In Re Belizaire	SUPERIOR COURT OF NEW JERSEY CRIMINAL DIVISION: BERGEN COUNTY DOCKET NO.: 412-19

AMICUS'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO ENFORCE COMPLIANCE WITH THE SUBPOENA

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STATEMENT OF INTEREST FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. 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 just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and the courts of appeals, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL seeks to ensure that all criminal defendants are guaranteed their Sixth Amendment right to effective assistance of counsel and that all criminal defense attorneys provide legal services in a professional and ethical manner.

STATEMENT OF INTEREST FOR THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS – NEW JERSEY

The Association of Criminal Defense Lawyers – New Jersey ("ACDL-NJ") is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation,

education and assistance, to promote justice and the common good." See ACDL-NJ By-Laws, Article II(a). The ACDL-NJ frequently gets involved as *Amicus Curiae* at the trial level on issues like those presented here that could develop new areas of law in New Jersey, and that will invariably arrive at our Appellate Division and Supreme Court for further consideration. ACDL-NJ is an affiliate of NACDL.

The issues presented in this matter regarding attorney-client communications are of tremendous public importance, and of particular importance to the ACDL-NJ, as this Court's decision may very well effect many future defendants and their counsel. The Motion to Enforce implicates an important public issue – under what circumstances can the attorney-client privilege be breached. "The privilege recognizes that sound legal advice or advocacy serves public ends and rests on the need to 'encourage full and frank communication between attorneys and their clients.'" United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 561 (App. Div. 1984) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

Even if a crime-fraud exception might apply, there are additional safeguards to the attorney-client privilege that the State must overcome before the privilege can be eviscerated, and the sanctity of the attorney-client relationship is invaded by the State. The Motion to Enforce further implicates a criminal defendants' Sixth Amendment right to effective assistance of counsel as well as, in some circumstances, a defendant's fair opportunity for counsel of choice. Accordingly, the ACDL-NJ seeks to ensure that all criminal defendants are guaranteed their Sixth Amendment rights to counsel and that the attorney-client privileged is fully protected.

There is seemingly an epidemic in New Jersey of prosecutors making the conscious choice to invade the attorney-client relationship under circumstances where less intrusive

investigative means are at the disposal of the State. The ACDL-NJ is now involved in cases in Essex, Middlesex and Bergen where the central issue before the court is circumstances under which prosecutors can place a lawyer in the untenable and ethically perilous position of being asked to be a witness against his or her own client.

FACTUAL BACKGROUND

The ACDL-NJ and NACDL shall rely on the factual background set forth by Scarinci & Hollenbeck, LLC, counsel to Mr. Belizaire, in its May 17, 2019 letter brief in opposition to the State's Motion to Enforce Compliance with the Subpoena.

LEGAL ARGUMENT

PRELIMINARY STATEMENT

A prosecutorial subpoena to counsel representing a criminal defendant seeking evidence from that lawyer to use against his client has been recognized as a potential disaster to the lawyer-client relationship, which is built on trust that engenders full and frank communication from client to his counsel of choice. In Point I, we catalogue the near unanimous collection of authority to support that indisputable proposition.

As Amicus, our aim is to identify and extrapolate those issues that have a greater impact on the criminal justice system beyond the result in this specific case. Although we recognize that in the case at bar, the subpoenaed lawyer is no longer counsel to the accused, it appears that prosecutors in this State have been subpoenaing counsel to the grand jury who do represent a charged defendant. For example, there are or have been cases addressing identical or similar issues in both Essex and Middlesex counties. Because it is likely that any opinion issued by this court will be cited as persuasive authority by other trial courts facing the issue, we address what

is likely to be the more common fact pattern in other cases raising the identical issue of when the lawyer client privilege is subject to breach.

Thus, we believe our Point I is germane to the Court's consideration because of the importance to the criminal justice system of protecting the lawyer-client relationship as well as the lawyer-client privilege, which is, after all, specifically designed to protect and further that relationship. This case is actually more about the constitutionally protected lawyer-client relationship than it is about the crime-fraud exception to the privilege. That is why the State must show that the evidence it seeks is neither cumulative nor unnecessary to its purpose, even if the crime-fraud exception applies. In this case, it is obvious that the evidence the government seeks by subpoenaing defense counsel to the grand jury is both cumulative and unnecessary.

POINT I

A SUBPOENA DIRECTED TO A DEFENDANT'S LAWYER IS POTENTIALLY DAMAGING TO THE ATTORNEY-CLIENT RELATIONSHIP AND CAN IMPINGE ON THE CONSTITUTIONAL RIGHT TO COUNSEL

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." A defendant's right to counsel is similarly guaranteed by Article I, paragraph 10 of the New Jersey Constitution. The purpose of this fundamental constitutional right, the New Jersey Supreme Court has held, is "to enable the defendant to confront the prosecution and to ensure the integrity of the judicial process." State v. Sanchez, 129 N.J. 261, 265 (1992). The right to counsel attaches at the pretrial stages and is "triggered when 'adversary judicial proceedings have been initiated.'" Id.

"The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and rests on the need to 'encourage full and frank communication between attorneys and their clients.'" United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 561 (App. Div. 1984) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). That hallmark of our system of criminal justice is diminished and suppressed when a strategic exercise of the State's subpoena authority is used to undermine one of the most basic rights of an accused.

Courts have universally recognized that simply serving a subpoena on defense counsel "will immediately drive a chilling wedge between the attorney/witness and his client." United States v Klubock, 832 F.2d 649, 653 (1st Cir. 1987); see also Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania, 975 F.2d 102, 112 (3d Cir. 1992) ("This court is not unmindful of the serious problems associated with the practice of government prosecutors subpoenaing attorneys to testify about past or present clients before grand juries."); In re Custodian of Records, Criminal Div. Manager, 420 N.J. Super. 182, 189 (App. Div. 2011), aff'd as modified sub nom (confirming protection of client communications to obtain legal representation); In re Subpoena Duces Tecum on Custodian of Records, Criminal Div. Manager, Morris Cty., 214 N.J. 147 (2013)) In such a situation, "the client is uncertain at best, and suspicious at worst, that his legitimate trust in his attorney may be subject to betrayal. And because the subpoenaed attorney/witness may himself feel intimidated, this may in fact take place . . . ." Klubock, 832 F.2d at 653 (internal footnote omitted).

At minimum, a lawyer must divert attention and resources towards responding to or challenging the subpoena rather than just to providing effective assistance to the client. See id. ("The attorney now has a difficult 'second front' to deal with, in which he must dedicate his own

time and resources to looking after his own interests, while at the same time trying to protect those of his client."). A subpoena directed at defense counsel could cause a conflict between the client and the attorney, resulting in the attorney withdrawing as counsel or being fired for lack of trust, thereby infringing on the client's Constitutional rights. Id. at 654. See, e.g., Fuller v. Diesslin, 868 F.2d 604, 610 (3d Cir. 1989) ("[T]he most important decision a defendant makes in shaping his defense is his selection of an attorney. . . . Attorneys are not fungible as are eggs, apples and oranges. . . . Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment.").

POINT II

THE STATE IS NOT ENTITLED TO THE PROTECTED ATTORNEY-CLIENT COMMUNICATIONS BECAUSE THE STATE ALREADY HAS ALL THE INFORMATION IT SEEKS AND HAS NOT MADE A SHOWING THAT THE INFORMATION CANNOT BE OBTAINED FROM A LESS INTRUSIVE SOURCE

A. Even If The Crime-Fraud Exception Were To Apply, The State Must Make Additional Showings To Breach The Attorney-Client Privilege

The New Jersey Supreme Court has held that to avoid any infringement on the right to counsel, the least intrusive means of obtaining information necessary to secure an indictment against a defendant must be pursued rather than compelling the attorney's testimony. In Matter of Nackson, 114 N.J. 527 (1989). Thus, where the State already has the information, or where the information sought is merely cumulative, there can be no breach of the privilege.

Therefore, New Jersey courts "vigorously" protect the attorney-client privilege. Weingarten v. Weingarten, 234 N.J. Super. 318, 324 (App. Div. 1989). As former Chief Justice Hughes, writing for the New Jersey Supreme Court, posited:

> Privilege born of the common law, such as the attorney-client privilege here involved, is not an idle and anachronistic vestige of the ancient past. On the contrary, it has a well-defined relationship, recognized and defined over the centuries, to the administration of justice, to the basic needs of the human condition, to the essential rights of man and thus to the public interest. As such it clearly deserves the continued protection of the courts.
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> [In re Kozlow, 79 N.J. 232, 242 (1979).]

Protection of the well-defined attorney client privilege has been recognized for decades and is a fundamental component to our system of justice.

In Nackson, the defense counsel was subpoenaed by the State to appear before the grand jury. The attorney refused to answer five questions: "(1) What number did you call when you called him back [during the week of June 29, 1987]?; (2) Did you advise your client that in the opinion of the Warren County Prosecutor's Office, he was a fugitive from justice?; (3) Have you advised him that he should comply with the law?; (4) Can you tell the Grand Jury what his occupation is?; and (5) Can you tell the Grand Jury by whom he is employed at the present time?." Id. at 530.

The trial court held that the responses to questions two and three were indeed protected by the attorney-client privilege. However, when the trial court required Nackson to answer some of the State's questions the issue went up the appellate ladder to the New Jersey Supreme Court. The Supreme Court affirmed the Appellate Division holding that if there were "less intrusive means for obtaining information necessary to return an indictment against the client of an

attorney, those means must be pursued to avoid any infringement on the cherished Sixth Amendment and state constitutional right to counsel." Id. at 531.

The Court further emphasized the importance of pursuing other means to obtain the information that the State sought:

> The prosecution can first follow other means . . . such as searching F.B.I. computer files and conducting license searches and other investigative techniques. . . . If all reasonable efforts appeared futile, then a court would have first to balance the gravity of the public's interest in obtaining information against the client's legitimate expectations of confidentiality[.]
>
> [Id. at 538.]

B. The Department of Justice and American Bar Association Agree Subpoenas To Defendant Attorneys Can Only Be Used If There Is No Other Alternative To Obtain The Information

Both the American Bar Association and the United States Department of Justice ("DOJ") recognize the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the representation of a client. The DOJ has therefore issued extensive guidelines, which require that a federal prosecutor must first obtain approval from the Assistant Attorney General in charge of the Justice Department's Criminal Division before issuing the subpoena: "Approval is required to issue grand jury or trial subpoena to attorneys for information relating to the representation of [a] client". U.S. Dep't of Justice, United States Attorneys' Manual 9-2.410 (2018), *available at* https://www.justice.gov. The DOJ directive to its prosecutors reads:

> ***Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client***, the Department exercises close control over such subpoenas. . . . In considering a request to approve the

> issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division applies the following principles. . . . ***All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.*** . . . In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information. . . . The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.
>
> [Id. at 9.13-410 (emphasis added).]

Moreover, in 1990 the ABA amended its Model Rules of Professional Conduct to include a provision prohibiting attorney subpoenas unless a series of stringent procedural and substantive standards have been met. Model Rule 3.8(e), formerly Model Rule 3.8(f), provides, in relevant part:

> The prosecutor in a criminal case shall:
>
> ...
>
> (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
>
> (1) the information sought is not protected from disclosure by any applicable privilege;
>
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (3) ***there is no other feasible alternative to obtain the information.***

[Ibid. (emphasis added).]

Accordingly, the State must first attempt to obtain the requested information by other means. The State has not made a single attempt to retrieve the sought-after information by any other means.

C. The State Already Has the Alleged Evidence It Needs and Therefore the Subpoena Must be Quashed

To prove its case of Obstruction by Flight against defendant Roydell Cameron, the State must establish, beyond a reasonable doubt, that he: (1) committed an act of flight; (2) for the purpose of preventing the administration of law; and (3) in committing the act of flight, he attempted to obstruct, impair, or pervert the administration of law. See Model Jury Charges (Criminal), "Obstructing Administration of Law or Other Governmental Function" N.J.S.A. 2C:29-1 (Oct. 23, 2000). With regard to a defendant's "purpose" in fleeing, the model jury instruction for Obstruction also provides:

> Purpose is a condition of the mind that cannot be seen and that can be determined only by inferences from conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference, which may arise from the nature of defendant's acts and conduct, from all that he/she said and did at the particular time and place, and from all surrounding circumstances.
>
> [Id. at 3.]

Mr. Cameron's alleged purpose can be inferred from his arrest at John F. Kennedy International Airport ("JFK") with travel documents allegedly showing that he was going to Jamaica at the time that his attorney advised the State that he would be self-surrendering. It is

res ipsa loquitor (the thing speaks for itself). The State need not delve into the attorney-client relationship at all.

The State's reliance on State v. Ray, 372 N.J. Super. 496 (App. Div. 2004), for the proposition that the attorney-client privilege may be pierced when the State cannot secure the same evidence from any less intrusive source, is misplaced. While that legal proposition is true, the facts of Ray are dramatically distinguishable from the facts of the present case. In Ray, the State sought evidence from the defense attorney that would prove the defendant was responsible for preparing and filing the fraudulent medical documents used to secure the continuances. Id. at 500. Unlike the case at bar, the State in Ray supplied evidence to meet its burden that it had attempted to collect the information elsewhere, but could not. Specifically, the State certified that the one potential witness, the defendant's business partner at the time who had equal access to the fax machine, could not be located. Id. Therefore, the State asserted, it had no witnesses to attest to the defendant's involvement in the scheme. Id. In Ray, the State showed that the evidence it sought from the attorney was not cumulative and that it had attempted to obtain the information from a less intrusive source. Here, unlike in Ray, the State already has the evidence it needs for its Obstruction case, and has made no other efforts to obtain additional information through less intrusive sources.

POINT III

THE CRIME-FRAUD EXCEPTION DOES NOT PERMIT THE INTRUSIVE PROBING QUESTIONS PROFFERED BY THE STATE

Nine out of the ten questions proposed by the State do not even colorably come within the crime-fraud exception, and inquire into clearly privileged communications between Mr.

Belizaire and Mr. Cameron. The State is unable to even argue that it has met its burden of demonstrating that it is necessary to eviscerate the attorney-client privilege. Specifically, questions 1-6 and 8-10 have no legitimate connection to the State's investigation into Mr. Cameron's Obstruction by Flight, and seek privileged testimony from defense counsel against his client.

The seven sub questions to 7 (a, b, c, d, e, f and g) do appear to be focused on an issue that may implicate the crime-fraud exception. However, since there is no issue about authentication (the parties agree that the email to the Bergen County Assistant Prosecutor that purports to have been sent by Mr. Belizaire is acknowledged to have actually been sent by him to Assistant Prosecutor Danielle Grootenboer). Thus, the State already has everything needed – the email sent by Mr. Belizaire advising the assistant prosecutor that Mr. Cameron would self-surrender at 1 pm (delaying the appointment by an hour for reasons that are now demonstrably false) and the fact that at around 1 p.m. Mr. Cameron was arrested on an airplane at JFK where his travel documents allegedly indicate he was on his way to Jamaica.

Accordingly, even if the crime-fraud exception arguably applies, the questions proposed by the State are unnecessary and cumulative of the evidence it already has. Those questions, which seek evidence from defense counsel to use against his client, without a showing that the evidence is necessary, must not be permitted. There is no more a justification to make Mr. Belizaire a witness in this case than there is for the assistant prosecutor herself to be conflicted out of the matter so that she may testify as to her receipt and the authenticity of Mr. Belizaire's emails.

CONCLUSION

The ACDL-NJ and NACDL strongly urge the Court to affirm the need for the State to demonstrate the evidence it seeks is not available elsewhere, and/or is not cumulative, even if the crime-fraud exception applies. This Court's opinion will undoubtedly be used as persuasive authority in analogous cases, which have been brought already in other jurisdictions throughout New Jersey. The very existence of the right to effective assistance of counsel rests not only on trust, but on the full and frank communication between clients and attorneys of their choosing. The ACDL-NJ and NACDL assert that all criminal defendants must be guaranteed their Sixth Amendment right to counsel and have the sacred attorney-client privileged protected.

Respectfully submitted,

s/Matthew S. Adams
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ALAN SILBER
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Dated: June 21, 2019