DISABILITY RIGHTS NEW YORK

www.drny.org mail@drny.org 800-993-8982

July 25, 2023 Via email at coaadalison@nycourts.gov and regular mail

Honorable Michael J. Garcia
Judge of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

Re: **People v Fishman (Marc)**
Westchester County Indictment Number 18-06293
Application for Reconsideration of Leave Denial

Dear Judge Garcia:

Disability Rights New York ("DRNY") is the Protection and Advocacy agency for New York State. Protection and Advocacy agencies are authorized by federal law to provide legal representation and other advocacy services to people with disabilities. We provide information and referrals, as well as training and technical assistance to service providers, state legislators and other policymakers.

DRNY was first contacted by Marc Fishman in January 2018 regarding the lack of free transcription services available to him in the following proceeding: Jennifer Solomon v. Marc Fishman, Docket Nos. V-081887/8/9-14/15B. DRNY was able to assist Mr. Fishman in advocating for CART real-time transcription services. Mr. Fishman is an individual with multiple disabilities, including Traumatic Brain Injury (TBI) and tinnitus. Mr. Fishman requires transcription and/or captioning services in order to fully participate in the legal proceedings against him.

Upon review, an Order by the Court of Appeals (Order 20-1300), Second Circuit, issued July 16, 2021 *required* the lower court to provide Mr. Fishman with CART services during his court proceedings. This order was ignored by Judge Zuckerman, who completed the aforementioned proceedings without Mr. Fishman having been provided with these accommodations. Needless to say, Mr. Fishman was not able to hear or later review the testimony of the witnesses involved. He was also unable to testify on his own behalf, as he would not be able to hear the questions being posed to him by his own counsel or counsel for the opposing party. Mr.

Fishman now asks for leave to appeal this order of protection, as he was denied the ability to fully participate in the court proceedings against him.

In a letter dated June 26, 2023, District Attorney Miriam Rocah wrote in opposition to Mr. Fishman's application for reconsideration. Upon review of the letter, DRNY has several concerns about its content that must be reviewed. Firstly, District Attorney Rocah states that the motion relates to a *temporary* order of protection ("TOP") dated June 9, 2022. However, the order referenced is clearly labeled an "Order of Protection." Section 530.12(6) of The New York Criminal Procedure Laws, the statute under which the order was issued, makes clear that any order issued under this law must "bear in a conspicuous manner the term 'order of protection' or 'temporary order of protection' as the case may be." The June 26, 2023 order bears no such statement- in fact, the order makes no mention of the term "temporary order of protection." It is not clear whether District Attorney made this assertion in error, or whether the court erroneously issued a permanent order of protection in place of a TOP. The cause for the error is, however, irrelevant, as the District Attorney's statement that "no appeal lies from a temporary order of protection to the intermediate appellate court" is not applicable.

Secondly, even if Mr. Fishman's June 9, 2022 Order of Protection were determined to be temporary, the New York Supreme Court, First Department, has held that the mootness exception generally referred to as "capable of repetition but evading review" does in fact apply to temporary orders of protection. *Crawford v. Ally*, 197 A.D.3d 27, 32, 150 N.Y.S.3d 712 (2021). The *Crawford* court noted that even where the issue may not likely recur with the same petitioner, if it is likely to recur "among other members of the public," this exception may apply. *Id* at 716. The court further noted that the "temporary nature of short-term orders of protection serves in many ways to insulate them from legal challenge." *Id*. The court in *Crawford* held that, pursuant to principles of due process, an evidentiary hearing should be required for a TOP when there is information showing that the issuance of the TOP may result in an "immediate and significant deprivation of a substantial personal or property interest." *Id* at 717. The substantial personal interest addressed in *Crawford* was the directive that Crawford may have no visitation with her children. Indeed, what personal interest could be more substantial than a parent's ability to be with their children?

While a hearing was in fact held in this case, Mr. Fishman suffered precisely the same deprivation of his rights. The actions of the state court in purposefully denying Mr. Fishman's reasonable accommodations for such hearing caused an identical result: he was denied the right to participate in the hearing. And this happened despite the order of the reviewing court, which recognized his right to accommodations, and clearly-established ADA tenets.

This issue is not moot. The violation of Mr. Fishman's ADA rights renders the hearing invalid, and the lower court's actions are certainly capable of repetition. Indeed, when this order was made, it was the *second* time this judge had denied him the use of available courtroom accommodations. If one court will deny accommodations in willful ignorance or defiance of a higher court's order, it is not unlikely that another lower court could do the same.

For the foregoing reasons, Disability Rights New York respectfully requests that Your Honor grant Mr. Fishman's request for reconsideration.

Please feel free to contact me if you have any additional questions or concerns. You can reach me at (917) 936-6163 or at jara.barrett@drny.org

Thank you for your consideration.

Kind regards

Mx. Jara Barrett, Esq.
Staff Attorney
Disability Rights New York
Phone: (917) 936-6163
Email: jara.barrett@drny.org

CC: Miriam Rocah, Attorney for Plaintiff: Mrocah@westchesterda.net