No. 4D12-1930

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

JOHN B. GOODMAN,

***Defendant/Appellant*,**

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

On Appeal From the Circuit Court, Fifteenth Judicial Circuit
In and For Palm Beach County, Florida
[Case No. 2010CF005829AXXMB]

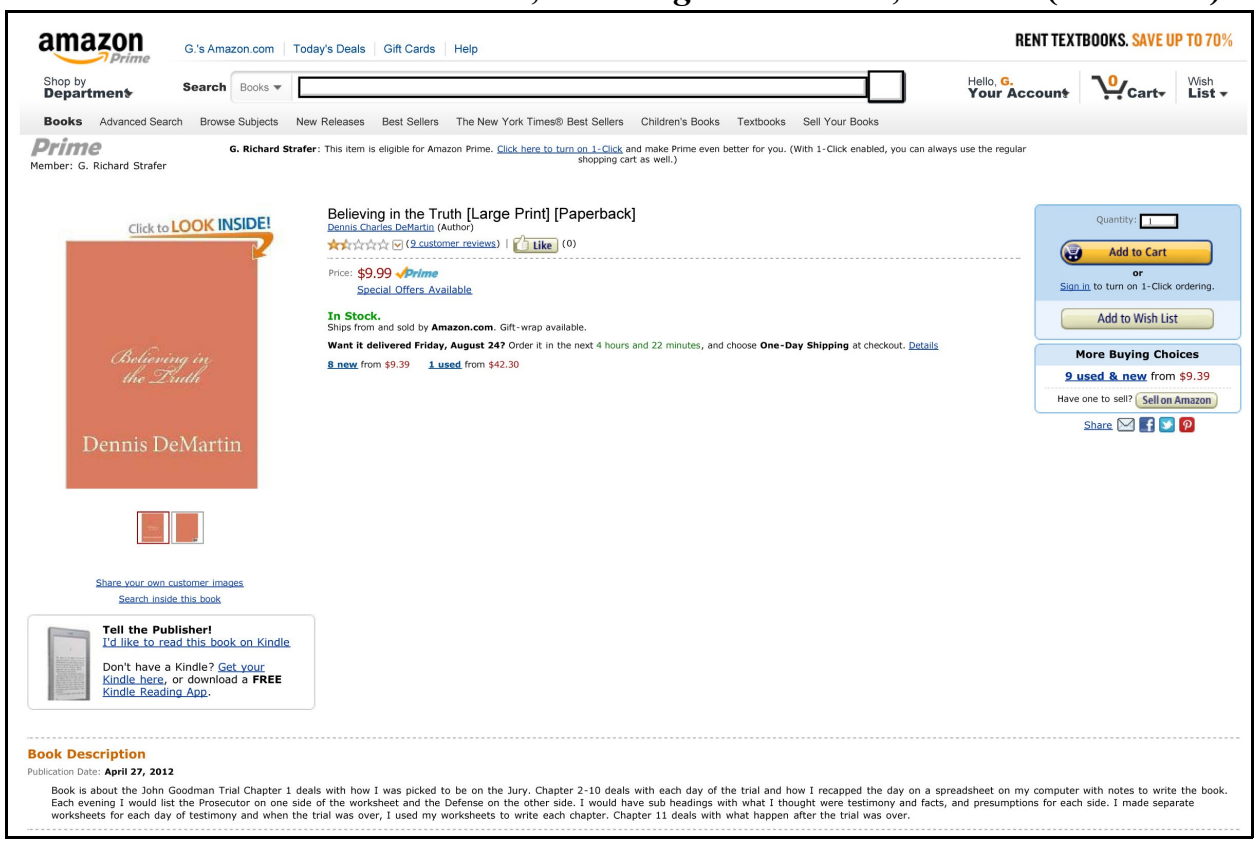
INITIAL BRIEF OF THE APPELLANT

ROY BLACK, ESQ.
MARK A.J. SHAPIRO, ESQ.
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 South Biscayne Blvd., Suite 1300
Miami, Florida 33131
Ph. 305-371-6421: Fax 305-358-2006
E-mails: Rblack@RoyBlack.com and Mshapiro@RoyBlack.com

G. RICHARD STRAFER, ESQ.
G. RICHARD STRAFER, P.A.
201 South Biscayne Blvd., Suite 1380
Miami, Florida 33131
Ph. 305-374-9091; Fax 305-377-9937
E-mail: straferpa@aol.com

PREFACE

Juror Dennis DeMartin's book, *Believing in the Truth*, On Sale (R23:4569)



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Miscellaneous

STATEMENT CONCERNING CITATIONS TO THE RECORD

Citations to the 55-volume Record-On-Appeal will be referred to as "R:" followed by the appropriate volume and page number(s). The 1-volume Supplemental Record will be referred to as "SR:" followed by the appropriate page number(s).

STATEMENT OF THE ISSUES

I. Whether Goodman was entitled to a judgment of acquittal of DUI manslaughter where the State failed to rebut his reasonable hypothesis of innocence?

II. Whether the State violated *Richardson* and due process by soliciting a car manufacturer to pay for and orchestrate secret tests on Goodman's vehicle and on an "exemplar" vehicle at the end of the trial and then concealing *Brady* material about sudden acceleration problems in the manufacturer's vehicles?

III. Whether a key witness' testimony should have been excluded based on the collusion between the prosecutors and the civil attorneys representing the decedent's family in giving the witness a "free" lawyer and whether the circuit court violated the Confrontation Clause by barring impeachment of the same witness about her dream/premonition concerning Goodman?

IV. Whether Goodman is entitled to a new trial due to serial jury misconduct and the circuit court's errors in concealing and then refusing to fully investigate it?

V. Whether Goodman was entitled to several special jury instructions and a "willfulness" instruction on the enhancement for the "failure to render aid and remain at the scene" and whether Goodman is entitled to a new sentencing, in any event, based on the circuit court's erroneous ruling that the jury found "willfulness"?

VI. Whether the cumulative effect of the errors requires a new trial?

STATEMENT OF THE CASE AND FACTS

Introduction

At 12:45 a.m. on February 12, 2010, Appellant John B. Goodman ("Goodman") crashed his Bentley into a Hyundai, killing its driver, Scott Wilson. R44:2096-97; R46:2441. Goodman was subsequently convicted of DUI Manslaughter/Failure to Render Aid and sentenced to 16 years in prison. R24:4715, 4721. The media blanketing the case feared that Goodman would use his wealth to fix the outcome. The media was half right; the pursuit of wealth undermined the proceedings. The Circuit Court allowed the case to be derailed by the financial interests of third parties – civil attorneys, suing Goodman for millions, who poisoned the jury pool and influenced a key witness by giving her a "free" attorney, the *Palm Beach Post*'s desire to sell newspapers, a stealth juror seeking fame and fortune at Goodman's expense, and a car manufacturer seeking to prevent lawsuits if Goodman was acquitted. This perfect storm of outside influences, at the very least, warrants a new trial.

Pretrial Proceedings

The Pretrial Publicity and Arguments About Moving the Bentley

When Goodman was not immediately charged after the crash, Wilson's parents retained personal injury attorneys Scott Smith and Christian Searcy to sue him. R5:485. Fueled by their interviews and staged "press conferences" (*see* R2:245-47),

as well as statements by police and lead prosecutor, Assistant State Attorney ("ASA") Ellen Roberts, the media unleashed an avalanche of prejudicial publicity against Goodman aimed largely at his wealth and social status and frequently comparing his "200,000" Bentley to Wilson's inexpensive Hyundai. R1:194-200; R2:235, 259-60.[1] In one story attacking "multi-millionaire" Goodman for hiring undersigned counsel, ASA Roberts stated "the only difference between [defense counsel] and me is they make a lot of money." R2:241; R10:1971; R34:591; R40:1556.

On May 19, 2010, the State filed a 2-count Information, charging DUI manslaughter and vehicular homicide. The manslaughter charge also alleged that Goodman "willfully" failed to remain at the scene, invoking the enhancement in F.S. §316.193(3)(b) and increasing the maximum penalty from 15 to 30 years. R1:7.

The State impounded the Bentley after the crash. Fearing that the State would damage it, on March 1, 2010, counsel wrote the State that they wished to be present for any tests. R19:3683-87. ASA Roberts ignored the request. Goodman filed a motion to have the Bentley, which was still sitting in Palm Beach County's open-air impound lot, moved to a location where it could be thoroughly examined. R1:35-45. Although Goodman agreed to have the State present and videotape the tests, the

[1] Goodman was referred to as a millionaire, billionaire or "mogul" 197 times, and bloggers threatened his life, mob violence and to have the judge "removed from the bench" if he was acquitted or given a "light sentence." R2:214-15, 223-29, 258-59.

prosecutors objected, insisting that "[t]he mere moving of these vehicles" on flatbed trucks "could compromise the[ir] integrity.... The risk of evidence spoliation is great." R1:135. They also objected to the defense conducting tests outside their presence, arguing that "secrecy" was unnecessary and suspicious and that their presence was "essential ... so that the integrity of the evidence is preserved." R1:138. The Wilsons' attorneys filed similar oppositions in both their civil wrongful death action and the criminal case. R1:55. Sustaining the tag team of objections, the court denied the defense motion. R1:139-40.

Later, the State moved for the jury to view the crash vehicles. R8:1490. Goodman opposed the motion, arguing that the State had already compromised their integrity by frequently moving them and leaving them exposed on the impound lot for two years. R8:1504-05. The court overruled the objections but ordered that the viewing take place at the courthouse. R8:1534. Although that required carting the Bentley back and forth on a flatbed truck, neither side objected since, by then, their respective experts had already completed their tests on the Bentley.

The Secret "Pouring" Test and Concealment of Brady Evidence

A key State witness was bartender Cathleen Lewter. From her depositions, the State knew that she only poured Goodman four drinks, not enough to intoxicate him or to produce his post-crash blood alcohol levels. Taking their cue from the Wilsons'

attorneys, who tried to confuse Lewter in civil depositions about how much she poured (R:39:1366-71, 1388-89), the prosecutors secretly forced Lewter to go to their office without an attorney and demonstrate her pouring accuracy. When she consistently poured drinks accurately, however, the prosecutors hid the exculpatory results from Goodman. R39:1374-76.

The State Deposes Defense Expert Luka Serdar

On February 3, 2012, the State deposed defense expert Luka Serdar. He testified that the Bentley's diagnostic codes were critical to the defense and that error codes in the computer system revealed a malfunction in the throttle that may have caused an unexpected acceleration. R17:3363-69. The prosecutors characterized this as the "runaway vehicle" defense and admitted at a post-verdict press conference that it was Serdar's deposition that caused them to contact and "convince Bentley that they needed to step in and give us input." R17:3308, 3377.

Jury Selection and Opening Statements

Throughout the pretrial period, the Wilsons' attorneys continued to fuel prejudicial publicity, including about Goodman invoking the Fifth Amendment during depositions. R2: 251-53. Goodman sought a change of venue, accusing the attorneys and prosecutors of unethically fomenting publicity and warning of the potential for "'stealth' jurors" with ulterior motives who would try to "get seated" on

the "high profile" case. R2:293. The court denied the motion, trusting in voir dire to ensure a fair trial. R8:1512.

Voir dire started on March 6, 2012. Outside picketing the courthouse then, and throughout the trial, was a man holding a large sign ("LOCK HIM UP AND THROW AWAY THE KEY") and screaming expletives at Goodman and his counsel, all within earshot of the jurors. R17:3286-87; R35:755; R41:1680-81; R43:1881-82; R55:3736-37. The Wilsons' attorneys were present throughout the trial and tried, unsuccessfully, to participate in sidebars. R3:329; R5:484-87.

Most of the prospective jurors had heard about the case and many voiced prejudice about Goodman's wealth. *See, e.g.,* R29:82, 84; R30:207, 213-14; R31:359; R32:447-48; R33:501. Teresa Lewis, eventually selected as a juror, heard about the "polo guy," believed that the rich "have more advantages," but claimed she could be fair. R29:162, 170-71; R30:175; R35:819. Dennis DeMartin also admitted hearing about the case but said he would rely on "the law" and not "some personal code." R30:262-63; R35:795-96; R37:1083. When defense counsel asked if the panel was familiar with "sudden acceleration" problems in some cars, the prosecutors began making "facial expressions and gesticulations" to the jury. R37:1047-50. Counsel objected but the court merely cautioned everyone to be "mindful" of their behavior. *Id.* Once the jury was selected, and again before opening statements, the court

explicitly warned jurors not to "talk about the case" or conduct their own "investigat[ion] ... outside of the courtroom." R37:1133-35; R38:1156-59.

After jury selection and citing unnamed "sources," the media reported Goodman's confidential settlement with the Wilsons and speculated that he paid them millions. R9:1778-1781, 1788-1818. Goodman moved for a mistrial, but the court denied it when Lewis was the only juror who admitted hearing about it. R9:1778; R38:1151-53; R39:1324.

During statements, ASA Roberts compared Goodman's "expensive Bentley" to Wilson's "little Hyundai," although the cars were almost the same size. R38:1163, 1173; R49:2885. She also emphasized that Goodman liked "high-end vodka." R38:1162. Anticipating Goodman's sudden acceleration defense, she said that "[a] Bentley mechanic inspected the vehicle and determined there were no problems with [it]...." R38:1173. Defense counsel, relying on Serdar's analysis, stated that the computer system controlling the Bentley's two throttles malfunctioned, thereby causing fuel to keep pumping into the engine. As a result, the car "surge[d] forward, he panics, and it shoots into the intersection...." R38:1179-83, 1197-98. Counsel's opening about the malfunctioning Bentley drew immediate headlines (R17:3310, 3416-28), prompting Bentley to release a statement that "[w]e don't have any such incidents (sudden acceleration)" due to Bentley's "smart-pedal technology...."

R17:3431. The next day, Thomas Livernois, a "sudden acceleration" expert for the auto industry, received a call from the New York law firm that defends Bentley and its parent company, the Volkswagen Group. The same firm also defends Toyota in "sudden acceleration" claims across the country and has criticized the "legal tsunami" of such lawsuits. R17:3311; R18:3472, 3494-3556. R53:3456-61, 3497-98. Alarmed by Goodman's defense, the firm paid Livernois $10,000 to testify against Goodman, a fact which was not disclosed until Livernois testified. *See* pp. 22-23 *infra*.

Statement of the Facts

The Charity Event At the White Horse Tavern

On February 11, 2010, the White Horse Tavern in Wellington was sponsoring a polo-related charity event for the YMCA. R38:1213, 1255; R48:2801. Five male polo players and female horse enthusiasts acted as "celebrity" bartenders. R38:1256; R46:2378; R48:2802. Goodman attended but was served only one drink, a vodka tonic, by Kris Kampsen. R38:1220-23, 1258; R46:2378, 2383-84; R48:2781, 2802.

At 9:00 p.m., Goodman and guests had dinner on the patio. Goodman ate a full steak dinner and, due to poor service, no drinks were served. R38:1224, 1259-60; R48:2787-88, 2793, 2805-07. Lead investigator Troy Snelgrove, after interviewing at least a dozen witnesses, admitted that the State had no evidence that Goodman had more than one drink there. R38:1260; R46:2381-87, 2436; R48:2789, 2812-13. And,

the State's toxicologist, Tate Yeatman, conceded that Goodman's blood alcohol level would have been "zero" when he left. R46:2448.

Goodman's Three Drinks At the Player's Club

After leaving the tavern, Goodman drove to the Player's Club, which had bars inside and outside. Cathleen Lewter was the sole bartender inside and was the "eyes and ears" on the 15 customers. R38:1297-1300; R39:1348, 1392-94. Kampsen and his friends were already there when Goodman arrived at 11:23 p.m. R38:1309. Goodman went to the bar and ordered 10 shots of tequila, drinking one and giving the rest to Kampsen's group. R38:1303-04. Kampsen ordered 6-10 "Irish Car Bombs" (combining three types of alcohol) for his friends, offered one to Goodman but he rejected it. R38:1231-35, 1261-62.[2] Someone also ordered 8 "Mind Erasers" (another combination drink) but neither Lewter nor anyone else saw Goodman drink one, and Lewter had never seen Goodman order those types of drinks before. R38:1317-18; R39:1326-28, 1363, 1366-71. Goodman later ordered a second round of 5 shots of tequila but only drank one. R38:1310, 1312. Lewter saw Goodman have only one additional drink, a vodka tonic, which he sipped the rest of the evening while talking to Stacey Shore, and there was still liquid in it when Goodman paid the bill. R38:1313, 1315; R39:1354-59.

[2] The prosecutors' "wealth" questions to Lewter emphasized that Goodman asked for the "best" tequila and liked to drink "upper-end" vodka. R38:1303, 1306, 1308-10.

Neither Kampsen, Lewter, the Club's manager (Matthew Barter), the Club's valet nor Shore (a defense witness) thought that Goodman was intoxicated, slurred his words or smelled of alcohol when he left. R38:1262-63; R39:1328-30, 1345, 1364-65, 1408-09, 1413; R50:3033-34, 3045-47.[3] Indeed, Goodman "looked perfectly normal" to the valet, who was trained to withhold keys from drunk patrons. R39:1437-38, 1443-45. With no one witnessing Goodman drink any Irish Car Bombs or Mind Erasers, the prosecutors accused Lewter of "over pouring" Goodman's three drinks (R39:1331-37), while concealing their pretrial "pouring" experiment which debunked that accusation. *See* pp. 4-5 *supra*. When Lewter then revealed what happened, the prosecutors claimed there had been no *Brady* violation because they had not videotaped the test. R47:2590-93: R48:2825-26. Agreeing, the court refused to permit counsel to cross-examine Dep. Snelgrove about the episode. R47:2593.

The Accident

With no street lights on 120th Avenue and only a crescent moon, Dep. Snelgrove agreed it was dark. R43:1900; R44:2072-73. When the accident occurred at 12:45 a.m., Wilson was driving down Lake Worth Road, speed limit 45 mph, at 44 mph, while Goodman was driving down 120th Avenue, speed limit 35 mph, at 63

[3] Shore was with Goodman for one and a half hours and saw him consume two of the three drinks. R50:3026-31, 3045.

mph. R44:2024-27, 2096-97; R46:2441.[4] The vehicles were nearly the same size but the Bentley outweighed the Hyundai, causing the Hyundai to roll into a canal. R43:1994-95; R44:2040-41; R47:2537, 2540; R49:2885.

Five minutes later, Nicole Ocoro was driving home on Lake Worth Road. Spotting the wrecked Bentley, she called 911and reported that she did *not* "see another car." R40:1491-97; R43:1927, 1974. She then got out of her car and, with its headlights on, walked by a canal next to the road but several feet below the pavement. Seeing nothing, she thought the accident was a hit and run. R40:1500, 1505-06. Two men also drove by and called 911. They too only saw the Bentley but noted tires and a bumper in the canal. R43:1933-36. When officers arrived, the men alerted them to the canal but neither the police nor Fire Rescue attempted a rescue. R41:1691, 1741. When the Hyundai was later pulled from the canal, they discovered that its driver, Scott Wilson, had drowned. R48:2689.

The Bentley's windshield was cracked but Dep. Snelgrove claimed it was caused by the accident, not from Goodman's head hitting the glass. R44:2034-38. Dep. Snelgrove also believed that Bentleys have a crash shutoff for the fuel pump but admitted that he did not know "anything about the computer-type systems" that control a Bentley's engine and braking systems and did no tests to see whether the

[4] A defense expert estimated the Bentley's speed at 49-58 mph. R49:2950-56.

shutoff was working properly. R44:2062, 2064-65, 2146-47. He checked only the hydraulic fluid and pumped the brakes. R44:2058, 2061.[5]

The Aftermath

Lisa Pembleton lived in a trailer south of the crash. R38:1250; R40:1508. Sometime in March 2010, she was approached by attorney David Kelly from Searcy's firm, who arranged a meeting where Searcy and Kelly introduced their former partner, Harry Shevin, and offered to have Shevin represent her for free. R17:3289-90; R40:1541-43, 1546, 1562-65. Shevin then invoked the Florida Bar's "anti-contact rule" to prevent the defense from contacting Pembleton, while making her fully available to the prosecutors and his former partners. R40:1551-52, 1566-67. Pembleton claimed that she never asked who was paying Shevin and Shevin apparently claimed during a deposition that he was not being paid. R40:1564-65, 1597. As the court noted, "[i]t seems like the plaintiffs' lawyers wanted her to have a lawyer so that that lawyer could insulate the witness from the defense...." R40:1555. ASA Roberts defended the ploy by falsely telling the court that Pembleton was "a scared little girl" who "needed a lawyer because [the defense] investigator kept harassing her, I feel confident of that." R40:1543. When asked about it, however, Pembleton said she had never been approached by the defense. R40:1553.

[5] During Dep. Snelgrove's testimony on March 15, the jurors and others viewed the wrecked vehicles in the parking lot of the courthouse. R43:2002-04.

Goodman moved to strike Pembleton's testimony as illegally purchased (R11:2204-09), but the court denied it. The court allowed cross-examination about the free lawyer but then barred questions about a blog in which Pembleton described having had a premonition in a dream before the accident about "a guy coming into my camper, saying he was in an accident and needed a phone." R17:3292; R26:288; R40:1589-90; R43:1877-78. *See* **Appendix 1**.

Pembleton testified that Goodman banged on her door and barged in at 1:30 a.m., asking for a telephone and stating that he had been in an "end-of-the-world accident." R40:1519-21, 1530, 1585-86. He repeatedly asked "where am I," and appeared "[j]ust not right ... slow, out of it." R40:1528-31, 1580. While he did not appear to be in pain, he "possibly" acted like he had been hit in the head. R40:1529, 1537, 1579. She did not smell alcohol but Goodman said that he had had "a few" drinks. R40:1527, 1580, 1598.

Pembleton handed Goodman her phone and, at 1:52 a.m., he called a friend, Heather Colby, stating that "I really effed up," that he had "stopped at a stop sign" and hit something as he pulled out. R40:1524–25, 1611; R43:1971. Goodman asked Colby to have Carlos Leslie, Goodman's horse manager and driver, come help him but Leslie could not reach Goodman. R39:1450-51, 1460; R40:1525, 1535, 1578, 1611, 1614; R43:1971-72, 1985. When Goodman asked Pembleton what he should

do, she said to call 911. R40:1527. He wondered whether he should call his lawyer and "turn myself in" but Pembleton reiterated that he should call 911. *Id*. He did so at 1:54 and 1:55 a.m., telling the dispatcher that he had stopped at a stop sign and "pulled out in front of" another car which he had not seen coming. R43:1937-39, 1946, 1950, 1974. He "tried to call" 911 but his "phone was dead" so he went "down the road ... to a barn" to "find a phone." R43:1937-39, 1944. Goodman repeatedly asked if "everyone" was "okay," stating "I'm so sorry," "this is a disaster" and asking "I'm going to be in big trouble, huh?" R43:1945, 1947-50. R43:1950.

Goodman then left and flagged down the police. R40:1531, 1577; R41:1745-46; R43:1940. The officers who drove Goodman back to the scene testified that Goodman slurred his speech and that the odor of alcohol was so strong it could be smelled from 5 feet away – so strong, in fact, that the police car had to be ventilated to get rid of the smell. R40:1637; R41:1696-98, 1718, 1746-48, 1765. They confirmed that Goodman's phone was dead. R40:1637; R41:1749.

Two EMTs examined Goodman. Although they disagreed about how steady Goodman was on his feet, they agreed that he slurred his speech, smelled of alcohol and admitted to having had a couple glasses of wine. R42:1784, 1787, 1789, 1802, 1822-23, 1829, 1839. They both saw a laceration on his forehead, which later swelled up, and while Goodman did not exhibit obvious signs of a concussion, his

behavior was consistent with one. R42:1785, 1788-1801, 1805; 1836-37, 1841. Goodman told both that he thought he had stopped at the stop sign and then hit somebody afterwards. R42:1788, 1824-27.

After Goodman was taken to a hospital, he complained about pain in his wrist, chest and neck. R45:2183, 2212, 2221-22. He also reported that he had chronic back pain for which he had been prescribed hydrocodone. R45:2179. A nurse noted the head laceration but Goodman did not complain about it and showed no immediate signs of a concussion. R45:2183, 2186-91, 2202. However, the hospital did not conduct a CAT scan or MRI of Goodman's head and the nurse conceded that symptoms vary. R45:2193-94, 2204. When Snelgrove later interviewed Goodman at the hospital, he still smelled of alcohol, had bloodshot eyes and slurred his speech. R43:1911; R44:2087.

Goodman's blood was drawn at 4:00 a.m. and had a blood alcohol level of about 0.177, which toxicologist Yeatman said was consistent with Goodman having the three witnessed drinks *plus* an Irish Car Bomb and a Mind Eraser. R46:2414-25. However, when the steak dinner was considered, Goodman would have had to consume even more to reach 0.177 and would have displayed "both cognitive and psychomotor impairment" – which Yeatman conceded no one saw. R46:2455-58. Conversely, Yeatman acknowledged that if Goodman only had the three witnessed

drinks, his blood alcohol level would have been less than 0.04 and even lower if the alcohol in the drinks was only 80 proof, a fact Goodman established during the defense case. R27:458-64; R46:2452, 2456. Goodman's blood also revealed 42 nanograms of hydrocodone, at the far low end of the therapeutic range. R45:2317, 2324-38; R46:2415, 2426, 2459. While this amount had the "potential" to have an "additive" effect to the alcohol, Yeatman was unable "to quantify the degree or the amount of increase in overall impairment," if any. R45:2321; R46:2428.

Dep. Snelgrove continued to investigate the crash site and noticed boot prints that matched Goodman's and followed them south where they allegedly stopped near the end of Pembleton's driveway. R43:1905-08; R44:2069; R45:2246-56. However, Dep. Snelgrove admitted that her trailer was not visible from the road. R44:2072, 2091-92. The police also did not look for footprints around Kampsen's adjacent property and found no prints by Pembleton's trailer or the canal. R43:1908-09; R44:2079-80, 2082-83, 2095; R45:2264-65, 2272.

Goodman's Testimony and Corroborating Evidence

Goodman confirmed the testimony of the State's witnesses that he had only one drink at the White Horse Tavern, three at the Player's Club and was not impaired. R51:3238-44.[6] After leaving the Club, he was driving on Lake Worth Road when the

[6] When Goodman took the stand and stated he was nervous, ASA Roberts "burst out (continued...)

accident occurred and admitted that he was speeding but stated that when he applied the brakes as he approached the stop sign at 120th Avenue, the car did not react properly. Applying more braking power, he slowed "well before the stop sign" but when he took his foot off the brake, something happened "and that's the last thing I remember." R51:3244-47; R52:3356. After being unconscious for an unknown time period, he got out of the car in "real bad pain" from his head, chest and wrist but did not see what he had hit and saw no other vehicle. R51:3248-49; R52:3361, 3366, 3379-82. He left the scene because his cell phone was not working and the road was deserted. R52:3370. He saw no buildings down Pembleton's driveway but spotted a light by Kampsen's barn. R51:3250-51; R52:3289, 3364.[7]

As Kampsen testified, his barn had a second floor apartment which he called his "man cave." It had no telephone but Kampsen kept it unlocked and stocked with alcohol for friends to use. R38: 1240-47, 1270, 1277, 1281; R46:2351. Goodman went to the barn and knocked on a first floor apartment where Kampsen's employees,

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[6](...continued)
laughing" and, as the circuit court acknowledged, "gave the appearance to the rest of us in the courtroom that you were laughing at Mr. Goodman...." R51:3231; R52:3297-98. When Roberts claimed she was laughing at something else, defense counsel put on the record the prosecutors had been making facial expressions and audible derogatory comments throughout the trial. R52: 3299-3300. Finding Roberts' conduct "inappropriate," the court instructed the jury to disregard it. R52:3297-98.

[7] Both Dep. Snelgrove and Dep. Stephan had reluctantly agreed that Kampsen's barn could be seen from there, at least in daylight. R44:2093; R45:2271.

Paula and Marcos DaSilva, lived. R46:2349-2351; R51:3250-52. When no one answered, he went to the upstairs "man cave" but could not find a phone. R52:3346.[8] In "excruciating pain," he drank some of the liquor, hoping to alleviate the pain. R51:3253; R52:3369. After leaving the barn, Goodman saw a light by Pembleton's trailer. R51:3253-54. He knocked, entered and asked to use her phone.

Goodman also described the injuries he suffered during the accident. R51:3255; R52:3343-44. Before the accident, he already suffered from back pain for which he took pain medication but he did not remember taking any that day. R52:3345.[9] Dr. Richard Hamilton, a brain injury expert, testified that if Goodman's head had hit the car's windshield, he probably would have had a concussion. R48:2707, 2732-33. The symptoms of a concussion were similar to being drunk with "disorientation and confusion." R48:2709-10, 2718. Commonly, such patients do not realize that they had been unconscious and are "unreliable historians about what happened to them" because they can suffer from "confabulation" – or conveying an

[8] The DaSilvas testified they heard banging around 1:30 a.m. but assumed it was the horses. R46:2355. The next morning, Mr. DaSilva saw that the lights and television were on in the man cave, even though they were off the night before. R46:2355-61.

[9] At a break, a juror reported that ASA Roberts "keeps making faces towards" the jury. R26:311. She denied it, but the court was unconvinced now that a juror had "independently" reported it and stated that it was "offensive" and allegedly would not "be tolerated." R52:3384-85.

elaborate explanation of what happened that is inaccurate, although not intentionally. R48:2712-13, 2720-21.

The Testimony of Forensic Engineer Luka Serdar

Serdar has a Masters from MIT and has worked for NASA, the U.S. military and car manufacturers. R51:3096-3111. He testified that Goodman's Bentley had a powerful engine that could go from 0-60 in 4-4½ seconds. R51:3125-29. He inspected the Bentley, generating a list of "trouble codes" from its computer system. R51:3122-23, 3130-34. The codes revealed that the engine's two throttles were not synchronized, meaning that one of them could delay shutting when the brakes were applied, producing a surge of unknown strength. R51:3139-48, 3166-67, 3199, 3202. Such a malfunction may have "contributed" to the crash. R51:3208.[10]

Juror DeMartin Misleads the Court and Goodman

During Serdar's testimony, the court disclosed that it had received a letter (dated March 20) from DeMartin, stating that he had been writing a senior citizen "dating" book, that he had been corresponding with publishers about it and that "[i]f I was successful with that book, I would consider using the process to writ[e] about the experience of being a juror." R26:304-05, 309; R51:3143-44. Since DeMartin

[10] While questioning Serdar, ASA Roberts repeatedly referred to the "quarter of a million dollar" Bentley. R51:3174, 3190-92. When the court sustained objections to the tactic, she began calling it "this very expensive car." R51:3198, 3209, 3228.

was allegedly not *already* writing a book about the trial – which the court, at this point, stated would have been "inappropriate" (R53:3537) – the parties did not question him. In fact, as discussed *infra*, DeMartin had been working on a book about the trial every evening and, as he later admitted to the media, "I told them [the other jurors] about the notes that I was making every night." R20:3873-76, 3883-89.

The State's Rebuttal Case - The Testimony of Thomas Livernois

The prosecutors did not disclose Livernois as a witness until March 15, 2012. R11:2210. When Goodman moved to exclude his testimony as a *Richardson*[11] and due process violation (R11:2226-32), the prosecutors falsely claimed they did not ask Bentley for help until hearing counsel's "surprise" opening statement and that Serdar's trial testimony was somehow different from his deposition. R47:2620-22, 2630.[12] Before ruling, the court allowed defense counsel to depose Livernois, who the prosecutors claimed was arriving from California on the morning of March 20, 2012, and that the defense could depose him that afternoon after he had "physically look[ed] at the car to be able to give an opinion." R49:2833, 2836. In fact, Livernois had arrived on Sunday, March 18, 2012, to conduct new, secret and physically

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[11] *See Richardson v. State*, 246 So.2d 771 (Fla. 1971).

[12] As previously noted, in their post-verdict press conference, the prosecutors confessed that it was really Serdar's deposition, one month before trial, that prompted them to seek Bentley's help. *See* p. 5 *supra*.

manipulative tests on the Bentley, which had been shuttled back to the impound lot on a flatbed truck after the courthouse viewing. No notice of the test was given to the defense and it was not videotaped, despite the fact that Livernois used his fingers to physically tamper with the throttle. R52: 3403; R53: 3527-28; R26:251-56.

On the morning of March 20, 2012, Livernois went to the Bentley dealership in Palm Beach where he met engineer Paul Heenan, who had also been retained (for some undisclosed figure) by the Volkswagen Group to secretly conduct tests on a *different* Bentley – hand-picked by the Group to serve as an "exemplar" vehicle supposedly representative of the model. R53:3468, 3470, 3528. Heenan, who did not testify at trial, conducted the tests, while Livernois watched as he kept in contact "verbally with Bentley." R53:3509. R53:3506, 3531. Livernois claimed to know nothing about Heenan's arrangements with the Group and the State produced no discovery on the matter. R53:3531. Diagnostic codes on the "exemplar" Bentley were generated at 11:44 a.m. and 12:12 p.m. on March 20, 2012. R26:258, 267. The defense deposed Livernois after court ended that same day. R17:3435.

The next morning, the court conducted a *Richardson* hearing. Counsel argued that, contrary to the State's (and the Wilsons') objections to the defense tampering with the Bentley in secret, the prosecutors had allowed Livernois to do that very thing and the defense had "no opportunity" to "look into that" or to "rebut it." R51:3261-

63. Counsel also objected to admitting tests conducted on the mysterious exemplar vehicle, noting that Livernois had a "special relationship" with and was being paid by the manufacturer "to testify in sudden acceleration cases." R51:3257-61. The prosecutors continued to blame Goodman for counsel's supposedly "surprise" opening statement[13] and argued that the defense had been "dilatory" in not deposing Livernois earlier – even though Livernois' tests were only completed 4½ hours before the deposition while everyone was in court. R51:3260, 3265, 3275. The court nonetheless agreed with the State, holding that "there is no *Richardson* violation in the classic sense" because the State turned over Livernois' name on March 15 and because the State allegedly gained no "unfair advantage" since the defense had been able to depose him. R51:3279-80.

Allowed to testify, Livernois claimed that the accident caused the throttle malfunction codes and that all vehicles manufactured by the Volkswagen Group had a "failsafe" system that would *never* permit "sudden acceleration." R52: 3399, 3404-05, 3412; R53:3525. "It just – it won't happen." R52:3413-14. Livernois also relied heavily the Heenan-controlled tests on the exemplar Bentley, which allegedly confirmed his opinion about the cause of the codes. R52:3410-12; R53:3506-07, 3510-15. On cross-examination, Livernois revealed for the first time that he was

[13] Goodman demonstrated in detail how Serdar's deposition and trial testimony were virtually identical. *See* R12:2271-82. The State filed nothing in response.

being paid, not by the State, but by the Volkswagen Group's lawyers. Counsel moved to strike his testimony and/or for specific disclosures under *Giglio* about "who was paying him and what the arrangements" were. R53:3478-79. The prosecutors claimed that they learned about Livernois through Dep. Snelgrove, not any "civil attorneys," and that when they were told that the State did not have to pay Livernois, they "never asked anything further." R53:3474, 3479. The court then denied the defense motion, holding that deposing Livernois was sufficient and because the information about Livernois' payments was allegedly not in the State's possession. R53:3479-80. The court also refused to issue a cautionary instruction to the jury concerning Livernois' possible conflict of interest. R53:3544-46; R15:2869.

While counsel were permitted to cross-examine Livernois about his fees, when counsel tried to probe the circumstances surrounding *Heenan's* involvement and the appearance of the exemplar Bentley, the court claimed that the questions were "inappropriate," lacked "professionalism" and threatened to "start explaining to this jury that it's not improper to do the things that you're hinting or insinuating to this jury that there's been some sort of inappropriate behavior, which there has not been...." R53: 3532; *see also* R53:3527-28.

Following Livernois' testimony, counsel reported that Juror DeMartin made a dismissive gesture and comment to Juror Lewis and requested that they be

questioned about that and DeMartin's book writing, "given what he ... says in the letter that he's going to write about the case." R53:3534-39. DeMartin was summoned but claimed the gesture and comment were merely about a lost shirt button. R53:3540-41. When Lewis confirmed DeMartin's story (R53:3543), the court asked no questions about the incident or the book.

The Disputed Jury Instructions

Fla. Stat. § 316.062 is a *noncriminal* traffic infraction punishing the failure to give information and render aid at the scene of an accident based on a strict liability standard. Under both the felony statutes for DUI manslaughter and vehicular homicide, the Florida Legislature incorporated this enhancement by reference without expressly adding any *mens rea*. *See* Fla. Stat. §§ 316.193(3)(c)(3)(b)(I) and (II); 782.071(1)(b)(1) and (2). Nonetheless, as previously noted, the Information alleged that Goodman's failure to render aid was "willful." *See* p. 3 *supra*.

Ignoring the Information, the prosecutors requested Pattern Instructions 7.8 and 7.9 which would authorize conviction on a strict liability standard. Goodman objected and proposed his own "willfulness" instruction. R12:2234-40, 2244-46; R50:3055-57, 3060. The court overruled the objections and refused to issue his requested instruction without explanation. R50:3058-60. Goodman also requested a theory of defense instruction, which would have told the jury that it was a legal defense to the

enhancement if Goodman's conduct was "a result of being disoriented or confused because of a head injury...." R12:2247. The court rejected that instruction too, holding that Goodman's "intent to leave the scene would be completely irrelevant," regardless of Goodman's head injury. R12:2313; R52:3418-22; R53:3444.

Goodman also requested a "spoliation" instruction based on the State's bad faith failure to maintain Goodman's Bentley in its original condition by: (1) leaving the it exposed to the elements for two years on the impound lot; (2) transporting it to and from court on a flatbed truck after successfully arguing that would "compromise" its "integrity"; and (3) allowing Livernois to tamper with it during his testing, while not videotaping or allowing Goodman to witness the tests. R12:2307-11. The court denied the instruction without explanation.

The Closing Arguments and Tainted Verdict

During closings, the prosecutors repeatedly juxtaposed the "quarter of a million dollar" and "very expensive" Bentley with the "little bitty" Hyundai. R54:3692-93, 3698-99, 3712-13. While conceding that Goodman was "not a bad man" and that he lacked intent, they argued that there was no legal excuse for his failure to remain at the scene and render aid to Wilson. R54:3625, 3686, 3712. They then used Livernois' testimony to belittle Goodman's defense, claiming that neither "Bentley, [n]or any car manufacturer, has designed a product like that," risking liability.

R54:3692-95. The prosecutors also relied heavily on Pembleton's testimony, claiming she was "scared to death after this happened" and complimenting the "pro bono" attorney who represented her. R54:3623, 3710.

The jurors began their deliberations but could not reach a verdict by the end of the day. Unbeknownst to the defense, that evening, DeMartin conducted his own drinking experiment. In the book he later published on Amazon.com, *see* R23:4569, DeMartin described how it was "bothering" him that he did not know "how drunk" Goodman would be if he "only had 3 or 4 drinks" so "I decided to see." R23:4547, 4597.[14] Between 9 and 10 p.m., DeMartin drank three vodka tonics and then took a walk. The drinks made him "so confused" that he lost his way but he finally made it home. *Id.* In the morning, he "felt relieved" because "[t]he question in my mind the night before was answered to me. Even if a person is not drunk, 3 or 4 drinks would make it impossible to operate a vehicle." *Id.*

The next day, another juror asked to hear the 911 tape. R55:3731, 3736, 3740-68. In his book, DeMartin described how the jury found Goodman guilty after rehearing it but DeMartin acknowledged: "I surely decided that the night before." R23:4599 (underling by DeMartin). After the jury's verdict, the court granted the State's motion to nolle prosse Count 2. R55:3781.

[14] During voir dire, DeMartin stated that "I think I myself personally, I can have two drinks and I'd be fine." R37:1082.

The Trial Court Conceals Evidence of Jury Misconduct

As previously noted, after the verdict, the prosecutors told the media that, contrary to what they said in court, it was Serdar's deposition (*i.e.*, not counsel's opening) that caused them to solicit Bentley's help in refuting the "runaway car" theory. R17:3308. DeMartin also gave a televised interview. R18:3664-68; R22:4367. The clip broadcast did not refer to his book but later, referring back to this interview, CBS reported: "He told us then he's writing a book about his experience on the jury and showed us the daily notes." R20:3874, 3892.

On March 27 and 28, 2012, one of the alternate jurors, Ruby Mei Delano, twice telephoned the court's chambers, leaving at least one message with the court's secretary, wishing to report numerous forms of juror misconduct, including that: (1) jurors had disobeyed the court by "often discuss[ing] witness testimony and other evidence throughout the trial";[15] (2) some jurors "had already made up their minds before Thursday, March 22nd"; (3) jurors "[o]n many occasions" made derogatory comments about Mr. Goodman's wealth, mostly about him "having enough money to hire good lawyers" and "probably being guilty but getting away with it because he

[15] The discussions included "how anyone could have an accident and then go and drink ... why Mr. Goodman did not first call 911 ... why he did not stop at the stop sign" and "how Mr. Goodman could have passed his own driveway on 120th Avenue... We all had things to say about the trial as it progressed each day...." R18:3637-38.

has a lot of money. Although no one specifically used the word 'guilty'"; (4) DeMartin had lied about the meaning of his hand gesture and comment to Lewis; and (5) DeMartin was writing a book about the case during the trial and "would frequently tell us that he wrote down what happened in court each day, and all the jurors knew about it." R18:3637-41, 3670. The court did not return the calls or inform Goodman about them.

Also on March 28, 2012, DeMartin sent the court a second letter, attaching the first and last chapters of his book and noting that he had been making a spread sheet of his notes "each night" during the trial in order to write it.[16] The letter sought the court's advice about whether he should wait to try to publish the book until after the sentencing. The court did not respond to the letter or inform Goodman about it.

The Court's Refusal to Hold a Hearing or Grant Discovery On Goodman's First Motion For New Trial

On April 2, 2012, Goodman filed a motion for new trial, along with a request for an evidentiary hearing and discovery, concerning the circumstances surrounding the Volkswagen Group's role in supplying and paying for Livernois, Heenan and the "exemplar" vehicle. Goodman also argued that the State violated Goodman's due process rights by failing to disclose exculpatory evidence concerning the purported

[16] A copy of the letter was submitted to this Court as part of Appendix 2 to Goodman's Motion To Stay and To Relinquish Jurisdiction, May 29, 2012.

infallibility of the Volkswagen Group's "failsafe" software. In support, Goodman cited a report released by National Public Radio ("NPR") showing that the Group's cars were among those that the National Highway Traffic Safety Administration ("NHTSA") found were responsible for 15,000 sudden acceleration and related complaints between 2008-2010. R18:3581-90. Moreover, contrary to the prosecutor's closing argument that no car manufacturers "designed a product like that," *see* p. 25 *supra*, the motion documented that Toyota had been sued all over the United States for accidents allegedly caused by sudden acceleration problems, resulting in a recall of over 14 million cars, a $16 million fine by the Department of Transportation and a Congressional investigation. R17:3331-32; R18:3511-79, 3534-36. On April 13, 2012, the court denied the motion for new trial without a hearing. R18:3589-90.

The Jury Misconduct Gradually Comes to Light

Having been ignored by the court, on April 4, 2012, Juror Delano reported the jury misconduct to defense counsel. R18:3612-15. Based on her affidavit, Goodman again moved for a new trial and requested to interview the jurors under both Fla. R. Crim. P. 3.575 and Florida Bar Rule 4-3.5(d)(4). R18:3591-3635. The filings spawned extensive news coverage and more interviews with DeMartin in which he admitted taking daily notes during the trial for his book and informing other jurors about them. R20:3874, 3890-92. On April 17, 2012, the court conducted a hearing

to discuss possible jury interviews. Still concealing having received DeMartin's March 28th letter where he admitted working on his book during the trial, the court commented that "lots of jurors write books about their trial experience, so what. That's not grounds to excuse him...." R22:4403.

On April 18, 2012, after the media criticized him for jeopardizing Goodman's conviction, DeMartin wrote a third letter to the court, this time claiming that he had *not* discussed his "work sheets" with the jurors. R20:3897-99. The court did not disclose this letter to Goodman either, but Goodman learned about it from the media and asked the court for a copy. The court turned it over but continued to withhold the March 28th letter. R20:3876; 3897-99. Also on April 18, a citizen of Palm Beach, Toni May, hand-delivered a letter to the court reporting statements she overheard Juror Lewis make at a restaurant, including that: (1) "other jurors talked about Goodman's money and ... they believed he was guilty before the trial ended...."; (2) Lewis had complained to a bailiff about other jurors being bullied but that the bailiff did nothing; and (3) a juror, obviously DeMartin, had been "offered $50,000 for a book deal and was continually taking notes" during the trial which all the jurors knew about. R20:3980; R23:4472. The court neither disclosed May's letter, nor yet another letter DeMartin wrote to the court on April 19, complaining about Goodman "paying all that money to an attorney" instead of pleading guilty. R23:4539. Instead,

on April 20, the court denied Goodman's motion for new trial, refused to allow counsel to contact jurors under the Bar rule and ordered that the jurors be questioned only about any wealth-related comments. R19:3852-67. Interviewed again by the media the next day, DeMartin again confessed that "during the trial he worked on a book about the trial...." R20:3877.

Dismayed by the court's failure to act upon her letter, on April 25, 2012, May sent a copy to counsel. R20:3971-72, 3979. Suspicious about what else the court might be concealing, Goodman moved to compel full disclosure and for the court's disqualification. R20:3871-81, 3953-70. The court denied both motions, stating that it was "not personally aware" of any undisclosed correspondence and that the proper remedy was to file a writ of mandamus. R20:3974; R22:4385-86. Goodman then filed a consolidated petition for writs of prohibition (recusal) and mandamus (document production) in this Court. On April 30, 2012, the Court denied the writ of prohibition but ordered the court to show cause why the mandamus should not issue. R22:4439. Only then did the court release DeMartin's letters of March 28 and April 19 and May's letter of April 18, mooting the issue. SR:5

The Limited Hearing on April 30, 2012

Prior to the hearing on April 30, 2012, counsel submitted a list of specific questions they wanted to ask or for the court to ask (R22:4421-35), but the court

refused to allow counsel to ask any questions and did not ask any of the requested ones. The court also refused to expand the scope of the hearing based on Ms. May's letter. R20:3979-94; SR:12. Instead, the court asked a few leading questions to each juror. After Juror Delano adopted her affidavit, the court asked her a leading question about whether she heard any juror *explicitly* say "they had already decided which way they were going to vote before they deliberated." SR:19. When she said "no," the court did not ask her to elaborate on the evidentiary discussions referenced in her affidavit. The court next asked her a leading question about whether she had heard any juror *explicitly* say that "we're going to find him guilty ... because we think he has a lot of money and he might get away with it." *Id.* When she again said "no ... but it's always [a] money concern," the court did not ask her to explain or to relate what the jurors said about Goodman's "money." *Id.* Finally, the court asked a leading question about whether she had heard any jurors *explicitly* announce "they were going to vote one way or another before the trial had come to an end." SR:19-20. When Delano volunteered that the jurors talked about the facts of the case and not "reasonable doubt," the court asked no further questions. SR:20.

Juror St. John testified that prior to the deliberations he heard "quite a few comments like: We know he's guilty. Let's just sign the paperwork and go on...." SR:29-31. When St. John responded "[n]ot really" but "it was pretty upsetting" to the

court's leading questions about whether Goodman's wealth was discussed, the court asked no follow up questions. SR:34. In response to similar leading questions, the other jurors denied hearing any such statements. SR:22-28, 36-44.

The court briefly asked DeMartin about his book but not about whether he had already been writing it or had been paid money to do so *during* the trial. SR:41-42. DeMartin then volunteered – contrary to what he later wrote in his book – that he had *not* "decided" to convict until hearing the 911 tapes replayed. SR:43. Thereafter, the court rejected Goodman's renewed objections to its procedures and findings. R23:4466-90, 4621-23; SR:44-45.

DeMartin's Drinking Experiment

On May 3-4, 2012, DeMartin announced to the media that he had published his book and distributed copies, thereby revealing his drinking experiment for the first time. When the media questioned him about it in a live interview, DeMartin falsely claimed that "[t]he judge never told me don't do any experiments." R23:4548, 4604, 4606 4610. Goodman filed a new round of motions based on these revelations, and the court agreed to question DeMartin prior to sentencing on May 11, 2012. R23:4542-55, 4630. Counsel again requested to ask questions and, alternatively, submitted a list of questions for the court to ask. R23:4644-47; R24:4674-83.

Rejecting both requests without explanation, the court again asked only a few leading questions, and only to DeMartin.

DeMartin admitted conducting the experiment but claimed he did not do it "to find out if [Mr. Goodman] was guilty" but conceded that he concluded from the experiment that Goodman "was probably not rational when the accident happened." SR:81-82. When the court asked if he discussed his experiment with other jurors during the deliberations, DeMartin stated that "I believe I told that to the foreman after our verdict was done, if I recall correctly... He's the one – maybe he could verify it or not." SR:83. The court did not seek to clarify DeMartin's answer and asked no other juror if they were aware of the experiment. The court then found that while DeMartin had committed "misconduct," Goodman was not prejudiced because DeMartin had purportedly not told any other juror. SR:88-89; R24:4762, 4768.

The hearing was broadcast live and the court's ruling was widely reported by the media. On May 16, 2012, Juror St. John telephoned counsels' office to report that DeMartin had "lied when he said he did not tell the other jurors about his plans to conduct the drinking experiment, and that he was going to use the results of his experiment for use in deliberations." R24:4744, 4752. When Goodman moved the court to reopen the inquiry, the court refused. R24:4775.

The Sentencing

The bottom of Goodman's guideline range was 11½ years. The circuit court explained the 16-year sentence by stating that it had "accept[ed] the jury's verdict that he acted willfully and deliberately" in leaving the scene. SR:161. Counsel objected, arguing that the jury made no such finding due to the court's refusal to instruct that "willfulness" was required. SR:164-65. The court overruled the objection, again claiming "that the jury found, and I accept that the defendant did willfully fail to remain at the scene." SR:165. When counsel again objected, the court cut off the debate saying that "[t]he appellate court will let me know ... if I'm right." SR:166.

Postscript

On May 24, 2012, the court disclosed that it had received yet another letter from DeMartin. *See* Motion to Stay and To Relinquish Jurisdiction, App. 12. DeMartin said he had been contacted by a reporter seeking a comment about St. John's accusation that he had lied at the May 11th hearing. DeMartin then wrote: "I truly believe I told the foreman about the drinks after we heard the 911 tapes and voted guilty. *However, if he and other jurors say it was before the vote, I must be wrong*...." *Id.* (emphasis added). Based on DeMartin's equivocations, Goodman moved this Court to relinquish jurisdiction for an inquiry into the issue. On May 30, 2012, however, the Court summarily denied the request.

Standards of Review

The Court reviews *de novo* the sufficiency of the evidence (*Romero v. State*, 901 So.2d 260 (Fla. 4th DCA 2005)), questions of law (*Del Valle v. State*, 80 So.3d 999 (Fla. 2011)), "mixed questions of law and fact" (*Smith v. State*, 87 So.2d 3d 84 (Fla. 4th DCA 2012)), whether a judge should be disqualified (*Aberdeen Property Owners Assoc., Inc. v. Bristol Lakes Homeowners Assoc., Inc.*, 8 So. 3d 469 (Fla. 4th DCA 2009)), and whether the cumulative effect of the errors requires a new trial (*Goldman v. State*, 57 So.3d 274 (Fla. 4th DCA 2011)).

The Court reviews for abuse of discretion a court's discovery rulings (*Mascolo v. State*, 774 So.2d 827 (Fla. 2000)), whether to allow experts to testify (*Harrison v. State*, 33 So.3d 727 (Fla. 1st DCA 2010)), whether to give a particular jury instruction (*Cliff Berry, Inc. v. State*, Nos. 3D090-389 & 3D09-473 (Fla. 3d DCA Jan. 4, 2012), *2012 Fla. App. LEXIS 37*), whether to hold a hearing on a motion for new trial (*Rivera v. State*, 995 So.2d 191 (Fla. 2008)), and whether to grant a new trial based on juror misconduct (*State v. Hamilton*, 574 So.2d 124 (Fla. 1991)). A court abuses its discretion by basing a ruling "upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir. 2005), *cert. denied*, 547 U.S. 1085 (2006).

SUMMARY OF THE ARGUMENT

I. Every fact witness corroborated Goodman's defense that he only had three drinks at the Player's Club and that he was not impaired when he left. Based on the testimony of the State's own toxicologist, Goodman's blood alcohol level would then have been under .05, requiring the jury to *presume* that Goodman was *not* impaired. The only explanation for the .177 level recorded hours later at 4 a.m., which would be consistent with all the evidence, was Goodman's – that he drank *after* the accident in Kampsen's apartment. Since Goodman presented a reasonable hypothesis for his innocence, which the State never rebutted, he was entitled to a judgment of acquittal.

II. In allowing Livernois' testimony, the court committed a cascade of evidentiary and constitutional violations which both individually and collectively deprived Goodman of any semblance of due process. Despite knowing or being deliberately blind to the fact that Livernois was the hired gun of a car manufacturer intent on preventing a new "tsunami" of sudden acceleration litigation, the prosecutors allowed him to tamper with the Bentley in secret and then conduct other tests on an exemplar vehicle that was selectively chosen by the same self-interested manufacturer. The prosecutors' own post-verdict press conference belied their attempt to blame defense counsel's opening for this blatant *Richardson* violation and their claim that counsel were "dilatory" for not deposing Livernois *before* he conducted the tests that formed

the basis of his testimony was frivolous. The court then compounded these errors by denying Goodman's motion for new trial without a hearing into the State's concealment of *Brady* evidence about the purported infallibility of the Volkswagen Group's "failsafe" system which, in turn, immunized the related misrepresentations made by ASA Roberts in her closing argument.

III. Pembleton's testimony should have been excluded for similar reasons. The gift of free legal services to a key fact witness by another conflict-ridden third party, the Wilsons' attorneys, was tantamount to bribery. Its dual purpose was to influence her testimony while unconstitutionally insulating her from the defense. The circuit court then compounded the error in allowing her testimony by preventing Goodman from questioning her about whether her testimony was based on her memory of actual events or her dream-premonition.

IV. Goodman was plainly entitled to a new trial based on the evidence of serial jury misconduct that emerged, despite the circuit court's improper efforts to conceal it. Juror DeMartin's financial conflict of interest and misconduct in conducting his drinking experiment, standing alone, requires a new trial because, contrary to the circuit court, Goodman was entitled to six impartial jurors, not just five. Moreover, the circuit court abused its discretion in severely curtailing the inquiry into the other forms of jury misconduct revealed by Juror Delano, Juror St. John and Ms. May.

V. The circuit court also abused its discretion in refusing to issue (1) Goodman's special jury instructions on evidence "spoliation" and the need to consider with more caution witnesses who have been paid by third party benefactors, (2) an instruction that "willfulness" was an element of the failure to render aid and remain at the scene enhancement, and (3) Goodman's affirmative defense instruction based on his head injury. The circuit court then violated Goodman's right to due process by basing his sentence on a patently incorrect basis – the jury's nonexistent finding that Goodman acted "willfully" in committing the enhancement.

VI. The cumulative effect of these errors requires a new trial, especially when other errors not specifically addressed are considered, such as the court's refusal to grant a change of venue and the pervasive prosecutorial misconduct – including repeated misrepresentations to the court and constant attempts to improperly influence the jurors with their facial expressions and appeals to wealth and class bias.

ARGUMENT

I. GOODMAN WAS ENTITLED TO A JUDGMENT OF ACQUITTAL

In reviewing the sufficiency of the evidence, the Court must determine whether "a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." *Johnson v. State*, 863 So.2d 271, 283-84 (Fla. 2003). While the evidence must be viewed in the light most favorable to the State, a conviction cannot

be sustained based on "the sheerest of speculation." *Merritt v. State*, 523 So.2d 573, 574 (Fla. 1988). Where evidence of guilt is only circumstantial, it must not only be consistent with the defendant's guilt but also be inconsistent with *any* reasonable hypothesis of innocence. *Kormondy v. State*, 703 So.2d 454, 459 (Fla. 1997). Moreover, where, as here, the State's circumstantial case is directly refuted by eye witnesses,"the version of events related by the defense must be believed if circumstances do not show that version to be false." *McArthur v. State*, 351 So.2d 972, 976 n. 12 (Fla. 1977) (citation omitted). This rule has been consistently applied to reverse convictions even where the defendant's theory of defense was conveyed through his own testimony.

For example, in *Savage v. State*, 11 So.2d 778 (Fla. 1943), the defendant was driving down a highway with a passenger in a convertible when the car suddenly swerved off the road and plunged into a canal. The defendant extricated himself without serious injury, while bystanders sliced open the top of the convertible and pulled out the passenger. The defendant told the bystanders that he "drove off the road accidentally" when he momentarily blacked out. 11 So.2d at 780. When the passenger later died, the defendant was charged and convicted of manslaughter. However, the Supreme Court reversed, emphasizing that because there were no eye witnesses to the accident itself, the State had to "exclude every reasonable hypothesis

except that of the defendant's guilt." *Id.* at 781-82. Since the State's circumstantial case did not refute the defendant's version given to the bystanders, the Court held that the State failed to meet its burden. *Id.* at 782.

Goodman's case for acquittal was far stronger than in *Savage*. The State had the burden of proving that Goodman was intoxicated *at the time of the accident*. However, every witness who observed or served him alcohol testified that he had only four drinks the entire evening, one of which the State's own toxicologist discounted, and was not impaired when he left the Player's Club. The State's theory that every witness simply missed seeing him consume a huge additional volume of alcohol was "raw speculation," not a reasonable inference. *Wyatt v. State*, 755 So.2d 671, 673-74 (Fla. 4th DCA 1999). The State's case rested entirely on events occurring long after the accident, working backwards from Goodman's blood alcohol level However, the stench of alcohol and Goodman's appearance were inconsistent with every witness who saw Goodman at the Player's Club. Goodman's version of the events was the only one consistent with *all* the evidence and it was corroborated, at least circumstantially, by the DaSilvas. Moreover, the State made only a half-hearted attempt to rebut it with the footprint testimony, never bothering to look for footprints around Kampsen's property or fingerprints on Kampsen's liquor bottles. R47:2584, 2611. Accordingly, the Court should reverse and vacate Goodman's conviction.

II. THE COURT VIOLATED *RICHARDSON* AND GOODMAN'S RIGHT TO DUE PROCESS BY ALLOWING LIVERNOIS' TESTIMONY AND DENYING GOODMAN'S MOTION FOR NEW TRIAL WITHOUT A HEARING

A. The Discovery Violation

At a *Richardson* hearing, a court must first determine whether the State has violated the discovery rules. If so, the court must then assess "whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial." *Richardson*, 246 So.2d at 775. Even for inadvertent violations, however, the State's burden of disproving prejudice is "strict." *Irish v. State*, 889 So.2d 979, 981 (Fla. 4th DCA 2004). Reversal is required unless the Court can say "beyond a reasonable doubt that the defense was not procedurally prejudiced" and "if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful." *Id.*

In this case, the circuit court claimed that there was "no *Richardson* violation in the classic sense" because the prosecutors disclosed Livernois' identity once they obtained it from the Volkswagen Group. However, that was no justification, as a matter of law: "The identity of rebuttal witnesses is not excepted from the state's discovery obligation." *Sharif v. State*, 589 So.2d 960 (Fla. 2d DCA 1991). The prosecutors groped in vain to find some material difference between Serdar's

deposition and counsel's opening statement in order to support their cry of "surprise." In reality, the only relevance of counsel's opening was that the publicity it generated set alarm bells off at the Volkswagen Group – no doubt already on edge from NPR's report about sudden acceleration problems in its vehicles – information the Group and the prosecutors concealed from the defense.

The court's ruling that Goodman was not prejudiced because his counsel were able to depose Livernois at the end of the trial (after a full day in court with no opportunity to prepare for it) was also contrary to binding precedent *Casica v. State*, 24 So.3d 1236, 1240-41 (Fla. 4th DCA 2009), where this Court held that a mid-trial deposition of an expert was insufficient. Moreover, the prejudice Goodman suffered became obvious after the verdict when counsel found the NPR study that the State had concealed. Even apart from the blatant *Brady*[17] violation, Goodman could not adequately confront Livernois without investigating what he did to the Bentley during his new, secret test on March 18 and the circumstances surrounding the suspicious March 20 test on the exemplar Bentley. *See Bryant v. State*, 810 So.2d 532, 537 (Fla. 1st DCA 2002) (reversing conviction where the 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

[17] *See Brady v. Maryland*, 373 U.S. 83 (1963).

an expert"). The prosecutors disclosed nothing about how the exemplar vehicle got there, who paid for it, and whether it had been pre-screened by Heenan to prevent a new "tsunami" of litigation. And, if they did not know, it was only because of their deliberate ignorance. Nor was anything disclosed about Heenan, who orchestrated the entire episode and conducted the test while Livernois simply watched. The court's blunt, accusatory ruling that barred the exploration of these issues compounded the *Brady* violation and independently violated Goodman's due process and confrontation rights. In any event, the court erred in placing the burden on Goodman to establish prejudice, rather than on the State to disprove it. *Cliff Berry, Inc.*, *2012 Fla. App. LEXIS 37*, at *55. Exclusion was the only adequate remedy. *See Thomas v. State*, 63 So.3d 55 (Fla. 4th DCA 2011); *Casica*, 24 So.3d at 1241.

B. The Due Process and Confrontation Clause Violations

The court's rulings also violated Goodman's Fifth Amendment right to due process and Sixth Amendment right to confront Livernois. While prosecutors are allowed to retain experts, they must do so as representatives "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). The Volkswagen Group had no interest in seeking "justice." Therefore, the prosecutors

could not, consistent with due process, delegate their functions to such a conflict-ridden third party. *See Young v. United States*, 481 U.S. 787, 805-06 (1987) (prohibiting the appointment of private counsel to prosecute a criminal contempt where counsel also represented parties with "various civil claims" against the defendant which "theoretically could have created temptation to use the criminal investigation" to further "those suits" and holding that such an appointment "at a minium created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety") (emphasis in original). While there was nothing wrong with asking the Volkswagen Group to "assist[] a disinterested prosecutor," that "cannot justify permitting counsel for the private party to be in control of the prosecution." 481 U.S. at 806.

While the prosecutors may not have delegated the "control" of the entire case to the Volkswagen Group, they impermissibly allowed the Group to control the expert testimony and "experimentation" on Goodman's Bentley and the exemplar Bentley. In *People v. Eubanks*, 14 Cal.4th 580, 927 P.2d 310, 59 Cal. Rptr. 2d 200 (1996), the Supreme Court of California held that prosecutors created a disabling conflict of interest by soliciting a corporation, alleged to be the victim of trades secret theft, to pay $13,000 for expert witnesses "to asset in the investigation." 927 P.2d at 313. The court was especially concerned with the specter of "prosperous corporations ...

underwriting ... significant investigative costs" when they had an obvious conflict of interest. *Id.* at 318, 320. Although, unlike here, there was no suggestion in *Eubanks*, that the experts might have tampered with any evidence,[18] the court emphasized that "[a] public prosecutor must not be in a position of 'attempting at once to serve two masters,' the People at large and a private person or entity with its own particular interests in the prosecution." *Id.*[19]

The prosecutors' misconduct in this case was far more dangerous. The Volkswagen Group's sole interest was in protecting its pocketbook from a new wave of sudden acceleration cases if Goodman's already publicized defense prevailed. Knowing the Group's motivation, the prosecutors deliberately kept both themselves and the defense in ignorance of anything the Group did, deliberately not videotaping or allowing the defense to witness Livernois tamper with Goodman's Bentley or conduct tests on the magically-appearing exemplar Bentley – all despite their own previous insistence that *their* presence during *defense* testing was "essential ... so that the integrity of the evidence is preserved." *See* p. 4 *supra*. Allowing a third party with such a blatant conflict of interest "to be in control of" *creating* evidence without

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[18] The experts examined computer hard drives and transcribed numerous audiotapes. *Id.* at 313-14.

[19] The defendants cited due process cases in their pleadings but based their argument on state recusal statutes. Therefore, while noting the constitutional argument, the court likewise based its ruling on state law principles. *Id.* at 320, n. 8.

supervision or safeguards, violated Goodman's right to due process. *Cf. State v. Lead Industries Assoc., Inc.*, 951 A.2d 428, 476 (R.I. 2008) (finding that the state Attorney General could retain private counsel to assist in *civil* litigation on a contingent fee basis but only "so long as the Office of the Attorney General retains absolute and total control over all critical decision-making....").[20]

The court then compounded the prejudice, first, by refusing to instruct the jury that the testimony of witnesses paid by third parties should be viewed with caution (R15:2869) and, second, with a Confrontation Clause violation. The prosecutors made sure the jury knew how much *Serdar* was being paid and how much *his* testing cost, asking detailed questions about his billings, hourly rate, total hours spent and amount spent to create his "model." R51:3167-68. After the court condoned the prosecutors' *Giglio*[21] violation by excusing their deliberate blindness to what the Volkswagen Group paid for Livernois, Heenan and the production of the exemplar vehicle, the court improperly barred cross-examination of Livernois as "inappropriate" and lacking "professionalism." Goodman, however, had a Sixth Amendment right to fully expose the Group's conflict of interest.

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[20] "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).

[21] *See Giglio v. United States*, 405 U.S. 150 (1972).

C. Goodman Was Entitled To a Hearing on His Motion For New Trial

The circuit court also committed reversible error by denying Goodman's motion for new trial without a hearing into the prosecutors' violation of *Brady* and *Giglio*. The court abused its discretion in denying a hearing because the court was required to accept Goodman's "claims as true" and hold a hearing "unless the record *conclusively* demonstrate[d]" that he was "not entitled to relief." *Rivera v. State*, 995 So.2d 191, 197 (Fla. 2008) (emphasis in original, citations omitted). Goodman was entitled to a hearing on two distinct issues.

First, the prosecutors failed to disclose the full financial and other circumstances behind the conduct of the Volkswagen Group. By drafting the Group onto the prosecution team, the prosecutors became responsible for producing exculpatory and impeachment evidence in *the Group's* possession. *See generally United States v. Reyeros*, 537 F.3d 270, 281 (3rd Cir. 2008); *Schledwitz v. United States*, 169 F.3d 1003, 1014-15 (6th Cir. 1999). Livernois could testify only about *his own* fees, while the motives and activities of his benefactors remain shielded by the New York lawyers who hired him. The prosecutors produced nothing about Heenan's fees or how the exemplar Bentley was found, paid for and prepared for testing. *See generally Guzman v. Sec. Dept. of Corrections*, 663 F.3d 1336, 1350-51 (11th Cir. 2011) (prosecutor's failure to disclose a $500 payment to witness deemed material).

The circuit court, instead of granting a hearing on these issues to expose the facts, rewarded the prosecutors for their deliberate ignorance. However, "a prosecutor's office cannot get around *Brady* by keeping itself in ignorance." *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984). Indeed, "[a]llowing 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." *United States v. Burnside*, 824 F. Supp. 1215, 1257-58 (N.D. Ill. 1993). *See also 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"). The prosecutors' "hear no evil, see no evil, speak no evil" view of their discovery obligations violated due process.

Second, Goodman's motion also demonstrated that the State had suppressed exculpatory evidence that would have undermined Livernois' testimony concerning the purported infallibility of the "failsafe" systems used by the Volkswagen Group – evidence that ASA Roberts deceptively exploited in her closing argument to improperly suggest that car manufacturers were immune from sudden acceleration design defects. By their drafting the Volkswagen Group onto the "prosecution team," the prosecutors had at least constructive knowledge of the dozens of "sudden

acceleration" complaints against its vehicles between 2008-2010. Suppressing this evidence and then exploiting its absence in closing constituted a clear violation of *Giglio*. *See United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *United States v. Catton*, 89 F.3d 387, 389 (7th Cir. 1996). The Court should reverse for a full hearing into the circumstances behind both the conduct of the Volkswagen Group and the suppressed *Brady* material concerning the sudden acceleration problems in its cars. *See Rivera*, 995 So.2d at 197; *Cueto v. State*, No. 3D11-264 (Fla. 3d DCA June 6, 2012), *2012 Fla. App. LEXIS 8898*.

D. Goodman Was Entitled To a Spoliation Instruction

The court compounded its errors in allowing Livernois to testify by then refusing to issue Goodman's requested instruction on evidence spoliation. Even before Livernois arrived on March 18 to conduct his secretive, manipulative tests, the State had deliberately failed to maintain the integrity of the Bentley by (1) allowing it to sit, over defense objections, for two years rusting on the open-air impound lot and (2) then carting it back and forth to court on a flatbed truck where "[t]he risk of evidence spoliation [was] great." *See* p. 4 *supra*. The new tests should have been inadmissible on that basis alone. *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 prosecutors then misled the court and Goodman by stating that Livernois was arriving from California on the morning of March 20, 2012, to supposedly only "physically look" at the car before rendering an opinion when, as they well knew, he had already physically *tampered* with the car two days earlier. *See* p. 20 *supra*. That the Volkswagen Group's lawyers would participate in such a ploy with the prosecutors was particularly inexcusable since their other client, Toyota, was *simultaneously* being accused of remarkably similar misconduct in the "sudden acceleration" class action pending in California. *See In Re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 8:10-ML-2151 JVS (FMO) (C.D. Cal. June 11, 2012), *2012 U.S. Dist. LEXIS 88568*.

In that case, a critical piece of evidence was a 2008 Toyota Camry that had been involved in a fatal collision. *2012 U.S. Dist. LEXIS 88568*, at *175. Without notifying the plaintiffs' lawyers, Toyota sent a team of technicians to the bodyshop where the Camry was stored to secretly inspect it.[22] The shop owner, however, saw one of the technicians physically remove a piece of the brake calliper as well as "a piece of something that looked like plastic that was wedged in the throttle body...."

[22] A state trooper and someone from the NHTSA accompanied the technicians but they either did not see or did nothing to stop the testing. *Id.* at **197, 222-23.

Id. at *194-95. The technicians also hooked up a computer to the Camry to collect the stored crash data using software that could theoretically override the error codes and leave no trace. *Id.* at **201-02, 226. Although the court held that Toyota's conduct was not willful, its conduct and failure to allow opposing counsel "the opportunity to be present ... alone cast a cloud of suspicion" over the inspection, justifying not one but two spoliation instructions. *Id.* at **223, 230-32.

While the court's opinion was not issued until June 2012, according to the opinion, the sanction litigation had been ongoing since at least February and March, *i.e.*, at the same time the Volkswagen Group and prosecutors were deceiving the court and Goodman about what Livernois was up to. In light of the prosecutors' own position that *their* physical presence was "essential ... so that the integrity of the evidence is preserved" and defense counsel's written demand to be present for any testing by the State, the prosecutors' conduct can only be seen as deliberate and in bad faith. Under these egregious circumstances, the court abused its discretion in not issuing a spoliation instruction. *See United States v. Suarez*, No. 09-932 (JLL) (D.N.J. Oct. 21, 2010), *2010 U.S. Dist. LEXIS 112097*, at **22-31; *State v. Davis*, 14 So.3d 1130, 1133 (Fla. 4th DCA 2009); *State v. Leslie*, 147 Ariz. 38, 708 P.2d 719, 728 (Ariz. 1985) (en banc).

III. THE COURT VIOLATED GOODMAN'S DUE PROCESS AND CONFRONTATION RIGHTS BY ALLOWING THE WILSONS' CIVIL ATTORNEYS TO CORRUPT THE PROCEEDINGS AND BY THEN BARRING CROSS-EXAMINATION ABOUT PEMBLETON'S DREAM/PREMONITION

A. Pembleton's Testimony Should Have Been Excluded

Throughout this case, the prosecutors openly coordinated their actions with and reaped the benefits from the Wilsons' attorneys. Together, they poisoned the jury pool through prejudicial statements and unethical "press conferences" staged at the attorneys' offices. They then adopted a tag team approach to oppose Goodman's pretrial motion to conduct tests on the Bentley. *See* p. 4 *supra*. Searcy even tried to inject himself into the case directly. *See* p. 6 *supra*. The court then allowed them to corrupt the proceedings by giving a "free" lawyer (a former law partner) to star witness Pembleton and then used her "represented" status to, in the court's own words, "insulate the witness from the defense." *See* p. 12 *supra*.

The prosecutors could not have gotten away with such a tactic if *they* had given Pembleton the free attorney. 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 also United States v. Fischel*, 686 F.2d 1082, 1092 (5th Cir. 1982). But prosecutors cannot use private parties to do their dirty work without consequences. Through agency principles, they became responsible for the actions of the Wilsons' attorneys. *See Ayers v. Hudson*,

623 F.3d 301, 312 (6th Cir. 2010) (holding that an agency relationship between informant and prosecutors 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."). Pembleton should have been excluded on that basis alone.

Moreover, for someone other than the State to give valuable free services to a fact witness is tantamount to a bribe and would be so, even if Searcy did not pay Shevin in dollars (or future favors) – a disputed fact question the court did not resolve. *See United States v. Savoie*, 985 F.2d 612, 616 (1st Cir. 1993); *United States v. Dimora*, No. 1:10CR387 (N.D. Ohio July 12, 2012), *2012 U.S. Dist. LEXIS 96460*, at *20; *Jones v. United States*, 617 F.2d 233, 237 (U.S. Ct. Cl. 1980). Shevin's services, if billed hourly, were undoubtedly worth thousands of dollars. If defense counsel in a criminal case was discovered paying (or giving "pro bono" services to) a witness, 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 are exempted from these rules because they are presumed to act with impartiality. *See United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc), *cert. denied*, 527 U.S. 1024 (1999). However, a prosecutor's unique right to, in effect, purchase testimony is not a right that can be delegated to a private party, especially one with a conflict of interest. The attorneys, like the Volkswagen Group,

were plainly driven by their own motives which were hardly altruistic.[23] 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 through a "code of silence." *See United States v. Abbell*, 271 F.3d 1286, 1291-93, 1299 (11th Cir. 2001) (per curiam), *cert. denied*, 537 U.S. 813 (2002). *See also United States v. Locascio*, 6 F.3d 924, 932-33 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994). As the circuit court readily perceived, the "free" representation here was similarly motivated – to unconstitutionally "insulate the witness from the defense" and prepare her testimony, while technically allowing the prosecutors to keep their hands clean.

The use of valuable free services to influence Pembleton's testimony was also a violation of Rule 4-3.4(b) of the Rules Regulating the Florida Bar and the Supreme Court of Florida has condemned such conduct "in no uncertain terms." *Florida Bar v. Wohl*, 842 So.2d 811, 816 (Fla. 2003). *See Florida Bar v. Jackson*, 490 So.2d 935, 936 (Fla. 1986) ("The very heart of the judicial system lies in the integrity of the participants ... Justice must not be bought or sold...."). Yet, ASA Roberts fully endorsed it in her closing argument, mischaracterizing the wholly unnecessary representation as praise-worthy "pro bono" work. *See* p. 26 *supra*. Pembleton's purchased testimony should have been excluded, not praised. The court then

[23] They ended up settling the civil suit against Goodman for $40 million. SR:138-39.

compounded its error by refusing to issue Goodman's requested cautionary instruction (*see* R15:2869), which would have warned the jury to treat such purchased testimony with caution.

B. The Confrontation Violation

The circuit court also violated Goodman's Sixth Amendment rights a second time by barring cross-examination about Pembleton's dream premonition. The reliability of Pembleton's memory of the events at 1:30 in the morning were critical. Goodman, therefore, had the right to show the jury that her mental state was unreliable and that her testimony may have confused her dream with reality. As the Supreme Court of Florida has noted in the analogous context of hypnotically refreshed testimony, such testimony is subject to a phenomenon known as "confabluation" or the extreme difficulty in distinguishing between "historically accurate" memories and "fantasies." *Bundy v. State*, 471 So.2d 9, 15 (Fla. 1985) (citation omitted). "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." *Id.* Since the effect of Pembleton's dream on her perception of reality was directly relevant to her credibility, the court violated the Confrontation Clause by barring any inquiry into the subject.

IV. GOODMAN IS ENTITLED TO A NEW TRIAL BASED ON JURY MISCONDUCT, THE CIRCUIT COURT'S IMPROPER EFFORTS TO CONCEAL EVIDENCE OF IT AND FAILURE TO ADEQUATELY INVESTIGATE IT

A. DeMartin's Misconduct

1. DeMartin's Drinking Experiment

Contrary to DeMartin's claim to the media that "[t]he judge never told me don't do any experiments" (R24:4771), the court twice gave the jury lengthy instructions barring exactly that. *See* pp. 6-7 *supra*. DeMartin ignored those instructions for personal gain and undermined the integrity of the proceedings on one of the core issues in the case – the impact of three drinks on Goodman's faculties.

Under Florida law and Yeatman's testimony, the jury should have presumed that Goodman was *not* intoxicated. *See* Fla. Stat. § 316.1934(2)(a). DeMartin used his experiment to supplant the trial evidence in order to reach the opposite conclusion. The trial court was thus plainly correct in finding that DeMartin committed misconduct.[24] DeMartin's misconduct also violated Goodman's constitutional rights to confrontation and due process. *Durr v. Cook*, 589 F.2d 891, 892 (5th Cir. 1979). Goodman was, therefore, entitled to a new trial unless the State

[24] *See, e.g., Tapanes v. State*, 43 So.3d 159 (Fla. 4th DCA 2010); *Bickel v. State Farm Mutual Automobile Ins. Co.,* 557 So. 2d 674 (Fla. 2d DCA 1990); *Snook v. Firestone Tire & Rubber Co.,* 485 So. 2d 496 (Fla. 5th DCA 1986); *Edelstein v. Roskin*, 356 So.2d 38 (Fla. 3d DCA 1978).

proved "that there [was] no reasonable possibility that the juror misconduct affected the verdict." *Tapanes*, 43 So.3d at 162. However, "[j]urors may not be interrogated as to whether the influence actually affected their decision." *Pozo v. State*, 963 So.2d 893, 837 (Fla. 4th DCA 2007). Rather, the test is an objective one, examining the *nature* of the extrinsic evidence to see if the subject matter of the extrinsic evidence was *material* to the trial. If there is "any possibility" that the extrinsic evidence *could* have been material to a juror's decision-making, the defendant is entitled to a new trial. *Accord State v. Hamilton*, 574 So.2d 124, 127 (Fla. 1991).

The nature of DeMartin's drinking test, indeed its self-proclaimed purpose, was directly linked to a central issue in the case. And, DeMartin's self-serving statements about not deciding until he heard the 911 tape again should have been disregarded. *See Pozo*, 963 So.2d at 836-37. *Cf. Gray v. Hutto*, 648 F.2d 210, 211 (4th Cir. 1981) ("With the manifestly strong pressures on the juror to exculpate herself from a quite untenable position, her self-serving statements should not count for much.").[25]

The court's finding that DeMartin's misconduct w`as harmless because he allegedly had not told other jurors about the experiment was incorrect as a matter of law. Goodman had the right to six fair and impartial jurors, not just five. The court's

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[25] DeMartin's testimony was also contradicted by his own book where he conceded having "decided" that Goodman was impaired the night before the verdict based on the experiment. During the hearing on May 11, DeMartin confirmed that what he wrote in his book was "correct." SR:81.

theory that having "only" one tainted juror is not sufficiently prejudicial is both unprecedented and constitutionally unacceptable. Even if DeMartin did not advise other jurors about his test, "he tainted his own deliberations thereby violating appellant's right to [six] impartial jurors." *People v. Castro*, 184 Cal. App. 3d 849, 853-54; 229 Cal. Rptr. 280 (1986).

2. DeMartin's Concealed Conflict of Interest

DeMartin's misconduct was compounded by the conflict of interest that probably drove him to do it – his intent to profit at Goodman's expense and related desire to make himself a more prominent "character" in his book. However, even if unconnected to his experiment, DeMartin's concealment of his financial conflict of interest constitutes an independent basis to grant a new trial.

In order to determine whether DeMartin's concealment of his book plan during voir dire warranted a new trial, Goodman had to show that: (1) the information was material to jury service; (2) DeMartin concealed the information during voir dire; and (3) the failure to disclose the information was not attributable to Goodman. *See Royal Caribbean Cruises, Ltd. v. Pavone*, No. 3D10-2495 (Fla. 3d DCA June 6, 2012), *2012 Fla. App. LEXIS 8886*, at **1-2 (citations omitted). Goodman plainly satisfied this test. DeMartin had a duty to reveal any sources of bias during voir dire, *see Conaway v. Polk*, 453 F.3d 567, 585 (5th Cir. 2006); DeMartin's conduct cannot be attributed

to Goodman; and the circuit court's initial belief that such conduct would be "inappropriate" underscored its materiality. The court's decision to later find nothing wrong with such conduct should be soundly rejected by this Court.

Information is material if the defense may have used a peremptory challenge to remove the juror if the information had been disclosed. *Roberts v. Tejada*, 814 So. 2d 334, 341 (Fla. 2002) (citation omitted); *Murphy v. Hurst*, 882 So.2d 1157, 1161 (Fla. 5th DCA 2004). DeMartin's effort to profit from his jury service created a conflict of interest that would not merely have prompted a peremptory challenge; it would have justified a challenge for cause. Indeed, at least three states explicitly prohibit jurors from entering into contracts to sell their stories about cases in which they have served for various periods of time after their service has concluded. *See* N.Y. Penal Law § 215.28; N.J. Stat. Ann. 2C:29-8.1; Cal. Pen. Code § 116.5. This case underscores the valid reason for such laws.

While there are few reported decisions discussing the ramifications of a *juror's* attempt to exploit jury service for personal financial gain,[26] in the analogous context of *attorney* conflicts, the law is settled. Rule 4-1.8(d) of the Rules Regulating the Florida Bar prohibits lawyers from acquiring media rights in a client's case until it is

[26] In *Abbell*, 271 F.3d at 1301, the court held that a juror's mere "plan" to write a book in the future was not an "outside influence" that constituted misconduct. DeMartin was already writing a book when he misled the court and Goodman in his March 20th letter by professing to only have a contingent plan to write about the case.

over because 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. They also "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).

"Juror journalism" threatens the criminal justice system in the same way. 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." *See* Marcy Strauss, *Juror Journalism*, 12 YALE L. & POLICY REV. 389, 401 (1994). In cases involving sensational criminal cases, the most profitable verdict – the one most likely to appease the public, please the media and maximize potential profits – requires that the defendant be convicted. Moreover, the profit motive may drive the juror "to manipulate the deliberations and the verdict to ensure an outcome most conducive to the selling of the story." *Id.* at 401.

DeMartin sought to manipulate the proceedings, both before and after the verdict, through his improper drinking experiment, numerous conflicting statements to the court in letters and live television interviews. "Most significantly," DeMartin made sure the other jurors knew about his writing – conduct that may have

"inhibit[ed] the frank and open exchange of ideas during deliberations. Jurors may be reluctant to express minority or unpopular views if they believe that such opinions will be aired to the public." *Id.* at 402. In any event, DeMartin's failure to disclose his conflict of interest during voir dire warrants a new trial.

A new trial is doubly warranted because DeMartin repeatedly lied about his conduct. A juror is impliedly biased when, after concealing a conflict of interest "to get a seat on the jury," he then provides misleading, contradictory, and false statements when questioned about that conflict. *Green v. White*, 232 F.3d 671, 677-78 (9th Cir. 2000). *See also Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007); *DeFrancisco v. State*, 830 So.2d 131, 133 (Fla. 2d DCA 2002); *United States v. Daugerdas*, No. S3 09 Cr. 581 (WHP) (S.D.N.Y. June 4, 2012), *2012 U.S. Dist. LEXIS 82597*, at *74. That is precisely what happened here. After first concealing his book plan during voir dire, DeMartin wrote the court a deceptive letter on March 20, 2012, claiming that he was *only* writing a "dating" book when, in fact, he was working on his trial book every evening and showing the jurors his daily "work sheets." Then, after boasting about his conduct to the media and earlier letters to the court, he contradicted himself and denied having discussed his book with other jurors.[27] He also lied to the media about the court allegedly not issuing any

[27] Goodman submitted a chart to the court outlining these contradictory statements in (continued...)

instructions against jurors conducting experiments, and to the court with his "button" story. Finally, he contradicted his own book by claiming at the May 11th hearing that he did not "decide" to convict until he re-heard the 911 tape on May 23, when he wrote in his book that "I surely decided that the night before." DeMartin's bias then "bled through" when he wrote the court on April 19 to criticize Goodman for "paying all that money" to his attorneys, rather than pleading guilty. *See Daugerdas*, *2012 U.S. Dist. LEXIS 82597*, at *70. DeMartin's "sweeping dishonesty demonstrates that [he was] incapable of weighing the evidence, measuring credibility, and applying the law as instructed by [the] Court." *Id.* at *77. As the court found in granting a new trial for juror mendacity in *Daugerdas*, "[t]he presence of such a tainted juror, who cannot appreciate the meaning of an oath is simply intolerable." *Id.* at *81.

B. The Circuit Court Erred By Refusing To Sufficiently Investigate the Reports of Jury Misconduct or Allow Defense Counsel To Do So

1. The Circuit Court Should Have Been Disqualified

The discretion normally afforded courts in investigating claims of jury misconduct should not be accorded in this case because the circuit court should have been disqualified from presiding over that investigation. The court repeatedly concealed evidence of the misconduct – two telephone calls from Juror Delano,

[27](...continued)
detail. *See* R23:4474-76.

several letters from DeMartin and the letter from Ms. May. Moreover, some of this material was concealed at the same time that the court was conducting hearings (on April 17th and 30th) into the misconduct claims. The court even denied Goodman's motion to conduct broad-based jury interviews, in part, by finding that his motion was not sufficiently supported (*see* R19:3852-67) when, all along, the court had in its possession that very support – Ms. May's letter. The court's inexplicable behavior "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) (citation omitted). *See United States v. Van Griffen*, 874 F.2d 634, 637 (9th Cir. 1989) (disqualification required for magistrate's failure to disclose police report sent to him about the case before him).

The only excuse given by the court for the non-disclosures – that the court was "not personally aware" of the undisclosed correspondence – was legally deficient for two reasons. First, it violated Rule 2330(f) of the Florida Rule of Judicial Administration by providing a factual justification, rather than judging the legal sufficiency of the motion. Second, a court's lack of "personal" knowledge concerning the disqualifying facts is no excuse. Whether disqualification was required "d[id] 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."

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988). Therefore, this Court should remand for a complete investigation into the various forms of jury misconduct before a different judge. *See Howell v. State*, 80 So.3d 441, 442 (Fla. 4th DCA 2012); *Hathcock v. State*, 992 So.2d 918 (Fla. 4th DCA 2008) (per curiam).

2. The Court Abused Its Discretion In Severely Limiting the April 30 and May 11 Hearings

After the circuit court's efforts to conceal the jury misconduct were foiled by Delano, May and St. John contacting counsel and DeMartin's statements to the media, the court improperly used the limited hearings on April 30 and May 11 more as damage control than a search for the truth, thereby both abusing its discretion and violating Goodman's rights to due process and an impartial jury. As a threshold matter, the court erred, as a matter of law, in refusing to allow counsel to contact the jurors "informally" under the procedure provided in Florida Bar Rule 4-3.5(d)(4). *See DeFrancisco v. State*, 830 So.2d 131, 133 (Fla. 2d DCA 2002). That procedure remains distinct from Rule 3.575. *See Amendments to the Florida Rules of Criminal Procedure*, 886 So.2d 197, 199 (Fla. 2004). Once Goodman satisfied the minimal "reasonable grounds to believe" showing required by the Bar rule, counsel should have been permitted to seek additional evidence on their own.

The court then abused its discretion in refusing to allow counsel to ask any questions at the April 30th hearing and by refusing to ask any of the questions counsel

requested. The court tried to justify the whitewash with a cramped reading of *Johnson v. State*, 804 So.2d 1218 (Fla. 2001) (per curiam), claiming that only the most explicit discussions of Goodman's guilt would constitute improper premature "deliberations." Contrary to that ruling, even under *Johnson*, it is misconduct for jurors to begin discussing the "why's" and "how's" of the case. The circuit court eschewed all inquiry into what Delano was actually referencing in her affidavit – the type of full questioning that formed the basis of the Supreme Court's opinion in *Johnson*. *See Johnson*, 804 So.2d at 321-23. As in *Gray v. State*, 72 So.3d 336, 338 (Fla. 4th DCA 2011), the court abused its discretion in failing to conduct an adequate inquiry "where the defendant's allegations gave rise to a prima facie case of premature deliberations."

Goodman was particularly prejudiced by this approach since it served to conceal what exactly the jurors had to say about Goodman's wealth – discussions referred to by both Delano and May, especially when May's report implicated Lewis, the juror who had mentioned Goodman's wealth during voir dire. *See* p. 6 *supra*. Moreover, the prosecutors were shamelessly trying to stoke the jurors' class bias throughout the trial through their not so subtle references to Goodman's "quarter of a million dollar" and "expensive" Bentley and supposed desire for "high end" vodka. "[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 (1940). 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 of one party or another or sympathy for 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 circuit court did not take adequate steps to "avoid this risk" before, during or after the trial. Its "superficial at best" questioning denied Goodman a fair and impartial jury. *United States v. Heller*, 785 F.2d 1524, 1527-28 (11th Cir. 1986).

The court's inquiry into DeMartin's drinking experiment was even more deficient. By May 11, DeMartin had been thoroughly discredited, having repeatedly lied about his book plans, whether he showed jurors his "work sheets" for the book, the reason for his dismissive gesture during counsel's cross-examination of Livernois and whether the court had instructed him not to conduct any experiments. Yet, the court chose only to question (and then credit) DeMartin's *ambiguous* testimony, even

after St. John reported that DeMartin had "lied when he said he did not tell the other jurors about his plans to conduct the drinking experiment." *See* p. 34 *supra*. DeMartin's history of mendacity required more of an investigation, not less. S*ee* *DeFrancisco*, 830 So.2d at 133 ("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 this dishonesty required full jury interviews. *See Gray v. Moss*, 636 So.2d 881 (Fla. 5th DCA 1994). The court also refrained from asking any questions about May's report about Lewis discussing that DeMartin had at least been "offered" a $50,000 advance *during the trial* for writing a book on the trial. 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 juror, 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 Lewis' statements about DeMartin's conduct corroborated Delano's affidavit and undermined the rationale the court used to deny relief (that Goodman did not "offer any support for his belief about DeMartin's purported frame of mind other than mere speculation of bias"). *See* R19:3864.

Finally, the court refused to conduct any inquiry in Ms. May's report that Lewis had complained to a bailiff about the foreperson "'bullying' two other jurors" and that the bailiff did nothing. If true, Goodman would automatically have been entitled to a new trial under Fla. R. Crim. P. 3.410. *See State v. Merricks*, 831 So.2d 156 (Fla. 2002) (per curiam); *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). Therefore, the circuit court's failure to allow counsel to pursue informal interviews under the Bar rule and failure to conduct a meaningful hearing thereafter was reversible error.

V. THE JURY INSTRUCTION AND SENTENCING ERRORS

A. Jury Instructions

The existence of Pattern Instructions does "not relieve the trial court of its duty to ensure that the instruction[s] accurately and adequately convey the law applicable to the circumstances of the case." *Cliff Berry, Inc.*, *2012 Fla. App. LEXIS 37*, at *20. Therefore, a defendant is entitled to special instructions if they are (1) supported by the evidence (2) not sufficiently covered by other instructions and (3) correct statements of the law. *Id.* at **20-21 (citations omitted). Under this standard, as previously argued, Goodman was entitled to his instructions on spoliation and the need for the jury to view with caution the testimony of witnesses (Livernois and

Pembleton) who have received benefactor payments from third parties with conflicts of interest (the Volkswagen Group and the Wilsons' attorneys). R12:2260; R15:2868.

Goodman also requested and was denied an instruction requiring the State to prove that he "willfully" failed to remain at the scene and render aid and an affirmative defense instruction based on his head injury. *See* pp. 24-25 *supra*. Goodman was entitled to one or both of those instructions for two reasons.

First, Count 1 explicitly alleged that Goodman acted "willfully." While the prosecutors argued that this element was not required, they made no attempt to amend the Information under Fla. R. Crim. P. 3.140(o). Since the Information alleged that Goodman acted "willfully," Goodman was entitled to an instruction requiring the State to prove it. *See United States v. Cancelliere*, 69 F.3d 1116, 1120-21 (11th Cir. 1995) (where the indictment unnecessarily alleged that defendant "willingly" committed money laundering, trial court committed reversible error in redacting the term and later refused to instruct that "willfulness" was required to convict).

Second, the court's ruling that Goodman's intent was "completely irrelevant to this case" and resultant instructions on the enhancement, violated Goodman's right to due process. In *State v. Mancuso*, 652 So.2d 370, 371 (Fla. 1995), the Supreme Court of Florida reiterated "that section 316.027 creates only one crime, the felony of 'willfully' leaving the scene of an accident involving injury." Thus, *Mancuso* held

"that criminal liability under section 316.027 requires proof that the driver charged with leaving the scene either knew of the resulting injury or death or reasonably should have known from the nature of the accident and that the jury should be so instructed." 652 So.2d at 372. Moreover, since the enhancement elevates a noncriminal traffic infraction into a serious felony, doubling the potential penalty, due process required that the State prove that Goodman was at least consciously aware that Wilson's vehicle was in the canal and that the accident was not merely a hit and run – as Nicole Ocoro thought, even with her car's headlights illuminating the scene. *See* p. 11 *supra*. The severe criminalization of conduct without fault is usually limited to minor infractions such as parking violations or other regulatory offenses, *see Carter v. State*, 710 So.2d 110 (Fla. 4th DCA 1998), and the failure to require a sufficient level of intent may render a statute unconstitutional. *See Morissette v. United States*, 342 U.S. 246, 250 (1952).

In *State v. Adkins*, No. SC11-1878 (Fla. July 12, 2012), *2012 Fla. LEXIS 1365*, the Supreme Court of Florida recently surveyed the Florida and federal precedents for imposing strict liability, holding that strict liability (or a greatly diminished *mens rea*) is generally permissible for statutes prohibiting "affirmative act[s]," such as selling narcotics or witness tampering, but violates due process where statutes seek to criminalize the "inaction" and "essentially innocent conduct." *2012 Fla. LEXIS 1365*,

at **13-22 (citations omitted). The enhancement at issue herein seeks to punish "inaction" – a defendant's failure to render aid, remain at the scene of an accident and provide information to law enforcement. However, if the failure to act is the result of circumstances beyond the defendant's control – such as the inability to see a vehicle submerged in a canal in the dark and/or the defendant's head injury – it is not "rational" to send the defendant to prison.

Moreover, even in the controlled substance context, "[a]ny concern that entirely innocent conduct will be punished with a criminal sanction under chapter 893 is obviated by the statutory provision that allows a defendant to raise the affirmative defense of an absence of knowledge of the illicit nature of the controlled substance." *Adkins*, *2012 Fla. LEXIS 1365*, at *25. *Accord Maestas v. State*, 76 So.3d 991, 996 (Fla. 4th DCA 2011). Yet, in this case, the court refused to issue Goodman's affirmative defense instruction, which would have required the jury to acquit him if Goodman's conduct was found to be "a result of being disoriented or confused because of a head injury sustained during the crash." R12:2247. The court rejected Goodman's instruction, not for lack of evidence to support it, but because, in the court's view *Martin v. State*, 323 So.2d 666, 667 (Fla. 3d DCA 1976), was "inapplicable" and Goodman's intent was "completely irrelevant." R12:2313. That ruling cannot be squared with either due process or precedents construing §

316.027(1). *See, e.g., State v. Dumas*, 700 So.2d 1223, 1225-26 (Fla. 1997) (holding that "a driver must be aware of the facts giving rise to the affirmative duties imposed by the statute in order to be held liable for not performing those duties" because otherwise "the failure to act otherwise amounts to essentially innocent conduct").

B. Goodman's Sentence Violates Due Process

After authorizing the jury to convict Goodman of the enhancement without considering his intent, the court turned around at sentencing and based the 16-year sentence on the jury's non-existent finding of willfulness. Although that sentence was still within the guideline range, it was based on a patently improper basis. Therefore, the sentence violated Goodman's right to due process under *Townsend v. Burke*, 334 U.S. 733, 741 (1948).

VI. THE CUMULATIVE EFFECT OF THE ERRORS

"While a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error." *Perkins v. State*, 349 So. 2d 776, 778 (Fla. 2d DCA 1977). Therefore, even if any one trial error, standing alone, would not generate enough prejudice to require a new trial, the Court must view all the errors collectively to determine whether their cumulative effect substantially prejudiced Goodman. And, where, as here, many of the errors are constitutional in nature, the State bears the burden, as the beneficiary of the errors, to show that their

cumulative effect was "not harmless beyond a reasonable doubt." *McDuffie v. State*, 970 So.2d 312, 328, 332 (Fla. 2007).

The errors and negative incidents which occurred in Goodman's case are insurmountable; and not all of them could even be fully addressed in this Brief. In light of the venomous pretrial publicity, Goodman's trial should never have been held in Palm Beach County, and many of the errors that derailed the case flowed from the circuit court's mistaken belief that a fair and impartial jury could be found. The proceedings themselves were a televised circus, complete with the "sign man" prejudicing the jury against Goodman every day outside the courtroom. The prosecutorial misconduct was pervasive, including: (1) forcing Cathleen Lewter to go to their office a week before trial without her lawyer to perform a "pouring" demonstration, then concealing the exculpatory result from the defense and, when caught, making the frivolous argument to the court that *Brady* did not apply because the test had not been videotaped; (2) colluding with the Wilsons' attorneys to prevent the defense from contacting Pembleton by giving her a free lawyer, when she needed no lawyer at all, and then lying to the court to justify it by falsely accusing the defense team of "harassing" her – a lie later refuted by Pembleton herself; (3) lying to the court about what prompted them to contact the Volkswagen Group, claiming "surprise" from defense counsel's opening statement while later, with Goodman's

conviction in hand, boasting to the media that it was Serdar's pretrial deposition that caused them to enlist the help; (4) secretly colluding with the Volkswagen Group, allowing their paid expert Livernois to tamper with the Bentley's throttle while claiming to the court and Goodman that he was not even in town yet and was coming merely to "physically look" at the car; (5) exploiting the *Palm Beach Post*'s wealth bias theme throughout the trial with their loaded questions and closing arguments; and (6) constantly making facial gestures and loudly laughing during Goodman's testimony to prejudice the jury against him.

The jury then imploded. For money and fame, stealth juror Dennis DeMartin lied first to get on and then continued lying to stay on the jury – finally corrupting the entire process with his drinking experiment. Other jurors reportedly disregarded their oaths, as well, discussing the evidence and criticizing Goodman's "money." The cumulative impact of these errors plainly require a new trial. *See, e.g., Goldman*, 57 So.3d at 278 (reversing for cumulative error); *Baker*, 432 F.3d at 1223, 1229-31 (same); *Schledwitz*, 169 F.3d at 1014-15.

CONCLUSION

For all of the forgoing reasons, the Court should either vacate Goodman's conviction for insufficient evidence or reverse for a new trial and sentencing before a different judge.

Respectfully submitted,

ROY BLACK, ESQ.
[Fla. Bar No. 126088]
MARK A.J. SHAPIRO, ESQ.
[Fla. Bar No. 897061]
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 South Biscayne Blvd., Suite 1300
Miami, FL 33131
Telephone: (305) 371-6421

G. RICHARD STRAFER, ESQ.
[Fla. Bar No. 389935]
G. RICHARD STRAFER, P.A.
201 S. Biscayne Blvd., Suite 1380
Miami, FL 33131
Telephone: (305) 374-9091

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was e-mailed to the Fourth District Court of Appeals and mailed, via FedEx, to Richard Valuntas, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida, 33401, this 31st day of August, 2012.

G. RICHARD STRAFER

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.21(a)(2), I certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure.

G. RICHARD STRAFER

One of the horses rolling in the rain puddle today. Oh thank you Rudy for helping me out with the grooming!

I hope everyone had a wonderful Valentines day! Did I? Certainly, I had my usual day of rest.
My lessons and riding are getting better and better every ride. Geno & I have started counter canter and flying changes and Ruth thinks I should not sale him. She says that he is really good for me, in that I have to teach him everything he knows and again she says we are coming along by leaps and bounds. She also thinks he might have the ability to go FEI. The last couple weeks we have been working on counter canter and flying changes, but have been put on hold as I followed Ruth's advice and had Geno vetted and his hocks injected,so am currently awaiting our first post treatment ride tomorrow. In the mean time Jubal & I are doing awesome and have started leg yields and our canter work is coming along.

Last week Ruth graciously took me and several other guest to one night of the World Challenge where top Olympic & World dressage riders compete by invitation only. It was a great night of food & freestyle. Anky won & Steffen a respectable 2nd with the amazing Ravel.

Last Saturday one of Ruth's clients invited me to experience the very rare 40 goal polo game from their box seats. Mind you these seats are $10 grand. yes, that's 10,000 dollars...What a place to watch such a game! (a 40 goal game is the highest level game possible, it means that all four players on each team are ranked as 10 goal players. And I think there has only been 5 others in the history of polo here).

If you are on Facebook, you can preview my demo lesson with Jane Savoie. I am not on Facebook, but it is under: Solve your horse back riding fears. Ruth says that it is the most popular video they have ever posted

Last but not least on Friday morning I was awaken by a gentleman who was walking into my camper. What would you do if a guy was in your bedroom at 1:30 in the morning?

He said as I was sitting up..."I was just in an accident and I need to use your phone..." So I got up and searching for the phone I kept the lights off so he couldn't tell I was also searching for my mace because I didn't know who he was, if he was telling the truth or? After he got off the phone he sat on my couch and asked me "What should I do now?" and I told him he should call 9-1-1. He was very hesitant as he did not want to get into trouble, but after some encouragement he called and I walked with him down the driveway to meet the officers. It happens that there was infact a terrible accident or in his words "end of the world accident" right at the corner of my street which is one house away. You can read about it 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 he needed to get out and after he left I felt really bad...so by God's grace my response was different. The only thing I regret is while I was with him for about a half hour, before the authorities came, I never prayed with him
You can see other pictures on the internet, but here is one of mine from the early morning.

Pulling the car that John Goodman (owner of