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IN THE SUPREME COURT OF FLORIDA

Case No.: SC13-1549
On a Certified Question from the
United States Court of Appeals for
the Eleventh Judicial Circuit
Case No.: 12-14212

J.R.,

Appellant,

vs.

BARBARA PALMER,
Director of Agency for Persons with Disabilities,

Appellee.

APPELLANT'S BRIEF ON THE MERITS[1]

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[1] Corrected cover page from brief originally filed on October 1, 2013. No other changes to brief.

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STATEMENT OF FACTS AND CASE

This case involves a challenge to the constitutionality of Florida's statutory scheme for involuntary civil commitment of persons with intellectual disabilities.[1] As an initial matter, the Appellant adopts the Eleventh Circuit Court of Appeals' explanation of the statute, Fla. Stat. §393.062 et seq., and the Court's recitation of the facts regarding Appellant's circumstances. Order at 4-9. Appellant has also included his own overview of the statute and the facts specific to his circumstances, as briefed for the Eleventh Circuit Court of Appeals, below. References to the record in this brief are to the record on appeal to the Eleventh Circuit Court of Appeal and will follow the same citation format used in the appellate briefs there.

Statement of Facts

A. Overview of the Involuntary Civil Commitment Process for Persons with Intellectual Disabilities.

Section 393.11 of the Florida Statutes is Florida's involuntary civil commitment statutory scheme for persons who are intellectually disabled or autistic. Dkt. #41-2, ¶1. Persons committed under §393.11 are the responsibility of Appellee, the

[1] Effective July 2013, the Legislature passed a law substituting the term "intellectual disability" for "mental retardation" throughout the Florida Statutes. *See* Ch. 2012-162, Laws of Fla. Because this litigation and much of the briefing pre-dated these amendments, many of the references to the statutes in the record use the term "retardation." This Brief cites to the most recent version of the statutes and will use the term intellectual disability.

Director of the Agency for Persons with Disabilities ("APD").[2] Dkt. #41-2, ¶4. Involuntary admission to residential services can be initiated via petition or motion. Fla. Stat. §393.11; *see also* Fla. Stat. §916.303(2). Once a petition or motion has been filed in the appropriate circuit, the circuit court appoints a committee to examine the person being considered for involuntary admission to residential services. Dkt. #66 at 3; Fla. Stat. §393.11(5). After the examining committee files their report with the court, the court holds an adversarial hearing where the person subject to the commitment proceeding has the right to present evidence and cross-examine all witnesses. Dkt. #66 at 3; Fla. Stat. §393.11(7). The person is also entitled to representation by counsel at all stages of the proceeding. Dkt. #66 at 3; Fla. Stat. §393.11(6).

The court may not enter an order for involuntary admission to residential services unless the court finds, by clear and convincing evidence, that: (1) the person who is the subject of the proceeding is "intellectually disabled" or "autistic," (2) placement in a residential setting is the least restrictive and most appropriate alternative to meet the person's needs, and because of the person's degree of intellectual disability or autism, the person either: (a) lacks sufficient capacity to give consent to a voluntary application for services from Defendant and

[2] Appellee Barbara Palmer is the current Director of APD. She has been substituted for the former Director, Michael Hansen. Appellee is named in her official capacity as Director of APD.

lacks basic survival and self-care skills to such a degree that close supervision and habilitation in a residential setting is necessary and, if not provided, would result in a real and present threat of substantial harm to the person's well-being, or (b) is likely to physically injure others if allowed to remain at liberty. Dkt. #66 at 3-4; Fla. Stat. §393.11(8).

An involuntary admission order is of indeterminate duration. *See* Fla. Stat. §393.11(11). Unless jurisdiction is transferred to another circuit court, the court which issues the initial order for involuntary admission has continuing jurisdiction to "enter further orders to ensure that the person is receiving adequate care, treatment, habilitation, and rehabilitation, including psychotropic medication and behavioral programming." Dkt. #66 at 5; Fla. Stat. §393.11(11). A person who has been involuntarily admitted to residential services may not be released from such an order except by further order of the circuit court. *Id.*

The statute as written does not provide for any periodic review of orders entered pursuant to its authority. Dkt. #41-2, ¶11; Dkt. #66 at 6; *see generally*, Fla. Stat. §393.11. Nor has Appellee adopted any process by which persons committed pursuant to §393.11 are provided automatic, periodic reviews of their commitment orders by the court who has jurisdiction over the order. Dkt. #41-2, ¶17. The statute provides that any person involuntarily admitted to residential services may

file a petition for writ of habeas corpus to challenge the appropriateness of their commitment. Dkt. #66 at 6; Fla. Stat. §393.11(13).

APD is responsible for creating an individual support plan for each of its clients, *see* §393.0651, Fla. Stat., and for annual review of those plans. *See* §393.0651(7), Fla. Stat.[3] This responsibility includes creating support plans for persons committed pursuant to §393.11. Section 393.0651 makes no mention of review or consideration of involuntary admission orders. A support plan may be challenged through the State's administrative hearing process. §393.0651(8). However, a court order entered pursuant to §393.11 cannot be amended or rescinded by a support plan or through the administrative hearing process. Dkt. #66 at 6; *see* §393.11(11).

If an individual charged with a crime is found incompetent to proceed due to an intellectual disability or autism and remains incompetent for two years, the charges may be dismissed and the person involuntarily committed. Dkt. #66 at 2; Fla. Stat. §916.303. A petition for involuntary admission to residential services may be filed pursuant to §393.11 by the state attorney, criminal defense attorney, or APD. Dkt. #66 at 2; Fla. Stat. §916.303(2). If the defendant meets the criteria of §393.11

[3] APD provides services to a large number of persons with intellectual disabilities, not just those who have been involuntarily admitted to residential services. *See* Order at 4. To be eligible for APD services, a person must be at least three years of age, must meet residency and domicile requirements, and must have a diagnosis of a specified intellectual disability. See 65G-4015, Fla. Admin. Code.

and also presents a "substantial likelihood" of causing injury to another person or presents a danger of escape and all other less restrictive alternatives are adjudged inappropriate, then the court may commit the defendant to a *secure* facility pursuant to Section 916.303(3), Fla. Stat. Commitment to a secure facility must be reviewed annually by the court at a hearing to determine "whether the defendant continues to meet the criteria described in this subsection and, if so, whether the defendant still requires involuntary placement in a secure facility." §916.303(3). Section 393.11 does not have a similar process.

B. Individual Facts of Appellant, J.R.

J.R. is a person with an intellectual disability. Dkt. #66 at 6. He can read simple sentences but has poor written skills. *Id.* at 6-7. He functions at a 7 year, 1 month level on the Vineland Adaptive Behavior Scale and has a reported IQ of 56 (last tested on March 29, 2001). *Id.* at 7.

In 2000, J.R. was charged with a felony in Lee County, Florida. *Id.* In 2001, after finding J.R. incompetent to stand trial, the Lee County Circuit Court involuntarily committed J.R. to the custody of the Department of Children and Family Services ("DCF") for treatment in DCF's Mentally Retarded Defendant Program. *Id.*

In 2004, lacking evidence to suggest that J.R. would ever become competent to stand trial, the circuit court dismissed the criminal charges against J.R. and—upon

motion filed by J.R.'s attorney—ordered J.R. admitted to "secure" residential services pursuant to §393.11. *Id.* On or about June 22, 2004, after it was determined that the DCF was actually recommending "non-secure" as opposed to "secure" residential services for J.R., an amended motion was filed to involuntarily admit J.R. to non-secure residential services pursuant to §393.11. Dkt. #66 at 7; Dkt. #41-2, ¶19. On or about October 26, 2004, the circuit court in Florida's 20th judicial circuit entered an order involuntarily admitting J.R. to non-secure residential services pursuant to §393.11.[4] Dkt. #41-2, ¶20. The October 26th order was entered on the basis that J.R. met the criteria set forth in §393.11(8)(b), J.R.'s level of intellectual disability was mild to moderate, and the purpose to be served by residential care was vocational and social skills training. Dkt. #66 at 11; Dkt. #41-2, ¶21.

Since 2004, in compliance with his involuntary placement order, J.R. has and continues to reside at various residential placements. Dkt. #46-2, ¶¶8-9; Dkt. #62. In January 2006, Defendant admitted J.R. to a non-secure program called SEEDS at the developmental services institution in Sunland-Marianna. Dkt. #46-2, ¶¶8-9. In 2007, J.R. was moved to a behavioral focus group home, Positive Images Group

[4] All responsibilities under DCF's developmental services program, including persons committed pursuant to §393.11, were transferred to Defendant's agency when it was created in 2004. *See generally*, Ch. 2004-267, §87, Laws of Fla.; *see also* Fla. Stat. §20.197. Thus, upon the transfer of responsibilities, APD inherited the responsibility for the custody and care of J.R. while J.R. is under the authority of the §393.11 order. *Id*

Home, in Gainesville, Florida. *Id.* at ¶8. During the pendency of this litigation, J.R. was moved to a less restrictive group home. Dkt. #61, ¶¶3-4; Dkt. #62.

J.R.'s §393.11 order requires him to reside in a non-secure residential setting and receive social and vocational services. Dkt. #66 at 7. The Federal District Court found that J.R.'s behavior analysis services and his group home residence impose stringent rules on him, including a curfew, a ban on alcohol consumption, and other limitations on his freedom of movement. *Id.* at 8. If J.R. violates these rules, then the consequences include loss in the freedoms he has gained, being subjected to greater supervision, and potentially being placed in a more restrictive setting. *Id.* at 10. If J.R. elopes from his group home placement, then the police may be called to return him to his group home. Dkt. ##41-2, ¶9; 46-2, ¶13; 46-3, ¶11.

Although J.R.'s intellectual disability will always exist, his potential for dangerousness or harm to self or others can change. Dkt. #41-2, ¶25. J.R. can also develop skills that mitigate the effect of his disability and aid him in his ability to live independently. *Id.* at ¶26. When Respondent was notified that J.R.'s condition potentially changed such that a different residential setting was warranted, Respondent refused to take action to help J.R. seek court review and, instead, made it J.R.'s responsibility to obtain assistance on his own. (*Id.* at Appx. #7 at 00004-8; Dkt. #66 at 11.

The circuit court has not held a single hearing in regard to J.R.'s commitment since June 2005. Dkt. #41-2, ¶28. J.R.'s commitment order does not contain an end date, and J.R. will continue to live under its demands until the circuit court determines it is no longer necessary. Dkt. #66 at 23; Dkt. #41-2, ¶¶22, 29.

Course of Proceedings

In August 2011, Appellant, J.R., brought this action in the United States District Court for the Northern District of Florida pursuant to 42 U.S.C. §1983 to redress violations of his due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.[5] Dkt. #1. The Complaint sought declaratory and injunctive relief against Michael Hansen, in his official capacity, as Director of APD. *Id.* J.R. asked the District Court to find that Section 393.11 of the Florida Statutes, which governs the involuntary residential placement of individuals with developmental disabilities, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 7.

Defendant moved to dismiss the Complaint on the grounds that it failed to state a cause of action. Dkt. #10. The District Court denied the Motion. Dkt. #29. The parties then engaged in discovery.

On February 17, 2012, the parties filed their respective Motions for Summary Judgment. Dkt. ##41&44. J.R. responded to Defendant's Motion. Dkt. #46. The

[5] Appellant, JR, is a person with an intellectual disability. He asked and was granted permission to proceed anonymously. Dkt. ##13&14.

parties also filed statements of material facts. Dkt. #41-2 & 53. The District Court took the Motions under consideration. On May 23, 2012, the District Court granted the Defendant's Motion for Summary Judgment and dismissed the case. Dkt. #66. Final judgment was entered on the same date. Dkt. #67. J.R. filed a timely Motion for Reconsideration asserting, in part, that the District Court had based its Order on Summary Judgment on an argument that had not been made or briefed by the parties. Dkt. #70. The District Court denied the Motion for Reconsideration on July 13, 2012. Dkt. #74. J.R. then filed his Notice of Appeal on August 10, 2012. Dkt. #75.

Appellant appealed to the Eleventh Circuit Court of Appeals. After briefing and oral arguments, the Eleventh Circuit Court of Appeals, *sua sponte*, certified the following three questions to the Florida Supreme Court:

> (1) Does "support plan" review under Fla. Stat. §393.0651 require the Agency for Persons with Disabilities to consider the propriety of a continued involuntary admission to residential services order entered under Fla. Stat. 393.11?
>
> (2) Is the Agency for Persons with Disabilities required, pursuant to Fla. Stat. 393.0651 and/or Fla. Stat. 393.11, to petition the circuit court for the release from involuntary admission order in cases where APD determines the circumstances that led to the initial admission order have changed?

(3) Does Fla. Stat. 393.062 et seq. provide a statutory mandate to meaningfully periodically review involuntary admissions to non-secure residential services consistent with the commitment schemes discussed in *Parham v. J.R.*, 442 U.S. 584 (1979) and *Williams v. Wallis*, 734 F.2d 1434 (11th Cir. 1984)?

SUMMARY OF THE ARGUMENT

The Eleventh Circuit Court of Appeals determined that there was substantial doubt about the scope of APD's obligations under Chapter 393. The Court found that the doubt had to be resolved in order to determine whether Florida law provides J.R. with a meaningful periodic review of his involuntary admission order as required by principles of due process. In order to decide the case, the Court certified three questions regarding the requirements of Chapter 393 to this Honorable Court.

The Eleventh Circuit Court of Appeals opinion found that there is no explicit requirement in Chapter 393 which require a periodic review of the propriety of the continued order of involuntary admission to residential services. The certified questions essentially ask this Honorable Court to determine whether, in spite of the obvious textual omission of the requirements of procedural due process, the statute can be interpreted to meet the requirements of due process. J.R. respectfully asserts that all three answers should be "no."

Fundamental statutory construction principles guide the resolution of these questions. A statute should be construed so as not to conflict with the Constitution when reasonably possible. Such construction, however, must be consistent with the legislative intent ascertainable from the statute itself or its common sense application. The courts do not have the power to edit statutes so as to add

requirements that the Legislature did not include. J.R. contends that the provisions in Chapter 393 and §393.11 are not ambiguous and that the omissions of periodic review of involuntary admission orders was deliberate.

The Eleventh Circuit Court of Appeals opinion sets out four principles of procedural due process that guide this case: First, "some form of periodic review" of the involuntary commitment order is required to protect against the erroneous deprivation of liberty. Second, where medical professionals are well positioned and mandated to consider the propriety of ongoing commitment, adversarial judicial review is not necessary to protect against the erroneous deprivation of liberty. Third, where medical professionals are well positioned and mandated to act when an ongoing commitment is no longer proper, adversarial judicial review is not necessary to protect against the erroneous deprivation of liberty. And, finally, the availability of judicial review through habeas corpus serves only as a backup plan to protect against the erroneous deprivation of liberty. It is against these principles that the State's involuntary commitment process must be measured.

Chapter 393 does not explicitly require or mandate any of the procedures set out in the Eleventh Circuit Court of Appeals' guiding principles. Section 393.11 states that only the admitting court can terminate an involuntary admission order. However, §393.11 does not contain any provision for periodic review or

termination of the order by the court. None of the other provisions in Chapter 393 meet the requirements of a meaningful periodic review. The support plan review process in §393.0651 does not even mention review of the involuntary admission order. Nothing in the support plan review process mandates a consideration of the propriety of ongoing commitment. In addition, nothing in Chapter 393 requires APD to act or to petition the committing court if it is somehow determined that involuntary admission is no longer necessary. Finally, habeas corpus is the only means of obtaining termination of an involuntary admission order and is not just a "backup" procedure.

The provisions of Chapter 393 do not meet the due process requirements set out by the Eleventh Circuit Court of Appeals opinion and the answer to all three questions should be "no."

ARGUMENT

Introduction

Both the Federal District Court and the Eleventh Circuit Court of Appeals found that involuntary admission to residential services pursuant to §393.11 is a form of commitment that constitutes a loss of liberty. *See* Order at Fn. 9. They also agreed that due process requires involuntary admission to be terminated as soon as it is no longer necessary. *Id.*; *See O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975)(finding that even if involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed). In order to insure that the deprivation of liberty does not continue beyond that which is necessary, the Eleventh Circuit Court of Appeals found that J.R. is entitled to a meaningful periodic review of the involuntary commitment order. *See* Order at 10-11. J.R. contends that the statute, both on its face and as applied to him, denies him his due process right to such a review.[6]

The Federal District Court found the state involuntary admission statute constitutional based on an implied obligation on APD to petition the state circuit

[6] J.R. agrees that a non-adversarial, non-judicial process may satisfy due process if that process includes the authority to terminate the involuntary admission order. In Florida's statutory scheme, only the admitting court has the authority to terminate the admission order. §393.11(11), Fla. Stat. Therefore, the review and termination procedure must directly involve the admitting court. However the statute could be amended to provide for a non-adversarial process if it included a revew by a decision maker with the authority to terminate the order.

court if it were to determine that involuntary admission is no longer necessary. *Id.* at 27. On appeal, J.R. argued that there was no statutory basis for such an implied obligation and APD never asserted that such an obligation existed. Appellant's Principal Brief at 30-35. In addition, even if there were such an implied obligation, it did not meet the requirements of due process. *Id.* The Eleventh Circuit Court of Appeals, hesitant about making determinations and interpretations regarding Florida law, certified the questions regarding Chapter 393 to this Honorable Court. Order at 28-29. The certified questions essentially ask this Honorable Court to determine whether, in spite of the obvious textual omission of the requirements of procedural due process, the statute can be interpreted to meet the requirements of due process.

This Court is obligated to give a statute a constitutional construction where such a construction is reasonably possible. *Tyne v. Time Warner Entertainment Co. Lt.*, 901 So. 2d 802, 810 (Fla. 2005); *Firestone v. News-Press Publishing Co., Inc.*, 538 So. 2d 457, 459 (Fla. 1989). Such construction must be consistent with the legislative intent ascertainable from the statute itself or its commonsense application. *See State v. Globe Communications Corp.*, 648 So. 2d 110, 113 (Fla. 1994); *State v. Cronin*, 774 So. 2d 871, 874 (Fla. 1st DCA 2000). However, the Court is without power to construe an unambiguous statute in a way that would extend, modify, or limit its expressed terms or its reasonable and obvious

implications. To do so would be an abrogation of legislative power. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). Further, the Court is "not at liberty to add words to statutes that were not placed there by the legislature." *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999). It is fundamental that judges do not have the power to edit statutes so as to add requirements that the legislature did not include. *Cronin*, 774 So. 2d at 874; *Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999). These principles of statutory construction guide this Honorable Court in any answer to the Eleventh Circuit Court of Appeals' three questions regarding the interpretation of Chapter 393.

J.R. respectfully asserts that all three answers should be "no." The questions certified from the Eleventh Circuit Court of Appeals answer themselves. It is apparent from the face of the statutes that Chapter 393 deliberately omits any process for periodic review of the involuntary admission order. *See* Dkt. #1 at p. 4; 5. The reason for the omission may be that the Legislature did not believe that involuntary admission to residential settings infringed on liberty (a point argued by APD and rejected by the Eleventh Circuit Court of Appeals) or because of attitudes about the permanence of intellectual disabilities. Whatever the reason, the omission of a meaningful review and termination process renders the statute facially unconstitutional.

Chapter 393 is unambiguous. As argued below, any attempt to graft the due process elements specified by the Eleventh Circuit Court of Appeals into Chapter 393 would require a rewriting of the statute to insert procedures and processes that the Legislature intentionally and unambiguously left out. Including these procedures in Chapter 393 goes beyond the fundamental limitations of statutory construction and would infringe on the purview of the Legislature. J.R. and others subject to involuntary admission orders are entitled to more than just implied procedural protections. J.R.'s right to a meaningful periodic review of the order should be clear and explicit in the statute. Chapter 393 should not be rewritten by this Court and, instead, it should be found to be unconstitutional.

I. Section 393.0651 Does Not Require Consideration of the Continued Need for an Involuntary Admission Order During the Support Plan Review Process.

The Eleventh Circuit Court of Appeals found that there is no explicit requirement in §393.0651 for APD to periodically review the propriety of the continued order of involuntary admission to residential services. Order at 23. The Court found that the statute merely requires an annual review of support plans to determine whether the person under the involuntary admission order "has been placed in 'the most appropriate, least restrictive, and most cost-beneficial environment for accomplishment of the objectives for client progress.'" *Id.* In addition, the Eleventh Circuit Court of Appeals noted that APD has argued only

that "providers may use the support plan to recommend further review of a client's order." (emphasis in original). *Id.* at fn. 10.

Section 393.0651 requires development and review of support plans for all clients of APD, whether involuntarily committed or not, to determine if they are placed in the least restrictive and most cost beneficial environment.[7] *See generally*, §393.0651, Fla. Stat. In contrast, §393.11 authorizes involuntary admission to residential services only when an individual either: (1) poses a real and present threat of substantial harm to his or her well-being without the provision of involuntary services; or (2) is likely to physically injure others if allowed to remain at liberty. §393.11(8)(b). These criteria are not mentioned in §393.0651 and are not required to be addressed in a support plan or during a plan review. *Compare* §393.11(8) and §393.0651. As noted by the Eleventh Circuit Court of Appeals, the periodic support plan review process considers "only half of the question" of whether it is necessary for an involuntary admission order to continue. Order at 24.

[7] The criteria for involuntary admission to residential services are much more stringent than the eligibility criteria for APD services generally. Eligibility for APD services requires only that the person be at least three years of age, meet residency and domicile requirements, and have a diagnosis of a specified intellectual disability. *See* 65G-4015, Fla. Admin. Code. In addition, as noted by the Eleventh Circuit, APD provides Medicaid waiver services pursuant to Chapter 393 to many individuals on a voluntary basis. Order at 4.

Section 393.0651 is a detailed statute that contains numerous requirements for the development and review of support plans for all clients of APD. It is not vague or ambiguous. It does not, however, make any mention of involuntary admission orders or require a review of the continued need of such orders. Further, APD has not interpreted the statute to include any consideration of involuntary admission orders during the support plan review. Section 393.0651 requires APD to specify by rule the core components of support plans. §393.0651(1), Fla. Stat. APD has not adopted any rule, policy or other procedure that would require the support plan review to include a determination of whether a client of APD continues to meet the specific admission criteria set forth in §393.11. Order at 23 (noting that APD has offered no evidence that there are any procedures in place to require appropriate review); *Id.* at fn. 10 (noting that APD service providers may use the support plans to recommend further review of a commitment order (emphasis in original)). The record also demonstrates that APD has not adopted any rule or policy that would require service providers to be familiar with the standards for involuntary admission under §393.11. Dkt. #41-Appx. #7, ¶6. In addition, the Eleventh Circuit Court of Appeals found APD's argument that services in the support plan must be supported by "medical necessity" does not equate to a review of the propriety of the involuntary admission order. Order at 24, fn. 11. Thus, it is clear that APD itself has not interpreted §393.0651 to mandate a review of the

involuntary admission order. *See Dept. of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So.2d 815,820 (Fla. 1983)(noting that the administrative construction of a statute by the agency charged with its administration is entitled to great weight).

It is undisputed that the support plan review cannot, by the plain terms of the statute, modify or terminate an involuntary admission order. *See* §393.11(11); Dkt. #66 at 6; Dkt. #41-2, ¶14. The support plan review process is inadequate to provide the meaningful periodic review due to J.R. in relation to his continued involuntary admission because: (1) it is only directed at evaluating placement for those receiving APD services generally or Medicaid waiver services; (2) the support plan review does not require evaluation of the continuing need for involuntary admission; and (3) the treatment team reviewing the support plan has no authority to terminate an admission order. The fact that treatment providers may use the support plan review to consider the continuing need for involuntary admission does not satisfy due process requirements. *See Roller v. Holly*, 176 U.S. 398, 409 (1900)(noting that the "right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion").

A plain reading of the text of §393.0651 indicates that it does require any consideration of the propriety of involuntary admission orders. This omission appears to be deliberate. Since the statute is not vague or ambiguous it cannot now be construed as requiring APD to consider the propriety of continued involuntary

admission orders. *See Donato v. American Telephone and Telegraph Co.*, 767 So.2d 1146, 1150-51 (Fla. 2000)(noting that a court abrogates legislative power when it construes "an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications"). The answer to the Eleventh Circuit Court of Appeals' first question must be "no."

II. Neither Section 393.0651 nor Section 393.11 Requires APD to Petition the Circuit Court for Release from an Admission Order When APD Determines Circumstances That Led to the Initial Order Have Changed.

Neither Section 393.0651 nor Section 393.11 requires APD to petition the circuit court for release from an admission order if APD determines the circumstances that originally led to the initial admission order have changed. The Eleventh Circuit Court of Appeals recognized in its Order that the statute does not provide procedures for the APD if it were to decide someone should be released from an involuntary admission order. Order at 25. The Court specifically states that "nothing on the face of 393.0651 mandates that the APD, having found a client to no longer be a danger to himself or to others, should petition the circuit court, the only body with the power to alter the order." *Id.*

The Federal District Court resolved this issue by finding an implied obligation for APD to petition the admitting court to terminate an involuntary admission order when necessary. Order at 23. The District Court did not cite to any statutory provision in Chapter 393 in support of the implied obligation. In addition, the

Eleventh Circuit Court of Appeals noted that APD "has pointed to nothing explicit in the statute indicating that an obligation exists and has offered no evidence of procedures in place to require periodic review of the involuntary status of these people." *Id.* The Eleventh Circuit Court of Appeals also "noted with interest" that even APD does not "endorse any of the [District Court's] 'implied obligations'" in its briefing or arguments to the Court. *Id.* at 21.

The District Court described Chapter 393 as a "carefully devised" legislative scheme for the involuntary admission for residential services for persons with intellectual disabilities. Dkt. #66 at 21. The District Court noted that in enacting Section 393.11 the legislature "deliberately chose" not to require judicial review continuing involuntary admission orders. *Id.* In spite of the "carefully devised scheme," the District Court still found it necessary to imply fundamental and necessary procedural due process requirements in order to find the statute facially constitutional. *Id.* at 23. The language of the statute does not support the implied obligation found by the District Court.

J.R. agrees that the statute is carefully devised. It is obvious that the Legislature deliberately omitted any form of periodic review, either judicial or informal. The statute is clear that the legislature intended to involuntary admit orders to be of an indeterminate duration and that they could only be modified or terminated by a

circuit court. The Legislature deliberately omitted any process for returning to the circuit court to terminate an order except for habeas corpus.

The intention of the Legislature to omit a process for APD to terminate an involuntary admission order is evident in the way the Legislature has treated other involuntary commitment situations. The Eleventh Circuit Court of Appeals noted that when the Legislature intended to require court review in other circumstances, it specifically included such language in both other sections of this statute and in similar statutes addressing other "continued commitment" contexts. *See*, *e.g.*, Florida's mental illness statute by which people are involuntarily committed for inpatient or outpatient services (Fla. Stat. §394.467(7); Fla. Stat., §394.4655(7)), Florida's Sexually Violent Predators Act (Fla. Stat., §394.918(1) & (3)), and admission of intellectually disabled people to a secure setting (Fla. Stat., §916.303(3)). Order at 25-26. The Court said, "it is clear, therefore, that where the Florida Legislature wishes to provide periodic review of continued commitments, it has often said so explicitly." *Id.* at 26.

Additionally, the plain language of Chapter 393 supports a conclusion of a deliberate omission. It is undisputed that only the admitting court has the authority to modify or terminate an involuntary admission order. *See* §393.11(11); Dkt. #66 at 6; Dkt. #41-2, ¶14. It is also undisputed that Chapter 393 does not set out any process by which an individual such as J.R. may return to the court for termination,

except through habeas corpus. Dkt. #66 at 6; Fla. Stat. §393.11(13). As noted by the Eleventh Circuit Court of Appeals, the statutory section entitled "discharge" lists a few specific instances in which the statute does call for an involuntary admission order to be reviewed by the court. Order at 25-26; *see also* Fla. Stat. §393.115. The situation in which APD determines that an individual no longer requires an involuntary admission to residential services is not one of them. The specificity by which the Legislature has set out instances for discharge in other situations indicates that the omission of a process for termination (other than habeas corpus) for all others was intentional. The intent of the Legislature is evident from the plain language of the statute and this Court should not insert procedures into the statute which the Legislature deliberately left out. *See Globe Communications Corp*., 648 So.2d at 113-14 (refusing to rewrite a statute where there was no indication the Legislature intended any 'ifs, ands, or buts' to be read into the statute's unambiguous language).

There is nothing explicit in the statute requiring APD to provide a review process that would identify a change in a client's circumstances leading to possible release from an involuntary admission order, there is nothing explicit in the statute requiring APD to petition the circuit court for a client's release from an involuntary admission order, and there is no evidence that APD is doing either of these things in the absence of an explicit requirement in the statute. While the procedures in

Chapter 393 may have been carefully devised, they violate due process by not providing a constitutional procedure for review and termination of involuntary admission orders. The plain language of the statute indicates that these omissions were intentional. The answer to the Eleventh Circuit Court of Appeals' second question should be "no."

III. Section 393.062 et seq. Does Not Provide a Statutory Mandate for Meaningful Periodic Review of Admission Orders in Accordance with *Parham v. J.R.* and *Williams v. Wallis*.

In its Order, the Eleventh Circuit Court of Appeals relied on the cases of *Parham v. J.R.*, 442 U.S. 584 (1979), and *Williams v. Wallis*, 734 F.2d 1434 (11th Cir. 1984), to provide four "Guiding Principles" for analyzing Florida's involuntary admission to residential services scheme. Order at 16. First, "some form of periodic review" of the involuntary commitment order is required to protect against the erroneous deprivation of liberty. *Id.* at 16-17. Second, where medical professionals are well positioned and mandated to consider the propriety of ongoing commitment, adversarial judicial review is not necessary to protect against the erroneous deprivation of liberty. *Id.* at 17-18. Third, where medical professionals are well positioned and mandated to act when an ongoing commitment is no longer proper, adversarial judicial review is not necessary to protect against the erroneous deprivation of liberty. *Id.* at 18. Fourth, the

availability of judicial review through habeas corpus serves only as a backup plan to protect against the erroneous deprivation of liberty. *Id.* at 18-19.

The guiding principles provide a road map for determining whether Florida's statute provides procedures that meet the constitutional requirements for protecting J.R. from the risk of erroneous deprivation. An analysis of *Parham*, *Williams*, and the four guiding principles identified by the Eleventh Circuit Court of Appeals indicates that the answer to question three must be "no."

In *Parham v. J.R.*, the United States Supreme Court found that where minor children have been voluntarily committed by their natural parents or guardians, procedural due process entitles the children to periodic, administrative reviews by medical professionals to determine the appropriateness of continued commitment. In so holding, the Court specifically noted that "it is necessary that the decision maker have the authority to refuse to admit any child who does not satisfy the medical standards for admission…[and] it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure." 442 U.S. at 607; *see also, Clark v. Cohen*, 794 F.2d 79, 86 (3rd Cir. 1986)(citing *Parham* in finding that because procedural due process is not a "moot court exercise," when periodic review of a civil commitment is conducted "the hearing tribunal must have the authority to afford relief") and *Doe v. Austin*, 848 F.2d 1386, fn. 6 (6th Cir. 1988)(finding that an "independent decision maker must

have the authority to implement its decision"). The *Parham* Court reinforced its finding further in recognizing that the State's scheme for voluntary commitment of minor children to hospital care was constitutional, in part, because the professionals overseeing the periodic reviews possessed "an *affirmative statutory duty* to discharge any child who is no longer mentally ill or in need of therapy." 442 U.S. at 615 (emphasis added).

In *Williams v. Wallis*, the Court found that, like voluntarily committed minor children, persons found not guilty by reason of insanity are entitled to a periodic, administrative review conducted by medical professionals. *Williams*, 734 F.2d at 1436. In *Williams*, the Court reviewed the constitutional adequacy of Alabama's non-adversarial release process for persons committed to the state's mental health system after being found not guilty by reason of insanity. *Id.* The release process was described as follows:

> "The decision to release an acquittee is usually initiated by the treatment team. The psychiatrist on the team settles any disagreement among team members over the acquittee's fitness for release. After the team recommends release, an acquittee not classified as special can be released with the approval of the forensic unit director of the hospital to which he is committed. The proposed release of special patients must be reviewed by the hospital's superintendent or his designee. The reviewing authority may communicate the proposed release to the committing court, the district attorney, the acquittee's family, and others, or may order further treatment for, or evaluation of, the acquittee. The

> hospital superintendent then makes the final decision whether to release the special patient."

Id. The Court acknowledged that due process required that involuntary commitment must end when no longer justified and that periodic reviews reduced the risk that commitment would be longer than necessary. *Id*. at 1437-38. The Court found that Alabama's review process met the requirements of due process because the non-adversarial proceedings before medical professionals with final release authority posed little risk of erroneous deprivation and little risk that the patient would be confined longer than necessary. *Id.* at 1438-39. In *Williams*, the Court noted that the availability of habeas corpus as a "secondary or backup procedure," a safeguard available to rectify any error that might have occurred during the initial non-adversarial review, also decreased the risk of erroneous deprivation. *Id.* at 1440.

The procedure approved in *Williams* differs from Florida's involuntary admission scheme in several critical respects. First, Alabama had a clearly defined informal review and release process, including specific release criteria, whereby a patient could be released through a non-adversarial and non-judicial review of the commitment. In contrast, Florida's involuntary admission scheme does not specify *any* defined process, either judicial or non-judicial, to review the ongoing need for admission orders and for termination of admission orders when they are no longer necessary. Unlike the process in *Williams*, Florida's support plan review process

cannot, by the plain terms of the statute, terminate an involuntary admission order. *See* §393.11(11), Fla. Stat.; Dkt. #66 at 6.

Second, the Medicaid-directed support plan review process cited by APD, Appellee's Response Brief at 26, and contained in §393.0651 is nothing like the periodic review process described in *Williams*. The goal of the review process in *Williams* was "eventual release" from commitment, included consideration of release criteria, and involved a determination as to whether or not the patient continued to require commitment. *Williams*, 734 F.2d at 1438-39. In contrast, the Medicaid-directed support plan review is a process required by Medicaid for all Medicaid clients of the APD and is designed simply to determine whether or not the support plan meets Medicaid requirements that services be provided in an appropriate, least restrictive and cost beneficial environment.[8] *See generally*, Fla. Stat. §393.0651, Appellee's Response Brief at 11. The Medicaid support plan process is neither intended nor designed as a procedure for reviewing involuntary admission orders. *See* Order at 23-24. The Medicaid support plan process does not contain any release criteria and does not even require consideration as to whether or not the individual continues to meet admission criteria. *See Id.*

[8] Appellee emphasizes that J.R. is provided with a method to administratively challenge the contents of his support plan. (Appellee's Response Brief at 11, 26). However, this administrative challenge is a review process required for all Medicaid support plans and has no relationship to the involuntary admission order. Further, the District Court specifically noted that this administrative review process cannot amend or terminate an involuntary admission order. Dkt. #66 at 6.

Third, it was critical to the court's analysis in *Williams* that habeas corpus served merely as a "backup to an initial review process that posed little risk of erroneous deprivation. *Williams*, 734 F.3d at 1440. Under Chapter 393, habeas corpus is not merely a "backup." It is the *only* procedure specifically listed for allowing access to the committing court for termination of an involuntary admission order. Fla. Stat., §393.11(13).

Chapter 393 does not meet any of the requirements of the Eleventh Circuit Court of Appeal's guiding principles. First, Chapter 393 does not provide for any form of periodic review of the involuntary admission order either by the committing court or by the treatment professionals.[9] The statutory section on continuing of jurisdiction of the admitting court omits any mention of periodic review of whether the individual continues to meet the criteria for involuntary admission. *See* Fla. Stat., §393.11(11). In addition, as argued above in regard to questions one and two, the support plan review process contains no requirement to

[9] The District Court incorrectly interpreted J.R.'s argument as demanding periodic *judicial* review of §393.11 orders as a general requirement of due process. Dkt. #66 at 12-13. Throughout briefing this issue, J.R. continually maintained that due process does not necessarily require judicial or other adversarial review of §393.11 orders. *See* Dkt. ##12, 41, & 46. J.R.'s argument is that he is entitled to periodic review by a decision maker who has the authority to determine the continuing necessity of his involuntary admission order. As §393.11 is currently written, the circuit court retains sole jurisdiction to provide this relief. *See* Fla. Stat. §393.11(11); Dkt. #66 at 5. Since due process requires that the decision maker conducting the review have the authority to afford relief the circuit court must also provide periodic review. *See Parham*, 442 U.S. at 607; *Clark*, 794 F.2d at 86.

review the involuntary admission order. In light of the indeterminate duration of the admission order and the lack of a procedure for review and termination, Florida's admission scheme carries a great risk of erroneous deprivation.

Second, J.R.'s medical professionals are not *mandated* to consider the propriety of ongoing commitment. Appellant argues, and the Eleventh Circuit Court of Appeals agrees, that there is no explicit requirement for support plan reviews to include consideration of the propriety of an involuntary admission order. Order at 23-24.

Third, J.R.'s medical professionals are not *mandated to act* when an ongoing commitment is no longer proper. Appellant argues, and the Eleventh Circuit Court of Appeals noted, that there is no explicit requirement for APD to petition the circuit court when a client's circumstances have changed and an involuntary admission order may no longer be appropriate. Order at 25.

Fourth, the availability of judicial review through habeas corpus in the Florida statutory scheme is not just a "backup plan" to protect against the erroneous deprivation of liberty. In Chapter 393, habeas is the *only explicit means* for obtaining review of the involuntary admission order. *See* Fla. Stat., §393.11(13). Habeas corpus is only sufficient as a "backup" to a defined process for review and termination of involuntary admission orders. Chapter 393 does not provide any

defined process for periodic review or termination of the involuntary admission order. The availability of habeas corpus alone does not satisfy due process.

Since the Legislature explicitly required annual review of an order admitting an individual to a secure facility, then it must be assumed the omission of such a requirement for individuals admitted to residential services was intentional. Continued placement in a secure facility requires an annual review, requires the review to be decided by an entity (the court) that has the power to afford relief, requires review of continued need for admission and requires notice to all parties. Section 393.11 in contrast does none of these things. *Compare* Fla. Stat., §393.11(11) (continuing jurisdiction of involuntary admission to residential facilities) *with* Fla. Stat., §916.303(3)(continued placement in a secure facility).[10]

[10] Fla. Stat., §393.11(11) on continuing jurisdiction states: "The court which issues the initial order for involuntary admission to residential services under this section has continuing jurisdiction to enter further orders to ensure that the person is receiving adequate care, treatment, habilitation, and rehabilitation, including psychotropic medication and behavioral programming. Upon request, the court may transfer the continuing jurisdiction to the court where a client resides if it is different from where the original involuntary admission order was issued. A person may not be released from an order for involuntary admission to residential services except by the order of the court."

Fla. Stat., §916.303(3) provides: "Any placement so continued must be reviewed by the court at least annually at a hearing. The annual review and hearing must determine whether the defendant continues to meet the criteria described in this subsection and, if so, whether the defendant still requires involuntary placement in a secure facility and whether the defendant is receiving adequate care, treatment, habilitation, and rehabilitation, including psychotropic

Appellant argues, and the Eleventh Circuit Court of Appeal explicitly does not disagree, that the statute on its face, as written, does not meet constitutional muster. Order at 23. There is nothing in the language of Chapter 393 that would allow it to be construed in any manner that would save it from a finding that it is facially unconstitutional. It is well established that the requirements of procedural due process are "flexible" and may vary as the particular situation demands. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). As noted by the Eleventh Circuit Court of Appeals, the due process requirement of a periodic review could be satisfied by a range of procedures from adversarial judicial review to an informal non-adversarial process. Order at 17. This Court should not attempt to rewrite the statute to choose from this range of possibilities. That should be the purview of the legislature. The answer to the Eleventh Circuit Court of Appeals' third question must be "no."

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medication and behavioral programming. Notice of the annual review and review hearing shall be given to the state attorney and the defendant's attorney."

CONCLUSION

Chapter 393 does not explicitly require or mandate any of the procedures set out in the Eleventh Circuit Court of Appeals' guiding principles. Section 393.11 states that only the admitting court can terminate an involuntary admission order, but §393.11 does not contain any provision for periodic review or termination of the order by the circuit court.

None of the other provisions in Chapter 393 meet the requirements of a meaningful periodic review. The support plan review process in §393.0651 does not even mention review of the involuntary admission order. The treatment team conducting the support plan review is not mandated to consider the propriety of ongoing commitment nor are they mandated to act if they determine that an ongoing commitment is no longer proper. In addition, nothing in Chapter 393 requires APD to act or to petition the committing court if it is somehow determined that involuntary admission is no longer necessary. Finally, habeas corpus is the only means of obtaining termination of an involuntary admission order and is not just a backup procedure.

The provisions of Chapter 393 do not meet the due process requirements set out by the Eleventh Circuit Court of Appeals opinion and the answer to all three certified questions should be "no."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was transmitted by electronic transmission to counsel for Appellee, Jonathan Grabb, Leah Sevi and David Yon, on this 1st day of October 2013.

/s/ Peter P. Sleasman

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's Brief on the Merits is typed in 14-point proportionately spaced Times New Roman font.

/s/ Peter P. Sleasman