COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT

HELEN KIRK, Plaintiff/Petitioner, v. JUDGE KEVIN SULLIVAN, DISTRICT ATTORNEY TIMOTHY CRUZ, Defendants/Respondents.	Docket No. SJ-2010-0146

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AMICUS BRIEF OF *THE PATRIOT LEDGER* IN OPPOSITION TO MS. KIRK'S REQUEST TO CLOSE HER CIVIL RECOMMITMENT HEARING

George W. Prescott Publishing Company, LLC, publisher of *The Patriot Ledger* ("*The Patriot Ledger*"), submits this amicus brief in opposition to the request by Ms. Kirk to close her civil recommitment hearing. At the heart of this matter is the public's presumptive right of access to the courts, and its corresponding right to be fully and fairly informed about matters of significant public interest. As the Supreme Court has observed, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980). Closed hearings undermine the public's confidence and trust in the legal process, and engender suspicion and distrust. The press's ability to keep the public informed is premised in large part on open access to the court system, and on its ability to attend hearings and trials. The proposed closure seeks to deny that access, and will impede *The Patriot Ledger's* ability to report fully and accurately on a newsworthy matter of legitimate public interest. As set forth

below, the request for a closure order should be denied and the public and the press should be granted unfettered access to the hearings in this case.

I. THE DISTRICT COURT PROPERLY DENIED THE REQUESTED CLOSURE.

A. There is a presumption that civil and criminal proceedings will be open to the public.

The public has a right of access to court hearings and proceedings that is firmly grounded in the First Amendment and Massachusetts common law. See Presley v. Georgia, __ U.S. __, 130 S. Ct. 721, 722-725 (2010); Commonwealth v. Cohen, 456 Mass. 94, 106 (2010) ("The First Amendment implicitly grants the public, including the press, the right of access to court trials."), citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-606 (1982); Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 605-606 (2000) (presumption that court records in civil proceedings are available to the general public and the press is rooted in the common law); Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 507 n.7 (1995) ("free access to civil trials is well established under the common law"); Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 884 (1990) ("the tradition of the Commonwealth is that courts are open to the public"); see also GUIDELINES ON THE PUBLIC'S RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS AND RECORDS (the "GUIDELINES") p. 1, § II(A) ("There is a recognized common law and/or constitutional qualified right of access by the public to most criminal and civil proceedings."). A hearing cannot be closed unless "specific, on the record, findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." See GUIDELINES, p. 1, § II(A); see also Boston Herald, 421 Mass. at 506 (the judge must consider reasonable alternatives to closure, any closure order must be narrowly tailored, and no order can issue absent written findings).

Indeed, the interest that is necessary to warrant closure of a judicial hearing must be "overriding." See Boston Herald, 421 Mass. at 505-506 ("the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced..."), citing Press Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (additional citations omitted); Globe Newspaper Company, Inc. v. Clerk of Suffolk County Superior Court, 14 Mass. L. Rep. 315, No. 01-5588-F, 2002 Mass. Super. LEXIS 6, *11-12 (Suffolk Sup. Ct., Feb. 4, 2002) (Gants, J.) (recognizing an "overriding interest" is required to close a courtroom). As the Court noted in the Globe Newspaper case, "[c]losing a court record is analogous to closing a courtroom during a trial – both deny the public a right of access to see what is happening in a judicial case and both restrictions are of constitutional dimension." Id. at 11.

The fact that a hearing may take place outside a formal courtroom (which is unlikely to happen here) is irrelevant. The Supreme Judicial Court ("SJC") has held that, "[t]he right of public access applies equally to traditional and nontraditional settings." See Boston Herald, 421 Mass. at 506, citing Commonwealth v. DeBrosky, 363 Mass. 718, 722 (1973) (testimony taken in a hospital auditorium proper where "the public, including the press, had reason to believe it had a right of access").

The fact that the instant recommitment hearing is a civil proceeding does not alter this calculus, as the public's right of access applies to both criminal and civil proceedings. Indeed, the SJC has recognized that the public interest in civil proceedings may in some cases be even greater than its interest in criminal proceedings. See Boston Herald, 421 Mass. at 507 n.7, citing Gannett Co. v. DePasquale, 443 U.S. 368, 386-387 n.15 (1979) ("In some civil cases, the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.").

It bears emphasizing that in a situation like this where public access to court records and hearings is at issue, "it is as if there is an interested third party to the suit – the general public." See Neles-Jamesbury, 23 Mass. L. Rep. 39, No. 2007-1473A, 2007 Mass. Super. LEXIS 334, at *4 (Worcester Sup. Ct., Aug. 9, 2007) (Agnes, J.). *The Patriot Ledger* stands as a surrogate for the public in this instance, and seeks access to a hearing that is of legitimate and significant public interest. See Boston Herald, 421 Mass. at 505 ("The media's claim of access derives entirely from the public's right of access."). In fact, not only has *The Patriot Ledger* recently published two (2) articles about the recommitment hearing itself, one on March 3, 2010 and another on March 26, 2010, it also has reported extensively over the years about Ms. Kirk and the death of her child. This is a matter of overwhelming public interest, and the public has the right to be kept informed of events as they proceed.

B. There is no "overriding interest" warranting closure of the recommitment hearing.

The Court below properly denied the requested closure, as there is no "overriding interest" that would compel such an order. As an initial matter, Ms. Kirk bears the burden of showing that closure is necessary to protect such an interest. See Presley v. Georgia, 130 S. Ct. at 724, quoting Waller v. Georgia, 467 U.S. 39, 48 (1984); Boston Herald, 421 Mass. at 505-506. That burden cannot be met.

There is no statute in Massachusetts that permits closure of a civil recommitment hearing. To the contrary, the statute governing these proceedings states that "[a]ll subsequent proceedings for the further commitment of a person committed under this section shall be in the court which has jurisdiction of the facility or hospital." See G.L. c. 123, § 16(c). The statute indicates that "further commitment" proceedings will be in court, which is presumptively open to the public.

See e.g., Boston Herald, 421 Mass. at 507 n.7. Had the legislature intended to restrict access to such proceedings, it could have done so. It did not.

Ms. Kirk's principal argument appears to be that the proceedings should be closed to the public because records of the proceedings and reports of examinations are "required to be kept private," by G.L. c. 123, § 36A. Ms. Kirk's citation to Section 36A is inapposite. First, there is nothing in Section 36A that requires the closure of recommitment hearings or proceedings. In fact, even if closure were permitted by that statute – and it is not – the SJC has held that such a provision will not by itself justify closing a hearing. See Globe Newspaper Co. v. Commonwealth, 407 Mass. at 884 ("[A] statutory provision permitting closure will not alone justify the closing of a courtroom."), citing Globe Newspaper Co. v. Superior Court, 457 U.S. at 607-609 & n.20. Regardless of statutory provisions allowing closure, courts must still adhere to the constitutional requirements governing hearings and trials, *i.e.*, there must be a showing of an "overriding interest" that justifies the extraordinary step of closure. Id.

Second, Section 36A expressly states that "reports of examinations made to a court ..., shall be private ***except in the discretion of the court***," and that all commitment papers and documents used in such a proceeding, "shall be private ***except in the discretion of the court*** ...." G.L. c. 123, §36A (emphasis added). It could hardly be clearer that the statute itself does not impose an absolute bar on disclosure of documents used in these proceedings, and expressly contemplates public disclosure where appropriate (as here). In any event, the limited protection of records referenced in this statute does not obviate, or trump, the public's constitutional right of access to court hearings. See Globe Newspaper Co., 407 Mass. at 884.

Ms. Kirk's citation to the Massachusetts privacy act is also to no avail. See G.L. c. 214, § 1B. While the privacy statute provides that "a person shall have a right against unreasonable

substantial or serious interference with his privacy," nothing in that statute expressly addresses closure of a public hearing. As a result, Ms. Kirk must still show an "overriding interest" that would justify closure of the hearing, which she clearly has not done. Generic reference to privacy rights is plainly insufficient to establish an "overriding interest" that is likely to be prejudiced. See Boston Herald, 432 Mass. at 611-612 ("When the subject matter of publicity is of legitimate public concern, as it is here, there is no invasion of privacy."); Peckham v. Boston Herald, Inc., 48 Mass. App. Ct. 282, 287-288 (1999) (a matter of legitimate public concern cannot be the subject of an invasion of privacy action). That is particularly the case where, as here, "there has already been extensive media coverage of the individuals and events at issue." See Boston Herald, 432 Mass. at 612.

In this case, the death of Ms. Kirk's son, and the subsequent finding that she was not guilty by reason of insanity, is far more than a matter of "legitimate public concern" – it is a matter of the utmost public interest. See Cohen v. Bolduc, 435 Mass. 608, 616 n.19 (2002) ("[T]he commitment and treatment of mentally ill persons are matters of public importance."); In the Matter of Laura L., 54 Mass. App. Ct. 853, 856-857 (2002) (hearing under Chapter 123 is a matter of "significant public interest"). In short, the public has a right to understand the process that may (or may not) lead to Ms. Kirk's release from her commitment, and shielding that process from the public will undermine its confidence in the legal system and its workings.

The SJC's decision in Boston Herald v. Sharpe is especially instructive on this point. In that case, the Court extended the constitutional right of public access to court records established in criminal cases to civil cases under G.L. c. 209A involving domestic violence. See Boston Herald, 432 Mass. at 606-607. Critically, the SJC emphasized that openness would increase

public understanding of how courts resolve requests for domestic abuse prevention orders, thereby promoting confidence in the administration of justice:

> The media interveners properly note that it is of considerable importance for the public to be in a position to evaluate why an order may or may not be successful in protecting a victim of domestic violence. Conversely, protective orders may impose significant restraints on defendants, and it is equally important that the public's understanding of and confidence in the judiciary be facilitated by knowing the basis on which a judge acted in a particular case. Id.

The principles discussed by the SJC in Boston Herald v. Sharpe are equally applicable here: the public's "understanding of and confidence in the judiciary" will be facilitated by "knowing the basis on which [the] judge acted." Id. In this case, the judge must decide whether to release a woman who was charged with killing her own child. If the judge does in fact release her, and the hearing is closed, the level of public suspicion and distrust will be manifest, largely because the public will have been denied access to the hearing that led to the court's decision. Some level of distrust also may apply if her commitment is reinstated or extended during a closed process.

All of this, of course, is consistent with a broader interest here in ensuring that the public is adequately apprised of important events. That information is typically provided by the press, and closing the hearing will unduly restrict *The Patriot Ledger's* ability to inform the public. Indeed, without free and unimpeded access to judicial hearings like this, the ability of reporters to keep the public accurately informed about newsworthy matters would be severely curtailed. The press acts as the "eyes and ears" of the public, and when access to court proceedings is denied, the public is left with no way of monitoring the conduct of its own legal system. As the SJC aptly noted in Boston Herald v. Sharpe, "the presumption of access facilitates 'the citizen's desire to keep a watchful eye on the workings of public agencies,' permits the media to 'publish

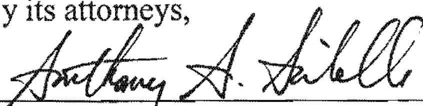
information concerning operation of government,' and supports the public's right to know 'whether public servants are carrying out their duties in an efficient and law-abiding manner.'" See Boston Herald, 432 Mass. at 606.

CONCLUSION

For all the reasons set forth above, *The Patriot Ledger* respectfully requests that the Court deny Ms. Kirk's petition to close the courtroom during her recommitment proceedings.

Respectfully submitted,
George W. Prescott Publishing Company, LLC,
publisher of *THE PATRIOT LEDGER*

By its attorneys,



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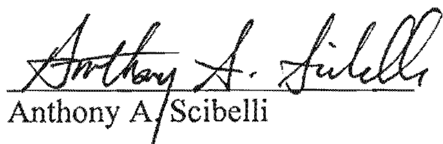
Dated: April 2, 2010

CERTIFICATE OF SERVICE

I, Anthony A. Scibelli, counsel for George W. Prescott Publishing Company, LLC, in connection with the above-captioned matter, hereby certify that a true copy of the foregoing Memorandum of Law was served by facsimile & first class mail on all counsel of record on April 2, 2010.



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