Bronx Family Court Docket No.
NA-31309-15

New York Supreme Court

Appellate Division – First Department

In the matter of SEAN M.,

a child under eighteen years of
age alleged to be neglected by

YANNY M.,
Respondent-Appellant,

-against-

ADMINISTRATION FOR CHILDREN'S SERVICES,
Petitioner-Respondent.

BRIEF OF AMICUS CURIAE
NEW YORK CIVIL LIBERTIES UNION

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PRELIMINARY STATEMENT

Amicus The New York Civil Liberties Union (the "NYCLU") urges the Court to vacate an order (the "Non-Disclosure Order" or the "Order") issued by the Bronx County Family Court that bars a criminal defendant from sharing lawfully-obtained documents and information relevant to her second-degree murder charges with her criminal defense attorney. The respondent-appellant and other *amici* have submitted briefs explaining why the Order is contrary to state law and violates the defendant's state and federal constitutional rights, and the NYCLU writes to elaborate on how the Order violates the defendant's First Amendment rights in particular.

The speech and association provisions of the United States and New York State Constitutions protect an individual's right to communicate and share documents with counsel. These communications are also of fundamental importance to an individual's Sixth Amendment right to counsel, and, as such, courts have held that they deserve particularly "rigorous protection." Any restriction on such communications must satisfy strict scrutiny; it must be narrowly tailored to promote a compelling government interest.

Here, the family court's Non-Disclosure Order represents a sweeping and unwarranted restriction on protected activity; it is certainly not narrowly tailored—or even broadly tailored—to further a compelling government interest. While the

government does have a general interest in protecting sensitive family court material from public dissemination, that interest is not furthered by prohibiting a criminal attorney, who is already working on a parallel criminal proceeding and is already ethically and legally bound to maintain the confidentiality of the information she receives from her client in connection with that proceeding, from having a fully-informed conversation with her client. The Order also penalizes indigent defendants, like the appellant in this case, who cannot afford to hire a single attorney to work concurrently on family and criminal cases in order to avoid the restrictions imposed on those with separate attorneys.

Full and open communication between a criminal defendant and her criminal defense attorney is absolutely vital to the fair administration of justice, and a targeted speech restriction like the Non-Disclosure Order seems designed to do the greatest amount of harm to that relationship without providing any benefit to the mission of the family court. For this reason, in addition to the reasons articulated by the respondent-appellant and other *amici* in their briefs, the Order should be vacated.

STATEMENT OF AMICI CURIAE

The New York Civil Liberties Union, an affiliate of the American Civil Liberties Union, is a non-profit, non-partisan organization with over 175,000 members deeply devoted to the protection and enhancement of basic rights and

liberties. Among the most basic of those liberties are the right to free speech and the right to fundamental fairness within the criminal justice system, particularly in the context of criminal defense. As a primary defender in New York State of both speech rights (*see Barboza v D'Agata*, 151 F Supp 3d 363 [SD NY 2015] [a successful constitutional challenge to an unlawful arrest and prosecution based on protected speech]) and the right to counsel for indigent defendants (*see Hurrell-Harring v New York*, 15 NY3d 8 [2010] [a multi-year class action challenging the inadequacies of New York State's public defense system that resulted in a landmark settlement in 2014]), the NYCLU is deeply invested in ensuring that defendants have every opportunity to exercise their right to speak freely with their attorneys about material that could be relevant—or even dispositive—to their criminal cases. On a pending appeal involving facts and legal questions that are virtually identical to those of this case, the Second Department recently granted the NYCLU's motion to appear as *amicus*; a version of this brief was filed with that court on February 2, 2017.[1]

BRIEF BACKGROUND

The respondent-appellant Yanny M. ("Ms. M.") is involved in both a criminal proceeding and a family court proceeding based on the same underlying

[1] A version of this brief was filed in the Second Department in *Matter of Kevin M.*, App. No. 2016-06180; *Matter of Kaden J.*, App. No. 2016-02399; *Matter of Magena J.*, App. No. 2016-04854; *Matter of Sidney S.*, App. No. 2016-02402; and *Matter of Imanol F.*, App. No. 2016-06770.

allegations that she killed her child's father while the child was in the home (*see* brief for respondent-appellant at 5; complaint, *People v [M.]*, 03681-2015 [Sup Ct, Bronx County]; petition, *In re Sean M.*, NA 31309/15 [Fam Ct, Bronx County]). Ms. M. is represented by the Bronx Defenders in family court and by private attorneys Steven H. Goldman and Daniel N. Arshack in criminal court (*see id.*).

In her family court proceeding, the Administration for Children's Services ("ACS") turned over required discovery to Ms. M. that included progress notes regarding ACS's investigation (*see* brief for respondent-appellant at 6). These records include notes of ACS caseworkers' conversations with Yanny's child and other witnesses with information relevant to the underlying allegations, and Ms. M. and her family court attorney sought to share the documents with her criminal defense attorney so that he could review them and assess their relevance to her criminal case (*see id.*). Because judges in the Bronx Family Court and Supreme Court have issued orders in other cases prohibiting family court defendants from sharing ACS progress notes with criminal defense counsel (*see id.* at 6-9), on May 27, 2016, Ms. M. filed a motion in the family court seeking clarification about whether she could share and discuss the ACS progress notes with her criminal attorney (*id.* at 8). Despite the fact that both ACS and the attorney for the children, the Legal Aid Society, submitted affirmations agreeing that Ms. M. should be allowed to share and discuss the records at issue with her criminal defense attorney

(*see id.* at 8-9), on October 3, 2016, the family court denied Ms. M.'s unopposed motion (*id.* at 9).

This Non-Disclosure Order prevents Ms. M. and her family court counsel, an attorney from The Bronx Defenders, from sharing or even discussing any discovery that she has received in her family court proceeding with her criminal counsel (*see id.*). It prevents her from asking her criminal attorney about the discovery's potential legal impact on her criminal case, and it subjects her family court counsel to potential sanctions if they, in the course of exercising their duty to give informed legal advice, were to seek input from Ms. M.'s criminal attorney on the criminal or other collateral consequences of a particular strategic decision in the family court case (*id.* at 6). The prohibited communication between Ms. M. and her criminal attorney would assist Ms. M. in making informed decisions about, among other things, vital aspects of her criminal defense against charges of murder, assault, and criminal possession of a weapon, including the investigation of relevant witness statements or potential mitigating factors (*see id.* at 27-28).

Because Ms. M. and her family court counsel seek the ability to communicate freely with criminal counsel about the relevant discovery that they have obtained, she timely appealed the Non-Disclosure Order and argues that it is both contrary to state law and unconstitutional (*id.* at 11-28). The NYCLU submits this *amicus* brief in support of her appeal and, specifically, to more fully describe

why the Order violates the First Amendment and the analogous free speech protections of the New York State Constitution.

ARGUMENT

THE NON-DISCLOSURE ORDER VIOLATES YANNY M.'S CONSTITUTIONAL RIGHT TO FREEDOM OF SPEECH AND ASSOCIATION

I. A restriction on communication with one's attorney merits strict scrutiny under the United States and the New York State Constitutions; it must be narrowly tailored to further a compelling government interest.

It is well settled that the communications prohibited by the Non-Disclosure Order enjoy the strongest constitutional protections. The First Amendment "protects the right of an individual or group to consult with an attorney on any legal matter" (*Denius v Dunlap,* 209 F3d 944, 954 [7th Cir 2000] [also noting that "the right to obtain legal advice does not depend on the purpose for which the advice is sought"]; *see also Weaver v James*, 2011 WL 4472062, at *3 [SD NY Sept. 27, 2011] ["The right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech [and] association."] [citing *Denius*]; *Mothershed v Justices of Supreme Ct.*, 410 F3d 602, 611 [9th Cir 2005]; *Hawkins v Mitchell*, 756 F3d 983, 997 [7th Cir 2014]; *Feliz v Kintock Group*, 297 Fed Appx 131, 137 [3d Cir 2008]; *Cipriani v Lycoming County Hous. Auth.*, 177 F Supp 2d 303, 323-24 [MD PA 2001]). When an order prohibits or burdens protected speech

based on the content of the communication, "it can stand only if it satisfies strict scrutiny . . . it must be narrowly tailored to promote a compelling Government interest" (*United States v Playboy Entertainment Group*, 529 US 803, 813 [2000]).

In addition, because the unique speech- and association-related interests at issue in attorney-client communications are "interwoven with [the Sixth Amendment] right to effective assistance of counsel" and "implicate [the] fundamental right of access to the courts," they are particularly "deserving of rigorous protection" (*Martin v Lauer*, 686 F2d 24, 32-33 [DC Cir 1982] ["[T]he right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems."]; *see also DeLoach v Bevers,* 922 F2d 618, 620 [10th Cir 1990] ["The right to retain and consult with an attorney . . . implicates not only Sixth Amendment but also clearly established First Amendment rights of association and free speech."]). Accordingly, the Constitution generally requires that "the state cannot impede an individual's ability to consult with counsel on legal matters" (*Denius*, 209 F3d at 954).

In *Jacobs v Schiffer*, the United States Court of Appeals for the District of Columbia Circuit held that the Department of Justice violated its employee's First Amendment speech and association rights when it sought to restrict the employee's ability to share relevant confidential documents with his attorney in a whistle-blower lawsuit (204 F3d 259, 259 [DC Cir 2000]). The court held that the plaintiff

had a "substantial interest in freely discussing his legal rights with his attorney" and that the restriction was not sufficiently tailored to furthering the government's interest in "prohibiting public dispersal of any sensitive information" (*id.* at 265-66). Particularly relevant to the court's analysis was the court's observation that "the attorney is likely to keep this information in confidence," because "there is a critical distinction between disclosures in the attorney-client context and public disclosures" (*id.*). Accordingly, the court struck down the restriction and held that the government had alternative tools that could better "protect its interest in prohibiting public disbursal of any sensitive information without intruding on" the plaintiff's attorney-client relationship (*id.* at 265-66 [citing *Martin*, 686 F2d at 32, 34-35]).

Similarly, in *In re Ti. B.*, the District of Columbia Court of Appeals held that the trial court in a child neglect proceeding had abused its discretion and violated the First Amendment when it prohibited a defendant from conferring and sharing discovery with his criminal defense counsel regarding his ongoing neglect proceeding (762 A2d 20 [DC 2000]). After noting that "[w]here a litigant has more than one lawyer . . . [it is] not the function of the trial court to decide which lawyer's advice the litigant shall receive" (*id.* at 28 [citing *People v Knowles*, 88 NY2d 763 [1996]), the court explained that, in the First Amendment context, this creates a "presumption that a litigant is free to share whatever he wishes to share

with his attorney" (*id.* at 33). The court found that defendant's interest in open communication with his criminal attorney was particularly strong because, among other things, it implicated his ability to obtain vital legal advice regarding his privilege against self-incrimination while testifying in the neglect proceeding (*id.* at 28). In addition, the court held that the restriction was not tailored to further the government's general interest in maintaining the confidentiality of neglect proceedings, particularly in light of the criminal attorney's existing "ethical obligation to preserve the confidences and secrets of his client" (*id.* at 32).

Other courts to have considered the First Amendment implications of restrictions on protected attorney-client communications have struck them down using similar reasoning.[2] In *Shaffer v Defense Intelligence Agency* (601 F Supp 2d 16 [DDC 2009]), for example, in which the government sought to limit the plaintiff's ability to share classified information with counsel, the court relied on "the First Amendment right to share information with an attorney when such sharing is necessary for an attorney to advise his client of his rights" to hold that the plaintiff had alleged a valid constitutional claim (*id.* at 26; *see also Martin*, 686

[2] To the extent that certain protective orders restricting attorney-client communications have been upheld, they much more frequently involve instances in which the court *allows* criminal defense counsel access to materials that are *denied* to the defendant herself—if, for example, the court fears that disclosure to the defendant directly could put a witness in danger—underscoring both the paramount importance of having a fully informed criminal defense attorney and the extent to which criminal defense attorneys are regularly entrusted with sensitive materials (*see e.g. People v Contreras*, 12 NY3d 268, 285 [2009] [affirming a protective order that "allow[ed] defense counsel to know the contents of the documents . . . so long as defendant himself was not told what the document said"]). Such reasoning could not possibly apply in this case.

F2d at 32, 34-35 ["[A] broad restriction . . . chilling discussions with counsel in order to protect the government's unclear interest . . . cuts too deeply into the employee's First Amendment rights"]).

Although they have had fewer opportunities than federal courts to adjudicate the issue, New York State courts agree. The Court of Appeals has held that "an individual's right to select an attorney who he believes is most capable of providing competent representation implicates both . . . First Amendment guarantees . . . and the Sixth Amendment right to counsel" (*Matter of Abrams*, 62 NY2d 183, 196 [1984]), and it has also confirmed that the New York State Constitution provides speech and associational protections that are at least as strong as the First Amendment's (*see e.g. People ex rel. Arcara v Cloud Books, Inc.*, 68 NY2d 553, 558 [1986]).

The Appellate Division has explicitly recognized the "constitutionally protected rights of expression and association" that ensure "the right to give and receive legal counsel" (*Vinluan v Doyle*, 60 AD3d 237, 250-51 [2d Dept 2009]). In *Vinluan*, the Appellate Division overturned, on First Amendment grounds, criminal sanctions against an attorney based on his provision of good-faith legal advice because it "would eviscerate the right to give and receive legal counsel" and be "an assault on the adversarial system of justice" to hold otherwise (*id.* at 250-51). The court also warned that, without strong speech protections, a "looming threat of

criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights" (*id.* at 250-51).

Ultimately, these New York decisions reflect the same speech and association concerns articulated by the federal courts in the cases described above. Restrictions on attorney-client communications implicate vital First Amendment interests, and they cannot survive when they, like the Non-Disclosure Order here, are not narrowly tailored to further a compelling government interest.

II. The Non-Disclosure Order violates Yanny M.'s First Amendment rights because it severely harms her well-established interest in open communication with her attorney, it is not narrowly tailored, and it fails to serve any countervailing government interest.

As described above, a court-imposed restriction on attorney-client communications cannot survive constitutional scrutiny unless it is narrowly tailored to further a compelling government interest (*see Playboy Entertainment Group*, 529 US at 813; *Gulf Oil Co. v Bernard*, 452 US 89, 102 [1981] [in the context of an order restricting class counsel from communicating with class members, requiring "a carefully drawn order that limits speech as little as possible"]). Here, the Non-Disclosure Order fails that test.

As in *In re Ti. B.*, the family court's Non-Disclosure Order in this case broadly restricts constitutionally-protected attorney-client communication and completely fails to further the family court's general interest in preventing the

public disclosure of sensitive material (*see* 762 A2d at 27). Just as in *In re Ti. B.*, the defendant here has a vital interest in obtaining the informed advice of her criminal attorney regarding the intersection between a family court case and a parallel criminal proceeding, and, just as in *In re Ti. B.*, the family court has imposed "arbitrary" and "unjustified restrictions on speech between attorneys and clients" while offering "no reason to conclude that [criminal counsel] would breach the statutory policy of confidentiality" that already prohibits the public disclosure of such material (762 A2d at 27, 32; *see also* CPLR 4503[a][1] [New York statute requiring confidentiality of attorney-client communications]).

It is clear that the Non-Disclosure Order is not "a carefully drawn order that limits speech as little as possible" (*Gulf Oil Co.*, 452 US at 102), and that narrowly-tailored options exist that would more effectively further the government's interest in preserving the confidentiality of family court material. The family court has far better means available to protect sensitive information from inappropriate public disclosures, including well-tailored sealing orders, document-specific protective orders, and reliance on the ethical obligations of attorneys to maintain confidentiality (*see* brief for respondent-appellant at 28 n 8 [discussion of alternative means of maintaining confidentiality in family court]). In addition, pursuant to its own rules and case law, the criminal court is and will

remain capable of crafting narrow orders limiting the disclosure of sensitive or confidential information in any criminal trial faced by Ms. M. (*see id.* at 8-9).

In addition, the Order's categorical and complete exclusion of Ms. M.'s criminal defense counsel renders it uniquely deserving of constitutional scrutiny. Compared to the DOJ policy struck down in *Jacobs*, for example, which did not categorically prohibit the sharing of information with attorneys but rather required "preclearance" before any such sharing, the Non-Disclosure Order here is significantly broader and simultaneously much less plausibly connected to any interest in preventing undue public disclosures (*see Jacobs*, 204 F3d at 266-67 ["[T]he Department could not reasonably insist that its interests could be protected only by preclearing document-by-document the information [the plaintiff] sought to share with his attorney."]). The result should be the same; the Order should be vacated.

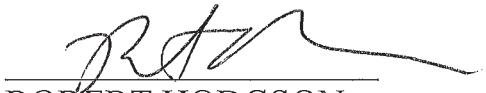
Finally, the Non-Disclosure Order here—along with other similar orders routinely issued by the Bronx County Family Court—penalizes indigent defendants more severely than others. The First Amendment violations described in this section fall most heavily on those defendants who cannot afford to hire a single attorney who could work concurrently on family and criminal cases and thus have unrestricted access to all relevant records. To the extent that these orders subject a population of indigent defendants—who are already vulnerable to threats

of a "severe imbalance in the adversary process" (*see Hurrell-Harring*, 15 NY3d at 27)—to additional constitutional infirmities, it is particularly vital that they be reversed.

CONCLUSION

Based on the foregoing reasons, and on the reasons articulated by the appellant and other *amici* in their briefs, the Court should vacate the Non-Disclosure Order.

Respectfully submitted,



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