IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

APPELLATE DOCKET 1302 WDA 2007

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

APPEAL OF F.C. III

Appeal from the Order of the Honorable Guido A. DeAngelis of the Allegheny County Court Of Common Pleas, Entered June 12, 2007 In Docket No. 1081-07

BRIEF OF APPELLANT, F.C. III

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Dated: *March 28, 2008*

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this matter pursuant to Pa.R.A.P. 341(b)(1) in that entry of the order below disposed of all claims of all parties. F.C. timely filed a notice of appeal on July 10, 2007.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court exercises plenary review over the trial court's conclusions of law, Tomaskevitch v. Speciality Records Corp., 717 A.2d 30, 32 (Pa. Cmmw. Ct. 1998); Phillips v. A-Best Products 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. Cmmw. 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).

ORDERS IN QUESTION

ORDER #1 (Filed May 30, 2007)

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

PRELIMINARY ORDER

And now, this 30th day of May, 2007 it is hereby ordered:

1. Conflict Attorney, Esquire [sic] is appointed as counsel for the minor child, [F.C. III].

2. The minor shall undergo a drug and alcohol assessment in compliance with Act 53 of 1997.

3. … Petitioner shall not be obligated for payment of court costs and counsel fees for the minor.

4. An evidentiary hearing on this Petition for involuntary commitment, which shall include the testimony of the person(s) performing the assessment, shall be held on June 12, 2007 at 10:00 A.M. before Judge DeAngelis. The minor is hereby directed to appear.

5. The petitioner is directed to provide the minor with a copy of the petition and this Order of Court.

See Appendix B for the unedited Preliminary Order.

ORDER #2 (Filed June 12, 2007)

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

ORDER OF COURT, ACT 53

And now this 12th day of June 2007 after a hearing in open court in the above captioned matter, this Court finds as follows.

- Clear and convincing evidence established that the above-named minor is in need of involuntary treatment services.
- Clear and convincing evidence established that the above-named minor will benefit from involuntary treatment.
- The above-named minor is not a drug and/or alcohol dependent person and not in need of involuntary treatment [sic]

It Is Therefore Ordered That: The Petition for Involuntary Drug and/or Alcohol Treatment is Granted. … Child to undergo complete psychiatric/psychological evaluation and follow thru with any and all recommendations.

See Appendix C for the unedited Order of Court, Act 53.

ORDER #3 (Filed July 16, 2007)

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

[AMENDED] ORDER OF COURT, ACT 53 [CORRECTING CLERICAL ERROR IN THE ORDER OF JUNE 12, 2007]

And now this 16th day of July 2007 after a hearing in open court in the above-captioned matter, this Court finds as follows.

- Clear and convincing evidence established that the above-named minor is a drug and/or alcohol dependent person in need of drug and/or alcohol treatment services.
- Clear and convincing evidence established that the above-named minor is incapable or accepting or unwilling to accept voluntary treatment.
- Clear and convincing evidence established that the above-named minor is in need of involuntary treatment services.
- Clear and convincing evidence established that the above-named minor will benefit from involuntary treatment.

It Is Therefore Ordered That: The Petition for Involuntary Drug and/or Alcohol Treatment Services is Granted. … It is further ordered that [F.C. III] is involuntarily committed to Pyramid Ridgeview facility to undergo drug and/or alcohol treatment for a period not to exceed forty-five (45) days, unless sooner discharged by the treatment provider.

See Appendix D for the unedited Order of Court, Act 53.

OPINION OF THE COURT (Dec. 21, 2007)

See Appendix E for the Opinion of the lower court.

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the adjudication of F.C. should be reversed as a matter of law because the lower court erred by denying F.C.'s facial and applied challenge that the Drug and Alcohol Abuse and Control Act as applied to minors, 71 Pa. Cons. Stat. § 1690.112a ("Act 53"), a) deprived F.C. and similarly situated minors of the right to notice of a petitioner's allegations that, if proven, can result in involuntary commitment; b) denied them the right to privacy when court ordered to undergo an assessment for drug use based on the mere filing of a petition; and c) denied them due process because Act 53 is devoid of any procedures to ensure that the allegations contained in the petition are true prior to ordering the assessment? [Suggested Answer: Yes]

2. Whether the adjudication of F.C. should be reversed as a matter of law and fact because Act 53 denied F.C. and similarly situated minors the right to a fair and impartial tribunal because a) the statute is unconstitutionally vague, b) the neutrality of the presiding judge is compromised, and c) youth may be shackled and handcuffed throughout the proceedings? [Suggested Answer: Yes]

3. Whether the lower court's order that F.C. receive involuntary, inpatient treatment for cannabis dependence should be reversed as a matter of law and fact because Act 53's commitment proceedings are not tailored to serve a compelling state interest? [Suggested Answer: Yes]

STATEMENT OF THE CASE

Nature of the Action

This appeal challenges the constitutionality of 71 Pa. Cons. Stat. § 1690.112a[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 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] ("Mental Health Act"). 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 Mental Health Act and established, for the first time, specific involuntary treatment and commitment procedures for drug dependent minors only—that is, persons under the age of eighteen.

Pursuant to Act 53, the Drug and Alcohol Abuse Control Act now subjects minors to personally intrusive assessments based on threadbare allegations of drug dependence by their parents or guardians, and authorizes the involuntary commitment of minors for drug and alcohol treatment under circumstances which provide them none of the procedural or substantive protections available under the Mental Health Act. Section 1690.112a(a) requires the division or judge assigned to proceedings under the

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

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

Commonwealth's Juvenile Act[3] 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
>
> (c) Based on the assessment defined in subsection (b) the court may order the minor committed to involuntary drug and alcohol

[3] 42 Pa. Cons. Stat. § 6300 et seq. (Westlaw through Act 2007-77).

> 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 Pa. Cons. Stat. § 1690.112a

Course of Proceedings

On May 30, 2007, F.C.'s grandmother, Christina Kennedy, filed a two sentence petition ("Act 53 Petition") with the Allegheny Court of Common Pleas for involuntary commitment of 14-year-old F.C. pursuant to Act 53. Act 53 Petition, May 30, 2007. The Act 53 Petition's 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, assigning an evidentiary hearing on the Act 53 Petition for June 12, 2007, and directing that F.C. appear for that hearing. 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]

F.C. remained in the home of his grandmother until the morning of June 12th when Allegheny County Sheriffs forcibly removed F.C. from his home, placed him in handcuffs and leg irons, and detained him in a juvenile delinquency isolation cell in the basement of Allegheny County's Family Court. Transcript of June 12, 2007 Hearing at 5-6 (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 13, 21. At no time prior to or during the assessment was F.C. informed about the Act 53 proceeding, his right to consult with counsel or an interested adult, or whether he understood that his statements could be used against him. 6/12/07 Hearing at 13-14.

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[4] Pursuant to Section 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 12th and July 24th hearings.

[5] Section 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. In Allegheny County the office of the public defender does not represent minors in Act 53 proceedings.

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

[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 14 (hereinafter "7/24/07 Hearing").

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 21, 22, 29.

After the assessment, F.C., still in handcuffs and shackles, appeared before the lower court for a hearing to determine drug dependency. At the hearing F.C. was represented by counsel.[8] F.C. met his lawyer moments before the beginning of the June 12th hearing. 6/12/07 Hearing at 13-14. 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 3. The lower court denied the request and ordered that F.C. remain shackled. 6/12/07 Hearing at 4.[9] 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 13-14. The lower court also denied that request, 6/12/07 Hearing at 15-16, and permitted Ms. Morgano to give evidence about the results of the assessment. Ms. Morgano testified F.C. cooperated with the drug assessment and admitted using cannabis daily. 6/12/07 Hearing at 21, 25. Ms. Morgano then recommended the court commit F.C. to an inpatient drug treatment program. 6/12/07

[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 "jailed." Shortly thereafter the June 12th hearing commenced at the request of F.C.'s counsel to address the issues raised herein.

[9] 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 5.

Hearing at 38. 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 31. The lower court nevertheless concluded the elements of Section 1690.112a(c) satisfied and committed F.C. to inpatient treatment at Pyramid Ridgeview for 30 days. 6/12/07 Hearing at 40.

Following the hearing F.C. was taken from the courtroom in handcuffs and shackles and placed in the delinquency isolation cell of the courthouse for several hours more, 7/24/07 Hearing at 4, 7, then, still in handcuffs, F.C. was transported to the Shuman Detention Center and later transported to Pyramid Ridgeview. 7/24/07 Hearing at 7-8.

On July 10, 2007, F.C. filed a timely notice of appeal.

On July 10, 2007, F.C. presented a Motion for Evidentiary Hearing *nunc pro tunc* to establish additional facts regarding F.C.'s pre-adjudicatory custody and detention. On July 17, 2007, the lower court denied the motion without a hearing.

At a July 24th commitment review hearing of 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 33-34. The lower court did not dismiss the Act 53 Petition and ordered that F.C. remain committed to the same involuntary inpatient program for an additional 30 days. 7/24/07 Hearing at 35-38.

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 "Tr. Ct. Op.").

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

SUMMARY OF ARGUMENT

Through this appeal F.C. challenges the constitutionality of Section 1690.112a of the Pennsylvania Drug and Alcohol Abuse and Control Act ("Act 53"). Under Act 53 a minor can be court ordered into inpatient treatment for drug or alcohol dependence. The proceedings must be initiated through a petition filed by the minor's parent or guardian. Minors found by the court to be "drug dependent "can be ordered into treatment for an initial forty-five days that can be continued for successive forty-five day periods. These commitment procedures only apply to minors. Prior to the passage of Act 53 persons subject to involuntary commitment for alleged drug or alcohol dependence could be committed only in accordance with the criteria and procedures for involuntary commitment under the Mental Health Procedures Act ("Mental Health Act").

In the case herein, F.C.'s grandmother filed an Act 53 petition for involuntary commitment of 14-year-old F.C. The petition's statement of sufficient facts and good reason for involuntary commitment merely stated "F.C. will not go to school and I believe he's doing drugs and he's running away. And he's stealing." Thirteen days after the Act 53 petition was filed sheriffs forcibly removed F.C. from his home, placed him handcuffs and leg irons, and detained him in an isolation cell. While in detention, F.C., still shackled and handcuffed, was compelled to undergo a drug assessment where he admitted to cannabis use. At a hearing on the Act 53 Petition the lower court determined F.C. drug dependent based on his incriminating statements and committed him to inpatient treatment for 45 days despite F.C.'s expressed willingness to attend outpatient treatment.

F.C. submits that the lower court erred in several respects. Act 53 violates both federal and state due process requirements at three critical phases: at pre-adjudication where, inter alia, the subject of an Act 53 petition is ordered to undergo an assessment for drug use based on the mere filing of a petition; at adjudication where the determination of "drug dependency" is vague, and the neutrality of the court is compromised by the absence of counsel for the Act 53 Petitioner; and at disposition and disposition review where procedures that subject minors to commitment in a highly restrictive setting are not narrowly tailored. The sum of these violations mandate that Section 1690.112a be struck. If Act 53 survives this facial challenge, F.C.'s adjudication should be reversed because the application of Act 53 deprived him of his civil rights and liberties.

ARGUMENT

Four decades ago, in In re Gault, 387 U.S. 1 (1967), the United States Supreme Court rejected the notion that good intentions by the state can justify arbitrary process.[10] Confronting the broken promises of the juvenile justice system, the Court held that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." Id. at 18. Declining to leave the system free any longer from "constitutional grief," id. at 16, the Court noted "[t]he absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment....Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." Id. at 18-19. Persuaded more by reality than labels, the Court in Gault extended due process protections to juveniles charged with crimes in juvenile court.

In considering the constitutionality of Section 1690.112a of the Pennsylvania Drug and Alcohol Abuse and Control Act ("Act 53"), this Court is confronted with a similar challenge. Act 53 eerily recalls the constitutional lapses of the pre-Gault era. Now, as then, the Court's warning must be heeded: "unbridled discretion, however, benevolently motivated, is frequently a poor substitution for principle and procedure." Id. at 18.

THE LOWER COURT ERRED IN HOLDING ACT 53 DOES NOT VIOLATE THE DUE PROCESS CLAUSES OF THE U.S. AND PENNSYLVANIA CONSTITUTIONS

Through this appeal F.C. challenges the constitutionality of Act 53, on its face and as applied, as violative of his rights to both substantive and procedural due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article 1 Section

[10] The state in Gault argued that the benefits of juvenile court offset the need for procedural protections. 387 U.S. at 21-28. The Supreme Court rejected this argument.

1 of the Pennsylvania Constitution. In challenging Act 53, F.C. seeks to invalidate an involuntary commitment scheme (and have his adjudication under that scheme reversed) because it infringes on his constitutionally protected rights without appropriate due process protections.

In rejecting F.C.'s due process challenge the lower court incorrectly equates the standards and procedures of Act 53 with the safeguards contained in the Mental Health and Procedures Act ("Mental Health Act"): "Though this Court has found little legal authority directly addressing Act 53 and the specific constitutional attack presented, it finds support in those [six] cases that address challenges to the Mental Health Procedures Act." Tr. Ct. Op. at 5. According to the lower court, because the admissions and commitment procedures set forth in the Mental Health Act comport with due process, Act 53 does too: "The purpose of both 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." Tr. Ct. Op. at 7. As F.C. argues in this appeal, the lower court's reasoning is specious. Act 53 is devoid of any of the procedural protections available to persons subject to involuntary civil commitment under the Mental Health Act.[11] As a civil commitment scheme which deprives F.C. and similarly situated youth of their constitutionally protected interest in liberty and right to be free from unwarranted restraint, Act 53 violates both the substantive and procedural components of due process.

[11] Ironically, language within the Drug and Alcohol Abuse Control Act, Sec. 1690.107, provides that "[a] person receiving care or treatment under the provisions of this act shall retain all of his civil rights and liberties excerpt as provided by law."

When confronted with a constitutional challenge premised upon substantive due process grounds, the threshold inquiry is whether the challenged statute purports to restrict or regulate a constitutionally protected right. Khan v. State Board of Auctioneer Examiners, 842 A.2d 936, 947 (Pa. 2004). If the statute restricts a fundamental right, it must be examined under strict scrutiny. Id. (citing Smith v. Coyne, 722 A.2d 1022, 1025 (Pa. 1999)).[12] Pursuant to that analysis, legislation that significantly interferes with the exercise of a fundamental right will be upheld only if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose. Id. Here, the lower court failed to recognize that Act 53 interferes with fundamental rights—*i.e.*, F.C.'s right to liberty, right to privacy—and did not employ a strict scrutiny analysis as to whether this commitment scheme is necessary to serve the Commonwealth's interest and whether the means used are narrowly tailored to effectuate that state purpose.

When a government action depriving an individual of life, liberty or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process. Salerno v. United States, 481 U.S. 739, 746 (1987) (emphasis added). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). Even through this more relaxed lens, the lower court erred when it refused to measure Act 53's deficiencies.

[12] See Addington v. Texas, 441 U.S. 418, 425 (1979) (recognizing that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); Stenger v. Lehigh Valley Hosp. Center, 609 A.2d 796, 799-802 (Pa. 1992) (acknowledging right to privacy as fundamental right protected under Pennsylvania Constitution).

It is well settled that "involuntary civil commitment constitutes deprivation of liberty and may be accomplished only in accordance with due process protections." In re Hutchinson, 454 A.2d 1008, 1110 (1982). As described below, Act 53 violates both federal and state due process requirements at three critical phases: at pre-adjudication where the subject of an Act 53 petition is ordered to undergo an assessment for drug use based on the mere filing of a petition; at adjudication where the determination of "drug dependency" is vague, and the neutrality of the court is compromised by the absence of counsel for the Act 53 Petitioner; and at disposition and disposition review where procedures that subject minors to commitment in a highly restrictive setting are not narrowly tailored. The sum of these violations mandate that Section 1690.112a be struck. If Act 53 survives this facial challenge, F.C.'s adjudication should be reversed because the application of Act 53 deprived him of his civil rights and liberties.

I. F.C. Was Deprived Of His Right To Liberty And Privacy When The Lower Court Ordered The Sherriff To Remove F.C. From His Home And Compelled F.C. To Undergo A Drug Assessment Based On The Mere Filing Of A Petition

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 and possibly vague petition by the minor's parent or guardian alleging that the minor is drug dependent and needs treatment. See Sec. 1690.112a(b)(2). Because the assessment requires the minor to disclose private information which will then be used by the court to involuntarily commit the minor, implicating the minor's rights to both privacy and liberty, due process requirements must be satisfied prior to ordering the assessment. Act 53, on its face and as applied to F.C., deprives youth of fundamental rights. At a minimum, before a minor can be compelled

to undergo a drug and alcohol assessment the constitution requires notice, and an initial hearing to test the sufficiency of the allegations in the petition.

A. Subjects of Act 53 Petitions Are Entitled to Notice of Allegations That If Proven Can Result In Indefinite Civil Commitment

Notice is a basic axiom of due process that applies with special force to minors in civil proceedings. Gault, 387 U.S. at 31. In Gault, Gerald Gault successfully argued that proceedings before the Juvenile Court of Gila County, Arizona were constitutionally defective because of the failure to provide adequate notice of the hearings. At that time, Arizona's Juvenile Code did not provide for notice of any sort to be given at the commencement of the proceedings to the child or his parents:

> The applicable Arizona statute provides for a petition to be filed in Juvenile Court, alleging in general terms that the child is "neglected, dependent or delinquent." The statute explicitly states that such a general allegation is sufficient, "without alleging the facts." There is no requirement that the petition be served and it was not served upon, given to, or shown to Gerald or his parents.

Id. at 32. The Supreme Court of Arizona rejected Gault's claim that due process was denied because of inadequate notice. It held that advance notice of the specific charges or the basis for taking young Gerald into custody was not necessary. The United States Supreme Court forcefully disagreed and reversed.

> 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 recognized the same axiom. This Court recently affirmed that formal notice and an opportunity to be heard are fundamental components

of due process when a person may be deprived in a legal proceeding of a liberty interest. 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 previous panels of this Court have explained: 'Notice, 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)).[13]

Act 53 does not provide for notice of any sort to the minor—*i.e.*, neither when a petition is filed, when the court orders an assessment, nor when the court schedules an adjudicatory hearing. In the present case F.C. did not learn about 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 state-compelled drug and alcohol assessment. As in Gault, the Constitution does not allow a hearing to be held in which a youth's freedom is at stake without timely notice in advance of the hearing of the specific issues that must be met.[14]

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[13] Recently, the Pennsylvania Supreme Court's recognized the importance of notice in juvenile proceedings when it adopted rules of court procedure. See Pa.R.J.C.P. 124 (Summons and Notice in Delinquency Matters), Pa.R.J.C.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.

[14] In the wake of this appeal Allegheny County, perhaps recognizing the constitutional defect of any notice provisions, adopted a notice procedure. Tr. Ct. Op. at 4, fn.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.

B. Act 53 Violates Due Process By Failing To Protect The Minor's Right To Privacy And Right Decline To Make Statements That Are Contrary To His Or Her Self Interest

Both the United States Constitution and the Pennsylvania Constitution provide protections for an individual's right of privacy. The United 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 School 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. In re T.R., 731 A.2d 1276 (Pa. 1999). In T.R. the Supreme Court of Pennsylvania held that a mother's right to privacy pursuant to Article 1 Section 1 of the Pennsylvania Constitution precludes in dependency cases the ordering of a psychological evaluation prior to adjudication and disclosure of the results to interested parties where there is a less intrusive means of obtaining relevant information about whether the children are being properly cared for and whether the mother is a fit parent. 731 A.2d at 1280-1282. As part of its privacy analysis, the Supreme 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 v. Commonwealth State Ethics Commission, 504 Pa. 191, 470 A.2d 945, 949 (1983)]. More recently, we have stated the test in terms of whether there is a compelling state interest. [Stenger v. Lehigh Valley Hospital Center, 530 Pa. 426, 609 A.2d 796, 802 (1992)]. In reality, the two tests are not distinct. 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.[15]

In K.D., this Court applied the T.R reasoning to find 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." In the Matter of K.D., 744 A.2d 760, 761 (Pa. Super. Ct. 1999) (emphasis added). Here, a skeletal Act 53 Petition of two sentences triggered a state-compelled drug and alcohol assessment for the purpose of determining involuntary commitment.

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. Disclosures about such things as involvement with the legal system, social and emotional problems, family relationships, school-related problems, drug and alcohol use, and high risk behaviors including sexual activity—all of which may be probed even though the court has neither physical nor legal custody[16]—are

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[15] The privacy interests the Pennsylvania Supreme Court recognized in T.R. include "the right to protect one's beliefs and thoughts from intrusion by others [which], to paraphrase Mr. Justice Brandeis, [is] one of the most comprehensive rights known to civilized men…. 'If there is a quintessential zone of human privacy, it is the mind. Our ability to exclude others from our mental process is intrinsic to the human personality.'" 731 A.2d at 1279 (1999) (citations omitted).

[16] Although a parent or guardian's petition triggers the court-ordered assessment, a petition does not and should 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 P.S. §

clearly covered by the Supreme Court's definition of the right to privacy.[17] 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.[18]

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 it authorizes 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. 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. Board of Higher Education, 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.").

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. Sec. 1690.112a(b)(2) ("[a]ssessments completed by

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10103. 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. Cons. Stat. § 1690.112.

[17] "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).

[18] 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. Sec. 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.

certified addiction counselors shall be based on the Department of Health approved level of care criteria...").[19] According to the ASAM, a minor's resistance to treatment, as reflected in his refusal to "acknowledge" he has a drug problem, is a specific factor to be considered in determining the appropriate level of treatment. Specifically, even a minor who cooperates in the assessment but has "difficulty acknowledging his or her addiction problems and attributes alcohol/other drug problems to other people or external events," ASAM Dimension 4, is, by his "denial," providing evidence to support the commitment. According to ASAM Dimension 4, the greater the minor's level of denial, *i.e.*, the less the minor is willing to acknowledge a drug and alcohol problem and thus a need for treatment, the more intensive treatment needed by the minor. As a result, under Act 53, minors may well be penalized for their outright denial or silence, as well as for choosing not to participate fully during the course of Act 53 assessments. Under these circumstances, Act 53 violates minors' due process rights.

C. Act 53 Violates Due Process by Failing To Require Initial Review Of The Act 53 Petition Prior To Ordering An Assessment

If Act 53 survives substantive due process scrutiny it must still be implemented in a fair manner. 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.

[19] See also testimony of Allegheny County's Act 53 Coordinator referencing ASAM as the recognized criteria in Pennsylvania for levels of care for outpatient or inpatient services. 6/12/07 Hearing at 38.

424 U.S. at 335.

Clearly, 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 an indefinite amount of time.[20] The assessment itself is extremely intrusive, requiring a minor to undergo a comprehensive examination of his mental and physical state. The government's interest in ordering the assessment prior to affording the minor notice and an opportunity to challenge the sufficiency of the allegations, in contrast, is very low.

While the state may have a legitimate interest in treating drug or alcohol addicted minors, this interest would not be compromised by requiring an initial review of petitions—in the form of a preliminary hearing or some similar initial review mechanism—to ensure that petitions have adequate factual basis so that the appropriate minors are targeted for treatment. Moreover, providing minors with something akin to a preliminary 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

[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. Sec. 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.

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).

Furthermore, the risk of erroneous deprivation is extremely high under the Act, as 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"). Under Act 53, immediately upon the filing of a petition, the court "[s]hall appoint counsel for the minor" and "[s]hall order a minor who is alleged to have a dependency on drugs or alcohol to undergo a drug and alcohol assessment." Sec. 1690.112a(b). Thus, F.C. had no opportunity to be heard until after the assessment—and intrusion into his privacy—had been completed.[21]

Nor does Act 53 provide any additional or alternative safeguards to minimize the risk of erroneous deprivation. The court orders the assessment based solely upon the allegations[22] set forth in the petition which, under the Act, are also not required to be based on personal knowledge. Compare 71 Cons. Stat. § 1690.112a(a) (requiring that a

[21] 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).

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

parent or guardian's petition "shall set forth sufficient facts and good reason for the commitment") with Mental Health Act, 50 Cons. Stat. § 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 Cons. Stat. § 1690.112a with Mental Health Act, 50 Cons. Stat. § 7302(c) (providing that upon arrival at a facility for an emergency involuntary examination, a person shall be informed of the reasons for the examination and his right to communicate with others, he shall be given reasonable use of the telephone, and any parties whom he identifies shall be notified of his status).[23]

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 allegations in the petition.[24] The only procedural protection contained in the Act, namely, the appointment of counsel for the minor, is illusory at the assessment stage. 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

[23] The Commonwealth's Juvenile Act also contains verification provisions to minimize risk of erroneous deprivation. 42 Pa. Cons. Stat. § 6334(a) (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.").

[24] The Act references a single hearing when the court hears the testimony of the assessor "on the petition for involuntary commitment." Sec. 1690.112a(b)(2).

opportunity to prevent the court-ordered assessment and may not even learn of it until after it has taken place. Compare 71 Cons. Stat. § 1690.112a(a) ("[u]pon petition...the court...shall appoint counsel for the minor") with Mental Health Act, 50 Cons. Stat. § 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). 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.

Finally, in the wake of this appeal Allegheny County, perhaps recognizing the absence of any objective review of the petition, revised its pre-trial procedures and now requires an initial court review hearing prior to a court ordered assessment.[25] Allegheny's decision to remedy the statute's constitutional defect does not affect F.C's challenge. F.C.'s adjudication should be reversed because these revised proceedings did not apply, and the statute should be struck because its assessment scheme remains defective for all the reasons raised above.

II. Act 53 Violates Due Process Requirements At Adjudication

A. Act 53 Is Unconstitutionally Vague

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. General Construction Co., 269 U.S. 385, 391 (1926), or (ii) it fails to provide explicit standards to those charged with its

[25] As discussed, *supra*, the lower court's opinion listed seven new procedures for Act 53 proceedings. Now, "[a]t 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." Tr. Ct. Op. at 4, fn.1.

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 Technologies 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 and Roe, 536 F.2d 251, 254 (8th Cir. 1976) (stating 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.").[26] The vagueness doctrine has been employed in the past to strike down civil sanctions authorized by overly vague statutes, 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).[27]

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[26] 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 Technologies, 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.").

[27] 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. In Re William L., 383 A.2d 1228, 1231 (Pa. 1978); See 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.").

Applying the above standards, Act 53 contains several pivotal terms that are unconstitutionally vague and which both require "men of common intelligence" to guess at their meaning and fail to provide adequate guidance to those charged with the statute's enforcement. The statute's vagueness poses three 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.

Pursuant to the Act, before a minor can be involuntarily committed the court must find that the minor is a drug dependent person. Sec. 1690.112a(c)(1)(i). As defined, 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 Diagnostic and

Statistical Manual of Mental Disorders ("DSM-IV"),[28] 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. 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) 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

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[28] American Psychiatric Assoc., 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"

> (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. Cons. Stat. § 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.

By failing to track the DSM-IV criteria for substance dependence and diagnoses for specific drug dependencies, 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 alleged to be drug dependent based on criteria that do not meet the currently accepted definition of the disorder it seeks to treat.[29]

Second, the definition of "a drug dependent person" is circular. 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" is not clarifying 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, the only official classification of mental disorders that is widely used and accepted by clinicians, researchers and other mental health professionals. 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

[29] 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. Cons. Stat. § 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. Cons. Stat. § 1690.105. See Op. Att'y Gen. 27 (1973).

applying the criteria.[30] 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 reference to administration of the drug or alcohol on "a continuing basis," 71 Pa. Cons. Stat. § 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" there under, 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. Would once a month satisfy the Act? Once every two weeks? Or does the Act intend only daily use of the controlled substance by the minor sufficient to warrant involuntary commitment? 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.

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"

[30] The vagueness of the term is compounded by 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 two or more experts customarily used in these types of proceedings. See and compare, *e.g.*, Mental Health Procedures Act, 50 Cons. Stat. § 7304(e) (providing that person subject to a petition for involuntary mental health commitment has right to assistance of mental health expert).

voluntary treatment. See, *e.g.* id. This term is also susceptible of several interpretations. For example, does the term refer 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 21, 25, and, during the hearing, agreed to out-patient counseling, 6/12/07 Hearing at 31-32, 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." Id. at 647-648.[31]

B. Act 53 Violates Due Process In That It Compromises the Neutrality of the Presiding Judge

Litigants have the right to a 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). See also Lyness v. Commonwealth, State Board of Medicine, 605 A.2d 1204, 1207 (Pa. 1992) (holding that individuals have a similar right under the due process guarantees of the Pennsylvania Constitution, Article I, Sections 1, 9, and 11). Because the judge presiding over an Act 53 petition must perform both prosecutorial and adjudicatory functions, F.C. and similarly situated youth are denied the due process protection of a fair and impartial tribunal.

[31] 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.

Due process requires the absence of bias. See Murchison, 349 U.S. at 136. This requirement "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Id. (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). The Pennsylvania Supreme Court recently recognized "any tribunal permitted to try cases and controversies must not only be unbiased but must avoid even the appearance of bias. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings." Commonwealth v. White, 910 A.2d 648, 657 (Pa. 2006).

The judge's role as neutral arbitrator during the "hearing" on the petition is compromised by statutory scheme of Act 53. Because there is no provision for the appointment of counsel for the parent-petitioner, and no separate prosecutor-solicitor representing any interest of the Commonwealth or the county, the judge is required to occupy this prosecutorial role. As a result, the presiding judge performs both prosecutorial and adjudicatory functions at the "hearing" on the petition. This commingling of functions deprives F.C. and similarly situated minors crucial due process protections.

At the "hearing," the judge receives the report and testimony of the assessor who conducted the drug assessment that the court ordered upon the filing of the petition. Because the Act provides for no counsel to prosecute the petition, the generally non-judicial task of calling the assessor to testify and eliciting the assessor's testimony necessarily falls to the judge, who alone will conduct the direct examination of the

assessor in order to adduce evidence to support the parent's request for commitment. Having then called and examined the assessor, the judge must next revert to his traditional adjudicatory role and evaluate that very same evidence to determine whether it supports commitment under the Act. Far from acting precisely as they do in any judicial proceeding, judges under Act 53 are forced to fulfill different roles at different times and even play some roles simultaneously.

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. For example, during the direct examination of Josie Morgano, the drug assessor, the judge occupied his judicial role when he reminded F.C.'s counsel that as the fact-finder he is capable of discerning the relevant facts and remaining unbiased in hearing Ms. Morgano's testimony. In particular, the judge states:

> THE COURT: [Counsel for F.C.], I would trust that you would have the confidence in the Court being able to discern those facts which are relevant for this proceeding…But the Court is able to bifurcate and discern what the relevant facts are for this proceeding, and the other facts that were presented will not allow the Court to be prejudiced in any way, or biased towards making a decision…I thought I would add that and save you an objection so we have an understanding and I would trust that [counsel for F.C.] is confident in this Court's conduct in the past to be able to discern those issues and do what needs to be done.

6/12/07 Hearing at 21-22. At this moment, the judge is clearly acting in his judicial role.

Immediately after asserting his lack of bias, however, the judge then slips into the role of prosecutor. In particular, when Ms. Morgano testifies, it is the judge who questions her on direct examination. See 6/12/07 Hearing at 22-23 (the court questioning Ms. Morgano regarding whether F.C.'s mental health issues were part of his history, how

she obtained that history, and whether she has any other testimony to offer). No one else questions Ms. Morgano during her direct examination.

Then, during this direct questioning of Ms. Morgano, the judge inadvertently reverts back to his judicial role. In particular, after asking Ms. Morgano how she obtained her information, the judge stated: "That being the case – well, I'll reserve my comment on that until later on, and allowed[sic] [F.C.'s counsel] to address whatever issues he would like." 6/12/07 Hearing at 23. Here, the trial judge begins to slip out of the prosecutorial role and back into the judicial role before catching himself. Because Act 53 fails to provide for the appointment of counsel for the parent-petitioner or a separate prosecutor-solicitor to represent the interest of the Commonwealth or the county, judges are forced to occupy the role of the missing prosecutor. Alternating between that role and their judicial role compromises the judges' neutrality, depriving minors of due process.

At the very least, the dual roles the judge must play creates the potential for bias and appearance of impartiality, which in and of itself violates due process. The "mere possibility of bias under Pennsylvania law is sufficient to raise the red flag of protection offered by the procedural guaranty of due process." Lyness, 605 A.2d at 1208. The commingling of prosecutorial and adjudicatory functions raises this flag and thus "must be viewed with deep skepticism, in a system which guarantees due process to each citizen." Id. at 1207. For example, in Lyness, the Pennsylvania Supreme Court held that a physician's due process rights were violated by the State Board of Medicine that both determines that a professional licensing prosecution should be initiated, and then acts as the ultimate fact-finder in determining whether a violation has occurred. "Whether or not

any actual bias existed as a result of the Board acting as both prosecutor and judge is inconsequential; the potential for bias and the appearance of non-objectivity is sufficient to create a fatal defect under the Pennsylvania Constitution." Id. at 1210 (emphasis added).

Similarly, the U.S. Supreme Court has held that a judge's combination of prosecutorial and adjudicatory functions in the same case violates due process. In Murchison, 349 U.S. at 136, a state court judge acted as a "one-man grand jury" investigating police corruption. Two witnesses before the judge in his role as grand juror answered questions in such a way as to convince the judge that those witnesses had committed contempt. The judge charged the two witnesses with contempt and subsequently tried and convicted them. Id. at 134-35. The Court held that the trial before the same judge who brought the contempt charges violated the defendants' right to due process. "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." Id. at 137.

Under Act 53 the commingling of prosecutorial and adjudicatory functions at a hearing on an Act 53 Petition deprives minors accused of drug dependency of due process as criminal defendants were denied due process in Murchison and the physician denied due process by the State Board of Medicine in Lyness. In all of these situations, a judge or an administrative body performs prosecutorial functions. Once it performs these functions, the same judge or body cannot now serve as a disinterested decision-maker. Whether or not the decision-maker will show any actual bias is unimportant, "our system

of law has always endeavored to prevent even the probability of unfairness." Murchison, 349 U.S. at 136.

Finally, the "hearing" on the petition provided for under Act 53 is not a truly adversarial hearing. In our judicial system's adversarial process, it is crucial that both sides be afforded an opportunity to actively assert their case and present evidence. This Court has noted that "we have placed reliance in a system in which parties take an active, highly partisan role in unearthing and arguing the significance of relevant evidence from which the decision-maker may relatively passively determine truth." Commonwealth v. Santiago, 591 A.2d 1095, 1110, 1113 (Pa. Super. Ct. 1991) (holding " due process interests of safeguarding the integrity of our adversarial search for the truth of accusations, as well as preserving public confidence in the sanctity of our system," require trial court to disclose to criminal defendant exculpatory evidence in its sole possession). It is through this adversarial process that the truth is determined. See id. ("In our system, truth is determined through an essentially adversarial process in which, truth is best discovered by powerful statements on both sides of the question.") (internal quotations and citations omitted).

As discussed above, the judge's neutrality is compromised because he is forced to occupy the duel roles of prosecutor and decision-maker at hearings on the petition. Moreover, although the minor is represented by counsel, Act 53 does not provide any opportunity for the minor to present witnesses, enter a statement, or challenge evidence. In fact, the only basis on which the judge is to make his determination on involuntary commitment is the drug assessment that he himself ordered. See 71 Pa. Cons. Stat. § 1690.112a(c). As a result, the "hearing" on the petition is not a truly adversarial hearing

where a neutral fact-finder makes a decision after each side is afforded the opportunity to present evidence.

Because Act 53 forces a judge to perform both prosecutorial and adjudicatory functions at a hearing that lacks the features of an adversarial process, it violates the F.C. and similarly situated minors' rights to due process under the U.S. and Pennsylvania Constitutions. At the very least, a minor facing involuntary commitment, a significant deprivation of liberty, deserves the right to be judged by a fair and impartial tribunal.

C. The Lower Court Denied F.C. A Fair Hearing When It Refused To Free F.C. From The Shackles and Handcuffs He Wore Throughout The Proceedings

At the beginning of the judicial hearing in the instant matter, the lower court denied F.C.'s request, through his trial counsel, that his handcuffs and shackles be removed. 6/12/07 Hearing at 3-4. The lower court failed to make an individualized finding of dangerousness or risk of flight. It denied F.C.'s request because the sheriff indicated unrestrained subjects are "contrary to their policy," 6/12/07 Hearing at 4, and because "over a number of months children have fled from this courtroom." 6/12/07 Hearing at 8. The lower court's opinion repeated this rationale. Tr. Ct. Op. at 9 (stating "the sheriff's department informed the court that persons in their care are always handcuffed, and noting the clourt did not "notice any undue distress"). The opinion did not address F.C.'s complaint about physical restraint in greater detail because counsel failed "to set forth in what manner it prejudiced his right to a fair and impartial tribunal." Tr. Ct. Op. at 10. For the reasons set forth below, F.C.'s adjudication should be reversed.

The mere wearing of restraints is presumptively prejudicial unless justified by an essential state interest. 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"). Illinois v. Allen, 397 U.S. 337, 343-44 (1970) (holding restraints may be used when necessary to maintain dignity, order, and decorum in the courtroom).

In Deck, the United States Supreme Court reviewed the considerations that militate against the routine use of visible physical restraints during a criminal trial. 544 U.S. at 630-31. The Court identified three fundamental legal principles: (1) "the criminal process presumes that the defendant is innocent until proved guilty," and visible physical restraints undermine that presumption, suggesting "to the jury that the justice system itself sees a need to separate a defendant from the community at large;" (2) "the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel," and "[s]hackles can interfere with the accused's ability to communicate with his lawyer;" and (3) "judges must seek to maintain a judicial process that is a dignified process ... which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." Id. (citations omitted).[32]

[32] Pennsylvania appellate courts have not considered whether the use of physical restraints during a hearing offends the constitution. With respect to an Act 53 proceeding, the effect of visible physical restraints on a jury does not apply. However, other courts have recognized that juveniles have the same rights as adult defendants to be free from physical restraints. See In the Matter of Millican, 906 P.2d 857, 860 (Or. App. 1995); In re Staley, 364 N.E.2d 72, 74 (Ill. 1977). In Millican, the Court of Appeals of Oregon held that two factors warranted extending the right against physical restraint to juvenile proceedings. "First, the right to remain unshackled is based on considerations beyond the potential for jury prejudice, including inhibition of free consultation with counsel," and "[s]econd, extending the right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purposes" of the juvenile justice system.

In this instance, 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 10. The lower court did not consider counsel's objection valid, 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 also 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, who had not heard any facts or valid legal arguments 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. Trial courts must make an independent determination and not blindly defer to law enforcement in determining the necessity of physical restraints.[33] The lower court's decision to maintain the restraints

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906 P.2d at 860 (citations omitted). "Allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process." Id.; see also Staley, 364 N.E.2d at 74 (extending to juveniles the right to remain free from restraints in non-jury proceedings absent a showing of clear necessity for restraints).

[33] 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. 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. 1977) (holding the trial court's decision to allow the sheriff to determine if defendant was to be physically restrained was clearly erroneous); Millican, 906 P.2d at 860 (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 analysis necessary for the exercise of discretion); State v. Roberts, 206 A.2d 200, 205-06 (N.J. Super. 1965) (holding the trial court had discretion whether to apply physical 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.

III. The Lower Court's Order That F.C. Receive Involuntary Treatment Violates Due Process Because Act 53's Commitment Scheme Is Not Tailored To Serve A Compelling State Interest

As noted above, there is clearly a substantive liberty interest in freedom from unnecessary confinement. Vitek v. Jones, 445 U.S. 480, 491-92 (1980); U.S. v. Perry, 788 F.2d 100, 112 (3d Cir. 1986). "Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J. concurring). It is also well-settled that the Fourteenth Amendment's substantive due process component "forbids the government to infringe certain 'fundamental' liberty interests at all ... unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993) (emphasis added). This principle of constitutional analysis was first articulated by the Court in Shelton v. Tucker, 364 U.S. 479 (1960):

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Id. at 488 (emphasis added)(footnote omitted).

Assuming, *arguendo*, this Court finds due process satisfied at pre-adjudication and adjudication proceedings under Act 53, adherence to due process at one stage—*e.g.*, court-ordered assessment, finding the minor is "drug dependent"—does not satisfy the requirement of continued safeguarding of a minor's liberty interest as he undergoes

involuntary institutionalization. See In re S.O., 492 A.2d 727, 735 (Pa. Super. Ct. 1985) (recognizing that due process protections must expand as the deprivation of individual liberty increases). Here, Act 53's inpatient commitment scheme still abridges the due process rights of minors adjudicated drug dependent. At the June 12th hearing, F.C., through his counsel, agreed to begin outpatient treatment immediately, yet the lower court committed him to 45 days of inpatient treatment at Pyramid Ridgeview for cannabis dependence, and continued that commitment for an additional 30 days at the July 24th review hearing.[34] The lower court's determination, relied, in part, on the testimony of a single witness: the addiction counselor employed by Pyramid Ridgeview. 7/24/07 Hearing at 14. For the reasons set forth below, neither the Constitution nor the facts of this record support the lower court's decisions to order inpatient services.

A. The Lower Court Erred When It Relied On The Mental Health Act to Support Its Holding That Committing Minors To Involuntary Treatment Services Satisfied Due Process

In its opinion the lower court relies on the General Assembly's purpose for enacting the Mental Health Act to supports its holding that Act 53's commitment provisions comport with due process. Tr. Ct. Op. at 5. The lower court explains,

> The purpose of both 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.

[34] As noted above, under Act 53 a court order for involuntary, inpatient treatment requires clear and convincing evidence a drug dependent minor is incapable of accepting or unwilling to accept voluntary treatment services, and the court must find the minor will benefit from involuntary treatment services. 71 Pa. Cons. Stat. § 1690.112a(c)(1), (2). A court may order the minor for successive 45 day periods if it determines that the minor will benefit from services. Sec. 1690.112a(d).

Id. at 7 (emphasis added).[35] These two acts no more resemble one another than apples and oranges. Although both acts permit civil commitment for treatment, this Court recognized, "[w]e cannot, in exercising our paternalistic impulses, forget that due process requirements must be met to assure compliance with legal standards related to the restriction of liberty. We do not mean to denigrate good intentions, but … more is required than a sincere desire to help." In re S.O., 492 A.2d at 737. The Mental Health Act is narrowly tailored to restrain the liberty of mentally ill persons, but Act 53's inpatient commitment provisions fall far short of the due process required to commit drug dependent minors.

As a general matter, the Mental Health Act authorizes involuntary commitment of persons, including minors, only if they pose "a clear and present danger of harm" to themselves or others as a result of mental illness. 50 Pa. Cons. Stat. § 7301(a) (emphasis added). Act 53 plainly lacks this core requirement. In order to ensure that only mentally ill persons who meet the dangerousness standard are involuntarily committed, the Mental Health Act imposes significant checks at each stage in the commitment process.

At the outset, an emergency examination may only be made upon a showing of an immediate need for treatment. 50 Pa. Cons. Stat. § 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. Cons. Stat. §§ 7302(b), (d). If the treating facility determines that the

[35] Yet in F.C.'s case the need for immediate action is belied by the fact that thirteen days passed between the filing of the Act 53 Petition (May 30th) and a hearing on that Petition (June 12th). Moreover, there is a dearth of evidence that F.C.'s cannabis dependence posed a clear threat to his life or the lives of others that required inpatient treatment. Although drug dependence among minors may be associated with other social, emotional, behavioral and familial issues, other statutory mechanisms—e.g., Juvenile Act, Mental Health Act—should be used to authorize civil commitment to address these issues. The core inquiry here should be whether inpatient commitment was necessary to address F.C.'s cannabis dependence.

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. Cons. Stat. §§ 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. Cons. Stat. §§ 7303(a), (f), (h).

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. Cons. Stat. §§ 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. Cons. Stat. §§ 7304(e).

Any individual subject to court-ordered involuntary mental health treatment also has the express right to be committed to the least restrictive alternative necessary. 50 Pa. Cons. Stat. §§ 7102, 7304(f). The Mental Health Act also expressly states a preference for voluntary treatment over involuntary treatment. 50 Pa. Cons. Stat. § 7102. Consequently, under the Mental Health Act, inpatient treatment is deemed appropriate only after consideration has been given to less restrictive alternatives. Any order for inpatient treatment must include findings on this issue. 50 Pa. Cons. Stat. § 7304(f). In addition, under the Mental Health Act, 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. Cons. Stat. §

7304(g)(3); see also § 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 and for continuing court-ordered commitment based upon conduct during the most recent commitment period. 50 Pa. Cons. Stat. § 7305. Finally, the Mental Health Act 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.

In contrast to the statutory scheme described above, Act 53 strips minors of almost all of these protections. In addition to the lack of a "clear and present danger" component, under Act 53:

> 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;[36]
>
> 3. Minors may be committed for unlimited successive 45 day periods with no more procedural safeguards than those described above;[37]

[36] Sec. 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.

[37] Sec. 1690.112a(d) provides that the minor shall remain committed for a period of forty-five days "unless sooner discharged." Discharged by whom — the court? The treatment facility or program? The statute is completely silent as to who has the power to discharge the minor and this provision is therefore

4. Minors have no statutory right to the least restrictive appropriate treatment alternative, see Argument Section III.B., herein;

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;[38] and

7. Minors have no right to be committed only on the basis of a medical determination regarding the need for involuntary treatment.

The disparity between the standards and procedures of Act 53 and the Mental Health Act cannot withstand even minimal scrutiny under due process. The lower's court's determination that F.C. be committed to inpatient treatment should be reversed.

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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. Cons. Stat. § 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.

[38] 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. Cons. Stat. § 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. **Error! Main Document Only.** Cf. Mental Health Procedures Act, 50 Pa. Cons. Stat. § 7301-05 (requiring examination and recommendation of psychiatrist/psychologist as prerequisite for involuntary mental health commitment).

B. Act 53 Violates Due Process Because It Fails to Require that the Court Impose the Minimum Confinement Necessary To Meet the Minor's Treatment Needs

Act 53 also violated F.C.'s due process rights because it fails to require that minors be committed to the least restrictive placement setting that also meets their treatment needs. Eubanks v. Clarke, supports application of 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:

> The principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty. ... A statute sanctioning such drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law... We hold that, at a minimum, where a state has varying available facilities for the mentally ill which differ significantly in the amount of restrictions on the rights and liberties of the patients, due process requires that the state place individuals in the least restrictive setting consistent with legitimate safety, care and treatment objectives.

Id. at 1028. (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. Pursuant to Eubanks, the state must preserve a minor's liberty interest to the greatest extent possible. The Eubanks holding supports the application of the dual principles of a protected liberty interest and "less drastic means" of pursuing government purposes when a right to treatment has been established in the law.

More recently, in Clark v. Cohen, 613 F. Supp. 684 (E.D. Pa. 1985), aff'd 794 F.2d 79 (3rd Cir. 1986), the Third Circuit underscored this conclusion. 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." Clark, 613 F. Supp. at 702. The Third Circuit affirmed, upholding 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.[39]

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.

[39] 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.

CONCLUSION

WHEREFORE, for the above reasons, appellant F.C., by his attorneys, respectfully request that this Honorable Court reverse the decision of the lower court.

Respectfully submitted,

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