IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA CRIMINAL DIVISION "W"

CASE NO: 2009CF009771AMB

STATE OF FLORIDA,

Plaintiff,

VS.

DALIA DIPPOLITO,

Defendant.

### RESPONSE IN OPPOSITION TO STATE'S MOTION FOR PROTECTIVE ORDER AND REVOCATION OF PRO HAC VICE STATUS

Defendant Dalia Dippolito, through undersigned counsel, respectfully submits this Response in Opposition to the State's Motion for Protective Order and for Revocation of *Pro Hac* Vice Status. For the reasons that follow, this Court should deny the State's unabashed attempt to deprive Ms. Dippolito of her Sixth Amendment right to counsel of her choosing and impair her attorneys' First Amendment right to free speech by way of a blanket gag order.

#### I. **BACKGROUND**

This case arises from a murder-for-hire sting operation initiated by the Boynton Beach Police Department ("BBPD") after Mohamed Shihadeh notified BBPD that Ms. Dippolito was suffering from domestic abuse at the hands of her husband. Although he reported that Ms. Dippolito mentioned having her husband killed, Shihadeh only wanted to get Ms. Dippolito "help" and never wanted to serve as a confidential informant.

Instead of investigating Ms. Dippolito's domestic abuse, BBPD decided to manufacture a made-for-TV murder-for-hire plot. Knowing that the COPS television program would soon be filming their department, BBPD coerced Shihadeh to serve as a confidential informant through threats of prosecution and by falsely informing him that signing a confidential informant packet would allow him to remain anonymous. BBPD declined to deactivate him even though he repeatedly told officers he did not want to participate in the investigation. Detective Moreno also called him ten times a day and again threatened him with prosecution if he did not continue to act as a confidential informant. BBPD also placed an artificial deadline on the conclusion of the investigation, at one point instructing Shihadeh that he had to set up Ms. Dippolito within seventy-two hours, a time frame that coincided with the filming of the COPS television program.

BBPD conducted video surveillance of the alleged solicitation set up by Shihadeh. After the alleged crime was already complete, BBPD staged a fake crime scene and invited the COPS crew to film Ms. Dippolito's reaction as she was informed (falsely) that her husband had been killed. BBPD's public information officer, Stephanie Slater, rushed back from the fake crime scene to release the YouTube videos¹ of Ms. Dippolito before she was even charged with a crime. During the course of her subsequent interrogation, Sergeant Paul Sheridan tricked Ms. Dippolito into signing a waiver that purported to permit law enforcement to release the videos to the public by falsely telling her that it was a Miranda waiver form. BBPD reveled in the spotlight, and the chief of police sent an email notifying personnel that the department intended to have a "viewing party" to watch the COPS episode.

The videos BBPD posted went viral. As a consequence, the case garnered an extraordinary amount of media attention in advance of Ms. Dippolito's first trial. The overwhelming majority of the media accounts portrayed Ms. Dippolito in a negative light, at times referring to her as the "Black Widow," and insinuating that her guilt was a foregone conclusion. The release of the

<sup>&</sup>lt;sup>1</sup> BBPD continues to post those videos on its "Media Relations" YouTube page to this very day. *See* https://www.youtube.com/user/BBPDMediaRelations/search?query=dalia+dippolito (last visited February 13, 2017).

videos prior to trial deprived Ms. Dippolito of her right to a fair and impartial jury. Twenty-eight of the fifty-four potential jurors acknowledged their exposure to media coverage regarding Ms. Dippolito's case.

One potential juror recalled Ms. Dippolito was reportedly arrested for "trying to have her husband killed for the proceeds of a townhouse." Another potential juror stated that she saw a video of Ms. Dippolito in handcuffs and recalled the allegation that Ms. Dippolito hired a hit man to kill her husband. Yet another potential juror commented that, in addition to hearing the allegation of Ms. Dippolito hiring a hit man to kill her husband, he read an article in the Palm Beach Post reporting that Ms. Dippolito had attempted to kill her husband by poisoning him with antifreeze, an unsubstantiated allegation the Court had previously deemed inadmissible. Ms. Dippolito moved to strike the venire and moved for a mistrial. The Court denied those motions. The Fourth District Court of Appeal reversed that decision and remanded the case for a new trial.

The prosecutor, Elizabeth Parker, wasted little time capitalizing on her experience. In February of 2014, while Ms. Dippolito's case was still pending on appeal, Parker released a book entitled POISON CANDY: THE MURDEROUS MADAM: INSIDE DALIA DIPPOLITO'S PLOT TO KILL. In a promotional plug for the book, former Florida Attorney General Bob Butterworth described how Parker revealed facts gleaned from her prosecution, but unknown to the general public:

Elizabeth Parker, the prosecutor who convicted Dalia Dippolito, tells the behind-the-scenes story of what really happened behind the femme fatale sting and subsequent trial. One of Florida's most skilled and experienced criminal trial attorneys, *she unfolds little-known details of the case*...

E. Parker, POISON CANDY: THE MURDEROUS MADAM: INSIDE DALIA DIPPOLITO'S PLOT TO KILL, p. ii (2014) (emphasis added). The back cover of the book similarly states that the book reveals "juicy tidbits banned from the courtroom."

Another writer, Diane Dimond, is also quoted as follows: "That [Ms. Dippolito's] *real-life sociopathic* crimes are dissected here by the prosecutor who finally took her down is icing on this true crime cake." *Id.* at ii (emphasis added). In the prologue Ms. Parker echoes this characterization of Ms. Dippolito, referring to her as a "sociopath." *Id.* at xviii-xix. Ms. Parker elaborates on this theme early in the book: "She was poison candy—sweet, delicious, mouthwatering on the outside, but deadly within, and designed to cripple the innocent. She was something only a monster could imagine, or something you'd find in a fairy tale." *Id.* at xx.

In the final chapter, Ms. Parker concludes with her unvarnished view of Ms. Dippolito:

What I never said during the entirety of the trial, but what I fervently believe is that *Dalia is a sociopath*. I truly believe *she has no soul*. . . . Maybe jurisprudence is a permanent quest to identify the *face of evil*, to show it free of shadow, so that we can recognize it when we see it in the supermarket or in the tabloids or across the breakfast table. If so, then Dalia Dippolito is a pretty good candidate to be its poster child.

Id. at 283 (emphasis supplied). Again, Ms. Parker made all of these extrajudicial comments whileMs. Dippolito's case was pending on appeal.

Although Elizabeth Parker had left the State Attorney's office when she published the book, her co-counsel and current prosecutor, Laura Laurie, felt no compunction about ratifying Ms. Parker's improper comments. Both Ms. Parker and Laura Laurie attended a local book signing event. Ms. Parker promoted the event on her Facebook page. *See* Exhibit A. In a Facebook post, Ms. Laurie also commented that she "can't wait" to "relive" the experience of prosecuting Ms. Dippolito. Exhibit B.

Ms. Laurie also repeatedly commented on Parker's book deal, celebrating the news of its release with a "Woohoo!" and "liking" Parker's various other Facebook posts about Ms. Dippolito. Exhibit C. Ms. Laurie and Ms. Parker also "friended" a number of ordinary citizens throughout

the community on Facebook, thereby increasing the probability that potential jurors would be contaminated through their exposure to the book. *See id*.

On remand, Ms. Dippolito retained an attorney from California, Brian Claypool, who agreed to take her case *pro bono* and appeared *pro hac vice*. In advance of the retrial, the defense expressed grave reservations regarding Ms. Dippolito's ability to receive a fair trial and pointed to the pervasive negative media attention the case had garnered. Ms. Dippolito's defense team moved for a change of venue. The State objected to the transfer of venue and assured the Court that, notwithstanding the immense media attention, Ms. Dippolito could receive a fair trial in Palm Beach County.

Ms. Dippolito's defense in her second trial focused on BBPD's voracious appetite for media attention. The defense team sought to establish that BBPD was not intent on seeking justice, but was instead determined to set Ms. Dippolito up in order to make salacious reality television. The theory of defense worked: five out of the eight jurors who sat through the trial would have voted to acquit Ms. Dippolito. After the conclusion of the trial, the State Attorney, Dave Aronberg, immediately issued a press release announcing its intent to re-prosecute Ms. Dippolito for a third time.

Counsel for Ms. Dippolito countered with their own press release. Brian Claypool observed that "justice" had been "served" by the verdict and lamented that the "taxpayers of Palm Beach County should . . . have to bear the price tag associated with the state prosecutors trying to save face and make a personal example out of Ms. Dippolito." Ms. Dippolito's other attorney, Greg Rosenfeld, characterized the prosecution as "politically motivated" and suggested that the case had "become personal" for the State Attorney's office. Attorney Rosenfeld also remarked

that, "given the obvious political motivations behind wanting a win," the "taxpayers ought to know what it's costing them."

Seizing on these comments, the State moved this Court for a protective order, demanding that Ms. Dippolito's attorneys no longer be permitted to speak to the media. The State also requested that the Court revoke Mr. Claypool's *pro hac vice* status. This, in turn, would force Ms. Dippolito to proceed to her trial, which is set for June, without the assistance of the attorney this Court has recognized as Ms. Dippolito's lead counsel.

#### II. MEMORANDUM OF LAW

This Court should deny this transparent attempt to deprive Ms. Dippolito of her Sixth Amendment Right to counsel of her choice. The Court should also reject the request for a broad blanket gag order on defense counsel, a prior restraint of speech that is antithetical to the protections enshrined in the First Amendment.

### A. The Court Must Deny this Attempt to Deprive Ms. Dippolito of her Sixth Amendment Right to Counsel of her Choice.

The Sixth Amendment "commands . . . that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (emphasis added); accord Wheat v. United States, 486 U.S. 153, 159 (1988) ("[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment . . . . "); Powell v. Alabama, 287 U.S. 45, 53 (1932) ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). "Given the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust," it is not "surprising that the [Supreme Court] has held that the Sixth Amendment grants a defendant 'a fair opportunity to

secure counsel of his own choice." Luis v. United States, 136 S. Ct. 1083, 1089 (2016) (quoting Powell, 287 U.S. at 53).

While a criminal defendant does not have an absolute right to retain counsel who is not a member of the bar, *Luis*, 136 S. Ct. at 1089, once an attorney has been retained, courts must remain "reluctant" to exercise the "extraordinary" remedy of disqualifying that attorney. *Melton v. State*, 56 So. 3d 868, 872 (Fla. 1st DCA 2011).

The Fourth District has explained the reasoning underlying this reluctance as follows:

'Disqualification of a party's chosen counsel is an extraordinary remedy and should only be resorted to sparingly.' Motions for disqualification are generally viewed with skepticism because disqualification of counsel impinges on a party's right to employ a lawyer of choice, and such motions are often interposed for tactical purposes. Confronted with a motion to disqualify, a court must be sensitive to the competing interests of requiring an attorney's professional conduct and preserving client confidences and, on the other hand, permitting a party to hire the counsel of choice.

Minakan v. Husted, 27 So. 3d 695, 698 (Fla. 4th DCA 2010) (quoting Alexander v. Tandem Staffing Solutions, Inc., 881 So. 2d 607, 608-09 (Fla. 4th DCA 2004)).

In this case, the State seeks to disqualify the attorney this Court has recognized as Ms. Dippolito's lead counsel for just the sort of tactical purposes the Fourth District warned against in *Minakan*. The State asserts that the comments of Mr. Claypool are "in direct violation" of Florida Rule of Professional Conduct 4-3.6. This claim does not withstand scrutiny.

Rule 4-3.6, which governs trial publicity, prohibits extrajudicial statements "if the lawyer knows or reasonably should know that it will have a *substantial likelihood* of materially prejudicing an adjudicative proceeding due to its creation of an *imminent and substantial detrimental effect on that proceeding.*" R. REGULATING THE FLA. BAR, R. 4-3.6 (emphasis added). This standard does not prohibit all extrajudicial comments. On the contrary, the Florida Supreme Court changed the text of the Rule in order to strike the "constitutionally permissible balance".

between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials" that the United States Supreme Court approved in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). *The Florida Bar re: Amendments to Rules Regulating The Florida Bar*, 644 So. 2d 282, 283 (Fla. 1994) (quoting *Gentile*, 501 U.S. at 1075).

The commentary of the Rule expressly recognizes that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." R. REGULATING THE FLA. BAR, R. 4-3.6, comment. It goes on to note that "the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy." *Id.* In other words, the Rule was designed to *preserve* the First Amendment right of attorneys to comment on proceedings and proscribe only those comments that raise a "substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an *imminent and substantial detrimental effect on that proceeding.*"

The comments of Mr. Claypool and Mr. Rosenfeld fall well within the permissible bounds of Rule 4-3.6. It is worth noting that it was Attorney Rosenfeld—not Mr. Claypool—who referred to the prosecution as politically motivated. All that is left with regard to Mr. Claypool is his statement that "justice" had been "served" by the hung jury and his remark that the "taxpayers of Palm Beach County should not have to bear the price tag associated with the state prosecutors trying to save face and make a personal example out of Ms. Dippolito."

Mr. Claypool's comments were not an attack on the State Attorney's office. Rather, Mr. Claypool raised issues of legitimate public concern. The State's misuse of the taxpayer funding to take this case to trial yet a third time, despite the fact that Ms. Dippolito has already served time on house arrest well in excess of the recommended guidelines sentence, and despite the fact that

the majority of jurors that heard her case would have acquitted her, is a matter of "direct significance in debate and deliberation over questions of public policy." R. REGULATING THE FLA. BAR, R. 4-3.6, comment. Therefore, the comments of Mr. Claypool, which are rooted in fact, enjoy full protection from the First Amendment.

And there is virtually no likelihood that the comments create an *imminent* and *substantial* detrimental effect on the trial proceedings. The State adduced no evidence that any news media outlet ever actually published the press release or printed the quotes of Mr. Claypool. Nor has the State adduced evidence that any potential jurors actually read the comments. The trial in this case, moreover, is five months away, and so, even assuming *dubitante* that the anodyne comments of Mr. Claypool actually penetrated the public consciousness, those comments will recede like a distant memory by the time this case proceeds to trial. Finally, the Court could easily implement measures during *voir dire* to ensure the venire has not been affected by the comments of Mr. Claypool. It follows that Mr. Claypool's comments do not violate Rule 4-3.6 because they do not create a *substantial likelihood* of *imminent and substantial detrimental effect* on the trial proceedings.

It is true that this case is the subject of pretrial publicity, but "pretrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial." *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1164 (Fla. 3d DCA 1999) (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976)). It also bears noting it was the *State* that actually caused this pretrial publicity in the first place.

It was the *State*—not Ms. Dippolito—that invited the COPS television program to take part in her investigation. It was the *State*—not Ms. Dippolito—that uploaded the videos that form the basis for her prosecution to YouTube before she was even charged with a crime. And it was the

State—not Ms. Dippolito—whose prosecuting attorney attended a book signing celebrating the release of a book that disparaged Ms. Dippolito in a most appalling manner while her case was pending on appeal. Who is the author of this book? None other than the former prosecutor for the State, Elizabeth Parker, who remains an attorney of record in this case and frequently comments about this case in the media.

Capitalizing on the media exposure associated with this case is not just a thing of the past: BBPD continues to publicize the case to this day by posting the videos of Ms. Dippolito on its website, even though the case is seven years old, and even though Ms. Dippolito has an upcoming trial. Interestingly, though the State claims that it will be deprived of a fair trial by virtue of the comments of Ms. Dippolito's counsel, Assistant State Attorney Craig Williams' own wife, Liz Quirantes, a local television reporter for CBS12, has increased the media exposure of the story. See Exhibit D. Ms. Quirantes reported on the State's motion and publicized her own reporting on her Facebook and Twitter page, conduct that raises questions about whether the State really wants this case to take on a lower profile. *Id*.

Lest there be any doubt about the duplicitous nature of the State's request, the Court need only hearken back to the last trial, when the State assured the Court in no uncertain terms that Ms. Dippolito could receive a fair trial in Palm Beach County, even though defense counsel presented the Court with overwhelming evidence of pervasive media attention, all of which portrayed Ms. Dippolito in a decidedly negative light. Now the *State* claims, without any supporting evidence, that *it* cannot receive a fair trial. The irony is exquisite.

In light of the foregoing, it is clear that Mr. Claypool has not violated Rule 4-3.6. It is equally clear that the only remaining reason that the State would seek to disqualify him is a tactical one: Mr. Claypool devoted a significant amount of his own resources to an indigent defendant and

very nearly secured an acquittal during the most recent trial. To paraphrase Dorothy Parker, the State's request for disqualification should not be cast aside lightly, it should be hurled across the courtroom with great force.

#### B. The Court Should Deny the State's Unwarranted Request for a Gag Order.

The State has utterly failed to carry the burden required to justify the issuance of a pretrial gag order that would restrict any and all speech of Ms. Dippolito's attorneys in the months leading up to her trial. "In Florida, the limitations imposed by the court on communications between the media and lawyers and/or litigants must be for good cause to assure fair trials." *Rodriguez*, 734 So. 2d at 1165; *see also EI Du Pont De Nemours v. Aquamar, SA*, 33 So. 3d 839, 841 (Fla. 4th DCA 2010) (quoting *Rodriguez*). Thus, a gag order must be supported by evidence and findings that any extrajudicial statements made by counsel or the parties pose a substantial or imminent threat to a fair trial. *Id*.

In *Rodriguez*, the plaintiff's attorneys in a medical malpractice case, "in an apparent effort to impeach or discredit [the doctor's] testimony, . . . placed an advertisement in the Miami Herald wherein their counsel sought to interview any woman who had been prescribed" a certain drug by the physician. *Rodriguez*, 734 So. 2d at 1163-64. In addition, the attorneys and their client were "interviewed by a local news broadcast" and were approached by the "Today Show" for a future interview. *Id.* at 1164. The doctor moved for a protective order to prohibit the plaintiffs from discussing the case in the media. *Id.* The trial court granted the motion. *Id.* 

The Third District quashed the order. *Id.* The *Rodriguez* Court held it was "violative of the exercise of [counsel's] First Amendment rights where the court made no findings that it was necessary to ensure a fair trial and where it was not narrowly tailored to preclude only extra-judicial statements which are substantially likely to materially prejudice the trial." *Id.* at 1164. It reasoned

that there "was no evidence presented or findings made that any extra-judicial statements or proposed extra-judicial statements made to the media by counsel or the parties posed a substantial and imminent threat to a fair trial." It further found that the order amounted to a "broad blanket 'gag order' which was not narrowly tailored to protect the fairness of this particular trial." *Id.* at 1165. In addition, the trial court "never considered less restrictive alternatives," although plaintiffs' counsel offered the same. *Id.* Finally, the Third District observed that in "the absence of any time or scope limitations on the prohibited extra-judicial communications," it would "preclude extra-judicial statements made long after the case was tried or settled." Accordingly, it granted a petition for certiorari review and quashed the order.

Under *Rodriguez*, this Court must deny the State's request for a blanket gag order. The State has only identified a few stray comments by Ms. Dippolito's attorneys, which, as discussed above, do not pose a substantial or imminent threat to a fair trial. Those comments, moreover, do not approach the conduct in *Rodriguez*, where trial counsel actually took out an advertisement in the Miami Herald to influence the trial proceedings and agreed to sit for an interview on the "Today Show." Similarly, the State has not and cannot produce any *evidence* that would support its claim that the comments pose a substantial or imminent threat to a fair trial. Finally, as in *Rodriguez*, the State's request is not narrowly tailored to preclude only extra-judicial statements which are substantially likely to materially prejudice the trial and is untethered in temporal scope. Therefore, it would violate the First Amendment to impose a "broad blanket 'gag order' which was not narrowly tailored to protect the fairness of this particular trial." *Id.* at 1165.

#### III. <u>CONCLUSION</u>

Based on the foregoing, Ms. Dippolito respectfully requests that this Honorable Court deny the State's Motion for Protective Order and for Revocation of *Pro Hac Vice* Status.

Respectfully submitted,

/s/ Andrew B. Greenlee

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#### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy hereof has been furnished by e-file and email to Laura Laurie, Assistant State Attorney, on this 13th day of February, 2017.

/s/ Greg Rosenfeld

Greg Rosenfeld

Law Offices of Greg Rosenfeld, P.A.

# EXHIBIT A



# EXHIBIT B



# EXHIBIT C

book.com/elizabeth.parker.5095?fref=ts





# EXHIBIT D



Prosecutors move for a gag order and attorney removal in murder-for-hire Dippolito case.

https://t.co/2MIDehINIw https://t.co/9t6JfHjxJd



Liz Quirantes (@lizquirantes) posted a photo on Twitter

Get the whole picture - and other photos from Liz Quirantes

PIC.TWITTER.COM/9T6JFHJXJD | BY LIZ QUIRANTES

