

TESTIMONY OF JUDGE MAUREEN D. DENNIS
VICE PRESIDENT CONNECTICUT JUDGES ASSOCIATION
April 9, 2007

RE: S.B. No 1479 (RAISED)
AN ACT CONCERNING JUDICIAL BRANCH OPENNESS

Good afternoon, Senator MacDonald, Representative Lawlor, and members of the Judiciary Committee. Thank you all for the opportunity of addressing you today.

I am here on behalf of the members of the Connecticut Judges Association and will be addressing some aspects of concern regarding the provisions of the raised bill regarding the openness of the Judicial Branch.

My remarks reflect issues raised by various individual members in the two working days between the posting of this bill on the web site and today's hearing.

The first section I would like to address is the provision regarding the police reports used during a court hearing as the basis for a judicial determination of probable cause, found in Section 9.

This would apply to each incarcerated defendant, appearing court for arraignment, who has been unable to post bond. The number of applicable cases varies on any given morning, but is substantial. In the Waterbury GA court, where I most recently presided in criminal court, we had anywhere from 20 to 50 arraignments per day, with a corresponding number of police reports.

The purpose of a probable cause review is to ensure that no defendant is incarcerated for more than 48 hours, without a judicial determination of probable cause. There is no such review or hearing for anyone who has posted bond and has been released from jail. This provision would have a disparate impact on defendants with minimal or no financial means, as only those defendants who could not afford to post bond, would have their police reports made public.

Each town or city police department has its own police report form. The formats vary, but all do include names, addresses, phone numbers, and sometimes dates of birth of alleged victims, as well as witnesses. Publicizing that type of personal information would have a chilling effect on members of the public, particularly alleged victims, who would be even more hesitant, or fearful to report crimes. Redacting such information would be cumbersome, time consuming and difficult, as the information can be interspersed throughout the body of the report.

The next issue that I would like to address is contained in the provisions of Section 10 regarding public disclosure of written reports regarding competency evaluations of defendants in criminal court.

The provisions provide that the report is confidential and subject to sealing, but the exceptions in the bill would result in the report being made public in virtually every case, as these reports must be marked as exhibits for the court to review them, and both parties and the court would be relying in some fashion on the contents of the report.

Many of the communications in these reports would be absolutely privileged under other statutes, for any other citizen. These reports contain a detailed history of the defendant's mental health history including prior treatment and medications, family history, social history, sexual history and other intensely personal information. Often they also contain the defendant's statements regarding events connected with the pending charges. The fact that a defendant may be functioning at so low a cognitive level that a competency evaluation is ordered, should not mean that this information should be made available to the public.

It is important to understand that competency evaluations are conducted to ensure that the defendant understands the nature of the charges pending and is able to assist his/her attorney in the defense of the case. These are not situations where the defendant is putting his/her own mental health at issue, as in the case of a mental disease or defect defense.

[See Appendix A for a comprehensive discussion of this issue by the Hon. Michael Sheldon.]

Finally I would like to address the provisions in Section 16 (b) and (c) regarding opening certain matters in the juvenile court to the public.

Section (c) provides that the court may enter orders prohibiting a member of the public, in attendance at a juvenile court proceeding, from using or disseminating the name, address, photograph or other personally identifiable information about a child, youth, parent or guardian disclosed during a proceeding. Although those provisions may sound comforting, any such orders would unquestionably constitute a "prior restraint" abridging the freedom of the press, in violation of the First and Fourteenth Amendments of the United States Constitution.

[See United States Supreme Court decision *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) attached as Appendix B]

One of the primary reasons most often given by proponents of opening child protection proceedings to the public is to improve the performance of the Department of Children & Families. One question I would pose is whether or not there are any empirical studies that show this to be a fact in other states whose child protection proceedings are open. I would ask that you study this issue carefully before you expose to the public, the lives of our most vulnerable citizens, the abused and neglected children.

Thank you for your time today and I would be happy to address any questions that you might have.

APPENDIX

A

September 8, 2006

Hon. Richard N. Palmer
Connecticut Supreme Court
Drawer N, Station A
Hartford, CT 06106

Re: Possible Disclosure of Competency Evaluation Reports To The Press and the Public

Dear Justice Palmer,

I understand that the Court Records Committee of the Judicial Branch Task Force on Public Access has proposed that competency evaluations completed pursuant to General Statutes § 54-56d be filed under seal, but be automatically unsealed in their entirety, and thus be made open to the press and the public, upon their use by the court. I further understand that the evaluation would be considered "used by the court" once it is considered, read and/or reviewed by the court or entered as an exhibit at a competency hearing, although the parties could move to seal it, in whole or in part, pursuant to Practice Book § 42-49A. I am writing at this time to express the view that the Task Force should reject that proposal as presented, and adopt in its stead the current proposal of the Governor's Task Force that all competency evaluations be filed and maintained under seal, and thus that their contents not be revealed to the press or the public except if and to the extent that any participant in the competency hearing relies upon them as a basis for his or her testimony, questions to witnesses, arguments to the court or judicial findings at the hearing.

Prepared at the order of the court by a clinical team that traditionally includes a psychiatrist, a psychologist and a psychiatric social worker, the competency evaluation typically includes detailed descriptions of the team's own interviews with the defendant as to his current legal and mental status, the results of diagnostic tests administered to him to ascertain the nature of his mental disabilities, if any, and their projected effects upon his ability to assist his counsel in conducting his defense, the self-reported history to date of his mental illness and of all courses of treatment undergone by him in connection therewith, and the team's conclusions as to the apparent degree of his current understanding of the charges against him and ability to assist counsel in his ongoing criminal prosecution. As such, it is often replete with details not only as to the defendant's current understanding of and reactions to his pending charges, but as to his prior psychiatric diagnoses and all treatments rendered therefor, including all medicines prescribed and all voluntary and involuntary hospitalizations recommended or ordered in

connection therewith. The latter, in particular, are matters as to which the ordinary citizen enjoys a far-reaching statutory privilege against involuntary disclosure under General Statutes § 52-146g. In my view, that privilege – which by statute, as confirmed by controlling case law, is personal to the patient to whom the records pertain, not to his lawyer or the court – should not be presumptively lost to the defendant merely because the court determines, either on its own motion or that of the prosecutor or defense counsel, that an evaluation of his competency may be necessary protect his right to a fair trial. Instead, such details should only be made public if and to the extent that a witness at the competency hearing, a lawyer (or the defendant) examining witnesses or presenting argument at such a hearing, or the Court itself, in announcing the basis for its decision as to competency, relies upon such details on the record in open court. Otherwise, if and to the extent that such details, though included in the competency evaluation, are not relied upon as a basis for establishing competency or incompetency, their revelation serves no valid purpose at all, much less one that supervenes the defendant's valid, unwaived statutory interest in keeping the fact and the details of his psychiatric history completely private.

The Governor's Task Force, fully understanding the importance of publishing a competency evaluation if and to the extent that its contents are actually relied upon by the court in making its findings at a competency hearing, has recommended that judges be required to state on the record all details of the competency evaluation upon which they have relied in making those findings. I agree with this approach, because it confines the scope of public disclosure to those parts of the evaluation which in fact have played some material role in the court's decision. Although such revelations may compromise the defendant's privacy interests without a waiver on his part, the fact that they have actually led the court to act as it did, in the conduct of the public's business, arguably justifies their public disclosure nonetheless. Beyond such functional revelations, however, the public has no interest in otherwise privileged material that has played no material role in influencing the court's decision on a matter of public importance.

I respectfully request that you bear all of these considerations in mind if and when you consider any proposal that all or any part of a competency evaluation be made available for inspection by the press and the public.

Sincerely,

Michael R. Sheldon
Judge

APPENDIX

B

United States Supreme Court Reports

OKLAHOMA PUBLISHING CO. v. DISTRICT COURT, 430 U.S. 308 (1977)

OKLAHOMA PUBLISHING CO. v. DISTRICT COURT IN AND FOR OKLAHOMA
COUNTY, OKLAHOMA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

No. 76-867.

Decided March 7, 1977

A state court's pretrial order enjoining the news media from publishing the name or photograph of an 11-year-old boy in connection with a pending juvenile proceeding charging the boy with delinquency by second-degree murder held to abridge the freedom of the press in violation of the First and Fourteenth Amendments. *Nebraska Press Assn. v. Stuart*, **427 U.S. 539**; *Cox Broadcasting Corp. v. Cohn*, **420 U.S. 469**. These Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings that were in fact open to the public. Here, notwithstanding that a state statute provided for closed juvenile hearings unless specifically opened to the public by court order, it appears that whether or not the presiding judge made such an order, members of the press were in fact present at the boy's detention hearing with full knowledge of, and without objection by, the judge, the prosecutor, and defense counsel, and there is no evidence that petitioner newspaper publisher acquired the boy's name and photograph unlawfully or even without the State's implicit approval.

Certiorari granted; **555 P.2d 1286**, reversed.

PER CURIAM.

A pretrial order entered by the District Court of Oklahoma County enjoined members of the news media from "publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child" in connection with a juvenile proceeding involving that child then pending in that court. On application for prohibition and mandamus challenging the order as a prior restraint on the press violative of the First and Fourteenth Amendments, the Supreme Court of the State of Oklahoma sustained the order. This Court entered a stay pending the timely filing and disposition of a petition for certiorari.

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429 U.S. 967 (1976). We now grant the petition for certiorari and reverse the decision below.

A railroad switchman was fatally shot on July 26, 1976. On July 29, 1976, an 11-year-old boy, Larry Donnell Brewer, appeared at a detention hearing in Oklahoma County Juvenile Court on charges filed by state juvenile authorities alleging delinquency by second-degree murder in the shooting of this switchman. Reporters, including one from petitioner's newspapers, were present in the courtroom during the hearing and learned the juvenile's name. As the boy was escorted from

the courthouse to a vehicle, one of petitioner's photographers took his picture. Thereafter, a number of stories using the boy's name and photograph were printed in newspapers within the county, including petitioner's three newspapers in Oklahoma City; radio stations broadcast his name and television stations showed film footage of him and identified him by name.

On August 3, 1976, the juvenile was arraigned at a closed hearing, at which the judge entered the pretrial order involved in this case. [fn1] Additional news reports identifying the juvenile appeared on August 4 and 5. On August 16, the District Court denied petitioner's motion to quash the order. The Oklahoma Supreme Court then denied petitioner's writ of prohibition and mandamus, relying on Oklahoma statutes providing that juvenile proceedings are to be held in private "unless specifically ordered by the judge to be conducted in public," and that juvenile records are open to public inspection "only by order of the court to persons having a legitimate

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interest therein." Okla. Stat. Ann., Tit. 10, §§ 1111, 1125 (Supp. 1976).

As we noted in entering our stay of the pretrial order, petitioner does not challenge the constitutionality of the Oklahoma statutes relied on by the court below. Petitioner asks us only to hold that the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public. We think this result is compelled by our recent decisions in *Nebraska Press Assn. v. Stuart*, **427 U.S. 539** (1976), and *Cox Broadcasting Corp. v. Cohn*, **420 U.S. 469** (1975).

In *Cox Broadcasting* the Court held that a State could not impose sanctions on the accurate publication of the name of a rape victim "which was publicly revealed in connection with the prosecution of the crime." *Id.*, at 471. There, a reporter learned the identity of the victim from an examination of indictments made available by a clerk for his inspection in the courtroom during a recess of court proceedings against the alleged rapists. The Court expressly refrained from intimating a view on any constitutional questions arising from a state policy of denying the public or the press access to official records of juvenile proceedings, *id.*, at 496 n. 26, but made clear that the press may not be prohibited from "truthfully publishing information released to the public in official court records." *Id.*, at 496.

This principle was reaffirmed last Term in *Nebraska Press Assn. v. Stuart*, *supra*, which held unconstitutional an order prohibiting the press from publishing certain information tending to show the guilt of a defendant in an impending criminal trial. In Part VI-D of its opinion, the Court focused on the information covered by the order that had been adduced as evidence in a preliminary hearing open to the public and the press; we concluded that, to the extent the order prohibited the publication of such evidence, "it plainly violated settled principles," **427 U.S., at 568**, citing *Cox Broadcasting*

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Corp. v. Cohn, supra; Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966) ("[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom"); and *Craig v. Harney, 331 U.S. 367, 374* (1947) ("Those who see and hear what transpired [in the courtroom] can report it with impunity"). The Court noted that under state law the trial court was permitted in certain circumstances to close pretrial proceedings to the public, but indicated that such an option did not allow the trial judge to suppress publication of information from the hearing if the public was allowed to attend: "[O]nce a public hearing had been held, what transpired there could not be subject to prior restraint."
427 U.S., at 568.

The court below found the rationale of these decisions to be inapplicable here because a state statute provided for closed juvenile hearings unless specifically opened to the public by court order and because "there is no indication that the judge distinctly and expressly ordered the hearing to be public." We think *Cox* and *Nebraska Press* are controlling nonetheless. Whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel. No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were "publicly revealed in connection with the prosecution of the crime," **420 U.S., at 471**, much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain. **[fn2]** Under these circumstances, the District **Page 312** Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments.

The petition for certiorari is granted, and the judgment is

Reversed.

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In addition to enjoining publication of the name and picture of the juvenile, the order also enjoined law enforcement officials, juvenile authorities, and prosecution and defense counsel "from disclosing any information or making any comments concerning" the delinquency proceeding pending against the juvenile. Petitioner does not now challenge the restraints on counsel (which were rescinded in a modification of the order on August 5) or on public officials.

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In *Cox Broadcasting* the Court quoted the following description by the reporter of the manner in which the name of the rape victim was revealed to him:

"[D]uring a recess of the said trial, I approached the clerk of the court, who was sitting directly in front of the bench, and requested to see a copy
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of the indictments. In open court, I was handed the indictments, both the murder and the rape indictments, and was allowed to examine fully this document. . . . Moreover, no attempt was made by the clerk or

anyone else to withhold the name and identity of the victim from me or from anyone else and the said indictments apparently were available for public inspection upon request.'" 420 U.S., at 473 n. 3.

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