No.: _____

IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT
STATE OF FLORIDA

DALIA DIPPOLITO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

This Petition seeks to quash an overbroad gag order issued by the Honorable Glenn D. Kelley (the "court") designed to prohibit defense counsel from disseminating political speech to the media in this high-profile criminal case. The trial court issued the gag order without any evidence of a substantial and imminent threat to a fair trial. In fact, the comments of defense counsel that precipitated the request for the gag order were made four months before the trial date.

The injunction is not narrowly tailored to preclude only statements that are substantially likely to materially prejudice the trial. The gag order is also overbroad because the court failed to consider less restrictive alternatives, such as addressing any adverse media coverage during voir dire. Finally, the trial court engaged in discriminatory enforcement because it declined to order the Boynton Beach Police Department ("BBPD") to remove inflammatory videos of the Petitioner, Dalia Dippolito, which will be introduced as evidence at trial from BBPD's YouTube channel. Thus, agents of the State of Florida (the "State") are currently permitted to disseminate information prejudicial to the defense, while defense counsel is barred from countering the State's narrative or otherwise commenting on matters of legitimate public concern. The gag order violates the First Amendment and must be quashed.

Basis for Invoking Jurisdiction

Article V, section 4(b)(3), of the Florida Constitution, and Florida Rules of Appellate Procedure 9.030(b)(2)(A) and (b)(3), 9.130(a)(3)(B), and 9.100(d) confer jurisdiction on this Court to issue writs of certiorari. A writ of certiorari is generally available where an order implicates a violation of the party's constitutional rights which cannot be remedied on plenary review, as is the case where counsel is enjoined from discussing matters involved in a case with the media. *Rodriguez v. Feinstein,* 734 So. 2d 1162, 1163 (Fla. 3d DCA 1999). While non-final orders excluding or granting access to the press are generally reviewable through Rules 9.030(b)(2)(A) and (b)(3), and 9.100(d), "because the subject order is in the nature of an injunction, it alternatively is reviewable as a non-final order granting an injunction pursuant to rule 9.130(a)(3)(B)." *Id.* at 1163 n.1.

Statement of the Case and Facts

In the summer of 2009, Mohamed Shihadeh contacted BBPD about Ms. Dippolito. App. 11-12. He wanted to get her help because she was the victim of domestic violence, and "she [felt] like her only solution [was] for her to be dead or for him to be killed." App. 12. Mr. Shihadeh reported that Ms. Dippolito had talked about wanting her then husband, Michael Dippolito, killed. *Id.* BBPD videotaped meetings between Ms. Dippolito and Mr. Shihadeh, as well as between Ms. Dippolito and a purported hit man, who was in reality an undercover officer.

In August of 2009, the State charged Ms. Dippolito with solicitation to commit first degree murder with a firearm. *Dippolito v. State*, 143 So. 3d 1080, 1081 (Fla. 4th DCA 2014). This case attracted national media attention after BBPD invited the television show *COPS* to film a staged crime scene, as well as Ms. Dippolito's arrest and subsequent interrogation. App. 84.

BBPD posted videos on the internet, and members of BBPD participated in podcasts to discuss the case. *Id.* The *COPS* television show aired a story on Ms. Dippolito's case, featuring videos from the case and interviews by members of BBPD. *Id.* These videos were broadcast nationally. *Id.* Ms. Dippolito pled not guilty, and after a ten-day jury trial in April and May of 2011, the jury found Ms. Dippolito guilty. *Dippolito*, 143 So. 3d at 1081.

In February of 2014, the prosecutor, Elizabeth Parker, released a book entitled *Poison Candy: The Murderous Madam: Inside Dalia Dippolito's Plot to Kill.* App. 84. In a promotional plug for the book, former Florida Attorney General Bob Butterworth described how Parker revealed facts gleaned from her prosecution, but unknown to the general public:

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

Elizabeth Parker, *Poison Candy: The Murderous Madam: Inside Dalia Dippolito's Plot to Kill*, p. ii (2014) (emphasis added). The back cover of the book similarly states that the book reveals "juicy tidbits *banned from the courtroom*."

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

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

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

Id. at 283 (emphasis supplied).

Although Elizabeth Parker had left the State Attorney's office when she published the book, she made all of these extrajudicial comments while Ms. Dippolito's case was pending on appeal. In addition, her co-counsel and current prosecutor, Laura Laurie, felt no compunction about ratifying Ms. Parker's improper comments. Ms. Parker and Laura Laurie attended a local book signing event along with two of the lead detectives. App. 34. Ms. Parker promoted the event on her Facebook page, and Ms. Laurie also commented that she "can't wait" to "relive" the experience of prosecuting Ms. Dippolito. App. 36. Ms. Laurie also repeatedly commented on Parker's book deal, celebrating the news of its release with a "Woohoo!" and "liking" Parker's various other Facebook posts about Ms. Dippolito. App. 39.

Ms. Dippolito appealed her judgment and sentence. *Dippolito,* 143 So. 3d at 1081. This Court reversed her conviction, concluding that the trial court erroneously denied her motion to strike the jury pool, which had been contaminated due to the venire's exposure to the extensive pretrial publicity and the failure to conduct individual and sequestered voir dire. *Id.*

On remand, Ms. Dippolito retained an attorney from California, Brian Claypool, who agreed to take her case pro bono and appeared pro hac vice. App. 85. She subsequently retained an attorney from Florida, Greg Rosenfeld, who also agreed to take her case pro bono.

On December 1, 2016, the retrial of this case commenced, and once again, the case received extensive local and national media coverage. App. 86-87. Defense counsel moved for a change of venue three times during voir dire. App. 87. The State objected to a change of venue and assured the court in no uncertain terms that Ms. Dippolito could receive a fair trial despite the pervasive and negative media coverage. App. 2-7. The State was satisfied with the court's ability to ensure empanel a fair and impartial jury: "Judge, I mean, I've been here in court. The process is working." App. 9. While acknowledging the extensive news coverage, the lower court denied defense counsel's requests to change venue. App. 87, 88. Despite the media frenzy, the court concluded that "an impartial jury was selected and sworn." App. 88.

Ms. Dippolito's defense in her second trial focused on BBPD's voracious appetite for media attention. The defense team sought to establish that BBPD transformed a domestic violence complaint into a murder-for-hire plot because it knew that the *COPS* television show was coming to town. The theory of defense resonated with members of the jury, and the case ended in an evenly-split hung jury. *Id.*

Immediately thereafter, the State Attorney, Dave Aronberg, issued a press release announcing his intent to re-prosecute Ms. Dippolito for a third time. App. 61-62. Counsel for Ms. Dippolito countered with their own press release on

January 26, 2016. App. 18-19. Brian Claypool stated that "justice" had been "served" by the verdict and remarked that "taxpayers of Palm Beach County should . . . have to bear the price tag associated with the state prosecutors trying to save face and make a personal example out of Ms. Dippolito." App. 19. Greg Rosenfeld derided the decision to prosecute the case a third time as "politically motivated" and suggested that the case had "become personal" for the State Attorney's office. *Id.* Attorney Rosenfeld also remarked that, "given the obvious political motivations behind wanting a win," the "taxpayers ought to know what it's costing them." *Id.*

Although the comments of defense counsel were issued more than four months before the third trial, which was set for June 2, 2017, the State moved for a protective order, pursuant to Florida Rule of Professional Conduct 4-3.6, asking the trial court to enjoin defense counsel from making any extrajudicial comments to the press.[1] App. 13.

The State's Motion focused solely on subsection "a" of the rule, which addresses statements by counsel:

> **(a) Prejudicial Extrajudicial Statements Prohibited.** A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a

[1] The State also moved to revoke attorney Brian Claypool's ability to appear in this case pro hac vice, but the court denied that motion, so it will not be addressed in this Petition. App. 95.

> substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

R. Regulating Fla. Bar 4-3.6(a). The State claimed that "prior pattern and past tactics," as well as a press release issued to the PR News Channel ("the Press Release"), violated the rule and threatened their right to an impartial jury. App. 13, 15. Defense counsel filed a response on February 13, 2017, arguing that defense counsels' comments pertained to issues of legitimate public concern, and that the State's motion was an "unabashed attempted to . . . impair [Ms. Dippolito's] attorneys' First Amendment right to free speech by way of a blanket gag order. App. 20, 27. The State filed a Reply on February 28, 2017. App. 42-46.

On March 3, 2017, the court held an evidentiary hearing on the State's motion. App. 83. The State did not call any witnesses to testify or move any exhibits into evidence to establish that defense counsels' extrajudicial statements posed a substantial and imminent threat to a fair trial. App. 49-75. Instead, the State relied on general references to unidentified press conferences held by defense: "[T]hey hold numerous press conferences prior to trial, maligning the Boynton Beach Police Department, maligning the witnesses in the trial, and maligning the evidence." App. 51.

The State also relied on the Press Release, which the State attached to its motion as an exhibit. App. 17-19, 50-55. Without putting forth any evidence as to

whom, if anyone, this press release was disseminated, the State argued that this was "[m]ore improper stuff to get out to our potential jurors to make them despise the State Attorney's Office. All improper stuff that a juror should never consider." App. 58. Finally, the State relied on a comment by Mr. Claypool from March 2, 2016, more than a year before the hearing, which prompted the trial court to issue a show cause order that it subsequently discharged. App. 50-51.

Defense counsel responded that the State did not carry its burden in establishing a violation of Rule 4-3.6, and that a gag order would violate defense counsels' freedom of speech. App. 57-58, 61. Defense counsel pointed out that the comments in the Press Release were the only comments properly before the court, and that these extrajudicial comments were made in response to the elected State Attorney's immediate press release about trying Ms. Dippolito for a third time. App. 57, 59-60. Defense counsel asserted that these statements addressed matters of legitimate public concern and fell within the purview of the First Amendment. App. 59-61.

Further, defense counsel argued that the State did not meet its evidentiary burden in establishing that a gag order was necessary to prevent an imminent and substantial threat to the trial. App. 58, 62, 64, 65. The defense maintained that the allegations were not substantiated by the quantum of evidence that would warrant a gag order. App. 62. In this regard, defense counsel noted that the State did not

present any evidence of the dissemination of the Press Release or any evidence as to how the extrajudicial statements would deprive the State of a fair trial. App. 58.

Moreover, according to the defense, there was no showing that the jurors had been, or were at risk of, being tainted by the extrajudicial comments. App. 62. In addition, given that the trial remained three months away, the stray comments could not possibly pose an imminent threat. App. 58, 65. Finally, defense counsel argued that the State's request for a protective order was not narrowly tailored to ensure fairness and noted that granting the State's request would amount to viewpoint discrimination if it did not apply equally to the State. App. 62, 64.

The trial court agreed with the defense insofar as Florida law required the State to put forth evidence that "the extrajudicial statements pose a substantial or [imminent] risk to a fair trial." App. 67. In addition, the court noted that any order had to "be narrow and tailored in order to balance the rights of an attorney to speak, that is his First Amendment Rights versus his ethical duties under the Rules of Professional Conduct." App. 66-67.

The court asked the State a "two-fold question," first inquiring into what evidence the State put forth to establish a substantial and imminent threat aside from the Press Release:

> The evidence that you're relying upon with respect to the gag order, because your motion – Counsel is correct, *your motion made reference to the press release. What other evidence are you relying upon in connection with that request?*

> . . . .
> And that is what you've cited to me so far in your argument?

App. 67 (emphasis added). The State confirmed that the "evidence" on which it relied consisted of the Press Release, the comments made more than a year before the hearing, and the fact that the defense team held unspecified press conferences during the second trial:

> And – and his – the comments he made about Your Honor *back last year*.
> . . . .
> That, Judge, and as well as, all the press conf – who in – who has press conferences during a trial? Who – who goes out into the vestibule, where jurors can pass by, sit there and watch. They made allegations that jurors were sitting out there watching things. Who has press conferences during the trial?
>
> What's their motive to influence who? Who – what's their motive to do? Their motive was one thing, and that was to influence our jury panel. That was all he wanted to do.
>
> All day long, every day he left this Courtroom and his goal was get on TV so that I can influence this jury. That was his goal. Every day demeaning our witnesses, demeaning the Boynton Beach Police Department. Absolutely. That is evidence the Court should consider.

Id. (emphasis added).

The Court then asked the State how the requested protective order would be narrowly tailored. App. 69. The State responded that the order would be narrowly tailored if it only applied to counsel, not other parties involved in the case, and if it expired at the end of trial:

> Lawyers don't have a First Amendment Right to influence criminal trials. They don't. We know that. The issue is making narrowly tailored.
>
> Counsel, and my motion wasn't Defense Counsel. It was Counsel. Counsel in this case shall not be able to make any extrajudicial comments. Extrajudicial about what's going on in this Courtroom to the public until the trial is concluded. Period. It's that simple. *That's narrowly tailored. It only involves Counsel and it ends upon the ending of the trial.*

App. 69-70 (emphasis added).

The lower court took the State's motion under advisement, and on March 17, 2017, issued an order granting the State's Motion for Protective Order. App. 72, 95. The court ruled:

> All counsel in this case are prohibited from making any extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication, concerning or relating to, the following:
>
> a. The evidence in this case or any party's view or opinion of the evidence in this case;
>
> b. The facts of the case or any party's interpretation of the facts of the case, including any inferences that could be drawn from the facts;
>
> c. The motive or motivation of the State in prosecuting the case or the motive or motivation of the Defendant in pursuing any theory of defense;
>
> d. Sentencing or punishment of the Defendant including any reference to the sentence imposed after the first trial, the Defendant's score on the Criminal Punishment Code Scoresheet, length of in-house arrest or punishment of the Defendant if found guilty.

e. Theories of the case by the State or the Defendant.

f. The first or second trial of this case, including the results of those trials.

g. The disparagement of any attorney of record in this case.

Nothing in this order shall prohibit the attorneys from commenting generally on the progress of the case, procedural matters or rulings of the Court, provided the comments are consistent with the Florida Rules of Professional Conduct. Unless specifically renewed by the Court, the prohibitions contained in this Order shall automatically expire upon the swearing of a jury to hear and decide this case.

App. 95-96.

The trial court reasoned that potential jurors have been, and will continue to be, exposed to extensive media coverage. App. 94-95. The court stated that "[t]he extrajudicial statements made by the Defendant's attorneys in this case, whether intended or not, *are likely to bias potential jurors* by repeated exposure to matters which are completely collateral to this case." App. 94 (emphasis added). The lower court concluded that the "continued extrajudicial statements by the attorneys in this case poses a real and imminent threat to the orderly administration of justice and to a fair trial." App. 95.

After the court issued its order, defense counsel filed two Motions for Order to Show Cause against the State. App. 98-114. In the first motion, filed on March 21, 2017, defense counsel argued that the State violated the protective order because BBPD continued to disseminate the videos of Ms. Dippolito that the State

intended to introduce as evidence at trial on BBPD's personal "Media Relations" YouTube page. App. 99. In the second motion, filed on March 29, 2017, defense counsel asserted that the State or counsel for Michael Dippolito violated the order "by releasing either directly, or through their agents or employees, information pertaining to the first trial." App. 109.

On April 15, 2017, the court held an evidentiary hearing on defense counsel's motions for orders to show cause. App. 115-147. Defense counsel argued that the court's protective order relies on Florida Rule of Professional Conduct 4-3.6, which applies to both counsel and third parties. App. 120. Subsection "b" of the rule addresses statements made by third parties:

> **(b) Statements of Third Parties.** A lawyer shall not counsel or assist another person to make such a statement. *Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements* that are prohibited under this rule.

R. Regulating Fla. Bar 4-3.6(b) (emphasis added).

The crux of defense's argument was that either the protective order applies to this rule in its entirety and includes the State's agents, or the protective order lends itself to viewpoint discrimination. App. 120, 124. Defense counsel maintained that "if the Court finds otherwise, . . . the protective order essentially permits the all-powerful Government and its agents to disseminate any information

it wants, so long as it doesn't come directly out of the Attorney's mouths." App. 124.

With regard to the second motion, defense counsel pointed to statement in the media made after the court issued the protective order, in which a local reporter stated: "Now, a source close to the case tells me the State is doing what worked for them in Dippolito's first trial – calling Michael Dippolito to testify in their third try against her." App. 123. Defense counsel contended that this also violated the protective order: "This is clearly a statement about the result of the first trial, which is prohibited by the gag order. The only people who would know about the State calling Michael Dippolito would be [the prosecutors or counsel for Michael Dippolito] . . . ." *Id.*

After defense counsel finished its argument, the State declined to even respond to the allegations: "I don't know why we're here, Judge." App. 127. The court then denied both motions for order to show cause. *Id.*

Regarding the first motion, the court ruled that its authority only extended to the professional conduct of attorneys and that the protective order only applied to extrajudicial statements by attorneys. App. 127-28. Further, the court stated that its order does not "require anything that has already been placed into the public domain to be removed or changed in any way." App. 129. The court

acknowledged that the second motion "raised[d] potential issues with respect to comments, but it's insufficient for an order to show cause." App. 128.

The court then described the purpose of the protective order: "My whole goal here is to simply tell the Attorneys I don't want any extrajudicial statements, let's get to the trial, let's get a jury picked and let's try this case for the third time." App. 130. In response to this comment and the court's ruling, defense counsel questioned the court as to the scope of the protective order:

> **Mr. Rosenfeld**: Just based on this Court's ruling, I have some concern. Does the protective order, and I refer to 4-3.6 Subsection [B], does it not apply to [BBPD]? So could –
>
> **The Court**: My order doesn't apply to your client. Your client could say anything that she wishes. It doesn't apply to her mother. It doesn't apply to anyone but the Attorneys."
> . . .
> **Mr. Rosenfeld**: And when you say "Attorneys," does that include Counsel for Michael Dippolito? Does that – having filed a notice of appearance in this case for –
>
> **The Court**: Candidly, that raises a good issue, Mr. Rosenfeld, because I really hadn't considered that issue. My intent was – my initial order – my response to that question would be – my initial order would be no. I intended to cover the trial Counsel in this case. Ms. Parker is not trial Counsel, but you do raise an interesting point.
> . . . .
> **The Court**: I'm – my interpretation of my order was to basically, as the Supreme Court says, '***muzzle the trial attorneys***,' but I had not considered your point, and I want to consider it.

App. 131-132, 136 (emphasis added).

For purposes of clarifying the court's protective order, defense counsel inquired further into whether the protective order applied to agents and employees of counsel. App. 139. The court stated that the protective order does not apply to counsels' agents or BBPD, but the order does prohibit counsel from indirectly disseminating information through its agents. App. 139-40. In other words, in the view of the trial court, nothing prevented BBPD and agents of the State from making statements pertaining to the facts of the case, so long as counsel does not direct them to do so. *Id.*

Nature of Relief Sought

Petitioner seeks the entry of a writ of certiorari quashing the trial court's order granting the State's Motion for Protective Order and permitting defense counsel to exercise their First Amendment right to free speech.

Standard of Review

"To be entitled to certiorari relief, a petitioner must establish three elements: '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.'" *Lake v. State*, 193 So. 3d 932, 933 (Fla. 4th DCA 2016) (quoting *Nucci v. Target Corp.*, 162 So. 3d 146, 151 (Fla. 4th DCA 2015)).

A court departs from the essential requirements of law when it makes an error so serious that it amounts to a miscarriage of justice. *Id*. Mere disagreement

with the lower court's ruling is not enough. *Ivey v. Allstate Insurance Co.*, 774 So. 2d 679, 683 (Fla. 2003). Irreparable harm occurs when the injury cannot be readdressed in a court of law or there is no adequate legal remedy. *Fuller v. Truncale*, 50 So. 3d 25, 27 (Fla. 1st DCA 2010). Pretrial gag orders that violate a party's First Amendment rights by enjoining counsel from discussing a case with the media can constitute irreparable harm that is remediable by way of certiorari review. *Rodriguez*, 734 So. 2d at 1163.

Summary of the Argument

This Court should issue a writ of certiorari quashing the protective order. Defense counsels' comments are entitled to full First Amendment protection, as they relate to issues of legitimate public concern regarding the conduct of elected officials. Moreover, there was no evidence presented that any of the statements posed a substantial and imminent threat to a fair trial. The comments were made *over four months before the date of trial*, and the State did not even establish that the press release was actually published by any local media. In addition, the gag order is not narrowly tailored to protect the fairness of the trial, and was issued without considering less restrictive alternatives, such as reliance on the voir dire process, which the court previously found adequate to protect the fairness of the proceedings.

What is more, the gag order lends itself to discriminatory enforcement and viewpoint discrimination. The lower court ruled that BBPD, as well as other agents of the State, may disseminate information prejudicial to the defense. Defense counsel, on the other hand, cannot counteract the pervasive negative media attention by issuing any comments of their own. As a result, the discriminatory enforcement constitutes impermissible viewpoint discrimination.

Accordingly, since there is no evidentiary support that the comments pose an imminent and substantial threat to a fair trial, the order is not narrowly tailored, the court did not consider less restrictive alternatives, and the application of the order discriminates based on viewpoint, this Court should issue the writ and quash the order, which is anathema to defense counsels' First Amendment right to free speech.

Argument

I. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY ISSUING AN OVERBROAD PROTECTIVE ORDER ENJOINING COUNSEL FROM DISSEMINATING POLITICAL SPEECH TO THE MEDIA WHERE THE STATE OFFERED NO EVIDENCE OF A SUBSTANTIAL AND IMMINENT THREAT TO A FAIR TRIAL.

Attorneys, as with all citizens, enjoy the right to freedom of speech enshrined in the First Amendment. While trial courts in Florida do have the authority to issue orders prohibiting extrajudicial comments in limited circumstances, "the limitations imposed by the court on communications between

the media and lawyers and/or litigants must be for good cause to assure fair trials." *E.I. Du Pont De Nemours v. Aquamar, S.A.*, 33 So. 3d 839, 841 (Fla. 4th DCA 2010) (quoting *Rodriguez*, 734 So. 2d at 1164); *see State ex rel. Miami Herald Publ'g v. McIntosh,* 340 So. 2d 904, 910 (Fla. 1976).

A gag order is unconstitutional unless (1) it is supported by evidence and findings that the extrajudicial statements made by counsel will have a substantial likelihood of materially prejudicing the trial due to their creation of an imminent and substantial detrimental effect on the trial; (2) it is narrowly tailored and the court considered less restrictive alternatives; and (3) there are time and scope limitations on the prohibited extrajudicial communications. *Aquamar,* 33 So. 3d at 841; *Rodriguez,* 734 So. 2d at 1165. In Ms. Dippolito's case, there was absolutely no evidence presented demonstrating that the injunction was necessary to prevent a substantial and imminent threat to a fair trial, nor was the protective order narrowly tailored to protect the fairness of the trial. Finally, the trial court failed to consider less restrictive alternatives.

A. The Imminent and Substantial Harm Test.

Florida Rule of Professional Conduct 4-3.6(a), which governs trial publicity, establishes the "imminent and substantial harm" standard that protects lawyers' First Amendment Rights. Rule 4-3.6(a) only prohibits extrajudicial statements "if the lawyer knows or reasonably should know that it will have a *substantial*

likelihood of materially prejudicing and adjudicative proceeding due to its creation of an *imminent and substantial detrimental effect* on that proceeding." R. Regulating Fla. Bar 4-3.6(a) (emphasis added).

This standard does not prohibit all extrajudicial statements. On the contrary, the Florida Supreme Court changed the text of the rule in order to strike the "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials" that the United States Supreme Court approved in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). *The Florida Bar re: Amendments to Rules Regulating The Florida Bar*, 644 So. 2d 282, 283 (Fla. 1994) (quoting *Gentile*, 501 U.S. at 1075).

A closer look at the amendment to Rule 4-3.6(a) and *Gentile* illustrates that Florida attorneys are afforded greater First Amendment protections pertaining to extrajudicial statements than required by the United States Supreme Court. *See The Florida Bar re: Amendments to Rules Regulating The Florida Bar*, 644 So. 2d at 283; *Gentile*, 501 U.S. at 1068. In fact, Rule 4-3.6(a) incorporates the highest standard and most protection for attorneys. *Gentile*, 501 U.S. at 1068.

By the time *Gentile* was decided in 1991, all states had adopted one of three standards for balancing the First Amendment rights of attorneys in pending cases and the State's interest in fair trials. *Id.* The majority of the states, including Florida, utilized the "substantial likelihood of material prejudice" test, which

entails intermediate scrutiny. *Id.* at 1068 n.1. Eleven states adopted a rule that was less protective of lawyer speech, which applied a "reasonable likelihood of prejudice" standard. *Id.* at 1068. The minority of states adopted a rule that was more protective of lawyer speech, which applied either a "clear and present danger" standard or a standard that "arguably approximated clear and present danger." *Id.*

All of the states employing the "clear and present danger" standard relied on language that mirrors the "serious and imminent threat" language promulgated in the amendment to Rule 4-3.6 now in force in Florida. *Id.* at 1068 n.3 (surveying rules of professional conduct from other state bars).[2] And the clear and present danger is the functional equivalent of strict scrutiny. *See Carroll v. President and Com'rs of Princess Anne,* 393 U.S. 175, 181 (1968); *see also U.S. v. Ford,* 830 F.2d 596, 600 (6th Cir. 1987).

[2] "Only one State, Virginia, has explicitly adopted a clear and present danger standard, while four States and the District of Columbia have adopted standards that arguable approximate 'clear and present danger.'" *Id.* at 1068. The following are the states that adopted the heightened standard: Illinois Rule of Professional Conduct 3.6 (1990) ("serious and imminent threat to the fairness of an adjudicative proceeding"); Maine Bar Rule of Professional Responsibility 3.7(j) (1990) ("substantial danger of interference with the administration of justice"); North Dakota Rule of Professional Conduct 3.6 (1990) ("serious and imminent threat of materially prejudicing an adjudicative proceeding"); Oregon DR 7-107 (1991) ("serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect"); and the District of Columbia DR 7-101 (Supp.1991) ("serious and imminent threat to the impartiality of the judge or jury"). *Id.* at 1068 n.3.

The United States Supreme Court ultimately approved the intermediate standard, holding that "[w]e agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the States interest in fair trials." *Id.* at 1075. But, in doing so, the Court established a floor, not a ceiling, for protections afforded to attorneys to make extrajudicial statements.

In 1994, the Florida Supreme Court amended Rule 4-3.6(a) to include the following clause: "due to its creation of an *imminent and substantial detrimental effect* on that proceeding." *The Florida Bar re: Amendments to Rules Regulating The Florida Bar,* 644 So. 2d at 314 (emphasis added). Hence, the Florida Supreme Court abandoned the intermediate position established by the United States Supreme Court, and adopted the heightened, "clear and present danger" or "strict scrutiny" standard. This change served to strengthen Florida lawyers' First Amendment protections in pending cases and established a higher standard for Florida courts to impose protective orders.

The commentary of the rule expressly recognizes that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." R. Regulating Fla. Bar 4-

3.6, comment. It goes on to note that "the subject matter of legal proceedings is often of direct significance in debate and deliberation over public policy." *Id.*

In other words, the rule was designed to *preserve* the First amendment right of attorneys to comment on proceedings and proscribe only those comments that raise a "*substantial likelihood of materially prejudicing* an adjudicative proceeding due to its creation of an *imminent and substantial detrimental effect* on that proceeding." R. Regulating Fla. Bar 4-3.6(a). The commentary to the rule, coupled with the heightened protections afforded to attorneys when the Florida Supreme Court amended the rule and adopted the "clear and present danger" standard, demonstrates that the courts must give deference to lawyers' First Amendment rights, except in limited situations where there is a showing of an *imminent and substantial* detrimental effect.

"Thus, a gag order should be supported by evidence and findings that any extrajudicial statements made by counsel or the parties pose a substantial or imminent threat to a fair trial." *Aquamar*, 33 So. 3d at 841 (citing *Rodriguez*, 734 So. 2d at 1164). "[T]here must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or event probable; it must immediately imperil.'" *In re Adoption of Proposed Local Rule 17 of the Criminal Div. of the Circuit Ct. of the Eleventh Judicial Circuit*, 339 So. 2d 181, 185 (Fla. 1976) (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

Rodriguez illustrates the proper application of this standard. In *Rodriguez*, the plaintiff's attorneys in a medical malpractice case, "in an apparent effort to impeach or discredit [the doctor's] testimony, . . . placed an advertisement in the Miami Herald wherein their counsel sought to interview any woman who had been prescribed" a certain drug by the physician. *Rodriguez*, 734 So. 2d at 1164.

In addition, the attorneys and their client were "interviewed by a local news broadcast" and were approached by the "Today Show" for a future interview. *Id.* The doctor moved for a protective order to prohibit the plaintiffs from discussing the case in the media. *Id.* At the evidentiary hearing, "[n]o evidence other than the newspaper advertisement itself was presented to the court. The court made no review of the text of any statement(s) made by the petitioners or their counsel in published stories or news broadcasts." *Id.* After the hearing, the trial court granted the motion. *Id.*

The Third District quashed the order. *Id.* at 1165. The *Rodriguez* Court held it was "violative of the exercise of [counsel's] First Amendment rights where the court made no findings that it was necessary to ensure a fair trial and where it was not narrowly tailored to preclude only extra-judicial statements which are substantially likely to materially prejudice the trial." *Id.* It reasoned that "[t]here was no evidence presented or findings made that any extra-judicial statements or proposed extra-judicial statements made to the media by counsel or the parties

posed a substantial and imminent threat to a fair trial." *Id.* It further found that the order amounted to a "broad blanket 'gag order' which was not narrowly tailored to protect the fairness of this particular trial." *Id.* In addition, the trial court "never considered less restrictive alternatives . . . ." *Id.* Accordingly, it granted a petition for certiorari review and quashed the order. *Id.*

Similarly, in *Aquamar*, a trial court, in response to an article which the defendants in a civil suit allegedly published in the Sun Sentinel, entered an injunction consistent with Rule 4-3.6 enjoining "all parties and their counsel, and those that are working in concert with their respective agents and employees either directly or indirectly with the parties and/or their counsel," from participating, encouraging, assisting, or abetting in the dissemination of any out-of-court publicity. 33 So. 3d at 840.

This Court found that "the order on review was not supported by any showing that it was necessary to preclude a substantial likelihood of material prejudice to the trial of the case." *Id.* at 841. In addition, "there was no evidence presented and there were no findings made that any out-of-court publicity posed a substantial and imminent threat to the fairness of the trial proceedings." *Id.* As such, this Court held that the injunction departed from the essential requirements of law. *Id.*

B. The State Failed to Show an Imminent and Substantial Harm.

In this case, as in *Rodriguez* and *Aquamar,* the State utterly failed to carry the burden required to justify the issuance of a pretrial gag order. At the evidentiary hearing, the only "evidence" submitted for the trial court's consideration was the press release, which contained comments of defense counsel. But those comments occurred more than four months prior to trial, so they could not possibly satisfy the "imminence" requirement. In this regard, the case is indistinguishable from the hearing in *Rodriguez,* where "no evidence other than the newspaper advertisement itself was presented to the court." *See* 734 So. 2d at 1164.

Equally important, the State did not establish that the press release was actually published by any news outlets or disseminated in such a manner that would penetrate the consciousness of the general public. Aside from the press release, the State only referred to comments and press conference held by Ms. Dippolito's attorneys. But the references were presented through argument, not evidence, and argument of counsel generally cannot form the trial court's basis for making a factual determination. *See State of Fla. Dep't of Envtl. Regulation v. Chemairspray, Inc.*, 520 So. 2d 96, 97 (Fla. 4th DCA 1988). Even if those comments were properly presented for consideration, they do not approach the conduct which was held *insufficient* in *Rodriguez,* where trial counsel actually took

out an advertisement in the Miami Herald to influence the trial proceedings and agreed to sit for an interview on the "Today Show."

The trial court appeared to acknowledge that the State presented little if any evidence in support of its request for a gag order, pointedly asking the State what evidence it relied on. App. 67. Yet, even though the State offered no evidence that the comments were disseminated at all, the lower court ruled that there was a showing of an imminent and substantial threat to a fair trial. App. 93. This is error.

It was also error to rely on *Miami Herald Publishing* as its source for its inherent power to muzzle lawyers. *See* 340 So. 2d at 910. The standard set forth in *Miami Herald Publishing* predated the amended standard in Rule 4-3.6, which was adopted in the wake of *Gentile*. *The Florida Bar re: Amendments to Rules Regulating The Florida Bar*, 644 So. 2d at 283. As previously discussed, this "imminent and substantial harm" standard, or "clear and present danger" standard, affords extensive protections to lawyer speech, and does not authorize a trial court to "muzzle" the lawyers who appear before it.

Finally, the court applied the wrong standard regarding imminence. The court held that the "extrajudicial statements made by the Defendant's attorneys in this case, whether intended or not, are *likely* to bias potential jurors by repeated exposure to matter which are completely collateral to this case." App. 93. A

"likely" threat to potential jurors in Ms. Dippolito's trial does not rise to the level of imminent and substantial threat.

The Florida Supreme Court mandates that "there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or event probable; it must immediately imperil.'" *In re Adoption of Proposed Local Rule 17 of the Criminal Div. of the Circuit Ct. of the Eleventh Judicial Circuit,* 339 So. 2d at 185. In other words, it is not enough that the comments were "likely" to influence the jurors; the comments had to "immediately imperil" the State's right to a fair trial. The record is devoid of any evidence of any such substantial and imminent threats.

C. The Gag Order is not Narrowly Tailored and the Trial Court Failed to Consider Less Restrictive Alternatives.

As in *Rodriguez*, the injunction is not narrowly tailored to preclude only extrajudicial statements which are substantially likely to materially prejudice the trial. The order is akin to those in *Rodriguez* and *Aquamar,* except here, the trial court contains a list that prohibits nearly all manner of speech—including political speech that criticizes elected officials—pertaining to the case. The only exceptions are statements about procedural matters or rulings. "The benefit of using gag orders to prevent unnecessary chilling of speech is nullified [] when the terms of the gag order simply echo those of [the rule of professional conduct]." Loretta S.

Yuan, Comment, *Gag Orders and the Ultimate Sanction*, 18 LOY. L.A. ENT. L.J. 629, 636 (1998).

In addition, the trial court failed to consider less restrictive alternatives. When Ms. Dippolito moved for a change of venue during the course of trial, the trial court agreed with the State that the voir dire process adequately served to protect the fairness of the proceedings, despite the fact that a large number of the jurors confessed to exposure to the pretrial publicity that depicted Ms. Dippolito as a monster. "[P]retrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial." Rodriguez, 734 So. 2d at 1165 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976)). The trial court never explained why the voir dire process would not suffice to protect the interest of the State in receiving a fair trial, even though it had previously ruled that voir dire could protect Ms. Dippolito from a far more imminent threat. As such, the order is a departure from the essential requirements of the law and violates the First Amendment.

II. THE DISCRIMINATORY ENFORCEMENT OF THE GAG ORDER AMOUNTS TO VIEWPOINT DISCRIMINATION.

The protective order is overbroad and its application lends itself to discriminatory enforcement and viewpoint discrimination in violation of defense counsels' First Amendment rights. In *Gentile*, Justice Kennedy opined that an

attorney's responsibility to zealously advocate for his client is not limited to the courtroom:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

Gentile, 501 U.S. at 1043 (Kennedy, J.).

The United States Supreme Court further expressed its reservations about these forms of regulations on speech:

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. *The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State.* Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

Gentile, 501 U.S. at 1051 (Kennedy, J., majority opinion) (emphasis added) (internal citations omitted); *see id.* at 1082 (O'Connor, J., concurring) (commenting that "a vague law offends the Constitution because it fails to give fair

notice to those it is intended to deter and creates the possibility of discriminatory enforcement.").

Justice Kennedy is not the only one to express concerns with discriminatory enforcement. Legal scholars and the American Bar Association ("ABA") shared his concerns. Yuan, Comment, Gag Orders and the Ultimate Sanction, 18 LOY. L.A. ENT. L.J. at 629-37 (1998). Interestingly, the ABA, following the *Gentile* decision, amended Model Rule of Professional Conduct 3.6 (the ABA's version of Florida Rule of Professional Conduct 4-3.6) to "allow[] lawyers to make statements which a 'reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not intended by the lawyer or the lawyer's client.'" *Id.* at 637 (quoting Model R. Prof. Conduct 3.6(c) (1994)). This "right of reply" provision adopted by the ABA "recognizes situations where it is necessary for lawyers to respond to an adversaries' public statements in order to assure a fair trial." *Id.* This rule incorporates a "flexible sliding scale," so "as the level of prejudicial pretrial publicity increases, the scope of response the lawyer is entitled to make will also increase." *Id.*

In Ms. Dippolito's case, the protective order is particularly troubling because it was issued after eight years of crippling pretrial publicity, nearly all of which was prejudicial to Ms. Dippolito, and much of which was directly attributable to the State. It was *the State*—not Ms. Dippolito—that invited the COPS television

program to take part in her investigation. It was *the State*—not Ms. Dippolito—that uploaded the videos that form the basis for her prosecution to YouTube before she was even charged with a crime. And it was *the State*—not Ms. Dippolito—whose prosecuting attorney attended a book signing celebrating the release of a book that disparaged Ms. Dippolito in a most appalling manner while her case was still pending on appeal.

It is true, as the trial court observed, that Mr. Claypool's comments added to the already pervasive media coverage. However, his comments were not uttered in a vacuum; they came in the wake of six straight years of Ms. Dippolito being prejudged by the media. As the ABA has recognized, Mr. Claypool had the "right to reply," and that right included "an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." *Gentile*, 501 U.S. at 1043 (Kennedy, J.)

The trial's courts gag order exemplifies Justice Kennedy's concerns about discriminatory enforcement. As illustrated during the show cause proceedings, the injunction lends itself to discriminatory enforcement and viewpoint discrimination. In order to withstand constitutional scrutiny, the gag order has to apply to Rule 4-3.6 in its entirety, including agents of the State and BBPD. Subsection "b" of the rule, which the trial court did not address in the order, deals with statements made by third parties:

> **(b) Statements of Third Parties.** A lawyer shall not counsel or assist another person to make such a statement. *Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements* that are prohibited under this rule.

R. Regulating Fla. Bar 4-3.6(b) (emphasis added). On its face, the order is limited to "all counsel in this case." App. 95. At the evidentiary hearing on the motions for order to show cause, the trial court stated that "the order only applies to extrajudicial statements by attorneys." App. 59-60.

In response to defense counsel's question as to whether the order included statements of third parties, as defined in Rule 4-3.6(b), the court clarified that the order does *not* limit speech by Michael Dippolito's attorney, the BBPD, or any other agent of the State. App. 63-64, 68, 71-72.

While the court commented that the order does not apply to Ms. Dippolito either, the possibility of her commenting to the press offers little solace. A criminal defendant must rely upon her attorney to speak on her behalf in public because she cannot speak without waiving her right against self-incrimination and risking substantial prejudice to her defense. Justice Kennedy addressed this precisely this problem in *Gentile*:

> The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant, many of which are not within the scope of [the rule] or any other regulation. By contrast, a defendant cannot speak without fear of incriminating himself and

> prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel for the sole purpose of countering prosecution statements. These factors underscore my conclusion that blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny.

Gentile, 501 U.S. at 1056 (Kennedy, J.).

Thus, the court put Ms. Dippolito in a situation where her only avenue of leveling the playing field involves waiving her constitutional right against self-incrimination, while the State, through its "innumerable avenues for the dissemination" is free to disparage Ms. Dippolito and threaten her right to a fair trial. The defense attorneys are the only people being muzzled and the only voices being silenced. As such, the gag order's one-sided enforcement amounts to discrimination against defense counsels' viewpoint in violation of the First Amendment.

CONCLUSION

Based on the foregoing, this Court should grant this petition and issue a writ of certiorari quashing the trial court's unconstitutional protective order.

DATED this 17th day of April, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following was furnished this 17th day of April, 2017, via e-service to the Assistant Attorney General at crimappwpb@myfloridalegal.com and via first class mail to the Honorable Glenn D. Kelley at 205 N. Dixie Highway. West Palm Beach, FL 33401.

/s/ Greg Rosenfeld
Greg Rosenfeld, 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/ Greg Rosenfeld
Greg Rosenfeld, Esquire