IN THE SUPREME COURT OF PENNSYLVANIA

APPELLATE DOCKET 1302 WDA 2007

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, No. 1302 WDA 2007

BRIEF FOR APPELLANT

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this matter pursuant to Pa. R.A.P. 1112 and 42 Pa. Cons. Stat. Ann. § 724(a) (West, Westlaw through Act 2009-21). This Court granted Appellant, F.C.'s Petition for Allowance of Appeal on July13, 2009.

ORDERS IN QUESTION

Appellant seeks review of the Decision of the Superior Court, entered January 23, 2009, affirming the order of the Court of Common Pleas 1) to involuntarily commit F.C., and 2) rejecting F.C.'s challenge to the constitutionality of 71 Pa. Stat. Ann. § 1690.112a (hereinafter "Act 53"). The Opinion of the Court is reported at In the Interest of F.C., 966 A.2d 1131 (Pa. Super. Ct. 2009) (Colville, J.) and is attached as Appendix A.

STATEMENT OF SCOPE OF REVIEW AND STANDARD OF REVIEW

When considering questions of law, the Supreme Court extends plenary review and the standard is de novo. Hospital & Healthsystem Ass'n of Pennsylvania v. Dep't of Pub. Welfare, 888 A.2d 601 (Pa. 2005). This Court exercises plenary review over the trial court's conclusions of law, Tomaskevitch v. Speciality Records Corp., 717 A.2d 30, 32 (Pa. Commw. Ct. 1998); Phillips v. A-Best Prods. Co., 665 A.2d 1167, 1170 (Pa. 1995), and has an obligation to make an independent examination of the entire record in determining whether a constitutional right has been violated, Brown v. Philadelphia Tribune Co., 668 A.2d 159, 163 (Pa. Super. Ct. 1995). Where, as here, the essential findings of fact are conceded or are undisputed and the trial court's decision rests on an interpretation and application of the law rather than on the facts, this Court's review is broad.

Courts have an important responsibility to protect citizens' rights and they are the final arbiters of whether a statute passes constitutional muster. While deference to legislation is appropriate so long as it is functioning within constitutional constraints, "it would be a serious dereliction on [the part of a court] to deliberately ignore a clear constitutional violation." Common Cause/Pennsylvania v. Commonwealth., 710 A.2d 108, 117 (Pa. Commw. Ct. 1998). Where the facts are agreed upon and the question presented is whether or not a violation of a mandatory constitutional provision has occurred, judicial intervention is warranted. Id. In short, it "is a traditional and inherent power of the Courts to decide all questions of Constitutionality." Stander v. Kelly, 250 A.2d 474, 478 (Pa. 1969).

STATEMENT OF QUESTIONS INVOLVED

Whether 71 Pa. Stat. Ann. § 1690.112a ("Act 53") violates due process protections provided by the Fourteenth Amendment to the United States Constitution or Article 1, Section 1 of the Pennsylvania Constitution.

STATEMENT OF THE CASE

Nature of the Action

This case presents a question of first impression in this court. Appellant challenges the constitutionality of Act 53, 71 Pa. Stat. Ann. § 1690.101 et seq.[1], a provision of the Pennsylvania Drug and Alcohol Abuse and Control Act, that allows parents or guardians to petition courts to order involuntary civil commitment of their children to drug and alcohol treatment programs. Prior to the passage of Act 53, all persons subject to involuntary commitment for alleged drug or

[1] Act of Nov. 26, 1997, No. 53, sec. 3, 1997 Pa. Laws 622 (amending Pennsylvania Drug and Alcohol Abuse Control Act, 71 Pa. Stat. Ann. § 1690.101 et seq.) (Westlaw, West through Act 2007-77) ("Act 53") (*infra* for full text).

alcohol dependence in Pennsylvania could be committed by the court only in accordance with the involuntary commitment provisions of Pennsylvania's Mental Health Procedures Act[2] (hereinafter "MHPA"). Act 53 amended the Drug and Alcohol Abuse Control Act to carve out drug dependent minors from the class of all other persons otherwise committable under the MHPA and established, for the first time, specific involuntary treatment and commitment procedures for drug dependent minors only. [3]

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[2] 50 Pa. Stat. Ann. § 7101 et seq. (Westlaw, West through Act 2007-77).

[3] Section 1690.112a(a) requires the division or judge assigned to proceedings under the Commonwealth's Juvenile Act to review the results of the state-compelled assessment and determine drug dependency, yet none of the substantive or procedural provisions of the Juvenile Act apply either. Thus, pursuant to Act 53 alone, adjudicated minors can be ordered into treatment for an initial forty-five days that can be continued for successive forty-five day periods. Act 53 provides in pertinent part as follows:

> (a) A parent or legal guardian who has legal or physical custody of a minor may petition the court of common pleas of the judicial district where the minor is domiciled for commitment of the minor to involuntary drug and alcohol treatment services, including inpatient services, if the minor is incapable of accepting or unwilling to accept voluntary treatment. The petition shall set forth sufficient facts and good reason for the commitment. Such matters shall be heard by the division or a judge of the court assigned to conduct proceedings under 42 Pa. C.S. Ch. 63 (relating to juvenile matters), involving children who have been alleged to be dependent or delinquent.
>
> (b) Upon petition pursuant to subsection (a), the court:
>
> (1) Shall appoint counsel for the minor.
>
> (2) Shall order a minor who is alleged to have a dependency on drugs or alcohol to undergo a drug and alcohol assessment performed by a psychiatrist, a licensed psychologist with specific training in drug and alcohol assessment and treatment or a certified addiction counselor. Such assessment shall include a recommended level of care and length of treatment. Assessments completed by certified addiction counselors shall be based on the department of health approved drug and alcohol level of care criteria and shall be reviewed by a case management supervisor in a single county authority. The court shall hear the testimony of the persons performing the assessment under this subsection at the hearing on the petition for involuntary commitment
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> (c) Based on the assessment defined in subsection (b) the court may order the minor committed to involuntary drug and alcohol treatment, including inpatient services, for up to forty-five days if all of the following apply:
>
> (1) The court finds by clear and convincing evidence that: (i) the minor is a drug-dependent person; and (ii) the minor is incapable of accepting or unwilling to accept voluntary treatment services.
>
> (2) The court finds that the minor will benefit from involuntary treatment services.
>
> (3) Where the court decision is inconsistent with the level of care and length of treatment recommended by the assessment, the court shall set forth in its order a statement of facts and reasons for its disposition.

Course of Proceedings

On May 30, 2007, F.C.'s grandmother, Christina Kennedy, filed a Petition with the Allegheny Court of Common Pleas seeking the involuntary commitment of 14-year-old F.C. Act 53 Petition, May 30, 2007 at R2a. The Petition's two-sentence Statement of Sufficient Facts and Good Reason stated F.C. "will not go to school and I believe he's doing drugs and he's running away. And he's stealing." Id. There was no hearing to test the sufficiency of these allegations, yet the lower court[4] issued a preliminary order dated May 30, 2007, appointing counsel for F.C., [5] ordering F.C. to undergo a drug and alcohol assessment, scheduling a hearing on the Act 53 Petition for June 12, 2007, and directing that F.C. appear for that hearing. Preliminary Order, May 30, 2007, at R4a. The preliminary order also directed Christina Kennedy to provide F.C. with a copy of both the Act 53 Petition and the May 30th Order.[6] Id.

On the morning of June 12, 2007, Allegheny County Sheriffs forcibly removed F.C. from his home, placed him in handcuffs and leg irons, and detained him in an isolation cell for juveniles alleged or adjudicated delinquent in the basement of Allegheny County's Family Court.

> (d) A minor ordered to undergo treatment due to a determination pursuant to subsection (c) shall remain under the treatment designated by the court for a period of forty-five days unless sooner discharged. Prior to the end of the forty-five-day period, the court shall conduct a review hearing in accordance with subsection (c) for the purpose of determining whether further treatment is necessary. If the court determines that further treatment is needed, the court may order the minor recommitted to services for an additional period of treatment not to exceed forty-five days unless sooner discharged. The court may continue the minor in treatment for successive forty five-day periods pursuant to determinations that the minor will benefit from services for an additional forty-five days.

71 Pa. Stat. Ann. § 1690.112a.

[4] Pursuant to 71 Pa. Stat. Ann. § 1690.112a(a), the Act 53 petition is assigned to a judge from the Juvenile Division. In this instance, the preliminary order was issued by the Honorable Guido A. DeAngelis of the Allegheny County Court of Common Pleas. Judge DeAngelis is one of several judges in the Juvenile Division. Judge DeAngelis presided over F.C.'s Act 53 proceedings, including the June 12 and July 24, 2007 hearings.

[5] 71 Pa. Stat. Ann. § 1690.112a(b)(1) requires the appointment of counsel for the minor *upon the filing* of the Act 53 Petition. In this instance, the lower court's Preliminary Order appointed a "conflict attorney" as counsel for F.C. but that order did not identify an individual attorney. Preliminary Order, May 30, 2007. R4a. In Allegheny County the office of the public defender does not represent minors in Act 53 proceedings.

[6] There is no record that either Christina Kennedy received a copy of the May 30th Preliminary Order or that F.C. received either that order or the petition.

Transcript of June 12, 2007 Hearing at R24a (hereinafter "6/12/07 Hearing"). While detained at Family Court, F.C., still shackled and handcuffed, was compelled to undergo a drug assessment by a certified addiction counselor, Josie Morgano.[7] 6/12/07 Hearing, at R33a . At no time prior to or during the assessment was F.C. informed about the nature of Act 53 proceedings, whether he had a right to consult with counsel, or whether he understood that his statements could be used against him. 6/12/07 Hearing, at R33a-34a.

The assessment took approximately thirty minutes to complete, and inquired into the following areas of F.C.'s life: his involvement with the juvenile system: his family history, his social and emotional history including his involvement with the mental health system, his history and patterns of drug and alcohol use, and his involvement in other high risk behaviors. 6/12/07 Hearing, at R40a, R43a, R45a.

After the assessment, F.C., still in handcuffs and shackles, appeared before the juvenile court for a hearing to determine drug dependency according to Act 53. At the hearing F.C. was represented by counsel.[8] F.C. met his lawyer just moments before the beginning of the June 12th hearing. 6/12/07 Hearing, at R31a.[9] The Act 53 Petitioner, F.C.'s grandmother, did not have legal representation. No attorney represented the Commonwealth or the county of Allegheny.

At the beginning of the hearing, F.C's counsel requested the removal of F.C.'s handcuffs and shackles. 6/12/07 Hearing at R21a. The lower court denied the request and ordered that

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[7] Ms. Morgano is a certified addition counselor employed by Pyramid Ridgeview, an inpatient drug treatment program and F.C.'s destination for court ordered inpatient. Transcript of July 24, 2007 Hearing at R32a (hereinafter "7/24/07 Hearing").

[8] When F.C.'s trial counsel learned of F.C.'s pre-trial detention he visited him in the isolation cell, still handcuffed and shackled. F.C. was emotional—*i.e.*, upset and crying. He did not understand why he was being taken away and detained. Shortly thereafter the June 12th hearing commenced at the request of F.C.'s counsel to address the issues raised herein. See 6/12/07 Hearing, at R23a, 51a.

[9] F.C.'s lawyer had no knowledge that his client was in custody or detained. This belief was based upon a March 5, 2007, Act 53 proceeding in which another Allegheny County Judge admonished and prohibited Act 53 Coordinators from detaining juvenile respondents. See Motion for Evidentiary Hearing, at R 13a; 6/12/07 Hearing, at R23a. Nonetheless, F .C. was detained and shackled.

F.C. remain shackled. 6/12/07 Hearing, at R23a. [10] F.C.'s attorney then moved to suppress any statements and admissions that F.C. made while being assessed and detained. 6/12/07 Hearing at R31a. The lower court also denied that request, 6/12/07 Hearing, at R33a, and permitted Ms. Morgano to testify about the results of the assessment. Ms. Morgano testified that F.C. was cooperative and admitted using cannabis daily. 6/12/07 Hearing, at R39a. Ms. Morgano then recommended that the court commit F.C. to an inpatient drug treatment program. 6/12/07 Hearing, at R40a. Although F.C. did not believe he required drug treatment, he expressed his willingness to voluntarily attend outpatient drug treatment. 6/12/07 Hearing at R49a. The lower court nevertheless concluded that the elements of Act 53 were satisfied and committed F.C. to inpatient treatment at Pyramid Ridgeview for 30 days. 6/12/07 Hearing, R58a.

Following the hearing F.C. was taken from the courtroom, still in handcuffs and shackles, and placed in the delinquency isolation cell of the courthouse for several more hours, 7/24/07 Hearing, at R69a. He was then transported to the Shuman Detention Center, still in handcuffs, and later transported to Pyramid Ridgeview. 7/24/07 Hearing at R71a-72a.

On July 10, 2007, F.C. filed a timely notice of appeal as well as filed a Motion for Evidentiary Hearing nunc pro tunc, at R12a, to establish additional facts regarding F.C.'s pre-adjudicatory custody and detention. On July 17, 2007, the lower court denied the motion for an evidentiary hearing.

At a July 24th hearing to review F.C.'s commitment, the lower court heard evidence about F.C.'s inpatient treatment, including F.C.'s request that he attend out-patient treatment or continue in-patient treatment without a court order. 7/24/07 Hearing at R96a-97a. The lower court ordered that F.C. remain involuntarily committed to the same inpatient program for an

[10] F.C.'s court-appointed counsel also asserted F.C. did not receive notice of the hearing and was unaware of the allegations in the Act 53 Petition. 6/12/07 Hearing at R23a.

additional 30 days. 7/24/07 Hearing at R98a.

On August 20, 2007, Allegheny County adopted several new procedures for Act 53 cases which became effectively immediately. These new procedures included, inter alia, (1) a judicial inquiry of the petitioner when an Act 53 petition is filed to "ensure an adequate basis for a preliminary order," (2) giving the minor notice of the hearing on the Act 53 Petition, and (3) banning the Sheriff from forcibly transporting the minor for a drug assessment and judicial hearing absent a court order. December 21, 2007, Trial Court Opinion at 4 (hereinafter "Trial Ct. Op."). The Trial Court Opinion is attached as Appendix B.

On December 21, 2007 the juvenile court issued its opinion upholding the constitutionality of Act 53 and affirming its decision to adjudicate and commit F.C. for inpatient drug treatment. Trial Ct. Op.

On March 28, 2008, F.C. appealed the Trial Court's Order and Opinion. On January 23, 2008, the Superior Court issued an Opinion affirming the Order below. In the Interest of F.C., 966 A.2d 1131 (Pa. Super. Ct. 2009) (Colville, J.). On February 6, 2009, F.C. filed an Application for Reargument in the Superior Court. This Application was denied. A Petition for Allowance of Appeal was submitted to this Court on May 4, 2009 and was granted on July 13, 2009.

SUMMARY OF ARGUMENT

It is undisputed that substance abuse among children is a problem that warrants the attention of legislators and policymakers in this Commonwealth. This appeal does not challenge the importance of ensuring adequate and appropriate access to treatment for such youth, the underlying intent of Act 53. Rather, this appeal challenges the way that Act 53 as written achieves its purpose as well as how the Act was applied to petitioner F.C.

On its face, Act 53 permits compelled and intrusive substance abuse examinations of minors as well as compelled inpatient treatment based on unsubstantiated allegations, without notice or the meaningful assistance of counsel. These aspects of Act 53 make it constitutionally infirm as the Act lacks most of the core due process protections required to involuntarily restrict a youth's physical liberty. The Superior Court erred in its due process analysis of Act 53 by examining the Act against the backdrop of another statute—the Mental Health Procedures Act. The analysis of one statute cannot stand in for the analysis of another. The MHPA provides far more procedural protections for individuals at risk of losing their liberty than Act 53. While confinement and treatment are the core purposes of both statutes, the lack of due process protections in Act 53 makes the analogy to MHPA unsupportable.

Restriction of an individual's liberty even for the purposes of treatment implicates the due process clauses of the federal and state constitutions and thus requires significant due process protections to ensure that when liberty is restricted for treatment it is a last resort and the result of a thorough and credible inquiry. The involuntary commitment provisions of MHPA provide these due process protections. For example, an individual cannot be committed under the MHPA unless he is demonstrating behavior that is dangerous to himself or others. In addition, an individual at risk of being confined under the MHPA is given notice of the proceedings, told of his rights, permitted to present evidence, and must be afforded the least restrictive alternative for treatment. In contrast, under Act 53, the compelled examination is triggered by unsubstantiated allegations, no notice of the proceedings or statement of the allegations are provided, and neither the initial nor continued period of confinement is tied to any overt dangerous behavior.

In addition to procedural due process flaws, the Superior Court's Opinion should

be reversed because it failed to acknowledge the substantive due process violations occasioned by Act 53. These include both an infringement of the child's right to privacy by the court-ordered, very intrusive examination and the Act's unconstitutionally vague definitions of terms that are key to the statute, such as "drug dependent person," which are too vague to give proper warning of the targeted behavior and pose a high risk that enforcement of the Act will result in inconsistent and inequitable results.

Finally, Act 53 is unconstitutional as applied to F.C. Without notice of the proceedings or the allegations in the petition, F.C. was forcibly removed from his home and transported to court in shackles, restrained in handcuffs and shackles throughout the Act 53 proceedings and subsequent transport to a treatment facility, forced to undergo a substance abuse assessment without being informed of his rights and without access to his lawyer.

The State's desire to protect children suffering from substance abuse cannot trump children's longstanding rights to procedural and substantive due process before their liberty may be taken from them. In this case, F.C. simply asks the Court to give due respect to the constitutional rights of children even as it gives due regard for their well being.

ARGUMENT

I. The Superior Court Erred In Its Reliance On the Mental Health Procedures Act to Support Its Holding That Act 53 Comports with the Due Process Clauses of the State and Federal Constitutions.

The Superior Court adopted the trial court's view that the constitutionality of MHPA demonstrates the constitutionality of Act 53, In the Interest of F.C., 966 A.2d 1131 at 1136-38, because they "serve similar purposes." Id. at 1137-38. The lower courts' reliance on the

constitutionality of MHPA to determine the constitutionality of Act 53 is misplaced. While the Superior Court acknowledged that what process is due relies on the "particular situation," id. at 1138, it did not examine Act 53's particular application to the involuntary civil commitment of children for drug treatment. Because "not all situations calling for procedural safeguards call for the same kind of procedure," the specific provisions of Act 53 must be closely examined. See Morrisey v. Brewer, 408 U.S. 471, 481 (1972). Additionally, and most importantly, the procedural protections provided children in Act 53 fall well short of those provided by MHPA.[11]

[11] It is important to note that the statutes providing for involuntary commitment for substance abuse treatment for minors in several other states provide protections that ensure that examinations and commitment orders are only made after a rigorous analysis of the facts, followed by a full hearing if justified at a hearing to which the youth is given notice and an opportunity to prepare and test evidence and at which the least restrictive treatment alternative is central to the court's determination.

In other states, a petition cannot be filed absent an evaluation from a medical professional. See, e.g., Okla. Stat. Ann. tit. 43A § 5-509(A) (West, Westlaw through 2009 1st Reg. Sess.) (district attorney can only file a petition after a mental health professional concludes that, as a result of drug or alcohol dependence, the youth can be expected to inflict serious bodily harm to himself or others); Ind. Code. Ann. 31-32-16-1 (West, Westlaw through 2009 1st Reg. Sess.) (the petition must include an affidavit from a physician who has examined or treated the youth in the last thirty days). Many states require a showing that a youth is a danger to himself or others as a result of the drug or alcohol dependence. See Fla. Stat. Ann. § 394.499(2)(d)(1)-(2) (West, Westlaw through 2009 1st Reg. Sess.); La. Child. Code Ann. art. 1422(A)(4), 1434 (West, Westlaw through 2008 Reg. Sess.); Wis. Stat. Ann. § 51.20(a); Mass. Gen. Laws Ann. ch. 123, § 35 (West, Westlaw through 2009 Ch. 24); Okla. Stat. Ann. tit. 43A § 5-509 (A); Utah Code Ann. § 62A-15-301(6) (West, Westlaw through 2009 Reg. Sess. & 2009 1st Special Sess.)

Unlike Act 53, several other state statutes provide youth with substantial procedural due process protections in the examination process itself, including the right to an independent examiner, see, e.g., Wis. Stat. Ann. § 51.20(9)(a) (if probable cause is found to order an examination, the court must appoint two qualified behavioral health professionals, the youth may appoint one of the examiners, and the youth must be told of his rights prior to examination, including his right to remain silent); Mich. Comp. Laws Ann. § 333.6124(3) (West, Westlaw through 2009, P.A. 2009, No. 73) (the youth is permitted to have an independent evaluation done prior to the hearing), and the right to notice of the hearing, see Del. Code Ann. tit.16, § 2213 (West, Westlaw through 77 Laws 2009); Mich. Comp. Laws Ann. § 333.6123(2); Mass. Gen. Laws Ann. ch. 123, § 35; Wis. Stat. Ann. § 51.20(10)(a)-(b); 705 Ill. Comp. Stat. 405/4-9(2); 705 Ill. Comp. Stat. 405/4-14; Okla. Stat. Ann. tit. 43A § 5-510(A)(4). Two states give youth the right to have a jury trial at the commitment hearing. See Wis. Stat. Ann. § 51.20(11); Okla. Stat. Ann. tit. 43A § 5-511(D).

Contrary to Act 53, many state statutes require that the determination of whether inpatient treatment is the least restrictive setting consistent with treatment goals as part of the commitment determination. See Del. Code Ann. tit. 16 § 2213; Wis. Stat. Ann. § 51.20(9)(b); Utah Code Ann. § 62A-15-301(6)(c); Okla. Stat. Ann. tit. 43A § 5-503(A)(2). Several states also provide youth the right to request a hearing to determine whether continued confinement is necessary. See, e.g., La. Child. Code Ann. art. 1426(A)-(B); Mich. Comp. Laws Ann. §§ 333.6125(1), (3), 333.6126(2).

A. The MHPA, in Contrast to Act 53, Provides for the Involuntary Treatment of Persons Who are Both Mentally Ill and Who Pose a Clear Danger to Themselves or Others.

While both the MHPA and Act 53 share a purpose to provide treatment to individuals in need, the MHPA permits forced confinement and treatment only of mentally ill persons who also pose a clear danger to themselves or others. *At its core, it is the threat of harm that justifies the involuntary confinement, not simply the mental illness.* Act 53 does not require the threat of harm to others or self as a prerequisite for involuntary treatment. It merely allows for involuntary commitment based on a vague standard that does not require the demonstration of any outward behavior that is destructive or dangerous.

Additionally, the MHPA addresses the treatment needs of individuals who are "*severely* mentally disabled" and "in need of *immediate* treatment." 50 Pa. Stat. Ann. § 7302(a)(1) (West, Westlaw through Act 2009-21) (emphasis added). Their need for immediate treatment is not based on the mere existence of a disability or diagnosis, but an outward manifestation of this disability or diagnosis resulting in dangerous behaviors. "A person is severely mentally disabled when, as a result of mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a *clear and present danger of harm* to others or to himself."[12] 50 Pa. Stat. Ann § 7301(a) (emphasis added). The MHPA deals with "[p]otentially dangerous individuals," In re R.D., 739 A.2d 548, 554 (Pa. Super. Ct. 1999) -- individuals who need treatment to "protect a person from harm and even death." In re J.M., 726 A.2d 1041, 1047 (Pa. 1999) (internal citations omitted).

In fact, the MHPA makes clear that outward manifestations of dangerous behavior are

[12] No evidence or observations were presented to show that F.C. was a harm to himself or others. See 6/12/07 Hearing, at R39a-41a; 7/24/07 Hearing, R78a, 107a.

essential to triggering the involuntary commitment procedures under the MHPA: "[p]ersons who are mentally retarded, senile, alcoholic, or *drug dependent* shall receive mental health treatment *only if* they are also diagnosed as mentally ill, *but these conditions of themselves shall not be deemed to constitute mental illness*…" 50 Pa. Stat. Ann. § 7102 (emphasis added). "Assuming that the term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and live safely in freedom." Clark v. Cohen, 613 F. Supp. 684, 702 (E.D. Pa. 1985) (citing O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)). In contrast, Act 53 in no way conditions compelled treatment of a "drug dependent" youth upon evidence of affirmative acts to harm themselves or others.

Act 53 and the MHPA both provide for the involuntary commitment of individuals in need of treatment; both statutes impose a similar restriction on individual liberty. However, it is precisely because of the predicate finding of dangerousness under the MHPA that this severe restriction on liberty meets the requirements of due process.

B. The Procedural Protections of the MHPA are Significantly More Comprehensive than those Provided under Act 53.

Contrary to the Superior Court's Opinion, the procedural safeguards provided individuals under the MHPA are significantly greater than those provided in Act 53. While the MHPA is narrowly tailored to restrain the liberty of mentally ill persons, Act 53's inpatient commitment provisions fall far short of the due process required to commit drug dependent minors. In order to ensure that only mentally ill persons who meet the dangerousness standard are involuntarily committed, the MHPA imposes significant checks at each stage in the examination and commitment process that are absent in Act 53.

As noted above, an emergency *examination* may only be made under the MHPA upon a showing of an immediate need for treatment. 50 Pa. Stat. Ann. § 7302(a). If it is determined after the emergency examination that the individual is severely mentally disabled and in need of emergency treatment, such treatment may only be provided for up to 120 hours (*five* days). 50 Pa. Stat. Ann. § 7302(b), (d). If the treating facility determines that the person requires further emergency involuntary treatment beyond this initial five day period, such treatment may be provided only after a hearing and certification by the Court of Common Pleas. 50 Pa. Stat. Ann. § 7303(a), (b), (c), (f), (g), (h). Even if the Court of Common Pleas does certify the matter, the emergency commitment period may only be extended for up to *20* days. 50 Pa. Stat. Ann. § 7303(a), (f), (h).

The initiation of an Act 53 proceeding requires only that the petition "set forth sufficient facts and good reasons for the commitment." 71 Pa. Stat. Ann. § 1690.112a(a).[13] The court orders the assessment based solely upon the allegations[14] set forth in the petition which, under the Act, are not required to be based on personal knowledge. Compare 71 Pa. Stat. Ann. § 1690.112a(a) (requiring that a parent or guardian's petition "shall set forth sufficient facts and good reason for the commitment") with MHPA, 50 Pa. Stat. Ann. § 7302 (providing for an involuntary emergency medical examination upon certification of need *by a physician*, issuance of a *warrant by a county administrator*, or application by a physician or other authorized person "who has *personally observed* conduct showing the need for such examination") (emphasis added). Additionally, under Act 53 the youth is taken directly to be assessed and is not given the opportunity to speak to counsel or any other interested adult; under the MHPA, the individual is

[13] In this case, the petitioner alleged that F.C. "will not go to school and I believe he's doing drugs and he's running away. And he's stealing." Act 53 Petition, May 30, 2007, at R2a.

[14] Act 53 contains no requirement that the petition be verified by the parent or guardian.

apprised of his rights and **"**shall be informed of the reasons for emergency examination and of his right to communicate immediately with others. He shall be given reasonable use of the telephone. He shall be requested to furnish the names of parties whom he may want notified of his custody and kept informed of his status." 50 Pa. Stat. Ann. § 7302(c). Act 53 does not provide the youth with a comparable notice of his rights.

Additionally, the initiation of an involuntary commitment under the MHPA requires the certification of a physician, a warrant, or based on the personal observation of behavior. 50 Pa. Stat. Ann. § 7302(a)(1) & (2). In order to extend the involuntary commitment beyond 20 days, the court must find, by clear and convincing evidence, that the individual poses a clear and present danger to himself or others. 50 Pa. Stat. Ann. § 7304(a)-(c), (f). At the hearing under § 7304, the individual has the right, inter alia: (1) to counsel; (2) to the assistance of a mental health expert; (3) to refuse to testify; (4) to confront and cross-examine witnesses; (5) to present evidence; and (6) to request that the hearing be private. 50 Pa. Stat. Ann. § 7304.

In contrast, Act 53 provides minors with virtually none of these protections. For example: (1) minors may be involuntarily committed without any evidence of specific conduct within the preceding 30 days indicating the need for involuntary treatment; (2) minors may be involuntarily committed for up to 45 days even though not all of the criteria for commitment have been established by clear and convincing evidence;[15] (3) minors may be committed for unlimited successive 45 day periods with no more procedural safeguards than those described

[15] 71 Pa. Stat. Ann. § 1690.112a(c)(2), which requires that the court find that the minor will benefit from involuntary treatment services, sets forth no standard of proof by which the court is to make this finding. Due process requires that involuntary civil commitments must be based on clear and convincing evidence of the need for commitment. The statute's failure to provide any standard of proof also makes the statute unconstitutionally vague in this respect.

above;[16] (4)minors have no statutory right to the least restrictive appropriate treatment alternative; (5) minors have no right to be released by the facility or treatment program as soon as the director of the program determines that treatment is no longer necessary; (6) minors have no right to the assistance of an independent medical expert;[17] (7) and minors have no right to be committed only on the basis of a medical determination regarding the need for involuntary treatment.

Any individual subject to court-ordered involuntary mental health treatment under the MHPA also has the express right to be committed to the least restrictive alternative necessary for treatment. 50 Pa. Stat. Ann. §§ 7102, 7304(f).[18] Consequently, under the MHPA, inpatient treatment is deemed appropriate only after consideration has been given to less restrictive alternatives. State and federal case law has reinforced that the state and federal Constitutions require placement in the least restrictive setting, a requirement not set forth in Act 53. State and federal caselaw confirm this principal; the MHPA and Act 53 should be considered in light of

[16] 71 Pa. Stat. Ann. § 1690.112a(d) provides that the minor shall remain committed for a period of forty-five days "unless sooner discharged." The statute is completely silent as to who has the power to discharge the minor and under what conditions, making this provision is therefore unconstitutionally vague. This is in contrast to the Mental Health Procedures Act, which explicitly provides that the director of the facility must discharge the person if they are no longer mentally disabled and in need of treatment. 50 Pa. Stat. Ann. § 7304(g)(3). This is also contrary to the statutory scheme approved by the Supreme Court in Parham v. J.R., 442 U.S. 584, 615 (1979), in which the superintendent of each hospital was charged with the affirmative statutory duty to discharge any child who was no longer mentally ill or in need of therapy.

[17] Act 53 violates due process by permitting the involuntary commitment of minors based solely on the assessment and recommendation of non-medical personnel. Along with authorizing psychiatrists and psychologists trained in the field of substance abuse to perform assessments, the Act also permits non-medically trained Certified Addiction Counselors ("CACs") to perform assessments of minors, diagnose drug dependence, and make recommendations to the Court. 71 Pa. Stat. Ann. § 1690.112a(b)(2).

The U.S. Supreme Court has allowed children to be involuntarily hospitalized by their parents, but required that the commitment must be supported by the independent medical judgment of a physician. See Parham v. J.R., 442 U.S. 584, 607, 609, 613, 618 (1979). In Parham, the Court expressly stated that the challenged state mental health commitment procedures regarding minors satisfied due process because they involved "an independent medical decision making process, which includes the thorough psychiatric investigation described earlier, followed by additional periodic review of a child's condition . . . ." Id. at 613. Cf. Mental Health Procedures Act, 50 Pa. Stat. Ann. §§ 7301-05 (requiring examination and recommendation of psychiatrist/psychologist as prerequisite for involuntary mental health commitment).

[18] In addition, the MHPA also expressly states a preference for voluntary treatment over involuntary treatment. 50 Pa. Stat. Ann. § 7102.

this jurisprudence. For example, in Eubanks v. Clarke, the court applied the "less drastic means" analysis to treatment for those civilly committed. 434 F. Supp. 1022, 1027 (E.D. Pa. 1977). The court in Eubanks, upon finding a state statutory right to treatment for the mentally ill, held that due process required least restrictive alternative treatment. Id. at 1028 (The principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment) (quoting Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969).

In this instance, Act 53's purpose is, inter alia, to provide for treatment and rehabilitation alternatives. Consistent with Eubanks, the state must preserve a minor's liberty interest to the greatest extent possible. Eubanks supports the application of the dual principles of a protected liberty interest and least restrictive setting for pursuing government purposes when a right to treatment has been established in the law.

The Third Circuit underscored this principle in Clark v. Cohen, 613 F. Supp. 684 (E.D. Pa. 1985), aff'd 794 F.2d 79 (3d Cir. 1986). In Clark, the district court found that a mentally ill person has a due process right not to be "placed in an institutional setting unless a community placement cannot be developed." 613 F. Supp. at 702. The Third Circuit affirmed, upholding the judgment that an individual's "substantive liberty right to appropriate treatment under Youngberg [v. Romeo] was violated" where she was confined in a state institution, rather than released to a community living program — a far less restrictive environment. Clark, 794 F.2d at 87.[19]

[19] In Youngberg v. Romeo, 457 U.S. 307 (1982), the Court found that a mentally retarded individual has a constitutionally protected interest which requires the state to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint. In determining what treatment is reasonable, "courts must show deference to the judgment exercised by a qualified professional." Youngberg, 457 U.S. at 322.

In accordance with Clark, F.C. has a right to treatment in the least restrictive setting that meets Youngberg's "professional judgment" standard. At a minimum, where, in the view of qualified professionals, the best means of meeting an individual's need for treatment dictates community placement, institutionalization contrary to that professional judgment violates that individual's due process rights. Act 53's failure to require that the involuntary commitment of minors be no more restrictive than required by appropriate medical judgment violates F.C.'s due process rights.

Finally, under the MHPA, if the director of the treating facility determines, at any time, that the person is no longer severely mentally disabled or in need of treatment, the Director of the facility must discharge the person (or petition the court for discharge if the individual was committed as a result of criminal acts). 50 Pa. Stat. Ann. §§ 7304(g)(3) & § 7108(b). At the expiration of a 90-day involuntary commitment period, the court may extend the period of involuntary treatment only if it finds a continuing need for extending court-ordered commitment based upon conduct during the most recent commitment period. 50 Pa. Stat. Ann. § 7305. Finally, the MHPA provides that a person found to be dangerous only to himself may not be subjected to an additional period of full-time inpatient commitment unless he has first been released to a less restrictive alternative. Id.

Act 53 contains no comparable provisions. The disparity between the standards and procedures of Act 53 and the MHPA cannot withstand even minimal scrutiny under due process.

III. Act 53 is Unconstitutional on its Face.

A. Subjects of Act 53 Petitions are Denied Procedural Due Process Under Both the Federal and State Constitutions.

Act 53 mandates that persons receiving care or treatment under its provisions shall "retain all his civil rights and liberties except as provided by law." 71 P.S. 1690.107. In Mathews v. Eldridge, the Supreme Court articulated a balancing test to determine what process is due in a particular situation:

> [T]he specific dictates of Due Process generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

The individual interest at stake is very high under Act 53 given that information obtained from the minor during the initial assessment could result in involuntary civil commitment for a substantial period of time.[20] The assessment itself is extremely intrusive, requiring a minor to undergo a comprehensive examination of his mental and physical status. The government's interest in ordering an assessment *prior* to affording the minor notice and an opportunity to challenge the sufficiency of the allegations, in contrast, is very low. Without providing the minor either notice or an opportunity to be heard, Act 53 mandates that the court order an involuntary drug and alcohol assessment of a minor *upon the filing* of an untested, conclusory petition by the minor's parent or guardian alleging that the minor is drug dependent and needs

[20] While the initial period of commitment may not exceed 45 days, Act 53 authorizes the court to commit the minor for unlimited successive 45-day periods, until the minor turns 18. 71 Pa. Stat. Ann. § 1690.112a(d). In this instance the lower court committed F.C. to inpatient for an initial 45 days on June 12th and continued that commitment for an additional 30 days on July 24th.

treatment. See 71 Pa. Stat. Ann. § 1690.112a(b)(2). Act 53 on its face deprives youth of fundamental rights. At a minimum, *before* a minor can be compelled to undergo a drug and alcohol assessment the state and federal Constitutions require notice and an initial hearing to test the sufficiency of the allegations in the petition.

In Parham v. J.R., 442 U.S, 584, 600 (1979), the United States Supreme Court found that a child, like an adult, has a "substantial liberty interest" in not being confined against his or her will for treatment in a mental hospital. To comport with due process, the commitment decision must involve a careful analysis of the youth's background, their treatment history as well as an examination. "The independent judgment of what the child requires" should rely on "all sources of information that are traditionally relied on by physicians and behavioral specialists." Id. at 607. The adjudicator should engage in an "inquiry [that] must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child…. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure." Id. at 606-607. The full and comprehensive inquiry required in Parham is not provided by Act 53. Rather, Act 53 provides that the court need only rely upon an assessment that is triggered by a petition of untested allegations

Notice is also a basic axiom of due process that applies with special force to minors in civil proceedings. In re Gault, 387 U.S. 1, 31 (1967). In reversing the Arizona Supreme Court holding in Gault that advance notice of the specific charges or the basis for taking the child into custody was not necessary, the United States Supreme Court wrote:

> We cannot agree with the [Arizona Supreme Court's] conclusion that adequate notice was given in this case. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled

> court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity."

Id. at 33 (citations omitted).

Pennsylvania courts have also held that formal notice and an opportunity to be heard are fundamental components of due process when a person's liberty interest is at stake in a legal proceeding. Everett v. Parker, 889 A.2d 578, 580 (Pa. Super. Ct. 2005). Both notice and an opportunity to be heard must be afforded "at a meaningful time in a meaningful manner." Id. As Pennsylvania courts have explained: "[n]otice, in our adversarial process, ensures that each party is provided adequate opportunity to prepare and thereafter properly advocate its position, ultimately exposing all relevant factors from which the finder of fact may make an informed judgment." Id. (citing, inter alia, Langendorfer v. Spearman, 797 A.2d 303, 309 (Pa. Super. Ct. 2002)).[21]

Act 53 does not provide for notice when a petition is filed, when the court orders an assessment, or when the court schedules an adjudicatory hearing. Thus, in the present case F.C. did not learn about the Act 53 proceedings until the day of his adjudicatory hearing, *after* Allegheny County Sheriffs placed him in handcuffs and shackles, detained him at Family Court and *after* F.C. completed the statutorily mandated drug and alcohol assessment.[22]

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[21] The Pennsylvania Supreme Court recognized the importance of notice in juvenile proceedings when it adopted Rules of Juvenile Court Procedure, which became effective in February 1, 2007. See Pa. R. Juv. Ct. P. 124 (Summons and Notice in Delinquency Matters), Pa. R. Juv. Ct. P. 1124(a) (Requirements of the Summons in Dependency Matters), Pa.R.J.C.P.1601 (Permanency Hearing Notice). These rules only apply to proceedings under the Juvenile Act.

[22] In the wake of this appeal Allegheny County, perhaps recognizing the constitutional defect of any notice provisions, adopted a notice procedure. Trial Ct. Op. at 4, n.1. One of the seven new procedures for Act 53 proceedings states: "If [an Act 53 Petition] is scheduled for a hearing, the parent(s) or guardian(s) will be directed by the court to serve a copy of the order upon the minor within a reasonable period of time prior to the time of the hearing, so that the minor has notice of the hearing." Id. Allegheny's decision to remedy the statute's constitutional defect as to notice does not affect F.C.'s challenge. F.C.'s adjudication should be reversed because notice was not given, and the statute should be struck because of the complete absence of *any* provision within Act 53 to notify the minor about *any* aspect of the commitment proceeding.

Additionally, the individual interest at stake is very high under Act 53 given that information obtained from the minor during the course of the assessment could result in involuntary civil commitment for a substantial period of time. While the state has a legitimate interest in treating drug or alcohol addicted minors, this interest is not compromised by requiring an initial review of the petition to ensure that the appropriate minors are targeted for assessment and treatment. Moreover, providing minors with some type of hearing prior to ordering an assessment would not pose any additional financial or administrative burden on the government. Indeed, giving minors an opportunity to present their side of the story prior to initiation of the commitment proceeding for drug and alcohol dependency would provide a more efficient mechanism for identifying minors in need of treatment by allowing the court to dismiss unsubstantiated petitions. See Goss v. Lopez, 419 U.S. 565, 579 (1975) (in requiring notice and an opportunity to be heard before student could be suspended from school for ten days or less, the Court noted, "[t]he student's interest is to avoid unfair or mistaken exclusion from the educational process... The Due Process Clause will not shield him from suspensions properly imposed, *but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted*.") (emphasis added). Cf. Bell v. Burson, 402 U.S. 535 (1971) (under Due Process Clause, State could not, while purporting to be concerned with fault in suspending driver's license, deprive a citizen of his license preliminarily without a hearing that would assess fault).

Under Act 53, immediately upon the filing of a petition, the court "[s]hall order a minor who is alleged to have a dependency on drugs or alcohol to undergo a drug and alcohol

assessment." 71 Pa. Stat. Ann. § 1690.112a(b). Thus, F.C. had no opportunity to be heard until *after* the assessment—and intrusion into his privacy—had been completed.[23]

Nor does Act 53 provide any additional or alternative safeguards to minimize the risk of erroneous deprivation, which is extremely high given that there are no procedures in the statute to ensure that the allegations contained in the petition are true prior to ordering the assessment. See Goss, 419 U.S. at 580 (noting that "[t]he risk of error is not at all trivial," where disciplinarians, "although proceeding in utmost good faith, frequently act on the reports and advice of others"). The court orders the assessment based solely upon the unverified allegations[24] set forth in the petition which, under the Act, are also not required to be based on personal knowledge. Compare 71 Pa. Stat. Ann. § 1690.112a(a) (requiring that a parent or guardian's petition "shall set forth sufficient facts and good reason for the commitment") with MHPA, 50 Pa. Stat. Ann. § 7302 (providing for an involuntary emergency medical examination upon certification of need *by a physician*, issuance of a *warrant by a county administrator*, or application by a physician or other authorized person "who has *personally observed* conduct showing the need for such examination") (emphasis added). The Act does not require that the minor be informed of the reasons for the assessment or that he be given an opportunity to communicate with anyone. Compare 71 Pa. Stat. Ann. § 1690.112a with MHPA, 50 Pa. Stat. Ann. § 7302(c) (providing that upon arrival at a facility for an emergency involuntary examination, a minor shall be informed of the reasons for the examination and his right to

[23] See also D.C. v. School Dist. Of Philadelphia, 879 A.2d 408, 419 (Pa. Cmmw. Ct. 2005) (striking a statute that presumed minors' unfitness to return to school as unconstitutional under a due process analysis because it creates an irrebutable presumption, and declaring minors are entitled to a hearing to challenge this designation).

[24] Act 53 contains no requirement that the petition be verified by the parent or guardian.

communicate with others, he shall be given reasonable use of the telephone, and any parties whom he identifies shall be notified of his status).[25]

In addition**,** while Act 53 requires the appointment of counsel at the same time the assessment is ordered, it does not specifically provide for counsel to be present at the assessment or to challenge the administration of the court-ordered assessment; in fact, counsel may not even learn of it until after it has taken place. Compare 71 Pa. Stat. Ann. § 1690.112a(a) ("[u]pon petition...the court...shall appoint counsel for the minor") with MHPA, 50 Pa. Stat. Ann. § 7304(c)(5) (providing "the right to have counsel present" at a psychiatric examination ordered pursuant to a petition to impose court-ordered involuntary mental health treatment).

Because the statute on its face fails to provide for any type of hearing *before* the assessment of the minor is ordered, there is no requirement that anyone—parent, guardian, county solicitor, physician, or district attorney—even appear before the court to support the petition, or offer any evidence beyond the bare allegations in the petition.[26] The only procedural protection contained in the Act, namely, the appointment of counsel for the minor, is illusory at the assessment stage. The lower court failed to balance the government's interest in assessing a minor for drug and alcohol dependency against intrusion into a minor's thoughts about his personal affairs.

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[25] The Commonwealth's Juvenile Act also contains verification provisions to minimize risk of erroneous deprivation. 42 Pa. Cons. Stat. Ann. § 6334(a) (West, Westlaw through Act 2009-21) (Contents of Petition) ("A petition, which shall be verified and may be on information and belief, may be brought by any person including a law enforcement officer.").

[26] The Act references a single hearing when the court hears the testimony of the assessor "on the petition for involuntary commitment." 71 Pa. Stat. Ann. § 1690.112a(b)(2).

B. Minors Subject to Act 53 are Denied Substantive Due Process Rights and Fourth Amendment Rights.

Both the United States Constitution and the Pennsylvania Constitution provide protections for an individual's right of privacy. The United States Supreme Court has recognized that privacy interests are implicit in the Due Process Clause of the Fourteenth Amendment. See generally Whalen v. Roe, 429 U.S. 589, 598-600 (1977). See also United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) ("Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life.") (citations and internal quotation omitted); Doe "A" v. Special Sch. Dist., 637 F. Supp. 1138, 1144 (E.D. Mo. 1986) ("An important manifestation of 'liberty' as guaranteed by substantive due process is the right to be free of state intrusions into personal privacy...").

The Pennsylvania Supreme Court has also acknowledged that an individual's right to privacy is a fundamental right protected under the Pennsylvania Constitution. Accordingly, only a compelling state interest will override one's privacy rights. Stenger v. Lehigh Valley Hosp. Center, A.2d 796, 799-802 (Pa. 1992); Fabio v. Civil Serv. Comm'n of the City of Philadelphia, 414 A.2d 82 (Pa. 1980). See also Denoncourt v. Commonwealth State Ethics Comm'n, 470 A.2d 945 (Pa. 1983) (Nix, J. dissenting); In re T.R., 731 A.2d 1276 (Pa. 1999). In T.R., this Court held that a mother's constitutional right to privacy precludes in dependency cases a court-ordered psychological evaluation and disclosure of the results to interested parties prior to adjudication where there is a less intrusive means of obtaining relevant information about whether the mother is a fit parent. 731 A.2d at 1280-82. As part of its privacy analysis, the Court stated:

> Our test of whether an individual may be compelled to disclose private matters, as we stated it in Denoncourt, is that "government's intrusion into a person's private affairs is constitutionally justified when the government interest is significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the governmental purpose." [Denoncourt, 470 A.2d at 949]...There must be both a compelling, i.e., "significant" state interest and no alternate reasonable method of lesser intrusiveness.

In re T.R., 731 A.2d at 1280. See also In the Matter of K.D., 744 A.2d 760, 761 (Pa. Super. Ct. 1999) (holding that the best interests of the children could be maintained without compelling the parent to submit to a psychological evaluation where the record revealed "a *noticeable* lack of support for subjecting appellant to this evaluation") (emphasis added).

In the instant case, a two-sentence unverified petition triggered a state-compelled drug and alcohol assessment for the purpose of determining involuntary commitment. The Superior Court erred in dismissing F.C.'s claim that his right to privacy had been infringed, In the Interest of F.C., 966 A.2d at 1135. Under Act 53, it is clear the assessment constitutes a substantial invasion of privacy, and the nature of the information required at the assessment makes the privacy interest all the more compelling.[27] Disclosures about such things as involvement with the legal system, social and emotional problems, drug and alcohol use, and high risk behaviors—all of which may be probed even though the court has neither physical nor legal custody[28]—are

[27] In addition, while F.C. was not subject to a physical examination of his person, he was subject to an abrupt seizure followed by extremely intrusive questioning about personal behavior while in the custody of the sheriff and court, violating his 4th Amendment rights. See Terry v. Ohio, 392 U.S. 1, 24-25 (1967) ("We have recognized that even a limited search of the person is a substantial invasion of privacy.")

[28] Although a parent or guardian's petition triggers the court-ordered assessment, a petition does not waive a minor's privacy rights about such matters. Indeed, Act 53 is contrary to other state laws recognizing a minor's right to privacy when he or she seeks to obtain services and/or procedures without a parent's consent. For example, under Pennsylvania law minors have the right to seek counseling and testing regarding pregnancy and venereal disease without parental knowledge or consent. See 35 Pa. Stat. Ann. § 10103 (West, Westlaw through Act 2009-21). Even the Drug and Alcohol Abuse Control Act provides that minors have the right to consent to the diagnosis and treatment of substance abuse without informing a parent. See 71 Pa. Stat. Ann. § 1690.112.

clearly covered by the United States Supreme Court's definition of the right to privacy.[29] In the instant case, F.C. was forcibly removed from his home, brought to Family Court in handcuffs and shackles, and compelled to answer highly personal questions.[30]

Moreover, Act 53 violates the due process rights of minors not only by compelling them, during the course of court-ordered assessments, to disclose information that can be used against them in the commitment determination, but by authorizing involuntary commitment when minors "deny" they have a drug problem. Act 53 requires Certified Addiction Counselors ("CACs") to employ drug and alcohol placement criteria that penalize the minor for refusing to cooperate with the assessor.[31] Cf. Spevack v. Klein, 385 U.S. 511 (1967) (holding that attorney could not be disbarred because he refused to testify at disciplinary hearing on ground that his testimony would tend to incriminate him); Slochower v. Bd. of Higher Educ., 350 U.S. 551, 557 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.").

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[29] "Minors, as well as adults, are protected by the Constitution and possess constitutional rights," including the right to privacy protected by the Fourteenth Amendment and other provisions of the Bill of Rights. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

[30] Under Act 53, the only evidence required to be presented to the court to support the involuntary commitment of the minor is the report and recommendation of the assessor. 71 Pa. Stat. Ann. § 1690.112a (b) (2), (c). Statements made by F.C. in the course of the assessment thus clearly form the basis of the commitment decision, resulting in the minor's loss of liberty.

[31] In accordance with the Act's provisions, CACs use the American Society of Addiction Medicine's ("ASAM") Patient Placement Criteria-2R in making placement recommendations to the court. 71 Pa. Stat. Ann. § 1690.112a(b)(2) ("[a]ssessments…shall be based on the Department of Health approved level of care criteria..."). The ASAM interprets a denial of the need for treatment as support for a commitment decision. See ASAM Dimension 4 ("denial" may provide evidence to support the commitment).

C. Act 53's definition of "Drug Dependent" is Unconstitutionally Vague.[32]

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that individuals are free to steer between lawful and unlawful conduct, we must insist that laws give persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and indiscriminate enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Under the Due Process Clause of the Fourteenth Amendment, a statute is unconstitutionally vague if (i) its terms are "so vague that men of common intelligence must necessarily guess at its meaning," Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926), or (ii) it fails to provide explicit standards to those charged with its enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498-99 (1982); Trojan Techs. v. Pennsylvania, 916 F.2d 903, 914 (3d Cir. 1990). See generally Government of the Virgin Islands v. Steven, 134 F.3d 526, 527-28 (3d Cir. 1998) ("A statute therefore meets the constitutional standard of certainty if its language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."); Horn v. Burns & Roe, 536 F.2d 251, 254 (8th Cir. 1976) (stating

[32] Appellant properly preserved all facial and as applied State and Federal Constitutional due process issues. "An 'issue' is a disputed point or question on which parties to an action desire the court to decide." Com., Pennsylvania Liquor Control Bd. v. Willow Grove Veterans Home Ass'n, Inc., 509 A.2d 958, 961 (Cmwlth. Ct. 1986), disapproved on other grounds, Appeal of Borough of Churchill, 575 A. 2d 550 (1990). The two issues challenged in this case are whether Act 53 comports with the Due Process requirements of our State and Federal Constitutions facially and as applied to F.C. These issues were raised throughout the hearings, the post-trial motion, and the trial court's opinion. See Hearing of June 12, 2007, R. 23a, 31a, 51a, 58a; Motion for Evidentiary Hearing, *Nunc Pro Tunc*, on Pre-Hearing Custodial Detention; Trial Ct. Op. at 3-4.

that the United States Supreme Court has recognized that "a noncriminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice.").[33]

Thus the vagueness doctrine was created to ensure fair notice and nondiscriminatory application of the laws. See United States. v. Tykarsky, 446 F.3d 458, 472 n. 9 (3d Cir.2006). Further, "[t]he determination of vagueness must be made against the contextual background of the particular law and with a firm understanding of its purpose." State v. Cameron, 498 A.2d 1217, 1219 (N.J. 1985). In short, an enactment that requires individuals of common intelligence to guess at its meaning violates due process. The doctrine has been employed in the past to strike down civil sanctions and "always operates when a statute's vagueness creates the possibility that it can be applied in an arbitrary manner that infringes on such fundamental interests as First Amendment rights of speech and assembly, or the right of physical liberty." Goldy v. Beal, 429 F. Supp. 640, 648 (M.D. Pa. 1976).[34]

Applying the above standards, Act 53 contains several pivotal terms that are unconstitutionally vague and which both require "[individuals] of common intelligence" to guess at their meaning and fail to provide adequate guidance to those charged with the statute's enforcement. Pursuant to the Act, before a minor can be involuntarily committed the court must

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[33] While economic regulation has generally been subjected to a less stringent vagueness test, see, e.g., Hoffman Estates, 455 U.S. at 498-99, such a relaxed standard is inappropriate where, as here, minors are threatened not with economic penalties, but with a deprivation of liberty. See, e.g., Trojan Techs., 916 F.2d at 914 (noting that the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

[34] The Supreme Court of Pennsylvania has similarly recognized that a statute which is so vague as to be susceptible to arbitrary enforcement or which fails to provide adequate notice is an unconstitutional violation of due process. See In Re William L., 383 A.2d 1228, 1231 (Pa. 1978). See also Commonwealth v. Ludwig, 874 A.2d 623, 628 (Pa. 2005) (recognizing "a statute may be deemed to be unconstitutionally vague if it fails in its definiteness or adequacy of statutory expression. This void-for-vagueness doctrine, as it is known, implicates due process notions that a statute must provide reasonable standards by which a person may gauge his future conduct—*i.e.*, notice and warning.").

find that the minor is a drug dependent person. 71 Pa. Stat. Ann. § 1690.112a(c)(1)(i). A "drug dependent person" is:

> a person who is using a drug, controlled substance or alcohol, and who is in a state of psychic or physical dependence, or both, arising from administration of that drug, controlled substance or alcohol on a continuing basis. Such dependence is characterized by behavioral and other responses which include a strong compulsion to take the drug, controlled substance or alcohol on a continuous basis in order to experience its psychic effects, or to avoid the discomfort of its absence. This definition shall include those persons commonly known as "drug addicts."

Pennsylvania Drug and Alcohol Abuse Control Act, 71 Pa. Stat. Ann. § 1690.102.

This definition is unconstitutionally vague in several respects. First, although the Act purports to provide for the involuntary civil commitment of minors suffering from drug or alcohol dependence, the Act's definition of "drug dependent person" does not correspond to the definition of substance dependence set forth in the current version of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"),[35] the only official classification of mental disorders that is widely used and accepted by clinicians, researchers and other mental health professionals. The DSM-IV defines "substance dependence" as "a cluster of *three or more* of the symptoms...occurring at any time in the same 12-month period." Id. at 176 (emphasis added). The DSM-IV then sets forth the following detailed criteria for substance dependence:

> Criteria for Substance Dependence
>
> A maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more)

[35] American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994).

DSM-IV is a classification of mental disorders that was developed and published under the auspices of the American Psychiatric Association to provide clinicians and researchers an official nomenclature that could be used and applied in a wide diversity of contexts. DSM-IV was developed for use in clinical, educational and research settings. In DSM-IV, each of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and is associated with present distress or disability or with significantly increased risk of suffering death, pain, disability or an important loss of freedom. This syndrome or pattern must currently be considered a manifestation of a behavioral, psychological or biological dysfunction in the individual. See generally, DSM-IV, "Introduction"

> of the following, occurring at any time in the same 12-month period:
>
> (1) tolerance, as defined by either of the following:
>
> (a) a need for markedly increased amounts of the substance to achieve intoxication or desired effect
>
> (b) markedly diminished effect with continued use of the same amount of the substance
>
> (2) withdrawal, as manifested by either of the following:
>
> (a) the characteristic withdrawal syndrome for the substance (refer to Criteria A and B of the criteria sets for Withdrawal from the specific substances)
>
> (b) the same (or a closely related) substance is taken to relieve or avoid withdrawal symptoms
>
> (3) the substance is often taken in larger amounts or over a longer period than was intended
>
> (4) there is a persistent desire or unsuccessful efforts to cut down or control substance use
>
> (5) a great deal of time is spent in activities necessary to obtain the substance (*e.g.*, visiting multiple doctors or driving long distances), use the substance (*e.g.*, chain smoking), or recover from its effects
>
> (6) important social, occupational, or recreational activities are given up or reduced because of substance use
>
> (7) the substance use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance (*e.g.*, current cocaine use despite recognition of cocaine-induced depression, or continued drinking despite recognition that an ulcer was made worse by alcohol consumption)

Id. at.181. At best, the Drug and Alcohol Abuse and Control Act's definition of drug-dependence captures only one of the seven possible criteria listed under the DSM-IV criteria for substance—withdrawal. See 71 Pa. Stat. Ann. § 1690.102 (defining drug dependence as characterized by "behavioral and other responses which include a strong compulsion to take the

drug, controlled substance or alcohol on a continuous basis in order to experience its psychic effects, or to avoid the discomfort of its absence"). Moreover, in addition to setting forth detailed criteria for substance dependence, the DSM-IV also separately sets forth additional criteria for diagnoses of specific drug use disorders, such as cannabis dependence. See DSM-IV at 216 (detailing and defining "304.30 cannabis dependence"). In contrast, the Drug and Alcohol Abuse and Control Act does not define specific drug dependencies.[36]

By failing to track the DSM-IV criteria for substance dependence and diagnoses for specific drug dependencies or otherwise defining drug dependence more clearly, the Act allows minors to be involuntarily committed without requiring an appropriate medical diagnosis as a prerequisite to commitment. The Act thus authorizes the involuntary commitment of minors

[36] Because of its wide acceptance among clinicians and mental health professionals, some states have adopted the definition of drug dependence outlined in the DSM-IV. For example, in Connecticut, a drug dependent person is defined in as a person who has a psychoactive substance dependence on drugs as that condition is defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. See Conn. Gen. Stat. Ann. § 21a-240(19) (West, Westlaw through 2009 Jan. Reg. Sess.); See also Neb. Rev. St. Ann. § 38-307 (West, Westlaw through 2008) ("Alcohol or drug disorder means a substance-related disorder as defined by the department in rules and regulations substantially similar with the definitions of the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental Disorders"). Furthermore, even if not adopting the definition directly from the DSM-IV, other states' definitions of drug dependence are more specific in keeping with constitutional mandates. In Louisiana, "substance abuse" means the condition of a person who uses narcotic, stimulant, depressant, soporific, tranquilizing, or hallucinogenic drugs or alcohol to the extent that it renders the person dangerous to himself or others or renders the person gravely disabled. La. Child. Code Ann. art. 1470 (West, Westlaw through 2008 Reg. Sess.) Minnesota defines a "chemical dependent person" as someone who is incapable of self- management or management of personal affairs by reason of the habitual and excessive use of alcohol, drugs, or other mind-altering substances; but also requires that the person's recent conduct as a result of "habitual and excessive use of alcohol, drugs, or other mind-altering substances poses a substantial likelihood of physical harm to self or others as demonstrated by (i) a recent attempt or threat to physically harm self or others, (ii) evidence of recent serious physical problems, or (iii) a failure to obtain necessary food, clothing, shelter, or medical care." Minn. Stat. Ann. § 253B.02 Subd. 2 (West, Westlaw through 2009 Reg. Sess.) This definition not only provides for continued use and abuse of substances, but it also requires a causal effect of harm. See id. In Illinois, "addict" under the Controlled Substances Act means any person who habitually uses any drug, chemical, substance or dangerous drug other than alcohol so as to endanger the public morals, health, safety or welfare or who is so far addicted to the use of a dangerous drug or controlled substance other than alcohol as to have lost the power of self control with reference to his addiction. Ill. Comp. Stat. Ann. 570/102 (West, Westlaw through 2009 Reg. Sess.).

alleged to be drug dependent based on criteria that *do not meet the currently accepted definition of the disorder it seeks to treat*.[37]

Second, the definition of "a drug dependent person" is circular and therefore compounds the vagueness of the statute. A "drug dependent person" is defined as a "person" who is using a "drug" and in a state of "dependence." This circular definition provides no guidance to courts or the assessor. See, e.g., Goldy, 429 F. Supp. at 648 (striking down as unconstitutionally vague the "circular" standard for involuntary civil commitment under former Pennsylvania Mental Health and Mental Retardation Act of 1966, which provided that a person may be committed if he is in need of care because of a mental disability which so lessens his capacity "as to make it necessary or advisable for him to be under care...").

Third, the term "psychic dependence" does not provide any additional guidance because it is not a term typically used by medical professionals practicing in the field of substance abuse. The term "psychic dependence" also does not appear in the DSM-IV. If medical professionals themselves must guess at its meaning in this context, judges and assessors will fare no better at either understanding the meaning of the statute's criteria for involuntary commitment, or in applying the criteria. In the absence of more clarity in the term itself, "psychic dependence" fails to give adequate guidance to the judges (and assessors) charged with its enforcement and thus unconstitutionally fails to limit their discretion.

Fourth, the Act's vagueness arises from the fact that the court must rely solely on the report and recommendation of a single assessor rather than on the more informative testimony of

[37] Indeed, the definition of drug dependent person upon which Act 53 relies was never intended to be used for the purpose of involuntary commitment at all. This definition set forth in 71 Pa. Stat. Ann. § 1690.102. derives from the original definitions section of the Drug and Alcohol Abuse Control Act, which did not itself provide for involuntary commitment. As that statute expressly provided, all admissions and commitments for drug or alcohol treatment were to be made according to the admissions or commitment criteria and procedures set forth in the applicable mental health statute. 71 Pa. Stat. Ann. § 1690.105. See Op. Att'y Gen. 27 (1973).

experts typically used in these types of proceedings. Cf. 50 Pa. Stat. Ann. § 7304(e) (providing that person subject to a petition for involuntary mental health commitment has right to assistance of mental health expert). The Superior Court has previously held that even if using a subjective standard to determine the "drug dependence" of a person, there is no bar to the introduction of expert testimony. In fact, expert testimony would be relevant to show what dosages of a controlled substance would, if administered on a continuing basis, produce 'psychic or physical dependence;' what responses are for a person dependent on the substance and how to determine whether those responses are present. Commonwealth v. Stoffan, 323 A.2d 318 (Pa. Super. Ct. 1974). For example, the Act's reference to administration of drugs or alcohol on "a continuing basis," 71 Pa. Stat. Ann. § 1690.102, fails to provide any useful guidance. The term "continuing" is understood generally to mean "persistent." See, e.g., American Heritage Dictionary of the English Language (4th ed. 2000) (defining "continue," and "continuing" as "1. To go on with a particular action or in a particular condition; persist. 2. To exist over a prolonged period; last."). However, the Act fails to specify what level of frequency of use qualifies as persistent use. In addition, the term "continuing" is susceptible to several interpretations. See, e.g., Goldy, 429 F. Supp. at 648 (striking standard for involuntary civil commitment as impermissibly vague because phrase "in need of care" was susceptible of several interpretations). The Act is silent on this point and thus forces people of ordinary intelligence to guess at how frequent the minor's use of—or desire to use — the drug or alcohol must be in order to justify court-ordered commitment and treatment.[38]

[38] See Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (individuals who must obey the law and those who must administer it should not "necessarily guess at its meaning and differ as to its application."); Gibson v. Mayor & Council of Wilmington, 355 F.3d 215, 225 (3d Cir.2004); Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

Finally, Act 53's requirement that the court find that the minor is either "incapable" of accepting, or "unwilling" to accept, voluntary treatment is also unconstitutionally vague. The Act does not define the term "incapable of accepting" voluntary treatment. This term is also susceptible to several interpretations. For example, it is unclear if the term refers to physical incapability, intellectual or cognitive incapability, or emotional incapability. Does a minor's refusal to abide by his parent's wishes that he obtain drug treatment mean he is "incapable" of accepting treatment? In this instance F.C. cooperated with the court-ordered drug assessment, 6/12/07 Hearing at R39a, R43a and, during the hearing, agreed to out-patient counseling, 6/12/07 Hearing at R49a-R50a, yet the lower court determined he was "incapable or unwilling to accepting treatment."

As recognized by the Court in Goldy, "[s]uch lack of specificity in a statute that authorizes an interference with the constitutionally protected right of physical liberty places insufficient limits on the discretion of officials who are responsible for its implementation, with the result that there is nothing in the statute to prevent it from being enforced arbitrarily." 429 F. Supp. at 647-48.[39] Act 53's vagueness poses three specific dangers. Most obviously, there is the danger that courts, forced to guess at what the statute means, will apply it in an arbitrary manner. Assessors also risk applying the Act arbitrarily as they too are forced to guess whether a particular juvenile qualifies as "drug dependent" under the statute's vague definition. Finally, the Act requires a court-ordered intrusive assessment upon the allegations of a parent or guardian — who in general will be even less able to interpret and apply the Act's cryptic terms in a consistent manner.

[39] Two other provisions of the Act, § 1690.112a(c)(2), (d), discussed *infra* in Section III as violating F.C.'s right to be free from inpatient treatment, also pose vagueness problems.

D. The New Act 53 Procedures Adopted by Allegheny County Highlight the Facial Deficiencies of Act 53.

Subsequent to the proceedings below, the Allegheny County Court of Common Pleas instituted New Procedures for Act 53-Involuntary Commitment for Drug and Alcohol Treatment Matters. See Trial Ct. Op., at 4, n. 1. Included among these new procedures are the following:

1. At the time of the filing of the petition, the motions judge will supplement the petition by asking questions of the petitioner on the record. This will insure that there is an adequate basis for issuing the preliminary order and scheduling the case for a hearing.
2. If a preliminary order is issued and the case is scheduled for a hearing, the parent(s) or guardian(s) will be directed by the court to serve a copy of the order upon the minor within a reasonable period of time prior to the time of the hearing, so that the minor has notice of the hearing.
3. If a preliminary order is issued and the case is scheduled for a hearing, counsel will be appointed to represent the minor. Counsel shall be provided with a copy of the petition and a copy of the court order granting the preliminary relief. The petitioner shall provide the minor with notice of the hearing within a reasonable period of time prior to the hearing.
4. Effective immediately, no attachments will be issued prior to the hearing data and time…

Id. These new procedures demand a greater degree of evidence than mere allegations prior to scheduling a hearing, that notice and a copy of the petition be provided to the youth, and that attachments are not issued prior to hearings. As such, these procedures make significant strides in curing the due process violations apparent from the face of the statute. Of course, they also serve to underscore F.C's arguments that Act 53 is invalid on its face, and provide no remedy to F.C's facial challenge as these procedures are applicable only in Allegheny County; the lack of procedural and substantive due process under the statute is not cured elsewhere in the Commonwealth.[40]

[40] Act 53 also denies minors due process by failing to provide a full and fair tribunal. See In re Murchison, 349 U.S. 133, 136 (1955) (holding a fair trial in a fair tribunal is a basic requirement of the Due Process Clause of the Fourteenth Amendment). Because the judge presiding over an Act 53 petition must perform *both* prosecutorial and adjudicatory functions, his or her role as neutral arbiter during the "hearing" is compromised and therefore F.C. and similarly situated youth are denied the due process protection of a fair and impartial tribunal. In Act 53 proceedings

IV. Act 53 is Unconstitutional As Applied to F.C.

A. Shackling F.C. and Failing to Provide Notice of the Hearing Violated his Rights to Due Process.

The shackling, restraint and detention of F.C. prior to, during and after the proceedings below violated his substantive and procedural due process rights under controlling state and federal law. F.C. was taken into custody by law enforcement without notice. He was transported to court in shackles and leg irons, held in a delinquency holding cell prior to and following the Act 53 hearing, held at Shuman detention center (a facility for allegedly delinquent or adjudicated delinquent youth) and then transported in leg irons and shackles to the drug treatment facility where he was ordered to undergo inpatient treatment.

No warrant or other document exists in the record to justify taking F.C. into custody. The Superior Court erred by basing its determination on an assumption of facts and evidence that were not in the record. Only facts in the record can be considered by the appellate court. Commonwealth v. Wrecks, 931 A. 2d 717, 722 (Pa. Super. Ct. 2008). The trial court's statement that "[d]ue to these concerns [that the petitioner reported that the appellant may flee] a body attachment order was issued," Trial Ct. Op., at 9 is incorrect; there is no attachment order or warrant in the record. This issue was preserved and was never addressed by the court. See Motion for Evidentiary Hearing, *Nunc Pro Tunc*, on Pre-Hearing Custodial Detention ¶ 3, at R.12a. Because the court never acknowledged the absence of a warrant or attachment order in the record, the court did not address the due process challenge as applied to appellant, including

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no prosecutor is appointed. In F.C.'s case, the trial judge slipped in and out of the role of prosecutor and the role of fact-finder within the span of only a few minutes during the "hearing" on the petition by questioning the assessor and evaluating the facts. At the very least, the dual role the judge must play creates the potential for bias and appearance of impartiality, which in and of itself violates due process. See Murchison, 349 U.S. at 137 ("Having been part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.") Once he performs prosecutorial functions as Act 53 demand, the same judge or body cannot serve as a disinterested decision-maker.

the legality of his pre-trial detention and the suppression of statements made during that detention. This treatment of F.C. is particularly egregious considering that the Allegheny County Juvenile Court had previously directed that subjects of Act 53 petitions should not be detained. See 6/12/07 Hearing, at 23a; Motion for Evidentiary Hearing Nunc Pro Tunc, July 10, 2007 ¶ 7, at R13a.[41]

The trial court would not address the procedures used to bring F.C. to court or to shackle him, accepting the sheriff's explanation that unrestrained subjects are "contrary to their policy," 6/12/07 Hearing, at R22a. The Superior Court reiterated this view: "these complaints go to the procedures employed by the deputy sheriffs and [is] permitted by the court with respect to F.C." Super. Ct. Op., ¶ 8, n. 3. The mere wearing of restraints is presumptively prejudicial unless justified by an essential state interest. See Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986); Deck v. Missouri, 544 U.S. 622, 628 (2005) (recognizing that during a trial's guilt phase, "a criminal defendant has a right to remain free of physical restraints that are visible to the jury"). The fairness and dignity of the judicial process was also compromised by the use of these extreme restraints for a minor. The lower court failed to make an individualized finding of dangerousness or risk of flight. Trial courts must make an independent determination and not blindly defer to law enforcement in determining the necessity of physical restraints.[42]

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[41] "[I]n a prior case it was ordered that that child would not be detained, nor should the Act 53 coordinator continue with the policy of unilaterally having children taken into custody without their knowledge or forethought." 6/12/07 Hearing, at 23a.

[42] Judges have the authority over what happens in the courtroom. See Lakin v. Stine, 431 F.3d 959, 964 (6th Cir.2005) (holding the trial court's deference to a corrections officer was a violation of due process); Woodards v. Cardwell, 430 F.2d 978, 981-82 (6th Cir.1970) (holding the trial court abused its discretion by leaving the decision of whether to physically restrain to the sheriff); In re A.H., 833 N.E.2d 915, 923 (Ill. App. Ct. 2005) (holding the trial court, not the sheriff, has discretion to decide whether to leave a respondent in physical restraints); State v. Carter, 372 N.E.2d 622, 626-27 (Ohio App. Ct. 1977) (holding the trial court's decision to allow the sheriff to determine if defendant was to be physically restrained was clearly erroneous); State ex rel. Juvenile Dept. of Multnomah County v. Millican, 906 P.2d 857, 860 (Or. App. 1995) (holding a conclusory statement by a law enforcement officer or prosecutor of a serious risk of dangerous behavior was not sufficient to meet the independent

The Superior Court wrongly relied upon caselaw concerning the use of restraints in adult criminal matters in dismissing F.C.'s challenge to this practice. Sup. Ct. Op., ¶¶ 27-29. However, in its Opinion, the Superior Court also repeatedly acknowledged – and indeed emphasized – the civil nature of Act 53 proceedings and the Act's emphasis on treatment, not punishment. In the Interest of F.C., 966 A.2d at 1136 , 1137-38. In almost all respects, however, F.C. was treated as a "defendant" or delinquent,[43] not a potential patient.

Counsel objected to the use of restraints because it interfered with his ability to communicate with his client: "I just wanted to make it clear that if the [restraint] policy is created in such a way that it viscerates [sic] my ability to represent clients in Act 53, then the right to counsel is rendered meaningless." 6/12/07 Hearing, at R28a. The lower court refused to hear additional testimony or argument, and proceeded with the adjudicatory phase of the hearing. Id. at 10-11.

The fairness and dignity of the judicial process was compromised by the use of these extreme restraints for a minor who, prior to appearing before the court, had cooperated with the court-ordered drug assessment. 6/12/07 Hearing at 21, 24-25. Here, the lower court, with no evidence to justify the restraints, prejudged F.C. as dangerous and a flight risk. The lower court failed to make an individualized finding of dangerousness or risk of flight. The lower court's decision to maintain the restraints was prejudicial—*i.e.*, punishment before a finding of drug dependency—and it should not have presided over F.C.'s drug dependency determination.

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analysis necessary for the exercise of discretion); State v. Roberts, 206 A.2d 200, 205-06 (N.J. Super. Ct. App. Div. 1965) (holding the trial court had discretion whether to apply physical restraints).

[43] The Superior Court has recently reiterated that Pennsylvania law and jurisprudence prohibits the detention of status offenders and dependent youth as though they were delinquent youth. In re K.K., 957 A.2d 298 (Pa. Super. Ct. 2008). In this proceeding, which is not a delinquent matter and is a civil proceeding, a similar prohibition should apply.

Children's attorneys and juvenile justice personnel alike have noted the various negative effects of shackling children. For example, the Council of Juvenile Correctional Administrators ("CJCA") have promulgated guidelines for the use of physical restraints in the juvenile justice system, which emphasize that they should be used only in limited situations and based on individualized determinations of danger. See Council of Juvenile Correctional Administrators, Position Paper on Physical and Mechanical Interventions with Juvenile Offenders (2003), available at http://cjca.net/photos/content/documentsInterventions.pdf. The critique of shackling children springs largely from its conflict with the therapeutic and rehabilitative goals of the juvenile justice system.

> The primary objective of the juvenile justice system is to rehabilitate youth. However, shackles run directly contrary to this goal. Shackles affect a juvenile's sense of right and wrong; cause physical and psychological harm, stigma, and embarrassment; foster a sense of distrust for the justice system; and teach children that they will be treated like criminals.

Anita Nabha, Shuffling to Justice: Why Children Should Not Be Shackled in Court. 73 Brook. L. Rev. 1549, 1576-67 (2008). See also Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 375 (Cal. App. 2007) (shackling without an individualized determination of need conflicts with the rehabilitative goals of the juvenile court system); Pena v. N.Y. State Division for Youth, 419 F. Supp. 203, 211 (S.D.N.Y.1976) (shackles are "highly anti-therapeutic" and cannot be used for youth adjudicated delinquent without an individualized determination of danger). Act 53 proceedings are targeted exclusively at minors and are presented as having solely therapeutic goals. Thus, the principles that make shackling at odds with the therapeutic goals of the juvenile justice system are even stronger in Act 53 proceedings. By shackling F.C., both his due process rights and the purported goals of Act 53 were compromised.

B. Permitting F.C.'s Assessment to Proceed Without Counsel Violated his Procedural Due Process Rights.

Because the Act requires the appointment of counsel at the same time the assessment is ordered and does not specifically provide for the right to have counsel present at the assessment, the minor's counsel is afforded no opportunity to prevent the court-ordered assessment and may not even learn of it until after it has taken place. Compare 71 Pa. Stat. Ann. § 1690.112a(a) ("[u]pon petition...the court...shall appoint counsel for the minor") with MHPA, 50 Pa. Stat. Ann. § 7304(c)(5) (providing "the right to have counsel present" at a psychiatric examination ordered pursuant to a petition to impose court-ordered involuntary mental health treatment). In this case counsel was appointed at the same time as the assessment was ordered. See Order of Court, Act 53, June 12, 2007, at R5a. There was no opportunity for counsel to take any court action to stay proceedings or to be present at the assessment. In contrast, under the MHPA, the individual is apprised of his rights and **"**shall be informed of the reasons for emergency examination and of his right to communicate immediately with others. He shall be given reasonable use of the telephone. He shall be requested to furnish the names of parties whom he may want notified of his custody and kept informed of his status." 50 Pa. Stat. Ann. § 7302(c).

CONCLUSION

For the foregoing reasons, F.C. respectfully requests that his adjudication of drug dependency under Act 53 be reversed and that Act 53 be held unconstitutional under the due process clauses of the federal and state constitutions.

Respectfully submitted,

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Superior Court of Pennsylvania.
In the Interest of F.C., III, a minor.
Appeal of F.C., III, Appellant.
Argued Oct. 29, 2008.
Filed Jan. 23, 2009.
Reargument Denied April 2, 2009.

Background: Juvenile sought review of order of the Court of Common Pleas, Allegheny County, Civil Division at No. Docket No. 1081-07, History No. 67217-C, DeAngelis, J., committing him to involuntary drug and/or alcohol treatment.

Holdings: The Superior Court, No. 1302 WDA 2007,Colville, J., held that:
(1) juvenile's right to counsel was not violated when he was assessed for drug and/or alcohol dependency without counsel present;
(2) juvenile was not denied due process when he was detained and subjected to a drug and alcohol assessment in which he was compelled to divulge private information without notice and opportunity to test the allegations in the petition;
(3) juvenile's in-court restraints did not violate his due process rights; and
(4) juvenile's restraints did not violate his right to counsel.

Affirmed.

West Headnotes

[1] Chemical Dependents 76A 19

76A Chemical Dependents
76AII Commitment or Treatment
76Ak13 Proceedings
76Ak19 k. Examination. Most Cited Cases

Constitutional Law 92 4347

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4346 Children and Minors
92k4347 k. In General. Most Cited Cases

Juvenile was not denied due process when, based solely on a petition for involuntary drug treatment, he was detained and subjected to a drug and alcohol assessment in which he was compelled to divulge private information without first being given notice and an opportunity to test the allegations in the petition; prerequisite of a court-ordered assessment upon sufficient facts and good reason, an assessment conducted by a qualified person, the appointment of counsel, an in-court hearing requiring clear and convincing evidence prior to involuntary commitment, and provisions for ongoing review before recommitments ensured protection of minor's due process rights. U.S.C.A. Const.Amend. 14; 50 P.S. § 7302.

[2] Chemical Dependents 76A 19

76A Chemical Dependents
76AII Commitment or Treatment
76Ak13 Proceedings
76Ak19 k. Examination. Most Cited Cases

Juvenile's right to counsel was not violated when he was assessed for drug and/or alcohol dependency without counsel present, as part of involuntary drug treatment and commitment proceedings; a court-ordered assessment upon sufficient facts and good reason coupled with an assessment conducted by a qualified person was necessary prior to appointment of counsel. U.S.C.A. Const.Amend. 6.

[3] Mental Health 257A 37.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak37.1 k. In General. Most Cited Cases
As the number and length of involuntary civil commitments increase, so do the procedural safeguards afforded to the committed person in connection with each hearing.

[4] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4337 k. Commitment and Proceedings Therefor. Most Cited Cases

Mental Health 257A 40

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak40 k. Custody Pending Proceedings. Most Cited Cases
While the process involved in short-term civil commitment for assessment purposes provides minimal constitutional protections, it is nevertheless constitutionally sound in light of the therapeutic and nonpunitive intent and short duration of the procedures; the increasing procedural protections associated with extended treatment, later hearings, and ongoing commitments then satisfy the increasing demands of due process. U.S.C.A. Const.Amend. 14; 71 P.S. § 1690.112a.

[5] Chemical Dependents 76A 11.1

76A Chemical Dependents
76AII Commitment or Treatment
76Ak11 Eligibility For, and Persons Subject To, Commitment or Treatment
76Ak11.1 k. In General. Most Cited Cases

Chemical Dependents 76A 18

76A Chemical Dependents
76AII Commitment or Treatment
76Ak13 Proceedings
76Ak18 k. Notice, Hearing, and Determination. Most Cited Cases
A trial court may not commit a minor to involuntary commitment without proof by clear and convincing evidence that the minor is drug dependent and is incapable of accepting or unwilling to accept treatment; this heightened standard of proof provides significant protection to the minor before commitment is ordered. 71 P.S. § 1690.112a(c).

[6] Constitutional Law 92 3865

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3865 k. In General. Most Cited Cases

Constitutional Law 92 3866

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3866 k. Fairness in General. Most Cited Cases
Considerations of due process involve commonsense reasoning and fundamental fairness. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
Due process is a flexible concept incapable of exact definition, and is concerned with the procedural safeguards demanded by each particular situation in light of the legitimate goals of the applicable law. U.S.C.A. Const.Amend. 14.

[8] Chemical Dependents 76A 18

76A Chemical Dependents
76AII Commitment or Treatment
76Ak13 Proceedings
76Ak18 k. Notice, Hearing, and Determination. Most Cited Cases

Constitutional Law 92 4347

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4346 Children and Minors
92k4347 k. In General. Most Cited Cases
Juvenile was not denied due process by being restrained in shackles prior to and during hearing to determine his involuntary commitment for drug and/or alcohol treatment; hearing was before a trial judge, not a jury, and the court was quite aware at the outset of the hearing that juvenile was restrained, and the record on appeal did not show the court was biased by that knowledge, and juvenile did not show that the court somehow later became biased by juvenile's continued restraint for what appeared to have been a comparatively brief hearing. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 92 4616

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4613 Presence and Appearance of Defendant and Counsel
92k4616 k. Custody and Restraint. Most Cited Cases
Generally, due process guarantees defendants the right to appear in court free of restraints; this right arises, at least in part, because the appearance of restraints can fix in the jurors' minds prejudice against the defendant. U.S.C.A. Const.Amend. 14.

[10] Criminal Law 110 637.4

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k637 Custody and Restraint of Accused
110k637.4 k. Grounds and Circumstances Affecting Use of Restraints in General. Most Cited Cases
Defendants may be restrained in open court to prevent escape, to protect others in the courtroom, and/or to maintain order in the courtroom.

[11] Criminal Law 110 637.7

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k637 Custody and Restraint of Accused
110k637.7 k. Visibility of Restraint; Restraint Not Observed by Jurors. Most Cited Cases
The jurors' brief observation of a defendant in physical restraints, particularly if the defendant is observed outside of the courtroom, does not necessarily render the trial so unfair as to require a mistrial.

[12] Chemical Dependents 76A 18

76A Chemical Dependents
76AII Commitment or Treatment
76Ak13 Proceedings
76Ak18 k. Notice, Hearing, and Determination. Most Cited Cases
That juvenile was held in restraints during involuntary civil commitment proceedings did not prevent him from communicating with his counsel in violation of his right to counsel; transcript of hearing showed that trial court was aware of situation and acknowledged that juvenile and his counsel could in fact communicate with one another. U.S.C.A. Const.Amend. 6.

***1132** William R. Crum, Jr., Pittsburgh, for F.C., appellant.

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Thomas W. Corbett, Jr., Attorney General, Harrisburg, participating party.

***1133** BEFORE: MUSMANNO, DONOHUE and COLVILLE [FN*], JJ.

FN* Retired Senior Judge assigned to the Superior Court.

OPINION BY COLVILLE, J.:

¶ 1 F.C., a minor, appeals the order committing him to involuntary drug and/or alcohol treatment under 71 P.S. § 1690.112a (commitment of minors, "Act 53"). The issues are: (1) whether F.C. was denied due process when, based solely on a petition for involuntary drug treatment, he was detained and subjected to a drug and alcohol assessment in which he was compelled to divulge private information without first being given notice and an opportunity to test the allegations in the petition; (2) whether his right to counsel was infringed when he was assessed without counsel present; (3) whether he was denied due process by being restrained in shackles prior to and during the hearing to determine his involuntary commitment; (4) whether his right to counsel was infringed during the hearing because, being held in restraints, he could not communicate with his counsel.[FN1] We affirm.

FN1. To support his claims that he was denied due process, F.C.'s brief also sets forth additional legal theories *(e.g.*, Act 53 is unconstitutionally vague; it compromises the neutrality of the court because, during Act 53 hearings, there is no lawyer who advocates the commitment petition but, instead, the court essentially acts as an advocate for the petition while also adjudicating that petition; Act 53 does not afford the minor an opportunity to offer evidence or adequately challenge evidence at the hearing; Act 53 is not narrowly tailored so as to withstand constitutional scrutiny; and Act 53 is unconstitutional because it does not require the minimum confinement necessary to effectuate treatment). These theories were not preserved during or before the Act 53 hearing and, as such, they are waived. *Commonwealth v. Rush*, 959 A.2d 945, 949 (Pa.Super.2008); Pa.R.A.P. 302(a).

Statutory Provisions

¶ 2 The relevant portions of the statutes at issue are as follows:

§ 1690.112a. Commitment of Minors

(a) A parent or legal guardian who has legal or physical custody of a minor may petition the court of common pleas of the judicial district where the minor is domiciled for commitment of the minor to involuntary drug and alcohol treatment services, including inpatient services, if the minor is incapable of accepting or unwilling to accept voluntary treatment. The petition shall set forth sufficient facts and good reason for the commitment. Such matters shall be heard by the division or a judge of the court assigned to conduct proceedings under 42 Pa.C.S. Ch. 63 (relating to juvenile matters), involving children who have been alleged to be dependent or delinquent.

(b) Upon petition pursuant to subsection (a), the court:

(1) Shall appoint counsel for the minor.

(2) Shall order a minor who is alleged to have a dependency on drugs or alcohol to undergo a drug and alcohol assessment performed by a psychiatrist, a licensed psychologist with specific training in drug and alcohol assessment and treatment or a certified addiction counselor. Such assessment shall include a recommended level of care and length of treatment. Assessments completed by certified addiction counselors shall be based on the Department of Health approved drug and alcohol level of care criteria and shall be reviewed by a case management supervisor in a single county authority.

The court shall hear the testimony of the persons performing the assessment under this subsection at the hearing on the petition for involuntary commitment.

***1134** (c) Based on the assessment defined in subsection (b), the court may order the minor committed to involuntary drug and alcohol treatment, including inpatient services, for up to forty-five days if all of the following apply:

(1) The court finds by clear and convincing evidence that:

(i) the minor is a drug-dependent person; and (ii) the minor is incapable of accepting or unwilling to accept voluntary treatment services.

(2) The court finds that the minor will benefit from involuntary treatment services.

(3) Where the court decision is inconsistent with the level of care and length of treatment recommended by the assessment, the court shall set forth in its order a statement of facts and reasons for its disposition.

(d) A minor ordered to undergo treatment due to a determination pursuant to subsection (c) shall remain under the treatment designated by the court for a period of forty-five days unless sooner discharged. Prior to the end of the forty-five-day period, the court shall conduct a review hearing in accordance with subsection (c) for the purpose of determining whether further treatment is necessary. If the court determines that further treatment is needed, the court may order the minor recommitted to services for an additional period of treatment not to exceed forty-five days unless sooner discharged. The court may continue the minor in treatment for successive forty-five-day periods pursuant to determinations that the minor will benefit from services for an additional forty-five days.

71 P.S. § 1690.112a.

§ 1690.102. Definitions

(a) The definitions contained and used in the Controlled Substance, Drug, Device and Cosmetic Act shall also apply for the purposes of this act.

(b) As used in this act:

* * * * * * *

"**Drug dependent person**" means a person who is using a drug, controlled substance or alcohol, and who is in a state of psychic or physical dependence, or both, arising from administration of that drug, controlled substance or alcohol on a continuing basis. Such dependence is characterized by behavioral and other responses which include a strong compulsion to take the drug, controlled substance or alcohol on a continuous basis in order to experience its psychic effects, or to avoid the discomfort of its absence. This definition shall include those persons commonly known as "drug addicts."

* * * * * * *

71 P.S. § 1690.102 (footnotes omitted).

Facts

¶ 3 On May 30, 2007, F.C.'s grandmother ("Petitioner") filed a petition seeking to have F.C. involuntarily committed to drug and/or alcohol treatment pursuant to Act 53. The petition stated, "[F.C.] will not go to school and I believe he's doing drugs and he's running away. And he's stealing." Petition, 05/30/07, at 1.

¶ 4 On that same date, the court issued an order appointing counsel for F.C., directing F.C. to undergo a drug and alcohol assessment under § 1690.112a(b)(2), scheduling an evidentiary hearing on the petition for involuntary commitment, requiring F.C. to appear at that hearing, and instructing Petitioner to provide F.C. with a copy of the petition and court order.

¶ 5 It is not clear whether Petitioner served F.C. with the petition and order. ***1135** Irrespective of that question, though, F.C. maintains that, on or about June 12, 2007, Allegheny County Deputy Sheriffs took him into custody at his home and transported him to the courthouse for the court-ordered assessment and hearing. The court would later indicate it did not know the exact logistics of how F.C. arrived at the courthouse, but it appears undisputed that F.C. did indeed come to be in the custody of the sheriffs prior to the hearing. While in custody, he underwent the aforesaid drug and alcohol assessment. After the assessment, F.C. was brought in restraints before the court for the hearing to determine whether he should be involuntarily committed.

¶ 6 Before and during the hearing, F.C.'s counsel voiced several challenges, reflected in the issues listed *supra*, to the procedure by which F.C. was ordered and brought to his assessment and to his hearing. The court granted no type of relief in response to any of the challenges. Thereafter, the court took testimony from a Ms. Morgano who had conducted the assessment. F.C.'s counsel stipulated to her qualifications to conduct the assessment. Morgano testified that F.C. had a history of outpatient mental health treatment, had been truant from school, had run away from home, had stolen money from Petitioner, had been "very difficult to contain in the home environment," and had a diagnosis of cannabis dependence. N.T., 06/12/07, at 21. It appears the foregoing history to which Morgano testified was supplied to her entirely or at least largely by Petitioner.

¶ 7 Initially, Morgano provided no specific facts, other than the claimed diagnosis of dependency, evidencing F.C.'s marijuana use. On cross-examination, however, Morgano testified to various particulars that had been provided to her by Petitioner. Morgano explained Petitioner had claimed

to observe F.C. while he smelled like marijuana and had glassy eyes. Morgano also testified Petitioner had expressed her belief that, based on her aforesaid observations of F.C., he appeared to use marijuana several times per week.

¶ 8 Also on cross-examination, Morgano testified to what F.C. had told her. He admitted during the assessment that he smoked marijuana every day and sometimes used alcohol. He told Morgano he had been using marijuana for one year. Moreover, the context of the testimony revealed the daily usage rate had persisted throughout the one-year period.

¶ 9 At the conclusion of testimony, the court granted the petition and ordered F.C. committed to inpatient treatment.[FN2] F.C. later filed this timely appeal.

> FN2. On that same date, the court issued a written order intended to reflect its decision to commit F.C. The face of the order contained a typographical error, the specifics of which are not now relevant. Due to the typographical error on the face of the order, an amended written order was issued on June 16, 2007. Thus, the June 16th order was merely a clerical correction of the one issued on June 12th.

Analysis

[1][2] ¶ 10 F.C.'s first two complaints are that he was denied due process and the right to counsel when, based solely on the petition, he was detained and subjected to an assessment in which he was compelled to divulge private information without first being given notice and an opportunity to be heard in order to test the allegations in the petition. We will resolve these issues together.

¶ 11 First, we note that these complaints involve the constitutionality of Act 53. These matters are questions of law and, therefore, our standard of review is *de novo*. ***1136***Commonwealth v. Ludwig,* 583 Pa. 6, 874 A.2d 623, 628 n. 5 (2005). Our scope of review is plenary. *Id.*

¶ 12 We agree with the trial court that portions of the Mental Health Procedures Act ("the MHPA"), 50 P.S. §§ 7101-7503, provide guidance for an analysis of F.C.'s issues. This premise is particularly so since the Legislature regards drug dependence as a mental illness, sickness or health problem. *See*71 P.S. § 1690.110. Accordingly, it will be helpful to review the steps that take place under the MHPA.

¶ 13 Under 50 P.S. § 7302 ("Section 302"), a county administrator may issue a warrant requiring a person to undergo an involuntary emergency examination at a treatment facility and directing a peace officer to take such a person to the facility specified in the warrant. The warrant may issue upon reasonable grounds that the person is severely mentally disabled and in need of immediate treatment. 50 P.S. § 7302(a)(1). The term "severely mentally disabled" is defined in detail in the MHPA and, in essence, means the person, as a result of mental illness, poses a clear and present danger to himself, herself or others. 50 P.S § 7301(a).

¶ 14 After being transported to the specified facility, the person is subject to an examination by a physician. 50 P.S. § 7302(b). Depending on the results of the examination *(i.e.*, whether treatment is required), the person is either discharged or treated. *Id.* If treated, the person may not be held involuntarily for more than one hundred twenty hours unless, upon application, the Court of Common Pleas orders extended involuntary treatment. 50 P.S. § 7303 ("Section 303"). If such an application is filed, the court then appoints counsel for the person and, within twenty-four hours of the filing of the application, an informal hearing is held. 50 P.S. § 7303(b). At the start of that hearing, the court informs the person of the purpose of the hearing. 50 P.S. § 7303(c). The informal hearing may result in extended treatment which, at that point, may not

exceed twenty days. *Id.*

[3] ¶ 15 The MHPA then provides for possible judicial review of the extended treatment order and/or for additional periods of commitment for increasing amounts of time based on additional hearings. 50 P.S. §§ 7303-05. As the number and length of involuntary commitments increase, so do the procedural safeguards afforded to the committed person in connection with each hearing. *See In re: R.D.*, 739 A.2d 548, 555-57 (Pa.Super.1999) (discussing increased procedural protections such as evidentiary formalities as length of commitment increases).

¶ 16 As is apparent from the foregoing discussion, the initial infringement of liberty interests when the person is transported to a treatment facility, subjected to an involuntary psychiatric examination/treatment and then, perhaps, subjected to an informal hearing for a possible twenty-day commitment, takes place with minimal due process or other constitutional guarantees. For example, although a warrant is required for an involuntary examination, there is no notice or opportunity to test the warrant application before the examination is ordered. Counsel is not appointed for the examination but, rather, is appointed if a petition for continuing treatment beyond one hundred twenty hours is filed. An informal hearing held upon petition for extended treatment beyond one hundred twenty hours takes place within twenty-four hours of when the petition is filed, thus affording the person little or no notice until the start of the hearing itself.

[4] ¶ 17 While the foregoing process provides minimal constitutional protections, it is nevertheless constitutionally ***1137** sound in light of the therapeutic/non-punitive intent and short duration of the Section 302 procedures. *In Re: J.M.*, 556 Pa. 63, 726 A.2d 1041, 1046-49 (1999). The increasing procedural protections associated with extended treatment, later hearings, and ongoing commitments under Sections 303-305 then satisfy the increasing demands of due process. *In re: R.D.*, 739 A.2d at 555-56.

¶ 18 The procedures under Sections 302 and 303, designed to facilitate therapy for severely mentally ill persons, are similar to those providing drug treatment under 71 P.S. § 1690.112a. While Section 302 calls for a warrant to be issued after reasonable grounds are presented to a court, Section 1690.112a(a) calls for an order to be issued after "sufficient facts and good reason" are presented by petition to the court. Just as Section 302 does not require the appointment of counsel, or notice and an opportunity to be heard before the warrant issues, neither does Act 53 provide such protections before the assessment is ordered. While the Section 302 warrant directs an involuntary examination by a physician, the Section 1690.112a order directs an assessment by a psychiatrist, psychologist or certified addiction counselor.

¶ 19 We note also that F.C. has not particularized what private information he supposedly divulged during the assessment but, in any event, he certainly has not demonstrated that the assessment invaded his privacy any more than would a psychiatric examination under Section 302.

¶ 20 Section 303 calls for the appointment of counsel and requires a hearing within a mere twenty-four hours of the filing of a petition for extended involuntary commitment of up to twenty days. 50 P.S. § 7303(a), (b). Similarly, Section 1690.112a(b) calls for the appointment of counsel, a hearing, and possible commitment of up to forty-five days.

¶ 21 Just as there is no requirement of notice under Section 1690.112a before the start of the hearing, we observe there is little or no notice that needs to be given under Section 303 before the commitment hearing under that section starts.

[5] ¶ 22 Additionally, we note that, under Act 53, the court may not commit a minor to involuntary commitment without proof by clear and convincing

evidence that the minor is drug dependent and is incapable of accepting or unwilling to accept treatment. 71 P.S. § 1690.112a(c). Clear and convincing evidence is evidence that is so clear, direct, weighty, and convincing that the factfinder could come to a clear conviction, without hesitating, regarding the facts at issue. *Commonwealth v. Feucht,* 955 A.2d 377, 380 (Pa.Super.2008). This heightened standard of proof provides significant protection to the minor before commitment is ordered.

¶ 23 Finally, as we have observed *supra* that the MPHA provides increasing constitutional protections as the persons are subjected to continuing and increased periods of commitment. Similarly, Act 53 provides for ongoing hearings if the court wishes to recommit the minor to treatment. 71 P.S. § 1690.112a(d). In F.C.'s case, at the end of his first hearing, he was notified that a review hearing on his case would be held on July 24, 2007, some six weeks in the future. Thus, he received notice of that review hearing significantly in advance thereof.

¶ 24 In light of the foregoing, we are persuaded that the MPHA and Act 53 serve similar purposes through similar steps with similar constitutional protections. Just as the MPHA survives constitutional scrutiny, *see In Re: J.M.,* 726 A.2d at 1046-49; *In re: R.D.,* 739 A.2d at 555-57, we find so does Act 53. We are not suggesting that every aspect of the ***1138** MHPA and every part of its increasing constitutional protections mirror every aspect of Act 53 and its protections. However, the MHPA and Act 53 are sufficiently analogous that the case law finding the MHPA constitutional leads us to a similar result for Act 53.

[6][7] ¶ 25 In reaching this conclusion by analogy, we note also that considerations of due process involve common-sense reasoning and fundamental fairness. *In re: S.L.W.,* 698 A.2d 90, 94 (Pa.Super.1997). Moreover, due process is a flexible concept incapable of exact definition, and is concerned with the procedural safeguards demanded by each particular situation in light of the legitimate goals of the applicable law. *See id.; Corra v. Coll,* 305 Pa.Super. 179, 451 A.2d 480, 482 (1982). Given Act 53's important goal of facilitating treatment for drug-dependent minors, and given the dangers posed to minors and those around them when those minors abuse drugs, a common-sense analysis leads us to conclude the procedures under Act 53 are fundamentally fair and provide constitutionally adequate protections for minors subject thereto. The prerequisite of a court-ordered assessment upon sufficient facts and good reason, an assessment conducted by a qualified person, the appointment of counsel, an in-court hearing requiring clear and convincing evidence prior to involuntary commitment, and the provision for ongoing review before recommitments all examples of ways in which the minor's rights are protected. In short, F.C. has simply not convinced us the statute violated his due process rights or his right to counsel.

[8] ¶ 26 F.C. next argues it was a due process violation for him to be restrained prior to and during his hearing. He suggests the due process violation arose because the restraints, being visible, rendered his hearing unfair. At the same time, he also seems to complain the restraints were improper merely because this matter is a civil case, not a delinquency or criminal hearing. We will address these matters together.[FN3]

FN3. These arguments are not statutory matters because the statute does not require that the minor be restrained. Rather, these complaints go to the procedures employed by the deputy sheriffs and permitted by the court with respect to F.C. According to F.C.'s brief and the court's opinion, it appears the Allegheny County Court of Common Pleas may have adopted new procedures regarding the way in which Act 53 assessments and/or hearings are conducted. The new procedures are of no con-

cern to us with respect to the instant case.

[9] ¶ 27 While this case is not a criminal matter, the law concerning criminal defendants who are restrained in or near the courtroom is nonetheless a helpful starting point. Generally, due process guarantees defendants the right to appear in court free of restraints. *Commonwealth v. Mayhugh,* 233 Pa.Super. 24, 336 A.2d 379, 381 (1975). This right arises, at least in part, because the appearance of restraints can fix in the jurors' minds prejudice against the defendant. *Id.* at 382.

[10][11] ¶ 28 Even still, defendants may be restrained to prevent escape, to protect others in the courtroom and/or to maintain order in the courtroom. *Commonwealth v. Cruz,* 226 Pa.Super. 241, 311 A.2d 691, 692 (1973). The decision to restrain a defendant in such cases rests in the court's discretion. *Id.* Additionally, the jurors' brief observation of a defendant in physical restraints, particularly if the defendant is observed outside of the courtroom, does not necessarily render the trial so unfair as to require a mistrial. *Commonwealth v. Rios,* 591 Pa. 583, 920 A.2d 790, 802 (2007).

***1139** ¶ 29 The foregoing principles provide a perspective from which to analyze the instant case. Had the instant matter been a criminal trial involving a jury, F.C. might well have a prevailing argument that he was denied due process. However, this matter did not involve a jury. It involved a judge. We think it fair for this Court to take notice that, every day in Common Pleas courtrooms, judges who are about to act as factfinders in criminal trials see defendants escorted into courtrooms while restrained. Of course, the defendants are then most often freed of the restraints for the duration of the trial. Nevertheless, the factfinding judges have already seen those defendants in restraints in their respective courtrooms. Just as we see no reason to believe that a judge's initial observation of a defendant in restraints somehow renders that judge incapable of then acting as a fair factfinder, so too we find no reason to believe the instant judge's initial observation of F.C. in restraints rendered the judge incapable of adjudicating this matter fairly. More to the point of F.C.'s argument, there being no reason to find that the court's initial observation of F.C. in restraints biased the court, we likewise find no reason to conclude that the court would have inexplicably become biased in the short course of the relatively brief hearing that followed. Phrased differently, the court was quite aware at the outset of the hearing that F.C. was restrained, the record does not show the court was biased by that knowledge, and F.C. does not persuade us that the court somehow later became biased by F.C.'s continued restraint for what appears to have been a comparatively brief hearing.

¶ 30 In this vein, we observe that, initially, the court believed the hearing would last only five or ten minutes. While the length of the transcript *(i.e.,* forty-six pages of combined argument and testimony) suggests the hearing did last longer than the anticipated period of time, the transcript does not suggest that the hearing was a particularly extended one relative to many other hearings of which this Court is aware. Rather, the proceedings appear to have been comparatively brief. We are simply unpersuaded F.C. was prejudiced by being restrained during those relatively short proceedings. As such, he has not shown us that his hearing was unfair.

¶ 31 Additionally, the court expressed its concern that F.C. was a flight risk. In doing so, the court referenced without specifying one or more off-the-record discussions regarding the possibility of flight. On the one hand, F.C. did not seem to dispute that such discussions occurred. On the other hand, as we do not consider facts not of record, we have no basis to evaluate the significance of whatever discussions may have taken place. *See Commonwealth v. Wrecks,* 931 A.2d 717, 722 (Pa.Super.2007) (indicating this Court can only consider facts of record). However, the record does indicate F.C. was known to run away from home.

Moreover, the court also indicated that, in its experience, Act 53 hearings carried with them the risk of flight by the minors. Accordingly, we think the court's comments reveal a reasonable design to ensure F.C.'s compliance with the court's order of May 30th requiring that F.C. appear, and therefore remain, for the hearing. Thus, although this matter was not a delinquency or criminal case, the restraints were justified by the court's need to keep F.C. in the courtroom and thereby maintain order.

¶ 32 In sum, F.C. has not convinced us the court's exercise of discretion in keeping him restrained infringed his due process rights. Therefore, he is entitled to no relief on this claim.

***1140** [12] ¶ 33 In his last issue, F.C. also argues, to some extent, that the restraints impeded his ability to communicate with his counsel and thereby infringed his right to counsel. 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. Accordingly, we are unconvinced by F.C. and, as such, his claim must fail.

¶ 34 Based on the foregoing discussion, we affirm the court's order involuntarily committing F.C.

¶ 35 Order affirmed.

Pa.Super.,2009.
In re F.C., III
966 A.2d 1131, 2009 PA Super 9

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
PENNSYLVANIA
JUVENILE COURT SECTION
ORPHANS' COURT DIVISION

IN THE INTEREST OF:
F.C.,

A Minor

Docket No. 1081-07

OPINION

BY:

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
PENNSYLVANIA
FAMILY DIVISION
JUVENILE COURT SECTION

IN THE INTEREST OF: Docket No. 1081-07
F.C,
A Minor

OPINION

DeAngelis, J.

The juvenile at issue in the present matter, F.C. was born October 23, 1992. As of May 30, 2007, F.C. had been in the custody and care of his legal guardian, his grandmother, for approximately 10 years. Recent behavior of F.C. caused grandmother concerns to the extent that she contacted health services for assistance. Grandmother filed a petition pursuant to **71 P.S. 1690.112(a)** (herein after Act 53), setting forth that F.C. was truant from school, engaged in drug use, running away from home, and stealing.

Due to her inability to maintain control of F.C., grandmother requested assistance in securing F.C.'s attendance at the hearing on her petition. On June 12, 2007, an attachment order was entered directing the sheriff of Allegheny County to take custody of F.C. and transport him to Juvenile Court for attendance at the hearing.

On that date, Sheriff's deputies traveled to the home of F.C., took him into their custody, and delivered him to a secured area within the Juvenile Court facility. F.C. was held in a area that was not occupied by adults, nor was it occupied by other juveniles that were charged with delinquent activities. This Court, upon learning that F.C. was in custody, directed that he be brought to the courtroom at the earliest available time. Pursuant to the

policies of the Allegheny County Sheriff's Department F.C. was transported to the courtroom handcuffed. This Court was able to observe that the juvenile had the ability to communicate with his counsel and though handcuffed, was not restrained in a cruel or unusual manner. (Counsel for F.C. objected to his client attending the hearing in handcuffs) This Court found that given the short duration of the hearing, the concern of flight risk, and injury to himself, the handcuffs were not inappropriate.

Prior to F.C. being delivered to the courtroom, he was interviewed by Josie Morgano, a Court Expert on substance abuse and dependency. The Court, in the presence of the juvenile, his counsel, Ms. Morgano, and the Act 53 coordinator, took testimony as to the facts supporting the petition filed.

Ms. Morgano testified that during her interview, F.C. confirmed that he used marijuana on a daily basis. She concluded that inpatient therapy was needed, and that F.C. was incapable of completing his requisite treatment on an outpatient basis. Upon conclusion of the testimony, this Court ordered F.C. committed to inpatient treatment for marijuana dependency with a review scheduled within one (1) month. F.C. was thereafter taken to an inpatient facility.

Counsel for F.C. filed a Notice Of Appeal and after order of Court, filed a Concise Statement Of Matters Complained Of On Appeal. Counsel challenges the factual findings of this Court as well as the constitutionality of Act 53 and raises issues as follows:

1. The Pennsylvania Drug and Alcohol Abuse Control Act as applied to minors, **71 Pa. Cons. Stat. Ann. 1690.112a,** on its fact and as applied to F.C., deprives minors of their liberty in violation of the Due Process Clause of the Fourteenth Amendment of the United State Constitution by failing to require notice, a preliminary hearing or probable cause determination, and an opportunity for the minor to be heard to test the sufficiency of the allegations in the petition before ordering that the

minor undergo an assessment that will serve as the sole basis for court-ordered involuntary commitment.

2. F.C. was deprived of his liberty, his right to privacy, and was subjected to an unlawful seizure when removed from his home in handcuffs and leg irons by the Allegheny County Sheriffs Department without adequate notice and prior to any hearing related to the **Section 1690.112a** Petition.

3. F.C. was deprived of his right to due process, including his right to counsel, when he was compelled to undergo a drug assessment, while shackled in a delinquency isolation cell in the basement of family court, without a meaningful opportunity to consult with the attorney assigned to represent his legal interests.

4. The trial court violated F.C.'s right to privacy under the Pennsylvania Constitution when a) it ordered F.C. to undergo a drug assessment without an initial hearing to test the sufficiency of the allegations in a two sentence, **Section 1690.112a** Petition that did not set forth sufficient facts and good reason for commitment; and b) it refused to suppress F.C.'s incriminating statements made while he was shackled during the court-ordered assessment.

5. Assuming, arguendo, F.C's incriminating statements are suppressed because they violated his right to privacy, the trial court's commitment determination must be reversed because there was insufficient evidence of F.C.'s drug dependency.

6. The trial court violated the due process provisions of the federal and state constitutions, including F.C.'s right to a fair and impartial tribunal, by ordering F.C. remain shackled during the commitment determination and commenting "I'm not going to go ahead and have his cuffs and shackles released for five or ten minutes only to be re-imposed."

7. The trial court's commitment determination must be reversed because **Section 1690.112a (c)(1)(ii)** requires clear and convincing evidence that a minor be "incapable of accepting or unwilling to accept voluntary treatment services" and during the commitment

determination hearing F.C. expressed his willingness to accept voluntary treatment services.

8. The lower court erred as a matter of law and fact because it failed to require that F.C. be committed to the least restrictive placement that also meets his treatment needs, and failed to set forth any proof to the required showing in **Section 1690.112a(c)(2)** that F.C. would benefit from involuntary in-patient treatment.

Initially, it should be noted that subsequent to the hearing of May 30, 2007, new procedures were adopted for the manner in which petitions and proceedings were commenced pursuant to Act 53.[1] While this Court agrees with and commends the new procedures that have been adopted, nonetheless

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[1] NEW PROCEDURES FOR ACT 53-INVOLUNTARY COMMITMENT FOR DRUG & ALCOHOL TREATMENT MATTERS

1. At the time of the filing of the petition, the motions judge will supplement the petition by asking questions of the petitioner on the record. This will insure that the there is an adequate basis for issuing the preliminary order and scheduling the case for a hearing.

2. If a preliminary order is issued and the case is scheduled for a hearing, the parent(s) or guardian(s) will be directed by the court to serve a copy of the order upon the minor within a reasonable period of time prior to the time of the hearing, so that the minor has notice of the hearing.

3. If a preliminary order is issued and the case is scheduled for a hearing, counsel will be appointed to represent the minor. Counsel shall be provided with a copy of the petition and a copy of the court order granting the preliminary relief. The petitioner shall provide the minor with notice of the hearing within a reasonable period of time prior to the hearing.

4. Effective immediately, no attachments will be issued prior to the hearing date and time.

5. The minor and his/her parent(s) or guardian(s) will be directed to appear for the hearing at 8:30 A.M. If the minor fails to appear, the court will issue an attachment and direct the sheriff to serve the attachment and transport the minor to court.

6. If the attachment is served and the minor is transported to court on the original hearing date, the case will proceed in the usual manner (drug assessment and hearing.) If the court grants the petition, the court will have the option of having the minor transported by the sheriff to the treatment facility.

7. If the attachment is not served on the date of the original hearing date, the case shall be continued (for not more than 30 days) and the attachment will remain in effect. Once the attachment is served, the judge has the option of returning the minor home or having the minor placed into shelter pending the hearing. If the minor is placed into shelter, the hearing date can be accelerated, if necessary.

for the reasons that will be set forth in this opinion, the manner in which the hearing was conducted on behalf of F.C., was proper in all respects.

Though the issues complained of on appeal are set forth in multiple many paragraphs, they can, and will be addressed in a more concise fashion.

The first issue raised on appeal asserts a constitutional challenge to the manner in which the hearing proceeded, as well as a constitutional challenge to the Act itself. Specifically it is claimed that **71 P.S 1690.112a** "violates the 14th amendment of the United States Constitution by failing to require notice, a preliminary hearing, or probable cause determination, and an opportunity for the minor to be heard to test the sufficiency of the allegations in the petition before ordering the minor undergo an assessment that will serve as the sole basis for court ordered involuntary commitment."

When a challenge to the constitutionality of a statute is raised, the statute will be upheld unless it is clearly, and plainly violative of the individual's constitutional rights. There is a strong presumption that legislative enactments do not violate the Constitution. As such, there is a heavy burden of persuasion upon the party raising the constitutional challenge to the Act. **Commonwealth v. Leddington 908 A.2d 328(PA.Super.2006).** Where such a challenge has been raised, the Courts are instructed to view the statute by giving plain meaning to the words contained therein.

Though this Court has found little legal authority directly addressing Act 53 and the specific constitutional attack presented, it finds support in those cases that address challenges to the Mental Health Procedures Act. In fact, language within Act 53, at **1690.105**, provides that the admissions and commitment provisions shall be in accordance with the Mental Health Procedures Act. Our Courts have in the past been called upon to address the infringement of personal liberties for those suffering from mental illness.

Those Courts have found a distinction between rights that are infringed in the enforcement of criminal statutes that provide punitive sanctions versus infringements that occur in an effort to protect both society and the individual whose rights are at issue in mental health related proceedings.

The Superior Court defining the due process distinction set forth in **In Re: R.D., 739A2d 598, 1999 Pa Super 226**, "It is well-settled that involuntary civil commitment of mentally ill persons constitutes deprivation of liberty and may be accomplished only in accordance with due process protections." **In Re: Hutchinson, 500 Pa 152, 156, 454 A2d 1008, 1010 (1982).** However, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. [D]ue process is flexible and calls for such procedural protections as the particular situation demands." **Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)** (citations omitted). We must be mindful that the fundamental purpose of any protections we apply is to minimize the risk of erroneous decisions. **Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)**. To discern the demands of due process, we must adjudge the necessity of the protection sought in view of the nature and purpose of the underlying deprivation and the potential consequences in the absence of that protection. **See id. at 418, 425-27, 99 S.Ct. 1804** (mandating standard of proof by "clear and convincing evidence" to civil commitments of indefinite term based on adverse social consequences to individual committed and risk that factfinder might commit individual based on "a few isolated instances of unusual conduct"); **Allen v. Illinois, 478 U.S. 364, 373-74, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986)** (declining to adopt privilege against self-incrimination under commitment statute for "sexually dangerous persons" because statute's objective was therapeutic rather than

penal); **In re J.M., 556 Pa. 63, 75-76 n. 9, 726 A.2d 1041, 1047-48 n. 9 (1999)** (declining to require showing of probable cause for issuance of warrant under section 302 "[i]n light of the emergency nature, therapeutic purpose and short duration" of warrant); **Hutchinson, 500 Pa. at 157, 454 A.2d at 1011** (providing right to effective assistance of counsel under section 304 because without it individual's procedural due process rights "would be rendered worthless"); **In re Hancock, 719 A.2d 1053, 1057 (Pa.Super.1998)** (applying clear and convincing evidence standard of proof to twenty day commitment under section 303 to reduce risk that in relaxed setting of an informal conference "fact finder may be blinded by a set of isolated incidents"). **Id. At 554.**

Much as the Legislature's purpose for enacting the Mental Health Procedures Act was to guarantee adequate treatment to those who are mentally ill, it has set forth an equal concern to aid parents of children who are suffering from substance addiction. As with both Acts, it is the goal of the state to achieve those objectives within the constraints of due process, while utilizing a flexible application that will insure that those protections strengthen with the length of time a person may be deprived of their liberty. The purpose of both of these Acts is to provide immediate aid to protect those in need from potential injury. As these matters are civil commitments, the initial infringement upon liberty is viewed as a necessity to allow the opportunity to avoid life threatening actions by the individual.

Act 53 provides both the procedure, and standard to be followed by the courts when making a determination as to whether to involuntarily commit a juvenile to a treatment facility:

"A parent or legal guardian who has legal or physical custody of a minor may petition the court of common pleas of the judicial district where the

minor is domiciled for commitment of the minor to involuntary drug and alcohol treatment services, including inpatient services, if the minor is incapable of accepting or unwilling to accept voluntary treatment. The petition shall set forth sufficient facts and good reason of the commitment. Such matters shall be heard by the division or a judge of the court assigned to conduct proceedings under **42 Pa.C.S. Ch 63** (relating to juvenile matter), involving children who have been alleged to be dependent or delinquent.

(b) Upon petition pursuant to subsection (a), the court:

(1) Shall appoint counsel for the minor.

(2) Shall order a minor who is alleged to have a dependency on drugs or alcohol to undergo a drug and alcohol assessment performed by a psychiatrist, a licensed psychologist with specific training in drug and alcohol assessment and treatment or a certified addiction counselor. Such assessment shall include a recommended level of care and length of treatment. Assessments completed by certified addiction counselors shall be based on the Department of Health approved drug and alcohol level of care criteria and shall be reviewed by a case management supervisor in a single county authority.

The court shall hear the testimony of the persons performing the assessment under this subsection at the hearing on the petition for involuntary commitment.

(c) Based on the assessment defined in subsection (b), the court may order the minor committed to involuntary drug and alcohol treatment, including inpatient services, for up to forty-five days if all of the following apply:

(1) The court finds by clear and convincing evidence that:

(i) the minor is a drug-dependent person; and (ii) the minor is incapable of accepting or unwilling to accept voluntary treatment services.

(2) The court finds that the minor will benefit from involuntary treatment services.

(3) Where the court decision is inconsistent with the level of care and length of treatment recommended by the assessment, the court shall set forth in its order a statement of facts and reasons for its disposition." **71 P.S. 1690.112a.**

The Act provides that if a parent or legal guardian has sufficient concerns that they are unable to address without the aid of the Commonwealth, then they shall file a petition that must allege sufficient facts, and good reason to

permit Court intervention. Once this has been done, the Court shall order an assessment, as set forth in the statute. Because this statute is not penal in nature, the interview and assessment in no way carries the same state action as is associated with an interview conducted by law enforcement. While it is true that a juvenile does share many of the same constitutional protections afforded an adult in a criminal prosecution, it must never be forgotten that this Court has an underlying mandate to act within the best interest of the child. This mandate is not only a requirement of the state, but also of every parent. It is for this reason that while we do not place criminal responsibility upon adults who fail to provide adequate medical care for a sibling or spouse in certain situations, we will hold a parent criminally responsible for that same failure. **Commonwealth vs. Nixon 563 Pa 425, 761A2d 1151(2000).**

It is with this burden, obligation, and responsibility in mind that we review the actions that have been taken in the present case. Grandmother filed a petition alleging that she had concerns for truancy, theft and drug addiction. Based upon past performance she made representations that she did not believe the child would voluntarily attend a hearing on the petition and may in fact flee. Due to these concerns a body attachment order was issued. The sheriff's proceeded to the residence and upon taking the child into custody utilized handcuffs. When the child was brought to the juvenile courthouse, he remained in a separate area, segregated from both adults and juveniles. When the child attended the hearing the handcuffs remained. This Court was informed that when transporting persons in their care, the sheriff's department policy always utilizes handcuffs. This Court had the opportunity to observe the juvenile and did not notice any undue distress given the situation in which the child was treated.

Though it is complained of on appeal that the handcuffs during the hearing were a violation of due process counsel fails to set forth in what manner it prejudiced his right to a fair and impartial tribunal. At the time of the hearing this Court heard the assessment of the court-appointed expert whose qualifications were stipulated to buy counsel. That assessment included statements by the juvenile of daily marijuana use and a recommendation of inpatient treatment. This Court found the expert to be credible and agreed with her recommendation. Though the child indicated that he was willing to seek outpatient treatment, the court did not find he was capable of responsibility complying with his obligations. Given his history, as well as his statements, this Court felt his offer was disingenuous. The Court saw this as nothing more than an example for the occasion where the spirit is willing but the flesh is weak.

Additionally, this Court rejects Counsel's request to suppress any statements made by the juvenile to the court expert as being without any legal support and in contravention of the entire purpose of the statute itself. It is for these reasons that the court entered the order that it did, as well as take those actions as set forth on the record.

BY THE COURT:

J.

Date: 12-21-07

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on March 28, 2008 he personally caused to be served two copies of the foregoing Brief of F.C. III, via first class mail, postage pre-paid, upon:

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