she went to someone, I thought she said ***the bailiff*** and complained about the situation ... that ***they were not following the judge's protocol***" but this person who she thought was the bailiff apparently did nothing. (Emphasis added.)

c. A juror, obviously Mr. DeMartin, "was offered ***$50,000 for a book deal*** and was continually taking notes and filled up 4-5 notepads during the trial... She knew details about the book deal and said it was clear he wanted to get it done...." (Emphasis added.)

18. The letter also explains how she felt the need to come forward after hearing about how Ms. Delano was being "ridiculed" by the media for coming forward:

> I felt the need to come forward to your Honor because I was raised by a former judge and attorney and have been taught you must do what is right at all times, no matter your own views. In addition, this

> alternate juror is being talked about, ridiculed and accused of taking bribes from Goodman's attorney. I can tell you that what I heard the day after she was released from jury duty doesn't match up to those accusations....

19. Despite having Ms. May's letter in its possession ***before*** the Court denied Defendant's motion for new trial and authorizing only limited jury interviews, the Court entered its April 20th order never mentioning or disclosing the letter. Nor did the Court promptly disclose the existence of the letter following the filing of the Defendant's motion to compel.

20. The letter reveals egregious forms of jury misconduct, including:

a. The bailiff's failure to report Ms. Lewis' complaint about the "bullying" and disregarding of the Court's protocols which constitutes *per se* reversible error under Rule 3.410 of the Florida Rules of Criminal Procedure, as construed by the Supreme Court of Florida in *State v. Merricks*, 831 So.2d 156 (Fla. 2002) (per curiam). *Accord Natan v. State*, 58 So.3d 948 (Fla. 2d DCA 2011); *Dixon v. State*, 768 So.2d 14 (Fla. 3d DCA 2000); *Thiefault v. State*, 655 So.2d 1277 (Fla. 4th DCA 1995). *See also* Fla. Stat. § 9918.07 (prohibiting officers in charge of jurors from communicating with jurors "on any subject connected with the trial").

b. Juror DeMartin had been at least "offered" a $50,000 advance ***during the trial*** for writing a book on the trial, while lying about it to the media and misrepresenting his conduct to the Court during the trial, was blatantly improper. The book advance itself may even be criminal. *See* Fla. Stat. § 918.12 ("Any person who influences the judgment ... of any ... petit juror on

any matter ... which may be pending ... before him ... as such jury, with intent to obstruct the administration of justice, shall be guilty of a felony of a third degree"). *See generally* Note, *Post-Trial Jury Payoffs: A Jury Tampering Loophole*, 15 ST. JOHNS J.L. COMM. 353 (Spring 2001). Certainly, the payment and Ms. Lewis' statements about Mr. DeMartin's conduct thoroughly corroborated Ms. Delano's affidavit and completely undermined the rationale this Court used to deny relief (that the Defendant did not "offer any support for his belief about Mr. DeMartin's purported frame of mind other than mere speculation of bias").

c. Ms. Lewis' statements, as noted above, revealed that Mr. DeMartin had been dishonest with the Court and the parties. That dishonesty constitutes an independent basis to find jury misconduct by Mr. DeMartin. S*ee DeFrancisco v. State*, 830 So.2d 131, 133 (Fla. 2d DCA 2002) ("If a juror answers a question falsely or conceals a material fact, that misconduct is prejudicial to one of the parties because it impairs his or her right to challenge the juror") (citations omitted). The evidence of Mr. DeMartin's dishonesty, which this Court concealed, supported Defendant's motion to interview the jurors. *See Gray v. Moss*, 636 So.2d 881 (Fla. 5th DCA 1994).[5]

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[5] Bias may be implied "where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury." *Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007); *see also Green v. White*, 232 F.3d 671, 677-78 (9th Cir. 2000) (holding that a juror was impliedly biased where he "lied twice to get a seat on the jury," provided misleading, contradictory, and false responses when questioned about those lies, and engaged in behavior that brought his impartiality into question); *United States v. Boney*, 977 F.2d 624, 634 (D.C. Cir. 1992) ("[L]ying or failing to disclose relevant information during voir dire itself raises substantial questions about the juror's possible bias."); *United States v. Colombo*, 869 F.2d 149, 152 (2d Cir. 1989) ("[H]er willingness to lie about it exhibited an interest strongly-suggesting (continued...)

21. Pursuant to Rule 2.330(b)(4), no other motions to disqualify have been previously filed or granted.

22. The Defendant fears that he will not receive either a fair hearing on his pending motions or a fair sentencing because of the above-described prejudice or bias of the Court. *See* Florida Rule of Judicial Administration 2.330(d)(1).

MEMORANDUM

Of all the rights guaranteed by the due process clause, there is none more fundamental than the right to an impartial judge. An impartial tribunal free from bias or prejudice is a fundamental requirement of the due process clause. *See In re Murchison,* 349 U.S. 133, 136-37, 75 S.Ct. 623, 99 L.Ed 942 (1955). Rules of law, no matter how perfect, mean nothing unless they are administered and applied by a fair tribunal. Indeed, the "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The Court apparently lost sight of these principles when it repeatedly concealed evidence of jury misconduct that the Court received either directly from the jurors themselves or by third parties at the same time that the Court was considering and then denying Defendant's motion for extensive jury interviews. The Court's concealment of material information has generated a well-founded fear that the Defendant "will not receive a fair" hearing or sentence in this matter "on account of the prejudice of the judge...." Fla. Stat. § 38.10.

Florida Rule of Judicial Administration 2.330(f) provides that a judge faced with a disqualification motion "shall determine *only* the legal sufficiency of the motion and shall not pass

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[5](...continued)
partiality.").

on the truth of the facts alleged" and "[i]f the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." (Emphasis added.)[6] Moreover, the rule expressly states that if the judge finds that the grounds are insufficient "[n]o other reason for denial shall be stated, and an order of denial shall not take issue with the motion."

The instant motion is certainly legally sufficient. Disqualification is required when the allegations made in disqualification, taken as true as required by Rule 2.330(f), "would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Kates v. Siedenman*, 881 So.2d 56, 75 (Fla. 4th DCA 2004), *citing MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1334 (Fla. 1990). *Accord Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983); *State v. Thompson*, 79 So.3d 933, 933-34 (Fla. 1st DCA 2012) (per curaim); *Salters v. State*, 857 So.2d 977 (Fla. 4th DCA 2003); *Siegel v. State*, 861 So.2d 90, 92 (Fla. 4th DCA 2003); *Peterson v. Asklipious*, 833 So.2d 262 (Fla. 4th DCA 2002). A party does not need to prove "actual prejudice." *Aberdeen Property Owners Assoc., Inc. v. Bristol Lakes Homeowners Assoc., Inc.*, 8 So. 3d 469, 472 (Fla. 4th DCA 2009). Thus, "[i]t is not a question of what the judge feels, but the feeling in the mind of the party seeking to disqualify and the basis for that feeling." *Aberdeen Property Owners*, 8 So. 3d at 471. *See also Goines v. State*, 708 So.2d 656, 659 (Fla. 4th DCA 1998) ("[T]he facts

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[6] Rule 2330(f) provides:

> The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

Florida Rule of Judicial Administration 2.330(d)(1) states: "A motion to disqualify shall show: (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge...."

underlying the well-grounded fear must be judged from the perspective of the moving party."), *disagreed with on other grounds by Thompson v. State*, 949 So.2d 1169 (Fla. 1st DCA 2007), *quashed*, 990 So.2d 482 (Fla. 2008).

The Florida rule parallels the rule governing federal judges in 28 U.S.C. § 455(a), in that it imposes a "reasonable man" or objective standard in determining whether a judge must disqualify himself. Therefore, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks "to the average man on the street." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). *Accord Moran v. Clarke* 296 F.3d 638, 648 (8th Cir. 2002); *Home Placement Serv., Inc. v. Providence Journal Co.*, 739 F.2d 671, 676 (1st Cir. 1984). *See also United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert. denied sub nom. Alabama State Univ. v. Auburn Univ.*, 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988).

The rule is thus concerned as much with appearances as with reality. Where it is reasonable for the public to believe that a judge is not impartial, a judge is deemed to possess a disabling conflict *whether or not* the public is correct. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.") (internal quotation marks omitted); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) (whether § 455(a) is violated "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew"). Doubts must be resolved in favor of disqualification, since "[t]he very purpose of § 455(a)

is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *United States v. Kelly*, 888 F.2d 732, 744-45 (11th Cir. 1989) (citations omitted).

Judges may properly form impressions and opinions about a case during the course of hearing the issues and the evidence ***in the record***. However, "[w]hen the judge enters into the proceedings and becomes a participant, a shadow is cast upon judicial neutrality so that disqualification is required." *Asbury v. State*, 765 So.2d 965, 966 (Fla. 4th DCA 2000) (per curiam), quoting *Chastine v. Broome*, 629 So.2d 293, 295 (Fla. 4th DCA 1993). When "the court transforms itself into one of the litigants, it creates a well-founded fear that a party will not be dealt with in a fair and impartial manner. The court's quest for information in this case crossed the line of neutrality." *Chillingworth v. State*, 846 So.2d 674, 676 (Fla. 4th DCA 2003). A similar rule also applies in the federal system. Under 28 U.S.C. § 455(b)(1), a judge must disqualify himself where, among other things, he or she "has ... personal knowledge of disputed evidentiary facts concerning the proceeding." Disqualification under this standard is required where a judge conducts an extrajudicial investigation of the facts. Such "[o]ff-the-record" investigations, of course, "leave no trace in the record." *In the Matter of: James R. Edgar*, 93 F.3d 256, 259 (7th Cir. 1996) (per curiam).

In *Edgar* the Seventh Circuit ordered a judge disqualified under § 455(b) for a number of extrajudicial meetings with appointed experts, including a letter he received from one of the experts. *Id.* at 261. Florida courts also routinely require disqualification when trial courts engage in *ex parte* communications. *See, e.g., Howell v. State*, 80 So.3d 441 (Fla. 4th DCA 2012) (reversing conviction and remanding for a new trial, holding that "the trial court erred by engaging in an ex-parte communication in which the trial judge indicated how he would rule on the State's motion in limine to preclude the defendant from claiming a mental health defense") (citation omitted); *Frengel v.*

Frengel, 880 So.2d 763 (Fla. 2d DCA 2004) (per curiam) (requiring disqualification when judge assigned to child custody dispute gave her telephone number to the children, invited them to communicate with her and then failed to disclose emails with the children to the mother).

While there is no evidence that this Court invited the communications it received from jurors and third parties concerning the jury, the Court received multiple contacts – first from Ms. Delano, then from Mr. DeMartin and finally from Ms. May – none of which the Court disclosed on its own. Moreover, all three sets of communications either alleged or exhibited various forms of jury misconduct during the time period in which the Defendant was seeking to interview the jurors. By not disclosing these communications, the Court has allowed itself to be "transform[ed] ... into one of the litigants," thereby "creating a well-founded fear that a party will not be dealt with in a fair and impartial manner." The Court then compounded its error by denying the Defendant's motion to conduct broad-based jury interviews, in part, by finding that his motion was not sufficiently supported when, all along, the Court had in its possession that very support – the letter from Ms. May. The appearance of impartiality was destroyed by the Court's suppression of material evidence that supported the Defendant's motion.

An analogous situation occurred in *United States v. Van Griffen*, 874 F.2d 634 (9th Cir. 1989). In that case, a magistrate (presiding at trial) came into possession *ex parte* of a police report concerning the case before him. He kept the report at the bench during trial, although he denied ever having looked at it prior to the trial. The Ninth Circuit found that this conduct was improper:

> If it was not good practice to receive the communication, it was equally not good practice to retain it. We have no assurance from the magistrate that he did not subsequently look at the communication. Certainly he might have been tempted to do so. The rule requiring disqualification when there is an appearance of partiality is a rule designed to remove the possibility of temptation. Tumey v. Ohio, 273 U.S. 510, 532 . . .(1927). It is not an imputation against the honesty of the magistrate to say that a reasonable person could doubt his impartiality when he kept with him at trial this *ex parte* communication. If a jury had received such an *ex parte* communication that had a reasonable possibility of affecting the verdict, its verdict would be tainted.... Here, the magistrate was the trier of fact and he did not dispose himself of a communication which he himself implicitly acknowledges he should not have had. A reasonable person could doubt his impartiality.

874 F.3d at 637 (emphasis added).

The instant case is far more egregious than *Van Griffen*. There was no suggestion in *Van Griffen* that anything exculpatory or of evidentiary benefit to the defendant was contained in the concealed police report. Here, in sharp contrast, the Court did not voluntarily disclose that it had received material information that directly supported the Defendant's allegations of jury misconduct ***while the Defendant's motion was pending***. Worse, the Court then denied the motion, in substantial part, based on criticisms about the Defendant's insufficient factual showing – an alleged deficiency that the concealed evidence would have remedied. A reasonable person could not but doubt the Court's impartiality under these circumstances.

CONCLUSION

Wherefore, the Court should disqualify itself from this case.

JOHN B. GOODMAN

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before me, personally appeared, John B. Goodman, who, being of sound mind and after being properly sworn, states that I have read the foregoing and, under penalty of perjury, swear that the foregoing is true.

JOHN B. GOODMAN

SWORN TO AND SUBSCRIBED before me this 26th day of April, 2012, at Palm Beach County, Florida.

NOTARY PUBLIC-STATE OF FLORIDA
Guy P. Fronstin
Commission # DD844957
Expires: DEC. 14, 2012
BONDED THRU ATLANTIC BONDING CO., INC.

NOTARY PUBLIC, STATE OF FLORIDA

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY, pursuant to Fla. Stat. § 38.10 ~~and Fla. R.~~ Jud. Admin. 2.330(c), that the foregoing motion and statements by Mr. Goodman are made in good faith.

By: _____
Roy Black, ESQ.

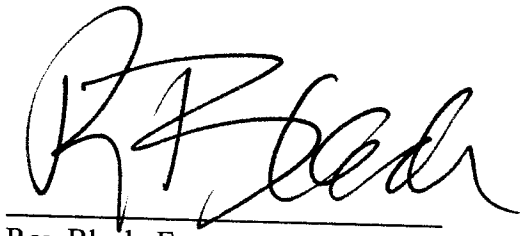
BLACK, SREBNICK, KORNSPAN, & STUMPF, P.A.
201 South Biscayne Boulevard, Suite 1300
Miami, Florida 33131
Ph. (305) 371-6421 – Fax (305)358-2006
E-mail RBlack@RoyBlack.com
E-mail Mshapiro@RoyBlack.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2012, my office hand-delivered a true copy of the foregoing to:

Ellen Roberts
Assistant State Attorney
West Palm Beach State Attorney's Office
Traffic Homicide Unit
401 North Dixie Hwy.
West Palm Beach, FL 33401

The Honorable Jeffrey Colbath
Circuit Court Judge
Fifteenth Judicial Circuit
205 North Dixie Highway
West Palm Beach, FL 33401

By: 
Roy Black, Esq.

QUANTUM FOUNDATION

Advancing Health & Education

The following facsimile includes 2 pages including this cover sheet. The information contained in this facsimile message is privilege and confidential information intended for the use of the addressee listed below. If you have received this telecopy in error, please immediately contact 561-832-7497 to arrange for the return of the original documents.

DATE:

COMPANY: Roy Black

ATTENTION:

FAX #: (305)3580092 TELEPHONE:

FROM: Toni May

COMMENTS:

Please call with questions
Clearly I was confused in
my assumption it was
alternate juror —

Toni May

Phone 561-832-7497 • Fax 561-832-5794 • 2701 N. Australian Avenue • Suite 200 • West Palm Beach, Florida 33407

Exhibit 1

On Saturday March 24, 2012, at about 1:00 pm, my husband and I were dining at the bar at Rocco's Tacos on PGA Blvd and I overheard the woman right next to me talking about jurors in the John Goodman trial. As a journalist, my interest was piqued and I began listening to her concerns. It was clear to me after a few moments that she had been one of the jurors. It was also extremely clear to me that she was stressed out and frustrated with what had occurred during the trial. She kept saying that other jurors talked about Goodman's money and, in her opinion, they believed he was guilty before the trial ended. She continually mentioned a juror named "Mike". She said at one point he was 'bullying' two other jurors who were clearly not agreeing with what he believed should be the verdict. What I heard her say was she went to someone, I thought she said the bailiff and complained about the situation. She said that at one point she even asked the bullying juror to stop as she felt sorry for the other woman on the jury. She said something like, "I'm tough, I can take it but some of them can't."

She mentioned a juror was offered $50.000 for a book deal and was continually taking notes and filled up 4-5 notepads during the trial which she said the juror kept. She knew details of the book deal and said it was clear he wanted to get it done. I don't know if she meant the book deal or the trial. She also mentioned that one of the jurors kept referring to a boating trip, but I wasn't sure in what context.

Her demeanor was one of pure exhaustion and stress, she repeatedly said it was very tiring and she was just glad to be 'free'. I did NOT get the feeling she was saying Goodman was innocent , but I did clearly understand she did not feel the jury acted properly and that she tried to convince them , and someone outside the jury room but never sure who she was referring to, that they were not following the judge's protocol.

Because of the importance of what she was saying, I texted my husband exact quotes throughout part of her conversation. I was concerned about what I heard and called a friend who is a lawyer on the Monday following the conversation. This was purely a friendly inquiry and I didn't give him details of what I heard but asked about juries and what could overturn a verdict. He told me to look up case law so I found Baptist Hospital of Miami, Inc. v. Maler, and Devoney v. State that showed juries are protected and that made me feel like it wasn't worthy of pursuing with you, the prosecutor or Goodman's attorney. I left it at that until I heard the news that an alternate juror had filed an affidavit which clearly is the same women I heard talking less than 24 hours after the verdict.

I felt the need to come forward to your Honor because I was raised by a former judge and attorney and have been taught you must do what is right at all times, no matter your own views. In addition, this alternate juror is being talked about, ridiculed and accused of taking bribes from Goodman's attorney. I can tell you that what I heard the day after she was released from jury duty doesn't match up to those accusations. I don't know this woman. She said a few words to me about the food because we were literally sitting arm to arm at the bar eating, but it was a few brief words and we never exchanged names. I have no agenda other than to share this as I feel it may be pertinent to your review of her claims.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION: "W"
CASE NO.: 2010CF005829AXXMB

STATE OF FLORIDA
Plaintiff,

vs.

JOHN GOODMAN,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO DISQUALIFY COURT

THIS CAUSE comes before the Court on the Defendant's Motion to Disqualify the Court and Incorporated Memorandum of Law filed on April 26, 2012 pursuant to Florida Rule of Judicial Administration 2.330, section 38.10, Florida Statutes (2012), and Canon 3(B)(7) of the Florida Code of Judicial Conduct. The Court having reviewed the Defendant's Motion, the pertinent Rule and applicable case law, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED that the Defendant's Motion is **DENIED** as legally insufficient.

DONE AND ORDERED, in Chambers at West Palm Beach, Palm Beach County, Florida this 27 day of April 2012.

JEFFREY J. COLBATH
CIRCUIT JUDGE

Copies Provided To:

Ellen Roberts, ASA, Assistant State Attorney, 401 N. Dixie Hwy. West Palm Beach, FL 33401.

Roy Black, Esq., Black, Srebnick, Kornspan & Stumpf, 201 S. Biscayne Blvd., Ste. 1300, Miami, FL 33131.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION: "W"
CASE NO.: 2010CF005829AXXMB

STATE OF FLORIDA
Plaintiff,

vs.

JOHN GOODMAN,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO COMPEL

THIS CAUSE comes before the Court on the Defendant's "Motion to Compel Disclosure of All Communications Between Jurors and the Court" filed April 24, 2012. The Court has reviewed the motion and finds as follows:

1. The motion seeks to compel action by the Court. A Petition for Writ of Mandamus filed with a higher court, rather than a Motion to Compel, is the proper pleading to seek action by a Court.

2. The Court does not review communications from jurors. The Court's office practice is to forward copies of juror communications to counsel for both the state and defense and therefore the Court is not personally aware as to what correspondence exists.

3. Requests for public records are to be handled in accordance with Administrative Order No. 2.304-4/10.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Defendant's Motion is **DENIED.** The Motion to Compel Disclosure of All Communications Between Jurors and the

Court will be treated as a request for public records. Court Administration is to respond to the records request in accordance with Administrative Order No. 2.304-4/10.

DONE AND ORDERED, in Chambers at West Palm Beach, Palm Beach County, Florida this 27 day of April 2012.

JEFFREY J. COLBATH
CIRCUIT JUDGE

Copies Provided To:
Ellen Roberts, ASA, Assistant State Attorney, 401 N. Dixie Hwy., West Palm Beach, FL 33401.
Roy Black, Esq., Black, Srebnick, Kornspan & Stumpf, 201 S. Biscayne Blvd., Ste. 1300, Miami, FL 33131.
Court Administration (via interoffice mail)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,)
)
vs.) CASE No: 2010CF005829AXX
)
JOHN GOODMAN,)
)
Defendant.)

MOTION HEARING

PRESIDING: HONORABLE JEFFREY COLBATH

APPEARANCES:

ON BEHALF OF THE STATE:
PETER ANTONACCI, ESQUIRE
State Attorney
401 North Dixie Highway
West Palm Beach, Florida 33401
By: SHERI COLLINS, ESQUIRE
ELLEN ROBERTS, ESQUIRE
Assistant State Attorneys

ON BEHALF OF THE DEFENDANT:
BLACK, SREBNICK, KORNSPAN & STUMPF
201 South Biscayne Blvd, Ste 1300
Miami, Florida 33131
By: ROY BLACK, ESQUIRE
MARK SHAPIRO, ESQUIRE
JOSHUA DUBIN, ESQUIRE

April 17, 2012
Courtroom 11-F
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401
Beginning at 4:00 o'clock p.m.

BE IT REMEMBERED that the following proceedings were had in the above-entitled cause before the HONORABLE JEFFREY COLBATH, one of the judges of the aforesaid Court, at the Palm Beach County Courthouse, located in the City of West Palm Beach, State of Florida on the 17th day of April, 2012, beginning at 4:00 o'clock p.m., with appearances as hereinbefore noted, to wit:

THE BAILIFF: Court is back in session.

THE COURT: All right. Hello, let me call the case of the State of Florida versus John Goodman to order. Let me note for the record that we're here in the courtroom, I have got Ms. Collins and Ms. Roberts here, also present via telephone is -- Mr. Black, is that you?

MR. BLACK: Yes, Roy Black, Mark Shapiro with Josh Dubin.

THE COURT: All right. Mr. Dubin and Mr. Black, good afternoon.

MR. DUBIN: Good afternoon.

THE COURT: A couple of things, the reason -- well, does anybody object to me hastily setting this quick hearing, and

before you answer, I'll tell you just the limited purpose that I called for the hearing is, I read in your Motion for New Trial a notice for an intent to interview jurors, and it appeared to me as though you might possibly be entertaining the notion that you are going to go and start interviewing jurors on your own after giving the notice that's kind of laid out under the Rules of Regulating the Florida Bar rather than the Florida Rule of Criminal Procedure so --

MR. BLACK: Your Honor, once the State filed their objection, we had no intent to proceeding ahead by ourselves without leave of the Court.

THE COURT: Okay. That was what my intent was, to make sure that no one starts going out interviewing jurors without there being some preliminary findings by me and investigating this issue, collectively, together with everybody having input.

MR. BLACK: Yes, Your Honor. The reason we did it that way is that's the way that the Ethics Rule and the Criminal Rule

states that we are supposed to send a notice of interview. We never figured we would do that by ourselves anyway but that's the process we had to follow.

THE COURT: Yeah. The two rules are not quite in sync and it is curious, so it looks like the Ethics Rules kind of permits, you know, at least -- at least, it leaves open the question of, can a lawyer send a notice that doesn't get objected to, start conducting interviews without intervention, or an Order of the Court. It really doesn't -- it leaves open that question.

It appears as though that might be so, but the Florida Rules of Criminal Procedure are a little bit more restrictive and so, anyway, I'm glad -- if it's not clear, I will order that nobody conduct any juror interviews without further Order of the Court, which means that I have now got to go through the process of reviewing what it is.

Now, are going to formalize -- are you going to file a motion to highlight

your entitlement to juror interviews, or you just want to travel on the affidavit you have got and wrap that up under the motion, put it under the context of your Motion for New Trial?

MR. BLACK: Well, Your Honor, we filed a motion with the affidavit setting forth, you know, why we believe that the process should go ahead, so that's really what we are relying upon.

THE COURT: Okay.

MR. BLACK: And if the Court wants us to submit anything else that would be helpful to the Court, you know, we're happy to do it, but, you know, we want to go forward on both standards, both the interview standard and on the new trial standard, just so -- you know, I realize it's a little confusing, you know with the Rule and the Ethical Rule, but we want to go ahead with interviews of all the jurors, we want it to be done with Court supervision, with the Court and the State present.

THE COURT: Okay. All right. Then

I'll go forward on that and the -- anything, anything from the State's perspective, Ms. Collins?

MS. COLLINS: Yes, Your Honor. First of all, the State filed a notice of objection, and I appreciate Counsel's position that they have taken. However, their request for -- or their Notice of Intent is to interview Juror Numbers 1 through 7, the affidavit is as to Juror Number 8.

The State would like to, first and foremost, talk to Juror Number 8, and I'm assuming by Juror Number 8, they mean the juror -- and that's where we were unclear, we weren't sure if Juror Number 8 was the person who was seated in the 8th seat during the trial, who was designated as Number 8 by the Court or the last person who was selected during voir dire, who was originally the 8th juror before the Judge scrambled them.

THE COURT: For whatever it's worth, their names have all been released to the media and so I don't think we need to any

longer dance around and try to accommodate the privacy concerns of the jurors because they're out there.

Is -- let me ask Mr. Black, is the person that you got the affidavit from, are their initials RD?

MR. BLACK: Yes, Your Honor.

THE COURT: All right. We are talking about Ruby Delano. So that's the person -- yeah, I think that the procedure is as follows -- and I'm thinking out loud and I'm inviting you all to argue and shape my thinking if you think I'm on track, but I think the procedure is this:

I'm going to review everything that's been submitted and I'm going to think to myself, if everything in the affidavit of Ms. Delano is true, would the Defendant, would Mr. Goodman be entitled to some relief.

If the answer is yes, then I will start down the next path towards pursuing this issue.

If the answer is no, if I believe everything is true, does the law afford a

remedy. And if the answer is no, then I'll just deny it and that will be the end of that.

If I find that the issues that Ms. Delano raises does warrant, or could afford relief to Mr. Goodman, then I would probably have Ms. Delano come in, do the equivalent of -- I don't know, an Adversarial Probably Cause Hearing, and we would -- at least, I would question her in your presence and you all would question her in all of our presence and everybody would have a chance to ask Ms. Delano more about this issue.

And then, and then if I found that her statement or testimony warranted further investigation, I would then need to determine, are we going to start interviewing some or all of these jurors. That's kind of what I think the procedure is.

Ms. Collins, what do you think?

MS. COLLINS: Judge, I would agree with the procedure, however, I think that just raising the spectre of

pre-deliberations does warrant possible juror interviews, but the State's position was the person we need to speak to first is Ruby Delano.

THE COURT: So you think that what's raised in the affidavit is enough to, at least, bring Ms. Delano in and start quizzing her, asking her questions about, you know, be more specific?

MS. COLLINS: Yes.

THE COURT: I'm not so sure I agree with you. I'm not saying I disagree with you, but I'm not sure that I agree with you. I think that that may be those type of problems that inure to the verdict, as the case law says, whatever that might mean. That seems to be a buzz phrase to, you know, the bright line.

Anyway, Mr. Black, your thoughts.

MR. BLACK: Yes, I disagree with the Court's procedure. I do not disagree that the Court should take a look at the affidavit to determine if it makes out a sufficient basis to proceed ahead.

I do not believe that the Court

should only call in Juror Number 8 because what the Rule says is that the burden is "reason to believe". That's a very low burden to do these interviews. So the question is, does the affidavit of Juror Number 8 give the Court reason to believe there is a basis for the interviews of Jurors Number 1 through 7?

Now, if we are going to interview Jurors 1 through 7, then we agree that 8 should be there as well, but there is no Adversary Probable Cause Hearing to determine whether or not "reason to believe" exists.

The Rule has that, it's a very low burden, so I believe that if the Court feels that there is reason to believe that there is misconduct, then the Court has to go ahead and order the interviews of all the jurors. So we cannot just single out Juror Number 8 and have her come in to be cross-examined on it because it is not that type of a hearing; it is "reason to believe". And if the Court finds reason to believe, then we go ahead with the

interviews.

THE COURT: Okay. Yeah. I didn't mean to suggest that we would mirror the adversarial preliminary hearing-style proceeding, I was just trying to use that as an analogy and, perhaps, it was a poor one.

Yeah. I mean, ultimately -- well, if Ms. -- if Juror Number 8, if she comes in and says exactly what she has put in her affidavit, well, then the State is conceding that we ought to conduct more interviews with the other jurors.

I think Mr. Black, you're saying, bring all eight of them in from the get-go and just interview all eight of them right away and there is no further threshold other than what's on this affidavit.

MR. BLACK: Yes, because it is an affidavit. This is not one of those cases where the lawyer just filed something with the Court, where the lawyer says, well, I believe this happened, or I heard something in the hallway, or the family said it.

Here, we have an affidavit from the

actual alternate juror so that is more than sufficient to meet the burden of "reason to believe" and once that burden is met, then the Court should go ahead with all the interviews.

THE COURT: Okay. All right. Ms. Collins, Ms. Roberts, anything further?

MS. COLLINS: Judge, I don't have anything further on the issue. I mean, I have looked through the case law. I think that -- I think the issue is, though, how far are we going to go in the first stage.

You know, does the Court want to bring them all in the first stage. And that's why the State was indicating we wanted to talk to Ms. Delano first.

THE COURT: Yeah. I think I'm still inclined to go forward in the fashion that I have described.

The first step I'm going to do is, take a closer look at the affidavit, take a closer look at the case law and determine if everything in the affidavit is true.

Does that -- might that entitle Mr. Goodman to some juror interview, and if the

answer is yes, then I think what I'll do; notwithstanding your suggestion to the contrary, Mr. Black, I think what I'll do is bring Ms. Delano in -- and it might be all in the same day. I mean, I don't want to make this a protracted deal but, I don't want to, you know, proceed like cutting a dog's tail off one inch at a time, I would like to wrap this up as quickly as we can, but before we start invading the sanctity of jury's deliberations, that is a very big deal and so I'm not inclined to start dragging them back down to the courthouse to quiz them about that without being very certain that it is appropriate to do so.

So I'm inclined to bring Ms. Delano in first, and we will all have an opportunity to question her about what she -- what she saw and heard and what misconduct she thinks took place.

MR. BLACK: Your Honor, can I add something to that?

THE COURT: Yes.

MR. BLACK: Yesterday, or maybe we saw it this morning, a television news crew

went out to Mr. DeMartin's house and interviewed him about it and he admitted that he's writing a book about the case and he did it every day. And he admitted that he told the jurors about the notes that he was taking and they actually have film of the screen of his computer showing the notes he was taking during the trial, so I believe that we would add on what -- and we'll submit to the Court, I think, we just found this out, a supplemental submission with Mr. DeMartin's admissions on it.

THE COURT: Yeah. I'm looking through the case law and I don't get that that's offensive. I don't think the case law supports that that's something that would warrant, you know, juror interviews, but I share that with you because I believe that's what the case law says.

I haven't gone through the cases that you have submitted and my own research quite yet, but my unrefined thoughts on that are that I don't think that's enough to invade the province of the jury.

MR. BLACK: Well, Your Honor, the

reason I bring that up is because it's inconsistent with the letter that he sent to the Judge. And we did not do a voir dire of him about writing book because he said he was only writing a book about dating as a senior.

THE COURT: Well, that was -- when was that? Are you talking -- that occurred during jury selection or some time during the trial?

MS. COLLINS: That was during the trial.

MR. BLACK: During the trial itself.

MR. DUBIN: Your Honor, if you'll recall -- this is Mr. Dubin, if you'll recall, Mr. DeMartin wrote a letter to Your Honor on March 20th, indicating that he was writing a book about dating.

THE COURT: Right, without a car.

MR. DUBIN: And what he said in the letter is completely contrary, vis a vis, him writing a book about the trial and taking notes during the trial is directly contrary to what he represented in the letter and we made a tactical decision as

to whether we would follow-up with him during the trial based upon what he said in that letter, assuming that he was telling us the truth in his -- you know, the interview that he gave yesterday to the news is contrary to that.

THE COURT: Well, I mean, so what? So he said -- so in the middle of the trial, he decided, you know what, I'm going to write a book about this trial or, perhaps, at the very beginning he thought secretly, well, I'm going to write a letter -- I'm going to write a book about this trial, but, today, I'm going to tell them about, I'm writing a book about dating without a car.

I mean, lots of jurors write books about their trial experience. I mean, so what? That's not grounds to excuse them, not that I know of.

MR. DUBIN: Hopefully, Your Honor, lots of jurors don't lie in open court.

THE COURT: Well, I hope so, too, but, in any event, I'm going to, like I say, I'm going to -- I know that the case

law tolerates some juror -- misconduct might be a too-strong a word in this setting, but it will tolerate a lot of the jurors' conduct and it -- you have to cross kind of a pretty bright line before verdicts get set aside and new trials are granted. And so I want to get a firmer understanding of where that line is to be drawn and then set about the task of figuring out, do these allegations fall on one side of that line or the other so.

MS. COLLINS: Judge, can I give you another case that is not contained within the Defense's Motion for a New Trial that would be helpful for the Court?

THE COURT: Sure. That's a loaded question. No, don't get me a helpful case, I'm not interested --

MS. COLLINS: Judge, it's Pozo, P-o-z-o versus State at 963 So. 2nd 831.

THE COURT: 963.861?

MS. COLLINS: 831.

THE COURT: 831.

MS. COLLINS: It's a Fourth DCA case. I think that, originally, Judge Wennet

declined to do juror interviews and the Fourth disagreed with him and said no, no, no, you need to do juror interviews.

MS. ROBERTS: He did. We had a -- we received a letter, because I tried that case. We received a letter from a juror saying that had she known he was going to go to prison that she wouldn't have found him guilty and all of this, and so the Judge just sort of summarily dismissed it. And then the -- because the Defense wanted to question all the jurors, and at which point the Judge denied that, and it did go on appeal and we ended up, it was -- his order was reversed and we ended up --

MS. COLLINS: Doing interviews.

MS. ROBERTS: -- doing interviews.

THE COURT: So you did the interviews. Okay.

And, is there any guidance from the case law that says, well, if you are going to interview one, you've got to interview them all, or can you interview like, you know, just the ones that seem to be affected? Do we have to talk to all of

them? I mean, this seems to be one of those -- the allegations seem to spread to all the jurors in our case.

MS. ROBERTS: I would think that we need to do all of them.

THE COURT: Okay.

MS. COLLINS: I think in the abundance of caution it's best.

THE COURT: Okay. Now, what Mr. Black's suggestion, getting back to that. I have kind of indicated I would probably do Juror Number 8 first. And then if her allegations don't rise to the level of the possibility of granting some relief, leaving the others alone. Do you think that's more appropriate or do you think that I should bring them all in and just get it --

MS. COLLINS: Judge, I think you should bring them all in.

THE COURT: Just bring them all.

MS. COLLINS: Yes, Judge.

THE COURT: Start with her.

MS. ROBERTS: Start with her and see what -- if there is actually any merit to

what she's saying. You know there's a lot of questions we have to ask about how many times she allegedly called your office and didn't receive a call and why. I'm curious to know why she went to the Defense as opposed to the --

MS. COLLINS: Writing a letter.

MS. ROBERTS: -- legal body, or not writing a letter to the Court because I do believe you instructed them to.

THE COURT: Yeah. And the other issue that's kind of out there, Mr. Black, quite frankly, I haven't really thought about it much yet, but, I mean, didn't you, in fact, conduct an interview when this woman came to you, and instead of saying, hold it, I've got to go to the Court before I can talk to you more, you interviewed her, reduced her story to an affidavit and put it in, in support. I mean, I'm a little bit nervous about that conduct on your behalf with -- reassure me that there's not an ethical problem there.

MR. BLACK: Well, Your Honor, we put in our pleading that we not only looked at

your transcript, which you told the alternate juror that the lawyers can't contact you, but you can contact them, number one.

Then we looked at the Ethical Rule that says we could not initiate the contact. And we twice got rulings from the Florida Bar Ethics hotline that we could go ahead and do this.

THE COURT: Okay. Well, good. Fine. Thank you for --

MR. BLACK: It's in our pleadings, and we even put in the number of the rulings from the Bar to show that we did not talk to her without a ruling from the Bar first.

THE COURT: Yeah. And I don't know how the question was asked of the Bar. I don't know how that is instructed. I know that -- you know, what you are allowed to do and what someone else might have done. They both may be allowable.

I might have just said, stop, let me go to the Judge right now before we start, you know, skating out on what might be thin

ice, but I'm reassured that -- I'm not going to do anything further on, on this issue in that regard so, all right, good.

All right. Well, then within the next couple of days -- where are we; what date is this?

MS. COLLINS: Today is the 17th.

THE COURT: Tuesday, the 17th?

MS. COLLINS: Yes.

THE COURT: By the end of the week or sooner, I will give you an Order as to which way we are going to go. And it sounds like, unless I have a strong opinion that the State and Mr. Black are both wrong with regard to juror interviews, it sounds like we are going to start mapping out a day with the jury.

And now, do you want me to -- if you think it's necessary, we had two alternates, do we need to bring in the other alternate?

MR. BLACK: Yes.

THE COURT: So all eight?

MR. BLACK: Yes.

MS. COLLINS: The State would agree.

THE COURT: All right. Then what I'll do is, probably, if I come to the conclusion that we are going to conduct interviews, I'll have Ms. Cartwright contact you all to carve out -- I'm guessing, half a day.

MS. COLLINS: Okay.

THE COURT: I mean, you think it's going to take a couple of hours?

MS. COLLINS: Probably.

MR. BLACK: It could -- it could take that, Your Honor.

THE COURT: Okay. I'll carve out some time for all of us to get together and start talking to the jury.

MS. COLLINS: And, logistically, how are they summoned?

THE COURT: Well, I think we would have to issue them a subpoena so I'll probably --

MS. COLLINS: And who would do that?

THE COURT: Any objection, Mr. Black, if I direct the State to issue the subpoenas to have the jurors come in and visit with us?

MS. COLLINS: Judge, I don't think we want to issue a State Attorney subpoena. I think maybe the jury room clerk could summon them.

THE COURT: Oh, there you go; the Court will. I mean, I'll get -- I'm not used to issuing subpoenas so I'll figure it --

MS. COLLINS: I don't believe the State wants to use State subpoenas.

THE COURT: Okay. Maybe that's a good idea.

MS. COLLINS: Thank you.

MR. BLACK: But you're a judge, you can do it.

THE COURT: You know what, I know I can, we just never ever do, and so I've got to figure out -- go through the deep part of the old drawers to find Court's subpoenas someplace. I'll find them.

MS. COLLINS: Well, I'm sure the jury, the jury clerk can find some somehow.

THE COURT: Yeah, that's a good suggestion. I'll have the -- I'll have the jury -- the clerk of the jury pool issue

the summons, or subpoenas and get them in here, then I'll invite them in and entice them with coffee and donuts.

MR. BLACK: Okay.

THE COURT: Anything else?

MR. BLACK: That's it, Your Honor. Thank you for having the hearing today.

THE COURT: Thank you so much. Have a good afternoon everybody.

MS. COLLINS: Thank you, Judge.

THE COURT: Bye-bye.

(Proceedings concluded.)

C E R T I F I C A T E

THE STATE OF FLORIDA,

COUNTY OF PALM BEACH.

I, MICHELLE L. VOCE, R.P.R., F.P.R., Official Court Reporter for the Fifteenth Judicial Circuit, Criminal Division, in and for Palm Beach County, Florida; do hereby certify that I was authorized to and did report the foregoing proceedings before the Court at the time and place aforesaid; and that the preceding pages numbered from 1 to 25, inclusive, represent a true and accurate transcription of my stenonotes taken at said proceedings.

IN WITNESS WHEREOF, I have hereunto affixed my official signature this 26th day April, 2012.

_____

MICHELLE L. VOCE, R.P.R.,F.P.R.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix was furnished by hand, this 30th Day of April, 2012, to:

Ellen Roberts
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The Honorable Jeffrey Colbath
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Fifteenth Judicial Circuit
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By: 
G. RICHARD STRAFER