IN THE SUPREME OF PENNSYLVANIA
WESTERN DISTRICT

No. 17 WAP 2009

IN THE INTEREST OF F.C. III, A MINOR

APPEAL OF F.C. III

APPEAL FROM THE JUDGMENT ENTERED ON JANUARY 23, 2009, IN THE SUPERIOR COURT OF PENNSYLVANIA AT NO. 1302 WDA 2007

BRIEF FOR APPELLEE
(THE ATTOENEY GENERAL OF PENNSYLVANIA – INTERVENOR)

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COUNTER-STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked by appellant under 42 Pa.C.S.A. § 724(a). On July 13, 2009, this Court granted appellant's petition for allowance of appeal. In the Interest of F.C., III, ___ Pa. ___, ___, A.2d ___ (2009) WL 2023185.

COUNTER-STATEMENT OF THE ORDER IN QUESTION

The order granting allowance of appeal in this case is currently published electronically and appears at In the Interest of F.C., III, ___ Pa. ___, ___ A.2d ___ (2009) WL 2023185.

The order and opinion of the Superior Court in this case is published and appears at In the Interest of F.C., III, 966 A.2d 1131 (Pa. Super. 2009).

The seminal order and opinion of the Court of Common Pleas of Allegheny County, Juvenile Court Section, Orphans' Court Division in this case are unpublished but are found respectively in the Reproduced Record ("R.") at 5a-6a and attached as Appendix B to the Brief for Appellant.

COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The scope of review governing consideration of the constitutionality of a statute is plenary and standard of review is de novo. Commonwealth v. Davidson, 595 Pa. 1, 11, 938 A.2d 198, 203 (2007). Schmel v. Wegelin, 592 Pa. 581, 587, 927 A.2d 183, 186 (2007). The statute is presumed to be valid and will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution, and the party seeking to overcome the presumption of the statute's constitutionality bears a heavy burden of persuasion. Id.

COUNTER-STATEMENT OF THE QUESTION INVOLVED

I. WHETHER appellant has waived his various challenges to the constitutionality of Act 53 as being void for vagueness, as failing to provide for an impartial tribunal, as failing to provide adequately for the minor to be able to offer his own evidence at the commitment hearing or to challenge the evidence otherwise presented, and as failing to provide for involuntary commitment of the minor for drug dependency as the least restrictive alternative by failing to raise them in the hearing court?

(Answered in the affirmative by the Superior Court.)

II. WHETHER, aside from the absence of any indication that appellant presented the issue either to the Court of Common Pleas or to the Superior Court, his current failure in his brief in this case to meet the mandatory obligation of a litigant who seeks to assert his rights under the Pennsylvania Constitution to present an analysis of the claims under the four part Edmunds test means that appellant's claims under the state constitution cannot be considered by this Court?

(Not answered by the Superior Court?)

III. WHETHER, the procedures employed under Act 53, specifically, to initiate proceedings under the act against F.C., and to compel his attendance and participation in a professional assessment of whether he is a drug dependant child in need of inpatient treatment, and in general terms, as being an involuntary commitment statute, meet the demands of the right to due process of law under the U.S. Constitution?

(Answered in the affirmative by the Superior Court.)

IV. WHETHER, appellant's federal constitutional rights were violated because he was kept in physical restraints during the Act 53 hearing?

(Answered in the negative by the Superior Court.)

COUNTER-STATEMENT OF THE CASE

This is an appeal by allowance by F.C., III, a minor, from the order of the Superior Court of Pennsylvania entered at No. 1302 WDA 2007 on January 23, 2009, reargument of which was denied on April 2, 2009. This order affirms the order of the Court of Common Pleas of Allegheny County, Juvenile Court Section, Orphans' Court Division entered at No. 1081-07 on June 12, 2007 committing appellant for involuntary treatment as an inpatient for "drug dependence" under 71 P.S. § 1690.112a, "Commitment of Minors" (Act 53). It assails the constitutionality of the statute.

The Attorney General of Pennsylvania, Thomas W. Corbett, Jr., accordingly has elected to exercise his official prerogatives under Pa.R.A.P. 521 to file a brief for appellee as Intervenor in this case. By and through a deputy, the Attorney General entered his appearance as Intervenor on behalf of appellee on August 17, 2009.

The pertinent facts yield to brief summary in this case.

On May 30, 2007, Christina Kennedy, the grandmother, custodial parent and legal guardian for F.C., III, a minor then aged 14, filed a petition verified under penalty of law, invoking Act 53. She represented she believed F.C. was "doing drugs," had been a runaway, was truant and was stealing. Reproduced Record ("R.") at 3a. Accordingly, the Court of Common Pleas of Allegheny County, Juvenile Court Section, Orphans' Court Division entered an order directing appellant to undergo a drug and alcohol assessment under 71 P.S. § 1690.112a(b)(2), and setting a hearing under Act 53 at which appellant was required to appear, appointing counsel for appellant and directing his grandmother to serve appellant with the petition and court order. R.5a.

On June 12, 12007, the date set for the assessment and Act 53 hearing, appellant was taken into custody by sheriff's deputies at his home and transported to the location of the family court for the hearing. R.2.1a-R.2.3a. It remains unclear how this came about. He was held prior to the hearing alone in an isolated cell located in the basement of the courthouse. R.34a. To effectuate the hearing he then underwent the mandated assessment conducted by a certified addiction counselor (CAC). 71 P.S. §1690.112a(b)(2). Counsel was not present during the assessment. Appointed counsel asked the court at some point to accelerate the holding of the hearing because his client was being held in handcuffs and leg shackles and was distressed by the situation he found himself in. R.21a. The court granted the motion. Id.

At the beginning of the hearing counsel moved the court to have the appellant's handcuffs and shackles removed. Id. The court denied this motion, the judge noting without exception that he and counsel had both recently been privy to a discussion de hors the record with the county Act 53 coordinator who had expressed concern based on conversation with the grandmother that there was a risk F.C. might flee. R.22a-23a, 25. This pertinently was the court's basic concern. Id. The court observed the restraints did not impair appellant's ability to cooperate with his attorney in any way the court could perceive. R.22a-23a, 29a. The court also noted with regard to the physical restraints, at one point, that it necessarily would not be a lengthy proceeding by its terms and if F.C. were to be committed the restraints if removed would only have to be put back on for purposes of transporting him to a treatment facility. Id.

As required by Act 53 the certified addiction counselor, a Ms. Morgano, who did the mandated assessment testified. Counsel for F.C. stipulated to her qualifications. R.30a. He objected, however, to any forthcoming testimony from her based upon any statements appellant had made to her during the assessment as conducted in the absence of appointed counsel. R.30a,

33a. The court denied this motion on the grounds that it was a civil case and the statements were obtained strictly for therapeutic purposes. R.33a.

Ms. Morgano testified and was subject to cross-examination by counsel. She testified F.C. had a history of mental treatment as an outpatient, had been truant, a runaway and stolen money from his grandmother, who found him difficult to control at home. His grandmother said on occasions he smelled like marijuana and exhibited glassy eyes; she thought he smoked marijuana several times per week. Appellant told Ms. Morgano, however, he smoked a "blunt" daily and had been using marijuana for a year. R.40a-49a.

The court entered an order at the conclusion of the proceedings committing him for inpatient treatment under the act. The Attorney General acknowledges that this appeal is not moot, regardless of appellant's current statutes under Act 53. See, In re J.M., 556 Pa. 63, 726 A.2d 1041, 1045, n.6 (1999).

SUMMARY OF ARGUMENT

Appellant has indeed waived the claims that Act 53 is void for vagueness, that it is offensive to his right to an impartial tribunal, and that it fails to satisfy a supposed constitutionally imposed mandate requiring involuntary inpatient commitment to be the least restrictive alternative, just as the Superior Court found in its review of the case. He can find no solace from being caught in this predicament in the fallacy that there is some distinction for purposes of waiver between "grounds" and "theories," a misconception that was definitively discredited by this Court nearly thirty-five years ago.

He has also failed in his obligation as a litigant to properly present claims for relief based upon the Constitution of Pennsylvania by means of an Edmunds analysis.

This statute – Act 53 – is constitutional for the same reasons the comparable Mental Health Procedures Act are constitutional, just as the Superior Court found. It also proceeds upon the worthy premise that the procedural protections afforded to a respondent minor increase with the degree of intrusion to be justified or the degree and duration of the deprivation of liberty sought to be imposed. Involuntary commitment for therapeutic purposes does not need to mimic the procedures for a criminal trial in order to pass constitutional muster. But fundamentally, appellant's analysis must fail for its basic refusal to acknowledge that Act 53 strikes an appropriate balance here between his own undoubted constitutional rights and the no less important constitutional rights of his custodial parent – his grandmother in his case.

Finally, F.C. did not suffer a violation of his constitutional rights in this particular case because of the informed choice the hearing court made to exercise its discretion to have him kept in handcuffs and shackles during the hearing.

ARGUMENT

I. APPELLANT HAS FAILED TO PRESERVE ANY ISSUES FOR CONSIDERATION ON THIS APPEAL BEYOND THOSE ADDRESSED BY THE SUPERIOR COURT IN ITS PREVIOUS OPINION IN THIS CASE.

The Superior Court properly confined its appellate review in this case to those issues appellant actually had raised in the hearing court when his hearing under Act 53 was held and that the hearing court accordingly had addressed in its Rule 1925 opinion after the notice of appeal had been filed. These therefore are also the only issues currently before this Honorable Court in the present review.

Specifically, they are limited to solely to the following issues: (1) whether Act 53 is unconstitutional (both on its face and as applied to F.C.) as violative of the federal constitutional guarantee of due process of law a) because the minor has no notice, prior to the filing of the petition by the parent or guardian that initiates proceedings under Act 53, of the allegations the petition contains, nor an opportunity to confront or contest them before a petition is filed nor does the minor have a right to counsel at this stage; b) because after the petition is filed, and solely on the basis of the allegations contained there the minor is constrained to participate in a professional assessment of whether the minor is drug dependent, by physical constraint and detention if necessary, at which appointed counsel need not be present, and during which the minor is effectively subject to compulsion to disclose information of a private or personal nature in connection with the inquiry into whether the minor is dependent drug; and c) because whether conducting the assessment provided for under Act 53 without affording appointed counsel the chance to be present for it. violates the minor's right to appointed counsel that is also provided for under the act after the petition has been filed; and (2) whether the

appellant's constitutional right to due process during the Act 53 hearing under the Fourteenth Amendment was violated because a) he was handcuffed and shackled before and during the hearing; and because b) the minor's statutory right to appointed counsel under Act 53 is effectively violated by the possibility posed by these restraints, as employed in the manner that they were used here, to impair the minor's ability to communicate with counsel. In the Interest of F.C., III, 966 A.2d 1131, 1133 (Pa. Super. 2009). See also, In the Interest of: F.C., Docket No. 1081-07, Court of Common Pleas of Allegheny County, Juvenile Court Section, Orphans' Court Division, Opinion (Dec. 21, 2007) at 5, 9, 10 (explicitly compressing and reorganizing the eight (8) items set forth in the concise statement of matters complained of on appeal to fall into roughly the preceding categorization); Appendix B to the Brief for Appellant. The various speaking objections that appellant's counsel lodged during the course of the Act 53 hearing itself basically and materially correspond to, and are coextensive with, the issues identified as having been preserved for appellate review by the Superior Court. Reproduced Record (R.) at 21-23, 29-33. Counsel for the appellant in the hearing however, did not raise, or attempt to raise, any other additional issues before the hearing court on F.C.'s behalf besides those identified by the Superior Court as having been preserved for review.

The Superior Court also identified several other novel legal theories that pertain ostensibly in general relation to his contention the Act 53 violates due process that appellant attempted to raise for the first time on that appeal: 1) that Act 53 is void for an unconstitutional degree of vagueness; 2) that Act 53 impermissibly conflates prosecutorial and adjudicative functions in the person of the hearing judge thus depriving the minor of an impartial tribunal; 3) that the act does not afford the minor an adequate opportunity to offer evidence at the hearing or to challenge the evidence presented; and 4) that it is neither sufficiently narrowly tailored, nor so

careful to limit a minor's confinement for treatment as an inpatient only to the situation when it is the least restrictive alternative available, as to survive the strict scrutiny required for it to be found constitutional. The Superior Court concluded they had all been waived by appellant. In the Interest of F.C., III, supra, 966 A.2d at 113, n.1. The Attorney General as intervenor in defense of Act 53 strongly urges this Honorable Court to adopt precisely the same view of this matter that the Superior Court has previously done in this regard. It is the correct one, simply put.

These particular issues have been waived. It axiomatic that issues not raised and preserved in proceedings before the lower court may not be pursued by an appellant on appeal. Pa.R.A.P. 302(a). Through his counsel, F.C. does not presently try to demonstrate in his brief where he raised the specific issues that the Superior Court found to have been waived in the Act 53 hearing before the court of common pleas. Appellant instead attempts to circumvent this plain prohibition by arguing that, in effect, these specific issues are fully incorporated within the general category of his overall challenge to the constitutionality of Act 53 facially and as applied as violative of due process. Brief for Appellant at 27, n.32. This is nothing more than an a woefully anachronistic effort to introduce the fundamentally captious conceptual distinction between "grounds" and "theories" as a clever means for an appellant to evade the consequences of suffering waiver as the inexorable sanction for having failed first to have raised the particular legal theory now sought to be presented on appeal for the full and informed consideration of the court below. Pennsylvania jurisprudence, however, has long denied to the hapless appellant who is embarrassed to find himself in such a predicament this essentially specious means of extrication. F.C. must be treated no differently.

"To make a distinction upon the fact that one is merely advancing a new theory, creates a fiction which frustrates the very purpose sought to be accomplished by strict application

of waiver." Commonwealth v. Mitchell, 464 Pa. 117, 126 346 A.2d 48, 53 (1975) overruling, Commonwealth v. Wayman, 454 Pa. 79, 82, n.1. 309 A.2d 784, 787, n.1 (1973) (articulating the "grounds" and "theories" distinction as means of avoiding waiver); Commonwealth v. Polof, 238 Pa.Super. 565, 569-573, 362 A.2d 427, 430-431 (1976). Thus, it remains a "salutary and fundamental principle of appellate review" in Pennsylvania that on appeal a court will not reverse a judgment on a legal theory that was not presented to the lower court. Commonwealth v. Klobuchir, 486 Pa. 241, 248, 405 A.2d 881, 884 (1979); Kimmel v. Somerset County Commissioners, 460 Pa. 381, 384, 333 A.2d 772, 779 (1975). None of the issues the Superior Court found to be waived were, in terms of legal theories for relief, ever presented to the court of common pleas in this case.

Indeed, the present case clearly illustrates the practical significance in application of one of the primary rationales offered by this Court for rejecting the "grounds" versus "theories" distinction for circumventing waiver in its Mitchell decision. Specifically, in Mitchell, supra, this Court reasoned that a major reason for rejecting the "grounds" and "the theories" distinction of Wayman, supra, is that it would result in appellate review of an issue for which neither a full record had been made in the court below nor would the appellate court have the benefit of reviewing the lower court's reasoning and ruling on the matter at issue. And that proves to be just exactly the case instantly regarding those issues that the Superior Court found to have been waived by appellant's failure to present them to the hearing court. There is no record to guide and inform an appellate review of the issues and there is ultimately no ruling or an opinion of a court concerning them for this Court to review.

The fact that appellant, through counsel, made a "Motion for Evidentiary Hearing, Nunc Pro Tunc, on Prehearing Custodial Detention" should not alter any of the preceding

analysis. R.12a-16a. First, the motion was not filed until July 10, 2007, or contemporaneously with the filing of the notice of appeal of the basic order of court (entered on June 12, 2007) committing F.C. for treatment under Act 53. R.7a.-10a. Although this motion was summarily denied on July 17, 2007 by the hearing court, that court actually did not have jurisdiction to act on the motion at that point because a timely appeal had also been taken. Pa.R.A.P. 1701(a). The entry of the order is accordingly an ultra vires act and thus legally a nullity. Of course, by the very same token, the motion for an evidentiary hearing, nunc pro tunc, itself was also a nullity, at that point, and indeed it was the generative nullity. This is the fact of the matter with it since there was no real decisional jurisdiction over the case remaining in the court of common pleas at the time the motion was filed, due the simultaneous filing of the notice of appeal, unless it would be for the hearing court to entertain a timely filed motion for reconsideration. Pa.R.A.P. 1701(b).

The motion expressly is not characterized as a motion for reconsideration. Nor is it a de facto motion for reconsideration if it is considered in terms of the relief it seeks. If, for the sake of argument alone, the motion for an evidentiary hearing, nunc pro tunc, however, were to be considered as a motion for reconsideration (and as one that is timely under the statute which establishes the general rule that such a motion must be filed within 30 days of the order whose reconsideration is sought, i.e., 42 Pa. C.S.A. § 5505), then the fact still remains that as such a motion it was denied by operation of law two days after it was filed (or on July 12, 2007) -- regardless of the hearing court's subsequent ultra vires order to the same effect. And this is simply because the hearing court did not enter "an order expressly granting reconsideration" at any time within the remainder of the thirty (30) day time period for filing a notice of appeal from

the commitment order of June 12, 2007 -- or by July 12, 2007. Pa.R.A.P. 1701(b)(3)(ii).[1] However it is considered, this motion did not succeed in changing the parameters of the universe of discourse for this appeal from those so carefully limned by the Superior Court.

A final point remains: appellant, through his counsel, has not succeeded in raising and preserving any claim of error based upon the proposition that Act 53 is violative of Art. I, Section 1 of the Constitution of Pennsylvania, the state's own due process clause. This is quite evident from the absence of any apparent reference to the due process provision of the Pennsylvania Constitution in either the hearing, the hearing court's opinion or Judge Colville's opinion for the Superior Court, in which appellant's claims notably are addressed without making reference to the state constitution and exclusively in terms of the Fourteenth Amendment.

More importantly, however, appellant in his current brief, (which -- noting his Table of Authorities at page v -- fails to even to cite to Article I, Section 1) fails to essay any attempt at doing the four part Edmunds analysis for considering whether a state constitutional provision affords greater protections than the comparable provisions of the U.S. Constitution, or is otherwise coextensive with them in this respect. This is, however, plainly recognized by the law to be his mandatory duty and obligation as a litigant seeking here to obtain the specific protections of the Constitution of Pennsylvania. Jubelirer v. Rendell, 598 Pa. 16, 28-34, 953 A.2d 514, 521-525 (2008). His failure to meet this obligation would be fatal to any effort on his part to have his claims due process, had they otherwise been preserved for appeal considered under the Pennsylvania Constitution.

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[1] This disposition itself has, of course, never been assigned for appellate review as an error by a appellant in any conceivable sense at any point in this case, nor hypothetically speaking, would it be within the scope of the present terms of his Court's grant of allocator instantly if he had ever done so.

Therefore, only those issues previously identified and considered by the Superior Court in this Case as having been preserved for review, under the terms in which they were specifically considered by the Superior Court, are before this Court on the present review. That is all that has been duly preserved. Cf., In re J. M., 556 Pa. 63, 83, n.15, 726 A.2d 1041, 1051, n.15 (1999) (This Court refused to consider the merits of an alleged due process violation on review of an appeal by allowance from Superior Court by a person challenging his commitment for involuntary mental health treatment that had first been raised sua sponte by the Superior Court because appellant had waived it by failing to raise it in the lower court.) It is respectfully submitted that the grant of allocatur by your Honorable Court in the instant case ought to be viewed through this lens.[2]

II. IN GENERAL, ACT 53 FULLY AFFORDS DUE PROCESS TO THE MINORS WITH WHOM IT IS CONCERNED AND F.C.'S RIGHT TO DUE PROCESS WERE SPECIFICALLY RESPECTED IN HIS CASE.

In a very comprehensive sense, F.C.'s argument that Act 53 is unconstitutional is, by and large, the captive of a flawed premise -- that the only constitutional rights at issue in this case, the only rights that matter, are his rights under the U.S. Constitution not to be deprived of

[2] Neither those issues identified at footnote 1 of the Superior Court's opinion nor any claim of violation of the state constitution have any place in this review. In the Interest of F.C., III, supra, 966 A.2d at 133, n.1. This means stripping out the following portions of the brief for appellant: primarily Argument II, C. in the brief for appellant in its entirety, challenging Act 53 as void for vagueness; the argument presented in the brief for appellant in footnote 40 on page 35 regarding the alleged confusion of prosecutorial and adjudicative roles resulting in the loss of an impartial tribunal; and the invitation to find a violation of the state constitution in the heading of Argument II., A. (See also page 24 in this regard.) To the extent appellant argues now that involuntary commitment for drug treatment is unconstitutional unless it is the least restrictive alternative (at pages 15-17 of his brief) that is also waived. He seems to have abandoned the argument concerning the ability of a minor to offer evidence at the hearing or to confront the evidence presented as a basis for his argument for reversal based upon an alleged due process violation.

his liberty without due process of law. That is simply not true. Just as in the case of any legal procedure that is available to parents or guardians for obtaining mental health care or behavioral care for an emotionally disturbed child in their custody and under their care (with or without the direct aid of the state, depending on the child's degree of recalcitrance), when providing such care involves imposing some level of significant physical constraint or confinement of the child in order to assure its provision, the child in proceedings under Act 53 is certainly not the only one, in the sense of having constitutional rights, "with skin in the game." The parent is also a "stake holder." The well-established constitutional rights of the parent to be a parent, and the corresponding duty to be a "fit parent" are also profoundly involved under the circumstances whenever Act 53 is invoked. Here that person, his parent in effect, is F.C.'s grandmother, his legal guardian. The Attorney General as intervenor vigorously maintains that appellant's failure to grasp this point - that his grandmother's constitutional rights are also implicated - and to make any attempt to come to terms with it in the context of the due process challenge he has mounted to the statute here, and his concomitant failure in this same context, as well, even to acknowledge the existence of a parent's constitutional right to care for her child, much less the recognition that it is involved here, must be considered in the final analysis to have deprived his argument of weight it needs to prevail.

Recent decisions of both this Honorable Court and the U.S. Supreme Court have reaffirmed the strength of our law's historic commitment to recognizing that a parent has fundamental right, that is constitutionally protected under the rubric of substantive due process, to make decisions concerning the care, custody and control of their children. Hiller v. Fausey, 588 Pa. 342, 358, 904 A.2d 875, 885 (2006); Schmehl v. Wegelin, 592 Pa. 581, 588, 927 A.2d 183, 187 (2007); Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this

case-the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this Court.") Its origins in the jurisprudence of the U.S. Supreme Court have been traced back to Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society v. Sisters, 268 U.S. 510 (1925). The Court in Parham v. J.R., 442 U.S. 584, 602 (1979) observed that its jurisprudence in this respect consistently reflects the traditional concept of the family rooted in Western civilization that invests parents with broad authority over minor children. See also, Wisconsin v. Yoder, 406 U.S. 205, 532 (1972) Concomitantly, this view has also engendered the legal presumption that a parent acts in the best interests of the child. Parham, supra, 442 U.S. at 602. Your Honorable Court is second to none in valuing the importance of this fundamental right. In Hiller, supra, this Court answered the question expressly left open by the U.S. Supreme Court in Troxel, regarding what level of judicial scrutiny is appropriate for reviewing the constitutionality of legislation that trenches upon it, by concluding that only the most rigorous and demanding form, or "strict scrutiny", will suffice.

With such strong rights, it has always been thought, come equally exacting and "high" duties for a parent. Pierce, supra, 268 U.S. at 535. Chief among these is the duty to provide needed medical care for the child, especially in exigent or potentially life-endangering circumstances. Prince v. Massachusetts, 321 U.S. 158 (1944); Parham v. J.R., supra, 442 at 602 (parents' duties "include a 'high duty to recognize symptoms of illness and to seek and follow medical advice"); Commonwealth v. Nixon, 563 Pa. 425, 428-429, 761 A.2d 1151, 1153 (2000) (construing the criminal offense of endangering the welfare of children under 18 Pa. C.S.A. § 4304, this Court notes that "[b]y mandating primary responsibility for the child's well-being upon the parents, the legislature has not only acted toward fulfilling its role as parens patriae, but

has also recognized that parents have to provide for their children which accompanies the right to raise children with minimal state encroachment.").

"For centuries it has been a canon of the common law that parents speak for their minor children. So deeply embedded in our traditions is this principle of law that the Constitution itself may compel a state to respect it." Parham, supra at 621 (Stewart, J. concurring). Yet "in ironic contrast," counsel for appellant would have its Court hold, in effect, that the United States Constitution commands that parents can have no voice when it comes to seeking the state's aid in obtaining treatment for their unfortunate child who is dependant on drugs. Id.[3] The Attorney General asserts that, on the contrary, in enacting Act 53 the Commonwealth has acknowledged parents should have a voice in such matters, and that it is not only in the best interest of society that they do, but in the best interests of their afflicted children

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[3] Justice Stewart's further reflections in Parham, a case that upheld Georgia's statutory scheme permitting parents or guardians to secure the voluntary admission of minor children to mental hospitals for treatment, are apt in the context of the present case:

> Under our law, parents constantly make decisions for their minor children that deprive the children of liberty and sometimes even of life itself. Yet surely the Fourteenth Amendment is not invoked when an informed parent decides upon major surgery for his child, even in a state hospital. I can perceive no basic constitutional differences between commitment to a mental hospital and other parental decisions that result in a child's loss of liberty.
>
> I realize, of course, that a parent's decision to commit his child to a state mental institution results in a far greater loss of liberty than does his decision to have an appendectomy performed upon the child in a state hospital. But if, contrary to my belief, this factual difference rises to the level of a constitutional difference, then I believe that the objective checks upon the parents' commitment decision, embodied in Georgia law and thoroughly discussed, *ante*, (...) are more than constitutionally sufficient.

Id., 624.

as well, considering the law presumes that in fact is the polestar of the fit parent. Act 53 is really an effort to assure that parents will be able to exercise their ability to act in their child's best interest when they find themselves in a particularly difficult situation where they need the assistance of the state in order to be able to do so.

That this effort passes constitutional muster is a conclusion that must proceed first form the recognition that the situation of a recalcitrant child with an intractable drug problem whose parent or guardian needs to get him into treatment involves a degree of tension between the constitutional rights of both parent and child. In evaluating a comparable scenario where the parent seeks to have the child voluntarily committed for mental health treatment, the U.S. Supreme Court in Parham, supra, 442 U.S. 584, 600 acknowledged,

> We must consider first the child's interest in not being committed. Normally, however, since this interest in inextricably linked with the parent's interest in and obligation for the welfare and health of the child, the private interest at stake is a combination of the child's and the parents' concerns.

The same is true for Act 53.

Second, by its terms Act 53 is not a punitive criminal or delinquency statute. Its language is explicitly "civil" in nature and its focus is on treatment and recovery, not sanction and punishment. Allen v. Illinois, 478 U.S. 364, 368-369 (1986) (finding the Illinois Sexually Dangerous Persons Act to be a civil commitment statute so that the right against self-incrimination consequently had no application to it.) Commitment under Act 53 is to "involuntary drug and alcohol treatment services." 71 P.S. 1690.112a(a); Allen, supra at 373 (mandating commitment to a psychiatric hospital also shows that the statutory purpose is treatment, not punishment); c.f., In re K.K., 957 A.2d 298 (Pa. Super. 2008) (under certain circumstances a non-delinquent juvenile can be detained, but cannot lawfully be confined in a

secure juvenile detention facility). "In civil commitment state power is not exercised in a punitive sense." Addington v. Texas, 441 U.S. 418, 428 (1979). Your Honorable Court has utilized the same terms of analysis in finding that the Mental Health Procedures Act (50 P.S. §§ 7301 et seq.) is "civil" in nature, and treatment-focused in purpose, in concluding that a showing under the criminal standard of "probable cause" is not constitutionally required to support the issuance of a warrant under its provisions for an emergency mental health examination (50 P.S. § 7302(a)(1)) but that the "clearly less exacting" standard of "reasonable grounds," even if based on hearsay, will suffice. In re J. M., 556 Pa. 63, 73-79, 726 A.2d 1041, 1046-1049 (1999).

Juxtaposed against this must be the frank realization and resulting concern that, just as is the case in any other statute involving the involuntary commitment of a person for some form of mental health treatment, the ability of an individual to avoid or evade treatment by remaining free, far from being an unalloyed "good thing" in its own right, as indeed are most "liberty" interests in most circumstances, can instead prove to be most harmful for the individual himself -- if it means he does not get the treatment he desperately needs. Addington, supra, 441 U.S. at 428-430 (observed in connection with rejecting a standard of proof beyond a reasonable doubt on due process grounds in favor of a standard of proof by "clear and convincing" evidence for involuntary commitment for mental health treatment); In re J.S., 526 Pa. 418, 428 586 A.2d 909, 914 (1991) (stating "if involuntary treatment is all that is available to protect a person from harm and even death then the availability of this form of mental treatment is to be valued and encouraged."). This is true, a fortiori, in the case of a child in need of treatment. See Parham, supra, 442 U.S. at 601 (stating "the child who exhibits abnormal behavior may be seriously injured by an erroneous decision not to commit"). Therefore, in such circumstances therapeutic concerns are ill-served by a process animated by the restrictive approach to due process that is

characteristic of criminal procedure. In re J. M., supra at 76-77, 726 A.2d at 1048; In re R.D., 739 A.2d 548, 556 (Pa. Super. 1999); see also, Allen, supra, 478 U.S. at 372 ("Addington demonstrates that involuntary commitment does not itself trigger the entire range of due process protections.")

The state's parens patriae authority adds a final complication to be juggled in a context of framing a constitutionally valid commitment statute. "The 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." Allen, supra, 478 U.S. at 373. That this power extends to cover drug dependent children cannot be seriously disputed, especially after the opinions that were handed down in Prince and Commonwealth v. Nixon.

The method the law uses to deal with the problem of squaring the circle of these competing rights and their attendant considerations in at this point is both well-established and is well-settled by caselaw to be one that is satisfactory for due process. And it is therefore not remarkable that Act 53 too employs this structure. The recognition of this point underlies and comprises the Supreme Court's primary rationale for upholding the act in the fact of present constitutional challenge. The Attorney General respectfully submits that this Court should find no cause to differ with Superior Court on this subject.

In the particular area of providing involuntary mental health treatment of a minor, where one would reasonably consider that the consideration of a statute governing the involuntary commitment of a minor for drug dependence, like Act 53, fits, one might well think that the law would decide that parens patriae power and the parents' constitutional right to care for their child combine into a juggernaut that would work together to totally extinguish any right the child has to remain free and to avoid it. That, however, is not the case.

The child's liberty interests are not so important as to compel state intervention to cancel out that of his parent in this context. Parham, supra, 442 U.S. at 603. Neither are they inconsequential. Even in the situation of a parent voluntarily placing a disturbed child into a commitment for mental health treatment some process is nevertheless still due to make sure a parent does not abuse the procedure to "dump" a troublesome or unwanted child. Parham, supra at 604, 606-607.

Proceeding from this premise the legislature has developed, and your Honorable Court has approved, what has been characterized a "measured approach" to affording due process in the area of involuntary mental health commitment proceedings. In re R.D., 739 A.2d 548, 556 (Pa. Super. 1999); see In re J.M., supra, 556 Pa. at 75-76, n.9, 726 A. 2d at 1048. n.9, and Matter of Seegrist, 517 Pa. 568, 574, 539 A.2d 799, 802 (1988). "[The scheme adopted by the legislature ... envisions that more extensive or procedural or 'due process' protections will apply as the amount of time a person may be deprived of liberty increases above a bare minimum." Seegrist, supra. In other words it is a sliding scale approach as exemplified in Section 302, 303 and 304 of the mental health procedures act and judicially approved by the various state cases cited previously.

As Judge Colville perceived in writing for the Superior Court in this case, Act 53 fits comfortably within this concept.[4] These conclusions are explicitly drawn in the Superior Court's Opinion by comparison to the mental health statute and the cases of this Court approving its various provisions. In re F.C., III, supra, 966 A.2d 1131, 1136-1137. It is respectfully submitted that this Honorable Court should give them its imprimatur.

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[4] Indeed compare the similarities between 50 Pa. C.S.A. § 7303(b) approved in R.D. with 71 P.S. 1690.112a(b) and (c).

Appellant's primary due process attack focuses upon him having been taken into custody and held in brief detention, and then subjected to a psychological and professional assessment as to whether he was drug dependent at which his appointed counsel was not present, and before he had consulted with him, that occurred immediately prior to hearing on that same day.

This is necessarily compelled by the fact that he could have nothing to criticize in regard to a due process violation in the hearing itself, in the sense of the procedures by which it was conducted. It was held before a judge, while F.C. was represented by counsel, who presented argument and cross-examined his professional assessor on his behalf, and where the commitment decision was required to be reached in terms of the constitutionally compelled standard of "clear and convincing" evidence, and following reflection and due consideration of whether the period of involuntary inpatient treatment ordered was the least restrictive alternative, although that is not recognized as being a constitutional requirement. Clark v. Cohen, 794 F.2d 79 (3d Cir. 1986); 71 P.S. § 1690.112a(c)(1)-(3).[5]

Appellant casts aspersions on the short and simple annals of his grandmother's Act 53 petition as providing sufficient due process to initiate involuntary treatment proceedings. R.2a-4a. They are definitely not unverified. The statements are expressly made under penalty of unsworn falsification to the authorities, 18 Pa. C.S.A. § 4904. R.3a. She is his parent and guardian with a legal duty to take care of him extending to getting him the health care he needs.

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[5] The assessment was done here by a certified addiction counselor (CAC), Ms. Morgano, as expressly permitted by the statute at subsection b) (2). In the J.M. decision this Court approved the use of a crisis service mental health unit worker to do the examination as being a "responsible person" in terms of the mental health act in connection with conducting an examination for an emergency commitment required under 50 Pa. C.S.A. § 7302. In re J.M., supra at 80, n.12, 726 A.2d at 1050, n.12.

It is enforceable under the criminal law. She has a constitutional right to parent him in this respect.

The petition certainly set forth constitutionally sufficient grounds to support a de facto "warrant" to have had F.C. taken into such custody and subjected to such detention as was necessary to do a professional assessment of whether he was drug dependent. That is the only period of custody conceivably at issue and it is measured in hours. The J. M. decision should control accordingly in this respect. Moreover, to paraphrase the language that this Court endorsed in J.M., this -- just like a Section 302 warrant -- is "a warrant to take [a child] to a doctor, not to take [a child] to jail." Id. at 75, 726 A.2d at 1047.

This leaves only his claim respecting the absence of counsel from the assessment coupled with the suggestion due process also required F.C. to have something like a right to remain silent during it or not to be compelled to participate verbally. It deserves short shrift. This was not a police interrogation in a criminal case. Fundamentally, his grandmother as his custodial parent got F.C., a child, to "see someone," so to speak, who was a qualified professional, about his drug problem, in order to see if he indeed had a serious problem, needed treatment for it and needed to go to facility to get it. That she had to go about it in an usual way, by getting the compulsion of law and here ultimately the sheriff's deputies to make him go to the appointment mustn't obscure that this is what it amounted to. As essentially a kind of medical proceeding counsel had no role to play in it as such. See Parham, supra, 442 U.S. at 609. It is more the "meaning" of the facts as professionally assessed and not so much the facts themselves that control the outcome reached in the assessment. Addington, supra, 441 U.S. at 429. Finally, if Allen did not have the federal due process version of a right against self-incrimination for an examination conducted under the Illinois Sexually Dangerous Persons Act, F.C. could not have

had one during his interview with a drug addiction counselor. Under Act 53, F.C. got at least all the process he was due prior to the hearing itself and unquestionably had due process in the hearing itself.

III. APPELLANT DID NOT SUFFER A VIOLATION OF HIS CONSTITUTIONAL RIGHTS RECAUSE OF HOW HE WAS HELD IN PHYSICAL RESTRAINTS AT THE ACT 53 HEARING.

The Superior Court found that appellant was not deprived of substantive due process by being handcuffed and shackled during the Act 53 hearing, neither in and of itself nor insofar as it interfered with the exercise of his statutory right to assistance of counsel afforded him by Act 53.[6] In re F.C., III, 966 A.2d 1131, 1138-1140 (Pa. Super. 2009).

As the Superior Court observes there is nothing in terms of procedures for using physical restraints in hearings held under the act in Act 53 one way or the other. The question

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[6] Appellant was taken into custody at his home by sheriff's deputies and then to the Court of Common Pleas Family Court location where he was held briefly in a holding cell in its basement and then underwent an assessment by a CAC at that location. All of this occurred shortly before the Act 53 hearing was held on June 12, 2007. Aside from what authority to do so might be implied from the lower court's order ordering the assessment and scheduling the Act 53 hearing, there appears to be no order or warrant in the record authorizing the deputies to take F.C. physically into custody in this manner. Cf., Opinion below (Brief for Appellant, Appendix B) (referring to issuance of an attachment). There are some vague indications that his grandmother essentially thought this procedure was needed to get F.C. to go to the court-ordered assessment or appear for the court-ordered hearing, but no record on this matter was specifically made in the lower court. See R.23a. There are no indications in the Superior Court's opinion that this matter was presented to it by appellant as part of his claim he was deprived of due process by Act 53 as it was applied in his case. It is not addressed therein. It thus should not comprise a legitimate aspect of the current review. Act 53 itself does not specifically mandate or otherwise address this procedure. It is submitted, however, that the Superior Court's holding that it did not offend due process under the circumstances to have appellant held in handcuffs and shackles at the Act 53 hearing logically means it could not have done so to apply these restraints earlier. The same justifications for the restraints would apply in both situations, by and large. F.C. was not held in a facility or holding cell along with accused or adjudicated delinquents while he awaited assessment and hearing. R.34a.

thus essentially becomes whether appellant's right under "substantive due process" to be free from arbitrary and irrational official conduct that "shocks" the judicial conscience was violated.[7]

As the Superior Court explains, F.C. cannot sensibly place his claim on the grounds of alleged, prejudicial impact such restraints might have had upon the fact finder: there was no jury here, of course, sitting in that role. Id., 1139. There is no reason to presume that a prejudicial impact upon a seasoned and well-regarded juvenile court trial judge resulted from him seeing the youth here in restraints. And Superior Court does not.

The relative brevity of the period that appellant was confined by these restraints removes duration as a factor for consideration too, it may be logically presumed. And Superior Court did so. Id., 1139.

The record does show that the hearing judge specifically considered whether or not the restraints prevented F.C. from communicating with his counsel, overruling counsel's pertinent objection, observing that in his opinion based on his observations, it simply was not the case. R. 22-23, 29. "The record indicates the court considered this matter and observed that F.C. and his counsel were able to communicate. There is nothing in the record to suggest the court was wrong. Moreover, F.C. offers us no specifics or elaboration as to how the restraints did in fact interfere with his right to counsel." Id., 966 A.2d at 1140.

Finally, we are left with the final question of whether it nonetheless somehow violated F.C.'s rights as the juvenile respondent in an Act 53 hearing to be in physical restraints during the proceeding. The Superior Court concludes plainly and clearly that the hearing court duly exercised its discretion here to order that the restraints be maintained but offers no guidelines for analysis. Id., 1140.

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[7] Substantive due process is somewhat of a standardless inquiry in practical fact, as some legal critics have pointed out from its inception.

The Attorney General respectfully submits that those federal Courts of Appeal that recognize the general right of a convict as plaintiff in a jury trial in a prisoners' civil rights action to be free of physical restraints in the courtroom, nevertheless permit it to be infringed in the judge's discretion in certain circumstances. Analyzed under these borrowed principles, appellant's rights were not violated by these restraints here. Lemons v. Skidmore, 985 F.2d 354 (7th Cir. 1993); Davidson v. Riley, 44 F.3d 1118 (2nd Cir. 1995); Holloway v. Alexander, 957 F.2d 529 (8th Cir. 1992). No steps were needed to be taken to minimize the potential for prejudicing the jury because there is no jury under Act 53. The restraints apparently were the minimum necessary to prevent his flight and were handcuffs and leg shackles – neither unwontedly peculiar nor elaborate in form as, for example, those that might have been appropriate for a "Hannibal Lector" sort of character. Finally, while the hearing judge, considering that the sheriff's office was primarily responsible for security in the courtroom, accordingly informed the exercise of his discretion here by considering the sheriff office's position on the need for physical restraints in the hearing, he did not slavishly defer to it. The court's significant and controlling consideration here was the existence of some indications to support a fear F.C. might flee. R. 22a-23a, 25a.

CONCLUSION

WHEREFORE, it is respectfully requested that the order of the Superior Court of Pennsylvania be affirmed.

Respectfully submitted,

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