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**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION**

ANGELINA CIANFAGLIONE, Plaintiff, vs. TERRY ROGERS in his individual capacity, DEE BURGIN, in his individual capacity, ROBERT WILSON, in his individual capacity, BEVERLY WEGER, in her individual capacity, and County of Edgar, Illinois, Defendants.	)	Case No. 10-2170

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE FOR A PROTECTIVE ORDER PROHIBITING RETALIATION AND INTIMIDATION OF WITNESSES

This motion seeks to enjoin Defendant Dee Burgin, Defendant Terry Rogers and Defendants' agents from intimidating, retaliating or threatening to retaliate against the Plaintiff, the Plaintiff's counsel and the Plaintiff's witnesses in this cause and/or, in the alternative, to issue a protective order protecting Plaintiff and Plaintiff's witnesses from intimidation, retaliation and threats from the Defendants and their agents.

The conduct complained of violates the Plaintiff's rights to seek redress for violations of her constitutional rights and interferes with her access to the courts, both of which are protected under the First Amendment and the Due Process Clause of the Fourteenth Amendment. The conduct delineated in the motion and attached affidavits impedes this Court's ability to fairly adjudicate the case before it. The conduct delineated undermines the ability of the Federal Judiciary to conduct its regular business without

the fear that illegal conduct will infect the proceedings.

Background Facts and Procedural Status

Plaintiff filed this lawsuit on August 3, 2010, alleging violations of her constitutional rights by Defendants' illegal search and seizure of herself, including a strip and body cavity search, pursuant to a failure-to-appear warrant that had not yet issued.

The Defendants filed a Motion For Summary Judgment to which the Plaintiff filed her Response and Defendants' Reply was filed. Defendants filed a Motion To Strike to which the Plaintiff Responded. These motions are now pending.

Facts Giving Rise to This Motion

Post-filing events have occurred in Edgar County which are extremely troubling to the administration of justice. In response to Defendants' Exhibits supporting their motion for summary judgment, Plaintiff filed the affidavits of three witnesses, under Fed.R.Evid. 608(a). These witnesses are Kevin and Cindy Farris of Vermilion and Tracy George Hall of Paris. On March 31, 2012, Kevin Farris was contacted by two individuals, Tracy Shanks of Vermilion and Chad Jewell of Paris. Each of these men advised Mr. Farris that they had been approached by Dee Burgin, a Defendant in this case, and asked to plant illegal drugs in Mr. Farris' store for a payment of $1,000.00 cash. Both of these men refused Burgin's request and they both are afraid for their life and safety, especially because they came forward with affidavits prepared by Plaintiff's counsel after giving statements to Plaintiff's counsel. Mr. Shanks' adult son, Michael Shanks witnessed some of the conversation that Dee Burgin had with Tracy Shanks. Chad Jewell testified that Dee Burgin stated that he wanted to put Kevin Farris in prison for 10 - 15 years by having Mr. Jewell plant 10,000 pills in the Farris' store, which Dee Burgin promised to supply.

Kevin Farris and his family have seen Defendant Dee Burgin repeatedly circling their premises in his marked Edgar County SUV and have seen Dee Burgin parked near their premises for hours, in his marked Edgar County SUV. Since he refused to illegally plant drugs in Mr. Farris' store, Tracy Shanks has seen Dee Burgin cruising slowly past his house, as many as three times a night, in the marked Edgar County SUV.

Cindy Farris has been receiving text messages from a woman who refuses to come forward out of fear of retaliation. This woman said she was approached by Dee Burgin's girlfriend who offered money to plant illegal drugs in the Farris' store in Vermilion.

Kevin and Cindy Farris are afraid for their lives and for their family's safety, due to their knowledge in the community of how bad things seem to happen to people who cross Dee Burgin and Terry Rogers. The Plaintiff moved out of Edgar County after filing suit.

Chad Jewell, Tracy Shanks and Michael Shanks are afraid for their lives and safety and are afraid that they may be set up with illegal drugs because they refused to cooperate with Dee Burgin and because they spoke with Redwood Law Office and they do not trust that they will be protected by Edgar County law enforcement.[1]

The Plaintiff and the Plaintiff's witnesses find this conduct intimidating.

Law and Analysis

"[R]etaliation offends the Constitution [because] it threatens to inhibit exercise of the protected right." *Crawford-El v. Britton,* 523 U.S. 574, 589 (1998)(citation omitted). Retaliation against citizens for exercising their right of access to the courts or other

[1] The basis of this lack of trust in Edgar County authorities is well documented in Michale Callahan's book, "Too Politically Sensitive" and by issues before this court in Mr. Callahan's lawsuit against the Illinois State Police regarding cover-ups in Edgar County.

means of refressing greivances violates the first Amendment. *See, e.g., Thaddeus-X v. Blatter,* 175 F.3d 378, 394 (6th Cir. 1999) ("[R]etaliation for the exercise of constitutional rights is itself a violation of the Constitution.") (citing *Crawford-El, supra.)*

For the Court to enter a preliminary injunction, plaintiff will have to show that (1) he has no adequate remedy at law; (2) he will suffer irreparable harm if the preliminary injunction is not granted; and (3) he has some likelihood of success in the sense that his chances are better than negligible. *Torres v. Frias,* 68 F.Supp.2d 935 (N.D. Illinois 1999), *National People's Action v. Village of Wilmette,* 914 F.2d 1008, 1010 (7th Cir. 1990). When the plaintiff makes this initial showing, the Court must then balance the harm to the parties and the public if an injunction is granted or not, and the plaintiff's actual likelihood of success on the merits. *Id.* These are not prerequisites but rather "factors to be balanced." *In re Delorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985). The factors need not be viewed in isolation from one another. *Blue Cross & Blue Shield Mut. Of Ohio v. Blue Cross and Blue Shield Ass'n.,* 110 F.3d 318, 334 (6th Cir. 1997) In addition, "[t]he general function of a preliminary injunction is to maintain the status quo pending determination of an action on its merits. *Blaylock v. Cheker Oil co.,* 547 F.2d 962, 965 (6th Cir. 1976).

Plaintiff is entitled to a preliminary injunction to prohibit threats and intimidation of her named witnesses and retaliation by Defendants

Plaintiff argues that the criteria to grant a preliminary injunction all militate in favor of an Order enjoining Defendants Dee Burgin, Terry Rogers and those acting in concert with them from any retaliatory, threatening, or intimidating activity intended to interfere with Plaintiff's lawsuit, Plaintiff's named witnesses or the redress of Plaintiff's

constitutional rights. The status quo that Plaintiff seeks to maintain is that of an individual prosecuting a lawsuit without threat of intimidation or retaliation against the Plaintiff's witnesses (including these witnesses' families and customers), the Plaintiff's counsel and legal staff and the Plaintiff herself by the Defendants.

When local law enforcement agents engage in unlawful retaliatory and intimidating conduct towards witnesses and citizens, the order of law is undermined. Such conduct permits officers to act illegally against citizens with impunity because it chills the citizens' willingness and ability to come forward and complain about illegal conduct.

Taking each of the factors for a preliminary injunction in turn, Plaintiff can demonstrate a strong or substantial likelihood or probability of success on the merits. Plaintiff has engaged in protected conduct, in the form of prosecuting this lawsuit and naming witnesses willing to testify against the Defendants for violations of her constitutional rights. Plaintiff has suffered an adverse action in that her witnesses have been intimidated and threatened. Defendant Dee Burgin stated that he is trying to send one of Plaintiff's witnesses to prison for 10-15 years, on felony drug charges. The causal connection is established because the solicitation of crime by Defendant Dee Burgin came shortly after the filing of affidavits, which are a matter of public record.

Second, Plaintiff will suffer irreparable injury without the injunction, in that retaliation for protected conduct is itself a violation of Plaintiff's First Amendment rights. "[T]he Supreme Court has long held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Jones v. Caruso,* 569 F.3d 258, 277 (6th Cir. 2009)(citing, *inter alia, Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673 (1976)). This threatening and illegal conduct impedes Plaintiff's

ability to prosecute this suit, and this Court's ability to hear issues and control the proceedings before the Court.

As to the third factor, granting this preliminary injunction causes no harm to Defendants or others. Plaintiff is merely requesting this Court to Order the Defendants to conduct their day-to-day business of law enforcement in a lawful manner and to refrain from suborning crime or intimidating witnesses with the power of their law-given authority. Plaintiff is not asking this Court to Order affirmative conduct, but only to Order Defendants and their agents to refrain from threatening, intimidating or carrying out threats of bad-faith criminal prosecution of Plaintiff's witnesses by illegally planting drugs and then arresting the witness for illegal possession of those drugs. In fact, enjoining the described illegal conduct will serve the Defendants best interests by insuring that they follow the laws that they are sworn to uphold and enforce. This will make the Defendants better police officers.

Finally, the public interest is clearly served by this injunction. Permitting illegal subornation of crime, intimidation of witnesses and threatening behavior by law enforcement officers to continue unabated not only intimidates and chills this Plaintiff, but harms innocent community members and teaches others in the community that the Courts will not protect them if they complain against local officers. The public interest is served by requiring that law enforcement officers always acts with impeccable honesty and adherence to the law. The public interest is served when this Court has the ability to hear all of the evidence in this case and when the witnesses feel free to come forward to testify without fear of retribution.

Under the "sliding scale" analysis of the harm to the parties and the public from

the grant or denial of the injunction, *National People's Action v. Village of Wilmette,* 914 F.2d 1008, 1011 (7th Cir. 1990) granting the injunction is clearly a win-win situation.

Alternatively, A Protective Order Prohibiting the Retaliatory, Intimidating and Illegal Suborning of Crime is Within This Court's Authority

Under the All Writs Act, federal courts are empowered to "issue all writs necessary of appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a). The United States Supreme Court has "repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent frustration of orders it has previously issued," and has noted that "[t]his statute has served since its inclusion, in substance, in the original Judiciary Act as a legislatively approved source of procedural instruments designed to achieve the rational ends of law." *United States v. New York Tel. Co.,* 434 U.S. 159, 172 (1977) (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)) (internal quotation marks omitted). Encompassed in the "rational ends of law" is the notion that "the courts may rely upon this statute in issuing orders appropriate to assist them in conducting factual inquiries." *Harris*, 394 U.S. at 299. These factual inquiries must include unfettered access to testimony by witnesses, in this case, the plaintiff's witnesses who have been threatened and intimidated by the Defendants' conduct.

The Supreme Court has emphasized that "a fede3ral court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *New York Tel. Co.,* 434 U.S. at 173 (quoting *Adams v. United States,* 317 U.S. 296, 273 (1942)). Further, "[t]he power conferred by the [All Writs] Act extends, under

appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order of the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *Id.* At 174. (citations omitted).

The district courts may apply the All Writs Act to "control actions or conduct that would inhibit [the court's] ability to resolve or manage a case before it." *Cinel v. Connick,* 792 F.Supp. 492, 497 (E.D.La. 1992). Courts may also use the Act to reach conduct "which, left unchecked, would have the practical effect of diminishing the court's power to bring the litigation to a natural conclusion." *Rubin v. Smith,* 882 F.Supp. 212, 219 (D.N.H. 1995) (quoting *Williams v. McKeithen,* 939 F.2d 1100, 1104-05 (5th Cir4. 1991)).

In *Ben David v. Travisono,* 495 F.2d 562 (1st Cir. 1974), the First Circuit upheld a portion of a protective order brought under the All Writs Act to prevent retaliation against prisoner witnesses. The inmates had filed a class action suit alleging that they were being subjected to "unconstitutional treatment in the form of beatings, mental abuse, inhumane and unsanitary conditions, mail censorship, and the like." *Id.* At 563. The district court's order

> restrain[ed] Rhode Island prison officials and state police, and their agents, 1. from perpetrating or suffering to be perpetrated the physical and mental abuse, brutalization and beatings of plaintiffs and members of plaintiffs' class by the defendants and their agents; 2. From taking any action in retaliation against plaintiffs and members of plaintiffs' class or of depriving plaintiffs and members of plaintiffs' class of any and all rights and privileges on account of plaintiffs and members of their class participating, assisting, or volunteering any facts or circumstances in the furtherance of this lawsuit. *Id.* (Internal quotations omitted)

The circuit court upheld paragraph 2 as "sufficiently within the court's discretionary authority"; however, it struck the first paragraph as too vague, and as not reflective of

actual findings of such conduct. *Id.* At 564-65.

The court instructed that "[t]he findings necessary to support such a protective order are simply that the plaintiffs reasonably fear retaliation and that the court's fact-finding may be materially impaired unless there is provided the tangible protection of a suitable court order[.]" *Id.* At 564. It approved the district court's determination that under the authority of the Act, the plaintiffs were not required to meet the usual criterial for ordinary protective orders, Fed.R.Civ.P. 26(c), or preliminary injunctions, Fed.R.Civ.P. 52, such as probability of success and balancing of equities. *Id.* At 563. It was sufficient that the lower court found that "serious accusations have been made" that the plaintiffs reasonably feared retaliation if they co-operated in the preparation of the litigation, and that the order prohibiting the defendants and those acting in concert with them from taking any retaliatory action was essential to guarantee "a fair and meaningful evidentiary hearing and an adequate inquiry into plaintiff's claims." *Id.* At 563 (internal quotations omitted).

Separate from the statutory grant of authority under the All Writs Act, federal courts have inherent powers to manage their own proceedings and to control the conduct of those who appear before them. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43-44 (1991). This doctrine "is rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." *IT Community Dev. Corpl. v. Barton,* 569 F.2d 1351, 1359 (5th Cir. 1978)(citation omitted).

Here the Plaintiff has alleged three separate incidents and has provided sworn affidavits from two independent witnesses to two of these incidents where Defendant Dee

Burgin (with possible collusion by Defendant Terry Rogers) has attempted to suborn the crime of planting illegal drugs on the property of two of the Plaintiff's witnesses, with the plan to then arrest and prosecute these witnesses in an unlawful criminal prosecution.

Under the *Younger* (*Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746 (1971)) doctrine of abstention, federal courts do not ordinarily interfere with pending state court proceedings. *Torres v. Frias,* 68 F.Supp.2d 935, 939 (N.D. Illinois 1999). However, Courts have carved out a specific exception to the *Younger* doctrine where plaintiff can show bad faith or a harassing prosecution. *Id.* In this case, the Plaintiff is asking this Court to intervene before any such bad faith or harassing prosecution can be initiated, based on evidence planted by the illegal machinations of the very law enforcement officers who will then arrest and assist in prosecution of the Plaintiff's witnesses.

Under the reasoning of *Ben-David,* an Order prohibiting retaliation against the Plaintiff and the Plaintiff's witnesses and counsel, including intimidation, threatening activity or offering to pay some person to plant illegal drugs on the Plaintiff's witnesses, such as described in the affidavits attached to Plaintiff's motion is within the authority of this Court under the All Writs Act.

Conclusion

For all of the foregoing reasons and pursuant to the law cited herein, the Plaintiff respectfully requests this Court to enter a preliminary injunction enjoining Defendant Dee Burgin, Defendant Terry Rogers and their agents from engaging any retaliatory or intimidating or threatening conduct toward the Plaintiff or towards the Plaintiff's named witnesses or the Plaintiff's Counsel, including but not limited to attempting to plant illegal drugs on any protected person and patrolling or driving by the witnesses homes

and businesses in Vermilion. Alternatively, Plaintiff requests a Protective Order against such conduct, pursuant to 28 U.S.C. §1651(a). Plaintiff requests this Court to award costs and attorney's fees pursuant to 42 U.S.C. §1988 and for such other relief as is available and which this Court deems just.

RESPECTFULLY SUBMITTED,
ANGELINA CIANFAGLIONE

April 7, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I electronically filed the foregoing Memorandum of Law in Support of Plaintiff's Emergency Motion for preliminary injunction or in the alternative for a protective order prohibiting retaliation and intimidation of witnesses on April 7, 2012 with the Clerk of the Court, using the CM/ECF system which will send notification of such filing to the following: Jude M. Redwood, Nathaniel M. Schmitz.

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