New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of KADEN J. M. (Anonymous).
ADMINISTRATION FOR CHILDREN'S SERVICES,
Petitioner-Respondent,
—against—
QUIANNA J. (Anonymous),
Respondent-Appellant.

DOCKET NO. 2016-02399

In the Matter of RIHANA J. H. (Anonymous).
ADMINISTRATION FOR CHILDREN'S SERVICES,
Petitioner-Respondent,
—against—
QUIANNA J. (Anonymous),
Respondent-Appellant.

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS & NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT-APPELLANT AND VACATUR

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Family Court, Kings County Docket Nos. N-2583-16 and N-2584-16

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INTEREST OF AMICI CURIAE

I. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers ("NACDL") is a not-for-profit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for persons accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 members with affiliates. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. Indeed, NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice, and safeguarding and championing the rights of criminal defendants guaranteed by the federal and State constitutions. NACDL frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states, seeking to provide *amicus* assistance in cases that present broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In recent years, NACDL's briefs have been cited on numerous occasions by the Supreme Court in some of the most important criminal law decisions, including those

involving a defendant's constitutionally-protected right to counsel. *See, e.g.*, *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012); *Rothgery v. Gillespie Cnty.*, 544 U.S. 191, 204-05 (2008); *see also Blakely v. Washington*, 542 U.S. 296, 312 (2004); *Crawford v. Washington*, 541 U.S. 36, 52 (2004).

Finally, NACDL commits significant institutional resources to ensuring that indigent accused persons have access to meaningful and effective representation. NACDL devotes considerable resources to providing back-up support to both public defenders and private counsel who handle assigned cases, and funds a full-time Resources Counsel to perform that function. The Association recognizes that a system of criminal justice that provides inferior justice to those whose poverty prevents them from hiring private counsel is inconsistent with fundamental American values, including, most significantly, the constitutional right to counsel.

NACDL thus has a particular interest in this case. In furtherance of its mission to preserve fairness in the state and federal criminal justice systems, NACDL seeks to preserve, protect, and defend the Sixth Amendment right to counsel and the right of its members' clients to discovery for use in connection with any proceedings the State has brought against them. Accordingly, NACDL brings a perspective that can uniquely inform the Court's consideration of the issues in this case, and has a direct interest in seeing that criminal defense lawyers

are able to effectively defend their clients' constitutional right to counsel, regardless of their clients' financial means.

II. NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The New York State Association of Criminal Defense Lawyers ("NYSACDL"), an affiliate of NACDL and the State's largest private criminal bar group, is a not-for-profit membership organization of some 750 criminal defense attorneys practicing throughout New York. It assists its members in better serving their clients and works to enhance its members' professional standing. NYSACDL strives to protect individual rights and liberties for all of the accused throughout the State.

INTRODUCTION

Judicial interference with the attorney-client relationship in a manner that prohibits full and open communication between an indigent defendant and her criminal defense attorney deprives the defendant of her constitutionally-protected right to meaningful and effective assistance of counsel. Accordingly, this Court should vacate the Non-Disclosure Order issued by the Family Court in Appellant's Article 10 proceeding.

As criminal defense lawyers, members of *amici* are unified in the view that to effectively represent clients in two forums based on the same underlying allegations—such as parallel criminal and Family Court proceedings—it is

necessary to obtain and assess information related to those allegations in the context of both proceedings, and to be able to share it with qualified co-counsel. Members of *amici* have access to all information relevant to their clients' cases. They are further unimpeded in their ability to share and discuss that information with other attorneys with whom they associate on a given matter. As a result, they are able to provide adequate representation to their clients: litigants who can afford to hire private counsel. An indigent defendant like Appellant is constitutionally entitled to counsel that can do the same.

Amici share a long and distinguished heritage of advancing their mission to ensure the fair administration of justice and advocating for the provision of qualified counsel to the indigent. Both NACDL and NYSACDL recognize that the right to effective counsel throughout the adversarial process is fundamental to justice and fairness. It is for these reasons, as well as to advance the integrity of the criminal justice system, that *amici* urge this Court to vacate the Non-Disclosure Order, thereby fully ensuring the right of all defendants to "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Doing so would improve both the integrity of the legal profession and the perception of the State's system of indigent defense.

ARGUMENT

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he has." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (quotations omitted). "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial" without effective representation. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

The Sixth Amendment grants defendants more than "mere formal appointment" of counsel. *Cronic*, 466 U.S. at 655-56 (citation omitted). It entitles criminal defendants to unimpeded communication with their counsel, because "ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Geders v. United States*, 425 U.S. 80, 88 (1975); *see also Evitts v. Lucey*, 469 U.S. 387, 394 n.6 (1985) (the Sixth Amendment recognizes that "an expert professional['s] ... assistance is necessary in a legal system governed by complex rules and procedures"); *People v. Ambers*, 26 N.Y.3d 313, 317 (N.Y. 2015) ("Under New York Law, the constitutional requirement of effective assistance of counsel is met when ... the attorney provide[s] meaningful representation") (quotation omitted). To safeguard these rights for an indigent defendant subject to parallel Family Court and criminal proceedings arising of the same conduct, this Court must allow full, open

communication between the defendant and the assigned criminal defender, and grant the criminal defender unfettered access to discovery from the related Family Court proceeding.

The Non-Disclosure Order—the issuance of which has become commonplace in Article 10 proceedings—unconstitutionally "restricts the defense ... in the planning of its case," *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972), creating considerable doubt that "any lawyer, even a fully competent one, could provide effective assistance." *Cronic*, 466 U.S. at 659-60. Such a severe restraint on communications between Appellant and her criminal defender, however, would not exist if Appellant could afford to hire a lawyer to represent her in both her Family Court and criminal proceedings, who would have access to the Family Court discovery as a matter of course. Members of *amici*, a majority of whom are private practitioners, often represent litigants with sufficient financial means in parallel civil and criminal proceedings, and submit that effective representation of these clients requires unrestricted access to information. Appellant may be "too poor to hire a lawyer," but she is constitutionally entitled to the same. *Gideon*, 372 U.S. at 344.

III. THE RESTRAINTS PLACED ON APPELLANT'S CRIMINAL DEFENSE ATTORNEY DEPRIVES APPELLANT OF HER CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL

A. The Non-Disclosure Order Renders Appellant's Criminal Defender Incapable of Providing Effective Representation

By restricting Appellant's disclosure of Family Court discovery to her Family Court attorney, the Non-Disclosure Order frustrates her criminal defender's ability to provide competent representation. A criminal defense attorney's access to information and documents relevant to the charged criminal conduct, and his ability to openly discuss such information with his client, are vital to the attorney's ability to effectively represent his client.

It is common for a litigant with sufficient resources to hire the same attorney to represent her in parallel proceedings, particularly in the white-collar context, where litigants have ample resources to hire corporate attorneys to act on their behalf in civil enforcement actions (such as those in front of the Securities and Exchange Commission ("SEC")) and criminal investigations with overlapping allegations. Such dual representation enables attorneys to provide, at a minimum, effective assistance, as they can consider all of the facts and circumstances holistically, as well as ramifications that decisions made in one proceeding might have on the other.

i. Effective Representation Requires Attorneys to Consider Estoppel Issues in Parallel Proceedings

With full knowledge of the evidence, an attorney can better consult with his client as to the benefits of entering into a plea, given that "[a] criminal conviction can be used offensively against the defendant in a subsequent regulatory or civil proceeding." Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel*

Proceedings: Basic Principles & Tactical Considerations, 7 SEC. LITIG. REP. 1, 10 (2010) (hereinafter, "*Defending Parallel Proceedings*"); *see also S.E.C. v. Bilzerian*, 29 F.3d 689, 694 & n.10 (D.C. Cir. 1994) (granting summary judgment for the SEC based on a criminal conviction for the same conduct); *S.E.C. v. McGinn, Smith & Co. Inc.*, No 1:10-cv-457 (GLS) (CFH), 2015 WL 667848, at *9 (N.D.N.Y. Feb. 17, 2015) ("Convictions are what matter for collateral estoppel purposes, and ... [defendant] was convicted of mail, wire, and securities fraud based on the same conduct as alleged in the [SEC's] second amended complaint."); *S.E.C. v. Kinnucan*, 9 F. Supp. 3d 370, 374 (S.D.N.Y. 2014) ("The SEC argues that [defendant] is estopped from contesting liability under Section 10(b) and Rule 10b-5 on the basis of his guilty plea. The Court agrees."); *S.E.C. v. Resnick*, Civ. No. CCB-05-1254, 2008 WL 2346021, at *1 (D. Md. June 3, 2008) (granting "motion ... to use offensive collateral estoppel to bar the defendant from relitigating the facts that underlie[d] his criminal conviction"); MARVIN G. PICKHOLZ, PETER J. HENNING & JASON R. PICKHOLZ, 21 SEC. CRIMES § 4:17 (2015) ("A conviction in a criminal case may estop relitigation in a subsequent civil or criminal proceeding. Courts have allowed plaintiffs to use evidence of a criminal conviction to prove elements of a civil case, including the SEC in a civil enforcement action."). Conversely, admissions made in civil enforcement actions can result in the addition of criminal charges. *See generally* Paul Radvany, *The SEC Adds a New*

Weapon: How Does the New Admission Requirement Change the Landscape?, 15 CARDOZO J. CONFLICT RESOL. 655, 699 (2014). Accordingly, "it is critical for [white-collar] defense counsel to determine whether the SEC staff will insist on admissions as part of [a] settlement." RICHARD A. ROSEN, CHRISTIAN J. MIXTER & ROBERT M. MORANO, SETTLEMENT AGREEMENTS IN COM. DISPUTES § 34.13 (2016) (hereinafter, "*Settlement Agreements*").

Like in SEC and other civil regulatory enforcement actions, "[t]he New York Court of Appeals has found that criminal convictions can be used as evidence and permit summary judgment in parallel Article 10 proceedings." *Matter of Suffolk Cnty. Dep't of Soc. Servs. v. James M.*, 83 N.Y.2d 178, 183 (1994) ("The establishment of [defendant's criminal] sexual abuse of [his child] constituted admissible proof of his neglect of [his other child]"); *see also In re Cashmere S.*, 125 A.D.3d 543, 544 (1st Dep't 2015) (error to dismiss neglect petition where evidence "at the fact-finding hearing demonstrated that the father was convicted, upon his guilty plea, of attempted sodomy in the first degree"); *In re Jewelisbeth JJ.*, 97 A.D.3d 887, 888 (3d Dep't 2012) ("The collateral estoppel effect of a criminal conviction may serve to satisfy a petitioner's burden of establishing neglect."); *In re Tali W.*, 199 A.D.2d 413, 414 (2d Dep't 2002) ("[T]he Family Court may grant summary judgment in a proceeding pursuant to the Family Court Act [A]rticle 10 where a parent has been criminally convicted of one or more acts

alleged in the petition."). Further, like when defendants in financial fraud cases enter into settlements with the SEC, stipulations or admissions defendants make in Article 10 proceedings can affect the strategy of their parallel criminal trials. *See* GARY S. SOLOMON, 10 N.Y. FAM. CT. PRAC. § 2:62 (2015).

ii. Criminal Attorneys Cannot Effectively Counsel Clients Regarding the Right Against Self-Incrimination Without Unfettered Access to Information in Parallel Proceedings

For members of the white-collar defense bar, including many members of *amici*, representing the same client in parallel civil and criminal proceedings gives them access to all relevant information in crafting a defense in both proceedings, as is critical to advising the client regarding invocation of the Fifth Amendment privilege.

Evidence in a civil proceeding, such as testimony in an SEC enforcement action, can be used against the defendant in a later criminal prosecution. *See S.E.C. v. AmeriFirst Funding, Inc.*, Civ. A. No. 3:07-CV-1188-D, 2008 WL 866065, at *2-3 (N.D. Tex. Mar. 17, 2008) (recognizing the "danger of self-incrimination ... [is likely where] criminal charges ... [are] directed at the same conduct that forms the basis of [an] SEC civil suit") (quotations omitted); *see also In re Herley Indus., Inc. Sec. Litig.*, Civ. A. No. 06-2596, 2007 WL 1120246, at *1-2 (E.D. Pa. Apr. 11, 2007) ("parallel proceedings may have the effect of undermining a defendant's Fifth Amendment privilege"). Yet, the decision to

invoke the Fifth Amendment in the civil proceeding also has its consequences, as "[c]ourts may draw an adverse inference against parties in civil actions … [including] SEC actions[,] … that refuse to testify in their defense." *Settlement Agreements* at 1; *see also Defending Parallel Proceedings* at 6 ("An individual's assertion of the Fifth Amendment privilege in a parallel regulatory or civil proceeding … carries with it the risk that the fact-finder will be permitted to draw an adverse inference.").

As a result, a white-collar "defendant faces a 'Hobson's choice' of either testifying in the civil proceeding, in which case [her] testimony can be used against [her] in the criminal proceeding, or asserting [her] Fifth Amendment right not to testify, in which case the court in the SEC civil enforcement proceeding can draw adverse inferences against [her]." CLIFFORD J. ALEXANDER & ARTHUR C. DELIBERT, MONEY MANAGER'S COMPLIANCE GUIDE ¶ 1050 (2015). White-collar attorneys therefore must be able to fully communicate with their clients and consider the information relevant to the civil and criminal allegations in tandem. Only then can they assess the "complicated tactical considerations with respect to asserting the Fifth Amendment privilege" in parallel proceedings. *Defending Parallel Proceedings*, at 6; *see also S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994) ("The decision to invoke or waive the Fifth Amendment … requires serious consideration of the consequences. Counselling by a lawyer

familiar with the ramifications of a particular case and the intricacies of the law in this area is highly desirable.").

In Article 10 proceedings based on the same conduct forming the basis of criminal charges, defendants face the same "dilemma." William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 481 (1990). Like white-collar or corporate defendants in parallel proceedings, "mother[s'] and father[s'] Fifth Amendment rights [are] threatened" during Family Court proceedings. *R.M. v. Ellmore Cnty. Dep't of Human Res.*, 75 So.3d 1195, 1202-03 (Civ. App. Ala. 2011). If a respondent testifies in Family Court, that same testimony can be used against her in a later criminal case, *In re J.W.*, 837 A.2d 40, 46-47 (D.C. Cir. 2003), yet asserting her privilege against self-incrimination can lead to an adverse inference. *Matter of Comm'r of Soc. Servs. v. Philip de G.*, 59 N.Y.2d 137, 141 (N.Y. 1983); *see also In re A.H.*, 15 Misc. 3d 677, 681 (Fam. Ct. Richmond Cnty. 2007) ("[T]he Court draws the ***strongest*** adverse inference against respondent as a result of his invoking his Fifth Amendment right against self-incrimination in this child protective proceeding.") (emphasis added). Accordingly, the potential ramifications that testifying in Family Court fact-finding hearings can have on parallel criminal cases requires "fully informed advice and assistance" of a trained criminal attorney. *In re Ti B.*,

762 A.2d 20, 26, 29 (D.C. Cir. 2000) (orders barring criminal defender from "information and access" in neglect proceeding "impair[ed defendant's] ability to obtain informed legal advice on his Fifth Amendment privilege"); *see also Matter of Melissa H. v. Shameer S.*, 100 A.D.3d 535, 535-36 (1st Dep't 2012) ("The fact-finding hearing was procedurally flawed and unfair to respondent ... [because] there [was] no indication that he understood ... [the import of] his testimony ... in [his] pending criminal case").

A criminal defense attorney, whether privately-hired or publicly-assigned, cannot competently help his client with the "difficult choice" of whether to testify in a parallel Article 10 proceeding without access to information relating to that proceeding. *In re A.H.*, 15 Misc. 3d at 678. Restraints on such access seriously diminish his ability to provide the competent and effective assistance to which his client is constitutionally entitled. Given Fifth Amendment considerations in parallel proceedings, litigants with financial resources regularly "seek counsel that is experienced in criminal and 'white collar' investigations" to advise in civil actions. Jane K. Storero & Jeffrey M. Taylor, *Circuit Court Supports SEC & U.S. Attorney Actions – Permits Simultaneous Civil & Criminal Investigations*, 5 SEC. LITIG. REP. 20, 20 (2008). By prohibiting anyone besides Appellant's assigned Article 10 attorney from accessing records in the Family Court case, the Non-

Disclosure Order prevents her from "seek[ing]" the advice necessary to protect her right against self-incrimination. *Id.*

The Non-Disclosure Order, in preventing Appellant's criminal defender from obtaining access to materials from the Article 10 proceeding, severely hampers the defender's ability to effectively counsel his client, particularly due to the fact that decisions made and tactics used in the criminal case will have consequences in the Family Court proceeding, and vice versa. Moreover, by prohibiting Appellant from sharing Family Court discovery with her assigned criminal counsel, it places her at a disadvantage vis-à-vis defendants with the financial means to hire private counsel. This Court should not sanction orders creating such inequity in the criminal justice system.[1]

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[1] Indeed, courts have recently even recognized the importance of the Sixth Amendment right to counsel for affluent white-collar defendants. *See Luis v. United States*, 136 S. Ct. 1083, 1087-89 (2016) (in case involving alleged Medicare fraud, finding that restricting defendant from using personal assets subject to criminal forfeiture to retain counsel violated Sixth Amendment); *United States v. Stein*, 435 F. Supp. 2d 330, 366 (S.D.N.Y. 2006) (practice of federal prosecutors, whereby they informed corporate defendants that their refusal to advance legal fees to employees would militate against a decision to indict, violated employees' right to adequate representation). "It seems inherently unfair for ... Sixth Amendment rights to be extended to wealthy corporate employees, but not equally extended to ... indigent defendants who are so poor that they cannot afford to pay for their own defense." Mark Sackin, *Applying United States v. Stein to New York's Indigent Defense Crisis*, 73 BROOK. L. REV. 299, 327 (2007) (hereinafter, "*Applying Stein*").

B. The Non-Disclosure Order Impairs Adequacy of Counsel by Prohibiting Communication Between Appellant's Two Assigned Attorneys

Not only do criminal defense attorneys require unfettered access to information when representing a client in parallel civil proceedings, but they also seek the advice of co-counsel and fellow attorneys in their law firms to effectively counsel clients regarding specific issues and areas of the law. Accordingly, the ability to openly communicate and share documents amongst attorneys is often vital to forming an effective defense.

In order to provide competent defense, lawyers in privately-retained law firms often consult with fellow law firm members regarding issues to which they lack expertise. *See, e.g., Weis v. Comm'r*, 94 T.C. 473, 486 (T.C. 1990) ("[Attorney] had no expertise in tax and asked a member of the tax department of his law firm ... to research [a tax] issue."); Corey B. Blake, *Ghost of the Past: Does the USPTO's Scientific Technical Background Requirement Still Make Sense?*, 82 TEX. L. REV. 735, 760-61 (2004) (recognizing that large firms have attorneys in different departments with specific areas of expertise that, in combination, serve client interests). They also seek the advice of co-counsel outside of their firms to provide effective representation. *See David B. Lilly Co., Inc. v. Fisher*, 810 F. Supp. 592, 593, 596 (D. Del. 1992) (rejecting legal malpractice claim where, in connection with a merger, retained counsel consulted

with another firm because it "lacked expertise in government procurement law"); *see also Heinitsch v. Wachovia Bank, N.A.*, No. 04 CVS 734, 2007 WL 2570750, at *3 (N.C. Super. June 11, 2007) ("[I]nstitutions often rely on the expertise and experience of outside law firms when litigation arises, rarely using their own legal personnel to handle such matters. In light of this practice, it was prudent for [bank] to engage outside legal counsel to provide advice and assistance."). In so doing—as they must to provide fully-informed advice to clients—attorneys within a firm, and attorneys and outside co-counsel, share confidential documents and information protected by the attorney-client privilege. *See Fields-D'Arpino v. Restaurant Assocs., Inc.*, 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999) ("[A] presumption arises that privileged information will be shared with other attorneys within a law firm."); *Papanicolau v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1086 (S.D.N.Y. 1989) ("[W]hen one attorney is infected with privileged information, the other attorneys at the firm are presumed to become contaminated"); *Stryker Corp. v. Intermedics Orthopedics*, 145 F.R.D. 298, 305 (E.D.N.Y. 1992) (communications between co-counsel "engaged in the lawyering process" are privileged) (quotation omitted).[2]

[2] Relatedly, in the context of white-collar criminal investigations, the attorneys of *multiple* defendants often work together to strategize as to a joint defense, which "requires uninhibited communication among the ... attorneys." Matthew D. Forsgren, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 78 MINN. L. REV. 1219, 1230-31 (1994).

In the context of parallel Family Court and criminal proceedings, the same consultation amongst attorneys with the requisite specialized knowledge is typical. *See In re J.P.B.*, No. 2-04-026-CV, 2005 WL 327168, at *4 (Tex. Ct. App. Feb. 10, 2005) (in a termination-of-parental-rights case, "[the parents] hired a criminal law attorney three days after the removal [of their son from their home]. Later, upon that attorney's recommendation, they hired a family law attorney."). As the First Department has explicitly recognized, "[New York] City contracts with The Bronx Defenders to provide representation in two different courts, and the attorneys specialize in either Criminal or Family Court practice." *People v. Salinas*, 48 Misc. 3d 791, 804 n.14 (1st Dep't 2015). As such, "providing a 'holistic' approach to representation may require attorneys from different practice areas to consult and confer with each other." *Id.*; *see also* Samuel V. Schoonmaker IV, *Criminal Law or Family Law: The Overlapping Issues*, 44 FAM. L.Q. 155, 155 (2010) ("Criminal law and family law serve different, incompatible purposes. Perhaps not surprisingly, few lawyers are proficient in both areas."). Consultation amongst these attorneys, and the concomitant open communication and ability to share information, is thus imperative to the attorneys' effective representation of their client in parallel proceedings.

Accordingly, the Non-Disclosure Order is an improper restraint on open communication between Appellant's two assigned lawyers; by "restricting ...

access to relevant information generated in the [Article 10 proceeding] ... the [Non-Disclosure Order] deprive[s Appellant] of ... full and timely legal assistance...with respect to [both] the [abuse] proceeding [and] ... the ... criminal prosecution." *In re Ti B.*, 762 A.2d at 23, 29 (vacating restraints on criminal defense attorney's access to neglect hearing, even where the neglect attorney "ha[d] criminal defense as well as neglect experience").

In contrast to Appellant's hamstrung assigned counsel, privately-retained attorneys in a law firm can (and do) consult with fellow members of their firms in order to adequately represent their clients. For example, and as informed by the experience of members of *amici*, it is common for a particular lawyer in a firm to represent a client in a civil matter, such as a regulatory action in front of the SEC, the Commodities Futures Trading Commission, or the Federal Energy Regulatory Commission, yet have a different lawyer within the firm handle a criminal prosecution based on the same underlying conduct. In this common scenario, the two attorneys—who may be in different departments in the firm, or even different cities—openly share information, evidence, and case strategies.

The Non-Disclosure Order denies Appellant the same benefit. Similar to two attorneys within a law firm representing the same client, two attorneys within Brooklyn Defender Services (BDS) have been assigned to represent Appellant in her parallel proceedings. Accordingly, the Order prohibits Appellant's Family

Court attorney from disclosing information and evidence to her defense counsel—despite the fact that all members of a firm, whether assigned by the court or privately-retained, are constitutionally required to provide effective representation. *See People v. Knowles*, 88 N.Y.2d 763, 768-69 (N.Y. 1996) ("Legal Aid was assigned by the court to represent defendant and that institution chose to divide the defense responsibilities between two attorneys—a choice that a private firm retained by a criminal defendant would also be free to make. Indeed, that defendant was represented by assigned rather than retained counsel is of no moment ... [regarding] an indigent defendant['s] ... constitutional right to ... represent[ation].") (citations omitted).

In conclusion, not only does the Non-Disclosure Order impermissibly interfere with Appellant's right to fully communicate and share documents with her criminal defender, but also improperly restrains open communication between her two assigned attorneys. By gagging her Family Court attorney from disclosing relevant information to her criminal defender, the Order renders both incapable of providing effective representation.[3]

[3] Relatedly, the Non-Disclosure Order prohibits the sharing of information with pro bono counsel. *Amici* commit significant institutional resources to providing back-up support to public defenders and private counsel who handle assigned cases. The Non-Disclosure Order interferes with such initiatives by restricting communications with public defenders and attorneys who offer their services on a pro bono basis. Indeed, it may even deter attorneys from offering such services, as they feel hamstrung, and thus incapable of adequately representing clients.

IV. THE NON-DISCLOSURE ORDER DENIES APPELLANT HER FUNDAMENTAL RIGHT TO COUNSEL DUE PURELY TO HER INDIGENCE

With good reason, it is typical for a litigant with sufficient financial means to engage a private attorney who can represent her in civil and criminal proceedings based on the same underlying circumstances, and who can seek the advice of other members of his law firm or outside co-counsel with particular expertise. Armed with access to all of the relevant facts and documents and the ability to confidentially consult with other attorneys, that attorney can make informed tactical decisions, craft an effective defense strategy, and consider the ramifications that choices in one proceeding may have in the other, including, *inter alia*, the defendant's choice whether to invoke her right against self-incrimination. From the perspective of privately-retained criminal defense attorneys, *amici* submit that to adequately represent their clients, it is necessary that they be able to review all relevant information, and to discuss it openly with both their clients and co-counsel, in parallel civil proceedings—whether in Family Court, in front of a federal or state regulator, or otherwise.

Any impediment to attorney-client communication and access to information, such as the Non-Disclosure Order, thus severely threatens defendants' constitutionally-protected right to effective assistance of counsel. *See* U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6; *see also Riggins v. Nevada*, 504 U.S. 127, 144

(1992) ("[E]ffective assistance of counsel is impaired when [a defendant] cannot cooperate in an active manner with his lawyer … The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf.") (citing an *amicus brief* filed by NACDL); *Geders v. United States*, 425 U.S. 80, 92 (1975) (Marshall, J., concurring) ("[A]n order prohibiting communication [between a defendant and] his lawyer impinges upon his Sixth Amendment right to counsel."). As the Supreme Court explained in *Powell v. Alabama*, without the ability to share information concerning the criminal conduct charged—like the discovery from an Article 10 proceeding—a defendant:

> "lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel in every step of the proceedings against him. Without it, though he [may] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

287 U.S. 45, 69 (1932). In this regard, the Non-Disclosure Order violates Appellant's right to effective counsel. *See Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) ("[R]equiring the accused and his lawyer to make … choice[s] without an opportunity to evaluate the actual worth of the[] evidence … restricts the defense – ***particularly counsel*** – in the planning of its case.") (emphasis added); *see also Douglas v. California*, 372 U.S. 353, 358 (1963) (right to counsel grants defendants the benefit of "counsel's examination into the record, research of the

law, and marshaling of arguments on [client]'s behalf"); *People v. Hodge*, 53 N.Y.2d 313, 321 (N.Y. 1981) ("[T]he test must not be what the hearing [without counsel] did not produce, but what it might have produced if the defendant's right to counsel had not been ignored."); *Applying Stein*, at 334 (preventing "disclos[ure of] … material evidence … render[s] indigent defendants uninformed as to how to best defend themselves."); *cf. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 126 (2d Cir. 2008) ("[P]roduction of materials to a party's attorney alone … strengthens our conviction that the discovery restrictions imposed by the District Court were perfectly appropriate.").

The impediment to attorney-client communication created by the Non-Disclosure Order severely undercuts the ability of Appellant's criminal defender to act as a "guiding hand," *Powell*, 287 U.S. at 69, effectively "convert[ing] the appointment of counsel into a sham and nothing more than formal compliance with the Constitution's requirement that an accused be given assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (quotation omitted); *see also Nicholson v. Williams*, 203 F. Supp. 2d 153, 257 (E.D.N.Y. 2002) ("Offering counsel to a mother accused of neglect, and then hamstringing that counsel in such a way that the mother is likely to receive inadequate representation impairs the litigant's Sixth Amendment right to effective counsel."). Such "judicial interference with an established attorney-client relationship in the name of trial

management ... compromise[s] the fair administration of justice," *People v. Knowles*, 88 N.Y.2d at 766-67, by stripping Appellant of her fundamental right to effective counsel.

As argued herein, and as *amici* routinely experience, effective representation can be provided when a defendant has sufficient funds to hire a private attorney, who obtains unfettered access to relevant information in parallel proceedings and can consult with his client and other attorneys openly and under privilege. Appellant's right to the same effective representation, as guaranteed by the federal and state constitutions, cannot be vitiated because of her financial position. As the Supreme Court recognized in *Gideon v. Wainwright*, "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That ... defendants who have the money to hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries." 372 U.S. 335, 344 (1963). Based on this reasoning, the Court held that in all criminal cases, indigent defendants are entitled to counsel. *Id.* at 340-42. In the same vein, when a litigant can hire a private attorney to appear on her behalf in parallel Family Court and criminal proceedings, her fundamental right to effective counsel can be vindicated.

Under the terms of the Non-Disclosure Order, that same right is violated for an indigent defendant like Appellant—contrary to our country's constitutional

tradition that "no man shall be deprived of counsel merely because of his proverty [sic]." *Betts v. Brady*, 316 U.S. 455, 477 (1942) (Black, J., dissenting), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963). Indeed, "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

CONCLUSION

Accordingly, and for the reasons set forth herein, this Court must vacate the Non-Disclosure Order on constitutional grounds.

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Respectfully submitted,

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