

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO. SJ-2010-0146  
TAUNTON DISTRICT COURT  
NO. 0931 MH 0330

**RECEIVED**

MAR 25 2010

MAURA S. DOYLE, CLERK  
OF THE SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY

HELEN KIRK

v.

JUDGE KEVAN CUNNINGHAM,  
DISTRICT ATTORNEY TIMOTHY CRUZ<sup>1</sup>

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COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO KIRK'S PETITION  
PURSUANT TO CHAPTER 211, SECTION 3 FOR CLOSURE OF HEARING  
ON PETITION FOR CIVIL RECOMMITMENT

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Now comes the Commonwealth and opposes Helen Kirk's petition pursuant to chapter 211, section 3 asking this Court to intercede and order the closure of the evidentiary hearing on the District Attorney's petition for civil recommitment, pursuant to G.L. c. 123, § 16(c).

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<sup>1</sup> Ms. Kirk's filings incorrectly refer to the hearing judge as Judge Kevin Sullivan in the caption and Judge Kevin Cunningham in the body. The motion for closure was heard before the Honorable Kevan Cunningham who serves on the bench in the District Court Department. The Commonwealth has used the correct spelling of his name in its caption.

ISSUE PRESENTED

Did the district court correctly deny Ms. Kirk's motion requesting that the hearing on the District Attorney's petition for civil recommitment be closed to the public?

STATEMENT OF PRIOR PROCEEDINGS

On April 1, 2005, Helen Kirk was arraigned in Brockton Superior Court on a charge of murder for killing her young son. (A.3, 7). After the indictment was amended to allege only so much as second degree murder, the defendant waived a jury. (A.7). Ms. Kirk was tried at a bench trial before Donovan, J. (A.7). On September 18, 2007, Ms. Kirk was found not guilty by reason of insanity and was committed under chapter 123. G.L. c. 123, § 16.

On November 10, 2009, two years after the order of commitment, the Taunton State Hospital notified the Plymouth County District Attorney's Office of its intention to discharge Ms. Kirk from its custody. G.L. c. 123, § 16(e). (A.8). The District Attorney's Office filed a timely petition for recommitment. (A.9). G.L. c. 123, § 16(c).

The matter was initially scheduled for a hearing on March 2, 2010 before the Taunton District Court, sitting at the Taunton State Hospital. (A.9). The Court sits at the

Hospital pursuant to a Standing Order. (A.9). On February 25, Ms. Kirk filed a motion to close the hearing to the public, claiming the "privacy rule" because of anticipated documentary evidence concerning Ms. Kirk's mental health. (A.11). On March 1, Ms. Kirk filed an amended motion for closure, relying on chapter 214, section 1B, chapter 123, section 36A and "The Privacy Rule, a Federal law." (A.12-18). The District Attorney opposed the motion. The parties agreed that on March 2, they would only address the closure of the hearing, rather than the District Attorney's petition.

On March 2, the Hospital Security staff prevented a reporter from a local newspaper, the Patriot Ledger, from entering the hearing room at the Hospital although Ms. Kirk's motion for closure had not even been heard yet.

(A.9). The Assistant District Attorney informed the District Court, Cunningham, J., about the Hospital's actions. (A.9). The hearing judge ordered that the reporter be permitted into the room. (A.10). Ms. Kirk did not object because her records would not be discussed that day. (A.10). However, the attorney representing the Hospital objected to the presence of the press. (A.10). The Hospital permitted Ms. Kirk's family and its own staff to be present for the hearing without judicial

intervention. (A.10). The District Court ordered that the evidentiary hearing on the District Attorney's petition be held in a public courtroom, thereby denying Ms. Kirk's motion. (A.10-11).

The District Attorney's petition has not yet been heard to allow Ms. Kirk to seek review pursuant to chapter 211, section 3. The tape of the District Court proceedings has been ordered but has not yet been received. (A.19).

#### ARGUMENT

THE DISTRICT COURT CORRECTLY DENIED MS. KIRK'S MOTION REQUESTING THAT THE HEARING ON THE DISTRICT ATTORNEY'S PETITION FOR CIVIL RECOMMITMENT BE CLOSED TO THE PUBLIC.

The public has a right under the First Amendment to attend and observe court proceedings. Presley v. Georgia, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721, 722-725 (2010); Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 (1984); Waller v. Georgia, 467 U.S. 39, 46, 50 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980); Gannett Co. v. DePasquale, 443 U.S. 368, 393-394 (1979); Commonwealth v. Cohen, 456 Mass. 94, \_\_\_, 2010 WL 522771, \*7 (2010). "The First Amendment implicitly grants the public, including the press, the right of access to court trials." Cohen, 456 Mass. at \_\_\_ 2010 WL 522771 at \*7. Nothing in the statute governing these types of

hearings requires or permits the closure of recommitment proceedings. G.L. c. 123, § 16(c) ("All 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.") Contrast G.L. c. 119, § 65 (juvenile proceedings are closed to the public, by statute).

There is no authority for any exception to be made to the general requirement for open court proceedings just because the Court happens to be sitting in Taunton State Hospital, rather than the usual courthouse. The Standing Order permitting the judicial proceedings to occur at the Hospital was made primarily for the convenience of the hospital personnel.

Ms. Kirk admits that no Massachusetts law specifically permits the closure of courtrooms during recommitment hearings. (Kirk's Memorandum, p.4-5). Her reliance on a statute from another jurisdiction, Alabama, just demonstrates that state legislatures know how to enact the necessary provisions, if they see fit to provide for closure of a courtroom for civil commitment hearings. (Kirk's Memorandum, p.4-5). The Massachusetts Legislature has not chosen to do so. Thus, unlike similarly situated persons in Alabama or juveniles charged with crimes in

Massachusetts, Ms. Kirk has no statutory right to the closure of the courtroom.

Ms. Kirk as the proponent of closed proceedings has the burden to show that closure is necessary. Presley v. Georgia, 130 S.Ct. at 724; Waller v. Georgia, 467 U.S. at 48.

"[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Id.

Presley v. Georgia, 130 S.Ct. at 724 quoting Waller v. Georgia, 467 U.S. at 48.

In her petition to this Court, Ms. Kirk claims a right to close the courtroom simply because she claims that the records of the proceedings and the reports of examinations "are required to be kept private." (Kirk's Memorandum, p.3) citing G.L. c. 123, § 36A. Ms. Kirk's reliance on section 36A is misplaced. Section 36A does not require the court to keep such documents private, if admitted into evidence. G.L. c. 123, § 36A. In fact, it gives the court the discretion to release those documents. G.L. c. 123, § 36A.

All reports of examinations made to a court pursuant to sections one to eighteen, inclusive, section forty-seven and forty-eight shall be private **except**

in the discretion of the court. All petitions for commitment, notices, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private **except in the discretion of the court....**

G.L. c. 123, § 36A (emphasis added). See Commonwealth v. Maxwell, 441 Mass. 773, 776 (2004) (section 36A contains a provision for the release of the records).

More importantly, section 36A makes no reference to the closure of the courtroom proceedings at which the records will be offered as evidence and at which the parties will present live testimony about Ms. Kirk's mental status. G.L. c. 123, § 36A. Even if section 36A were relevant to the closure of the courtroom, Ms. Kirk would still be required to demonstrate that the District Court judge abused his discretion. G.L. c. 123, § 36A. Contrary to Ms. Kirk's claim, section 36A does not prohibit a judge from holding a recommitment hearing in public. On the contrary, it grants the District Court judge the discretion to make all such information public. G.L. c. 123, § 36A. Therefore, Ms. Kirk cannot meet her burden under Presley and Waller by relying on section 36A.

Ms. Kirk also presses her claim under the general privacy statute. G.L. c. 214, § 1B.

A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

G.L. c. 214, § 1B. "[A] statutory provision permitting closure will not alone justify the closing of a courtroom." Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 884 (1990). Even when a statute permits closure, the judge must still abide by the constitutional limitations of closing a courtroom. Id.

Even under chapter 214, section 1B, Ms. Kirk must demonstrate that her current mental status or her potential release into the community is not a "legitimate public concern." Peckham v. Boston Herald, Inc., 48 Mass. App. Ct. 282, 287-288 (1999) (report of paternity suit against prominent businessman). If the subject matter of the judicial proceeding is a legitimate public concern, then disclosure in a public courtroom would not be an "unreasonable, substantial or serious interference with [her] privacy " under section 1B. Id. Ms. Kirk cannot meet her burden to show that this matter is not a legitimate public concern.

There is a strong public interest in the treatment of persons who were charged with murder but found not guilty by reason of insanity. A civil commitment hearing

under chapter 123, section 16 is a matter of "significant public interest." In the Matter of Laura L., 54 Mass. App. Ct. 853, 856-857 (2002). "[T]he commitment and treatment of mentally ill persons are matters of public importance." Cohen v. Bolduc, 435 Mass. 608, 616 n.19 (2002). See also Commonwealth v. Wiseman, 356 Mass. 251, 255, 262-263 (1969), cert. denied, 398 U.S. 960 (1970) (Titticut Follies, a film at state-run mental institution, was a legitimate public concern that could be used to educate public and to improve conditions at such facilities, despite privacy issues of patients, e.g. nudity, embarrassing depictions). The homicide of Ms. Kirk's four year old son and the subsequent finding that Ms. Kirk was not guilty by reason of insanity are both matters of significant public importance. Laura L., 54 Mass. App. Ct. at 856-857; Cohen v. Bolduc, 435 Mass. at 616 n.19.

The potential release of Ms. Kirk into the community, with or without restrictions on her liberty, and the rationale for the decision to release her two years after a finding of insanity present a significant basis for public concern. "When the subject matter of the publicity is of public concern, ... there is no invasion of privacy." Ayash v. Dana-Farber Cancer Inst.,

443 Mass. 367, 382, cert. denied, 546 U.S. 927 (2005) (physician's conduct in course of treating patient made public) quoting Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 612 (2000) (release of previously impounded divorce and 209A records after husband killed wife). See Globe Newspaper Co. v. Commonwealth, 407 Mass. at 884 ("[T]he public has a right of access to a hearing on a motion for a new trial and to any similar postconviction proceeding.") Given the significant and legitimate public concern in this matter, the disclosure of information about Ms. Kirk's current mental status is reasonable and warranted even under chapter 214, section 1B. Peckham v. Boston Herald, Inc., 48 Mass. App. Ct. at 287-288.

Ms. Kirk's claim that the closure of a court proceeding is required whenever medical or psychiatric evidence will be presented in court is overbroad and is inconsistent with existing statutes and case law. Massachusetts law does not preclude the admission in court of medical and psychiatric evidence that is relevant to court proceedings. G.L. c. 233, § 79 (admissibility of hospital records); G.L. c. 233, § 79G (admissibility of medical records); Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967) (admissibility of evidence of mental

illness); Commonwealth v. Keita, 429 Mass. 843, 849-850 (1999) (same). Embedded statements of a patient within records are admissible on the issue of the patient's mental or emotional condition. G.L. c. 233, § 20B(b). Also G.L. c. 233, § 23B (statements made during psychiatric care admissible at criminal trial on the issue of "mental condition"). "Massachusetts has long recognized a common-law right of access to judicial records." Republican Co. v. Appeals Court, 442 Mass. 218, 222 (2004) (court proceedings are presumptively open, which enhances fairness and public confidence in courts).

Even statements of a psychiatric patient made relative to diagnosis and treatment are not privileged if they were preceded by a warning that the communications would not be privileged. G.L. c. 233, § 20B(b). Ms. Kirk acknowledges that she received the Lamb warning that informed her that her statements "were not confidential" and that they would be disclosed "to the District Attorney" and "to the court." (Kirk's Memorandum, p.4). Commonwealth v. Lamb, 365 Mass. 265, 267 (1974) (privilege does not apply when patient has been warned that statements are not privileged); also In the Matter of Laura L., 54 Mass. App. Ct. at 854. None of these protective statutes nor the Lamb warning provides any guarantee, promise or suggestion that the medical and

psychiatric reports will be confidential or private.

Instead, they all indicate that such records are admissible in a public courtroom.

Likewise Ms. Kirk has no right to courtroom closure under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the federal statute that protects against the unlawful disclosure of medical records. 42 U.S.C. §§ 1320a, et seq. There is no private right of action under HIPAA. Miller v. Nichols, 586 F.3d 53, 59 (1<sup>st</sup> Cir. 2009), cert. denied, \_\_\_ U.S. \_\_\_ (2010). HIPAA permits a covered entity to disclose medical and health related information "in the course of any judicial or administrative proceeding." 45 C.F.R. § 164.512(e)(1). The permissible circumstances of disclosure in judicial proceedings are the disclosure necessary to comply with a court order and the disclosure necessary to respond to a subpoena or lawful process when the subject of the medical records has notice of the disclosure. 45 C.F.R. § 164.512(e)(1), (i)-(ii).

Here Ms. Kirk's medical records have been properly subpoenaed and the witnesses who will testify about Ms. Kirk's health will be properly summonsed to the court.

(A.10). Further, none of the Commonwealth's witnesses are subject to HIPAA because they are not her health care

providers. Any records reviewed by the Commonwealth's expert were disclosed pursuant to a court order, consistently with HIPAA. 45 C.F.R. § 164.512(e)(1). Ms. Kirk is a party who has notice of this expected disclosure. Therefore, HIPAA does not preclude disclosure of the information in Ms. Kirk's medical records during the current judicial proceedings. See United States v. Wilk, 572 F.3d 1229, 1236 (11<sup>th</sup> Cir. 2009), cert. denied, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1095 (2010) (HIPAA did not bar admission of medical and psychiatric records at criminal trial); United States v. Streich, 560 F.3d 926, 935 (9<sup>th</sup> Cir. 2009), cert. denied, \_\_\_ U.S. \_\_\_, 130 S.Ct. 320 (2009) (same); United States v. Bek, 493 F.3d 790, 802 (7<sup>th</sup> Cir. 2007), cert. denied, 552 U.S. 1010 (2007) (no federal right of confidentiality and defendant cannot bar admission of such evidence at trial; court entered protective order).

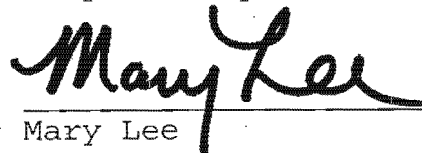
Ms. Kirk is not entitled to closure of the courtroom simply because this is a civil or quasi criminal matter. Civil commitment proceedings are matters of significant public interest and importance. In the Matter of Laura L., 54 Mass. App. Ct. at 856-857; Cohen v. Bolduc, 435 Mass. at 616 n.19. "Any curtailment of public access to judicial proceedings, whether civil or criminal, is a very serious matter. The judge must make every effort to arrive at a

reasonable alternative to closure." Boston Herald v. Superior Court Dept. of the Trial Court, 421 Mass. 502, 506-507 (1995). Any decision to close a courtroom must be based on written findings. Commonwealth v. Cohen, 456 Mass. at \_\_\_ 2010 WL 522771 at \*11; Boston Herald v. Superior Court, 421 Mass. 502, 506 (1995). Those findings must be particularized and must be supported by the record. Boston Herald v. Superior Court, 421 Mass. at 506. Any closure of the courtroom without a proper basis and without proper findings may be deemed structural error and may require reversal of the entire proceedings. Cohen, 456 Mass. at \_\_\_ 2010 WL 522771 at \*6, 13. Therefore, the Commonwealth urges this Court to deny the petition under chapter 211, section 3 for closure of the courtroom in these proceedings.

CONCLUSION

For the reasons stated above, the Commonwealth respectfully requests this Court to deny Ms. Kirk's petition pursuant to chapter 211, section 3 to close the courtroom during her recommitment proceedings.

Respectfully submitted,



Mary Lee  
Assistant District Attorney  
Plymouth District