STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. DISTRICT COURT
SIXTH DIVISION

IN RE: TODD MCELROY M.H. NO. 05-211

AMICUS CURIAE MEMORANDUM OF THE RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION

This proceeding raises significant and competing civil liberties concerns: the need for openness in the judicial process and the need to protect the privacy of confidential health care information. Amicus R.I. Affiliate, American Civil Liberties Union submits that both of these interests must be balanced by the Court in addressing the instant motion. As explained below, Amicus submits that the judicial proceeding at issue must, at least in part, be open, but that steps must also be taken by the Court to protect the privacy of the confidential information that is likely to be submitted in the course of the proceeding.

I. The judicial proceedings related to the civil commitment of Todd McElroy should be open because of the quasi-criminal nature of Mr. McElroy's detention and the furtherance of the public policy goal of fostering public trust in the judicial process.

In the *Providence Journal's* motion for access to the judicial proceedings and civil commitment hearing of Todd McElroy they quote *In re the Mental Condition of Billy Jo v. Gary Metro and Racine Journal Times* and state that the McElroy hearing is "a criminal case in civil clothing." 514 N.W. 2d 707, 716 (Wis. 1994). Amicus agrees that the civil commitment proceedings of Mr.

McElroy are quasi-criminal in nature in that the proceedings seek to indefinitely detain Mr. McElroy as "dangerous" based on his history of criminal behavior and the fear that he will repeat the same criminal behavior once released. The fact that the State is pursuing his involuntary commitment through a civil process does little to dispel the perception that Mr. McElroy is being detained because of his alleged criminal propensity.

It is the State's timing and use of the Mental Health Law, R.I.G.L. §40.1-5-8, to indefinitely detain Mr. McElroy that is questionable in this case. The timing is questionable because it was only as Mr. McElroy's release date approached that the State showed an interest in "helping" Mr. McElroy…by providing treatment that would result in his continued detainment. The use of the Mental Health Law to civilly commit Mr. McElroy is questionable because to do so §40.1-5-8(a) requires evidence that his "continued unsupervised presence in the community would create a likelihood of serious harm **by reason of mental disability**." (emphasis added) The critical question here is whether it is truly Mr. McElroy's mental disability that is being judged as "creating the likelihood of harm" or rather his past criminal conduct that is creating the perception of harm. Is the State inappropriately using the civil commitment process to lengthen a criminal sentence? It is this question and the circumstances under which §40.1-5-8 is being used in this case that compels the need for this particular hearing process to be open and transparent.

"The interest protected by open courtrooms is often said to be that of the criminal defendant whose rights might be curtailed in a secret proceeding." *Billy Jo* at 717. Here, the public is aware of many things through recent coverage by the press. They are aware of Mr. McElroy's past crimes. They are aware that correctional and state officials are concerned about his potential dangerousness in the community. They are aware that the Medical Director of the Eleanor Slater Hospital resigned his position in protest of the use of the Mental Health Law to detain Mr. McElroy. Surely, with all this known, the public ought to also be aware of the process that either detains or releases Mr. McElroy and be informed of the Court's reasoning for its decision. As the court opined in *Billy Jo* "it is essential that the public have confidence in the justice system's management of criminal cases involving the mentally ill…enabling public understanding may foster public faith in the courts." *Id.*

II. Although the judicial proceeding and the Court's reasoning should be open and transparent in this case, Todd McElroy's right to privacy in his healthcare services and information is protected by law and should not be forfeited by notoriety or past criminal behavior.

Unlike most court proceedings, a civil commitment hearing under §40.1-5-8 is a special type of judicial proceeding where, by its very nature, confidential healthcare information plays a crucial role in the court's process. It is also, by its very nature, an involuntary process, whereby the individual's confidential healthcare information is placed at issue without his or her consent or waiver. Thus, although, as argued above, the judicial process of civil commitment and the

Court's reasoning should, under some circumstances, be transparent to the public, an individual's right to privacy in his or her healthcare information, absent waiver or compliance with the appropriate confidentiality laws, should be protected, even during open judicial commitment proceedings.

Through the enactment of two separate laws the General Assembly has demonstrated that the privacy of healthcare information is a compelling state interest. The Rhode Island Confidentiality of Health Care Communications and Information Act (CHCCIA), §5-37.3 -4, *et seq*., and the Rhode Island Mental Health Law, §40.1-5-1, *et seq.,* both include provisions protecting an individual's privacy in his or her healthcare services and information. The laws detail specific exceptions to the confidentiality requirements and provide penalties for violation of their mandates. In the *Providence Journal's* motion they argue that while the General Assembly may have provided healthcare services with privacy protection under the law, they did not expressly provide the same protection for the judicial proceedings associated with such services, and thus, that the judicial proceedings were not meant to be confidential in all cases. Although Amicus agrees that the judicial proceedings of civil commitment should be open under specific circumstances, the court must protect the confidential healthcare disclosed during those proceedings in accordance with the law's mandate and intent.

If, under the Journal's argument, open proceedings resulted in the public disclosure of confidential healthcare information, then that would violate the law's intent. It seems illogical to conclude that the General Assembly made such an

effort to protect the privacy of healthcare information that they included its protection in two different laws and then purposely frustrated their own intentions by allowing public disclosure of that information through the very judicial process they devised to implement it. *See, Matter of Falstaff Brewing Corp.* 637 A.2d 1047, 1050 (R.I 1994) (holding that a statute may not be construed in a way that would defeat the underlying purpose of the enactment). Rather, it seems clear that the General Assembly first took measures to broadly protect the privacy of healthcare information and then, foreseeing the need for the controlled release of healthcare information, allowed for it under specific circumstances, to specific individuals, for specific purposes and with specific protections.

In this case §40.1-5-26 of the Mental Health Law requires that "the fact of admission or certification and all information and records compiled, obtained, or maintained in the course of providing services to a person **under this chapter shall be confidential**. Information and records may be disclosed only…to the courts and persons designated by judges thereof in accordance with applicable rules of procedure. **The records and files maintained in any court proceeding pursuant to this chapter shall be confidential** and available only to the person who was the subject of the proceeding or his or her attorney." (emphasis added) In so doing, the law provides broad privacy protection to healthcare information with specific exceptions and then protects the information from further disclosure. The civil court certification process as written in §40.1-5-8 is part of the Mental Health Law and is part of the chapter that holds that all information and records

made pursuant to its proceedings shall be confidential. Thus, even if the Court, under certain circumstances, opens its proceedings under §40.1-5-8, it must protect the privacy of confidential healthcare during those proceedings.

III. The Court should fashion a remedy to accommodate the two competing interests in this case, that of conducting an open and transparent hearing process while at the same time protecting Mr. McElroy's right to privacy in his healthcare information.

"The right to obtain information on criminal proceedings is essential to a free and responsible government. But other compelling state interests can intersect with the First Amendment guarantee of a free press." *Providence Journal v. Rogers*, 711 A.2d 1131, 1132 (R.I. 1998). In *Rogers* the Rhode Island Supreme Court balanced the competing interests of a free press and transparent process with the compelling state interest of protecting the confidentiality of child molestation victims. "If there are privacy interests to be protected in judicial proceedings, the State must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish." *Rogers* at 1136, (quoting *Cox Broadcasting Corp. v. Cohen,* 420 U.S. at 496-96 (1975)). In *Rogers* the Court balanced the competing interests of the public's right to know and the privacy rights of child molestation victims by fashioning a remedy consisting of a dual filing system designed to allow the public access to non-confidential information. *Rogers* at 1138.

The Court in this case must weigh and balance similar competing interests; the public's interest to understand and trust the judicial process with Mr. McElroy's right to privacy in his healthcare information. Amicus urges the Court to look to *Rogers* for guidance in this process and to similarly fashion a remedy in this case which allows for an open court process that provides a public ruling on the merits of the civil commitment proceeding itself, including its reasoning and adherence to the civil nature of its intent, while protecting the confidential healthcare information disclosed during its proceedings.

Respectfully submitted, Amicus Curiae
Rhode Island Affiliate, American Civil Liberties Union,
By its Cooperating Attorney,

Katherine Powell, #6492
Cooperating Attorney, Rhode Island Affiliate, American Civil Liberties Union
160 Beechwood Avenue
Pawtucket, RI 02860
Phone (401) 413-4868
Fax (401) 724-9735

CERTIFICATION

I hereby certify that on January 24, 2006, I mailed a true copy of the Amicus Curiae Memorandum of the Rhode Island Affiliate of the American Civil Liberties Union, to the following:

Jane Morgan, Esq.
Department of MHRH
John O. Pastore Center
14 Harrington Road
Cranston, RI 02920

Brian Adae, Esq.
Rhode Island Disability Law Center, Inc.
349 Eddy Street
Providence, RI 02903

H. Reed Cosper, Esq.
Office of the Mental Health Advocate
57 Howard Avenue, 4th floor
Cranston, RI 02920

Alan Goulart, Esq.
Assistant Attorney General
Department of Attorney General
150 South Main Street
Providence, RI 02903

Patricia Coyne-Fague, Esq.
Chief Legal Counsel
Department of Corrections
40 Howard Avenue
Cranston, RI 02920

Robert Mann, Esq.
Suite 610
One Turks Head Building
Providence, RI 02903

Kristen E. Rodgers, Esq.
Blish & Cavanaugh, LLP
Commerce Center
30 Exchange Terrace
Providence, RI 02903

_____