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

CRIMINAL DIVISION "W"

CASE NO.: 2010CF005829A MB

JUDGE JEFFREY COLBATH

STATE OF FLORIDA,

Plaintiff,

v.

JOHN B. GOODMAN,

Defendant.
_____/

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

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
E-mail Mshapiro@RoyBlack.com
Counsel for John B. Goodman

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CASE NO.: 2010CF005829AMB

STATE OF FLORIDA,

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JOHN B. GOODMAN,

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_____/

JUDGE JEFFREY COLBATH

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM OF LAW

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

A. Introduction

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

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

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

B. The Court's Rulings

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at p. 3.

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

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

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

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

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

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

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

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

2. The Unconstitutional "Free" Representation

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

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

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

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

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

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

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

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

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

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

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

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

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

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[14] Section 914.03 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Introduction

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

B. The Court's Rulings

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

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

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

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

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

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

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

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

3. The State Deposes Defense Expert Luka Serdar

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

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

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

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

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

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

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

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

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

The Prosecutors' Post Verdict News Conference

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

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

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

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

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

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

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

Id. at pp. 35-36.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. The Preliminary Richardson Hearing on March 19, 2012

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

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

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

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

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

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

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

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

11. The Second Richardson Hearing on March 21, 2012

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Argument

1. The Richardson Violation

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

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

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

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

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

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

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

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

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

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

2. Due Process/Confrontation Violations Regarding the Benefactor Support

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

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

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

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

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

3. The Brady/Giglio Violations Require an Evidentiary Hearing

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

a. The Benefactor Payments To Mr. Livernois

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The Suppressed Evidence Sudden Acceleration Cases

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

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

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

4. The Results of the Exemplar Testing Were Inadmissible

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

BLACK, SREBNICK, KORNSPAN, & STUMPF, P.A.
201 South Biscayne Boulevard, Suite 1300
Miami, Florida 33131
Ph. (305) 371-6421 – Fax (305)358-2006
E-mail RBlack@RoyBlack.com
E-mail Mshapiro@RoyBlack.com

By:
ROY BLACK, ESQ.
Florida Bar No. 126088
MARK A.J. SHAPIRO, ESQ.
Florida Bar No. 897061
Counsel for John B. Goodman

CERTIFICATE OF SERVICE

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

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

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