No.: _____

IN THE SUPREME COURT OF FLORIDA

DALIA DIPPOLITO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF PROHIBITION TO THE
CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
THE HONORABLE GLENN D. KELLEY, CASE NO.: 2009-CF-009771AMB

PETITION FOR WRIT OF PROHIBITION

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND RULES

PETITION FOR WRIT OF PROHIBITION

In late summer of 2009, the Boynton Beach Police Department ("BBPD") received a call from Mohamed Shihadeh. He wanted to get Dalia Dippolito "help" because she was in a physically abusive relationship with her husband, and she had talked about wanting him killed. Knowing that the COPS television program would soon be filming their department, BBPD coerced Shihadeh to serve as a confidential informant against Ms. Dippolito by falsely informing him that signing a confidential informant packet would allow him to remain anonymous. Shihadeh served as a confidential informant and set up recorded meetings with Ms. Dippolito. In one such meeting, a video appears to show Ms. Dippolito agreeing to pay an undercover agent to shoot and kill her husband in their home and make the killing look like part of a burglary.

During the investigation, BBPD officers failed to record a two to three hour portion of the initial interview with Shihadeh. BBPD threatened Shihadeh with prosecution when he told them he did not want to serve as an informant. BBPD failed to record over five hundred telephone conversations between Ms. Dippolito and Shihadeh over a five day period of the investigation. BBPD wired Shihadeh to

record an encounter with Ms. Dippolito at a Chili's restaurant, but never preserved and/or destroyed the recording, which Ms. Dippolito testified would have revealed that Shihadeh showed her a gun and threatened her to prevent her from backing out of the plot.

BBPD staged a fake murder scene for the benefit of the COPS television show. BBPD obtained Ms. Dippolito's signature to consent to appear on COPS by claiming the form related to her *Miranda* rights. And BBPD published videos of Ms. Dippolito at the fake crime scene on YouTube before she was charged with a crime. Those videos went viral and created such a media frenzy that Ms. Dippolito was deprived of an impartial jury, a fundamental defect that required the Fourth District Court of Appeal to reverse her conviction.

On remand, Ms. Dippolito moved to dismiss her charges. She claimed that the conduct of BBPD amounted to objective entrapment. The lower court denied her motion. Ms. Dippolito petitioned the Fourth District Court of Appeal for a writ of prohibition and argued that the egregious conduct of law enforcement violated her right to due process. The Fourth District Court of Appeal dismissed the petition. Ms. Dippolito now petitions this Court for a writ of prohibition because due process prohibits prosecutions brought about by methods offending one's sense of justice.

BASIS FOR INVOKING JURISDICTION

This Court has original jurisdiction to issue writs of prohibition under Article V, section 3(b)(7) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(3). A writ of prohibition is generally available where another adequate remedy does not exist. *Sutton v. State*, 975 So. 2d 1073, 1076 (Fla. 2008) ("A writ of prohibition is available only where there is no other 'appropriate and adequate legal remedy'") (citations omitted).

"Prohibition is an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction." *Madico v. Taos Constr., Inc.*, 605 So. 2d 850, 853-54 (Fla. 1992). While a writ of prohibition is discretionary, it should be utilized in cases of emergencies. *English v. McCarary*, 348 So. 2d 293, 296 (Fla. 1977).

A "petition for writ of prohibition is recognized as appropriate to review before trial some non-final orders in criminal cases." *Joseph v. State*, 103 So. 3d 227, 229 (Fla. 4th DCA 2012) (collecting cases). The writ of prohibition provides a defendant claiming immunity from prosecution a method of obtaining immediate review without first having to stand trial. *Dennis v. State*, 51 So. 3d 456, 464 (Fla. 2010) (affirming use of writ of prohibition to review whether criminal defendant is

entitled to immunity from prosecution under Section 776.032, Florida Statutes); *Bretherick v. State*, 170 So. 3d 766, 773 (Fla. 2015) (same); *Tsavaris v. Scruggs*, 360 So. 2d 745 (Fla. 1977) (writ of prohibition available to review before trial whether a defendant was immune from prosecution under the investigative subpoena statute, Section 914.04, Florida Statutes (1975)).

In *Tsavaris*, this Court explained the rationale for the use of a writ of prohibition in cases of immunity:

> The appropriate remedy . . . would be to challenge the jurisdiction of the . . . court to proceed by claiming immunity, and then, if that court proceeded, to seek relief by writ of prohibition in the appropriate court, that is, in the court having appellate jurisdiction. . . . Where a case is pending in the criminal court against a person claiming immunity . . . it would be the duty of the criminal court involved to give effect to such immunity if it existed. Should the criminal court in such a case refuse to recognize the immunity the further action of that court in prosecuting the cause would amount to an excess of jurisdiction which then would be subject to restraint by prohibition.

Tsavaris, 360 So. 2d at 747 (internal citations and quotations omitted).

In this case, Ms. Dippolito filed a motion to dismiss the charges against her based on objective entrapment. She argued that the behavior of law enforcement was so reprehensible that it amounted to a violation of her due process rights. Unlike subjective entrapment, which is an affirmative defense, in cases of objective

entrapment, the "protection of due process rights requires that the courts *refuse to invoke the judicial process* to obtain a conviction where the facts of the case show that the methods used by law enforcement officials cannot be countenanced with a sense of justice and fairness." *State v. Williams*, 623 So. 2d 462, 467 (Fla. 1993) (emphasis added). In other words, due process operates as "a general principle of law that *prohibits prosecutions* brought about by methods offending one's sense of justice." *Munoz v. State*, 629 So. 2d 90, 98 (Fla. 1993) (emphasis added).

The Fourth District Court of Appeal incorrectly dismissed the petition for writ of prohibition. Although the dismissal was entered without written opinion, it appears likely that the Fourth District concluded that it had no jurisdiction to review the merits of the entrapment claim before final judgment. However, as in *Tsavaris* and *Dennis*, Ms. Dippolito is not challenging her innocence from the charged offenses, but instead is claiming immunity from prosecution. Aside from a writ of prohibition, there is no other remedy available to prevent the State from violating Ms. Dippolito's due process rights by forcing her to stand trial.

The State argued in the Fourth District that Ms. Dippolito has an adequate legal remedy in that she can take an appeal after the entry of final judgment. That is incorrect. Objective entrapment is not an affirmative defense that must be raised on

appeal, but instead is a constitutional protection that immunizes a defendant from prosecution altogether. As Judge Farmer observed in *State v. Blanco*:

> [E]ntrapment takes two forms in Florida. The first form is essentially an affirmative defense centered around the accused's alleged lack of any predisposition to commit the crime. The second form is not an affirmative defense. In this second form of entrapment, the conduct of the government *operates as a legal bar to the entire prosecution*.

State v. Blanco, 896 So. 2d 900, 903 (Fla. 4th DCA 2005) (Farmer, J., dissenting) (emphasis added). In other words, Ms. Dippolito does not just seek to interpose an affirmative defense, she seeks immunity from prosecution.

In this regard, objective entrapment is analogous to immunity under the Stand Your Ground law. The only difference is that Stand Your Ground immunity is statutory in nature, while the immunity in cases of objective entrapment arises under the due process clause of the Florida Constitution. If immunity from prosecution may be conferred by statute, it follows *a fortiori* that immunity can flow from a protection enshrined in the Florida Constitution. Indeed, when the legislature sought to abolish objective entrapment, the Florida Supreme Court refused to recede from its prior precedent, because objective entrapment "involves the due process clause of article I, section 9, of the Florida Constitution" and could not be abridged by statute. *Munoz*, 629 So. 2d at 91.

If Ms. Dippolito is correct, and the outrageous conduct of BBPD amounted to objective entrapment, then due process prohibits her prosecution, and she should not have to stand trial any more than a defendant who avails himself of statutory immunity under the Stand Your Ground law. Accordingly, based on the foregoing, it is clear that this Court has jurisdiction to review this petition for writ of prohibition.

Accordingly, this Honorable Court has jurisdiction to issue a writ of prohibition to bar the trial court from presiding over a prosecution brought about by methods so outrageous that invoking the judicial process would violate Ms. Dippolito's right to due process.

STATEMENT OF THE FACTS

A. Manufacturing a Murder-for-Hire Plot: BBPD Coerces Shihadeh to Work as a Confidential Informant.

On July 31, 2009, Mohamed Shihadeh contacted BBPD about Ms. Dippolito. App. 170, 210, 343. Shihadeh and Dippolito had a sexual relationship, and he wanted her to get "help" because she was in an abusive relationship with another man who was "hitting her." App. 347, 348, 381. The "whole point" of contacting BBPD was to "go there . . . before the guy that she did talk to; who I didn't want her involved with; did something." App. 224.

Shihadeh reported that Ms. Dippolito had talked about wanting her husband killed. App. 381-82. According to Shihadeh, however, BBPD laughed at his story when they first heard it. App. 364. Shihadeh, moreover, did not think Ms. Dippolito had committed any crime and did not believe that an investigation would ensue: "I didn't even think there was gonna be an investigation. I [inaudible] thought they were just gonna pick up the phone and call her. And that's what I just wanted to happen. I really didn't want anything else to go on." App. 223, 348, 350. Shihadeh did not want the police to even get involved; all he wanted was for "someone to talk to her or help her or divorce . . . To stop her." App. 222.

Shihadeh testified during his deposition that BBPD failed to record the first two to three hours of his initial interview at the police station. App. 163-64. He testified that "there was a lot of joking" during that portion of his interview. App. 163. At the outset, BBPD disbelieved his story that Ms. Dippolito wanted her husband killed, finding the whole thing laughable, especially since Shihadeh did not know Ms. Dippolito's last name or her address. App. 346, 363-64. Nevertheless, Shihadeh testified that BBPD told him he "had to do this or these are going to be the consequences." App. 346.

On the second day of the investigation, when Shihadeh returned to the station to give another statement, BBPD officers remained jovial, and had to start the interview over and re-record the beginning portion because they were laughing. App. 159-60. During both of these two meetings, Shihadeh simply wanted BBPD to "help" and "call" Dippolito. App. 344-50.

Instead of investigating the perpetrator of domestic abuse, Michael Dippolito, BBPD decided that it wanted to investigate the victim, Dalia Dippolito, despite the fact that she had no criminal history. *See* App. 13, 14. In order to do so, BBPD had to enlist Shihadeh as a confidential informant, which, in turn, required him to review and sign a Confidential Informant Packet ("CI Packet"). App.249-53, 348-49.

Shihadeh testified during his deposition that BBPD fooled him into signing the CI Packet. App. 157. He believed that signing the packet only meant that he would remain anonymous and confidential. App. 157. Even though Shihadeh did not really read through the CI Packet, he signed it because he trusted the police. App. 209, 231. His intent in signing the CI Packet was to get Ms. Dippolito "to talk to the officer and for them to help her." App. 209.

From that point forward, BBPD relentlessly pressured Shihadeh to continue to participate in its investigation of Dippolito, even though he expressly told law

enforcement that he did not want to be involved. During his perpetuated trial testimony, Shihadeh testified as follows: "they were calling me constantly, like ten times a day to call her, make her call me or meet up. And, you know, I had a lot of things going on. And I just -- I didn't want nothing to do with it." App. 238-39. He also testified that BBPD "Kept on – kept on calling me; Officer Brown, Officer Moreno; telling me, we need you, we need you, we need you. Come in here, come in. I said, I want nothing to do with it. You know. What I said is what I said. And it kept on continuing." App. 225-26.

Shihadeh testified that at one point he told BBPD, "I don't want nothing to do with it, you know. They said we have to put a wire on you. If you don't, you'll get -- you can get prosecuted in a court of law." App. 246. Shihadeh also averred that during a meeting with Detective Ace Brown, BBPD told him that he "had to wear a wire or [he] would get in trouble." App. 211. Shihadeh said, "I was busy with my life, you know. And I just thought it was getting too far." App. 239. When asked why he believed that he could get prosecuted if he did not continue to work with BBPD, Shihadeh responded, "Because they told me I could." App. 240. That scared him, because he did not want to get arrested. App. 240.

Thus, according to Shihadeh, BBPD obtained his consent to work as a confidential informant under false pretenses, BBPD declined to deactivate him when he repeatedly told officers he did not want to participate in the investigation, and BBPD department called him ten times a day and threatened him with prosecution if he did not continue to act as a confidential informant.

B. The COPS Crew Comes to Boynton Beach

One explanation for why BBPD exerted such intense pressure on Shihadeh is because the crew from the COPS television show was in town, and the producers were set to start filming soon after Shihadeh's initial report. Over a year before the investigation, in September of 2008, BBPD's public information officer, Stephanie Slater, approached COPS producers to inquire into the possibility of BBPD appearing on the show. App. 415. Ms. Slater continued to correspond with COPS producers until she succeeded in securing COPS to commit to filming at BBPD in early August 2009. App. 417. She admitted that the purpose of appearing on COPS was to generate "great publicity" for the BBPD. App. at 415.

The filming was first set to begin on August 11, 2009. App. 418. However, the COPS producers pushed the date up to a week earlier, August 4, 2009. App. 418. The "powers that be" within the BBPD told the COPS crew about the case,

because it "sounded like a good case for them to go on." App. 192. So, "the next thing you know," the COPS television crew began accompanying the BBPD in its investigation. App. 192. The BBPD chief of police was so excited about the release of the COPS episode that he wanted to have a "big viewing party." App. 435.

C. BBPD Fails to Record Over 500 Calls Between Shihadeh and Dippolito

During the five days of the investigation, Ms. Dippolito's telephone records showed that she received 681 telephone calls from Shihadeh. App. 440-41. In 576 of those phone calls, Ms. Dippolito and Shihadeh actually had conversations. App. 441. Ms. Dippolito testified that she and Shihadeh were working on an acting project involving a fake murder-for-hire plot that was a simulation of an episode from the television show "Burn Notice." App. 442, 462.

According to Ms. Dippolito, she and Shihadeh discussed the acting project during their telephone conversations, and they also discussed Shihadeh's decision to involve the BBPD in the presentation. App. 442. However, Ms. Dippolito told Shihadeh that she ultimately decided to back out of the project during the phone calls after she learned that he had involved law enforcement. App. 443. As a result, Shihadeh "got really upset." App. 443.

Ms. Dippolito testified that during the telephone calls "he was threatening" her, "putting a lot of pressure" on her, and could not understand why she did not want to carry out the plan. App. 443. Shihadeh also told her that, since he had gone to the police department, "he was getting a lot of pressure from them," and that "they were threatening him." App. 443. Shihadeh told her that they needed to "just move forward with everything." App. 443. Shihadeh then asked Ms. Dippolito to meet him at a Chili's restaurant so that they could discuss things. App. 443.

In the motion to dismiss, counsel for Ms. Dippolito asserted that the State never recorded those 576 telephone calls. App. 35. When asked about the phone calls, Shihadeh testified there should be no reason why these calls were not recorded and made available to Dippolito. App. 371. One of the lead detectives, Alex Moreno, also testified during his deposition that BBPD "could have" recorded the phone calls between Ms. Dippolito and Shihadeh, but "didn't." App. 174. Moreno confirmed at the evidentiary hearing that BBPD "coulda provided him with a recorder" to document the phone calls with Ms. Dippolito. App. 597. Sergeant Frank Ranzie testified during his deposition that the failure to record those calls "definitely compromise[d]" the integrity of the investigation. App. 98. Detective

Moreno likewise confirmed that recording the phone calls was needed to preserve the integrity of the investigation. App. 599.

Shihadeh stated he had listened to a few of the recordings and averred that BBPD was present for a majority of the phone calls: "Uh, I know that they were tapped in . . . they were sitting right next to me. A lot of the phone calls they were sitting right next to me." App. 354, 371. Shihadeh also testified that the prosecutor provided him a CD with some of the calls before he left the country, but not all of the recordings were included. App. 372.

D. The Chili's Encounter

Ms. Dippolito and Shihadeh went to a Chili's restaurant on August 3, 2009, before the video recording that formed the evidentiary basis for the State's charges of solicitation of murder. Even though BBPD knew Shihadeh carried a gun and had a criminal history that included charges of domestic violence, the department allowed him to meet with Dippolito at the restaurant without supervision, and, it claimed, without a functioning recording device. App. 171, 362.

Ms. Dippolito testified that she told Shihadeh at Chili's that she no longer wanted to participate in the plan. App. 443. After telling him this, Dippolito asserted Shihadeh began to threaten her because he wanted to go through with the project and

had already gone to BBPD to put the plan in action. App. 443. Dippolito testified that, at one point during the 40 to 45 minute meeting, Shihadeh lifted up his shirt to show her a gun and threatened to kill her and her family if she did not follow through with the project. App. 444.

According to BBPD, the meeting at Chili's went unrecorded because one of the wires that the department intended to use was malfunctioning. Sergeant Frank Ranzie testified at the evidentiary hearing that he tried to convince Sergeant Paul Sheridan to delay the meeting, as that would be the proper thing to do, given the lack of extenuating circumstances. App. at 576-79. However, Sergeant Sheridan got upset with him, used profanity, and said, "Nope, I'm in charge. We are going." App. at 577-78. At a prior deposition, Sergeant Ranzie suggested that Sheridan's decision was influenced by time restraints, as he said, "we can't delay, we can't delay . . . . We're on a schedule and we're going." App. 84,121.

Shihadeh provided a different version of the encounter at Chili's. Shihadeh testified that he was certain he was wired at the police station before attending this meeting. App. at 360. He also testified that he was confident BBPD was in the parking lot and listening to the meeting. App. at 361. Shihadeh, however, disputed that he had a gun at this meeting and denied threatening Ms. Dippolito. App. 380.

E. The Fake Crime Scene

Even though BBPD already determined it had probable cause to arrest Ms. Dippolito for solicitation to commit murder by virtue of its video of her and an undercover officer, BBPD decided to set up a staged crime scene where it would inform Ms. Dippolito that her husband had been killed. App. 193. Stephanie Slater pitched the idea to COPS producers, who agreed to film the events. App. at 418-20.

Stephanie Slater attended the fake crime scene as it was being filmed by the COPS television show. App. at 421-22. She stated it was part of her job to be there and take note of what was happening because they had a press conference already in place to discuss Ms. Dippolito's arrest. App. at 421-22. Ranzie also took part in the fake crime scene and signed a waiver to appear on the show. App. at 581-82.

Sergeant Ranzie testified the fake crime scene was helpful to "cinch" up the case and get a confession, despite the fact that BBPD already had probable cause to arrest Ms. Dippolito. App. at 581-82. Ms. Slater's camera died, but another BBPD officer had a working camera, and they were able to film the action. App. 423.

F. BBPD Publishes the Video to YouTube Before Ms. Dippolito is Charged

After leaving the fake crime scene, Ms. Slater went directly back to her office at BBPD and posted on YouTube a recording of the action at the fake crime scene.

App. 424. It was always part of BBPD's plan to publicize the arrest. App. at 424-25. Frank Ranzie confirmed that Ms. Slater posted the videos within five or ten minutes of Ms. Dippolito's appearance at the fake crime scene. *See* App. 53. Ms. Slater admitted the recording was released even though investigation against Ms. Dippolito was still pending, and even though BBPD's policy prohibited the release of "[a]ny facts that might hinder the investigation of a crime or incident or jeopardize the rights of a person under arrest." App. 425-26.

Ms. Slater testified that the YouTube posting of the fake crime scene went viral nationally and internationally, which meant "it is seen by everyone using social media. Thousands and thousands of people have seen it." App. 428-29. She did not, however, think that releasing the video was against BBPD policy. App. 427-30.

Ms. Slater and Sergeant Frank Ranzie also participated in a podcast when COPS released its episode involving the Dippolito investigation. App. 431. During the podcast, she and Sergeant Ranzie chatted with people watching the episode. App. 431-32. Officer Slater did not think her and Sergeant Ranzie's podcast was against BBPD policy statement that prohibits the expression of any "[o]pinion of agency members regarding the guilt or innocence of an accused person or the merits of any case." App. 431-32.

G. Sergeant Sheridan Fraudulently Obtains Ms. Dippolito's Consent to Appear on the COPS Television Program.

After Ms. Dippolito arrived back at the police station, Sergeant Sheridan questioned her inside of an interrogation room. App. 448. She talked to Sergeant Sheridan for forty minutes. App. 448-49. Only at the end of their conversation did Sergeant Sheridan provide her with *Miranda* warnings. App. 449. Ms. Dippolito testified that during their conversation, Sergeant Sheridan gave her a sheet of paper and claimed it was an acknowledgment of her *Miranda* rights. App. 449. Ms. Dippolito signed the form. App. 449. Ms. Dippolito later discovered, however, that she did not sign a document pertaining to her *Miranda* rights, but rather Sergeant Sheridan tricked her into signing a waiver form to appear on COPS. App. 450.

H. Ms. Dippolito's Conviction is Reversed on Appeal

In 2009, the State charged Ms. Dippolito with solicitation to commit first degree murder with a firearm. App. 2. Ms. Dippolito pled not guilty. App. 2. After a ten-day trial, the jury found Ms. Dippolito guilty. App. 1-8.

Ms. Dippolito appealed the conviction. App. 1-8. She argued on appeal that the court erred by denying her request to individually question prospective jurors about their exposure to the extensive pretrial publicity about her case, and by denying her request to strike the entire venire panel after all the jurors heard an

allegation that she had attempted to poison her husband in this case. App. 1. The Fourth District Court of Appeal agreed. It determined Dippolito was deprived of an impartial jury and reversed her conviction and remanded for a new trial. App. 8.

I. The Motion to Dismiss and the Evidentiary Hearing

On remand, Ms. Dippolito moved to dismiss the charge of solicitation. She argued that the totality of BBPD's outrageous misconduct during the investigation of their murder-for-hire plot constituted objective entrapment. App. 9-327. The trial court conducted an evidentiary hearing on the motion on January 19, 2016 and February 23, 2016. App. 340-618. The parties introduced evidence, including the testimony of Shihadeh, several BBPD officers, and Ms. Dippolito. App. 340-686.

The majority of the evidence introduced at the evidentiary hearing did not conflict. The parties did not dispute that Shihadeh initially asked for BBPD to "help" Ms. Dippolito because she was being abused and hit by her husband. Shihadeh testified as follows: "I wanted her to get, I wanted, I want them to help her . . . I didn't even think there was gonna be an investigation. I [inaudible] thought they were just gonna pick up the phone and call her. And that's what I just wanted to happen. I really didn't want anything else to go on." App. 343, 347-48, 350. There was no dispute that BBPD initially found Shihadeh's report of Ms. Dippolito

laughable and not credible. App. 363-64. The parties did not dispute that sound police practice, as well as the policy of BBPD, required the following:

1. A confidential informant must understand the parameters of a confidential informant agreement.

2. A confidential informant needs to be controlled.

3. The use of confidential informants is prohibited when the informants are "no longer willing to cooperate."

4. It is prohibited to threaten a confidential informant with prosecution to coerce him to remain on an investigation.

5. All conversations with a confidential informant and suspect must be recorded and preserved whenever possible.

6. Officers who use confidential informants must take additional out-of-department training for how to use confidential informants.

7. The release of "any facts that might hinder the investigation of a crime or incident or jeopardize the rights of a person under arrest" is prohibited.

8. It is prohibited to express any "opinion of agency members regarding the guilt or innocence of an accused person or the merits of any case."

9. An investigating officer is required to interview the suspect of an internal affairs investigation.

App. 395-413, 425-26, 431-32, 556-58. Finally, the parties did not dispute that no recordings were available for the Chili's meeting and the hundreds of phone calls

between Ms. Dippolito and Shihadeh that occurred during the pendency of the investigation. App. 575, 598-600.

Sergeant Ranzie confirmed that it was "not legal" to threaten an informant with prosecution when the informant refused to cooperate. App. 573. Sergeant Ranzie also stressed the importance of controlling a confidential informant, agreed that allowing an informant to make 680 calls in four days would amount to a failure to control the informant, and criticized BBPD's failure to record over 560 phone calls between Shihadeh and Ms. Dippolito. App. 570, 573. Finally, Sergeant Ranzie testified to his belief that posting a video of the fake crime scene on YouTube was inappropriate because exposing the evidence for "public consumption" could taint the investigation. App. 586.

Although the parties did not dispute many issues at the evidentiary hearing, the evidence did conflict in three significant ways. First, Shihadeh testified that BBPD tricked him into cooperating and threatened him with prosecution if he did not cooperate as a confidential informant. App. 348-51, 364-66, 378. Detective Moreno, by contrast, testified that BBPD never lied to Shihadeh about the confidential informant agreement or threatened him, and he disputed that Shihadeh

ever expressed a desire to not cooperate with BBPD. App. 595. However, Detective Moreno testified that Shihadeh was credible as a witness. App. 602.

Second, Shihadeh claimed that BBPD wired him and then recorded the Chili's meeting. App. at 360. This conflicted with the testimony of BBPD, whose officers claimed that it did not wire Shihadeh or record the Chili's meeting because of an equipment malfunction. App. 575-79. Yet, as noted, both Moreno and Ranzie testified that Shihadeh was a credible witness. App. 560, 602. Sergeant Ranzie also confirmed that the meeting at Chili's should have been delayed since the wire had malfunctioned. App. 577.

Third, Ms. Dippolito testified that Shihadeh threatened her and her family with a gun at the Chili's meeting and threatened her during the hundreds of unrecorded phone conversations. App. 443-46. Shihadeh, for his part, testified that he did not threaten Ms. Dippolito with a gun at the Chili's meeting. App. 380.

After the close of the evidence, Ms. Dippolito asked the trial court to reopen the proceedings to adduce additional evidence call additional witnesses, including an expert on police practices and procedure, Sergeant Sheridan, who could testify about the claim that he fraudulently obtained Ms. Dippolito's signature on the COPS waiver form, and Officer John Bonafair, who could testify regarding the lack of any

maintenance logs regarding the equipment that allegedly malfunctioned during the Chili's conversation. App. 682-85. The trial court denied the motion.

J. The Order Denying the Motion to Dismiss

On March 2, 2016, the court entered an order denying Ms. Dippolito's motion to dismiss. App. 714-30. In denying the motion, the court characterized her claims as comprising of "general themes" and several individual claims of misconduct. App. 716-17. The court first considered the "themes" and then analyzed each instance of misconduct in isolation before reaching its conclusion that Ms. Dippolito did not allege facts that rise to the level of objective entrapment.

The court rejected Ms. Dippolito's "theme" of incompetence and lack of training on the part of BBPD, disputing Ms. Dippolito description of the department as a "cesspool of incompetency and lawless behavior." App. 717. According to the trial court, the theme lacked "any probative value when assessing whether *specific* action by the police violated concepts of due process." App. 716. While the court observed there a number of actions by BBPD warranted scrutiny, it found this theme "overblown." App. 717.

The court also discredited Ms. Dippolito's second "theme," that "the police manufactured her alleged crime so that they could appear on the television show

COPS." App. 717. The court found this assertion unsupported. It noted BBPD did not seek out Shihadeh. App. 717. In addition, although Ms. Dippolito presented evidence that BBPD had long sought an appearance on COPS, the court declined to consider this motive as evidence of misconduct, because, according to the lower court, the television show was not involved until after the alleged solicitation to commit murder had occurred. App. 718. The court acknowledged the presence of the television show resulted in actions "not consistent with good police practices," but it found "the staging of the murder scene, after the alleged crime occurred" did not amount to conduct that would implicate notions of due process. App. 718.

Similarly, the court refused to consider the fact that BBPD released the recordings of the fake crime scene on YouTube as part of Ms. Dippolito's claim. The court opined that, "if anything," releasing the videos to YouTube only made it "more difficult to select a jury that will not be influenced by pretrial publicity." App. 718. While acknowledging the release of the videos was "not consistent with good police practices," the lower court found it did "not support dismissal of the State's case for outrageous conduct." App. 718. The court also noted that Ms. Dippolito complicated the task of seating a jury by holding press conferences and making television appearances after the remand of her case on appeal. App. 718. Thus, the

court declined to consider the release of the videos on YouTube as a factor in the totality of the circumstances.

The court then moved to what it described as specific instances of misconduct. The court limited its consideration to what it deemed to be the significant claims, finding the remaining contentions did "not merit discussion." App. 720. The first claim of misconduct related to BBPD's failure to investigate Shihadeh to determine his reliability as a confidential informant. App. 720. The court found this to be "of no moment under the facts" of the case. App. 720. It reasoned that BBPD did not intend to use Shihadeh in multiple cases, and, when Shihadeh came forward with the report, the investigation lasted only six days. App. 720. The court also found Shihadeh's reliability was verified by the first call with Ms. Dippolito. App. 720.

With regard to Shihadeh's refusal to be involved and BBPD's coercive tactics to force his cooperation, the lower court credited Shihadeh's testimony that he did not want to get involved in the investigation in the first place and did not want anything to happen to Ms. Dippolito. App. 720. The trial court, however, found these facts of no "particular significance" because Shihadeh's desire "to stay on the sidelines, without more, does not support a claim of objective entrapment." App. 721. The trial court made no mention of the fact that Shihadeh did not approach

BBPD in the first instance to report a crime, and instead came forward to get Ms. Dippolito "help" regarding her abusive relationship. And, while the trial court noted that BBPD failed to record the initial conversation with Shihadeh, it concluded that the "lack of a recording does not establish outrageous police conduct." App. 722.

The lower court did express some concern about the pressure BBPD applied to force Shihadeh to cooperate, but it ultimately determined that BBPD only applied a pressure of "moral responsibility," and did not threaten him with prosecution. App. 721-22. The court did not appear to consider Shihadeh's prior deposition testimony referenced in the motion, where he expressly stated that he was threatened with prosecution, and it minimized Shihadeh's express affirmation that he was threatened with prosecution at the evidentiary hearing. Notwithstanding his prior testimony, the trial court found that it eventually became clear that "he was never really threatened with prosecution." App. 721. With regard to the failure to deactivate Shihadeh in accordance with BBPD policies, the court rejected the notion that this violation of policy could amount to outrageous government conduct. It reasoned that the gravity of the alleged claim justified the violation of policy. App. 723.

As for the failure to supervise Shihadeh, the trial court recognized that a large number of telephone calls went unrecorded. Nevertheless, it concluded that

"[u]nmonitored telephone calls to a targeted suspect, standing alone, will not support dismissal of a case for outrageous government conduct." App. 724. The trial court thus concluded that, if Ms. Dippolito were to make out a claim, she would have to show that Shihadeh threatened her at Chili's. App. 724-26. The court found Shihadeh's testimony on that point more credible than that of Ms. Dippolito. In this regard, the lower court opined that it "defies logic that police would send him into the restaurant with a gun." App. 725.

The trial court also did not find credible Ms. Dippolito's assertion that she attempted to back out during the unrecorded telephone calls, but was threatened by Shihadeh to continue with the plan. App. 725-26. According to the court, Shihadeh had no incentive to threaten her. App. 726. Here, too, the lower court did not appear to consider Shihadeh's prior testimony that he, himself, felt threatened with prosecution if Ms. Dippolito did not go through with the plan, which, if believed, could provide a motive for him to threaten Ms. Dippolito. Nor did it consider Ms. Dippolito's testimony that Shihadeh told her during their conversations that BBPD threatened him to force his continued cooperation with the investigation.

The trial court next considered the failure to preserve the audio recording of the encounter in Chili's. According to the court, the "lack of a recording of the

encounter at Chili's" was "raised independently as evidence of outrageous government conduct." App. 726. As such, the court considered this claim independently and concluded that the "mere lack of a recording of this encounter does not support dismissal of the case at this stage of the proceedings." App. 727.

The court noted there were two versions of events for the restaurant recording. According to BBPD, the restaurant meeting was not recorded because of equipment malfunction. Yet, according to Shihadeh, the meeting was recorded and should be discoverable to Ms. Dippolito. The trial court refused to resolve the factual dispute because it found (1) the failure to record a meeting, in and of itself, does not rise to level of outrageous government conduct, (2) the parties introduced insufficient evidence on the issue, and (3) Ms. Dippolito could raise this issue independently if she, in good faith, believes that the recording existed at one time and was destroyed. App. 726-28.

Finally, with regard to the BBPD's obtaining Ms. Dippolito's consent to appear on the COPS television show under false pretenses, the court opined that Sheridan's "forgery gives rise to criminal and civil remedies, but cannot be used to dismiss the case for objective entrapment. This occurred after the investigation was complete and is largely a collateral matter." App. 728. Thus, the court concluded

that "based on the totality of the circumstances, the actions of the police here are not so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." App. 729-30.

K. The Petition for Writ of Prohibition

After the denial of her Motion to Dismiss, Ms. Dippolito filed a petition for writ of prohibition in the Fourth District Court of Appeal. *See* App. 731. Ms. Dippolito argued that the conduct of law enforcement was so egregious that it violated her right to due process. The Fourth District entered a show cause order on April 22, 2016, directing the State to file a response that addressed the jurisdiction to issue the writ as well as the merits of the petition. *Id.* On August 17, 2016, four months after its submission, the Fourth District dismissed the petition without a written opinion. App. 732. Ms. Dippolito now files this Petition for Writ of Prohibition.

STANDARD OF REVIEW

In determining pretrial claims of objective entrapment, courts apply a mixed standard of review. A trial court's factual findings are entitled to deference and must be supported by competent substantial evidence, but its legal conclusions are reviewed de novo. *Joseph*, 103 So. 3d at 229-30.

SUMMARY OF THE ARGUMENT

This Court should issue a writ of prohibition and order the dismissal of the charges against Ms. Dippolito. As a preliminary matter, the trial court erred when it applied an incorrect legal standard in evaluating the merits of the petition. Rather than viewing all of the evidence in the aggregate, as required when applying a "totality of the circumstances" test, the trial court evaluated each instance of misconduct in isolation. By engaging in a divide-and-conquer analysis, the lower court misapplied controlling standard governing claims of objective entrapment.

If the trial court had applied the proper standard, it would have found that the conduct of BBPD rose to the level of objective entrapment. The evidence showed that BBPD manufactured a murder-for-hire a plot out of what was essentially a domestic abuse complaint. The State's own confidential informant testified that BBPD obtained his consent to work as a confidential informant under false pretenses, declined to deactivate him when he repeatedly told officers he did not want to participate in the investigation, called him ten times a day, and threatened him with prosecution if he did not continue to act as a confidential informant.

Moreover, the undisputed evidence showed that BBPD failed to preserve and/or destroyed critical evidence required in order for Ms. Dippolito to present her

defense of entrapment. That evidence included the initial two to three hour interview with Shihadeh, in which he testified that he initially told law enforcement that Ms. Dippolito was the victim of domestic abuse, rather than a criminal. It also included the wiretap evidence from Chili's, where Ms. Dippolito claims that Shihadeh threatened her with a weapon to force her to follow through on their plan. Finally, it included over five hundred unrecorded phone calls, which Ms. Dippolito averred contained evidence that she intended to back out of the endeavor, but was forced to continue to move forward by Shihadeh, who threatened her with violence. There is no material difference between the failure to collect evidence and the affirmative destruction of evidence. And the destruction and/or failure to preserve the staggering amount of evidence at issue here is outrageous enough to compel dismissal, particularly since the absence of this evidence effectively deprives Ms. Dippolito of the ability to prove a defense of entrapment.

But that is not all. The evidence revealed that BBPD's thirst for publicity led it to trample over Ms. Dippolito's due process rights. Sergeant Sheridan was more concerned with meeting a deadline related to the impending COPS episode than with sending Shihadeh into Chili's with a functioning wire. Stephanie Slater rushed back from the fake crime scene to release the YouTube videos of Ms. Dippolito before

she was even charged with a crime. And Sergeant Sheridan went so far as to obtain Ms. Dippolito's consent to appear on COPS by claiming it was a Miranda waiver form.

These aspects of Ms. Dippolito's arrest were not, as the trial court held, collateral to her due process claims. The right to a trial by an impartial jury lies at the very heart of due process, and BBPD impaired Ms. Dippolito's right to due process by turning the search for truth into a media conflagration of epic proportions. BBPD's conduct amounts to objective entrapment, and this Court should issue the writ and prohibit the lower court from presiding over Ms. Dippolito's prosecution.

ARGUMENT AND CITATION TO AUTHORITY

I. THE EGREGIOUS CONDUCT OF BBPD AMOUNTS TO OBJECTIVE ENTRAPMENT AS A MATTER OF LAW.

The outrageous acts of BBPD violated Ms. Dippolito's right to due process and constitutes objective entrapment as a matter of law. Instead of reviewing the totality of the circumstances, the trial court engaged in a divide and conquer analysis, isolating and rejecting each instance of police misconduct as independently insufficient to warrant dismissal. Yet, when the acts of BBPD are viewed in their totality, it is clear that the BBPD violated Ms. Dippolito's constitutional right to due process of law.

A. The Trial Court Applied the Incorrect Standard when it Reviewed Each Instance of Misconduct in Isolation.

Objective entrapment occurs when egregious law enforcement conduct amounts to a violation of the defendant's right to due process under article I, section 9, of the Florida Constitution. *See Munoz*, 629 So. 2d at 99; *State v. Glosson*, 462 So. 2d 1082 (Fla. 1985); *Cruz v. State*, 465 So. 2d 516 (Fla. 1985). Analyzing the defense of objective entrapment requires courts to review "the totality of the circumstances" in order to ascertain "'whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" *Bist v. State*, 35 So. 3d 936, 939 (Fla. 5th DCA 2010) (quoting *Rochin v. California*, 342 U.S. 165, 169 (1952)).

When courts review the "totality of the circumstances," it is inappropriate to engage in a "divide-and-conquer" analysis, whereby each individual factor is reviewed "in isolation." *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (applying "totality of the circumstances" test in the reviewing the reasonableness of search under the Fourth Amendment); *see also Wearry v. Cain*, No. 14-10008, 2016 WL 854158, at *4 (U.S. Mar. 7, 2016) ("the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively").

In this case, although the trial court paid lip service to the "totality of the circumstances" test, it actually employed a divide-and-conquer approach to the evidence presented. For instance, the trial court concluded that "Unmonitored telephone calls to a targeted suspect, *standing alone*, will not support dismissal of a case for outrageous government conduct." App. 724 (emphasis added). Similarly, the lower court found that Shihadeh's "desire to stay on the sidelines, *without more*, does not support a claim of objective entrapment." App. 721 (emphasis added). The trial court further found that the "forgery" of Ms. Dippolito's signature on the COPS consent form to be "largely a collateral matter," and therefore declined to consider it as part of the totality of the circumstances. App. 728-29.

The trial court also noted that "the presence of a television crew no doubt caused the Boynton Beach Police Department to act, in certain respects, in a manner which is not consistent with good police practices." However, it reviewed this factor in isolation and concluded that the "staging of the murder scene, after the alleged crime occurred, does not rise to the level of outrageous government conduct which implicates notions of due process." The trial court additionally noted that Ms. Dippolito raised "additional allegations concerning Shihadeh," but declined to even

discuss them and instead decided to "address only those allegations which could support a colorable claim of objective entrapment." App. 720.

The lower court continued in this vein, considering each instance of outrageous misconduct in isolation:

- The "lack of a background investigation of Mr. Shihadeh does not begin to support a claim of outrageous government conduct";
- The "lack of a recording [of the three-hour initial interview] does not establish outrageous police conduct."
- The "failure of the police to deactivate Mr. Shihadeh because he no longer wanted to cooperate was not outrageous."

App. 717-30. The error in this approach is clear: Each of these acts did not stand alone; they formed a broad pattern of outrageous misconduct that permeated the entirety of the investigation and prosecution. Thus, the trial court erred when it failed to consider the cumulative effect of this misconduct on Ms. Dippolito's right to due process.

Even more troubling is the failure to consider BBPD's release of the videos to YouTube as part of the totality of the circumstances. The trial court reasoned that, "*If anything*, the releasing of videos to the public, at any stage of the case, makes it

more difficult to select a jury that will not be influenced by pretrial publicity." App. 718 (emphasis added). But Ms. Dippolito's right to an impartial jury is hardly a minor matter.

Objective entrapment is rooted in the protections of due process, and the right to a trial by an impartial jury lies at the very heart of due process. *Irvin v. Dowd*, 366 U.S. 717, 721-722 (1961). The deprivation of Ms. Dippolito's right to a trial by an impartial jury caused the Fourth District to reverse her conviction after her first trial. Thus, holding that the pretrial publicity only mattered insofar as it exacerbated the difficulty in seating a jury,[1] and concluding that the release of the videos on YouTube "does not support dismissal of the State's case for outrageous conduct" is a serious error. The trial court erroneously compartmentalized this deprivation of due process as a "difficulty" that pertains to seating a jury.

Finally, and perhaps most importantly, the lower court isolated Ms. Dippolito's claim that the BBPD and/or the prosecutors violated her right to due process by failing to collect and/or destroying evidence of the recording of the

[1] The lower court also improperly considered an interview Ms. Dippolito conducted in its evaluation of the motion to dismiss. Since the actions of the defendant are irrelevant in determining whether objective entrapment has occurred, *see State v. Blanco*, 896 So. 2d 900, 902 (Fla. 4th DCA 2009), it was improper for the lower court to include Ms. Dippolito's interview as part of the analysis.

encounter at Chili's. According to the lower court, the destruction of evidence was "raised independently as evidence of outrageous government conduct." App. 726.

That is simply not the case. The destruction of evidence was a part of Ms. Dippolito's broader argument that the BBPD committed outrageous misconduct that warranted the dismissal of the charges against her. Therefore, it was improper for the trial court to treat the issue in isolation, to force Ms. Dippolito to raise the issue by separate motion, and to conclude, without looking at the totality of the circumstances, that "the *mere lack of a recording* of this encounter does not support dismissal of the case at this stage of the proceedings." App. 727 (emphasis added).

B. BBPD's Objective Entrapment Violated Ms. Dippolito's Right to Due Process as a Matter of Law.

The totality of the outrageous acts committed by BBPD rises to the level objective entrapment and due process therefore requires the dismissal of the charges brought against Ms. Dippolito. In considering objective entrapment, courts look to the totality of the circumstances, focusing on "whether the government conduct 'so offends decency or a sense of justice that judicial power may not be exercised to obtain a conviction.'" *Hernandez v. State*, 17 So. 3d 748, 751 (Fla. 5th DCA 2009); *Jimenez v. State*, 993 So. 2d 553, 555(Fla. 2 DCA 2008) ("Objective entrapment arises 'in the presence of egregious law enforcement conduct' ...").

"It is a balancing test; the court must weigh the rights of the defendant against the government's need to combat crime." *Bist v. State,* 35 So. 3d 936, 939 (Fla. 5th DCA 2010). The justification of dismissing criminal charges lies in foreclosing prosecutions premised upon "methods offending one's sense of justice." *Munoz v. State,* 629 So. 2d 90, 98 (Fla. 1993).

Defining "the limits of due process is difficult because due process is not a technical, fixed, concept; rather, it is a general principal of law that prohibits prosecutions brought about by methods offending one's sense of justice." *State v. Williams,* 623 So. 2d 462 (Fla. 1993); *Soohoo v. State,* 737 So. 2d 1108, 1110 (Fla. 4th DCA 1999). When evaluating this standard, a court must "limit its consideration to the conduct of law enforcement." *State v. Blanco,* 896 So.2d 900, 902 (Fla. 4th DCA 2005). The effect of the officer's conduct on the defendant, the defendant's subjective perception of the situation, and the defendant's apparent lack of predisposition to commit the offense are all factors that are irrelevant to a claim of entrapment on due process grounds. *Id.*

Florida courts have barred prosecutions when law enforcement manufactures the crime or fails to properly monitor a confidential informant. For instance, in *State v. Williams,* the defendant was arrested during a reverse sting operation by law

enforcement for purchasing crack cocaine within 1,000 feet of a school. *State v. Williams*, 623 So. 2d 462 (Fla. 1993). This Court reversed the defendant's conviction, finding a due process violation where law enforcement illegally manufactured the crack cocaine. *Id.* at 467. While it noted that it was not unmindful of the problems faced by law enforcement in combatting crime, this Court emphasized that certain conduct would not be tolerated: "While we must not tie law enforcement's hands in combatting crime, there are instances where law enforcement's conduct cannot be countenanced and the courts will not permit the government to invoke the judicial process to obtain a conviction." *Id*. at 465.

Similarly, in *State v. Glosson*, 462 So. 2d 1082, 1084 (Fla. 1985), this Court found that law enforcement's adoption of a contingent fee arrangement for the testimony of an informant constituted a violation of due process, because it "seemed to manufacture, rather than detect, crime." (citing *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962)); *see also Farley v. State*, 848 So.2d 393, 398 (Fla. 4th DCA 2003) (holding that law enforcement's manufacture of child pornography as part of an email solicitation, coupled with promises of protection from government interference, was a violation of due process).

The failure to properly supervise a confidential informant is also grounds for dismissal as objective entrapment. In *State v. Anders*, the Fourth District found charges were properly dismissed when: 1) law enforcement did not monitor the informant's activities, 2) did not instruct informant on how to avoid entrapment, 3) gave the informant a time limit to set-up individuals, and 4) allowed the informant to set up reverse-sting operations unsupervised. *State v. Anders*, 596 So. 2d 463, 466 (Fla. 4th DCA 1992). The *Anders* Court held that the conduct of law enforcement offended due process:

> [D]ue process of law will not tolerate the law enforcement techniques employed in this case. Sending an untrained informant out into the community, with no control, no supervision and not one word of guidance or limitation about whom he may approach or what he should do was an invitation to trouble.... Here, [the informant] was allowed to create a trafficking offense and offender where none previously existed, to engage in negotiations the contents of which no independent witness can verify, and, finally, to determine the potential mandatory prison term and fine the Defendant will face by selecting the amount of drugs to be sold. Due process is offended on these facts.

Id. at 466 (citations omitted).

Likewise, in *Dial v. State*, the Fourth District affirmed the dismissal of criminal charges where: 1) the informant was given leniency on her sentence, 2) the informant was the defendant's acquaintance, 3) the informant played on defendant's known vulnerabilities, 4) the informant was not given guidance or limitations by law

enforcement about how to negotiate drug deals, 5) the informant was not properly trained on how to avoid entrapment, 6) the informant's conversations with the defendant were not monitored, 7) the informant repeatedly urged defendant to follow through with the drug sale leading to her arrest, and 8) the defendant was not suspected of criminal activity beforehand. *Dial v. State*, 799 So. 2d 407, 409-410 (Fla. 4th DCA 2001).

Finally, in *Nadeau v. State*, Fourth District found that the dismissal of charges was warranted because the agents and officers did not actively monitor the confidential informant's repeated contacts with the defendant or prepare any notes of their contact with the confidential informant. *Nadeau v. State*, 683 So. 2d 504, 506 (Fla. 4th DCA 1995). Of critical importance in *Nadeau* was the fact that the defendant had no criminal history, the officers knew of no drug activity prior to the defendant's involvement in the case, and the confidential informant threatened the suspect during unrecorded phone calls. *Id.* at 506.

The misconduct at issue in this case easily rises to the level of misconduct at issue in the foregoing cases of objective entrapment. As to the manufacturing of a crime, it is undisputed that Shihadeh contacted BBPD to report Dippolito needed "help" with her abusive relationship before things got out of hand: "I wanted her to

get, I wanted, I want them to help her. . . . I didn't even think there was gonna be an investigation. I [inaudible] thought they were just gonna pick up the phone and call her. And that's what I just wanted to happen. I really didn't want anything else to go on." App. 343, 347-48, 350.

Ms. Dippolito had no prior criminal history and law enforcement had no reason to believe that she would kill her husband if left to her own devices. In fact, BBPD did not believe Shihadeh's story when he first told it, finding the whole thing laughable, App. 346, 363-64, and BBPD did not even bother to contact Michael Dippolito until the day it staged a crime scene. App. 564. Yet, instead of helping the victim of domestic violence, BBPD decided that it was more important to make salacious reality television, and so decided to manufacture a murder-for-hire plot, casting the victim of domestic violence as the perpetrator of the crime.

Moreover, BBPD abused its position of power vis-à-vis its confidential informant and failed to exercise any meaningful supervision over Shihadeh. BBPD knew that Ms. Dippolito was particularly vulnerable, given that she had a sexual relationship with Shihadeh and was struggling in a physically abusive relationship with her husband. *Dial v. State*, 799 So. 2d at 409-410 (noting that the informant

played on the vulnerabilities of the suspect). BBPD also knew that Shihadeh carried a gun and had a criminal history that included domestic violence charges. App. 171.

Notwithstanding the dangers inherent in such an arrangement, BBPD threatened Shihadeh with prosecution if he did not continue to participate as a confidential informant. Although the trial court found that the pressure applied was limited to "moral pressure," App. 722, the overwhelming weight of the evidence shows that BBPD threatened Shihadeh with prosecution. In his prior deposition, Shihadeh testified that law enforcement expressly told him, "If you don't [cooperate], you'll get -- you can get prosecuted in a court of law." App. 246. Shihadeh also averred that during a meeting with Detective Ace Brown, BBPD told him that he "had to wear a wire or [he] would get in trouble." App. 211. When asked why he believed that he could get prosecuted if he did not continue to work with BBPD, Shihadeh responded, "Because they told me I could." App. 240. He affirmed that the threats scared him, because he did not want to get arrested. App. 240.

Shihadeh also affirmed at the evidentiary hearing that he was threatened with prosecution, App. 373, and even on cross-examination testified that law enforcement told him that if anything happened to Dippolito's husband he would be prosecuted

and that it would "fall back on him." App. 377. In light of this testimony, it defies logic to conclude that Shihadeh was not threatened with prosecution. Moreover, BBPD applied other forms of pressure, calling him ten times a day, haling him into the police station, and asking him to call Ms. Dippolito and set up meetings with her, even after he told them in no uncertain terms that he did not want to be a part of the investigation. App. 225-26, 238-39.

The record also contains evidence that BBPD did this not because it wanted to prevent a crime from occurring, but because it wanted to capture the action in a COPS episode. The COPS deadline plainly influenced Sergeant Sheridan's decision not to delay the Chili's encounter so that Sergeant Ranzie could locate a working wire. Sergeant Ranzie testified that they could have delayed the Chili's meeting, but Sergeant Sheridan told him that they were "on a schedule" and could not "delay," even though the failure to record the Chili's episode would violated BBPD policy and compromise the integrity of the investigation. App. 84, 121, 577.

This, in turn, leads to perhaps the most problematic aspect of the investigation: the destruction and/or failure to collect material evidence that would allow Ms. Dippolito to prove her defense of entrapment. BBPD failed to record *over five hundred* phone conversations with Ms. Dippolito. Detective Moreno admitted on

two separate occasions that he could have provided Shihadeh with a recording device, but failed to do so. App. 174, 597. This procedure clearly violated BBPD's own policies. And, as both Ranzie and Moreno admitted, it compromised the integrity of the investigation. App. 98, 599. In addition, BBPD failed to record the initial two to three hour interview it conducted with Shihadeh, where he initially reported that Ms. Dippolito's husband was hitting her and that he wanted to get her help. App. 163-64.

Where lost or unpreserved evidence is "material exculpatory evidence," the loss of such evidence is a violation of the defendant's due process rights, and the good or bad faith of the State is irrelevant. *State v. Muro*, 909 So.2d 448, 452 (Fla. 4th DCA 2005). Lost or unpreserved evidence is "material" if the "omitted evidence creates a reasonable doubt that did not otherwise exist." *State v. Sobel*, 363 So.2d 324, 327 (Fla. 1978).

The trial court seemed to think that the failure to *collect* evidence in this case was excusable, while the active destruction of evidence would require serious sanction. "However, the distinction between collecting and not preserving and not even collecting potentially exculpatory evidence is one without a difference." *Muro*, 909 So. 2d at 455. The sanction for the failure to collect or preserve material

evidence is not dismissal per se, *State v. Davis*, 14 So. 3d 1130 (Fla. 4th DCA 2009); rather, the "determination of any discovery sanction to be imposed in cases where the state loses evidence depends upon the deliberateness of the act and the degree of prejudice to the defendant." *Id.* (quoting *State v. Snell*, 391 So.2d 299, 300 (Fla. 5th DCA 1980)).

In this case, the amount of evidence that was unpreserved is so overwhelming that serious sanctions are warranted, even if the State did not knowingly destroy evidence. This evidence was obviously material. As noted, were this evidence in existence, it would form the cornerstone of an entrapment defense. Ms. Dippolito testified to what occurred, and, though Shihadeh provided a different version of events, the divergence in his testimony is hardly surprising, given that he would have admitted to serious crimes if he conceded that he threatened Ms. Dippolito at gunpoint. It is also worth considering that Shihadeh owned a gun and had a criminal history that included domestic violence. He also testified that he felt that he would be prosecuted if he did not cooperate. In view of these facts, it hardly seems implausible that Shihadeh would threaten Ms. Dippolito as she claimed. Thus, the lost evidence is clearly material, and its absence would all but force Ms. Dippolito to waive her right not to testify in order to present her theory of defense.

Furthermore, there was no compelling reason why BBPD failed to collect or preserve this evidence. It certainly could have recorded the three-hour initial conversation with Shihadeh because it recorded the subsequent conversation with him. Moreno also confirmed that BBPD could have recorded the calls between Shihadeh and Ms. Dippolito, and even Shihadeh could not understand why the calls were not recorded and turned over to Ms. Dippolito. Most egregious, however, was the failure to record the Chili's encounter. Even assuming the failure to do so is attributable to equipment malfunction, Ranzie testified that he advised Sheridan against conducting an unmonitored and unrecorded encounter, but Sheridan brushed off his concerns because he wanted to ensure that Ms. Dippolito's alleged crime met his deadline so the events could be captured by the cameras of COPS. That is outrageous.

The bad acts of BBPD do not end there. The circumstances related to the COPS episode and the pretrial release of the videos on YouTube are beyond the pale. Stephanie Slater admitted that she solicited the COPS producers because she wanted "great publicity." She also admitted that she immediately released the videos of Ms. Dippolito on YouTube as soon as she got back to the offices, so the videos were uploaded before Ms. Dippolito was even charged with a crime. And if that were not

enough, Sergeant Sheridan tricked Ms. Dippolito into consenting to appear on COPS by falsely informing her that her signature was needed for a *Miranda* waiver.

These instances of misconduct are not, as the trial court held, collateral to Ms. Dippolito's objective entrapment claim. The lower court conceded that releasing the incredibly inflammatory videos of Ms. Dippolito would render it difficult to seat a jury. But that is all the more reason to consider the effects of the release on Ms. Dippolito's case. "Due process of law imposes upon a court the responsibility to conduct 'an exercise of judgment upon the *whole course of the proceedings* in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice.'" *State v. Marks*, 758 So. 2d 1131, 1135 (Fla. 4th DCA 2000) (quoting *State v. Glosson*, 462 So. 2d 1082 (Fla. 1985)).

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). By releasing the videos before Ms. Dippolito was ever charged with a crime, in violation of its own policies and procedures, BBPD violated Ms. Dippolito's due process right to a fair and impartial jury, and robbed her of the presumption of innocence.

When these violations of due process are viewed alongside all of the other blatant and outrageous instances of misconduct on the part of BBPD, the only conclusion is that the BBPD engaged in conduct that constitutes objective entrapment. Therefore, this Court should issue the writ of prohibition and order the dismissal of the charges against Ms. Dippolito.

CONCLUSION

Based on the foregoing, this Court should grant this petition, issue a writ of prohibition, and remand this case for dismissal of all charges against Ms. Dippolito.

DATED this 29th day of August, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 29th day of August, 2016 via email to Elba Martin-Shomaker at CrimAppTPA@myfloridalegal.com and elba.martinschomaker@myfloridalegal and via first class mail to the Honorable Glenn D. Kelley at 205 N. Dixie Hwy, West Palm Beach, FL 33401.

/s/ *Andrew B. Greenlee*
Andrew B. Greenlee, Esquire

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).

/s/ *Andrew B. Greenlee*
Andrew B. Greenlee, Esquire