

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

JOHN B. GOODMAN,

*Appellant,*

v.

**Case No. 4D12-1930**

Circuit Court No. 2010CF005829AXXMB  
15<sup>th</sup> Jud. Cir., Palm Beach County, Florida

STATE OF FLORIDA,

*Appellee.*

\_\_\_\_\_ /

**APPELLANT'S MOTION TO STAY AND TO  
RELINQUISH JURISDICTION TO SEEK  
A NEW TRIAL BASED ON THE  
PROSECUTOR'S CONFLICT OF INTEREST**

**ROY BLACK, ESQ.**

Florida Bar No. 126088

**MARK A.J. SHAPIRO, ESQ.**

Florida Bar No. 897061

**Black, Srebnick, Kornspan,  
& Stumpf, P.A.**

201 South Biscayne Boulevard, Suite 1300

Miami, Florida 33131

Ph. (305) 371-6421 – Fax (305)358-2006

E-mail [Rblack@RoyBlack.com](mailto:Rblack@RoyBlack.com) and [Mshapiro@RoyBlack.com](mailto:Mshapiro@RoyBlack.com)

**G. RICHARD STRAFER, ESQ.**

Florida Bar No. 389935

**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](mailto:straferpa@aol.com)

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**APPELLANT’S MOTION TO STAY AND TO RELINQUISH  
JURISDICTION TO SEEK A NEW TRIAL BASED ON THE  
PROSECUTOR’S CONFLICT OF INTEREST**

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The Appellant, JOHN B. GOODMAN, through undersigned counsel, respectfully moves this Court, pursuant to Fla. R. App. P. 9.600(b), for a stay of the instant criminal appeal and for an order relinquishing jurisdiction to the Circuit Court in order to consider granting either a motion for new trial and/or new sentencing, pursuant to Fla. R. Crim. P. 3.600(b)(5), or a motion to vacate his conviction and sentence, pursuant to Fla. R. Crim. P. 3.850(a)(1), based on the conflicts of interest of his chief prosecutor, former Assistant State Attorney (“ASA”) Ellen Roberts. As demonstrated below, Mr. Goodman has well-founded reasons to believe that ASA Roberts had two related conflicts of interests during her prosecution of Mr. Goodman.

First, between January and March 2012, ASA Roberts solicited the support of one of the lawyers who reaped millions in legal fees representing the parents of the decedent, Scott Wilson, in civil litigation against Mr. Goodman – Scott Smith of Lytal, Reiter, Smith, Ivey & Fronrath – in helping her unsuccessful bid to be appointed Interim State Attorney. In particular, she urged Mr. Smith to help by using the political influence of his brothers-in-law, U.S. Congressman Thomas Rooney and Florida State Representative Patrick Rooney, Jr.

Second, after not getting the appointment, ASA Roberts began “negotiating” for future employment directly with Mr. Smith’s firm in direct violation of Rule 4-1.11(d)(2)(B)<sup>1</sup> of the Rules Regulating the Florida Bar.

Individually but especially together, these conflicts of interest violated Mr. Goodman’s right to due process. The Court should therefore stay this appeal and relinquish jurisdiction to the Circuit Court to convene an evidentiary hearing in order to fully develop the facts and to permit the Circuit Court to grant Mr. Goodman relief. *See generally Young v. State*, 177 So.2d 345, 348 (Fla. 2d DCA 1965) (remanding for a hearing into prosecutor’s alleged conflict of interest to determine whether a new trial is required).

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<sup>1</sup> Rule 4-1.11(d)(2)(B) bars government attorneys (civil and criminal) from “negotiat[ing] for private employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially.”



In support of this motion, the Appellant submits the following memorandum. Part I summarizes the background of the case, highlighting the unusually collusive relationship between then ASA Roberts and the Wilsons' civil attorneys throughout this case. Part II summarizes the newly discovered evidence – emails recently obtained under Florida's public records statute. *See Composite Exhibit 1.* Part III demonstrates that ASA Roberts' handling of Mr. Goodman's prosecution while laboring under these conflicts of interest violated his right to due process.

## **MEMORANDUM**

### **I. PROCEDURAL BACKGROUND**

At 12:45 a.m. on February 12, 2010, the appellant, John B. Goodman (“Goodman”), crashed his Bentley into the side of a Hyundai, resulting in the death of the latter car's driver, Scott Patrick Wilson. Mr. Goodman was not immediately charged criminally but was sued civilly by Scott Wilsons' parents, represented by personal injury attorneys Scott Smith of Lytal, Reiter, Smith, Ivey & Fronrath and Christian Searcy of Searcy, Denney, Scarola, Barnhart & Shipley, P.A. R5:485. ASA Roberts spearheaded the parallel criminal investigation. It was also well known that ASA Roberts was scheduled to retire as of May 31, 2012, and that this would be her

last case with the State Attorney's Office. R10:1971; R34:591; R40:1556.<sup>2</sup> Neither prior to nor during trial did Ms. Roberts disclose what she intended to do after leaving the State Attorney's Office if she was appointed Interim State Attorney.

As discussed in Mr. Goodman's pretrial motion for a change of venue, even before Mr. Goodman was charged, he became the target of an unrelenting avalanche of prejudicial publicity

aimed increasingly at his perceived wealth.

See R1: 194-200; R2:

201-300. The motion

exhaustively

documented how

much of this publicity

was fomented by

leaks, interviews and



elaborate "press conferences" held by Messrs. Smith and Searcy. For example, on March 10, 2010, they held a "press conference" for television cameras at one of their

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<sup>2</sup> See also The Palm Beach Post, *Showdown over Polo mogul John Goodman's trial set to begin Tuesday*, March 3, 2012 ("The Goodman case may be the last big case for Roberts, who plans to retire in May unless Gov. Rick Scott appoints her to be the interim state attorney until January."), attached hereto as **Exhibit 2**.

offices, announcing that they were launching their own investigation into the accident. Portions of the speeches given by Messrs. Smith and Searcy during this press conference were later broadcast on television (and featured on YouTube). *See* R2:246-47.<sup>3</sup> The broadcast showed the Wilson family and both attorneys seated around a conference table in what appeared to be a law library. The library was filled with poster-size photographs of the crash site and a staged “exhibit” featuring a white-clothed table with eighteen shot glasses filled with a dark liquid – which was presumably meant to symbolize the number of drinks Mr. Goodman allegedly consumed before the accident. R2:245-46.

Messrs. Smith and Searcy unleashed another barrage of publicity on April 29, 2010, when they filed their wrongful death action against Mr. Goodman. Both the lawsuit and accompanying press release were loaded with inflammatory accusations and rhetoric that were dutifully picked up by the media, including allegations that Mr. Goodman had been using “controlled substances” and that he was “habitually” addicted to alcohol and had attended Alcoholics Anonymous meetings. The lawyers also falsely accused Mr. Goodman of using cocaine in both their complaint and numerous public statements to the press.<sup>4</sup> Perhaps the most prejudicial conduct of

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<sup>3</sup> *See* “Wilson Family Wants Answers From John B. Goodman! Part 3.”

<sup>4</sup> On June 3, 2010, Mr. Searcy gave a quote to the *Broward-Palm Beach New Times* (continued...)

Messrs. Smith and Searcy was their repeated statements to the media that Mr. Goodman refused to testify in civil depositions because he had invoked his Fifth Amendment right against self-incrimination.<sup>5</sup>

ASA Roberts eventually charged Mr. Goodman with DUI Manslaughter/Failure to Render Aid and Vehicular Homicide/Failure to Render Aid. As counsel later noted during Mr. Goodman's sentencing, counsel had tried "many times prior to trial" to engage ASA Roberts in plea negotiations but "the State would never give us" a plea offer. SR:135-36. In one story attacking "multi-millionaire" Goodman for hiring undersigned counsel, ASA Roberts stated "the only difference between [defense

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<sup>4</sup>(...continued)

for a story headlined, "Was John Goodman Using Cocaine the Night Before Fatal Crash?," claiming that he was a witness who was with Goodman before the accident who had confirmed that Mr. Goodman was on his way to buy cocaine when the accident occurred. *See also blogs.browardpalmbeach.com*, June 3, 2010, "Was John Goodman Using Cocaine the Night Before Fatal Crash?"

<sup>5</sup> *See WPBF.com*, August 17, 2010, "Polo Founder Appears For Deposition" (quoting Mr. Searcy as boasting that this was the first time the Wilson family had "been able to confront his killer" and "we're beginning to move in the direction of justice"); *Palmbeachpost.com*, Oct. 25, 2010, "Victim may share blame in fatal Feb. 12 crash near Wellington, polo mogul Goodman's attorneys assert in civil case"; *Palmbeachpost.com*, June 27, 2011, "Oct. 24 trial date set for polo mogul in fatal Wellington crash" (quoting Mr. Smith as saying that "[e]ach day is agony" for the Wilson family). Several other articles also reported that Goodman invoked his Fifth Amendment rights without mentioning the source. *See Palmbeachpost.com*, Oct. 26, 2010, "Polo mogul allowed to argue crash victim partially at fault - for now"; *Wptv.com*, Oct. 26, 2010, "Polo mogul's attorney blaming victim in fatal DUI crash"; *Palmbeachpost.com*, Jan. 10, 2011, "How much is Goodman really worth? Parents of Wellington man killed in crash seek answer in court."

counsel] and me is they make a lot of money.” R2:241; R10:1971; R34:591; R40:1556. The latter comment has now gained new meaning.

As discussed in Mr. Goodman’s appellate briefs, Messrs. Searcy and Smith attempted to act as if they represented an actual party in the criminal case. For example, they filed a motion in Mr. Goodman’s criminal case, opposing Mr. Goodman’s motion to conduct tests on his vehicle. R1: 55. They also provided a “free” attorney – Mr. Searcy’s former law partner, Harry Shevin – to a key State witness, Lisa Pembleton. R17:3289-90; R40:1541-43, 1546. After allowing the Wilsons’ attorneys to prepare Ms. Pembleton for her depositions (R40:1566-67), Mr. Shevin invoked the Florida Bar’s anti-contact rule, Rule 4-4.2 of the Rules Regulating the Florida Bar and barred Mr. Goodman’s counsel from contacting her. R40:1551-52, 1566.<sup>6</sup>

Shortly before trial, Mr. Goodman settled the wrongful death action with the Wilson family for \$40 million where “most verdicts would be somewhere between 5 and 8 million.” SR138-39.<sup>7</sup> Presumably, Messrs. Searcy and Smith split millions of dollars in contingent fees from this inflated recovery. However, that did not end their

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<sup>6</sup> This conduct is discussed more thoroughly in Mr. Goodman’s appellate briefs.

<sup>7</sup> The Wilsons also collected the full \$40 million from Mr. Goodman’s insurance company. SR1-138. The Court can take judicial notice of the fact that a significant percentage of Florida drivers are uninsured and the vast majority of drivers that are insured do not have either insurance policies or attachable assets even approaching \$5 million.

representation of the Wilsons who plainly expected them to continue assisting ASA Roberts in order to secure Mr. Goodman's conviction. Messrs. Searcy and Smith even attempted to participate in the *voir dire* with ASA Roberts announcing that the Wilsons were "upset" at not being able to attend sidebars. R5: 484. After the court denied the request, Mr. Searcy stood up, confessed that the request came from him and reiterated that "the victims" should be allowed to participate directly in Mr. Goodman's prosecution. R5: 486. That unprecedented request was denied.

Mr. Goodman went to trial in March 2012 and was ultimately convicted as charged on March 23, 2012. Although the Wilsons and their attorneys attended the trial, Mr. Goodman had no way of knowing the attorneys' interactions with ASA Roberts behind the scenes.

Mr. Goodman was not sentenced until May 11, 2012. As discussed below, by at least April 3, 2012, ASA Roberts was actively negotiating with Mr. Smith to join his firm. Bolstered by Mr. Smith's behind-the-scenes cheerleading, see *infra*, ASA Roberts requested that the Circuit Court sentence Mr. Goodman to 20 years in prison. SR127-29. The Circuit Court ultimately sentenced Mr. Goodman to 16 years.

Mr. Goodman timely filed a notice of appeal to this Court and the initial briefs have been filed. Even without the benefit of the new emails, Mr. Goodman's brief discusses how the trial was infected by the outside financial interests of many third

parties – (1) a car manufacturer intent on preventing class action lawsuits, (2) the *Palm Beach Post* trying to sell newspapers, (3) a stealth juror seeking fame and fortune at Mr. Goodman’s expense; and (4) the efforts of Messrs. Smith and Searcy to (a) poison the pools for both the criminal and civil trials and (b) influence the testimony of a key witness (and prevent Mr. Goodman’s lawyers from talking to her) by providing her with a “free” attorney. Unknown to Mr. Goodman and counsel at the time, the proceedings were also tainted by a fifth money-seeking participant – ASA Robert’s use of this case as the springboard to eliminate the only difference she had perceived between herself as a prosecutor and Mr. Goodman’s counsel – that “they make a lot of money.”

On January 18, 2013, Mr. Goodman sent the State Attorney’s Office a public record request under Ch. 119, Fla. Stat., seeking all telephone and email communications between Ms. Roberts and Mr. Smith. Counsel received the emails on February 20, 2013. The emails establish beyond any question that by no later than **April 3, 2012**, – over one month *before* Goodman’s sentencing on **May 11, 2012** and only 11 days after the verdict in Goodman’s trial – ASA Roberts was actively “negotiating” with Mr. Smith for employment at his firm. The emails also refer to at least one undated conversation she had with Mr. Smith about the job at some unknown time *before* April 3, 2012.

## II. THE NEWLY DISCOVERED EVIDENCE

As previously noted, it was common knowledge in the Palm Beach County legal community that the Goodman trial was to be ASA Robert's last before she retired. By May 29, 2012, a little more than two weeks after Mr. Goodman's sentencing, the media began reporting that Ms. Roberts was "head[ed] to *a civil firm* where she will continue to mentor younger, aspiring attorneys." See [www.wptv.com](http://www.wptv.com), *John Goodman prosecutor Ellen Roberts set to retire reflects on career, high profile cases*, May 29, 2012, **Exhibit 3** (emphasis added). A few days later, the media reported that this "civil firm" was Mr. Smith's. See Palm Beach Post, *Love her or hate her, all sides agree: Ellen Roberts had an impact*, June 2, 2012, **Exhibit 4** ("She also will be working part-time for the civil firm Lytal, Reiter, Smith, Ivey & Fronrath, where a partner recently represented the father of Goodman's victim, Scott Wilson.").

However, the recently received emails confirm that ASA Roberts was trading on her position as lead prosecution of the criminal case against Mr. Goodman to obtain personal "favours" from Mr. Smith's firm all along. After Palm Beach County State Attorney Michael McAuliffe announced that he would be leaving the office in March 2012, Governor Rick Scott began taking applications for the position of Interim State Attorney. ASA Ellen Roberts was one of the applicants and was reportedly interviewed by Governor Scott in late February 2012. See **Composite Exhibit 5**.



Before the interview, on January 25, 2012, ASA Roberts emailed Mr. Smith to ask: “First, did you get my CV that I faxed to you?” *See Composite Exhibit 1.* ASA Roberts used the rest of the email to inform Mr. Smith about the civilian witnesses she intended to call in Mr. Goodman’s trial and to discuss an exchange of discovery with Mr. Smith. The email ended with: “Let’s meet soon so we can discuss strategy!!!!” *Id.*

After another series of emails in which ASA Roberts kept Mr. Smith apprised of the status of the pretrial litigation in Mr. Goodman’s case, on January 31, 2012, ASA Roberts sent Mr. Smith an email about “Two things.” *Id.* The first topic was a report to Mr. Smith about her deposition of a defense expert. The second topic was a solicitation for Mr. Smith’s help in getting her the appointment from Governor Scott: “Also, I am sending to the governor today the application for appointment. *Can you let Tom and Pat know that I did this so if they want to follow up. Thanks for your help.* I will get you the depo of the expert when I have it.” *Id.* (emphasis added). It is well known in Palm Beach County social circles that Mr. Smith is married to Molly Rooney Smith – the sister of U.S. Congressman Thomas Rooney and Florida State Representative Patrick Rooney, Jr. *See Composite Exhibit 6.* While ASA Roberts’ application was pending, on February 6, 2012, ASA Roberts and Mr. Smith exchanged emails about both the status of her application and Mr. Goodman’s case. *Id.* Between

February 24 and 29, 2012, while ASA Roberts' application was still pending, she and Mr. Smith exchanged various discovery, including depositions, medical records and photographs. After Mr. Smith sent ASA Roberts the CDs of the civil video deposition of witness Cathleen Lewter, Ms. Roberts promised in return to let him know "how it goes after we 'have at her' in the morning." *Id.*

Therefore, by all appearances, these emails strongly suggest that in return for providing Mr. Smith a direct pipeline into the witnesses and thought process of the chief prosecutor, ASA Roberts wanted Mr. Smith to use his familial connections with a U.S. Congressman and a State Representative to help lobby for her to receive the appointment. What Mr. Smith did on ASA Roberts' behalf is unknown at this time. However, whatever he did proved unsuccessful as Governor Scott appointed Peter Antonacci to the position in early March 2012. *See Composite Exhibit 5.*

While the specific timing is unknown, it is clear from subsequent emails that sometime after ASA Roberts lost the appointment, she began lobbying Mr. Smith for a job directly with his firm. Meanwhile, Mr. Smith's influence on the criminal case had grown to such an extraordinary extent that on March 17, 2012, Mr. Smith emailed Ms. Roberts some 15 pages of cross-examination questions (and follow up questions)

for her to use in questioning an anticipated defense witness, a toxicologist. *See*

**Composite Exhibit 1.**<sup>8</sup>

Meanwhile, it took ASA Roberts less than a month from her failed bid to be appointed Interim State Attorney to secure a job offer from Mr. Smith. At 3:22 in the afternoon on April 3, 2012, ASA Roberts wrote to Mr. Smith and said: “I would really like to talk to you about my ‘retirement’ *and what we talked about. Apparently this case has helped my career!*” *Id.* (emphasis added).<sup>9</sup> Ms. Roberts then sought to portray her services as much in demand, boasting that she had “2 teaching jobs lined up in Orlando and St. Pete” but was “was waiting to talk to you.” Less than an hour later, at 4:15 p.m., ASA Roberts emailed Mr. Smith and offered to personally hand deliver a copy of Mr. Goodman’s motion for new trial and exhibits (filed the day before). Mr. Smith encouraged her to come to his office. What exactly transpired there is not completely known. However, in another email sent by Mr. Smith to ASA Roberts at 9:11 p.m. that evening, Mr. Smith informed her that he had “already sent an e-mail to all firm partners” and asked her not to make any “decisions until you have heard from me. You are a tremendous lawyers and person, and *we would be honored*

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<sup>8</sup> Since the witness was never called, there is no way of knowing how closely Ms. Roberts would have followed the script.

<sup>9</sup> Thus, even though the civil case had settled before trial, ASA Roberts needed to convict Mr. Goodman in order to use this case as a springboard into private practice.

*to have you on our team fighting for our clients.” Id.* (emphasis added). Mr. Smith then lobbied her, stating that there would be “plenty” of work at the firm “to keep you stimulated and motivated. I’ll be back in touch real soon.” *Id.* These emails plainly establish that their topic was the hiring of ASA Roberts by Mr. Smith’s firm. Presumably, ASA Roberts’ potential salary and benefits were some of the topics of the negotiation that occurred between the last two emails – a negotiation that resulted in a job offer to ASA Roberts that only needed the ratification of Mr. Smith’s partners.

Six days later, on April 9, 2012, ASA Roberts forwarded to a relative an email chain in which ASA Roberts and Mr. Smith discussed plans to have lunch the next day. The relative understood what this meant, gushing that she was “[t]hrilled for this opportunity for you.....” *Id.* In the email chain itself, ASA Roberts informed Mr. Smith that she had been invited to speak at the 27<sup>th</sup> Annual Traffic Safety Recognition Luncheon on June 6, 2012, and that “they want me to speak about my career *and my plans for the future*. 200 people usually attend. Officers as well as others.” **Composite Exhibit 1** (emphasis added). Mr. Smith responded that this was “great news” and invited her to lunch the next day. This exchange strongly suggests that ASA Roberts wanted to be able to announce her job with Mr. Smith’s firm at this luncheon and that doing so could be beneficial in drumming up business for her and the firm.

Meanwhile, ASA Roberts was working on a response to Mr. Goodman's first motion for new trial that had been filed on April 2, 2012. On May 1, 2012, she emailed Mr. Smith asking if he had found "any case law" for her to use, obviously suggesting that Mr. Smith or others at his firm were helping her, presumably for free, in conducting legal research to use in the State's response to the motion. In the same email, ASA Roberts changed the topic of conversation to her upcoming job, stating: "We need to pick a day when I can go 'shopping' at your office, if you know what I mean! Let me know...."

As previously noted, Mr. Goodman was sentenced on May 11, 2012, a hearing at which ASA Roberts continued to represent the State without disclosing anything about her job offer with Mr. Smith's firm. That same morning, ASA Roberts emailed Mr. Smith to announce that she had already started "packing up my books and stuff" in order to move into the firm's offices. Later that same month, May 22-23, 2012, there are additional emails between ASA Roberts and Mr. Smith about her move ending with Mr. Smith offering to send her help and noting, "You need to get used to having a support staff!"

On May 30, 2012, ASA Roberts began lobbying Mr. Smith to obtain business cards because "I am getting all of these speaking offers and I would like to be able to let people know where I will be working." *Id.* Mr. Smith agreed to help get them

printed but cautioned that if they used a local printer to print the cards, they would have to instruct that “this is confidential for time being (until June 18<sup>th</sup>).” June 18, 2012, was ASA Roberts’ last official day at the State Attorney’s Office.

Once joining Mr. Smith’s firm, it did not take long for her and Mr. Smith to use Mr. Goodman’s case to try to drum up business. On June 6, 2012, Ms. Roberts

attended the annual Dinner Meeting of the Palm



*Chris Searcy, Prosecutor Ellen Roberts  
& Scott Smith*

Beach County Justice Association where Messrs. Searcy and Smith gave a presentation, along with their “Special Guest Speaker and Guest of Honor” Ellen Roberts. *See Composite Exhibit*

7. The topic of the joint presentation was:

“Pursuing the Driving Under the Influence (DUI) Wrongful Death case in Florida – *Maximizing the Recovery for the Estate and Survivors.*” *Id.* (emphasis added). The Association’s Spring/Summer 2012 edition of its publication, *Briefings*, highlighted the speakers along with a photograph of Ms. Roberts flanked by Messrs. Searcy and Smith (see above). Unfortunately, counsel have been unable to obtain a tape recording of the presentation itself to determine what role Ms. Roberts claimed to have played while still working as a prosecutor in “maximizing” her future employer’s “recovery” in the lawsuit against Mr. Goodman.

Finally, until recently, Ms. Roberts' "bio" on the firm's website boasted that she helped convict "polo mogul John Goodman." *See Composite Exhibit 8* (see below). By February 2013, the firm finally cut the pejorative term "polo mogul." *Id.*

**THE LAW OFFICE OF LYTAL, REITER, SMITH, IVEY & FRONRATH**

**Ellen D. Roberts**  
[eroberts@foryourrights.com](mailto:eroberts@foryourrights.com)

Ellen D. Roberts is an accomplished trial attorney with decades of experience. She joined Lytal, Reiter, Smith, Ivey and Fronrath in 2012 after a 26 year career at the Palm Beach County State Attorney's Office. She spent the majority of her legal career as supervisor of the State Attorney's Office traffic homicide unit. Ms. Roberts now uses her knowledge of accident investigations and extensive trial experience to provide aggressive representation to individuals and families who have been injured or killed in auto and truck accidents and other personal injury matters.

Ms. Roberts prosecuted many high profile cases during her time at the State Attorney's Office including the 2012 vehicular homicide case against polo mogul John Goodman. As a successful prosecutor, she obtained justice for hundreds of crash victims and their families. She has also received comprehensive training on all aspects of vehicle accident investigations including accident reconstruction, low friction vehicle dynamics, physical evidence in forensic science. She is considered a specialist in both forensic mapping and crash data retrieval.

Ellen Roberts' vast knowledge and training allows her to make significant recoveries for her clients and continue her career-long fight for accident victims and their families.



### **III. ASA ROBERTS' CONFLICT OF INTEREST VIOLATED GOODMAN'S RIGHT TO DUE PROCESS**

Prosecutors wield enormous power over people's lives, liberty and reputations with very few checks on the exercise of their discretion to determine what methods of investigation should be used, what information will be sought as evidence, which persons should be utilized as witnesses and what inducements to offer them to do so. Therefore, "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the

prosecutorial decision and in some contexts raise serious constitutional questions.” *Marshall v. Jerrico*, 446 U.S. 238, 248-50 (1980). Therefore, contrary to Ms. Roberts’ special guest appearance with her new boss at the June 6<sup>th</sup> Dinner Meeting of the Palm Beach County Justice Organization, her job at the State Attorney’s Office was not to assist her future employer “maximiz[e] [his] recovery” in the civil wrongful death litigation. Rather, her duty was to embody the sovereign’s goal of securing the fairness and neutrality of the judicial process. “[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, [s]he must always be faithful to [her] client’s overriding interest that ‘justice shall be done.’” *United States v. Agurs*, 427 U.S. 97, 110-11 (1976). Justice, or at least the appearance of justice, is shattered when a prosecutor helps “maximize” an attorney’s financial recovery in a civil case using a criminal prosecution and then continue using the prosecution to secure a job with that same attorney.

For the individual attorney, a potential conflict of interest may seem merely a problem of “professional responsibility.” When a prosecutor is involved, the problem is more than just a matter of intra-professional regulation. More is then at stake than just the preservation of the public’s faith in the rectitude of the profession – much more. A prosecutor “is the representative not of any ordinary party to a controversy, but of a sovereign whose obligation [is] to govern impartially.” *Berger v. United*



*States*, 295 U.S. 78, 88 (1935). *United States v. Agurs*, 427 U.S. 97, 110-11 (1976).

For that reason, prosecutors are held to a stricter standard of neutrality than private attorneys in civil cases. *United States v. Witmer*, 835 F. Supp. 208, 214-15 (M.D. Pa. 1993); *Silverman v. Ehrlich Beer Corp.*, 687 F. Supp. 67, 69-70 (S.D.N.Y. 1987).<sup>10</sup>

For that reason, it is now well established that a defendant's due process rights are violated if the prosecutor in charge of the criminal case was simultaneously representing the victim of the crime in civil litigation against the same defendant.

For example, in *Comm. v. Eskridge*, 529 Pa. 387, 604 A.2d 700 (1992), the court reversed the defendant's conviction for homicide while driving under the influence and related charges where the district attorney's private law partners represented the victims of the accident in civil suits against Eskridge. Since "the successful criminal prosecution of [Eskridge] would have facilitated the prosecution of the civil actions," the court found that the district attorney "had a direct financial

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<sup>10</sup> See also *State v. Lead Industries Ass'n*, 951 A.2d 428, 475 (R.I. 2008) ("due to the special duty of attorneys general to 'seek justice' and their wide discretion with respect to same, such [contingent] relationships must be accompanied by exacting limitations."); *State ex rel. Bar Ass'n v. Douglas*, 416 N.W.2d 515, 550 (Neb. 1987) ("improper conduct on the part of a government attorney is more likely to harm the entire system of government in terms of public trust"); *In re Petition for Review of Opinion No. 569*, 511 A.2d 119, 122 (N.J. 1986) ("[p]recisely because government attorneys are invested with the public trust...their conduct must be even more circumspect than the private attorney"); *City of Los Angeles v. Decker*, 558 P.2d 545, 551 (1977) (state attorneys in civil actions "[o]ccupy a position analogous to a public prosecutor" and "are pledged to the accomplishment of one objective only, that of impartial justice").

interest in obtaining a conviction” and, therefore, violated due process. 529 Pa. at 389-90; 604 A.2d at 701. This was so, the court reasoned, because a defendant has a due process “right to have his case reviewed by an administrator of justice with his mind on the public purpose, not by an advocate whose judgment may be blurred by subjective reasons.” *Id.* Numerous state and federal courts have found due process violations under similar circumstances. *See, e.g., Ganger v. Peyton*, 379 F.2d 709 (4<sup>th</sup> Cir. 1967); *Young v. State*, 177 So.2d 345, 347 (Fla. 2d DCA 1965). *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (using supervisory power of the Court to bar a party’s attorney in underlying litigation from prosecuting a criminal contempt, “since a scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision”) (citation omitted). And, this type of conflict is exacerbated if the attorneys were handling the civil case on a contingent basis: “In the event the special prosecutors had the civil case on a contingency fee basis, then they would have a direct financial interest in the criminal proceeding leading to an irreconcilable conflict.” *State v. Eldridge*, 951 S.W.2d 775, 783 n. 3 (Tenn. Crim. App. 1997). In *Eldridge*, the court reversed the conviction, despite the absence of a

timely objection, holding that “the very integrity of our judicial system” was at stake.

*Id.* at784.<sup>11</sup>

An equally intolerable conflict of interest exists when a prosecutor is merely “negotiating” with a civil firm representing the victim or the victim’s family. The Rules Regulating the Florida Bar thus expressly provide that a government attorney “shall not ... negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.” Rule 4-1.11(d)(2)(B), Rules Regulating the Florida Bar. Similar rules bar judges from considering employment with a law firm appearing before them while actively handling cases where that same law firm represents a party. A Comment to the *ABA Model Judicial Code*, in elaborating on when a judge’s impartiality “might reasonably be questioned,” states that a judge should disqualify himself if he is “negotiating for employment with a law firm.” MODEL JUDICIAL

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<sup>11</sup> See also *General Motors Corp. v. United States*, 573 F.2d 936 (6<sup>th</sup> Cir. 1978), *cert. denied*, 99 S.Ct. 1277 (1979); *State of New Jersey v. Imperiale*, 773 F. Supp. 747 (D. N.J. 1991); *United States v. Gold*, 470 F.Supp. 1336 (N.D. Ill. 1979); *Davenport v. State*, 157 Ga. App. 704, 705-06, 278 S.E.2d 440, 441 (1981); *State ex rel. Koppers Co. v. International Union Oil. Chem. & Atomic Workers*, 171 W. Va. 290, 298 S.E.2d 827, 832 (W.Va. 1982); *People v. Zimmer*, 51 N.Y.2d 390, 395, 414 N.E.2d 705, 708, 434 N.Y.S.2d 206, 209 (1980); *People v. Superior Court of Contra Costa County*, 19 Cal. 3d 255, 268-69, 561 P.2d 1164, 1173, 137 Cal. Rptr. 476, 485 (1977); *Cantrell v. Commonwealth*, 229 Va. 387, 394, 329 S.E.2d 22, 26-27 (1985); *Sinclair v. State*, 278 Md. 243, 363 A.2d 468 (Md. App. 1976). See also *Wright v. United States*, 732 F.2d 1048 (2d Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

CODE, Canon 3E commentary. The United States Judicial Conference’s Committee on Codes of Conduct has similarly issued an opinion stating that a judge must “recuse from all cases handled by any such law firm during any such negotiations....” Judicial Conference of the United States, Committee on Code of Conduct for United States Judges, Compendium of Selected Opinions § 2.5 (2003). Judges have frequently been disqualified for failing to recuse based on such “negotiations.” *See, e.g., Continental Airlines Corp. v. Continental Airlines, Inc.*, 901 F.2d 1259 (5<sup>th</sup> Cir. 1990); *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7<sup>th</sup> Cir. 1985); *Scott v. United States*, 559 A.2d 745 (D.C. App. 1989) (en banc).

The anti-negotiation rule not only violates ethical norms but due process, as well. For example, in *Rissler v. Jefferson County Bd. of Zoning Appeals*, 225 W.Va. 346, 693 S.E.2d 321 (2010), the court found that a citizen seeking a zoning change was denied due process because the attorney representing the Zoning Board eventually left the Board’s employ to work for the law firm representing a real estate developer that opposed the zoning change. The attorney resigned from the Board on December 10, 2004, last worked for the Board on January 31, 2005, and joined the law firm the next day, February 1, 2005. 225 W. Va. at 356, 693 S.E.2d at 331. While the record was not clear when “exactly” the attorney “commenced and concluded his employment negotiations with CMZ, it is apparent that such talks likely occurred while he was still

working for the Board....” 225 W. Va. at 357, 693 S.E.2d at 332. Finding that this conflict or potential conflict violated due process, the court reversed for a new hearing before the Zoning Board. *Cf. Comm. v. Maricle*, 10 S.W.3d 117, 120 (Ky. 1999) (disqualifying defense firm where the prosecutor “continued to participate” in the matter “for some two and one-half months after she negotiated employment” with the firm).<sup>12</sup>

ASA Roberts flagrantly violated these principles, first, by permitting Mr. Smith to act as a behind-the-scenes member of the “prosecution team” in exchange for the political influence Mr. Smith’s brothers-in-law would hopefully wield on her behalf with Governor Scott, and, second, when that did not pan out, by “negotiating” to join Mr. Smith’s firm while still actively prosecuting Mr. Goodman. The fact that the Wilsons settled their lawsuit against Mr. Goodman before the trial does nothing to assuage ASA Roberts’ misconduct. While Mr. Smith may have no longer needed Mr. Goodman’s conviction to collect his contingency fee, his client, the Wilsons, were after more than just money. The Wilsons wanted Mr. Goodman convicted and sent to prison

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<sup>12</sup> Federal law even makes it a crime for a for a government official to negotiate for future employment with a law firm or company doing business with the official’s agency. *See* 18 U.S.C. § 208(a). *See generally United States v. Hedges*, 912 F.2d 1397, 1400-01 (11<sup>th</sup> Cir. 1990); *L-3 Communications Integrated Systems, L.P. v. United States*, 91 Fed. Cl. 347, 350 n. 3 (2010).

and they hired Messrs. Smith and Wilson to assure that result throughout the trial, even drafting ASA Roberts' cross-examinations.

Moreover, while Mr. Smith may have received his huge contingency fee before the trial, ASA Roberts would not be rewarded with a job at Mr. Smith's firm without Mr. Goodman's conviction. As the emails reflect, she shamelessly traded on her prosecution of the "polo mogul" to drum up business for Mr. Smith through speeches given before Mr. Goodman was even sentenced and used her notoriety to lobby Mr. Smith for the job. *See pp. 14-16 supra.* And, as her firm web page underscores, ASA Roberts has continued to use her conviction of the "polo mogul" to market new potential clients. Hence, both ASA Roberts and Mr. Smith's firm had personal financial incentives in making sure Mr. Goodman was convicted. ASA Roberts needed the conviction to obtain Mr. Smith's political help in getting the Interim State Attorney appointment and to justify being hired by Mr. Smith's firm. And, Mr. Smith's firm needed the conviction in order to benefit from hiring her, i.e., to share the new business the firm hoped to attract based on her highly publicized victory against undersigned counsel.

### CONCLUSION

ASA Roberts' conduct plainly violated both the anti-negotiation rule and Mr. Goodman's right to due process. While we do not currently know what influence Mr.

Smith exerted on her behalf with his politically powerful brothers-in-law in an attempt to win the appointment from Governor Scott, the January and February 2012 emails suggest that she was trading influence for influence – Mr. Smith could influence and gain full access to the criminal prosecution and Mr. Smith would, in turn, influence Governor Scott’s appointment decision. Similarly, while we do not currently know for certain when ASA Roberts first began “negotiating” with Mr. Smith for a job with his firm, their exchange of emails on April 3, 2012, make it clear that the negotiations had begun earlier and had culminated that day with a job offer. The terms of this employment agreement, however, are currently unknown, including salary negotiations, whether she received a “signing bonus,” and how much she is expected to work to earn her keep. Therefore, the Court should stay these proceedings and remand the case back to the Circuit Court for an evidentiary hearing and rulings on the impact of ASA Roberts’ conflicts of interest on this case.

Respectfully submitted,

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

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G. RICHARD STRAFER  
[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 has been furnished by e-mail, (CrimAppWPB@MyFloridaLegal.com) to Richard Valuntas, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida, 33401, on February 26, 2013. In addition, undersigned counsel certifies that the foregoing was also e-mailed to the Court on the same day.

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G. RICHARD STRAFER