SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : MENTAL HYGIENE PART

In the Matter of the Application of LEONEL URCUYO, M.D., Director of the Department of Psychiatry at Woodhull Medical and Mental Health Center, Petitioner, For an Order Pursuant to Section 9.60 of the Mental Hygiene Law Authorizing Assisted Outpatient Treatment - for - JAMES DOWLER, Respondent.	Index No. 9275/00
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MEMORANDUM OF THE ATTORNEY GENERAL IN OPPOSITION TO BRIEF OF AMICI AND IN SUPPORT OF CONSTITUTIONALITY OF KENDRA'S LAW

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Preliminary Statement

This memorandum of law is submitted by the Attorney General in opposition to the Brief of Amici in Support of

Respondent's Right to a Determination of Incapacity Before This Court May Order Respondent to Participate in Outpatient Psychiatric Treatment dated June 14, 2000 ("Amici Brief") and in further support of the constitutionality of Section 9.60 of the Mental Hygiene Law ("Kendra's Law").

Summary of Argument

Kendra's Law affects none of the rights established in Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986). Rivers concerned involuntary admittees to psychiatric hospitals who are subject to hourly supervision. Before the State may override the right of an involuntary admittee to determine the course of his treatment there must be a finding of lack of capacity. This right is in no way abridged or replaced by anything in Kendra's Law.

Kendra's Law applies to patients who are either ready for discharge or already living in the community, and who have been found, by clear and convincing evidence, to require supervision to live safely in the community. Kendra's Law is supported by State and Federal caselaw on involuntary commitment which allows clinicians to consider a patient's noncompliance and resulting dangerousness in the community in determining whether the patient needs the supervision offered by Assisted Outpatient Treatment. Orders issued under Kendra's Law are supported both by

the State's police power and by the doctrine of parens patriae. There is little, if any, burden on patients' right to control treatment, in light of the findings required to be made by the court before a Kendra's Law order may issue. What little burden exists is the least necessary to protect society as well as the patient from the risk of serious physical harm.

Amici improperly attempt to inject issues into this case which go well beyond those raised by the parties, such as alleging that the requirement of a finding of incapacity should extend to all forms of treatment, not just medication, Amici Brief at 6 n.17, that other forms of treatment should be employed to address the State's interest, id. at 11, and that this Court should become involved in the professional discussion on the basis of treating psychiatric illnesses with medication, id. at 14-23. This attempt should be rejected. Their argument concerning the efficacy of treatment with antipsychotic medication, in particular, is not supported by the established medical community. The Legislature has provided patients who are the subject of Kendra's Law petitions with ample opportunity to discuss individually, and litigate if necessary, the terms of their treatment plans.

ARGUMENT

POINT I

KENDRA'S LAW IS NARROWLY TAILORED TO MEET THE STATE'S INTEREST IN ENSURING THAT PATIENTS WITH MENTAL ILLNESS RECEIVE THE CARE, SERVICES AND SUPERVISION THEY NEED

Kendra's Law represents an attempt on the part of the State to halt the "revolving door" by which patients are discharged from the hospital, become noncompliant with outpatient treatment, and relapse to the point where rehospitalization is required. As a result of improved medication and enhanced services, the State has been able to discharge many patients with psychiatric conditions from inpatient institutions into the community. However, medication and other outpatient services are of little use to patients who refuse them. Kendra's Law allows the State to identify those patients who refuse services that they require and ensures that such patients receive these services.

Throughout their brief, amici refer to to "involuntary outpatient commitment." See, e.g., Amici Brief at 1. This is a misstatement. "Commitment" is "[t]he act of confining a person in a prison, mental hospital, or other institution." Black's Law Dictionary 266 (7th ed. 1999). In New York, "a commitment is a warrant, order, or process by which a court or magistrate directs

a ministerial officer to take a person to prison, or to detain him there." People ex rel. Allen v. Hagen, 170 N.Y. 46, 49 (1902). There is no "involuntary outpatient commitment" in New York State. The correct term is "Assisted Outpatient Treatment." Mental Hyg. Law § 9.60 (a)(1). The Pilot Project at Bellevue, which was the forerunner of Kendra's Law, was termed "Involuntary Outpatient Treatment." Mental Hyg. Law § 9.61. However, even in that statute, now expiring, there was no reference to "outpatient commitment." No doubt amici consider that the term somehow aids their case, but it is erroneous and should be disregarded by this Court.

A. No Useful Analogy Can Be Drawn Between the Patients in Rivers and Patients Subject to Kendra's Law

Amici argue that Rivers compels the courts to make a finding of incapacity before issuing a Kendra's Law order. However, the effect of a court order under Rivers is entirely different from the effect of a court order issued under Kendra's Law. A Kendra's Law order does not permit forcible medication over a patient's objection and thus does not infringe on a fundamental right. If a right is affected at all, that right, and the effect on that right, is entirely different from the right that is affected by a Rivers order. Furthermore, the effect on

that right is the least necessary in light of the showing petitioners must make and the findings a court must make before issuing a Kendra's Law order.

In Rivers v. Katz the Court of Appeals was presented with the issue of "whether and under what circumstances the State may forcibly administer antipsychotic drugs to a mentally ill patient who has been involuntarily confined to a State psychiatric facility." 67 N.Y.2d at 489-90, 504 N.Y.S.2d at 76. The patients in Rivers, who were involuntarily committed to State psychiatric hospitals, had objected to treatment with antipsychotic drugs. Their objections were overruled in administrative hearings and they were thereafter medicated. Id. at 491, 504 N.Y.S.2d at 77.

The Court noted that "every individual of adult years and sound mind has a right to determine what shall be done with his own body." Id. at 492, 504 N.Y.S.2d at 78. The Court found that neither the fact that the patients in Rivers had mental illnesses nor that they were involuntarily committed was enough to support the conclusion that they lacked the mental capacity to understand the consequences of their decisions to refuse medication. Id. at 494, 504 N.Y.S.2d at 79. The Court concluded that a psychiatric inpatient who refused medication when the

State's police power was not implicated had a right to a judicial determination that he lacked the capacity to make a decision about the treatment proposed before drugs could be forcibly administered to him pursuant to the State's parens patriae power.

A patient who is the subject of a Kendra's Law petition is in a different situation. He is not an involuntary admittee in a psychiatric hospital. He can refuse medication, or other forms of treatment. Clinicians have no authority under Kendra's Law, or otherwise, to forcibly medicate him. Their recourse, even after a Kendra's Law order is issued, is to attempt to persuade him to comply with treatment. Mental Hyg. Law § 9.60 (n). If a physician determines that the patient may meet the involuntary admission standard set out in section 9.27 of the Mental Hygiene Law, or may need immediate observation, care and treatment pursuant to sections 9.39 or 9.40, the physician can request that the patient be removed to a hospital for an examination. Mental Hyg. Law § 9.60 (n). However, even if the patient is hospitalized, under Rivers he still may not be forcibly medicated in the absence of an emergency unless he is found to lack capacity by a court.

B. Kendra's Law is Written for the Specific and Limited Object of Ensuring that Noncompliant Patients Receive Needed Treatment

Kendra's Law fits within the continuum of treatment

methods for patients who have been discharged from psychiatric centers and for those who have avoided treatment entirely. Contrary to amici's suggestion, Amici Brief at 10-11, New York State has made a significant investment in community mental health programs of various types. See, e.g., Public Protection Health and Mental Hygiene Budget, L. 2000, c. 54; Health Care Reform Act of 2000, L. 1999, c. 1; Mental Hyg. Law § 41.55 (Supp. 1999-2000). However, that has not fully addressed the problem of the "revolving door."

Generally, in ruling on the constitutionality of a statute, legislative findings are binding on the courts. 20 N.Y. Jur. 2d, Constitutional Law § 73. The Legislature is presumed to have investigated and found the necessary facts. Id. In the Legislative Findings accompanying Kendra's Law, the Legislature found that:

> [T]here are mentally ill persons who are capable of living in the community with the help of family, friends and mental health professionals, but who, without routine care and treatment, may relapse and become violent or suicidal, or require hospitalization. The legislature further finds that there are mentally ill persons who can function well and safely in the community with supervision and treatment, but who without such assistance, will relapse and require long periods of hospitalization.
>
> The legislature further finds that some mentally ill persons, because of their illness, have great

> difficulty taking responsibility for their own care, and often reject the outpatient treatment offered to them on a voluntary basis. Family members and caregivers often must stand by helplessly and watch their loved ones and patients decompensate. Effective mechanisms for accomplishing these ends include: the establishment of assisted outpatient treatment as a mode of treatment; improved coordination of care for mentally ill persons living in the community; the expansion of the use of conditional release in psychiatric hospitals; and the improved dissemination of information between and among mental health providers and general hospital emergency rooms.

L. 1999, ch. 408, § 1, reproduced in 34A McKinney's Mental Hygiene Law Sections 1.01 to 41.36 (Supp. 2000 at 31-32).

Kendra's Law was intended to address these problems. In order to obtain a Kendra's Law order, the petitioner must prove, by clear and convincing evidence, that the patient meets certain criteria. Mental Hyg. Law § 9.60 (c). In order to make out a case, petitioner must show, among other things, that:

> (4) the patient has a history of lack of compliance with treatment for mental illness that has:
>
> (i) at least twice within the last thirty-six months been a significant factor in necessitating hospitalization in a hospital, or receipt of services in a forensic or other mental health unit of a correctional facility or a local correctional facility, not including any period during which the person was hospitalized or incarcerated immediately preceding the filing of the petition or;
>
> (ii) resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others within the last forty-eight months, not including any

> period in which the person was hospitalized or incarcerated immediately preceding the filing of the petition ....

Mental Hyg. Law § 9.60 (c)(4).

Once the patient's history of noncompliance has been established, the physician must testify that he needs treatment, that without it he is unlikely to survive safely in the community, and that he requires treatment to avoid a relapse or deterioration that would result in serious harm to himself or others and possible rehospitalization, and that in the absence of a Kendra's Law order is is unlikely to voluntarily comply with treatment. Mental Hyg. Law § 9.60 (c)(2), (3), (5), (6) and (7). The physician must explain the patient's treatment plan and the rationale of each category he is proposing. Mental Hyg. Law § 9.60 (i)(1). Finally, he must testify that a Kendra's Law order directing Assisted Outpatient Treatment is the least restrictive alternative for the patient. Mental Hyg. Law § 9.60 (h)(4). These criteria represent a comprehensive and considered scheme to ensure that Kendra's Law orders are only applied in certain limited circumstances.

C. Kendra's Law is Based on State and Federal Caselaw Which Permit Consideration of Patients' Noncompliance with Treatment in the Community

The finding that discharge under a Kendra's Law order

is the least restrictive alternative for a patient is supported by several recent State cases which allow clinicians to consider a patient's history of noncompliance in the community as a basis to predict future behavior and decide whether renewed or continued involuntary hospitalization is warranted.

In Matter of Boggs, the First Department considered proof of a patient's life on the street in determining that she was a danger to herself. 132 A.D.2d 340, 523 N.Y.S.2d 71 (1st Dep't 1987), appeal dismissed as moot, 70 N.Y.2d 972, 525 N.Y.S.2d 796 (1988). Reversing the hearing court, which had ordered the patient released, the First Department noted that proof of dangerousness could be shown where the patient's "mental illness manifest[ed] itself in neglect or refusal to care for [herself] to such an extent that there is presented 'serious harm' to [her] own well-being." Id. at 362, 523 N.Y.S.2d at 84. Although the patient's condition had improved in the structured setting of the hospital, her history of assaultive and aggressive behavior on the street led the First Department to conclude that she should remain hospitalized. Id. at 363-64, 523 N.Y.S.2d at 85-86.

Boggs did not directly involve noncompliance with treatment. In 1993 the Second Department reached the same

conclusion with respect to a patient who did have a history of not complying with treatment and violent behavior on the street. Matter of Seltzer v. Hogue, 187 A.D.2d 230, 594 N.Y.S.2d 781 (2d Dep't 1993). The Second Department noted that the patient had improved somewhat in the hospital setting. Id. at 238, 594 N.Y.S.2d at 785. During his hearing, however, proof had been adduced about his noncompliant and antisocial behavior in the community. Id., 594 N.Y.S.2d at 785. The patient made no attempt to controvert this evidence. Id., 594 N.Y.S.2d at 785. The Second Department concluded, on the basis of this proof, that the patient should be retained. Id., 594 N.Y.S.2d at 785.

Finally, in a forensic context, the Court of Appeals has found that an insanity acquittee's stabilization in the hospital did not warrant his discharge. Matter of Francis S., 87 N.Y.2d 554, 561, 640 N.Y.S.2d 840, 842-43 (1995). The First Department had reversed a hearing court that ordered the acquittee's discharge. In affirming, the Court of Appeals noted that the First Department had "quite properly based its determination that Francis S. had a dangerous mental disorder on his history of prior relapses into violent behavior and of recurrent substance abuse and noncompliance with treatment programs upon release." Id., 640 N.Y.S.2d at 842-43.

Moreover, the United States Court of Appeals for the Second Circuit also had reviewed New York's civil commitment law and concluded that it meets the requirements for substantive and procedural due process. Project Release v. Prevost, 722 F.2d 960, 963, 971 (2d Cir. 1983). One of plaintiffs' arguments was that the statute must require a finding "of substantial and present risk of serious physical harm as evidenced by recent overt conduct." Id. at 972. The Second Circuit refused to impose the requirement of an "overt act." Id. at 973. It added that the requirement of a showing of dangerousness, which had been read into the statute by the Third Department, sufficed to meet minimum due process standards. Id. at 973-74, citing Scopes v. Shah, 59 A.D.2d 203, 205-06, 398 N.Y.S.2d 911, 913 (3d Dep't 1977).

Plaintiffs in Project Release had also contended that the civil commitment law violated due process by failing to require automatic probable cause hearings within forty-eight hours and full evidentiary hearings within five days. Project Release, 722 F.2d at 974. The Second Circuit noted "numerous provisions in the statute for notice and hearing and reassessment of a patient's status" by lawyers, clinicians, judges, and a jury, if desired. Id. The Court concluded that the statutory

scheme "reflects a careful balance between the rights of the individual and the interests of society." Id.

These cases demonstrate that clinicians are not limited, in assessing the risk of harm a patient presents to himself or others, simply to the patient's behavior in the hospital. Instead, clinicians may consider the patient's compliance with treatment outside the hospital, particularly when his lack of compliance has led to relapse, dangerousness to himself or others, and rehospitalization, to predict whether he could be safely discharged. Accordingly, Kendra's Law allows clinicians to consider this history in deciding whether the patient needs the additional treatment and supervision available through assisted outpatient treatment.

POINT II

KENDRA'S LAW PROMOTES THE STATE'S INTEREST IN ENSURING THAT PATIENTS RECEIVE NEEDED TREATMENT BY AVOIDING UNDUE INFRINGMENTS OF PATIENTS' RIGHTS

Amici argue that Kendra's Law cannot be justified under either the State's parens patriae power or the police power as limited by Rivers. Amici Brief at 3-11. However, the analysis in Rivers involves the relationship between involuntary admittees' need for hospitalization and their ability to make treatment decisions. This analysis does not extend to Kendra's Law, which

involves treatment plans for outpatients.

The State has an interest under its parens patriae powers in providing care to patients who are unable because of mental illness to care for themselves. Addington v. Texas, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809 (1979). It also has an interest under its police power "to protect the community from the dangerous tendencies of some who are mentally ill." Id., 99 S. Ct. at 1809.

A. Kendra's Law is a Valid Exercise of the State's Parens Patriae Power

Contrary to respondents' and amici's contention, see Amici Brief at 7-8, there is no need for this Court to make a Rivers finding that a patient lacks the capacity to make a reasoned treatment decision before a Kendra's Law order can issue. An involuntary admittee who is the subject of a Rivers order has his ability to make decisions about his body forcibly overridden. The patient who is the subject of a Kendra's Law is entitled to participate in the preparation of his treatment plan. Even if he unsuccessfully disputes aspects of the treatment plan, his loss is not as burdensome, given the findings that must be made to support a Kendra's Law order and given that his participation in the treatment plan is voluntary. If he does not

comply with the treatment plan contained in a Kendra's Law order, he does not risk a finding of contempt or lack of capacity, and his noncompliance, without more, is not grounds for involuntary civil commitment. Mental Hyg. Law § 9.60 (n), (o). Instead, he will be urged to comply with the treatment plan, and may be brought to a hospital for an examination if a physician decides that he may meet the standard for involuntary civil commitment. Mental Hyg. Law § 9.60 (n).

Amici characterize Kendra's Law as "a coercive scheme." Amici Brief at 4. However, Kendra's Law is intended to protect both the patient and the public. A court has already found that the patient has met the criteria for a Kendra's Law order, i.e., that he may relapse and become dangerous if he does not comply with treatment. Mental Hyg. Law § 9.60 (c). Kendra's Law provides a clear means of identifying patients most at risk of deteriorating or relapsing and becoming dangerous, and its provision for case management and treatment is a measured response intended to ensure that the patient does not experience serious harm as a result of a relapse.[1]

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[1] Amici also object to the provision in Kendra's Law to have the patient brought to the hospital. Amici Brief at 6-7. This Court should note that the Mental Hygiene Law allows police officers or peace officers to bring "any person who appears to be

New York State has "a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves ...." Addington v. Texas, 441 U.S. 418, 426, 99 S. Ct. 1804, 1809 (1979). This parens patriae interest is apparent in the State's provision for commitment of persons alleged to be in need of involuntary care and treatment. Mental Hyg. Law § 9.27 (a). The civil commitment law defines "in need of involuntary care and treatment" as meaning that "a person has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment." Mental Hyg. Law §§ 9.01, 1.03 (20) (definition of mental illness). Under this provision, the State must prove that the patient presents "a real and present threat of substantial harm

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mentally ill" to a hospital, and that any court may, upon receiving a verified statement, issue a warrant to have "a person who is apparently mentally ill" brought before it for an examination. Mental Hyg. Law §§ 9.41, 9.43. These provisions were part of the statutory scheme that was upheld as constitutional by the Second Circuit Court of Appeals. Project Release, 722 F.2d 960. In contrast to Kendra's Law, neither of these provisions require, as a prerequisite, proof by clear and convincing evidence of likely dangerousness in the event of noncompliance with treatment or a physician's determination that the person may meet the standard for involuntary civil commitment before the person can be brought before a hospital or the court.

to himself or others," although it may manifest itself as "neglect or refusal to care for himself .... " Scopes v. Shah, 59 A.D.2d at 205, 398 N.Y.S.2d at 913; see also Arnold A. v. Donaldson, 215 A.D.2d 302, 627 N.Y.S.2d 10, 11-12 (1st Dep't 1995) (release order reversed where patient was "socially incompetent and require[d] constant supervision"); Donaldson v. Daley, 206 A.D.2d 298, 614 N.Y.S.2d 525 (1st Dep't 1994) (same where patient's stabilization in hospital did not mean he could function as an outpatient).

Here, patients subject to a Kendra's Law order are either living in the community or about to be discharged from the hospital. Their interest, and the State's interest, is to ensure that they can maintain themselves in the community and avoid a relapse or deterioration resulting in dangerousness or rehospitalization. The Legislature has narrowly tailored Kendra's Law to provide that just this interest is addressed. The petitioner has to prove, by clear and convincing evidence, that if the patient becomes noncompliant, he will relapse and become dangerous to himself or others, and may require hospitalization, that he is unlikely to comply voluntarily with treatment in the absence of a Kendra's Law order, and that release with a Kendra's Law order is the least restrictive alternative for the patient.

The State has an interest in protecting its citizens from harm, whether the source of that harm is other people or the patient himself. A person who can be demonstrated to have become noncompliant to the point of requiring hospitalization or to have presented a threat of or actual serious physical harm to other people, and who will otherwise not comply with treatment in the future, is properly subject to supervision under the doctrine of parens patriae.

B. Kendra's Law is a Valid Exercise of the State's Police Power to Protect its Citizens From Harm

1. A Patient's Potential for Noncompliance and Dangerousness Properly Supports Exercise of the Police Power

The police power allows the State to maintain order and protect its citizens from the dangerous tendencies of some patients with mental illness. Addington v. Texas, 441 U.S. at 426, 99 S. Ct. at 1809. The civil commitment law contains several provisions that are supported by the police power of the State. See Mental Hyg. Law §§ 9.37 ("likely to result in serious harm"), 9.39 (a) ("substantial risk of physical harm"), 9.40 ("likely to result in serious harm to the person or others"). Kendra's Law employs similar language in its criteria. Mental Hyg. Law § 9.60 (c)(6) (assisted outpatient treatment needed to prevent relapse

or deterioration "which would likely result in serious harm to the patient or others").

Amici maintain that under Rivers the State can only exercise its police power in an emergency. Amici Brief at 8. However, Rivers addressed a situation in which the State had already committed a patient into a hospital. In such a context, the Court of Appeals ruled that the police power could be justified only where imminent danger existed. This does not mean that the police power is limited to emergency situations in the context of outpatients in the community. In fact, the police power is broad and encompasses "such reasonable regulations established directly by legislative enactment as will protect the public health and public safety." Jacobson v. Massachusetts, 197 U.S. 11, 25, 25 S. Ct. 358, 361 (1905) (smallpox vaccination).

Moreover, several cases have noted that clinicians can consider a patient's potential for noncompliance and dangerousness in the community in determining whether retention was warranted. See Hogue; cf. Francis S. (forensic patient).

Amici maintain that "[t]he fatal flaw of § 9.60 is that it attempts to take away the cherished fundamental right enunciated in Rivers for an indefinite period in the utter absence of an emergency .... " None of the rights enunciated in

Rivers is affected by Kendra's Law. Before overriding the right of an involuntary admittee to determine the course of his treatment there must still be a judicial finding that he lacks the capacity to make a reasoned decision about the proposed treatment. This right is in no way abridged or replaced by anything in Kendra's Law.

In order to obtain a Kendra's Law order, a petitioner must first show, by clear and convincing evidence, that the patient has a history of not complying with treatment and that if he does so in the future, he likely will become dangerous. Mental Hyg. Law § 9.60 (c)(6). He must show that the patient is not likely to voluntarily comply with treatment in the absence of a Kendra's Law order. Mental Hyg. Law § 9.60 (c)(5). The petitioner must then show by clear and convincing evidence that assisted outpatient treatment is the least restrictive alternative for the patient, suggesting that without it, he will have to remain hospitalized or, if he is in the community, he may need to be rehospitalized. Mental Hyg. Law § 9.60 (j)(2). This proof is sufficient, under Hogue, Francis S., and Project Release, to engage the State's police power and ensure that, for the safety of the community as well as himself, the patient should be subject to a Kendra's Law order.

2. Kendra's Law Does Not Impose an Undue Burden on Patients

Amici argue that the treatment plan contained in a Kendra's Law order can be burdensome and intrusive, Amici Brief at 5-6, ignoring the fact that, under the express terms of Kendra's Law, the treatment plan must be the least restrictive alternative for the patient. In order to obtain a Kendra's Law order authorizing supervision in the community the petitioner must have proven, by clear and convincing evidence, that the patient was noncompliant with treatment and as a result either required hospitalization twice, or was violent or threatened or caused serious physical harm to another person. Mental Hyg. Law § 9.60 (c)(4). Given this proof, the treatment plan is not as burdensome and intrusive as the alternative: hospitalization. Yet that is the very alternative authorized by Hogue and Francis S.

Indeed, the United States Supreme Court has recently found that "a finding of future dangerousness," linked with "the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible for the person to control his dangerous behavior," is sufficient to support civil confinement of an individual. Kansas v. Hendricks, 521 U.S. 346, 358, 117 S. Ct. 2072, 2080 (1997). The patient in Hendricks

stated that when he was not confined he became "stressed out" and could not "control the urge" to molest children. Id. at 355, 227 S. Ct. at 2078.

Here, Kendra's Law requires that a treatment plan be based on a finding, by clear and convincing evidence, that the patient has been noncompliant with treatment and, as a result, has either required hospitalization on two occasions or has become violent or threatened serious physical harm to himself or others. Mental Hyg. Law § 9.60 (c)(4), (j). Clearly, no unwarranted burden is created by the requirement that such patients submit to a treatment plan.

POINT III

THE AMICI'S INJECTION OF OTHER ISSUES INTO THIS CASE IS IMPROPER AND IN ANY EVENT, THESE ISSUES ARE SUBJECT TO DISCUSSION AND LITIGATION BY PATIENTS IN EACH CASE

A. The Function of Amici is to Assist the Court, and They May Not Inject New Issues into the Case

In the course of their brief, amici state that they believe that the requirement of a finding of lack of capacity extends to all forms of treatment, not just medication. Amici Brief at 6. Amici also contend that other forms of treatment should be employed to address the State's interest "in preventing individuals from deteriorating psychiatrically." Id. at 11.

Finally, amici cite a number of professional books and articles in an attempt to involve this court in a discussion of the basis for treating psychiatric illnesses with medication.

The amici should not be permitted to inject new issues into this case. "The briefs of the amicus curiae may not introduce new issues, but may only relate to the issues raised by the parties." Matter of Inc. Village of East Williston v. Pub. Serv. Comm'n, 153 A.D.2d 943, 947, 545 N.Y.S.2d 750, 753 (2nd Dep't 1989). "The phrase 'amicus curiae' has been defined as 'one who gives information to the court on some matter of law in respect of which the court is doubtful.'" Kemp v. Rubin, 187 Misc. 707, 708, 64 N.Y.S.2d 510, 511 (Sup. Ct. Queens Co. 1946) (citing The Claveresk v. Sutherland, 264 F. 276, 279 (2d Cir. 1920)). In New York State "an amicus curiae is one who, as a stander by, when a judge is in doubt or mistaken in a matter of law, may inform the court. He is heard only by leave, and for the assistance of the court, upon a case then before it. He is not a party to the suit, and has no control over it." Kemp, 187 Misc. at 708-709, 64 N.Y.S.2d at 511-12 (internal quotations and citations omitted).

"The function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter

then before it that may otherwise escape its consideration; it is a privilege and not a right; he is not a party, and cannot assume the functions of a party; he must accept the case before the court with issues made by the parties, and may not control the litigation." Kemp, 187 Misc. at 709, 64 N.Y.S. 2d at 512; see also United Parcel Service v. Michell, 452 U.S. 56, 60 n. 2, 101 S. Ct. 1559, 1562 n. 2 (1981) (amici's argument not considered as it was not raised by either of the parties either in the Supreme Court or below); Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 199 A.D.2d 488, 490, 606 N.Y.S.2d 44, 47 (2d Dep't 1993) (amici has no status to raise issues not raised by parties), aff'd as modified, 86 N.Y.2d 279, 631 N.Y.S.2d 551 (1995).

Given the traditional restrictions on the role of amicus curiae, this Court should reject amici's attempt to expand this case beyond the parameters set by the parties.

Furthermore, amici's description of the Andrew Goldstein case is based, in its most substantive part, on a newspaper article, which is hearsay not admissible under any exception. Amici Brief at 10-11 nn. 25, 27. The constitutionality of Kendra's Law does not turn on whether Mr. Goldstein wanted, did not want, or could not get services.

B. Patients have Sufficient Opportunity to Participate in Preparation of the Treatment Plans

Patients who are the subject of Kendra's Law orders are given adequate opportunity to discuss their treatment plans with clinicians. Petitioners for Kendra's Law orders are obligated by the statute to give patients an opportunity to participate in the preparation of their treatment plans. Mental Hyg. Law § 9.60 (i)(1). Furthermore, the Legislature encouraged patients who were subject to Kendra's Law to execute health care proxies. Mental Hyg. Law § 9.60 (c)(8).

In addition, the treatment plan is a principle subject of the Kendra's Law hearing. The physician who prepares it must testify about the rationale for each category of treatment proposed. Mental Hyg. Law § 9.60 (i). If the physician recommends that medication be included, he must testify about "the types or classes of medication recommended, the beneficial and detrimental physical and mental effects of such medication, and whether such medication should be self-administered or administered by an authorized professional." Mental Hyg. Law § 9.60 (i)(2). Furthermore, if the physician recommends blood or urine screening for illegal substances, he must testify about the patient's history of substance abuse and relate that history to the

possibility of a relapse or deterioration. Mental Hyg. Law § 9.60 (i)(1).

Moreover, the treatment plan is narrowly tailored to the need as established in the Kendra's Law hearing. As the Attorney General and petitioner noted in their main briefs, the risk a patient runs in not complying with a Kendra's Law order is that clinicians will try to persuade him to comply and that if he does not comply, a physician may require him to be examined to determine if he meets the standard for involuntary commitment. Mental Hyg. Law § 9.60 (n). Amici argue that the Kendra's Law order "can be exceedingly intrusive and an unreasonable burden on an individual's exercise of fundamental rights." Amici Brief at 5. However, the Legislature ensured that the treatment plan contained in Kendra's Law orders would fit each individual patient's needs by requiring that in each case a physician must testify about the rationale for each category of the treatment plan. Mental Hyg. Law § 9.60 (h)(4). Furthermore, if the treatment plan includes medication the testifying physician must explain the benefits and adverse effects of the medication, and if it includes blood or urine screens, the physician must explain how the patient's substance abuse exacerbates his psychiatric condition. Mental Hyg. Law § 9.60 (h)(4).

It has only been in the last fifty years that medication, treatment, and social programs have progressed to the point where patients with mental illness could maintain themselves safely in the community indefinitely. The State's interests under its police power and under the doctrine of parens patriae support the Legislature's attempt, as expressed in Kendra's Law, to prevent patients from experiencing deterioration, relapses, possible harm and re-hospitalization as a result of noncompliance with treatment.

CONCLUSION

FOR THE FOREGOING REASONS, THIS COURT SHOULD REJECT THE RESPONDENTS' AND AMICI'S ATTEMPT TO REQUIRE A FINDING THAT RESPONDENTS LACK CAPACITY

Dated: New York, New York
July 11, 2000

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PROOF OF SERVICE

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Dated: New York, New York
July 11, 2000

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