COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
22-00117

COMMONWEALTH

vs.

KAREN READ

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SANCTIONS AND FOR DISQUALIFICATION OF THE NORFOLK COUNTY DISTRICT ATTORNEY

On the morning of January 29, 2022, Karen Read's boyfriend, John O'Keefe, was found unresponsive in the snow outside the residence of Boston Police Officer Brian Albert. The defendant was later indicted on charges of murder in the second degree, manslaughter while operating under the influence of alcohol, and leaving the scene of personal injury and death. The Commonwealth's theory is that the defendant struck O'Keefe with her vehicle outside Albert's residence and left him there. The defendant is pursuing a third-party culprit defense, arguing that one or more persons attending a social gathering at Albert's home killed O'Keefe and that they, along with others, including the Canton and State Police, engaged in a coverup of the crime.

Claiming alleged prosecutorial misconduct by the Norfolk District Attorney Michael Morrissey ("DA Morrissey") and the Norfolk District Attorney's Office ("NDAO"), the defendant now moves for dismissal of the indictments or, alternatively, for disqualification of the NDAO from further investigation or prosecution of this matter. Because the Court concludes that no egregious misconduct occurred that is reasonably or substantially likely to materially prejudice or interfere with the defendant's right to a fair trial, the Court will deny the motion.

DISCUSSION

I. Defendant's Arguments for Dismissal and Disqualification

The defendant advances two arguments in support of her motion. First, she contends that a video statement issued by DA Morrissey on August 25, 2023 violated the Massachusetts Rules of Professional Conduct and her right to receive a fair trial. Second, she argues that the NDAO failed to disclose information regarding an investigation by the U.S. Attorney's Office ("USAO") into the defendant's prosecution in violation of the Rules of Professional Conduct pertaining to disclosure of exculpatory information. The defendant argues that these instances of misconduct warrant dismissal of the indictments or disqualification of the NDAO.

i. DA Morrissey's Video Statement

This case has generated significant media attention and public scrutiny in large part due to statements made to the media by defense counsel. On June 9, 2023, the Commonwealth filed a Motion to Prohibit Prejudicial Extrajudicial Statements of Counsel in Compliance with Massachusetts Rules of Professional Conduct 3.6 (a) in response to multiple media statements by the defendant's counsel in which they accused witnesses of being involved in O'Keefe's death and engaging in a coverup of the crime. The Court issued a decision on the motion on July 25, 2023 ("Rule 3.6 Decision"). While the Court acknowledged that the statements at issue were "arguably inflammatory and appear to have fueled much of the publicity in this case," it determined that they were generally in response to the accusations against the defendant and that at that time, when the trial date had yet to be scheduled, an order limiting defense counsel's statements was unnecessary. In doing so, the Court reminded defense counsel and the Commonwealth of their obligation to adhere to the Rules of Professional Conduct.

On August 22, 2023, ABC aired a Nightline news segment in which defense attorney Alan Jackson reiterated the defendant's theory of the case – that evidence was planted after the fact, that O'Keefe was physically beaten and murdered in Albert's house and placed outside, and that there was a coverup of the crime. According to Attorney Jackson, O'Keefe's appearance in the autopsy photographs support his theory.

On August 25, 2023, DA Morrissey issued a public statement about the case. He began by stating that "[t]he harassment of witnesses in the murder prosecution of Karen Read is absolutely baseless." See Commonwealth's Exhibits in Support of its Opposition ("CW Exhibit."), A. After discussing the evidence, DA Morrissey continued:

> . . . Jennifer McCabe, Matthew McCabe, Brian Albert. These people were not part of a conspiracy and certainly did not commit murder or any crime that night. They have been forthcoming with authorities, provided statements, and have not engaged in any cover up. They are not suspects in any crime—they are merely witnesses in the case.
>
> To have them accused of murder is outrageous. To have them harassed and intimidated based on false narratives and accusations is wrong. They are witnesses doing what our justice system asks of them . . . .
>
> Conspiracy theories are not evidence. The idea that multiple police departments, EMTs, fire personnel, the medical examiner, and the prosecuting agency are joined in, or taken-in by, a vast conspiracy should be seen for what it is—completely contrary to the evidence and a desperate attempt to re-assign guilt.
>
> Michael Proctor, the state police trooper being accused of planting evidence outside 34 Fairview Road, was never at Fairview Road on the day of the incident. Proctor and his state police partner traveled together the entire day, while other officers were processing 34 Fairview. Trooper Proctor was not there and did not plant evidence at 34 Fairview Road.
>
> In addition to having no opportunity to plant evidence as has been suggested, Trooper Proctor would have no motive to do so: Trooper Proctor had no close personal relationship with any of the parties

> involved in the investigation, had no conflict, and had no reason to step out of the investigation. Every suggestion to the contrary is a lie.
>
> This should all be seen for what it is – and not used as a pre-text to attack and harass others. . . .

Id.[1] About three weeks after this statement, the Court scheduled the trial date for March 12, 2024.[2]

The defendant argues that DA Morrissey's statement violates the Massachusetts Rules of Professional Conduct pertaining to trial publicity (Rule 3.6) and the Special Responsibilities of a Prosecutor (Rule 3.8). See S.J.C. Rule 3:07.

In relevant part, Rule 3.6 states:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

In relevant part, Rule 3.8 states that a prosecutor in criminal case shall:

> (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose:
>
> (1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and

[1] The foregoing is not a recitation of the full statement by DA Morrissey.
[2] The trial date has since been rescheduled.

> (2) take reasonable steps to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule

While DA Morrissey's statement, when viewed as a whole, appears intended to both rebut defense counsel's accusations in the Nightline interview using evidence from the investigation and to prevent further witness harassment, some of his comments are clearly inconsistent with the Rules of Professional Conduct. In particular, his comments about witnesses that relate to their credibility are the type of extrajudicial statements that are more likely to have a prejudicial effect on the proceeding. See Rule 3.6, Comment [5]. Additionally, DA Morrissey's statements characterizing the defense theory as a "desperate attempt to re-assign guilt" and as a "lie" also runs the risk of heightening the public condemnation of the defendant. The contentions of the defendant in this regard are nontrivial.

However, the Court finds dismissal of the indictments is not warranted. "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to justice" (citation omitted). *Commonwealth* v. *Rosa*, 491 Mass. 369, 373 (2023). Though certain comments by DA Morrissey crossed the line of permissible extrajudicial statements by a prosecutor, they are not egregious misconduct that is reasonably or substantially likely to materially prejudice or interfere with a fair trial. Much like the defendant's statements addressed in the Rule 3.6 Decision, DA Morrissey's August 25, 2023 statement occurred before a trial date was scheduled and is less likely to materially prejudice the proceedings. See Restatement (Third) of the Law Governing Lawyers § 109 (2000) ("a statement made long before a jury is to be selected presents less risk than the same statement made in the heat of intense media publicity about an imminent or

ongoing proceeding").[3] While DA Morrissey has responsibilities as a prosecutor that defense counsel does not bear, the Court can mitigate any potential prejudice of his comments through jury voir dire. See *Commonwealth* v. *McCowen*, 458 Mass. 461, 476 (2010) (risk from "substantial pretrial publicity" obviated by individual voir dire). Dismissal of the indictments is, therefore, not appropriate. See *Commonwealth* v. *Cronk*, 396 Mass. 194, 198 (1985) (dismissal of criminal charges "is a remedy of last resort").

Nor is disqualification of the NDAO required. "Disqualification of counsel is not a measure to be taken lightly." *Commonwealth* v. *Scanlon*, 493 Mass. 1020, 1022 (2024) (Rescript). It is only appropriate where an attorney's "continued participation as counsel taints the legal system or the trial of the cause before it." *Borman* v. *Borman*, 378 Mass. 775, 788 (1979). Complete disqualification of an entire district attorney's office, moreover, is highly unusual. See *Commonwealth* v. *Holley*, 476 Mass. 114, 122 (2016) (complete disqualification of an entire district attorney's office unnecessary where lawyer who previously represented defendant in unrelated matter joined district attorney's office prosecuting him); Cf. *Scanlon*, 493 Mass. at. 1023 (Superior Court judge disqualified prosecutor who was potential witness at trial but denied motion to disqualify entire district attorney's office). Contrary to the defendant's assertions, nothing before the Court suggests that the NDAO has an interest in the outcome of the prosecution other than the interest of justice or that the office cannot participate in a fair trial. While DA Morrissey's statement undoubtedly reflected poor judgment, there is no apparent

[3] Although the Court recognizes the seriousness of DA Morrissey's misstep, this is not the case, for instance, where prejudice from counsel's improper vouching for a witness occurred during trial and thus tainted the entire proceeding. See, e.g., *Commonwealth* v. *Ramos*, 73 Mass. App. Ct. 824, 826-827 (2009) ("In a case such as the present one, which rested entirely on the credibility of the complaining witness, we cannot [say] with assurance that the improper closing argument could not have influenced the jury to convict" (citation omitted)).

conflict within the NDAO such that its continued participation in this case would "taint[] the legal system or the trial." *Borman*, 378 Mass. at 788.

ii. Disclosure of Federal Investigation

In November 2022, the USAO began an investigation into the death of O'Keefe and prosecution of the defendant. On May 9, 2023, the NDAO wrote a letter to the USAO "regarding the issuance of federal grand jury subpoenas to at least two witnesses to the Commonwealth's investigation into the death of John O'Keefe." See CW Exhibit P, May 9, 2023 Letter. The letter stated that the NDAO had a "constitutional duty to provide the defendant with exculpatory evidence" and that to fulfill that duty, it was requesting discovery of all statements of witnesses to investigators and the grand jury. *Id.* The letter further stated that the NDAO had a duty under Mass. R. Crim. P. 14 to notify defendant when it became aware such statements exist. The NDAO acknowledged that it was "unaware of the parameters of the federal activity" but willing to file for protective orders to fulfill its constitutional and state disclosure duties. *Id.*

On May 18, 2023, DA Morrissey wrote a letter to the Office of Professional Responsibility ("OPR") at the U.S. Department of Justice requesting that the USAO's investigation be examined by the OPR or transferred to another office "without history of conflict, bias, and abuse of prosecutorial discretion." CW Exhibit P, May 18, 2023 Letter. The letter stated that the NDAO learned of the federal investigation "approximately three weeks ago" when multiple state witnesses were contacted by the FBI and received subpoenas to appear before a federal grand jury. *Id.* DA Morrissey further wrote that the NDAO had communicated with the USAO that it was trying to comply with its discovery obligations to the defendant but that the USAO had offered the opinion that "you can't turn over information that you don't

have." *Id.* The NDAO, however, had confirmed that witnesses had testified and was again requesting it be provided with information so it could fulfill its discovery obligations.

On June 1, 2023, the OPR responded to the May 18, 2023 letter declining to take any action. On June 12, 2023, the USAO responded to the May 9, 2023 letter stating that it "ha[d] no issue" with the NDAO advising defense about the contact between the USAO and NDAO if disclosure was warranted and that it would "be back in touch . . . as circumstances dictate." CW Exhibit P, June 12, 2023 Letter.

On October 12, 2023, the NDAO sent another letter to the USAO notifying the USAO that a trial date had been set and that the NDAO was again requesting "to the extent they may exist" statements made to investigators and grand jury minutes to fulfill its mandatory discovery obligations. CW Exhibit P, October 12, 2023 Letter.

On December 4, 2023, the NDAO provided the defendant with the letters exchanged between the NDAO and federal offices between May 2023 and November 2023. The Notice of Discovery indicated that the NDAO had not received any information about the parameters of the federal investigation or confirmed what witnesses had testified before the federal grand jury.

On February 21, 2024, the Commonwealth and the defendant received approximately three thousand pages of confidential materials pertaining to the investigation conducted by the USAO. The materials were produced in accordance with a protective order.

The defendant contends that the NDAO violated Massachusetts Rules of Professional Conduct 3.8 (d) because it knew about the federal investigation for six months before it disclosed information to the defendant in December 2023 and that the proper sanction is dismissal or disqualification. The Court does not agree.

Rule 3.8 (d) requires a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Nothing before the Court demonstrates that the NDAO violated Rule 3.8(d). The correspondence between the NDAO and the USAO suggest that while the NDAO was aware of the existence of the federal investigation and that some witnesses had been subpoenaed to testify before the grand jury as of May 2023, it had little to no information about the investigation and was unaware of what, if any, evidence the USAO had obtained. Indeed, the letters written by the NDAO to the USAO reflect an ongoing effort by the NDAO to obtain information about the federal investigation so it could produce such information to the defense to comply with its discovery obligations. See *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Matter of Grand Jury Investigation*, 485 Mass. 641, 649 (2020). The existence of the federal investigation alone was not "evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." See S.J.C. Rule 3:07, Mass. Rules of Prof. Conduct 3.8 (d).

Even if information as to the existence of the federal investigation was exculpatory, the defendant has not demonstrated to the Court that the delay in disclosure prejudiced the defendant such that dismissal or disqualification is warranted. Indeed, on May 3, 2023, Attorney Jackson stated in this Court that "it has been reported that the federal authorities have now gotten involved in the circumstances surrounding this case and have empaneled a federal grand jury to investigate some of these circumstances...." The defendant had the same information that the Commonwealth had in May of 2023—that a federal investigation was ongoing and witnesses had been subpoenaed to testify before a federal grand jury. When the USAO finally did release information it had obtained during its investigation, it did so to both parties at the same time.

Accordingly, any delay in disclosure by the NDAO does not require the drastic sanction of dismissal or disqualification.[4]

II. Conduct of Counsel and Extrajudicial Statements

In their opposition to defendant's motion, the Commonwealth has renewed its request to impose an order restricting extrajudicial statements or extrajudicial dissemination of evidence until a verdict is returned. Although the Court declines to issue such an order, it stresses, once again, that *both* the Commonwealth and defense counsel must adhere to the Rules of Professional Conduct concerning extrajudicial statements. This includes Attorney Jackson who has the privilege of practicing in this state on a temporary license granted to him by this court.

In addition to counsels' out-of-court conduct, the Court also reminds counsel of their legal and ethical obligations while appearing in this Court. See, e.g. S.J.C. Rule 3:07, Mass. Rules of Prof. Conduct 3.3 (Candor Toward the Tribunal). For example, it is unacceptable for counsel to misrepresent or distort facts in impounded documents, to file and argue a motion without required supporting documentation, and to fail to comply with orders of this Court—all of which have happened in this case. The trial now is imminent, and the Court will not tolerate actions by counsel which waste the Court's time and resources or violate the Rules.

[4] The defendant also contends that when the NDAO disclosed the existence of the federal investigation, it misrepresented that it was unaware what witnesses had testified before the grand jury. Even if the NDAO had such knowledge, the defendant has not shown how that misrepresentation prejudiced her right to a fair trial.

ORDER

For the foregoing reasons, the Defendant's Motion for Sanctions and for Disqualification of the Norfolk County District Attorney is **DENIED**.

Date: March 28, 2024

Beverly J. Cannone
Justice of the Superior Court