2003 WL 23356799 (C.A.11) (Appellate Brief)
United States Court of Appeals,
Eleventh Circuit.

JOHN/JANE DOES 1-13, Plaintiffs/Appellees,
v.
Jeb BUSH, et al., Defendants/Appellants.

No. 99-14590-DD.
January 21, 2003.

On Appeal from the U.S. District Court, Southern District of Florida Case no. 92-589-Civ-Ferguson

Appellants' Initial Brief

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***III STATEMENT REGARDING ORAL ARGUMENT**

The defendants/appellants request oral argument. The issues are complex, involving details of federal Medicaid law. Oral argument will help the court understand these difficult matters.

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*1 STATEMENT OF JURISDICTION

The district court had jurisdiction under 42 U.S.C. s. 1331. The complaint raised claims arising under federal law, 42 U.S.C. 1396a.

The order on appeal finds the defendants in contempt of an injunction and imposes sanctions of $10,000 a day. R-587. This court has jurisdiction under 42 U.S.C. s. 1292(a). See *Chairs v. Burgess*, 143 F.3d 1432, 1435 n. 3 (11th Cir. 1998).

The order on appeal was rendered Oct. 7, 1999. R-587.

The defendants filed their notice of appeal Nov. 5, 1999. R-593.

STATEMENT OF THE ISSUES

1. Whether the district court exceeded its authority in holding Governor Jeb Bush and four other defendants in contempt for failure to take actions that were not required by the Final Judgment, as affirmed and narrowly applied by the holding of this court.
2. Whether the trial court exceeded its jurisdiction by ordering class-wide relief (to an undefined class that was never certified) which would constitute comprehensive restructuring of the state's Medicaid program for individuals with developmental disabilities and require substantial legislative appropriations to implement.

***2** 3. Whether the trial court erred as a matter of law by providing for one 90-day period to determine (both) eligibility and provide services, and improperly usurped the defendants' authority to set eligibility requirements for Medicaid services based on "medical necessity."

4. Whether the trial court abused its discretion in using coercive punitive contempt sanctions against the defendants for actions taken (or not taken) by their predecessors in office, specifically where the court's various orders constitute a complex scheme of enforcement and where the individual defendants have no ability to comply or purge themselves of contempt.

5. Whether the court abused its discretion in finding Governor Bush in contempt and imposing sanctions upon him, when the previous Governor had been dismissed as a party defendant in 1992.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. Course of Proceedings and Disposition Below

Introduction

This is an appeal of a post-judgment order which appears to hold Governor Jeb Bush and four other defendants in contempt for the failure of their predecessors in office to take certain ***3** actions that are not required by the Final Judgment of October 7, 1999, R-587, as affirmed in *Doe 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998). In *Doe* this court narrowly and specifically found:

In the present case, the district court's Final Judgment reads: "Accordingly, it is ORDERED AND ADJUDGED that defendants shall, within 60 days of the date of this Order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities." *This language means only that the appellants must incorporate into their present scheme, of providing services procedures that insure a waiting list period of not more than ninety days. Consequently, the Eleventh Amendment poses no bar to this lawsuit or to the injunctive relief the district court imposed against the appellants.*

Doe 1-13 v. Chiles, 136 F.3d at 720-721 (emphasis added).

Contrary to the narrow holding set forth above, the Order on Motion For Contempt apparently holds the Defendants responsible for failure to develop and fund a "comprehensive plan" to provide Medicaid services to all individuals with developmental disabilities in Florida. R-587. The order was primarily based on the trial court's "Memorandum Findings", dated November 10, 1998, two months before Governor Bush and the other Defendants took office. R-530. The court's "Memorandum" finds that the previous Defendants had failed to comply with the Final Judgment and orders, inter alia, "immediate delivery of services" to an "unnamed class" of persons. The subsequent contempt order finds the "Defendants" in willful non-compliance with the Final ***4** Judgment and the November 10,1998 "Memorandum Findings", and fines the "Defendants" $10,000 a day, "until a *comprehensive plan*, which comports with the *letter and spirit* of the judgment. . . is submitted, *ready for implementation*." (R-587 p. 15, emphasis added). A "comprehensive plan . ., ready for implementation" was clearly meant by the trial court to be legislatively funded and cover all persons in Florida who may be eligible and in need of any services for the developmentally disabled (R-587).

The Final Judgment contains no "comprehensive plan" provisions and requires only that the previous defendants " 'establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed 90 days, for individuals who are eligible for *placement* in ICF/DD institutional care facilities.' " *Doe*, at 721 (emphasis added). This was accomplished in April 1998, when the previous defendants amended the Medicaid State Plan to provide for a 90-day waiting period for ICF/DD services. R-602 p. 126. The federal Health Care Financing Administration approved the amendment in July 1998. *Id.*

In addition to the "Memorandum Findings" and the "Order on Motion For Contempt", there are two other trial court actions pertinent to this appeal. First, in December 1992, the- court (per Judge Davis) dismissed Governor Chiles as a party defendant on the basis that the Governor in his official capacity had no ***5** liability to the Plaintiffs under the facts alleged. R-171. Nevertheless, Governor Chiles' name remained in the style of the case through June of 1999 and for the purposes of the previous appeal to this court. Second, although plaintiffs pled the case as a class action, (R-l), and moved for class certification, (R-58, 59), which the defendants opposed[1], no class was ever certified.

Parties and Mature of the Action

In March 1992, 13 individual "Does" plaintiffs brought this action pursuant to 42 U.S.C. s. 1983, against Governor Lawton Chiles of Florida and four other officials of the then Department of Health and Rehabilitative Services (now the Department of Children and Families and the Agency for Health Care Administration): Robert Williams, the department secretary; Gary Clarke, assistant secretary for Medicaid; Richard Lepore, assistant secretary for developmental services; and James Towey, administrator of district 11, a regional administrative unit of the department. R-1 p. 2. Plaintiffs alleged that they were eligible for Medicaid-funded "placement" in intermediate care facilities for individuals with developmental disabilities (ICF/DDs) and that the Defendants had violated their rights under Medicaid to receive "placement", with "reasonable promptness" (R- ***6** 1 pp. 4, 33-35.) In Florida, "placement" in an ICF/DD is considered institutional care and intended for people who need "24-hour observation and care and the constant availability of medical and nursing treatment and care ..." Sec. 59G-4.180(2)(a), Fla.Admin.Code.

After dismissal of Governor Chiles as a Defendant and pursuant to cross motions for summary judgment, Final Judgment was entered and the court also dismissed "all pending motions," including the motion for class certification, "as moot." R-449 p. 1.

The previous defendants appealed. This court affirmed, holding that the plaintiffs had a federally enforceable right under Medicaid to placement with reasonable promptness. *Doe 1-13 v. Chiles*, *supra*.

In November of 1998, after the appeal became final, Jeb Bush was elected Governor of Florida. Governor Bush took office in January 1999 and subsequently appointed former judge Kathleen Kearney as secretary of the Department of Children and Families (DCF). The present defendants were in office approximately four months when the trial court held a three-day hearing, May 24-26, 1999, on whether the "Defendants" had failed to comply with the Final Judgment and the court's "Memorandum Findings", dated November 10, 1998. R-601, 602, 603. Governor Bush; Judge Kearney; Gary Crayton, director of Medicaid; Carl Littlefield, ***7** assistant secretary for developmental services; and Sara Herald[2], district 11 administrator had not been substituted in as parties at the time of the hearing. It was not until June 21, 1999, in accordance with federal rules, attorneys for the defendants filed a notice of substitution of parties. R-586. Thus, the style of the case was changed in July 1999 to reflect the substitution of the present governor, Jeb Bush, for former Governor Chiles, even though the Governor had been previously dismissed as a party defendant (R-171 pp. 7-8). It was at this point that Judge Kearney, Crayton, Littlefield and Herald became party "defendants" in this action.

Post-judgment Enforcement Proceedings

After the appeal became final, Plaintiffs filed several motions for contempt, alleging that the previous defendants had failed to comply with the Final Judgment as affirmed by this court. R-55, 459, 490. The district court denied all such motions. R-354, 510. However, in August 1998, the court opted to treat the plaintiffs' latest motion for contempt, R-490, as a motion to

show cause. R-520. The court held a hearing on November 4, 1998 in regard to the show cause order. The only issue was whether the previous defendants were in compliance with the final judgment. R-599 p. 2.

***8** Based on this hearing and despite the fact that no testimony was taken, the court found that the previous defendants had failed to comply with the final judgment. R-530 p. 1, 2. However, the court did not enter a contempt order, but instead entered the "Memorandum Findings", dated November 10, 1998, and ordered the previous defendants to:
1. Provide services to the named plaintiffs within 30 days.

2. Submit a plan "which identifies, locates and provides for the immediate delivery of services to the 600 persons the state has recognized as eligible for but not receiving services for the developmentally disabled" within 60 days.

3. Fully comply with the final judgment "as to all members of the numbered class" by February 12, 1999.

R-530 p. 3.

The court threatened to hold the previous defendants in contempt for failure to comply with these directives -- which go beyond the limited requirements of the final judgment -- and also threatened to freeze expenditures for federal Medicaid funds or divert Medicaid funds from other programs to provide services to the developmentally disabled. *Id.*

****9 B. Statement of Relevant Facts***

The previous defendants filed a "plan" of compliance on January 11, 1999. R-532. The plan set out a complex array of steps the previous defendants intended to take to respond to the November 10 "Memorandum Findings" and the final judgment.

On May 24, 1999, the court commenced a three-day hearing On whether the defendants' "plan" complied with the previous final judgment and the court's directives in its November 10,1998 "Memorandum Findings". The defendants objected to efforts to impose class-wide relief as beyond the court's jurisdiction because of lack of class certification. R-579. The plaintiffs waived their right to put on testimony in regard to the issue of the defendants' compliance. May 26, 1999, transcript vol. 2 p. 12.

Despite their objections, the defendants tried to satisfy the district court's concerns and respond to the directives in the November 10 "Memorandum Findings". The new DCF officials presented extensive testimony in regard to their future plans for the entire state Medicaid Plan to provide a variety of services to individuals with developmental disabilities, including community-based, non-institutional services under the Medicaid Home and Community Based Waiver. See e.g., testimony of Robert Cohen, deputy secretary of DCF, R-601 pp. 39-116. These plans included new assessments and screening of persons requesting ***10** services for individuals with developmental disabilities to determine proper levels of service, based on "medical necessity." R-602 pp. 20-21, 148-155.[3]

After the hearing, the defendants proffered additional evidence, including information that the surviving named plaintiffs either had been provided services or offered services. R-583, 584 and 585.

Five months later, on October 7, 1999, the district court issued its Order on Motion for Contempt holding the "Defendants" in contempt, without naming or defining which persons were included in that term. R-581. While the court observed that Governor Bush "was substituted" for Governor Chiles, (R-587 p. 1 n. 1), the court failed to note the previous dismissal of the action against Governor Chiles.

In its lengthy order, the court found that the "Defendants" had not complied with the November 10 "Memorandum Findings", (R-581 pp. 3-4) and that there was a clear pattern of delay in the defendants' actions, (R-587 p. 3), without specifying which ***11** "defendants" were responsible. Among other findings, the trial court:

1. Found the defendants had failed to seek and obtain an additional $118 million to eliminate waiting lists

> for 23,000 individuals with developmental disabilities. R-587 p 6.

These 23,000 individuals are not waiting for ICF/DD services. The figure represents an estimate of all *individuals with developmental disabilities who may need* some *state service. R-601 pp. 78-79, 115; R-602 p. 73. They are not plaintiffs nor. are they members or any certified class.*[4] *There is nothing in the record to indicate what specific services, if any, these people are waiting for, if at all.*

2. Found that amendments to the eligibility requirements for ICF/DD placement were unlawful. R-587 pp. 6-7. The court disagreed with the defendants' determination that certain high-functioning individuals did not need the sort of intensive, institutional-level services funded through the ICF/DD program. *Id*, The court held that the defendants should have followed state and federal rulemaking ***12** requirements and should have provided notice and opportunity for hearing to affected individuals before making the change. *Id.*
3. Found that all eligibility determinations and placement had to take place within 90 days, R-587 p. 13, although federal regulations provide for a separate 90-day period to determine Medicaid eligibility and there is a another eligibility determination for ICF/DD services. See 42 C.F.R. s. 435.911(a) (1) (90-day deadline for determining Medicaid eligibility involving a disability); s. 65A-1.205(1)(c), Fla. Admin. Code, (adopting the 90-day deadline) and ss. 59G-4.170(3), 59G-4.171, 59G-4.180. Fla. Admin. Code, (providing for eligibility determinations for ICF/DD services).

4. The court made no findings that defendants failed to provide ICF/DD services to the named plaintiffs.

Significantly, the court recognized that the case was not a class action: "634 individuals are plaintiffs in this lawsuit as an order certifying a class was never entered." R-587 p. 6 n. 2. However, there are not 634 named plaintiffs in this lawsuit. R-1, R-585. Nor did the defendants identify 634 individuals as waiting for ICF/DD services. The defendants created the "600" list of these individuals (which the court referred to in its November 10 "Memorandum Findings", R-530 p. 3) in 1997. It consisted of ***13** people seeking "alternative residential placements," which consist not only of ICF/DDs, but also nursing homes, foster homes, and group homes. R-602 pp. 163-164.

Based on these findings, the district court held the defendants in contempt "for willful noncompliance" with the final judgment. R-597 p. 15. The court ordered:

> The defendants are fined $10,000 a day, which shall begin 10 days after the date of this Order, to continue until a comprehensive plan, which comports with the letter and spirit of the judgment entered August 28, 1996, is submitted, ready for implementation.

R-587 p. 15.

The defendants moved for reconsideration, R-590, and, on November 7, 1999, before the court ruled on the motion, the defendants filed a timely notice of appeal. R-593.

The district court denied the motion for reconsideration the day after the filing of the notice of appeal. R-595.

C. Standards of Review

The court reviews a district court's assertion of jurisdiction de novo. *In re E.I. Dupont De Nemours & Company-Benlate Litigation*, 99 F.3d 363, 367 (11th Cir. 1996).

The court reviews contempt and sanction orders for abuse of discretion. *Jove Engineering Inc. v. I.R.S.*, 92 F.3d 1539, 1545-1546 (11th Cir. 1996); *Citronelle-Mobile Gathering Inc. v. Watkins*, 943 F.2d 1297, 1301, 1304 (11th Cir. 1991).

***14** The court's findings of fact are subject to the "clearly erroneous" standard. *Citronelle-Mobile Gathering Inc.* 943 F.2d at 1302.

SUMMARY OF THE ARGUMENT

I.

The final judgment, affirmed by this court, was narrow and specific, requiring the defendants only to amend the Medicaid State Plan to provide for a 90-day waiting period for individual's eligible for and seeking ICF/DD services. On remand, the district court has gone far beyond this narrow requirement and has impermissibly attempted through the exercise of its contempt power to dictate both the structure and content of the Florida Medicaid program for individuals with developmental disabilities. The court required the filing of a "comprehensive plan" "ready for implementation" that would address the needs of 23,000 individuals seeking some kind of state-funded service, not' necessarily ICF/DD services, or even Medicaid services, and imposed a fine of $10,000-a-day against the defendants for noncompliance. Such a sweeping directive imposes class-wide relief far beyond the parameters of this narrow, limited lawsuit. In short, the district court has held the defendants in contempt ***15** for failing to take actions not required by the mandate of this court and the final judgment.

II.

The district court exceeded its jurisdiction by requiring a sweeping "comprehensive plan" "ready for implementation" that effectively provides class-wide relief going far beyond the boundaries of this action and compelling the defendants to seek $118 million in additional appropriations.

This action is not now and has never been a class action. The district court granted final judgment, and in that judgment denied all pending motions; including the motion for class certification. In the absence of a class properly defined in a certification order, the action cannot be maintained as a class action and cannot serve as a vehicle for class-wide relief of any kind.

The "comprehensive plan" mandated by the court to comply with the undefined "spirit" of the final judgment is nothing less than a sweeping effort to restructure the Florida Medicaid program for delivering services to individuals with, developmental disabilities. The court envisions this as one comprehensive plan addressing the needs of 23,000 individuals. However, these 23,000 individuals are not seeking ICF/DD services -- indeed, many are not Medicaid eligible and they seek non-Medicaid services paid ***16** for by state funds alone. Such a restructuring is not warranted by the limited scope of the final judgment.

The trial court found that the defendants' plan to comply with the final judgment was inadequate because they only secured an additional appropriation of $100 million in 1999. The court found that they should have obtained *another* $118 million, and held the defendants in contempt in large part for failing to obtain these additional funds. However, these funds were never meant to address the needs of individuals seeking ICF/DD services, but all individuals seeking *some* state-funded services. Requiring the defendants to acquire this $118 million converts the action into one against the state treasury. The Eleventh Amendment bars such an action.

III.

The trial court erred as a matter of law when determining the point when the 90-day waiting period for providing ICF/DD services begins. The court ignored or overlooked the precise language of the final judgment and misapplied controlling federal regulations and federal law. In addition, the district court usurped the defendants' authority to set eligibility criteria

for ICF/DD services based on "medical necessity."

First, the trial court found that the defendants' practice of treating the start of the 90-day period from a request for ICF/DD by a person already determined to be eligible violated the ***17** final judgment. The final judgment expressly requires a 90-day waiting period only for "individuals who are *eligible*." R-499 p. 1 (emphasis added). Medicaid regulations permit states 90 days to make Medicaid eligibility determinations. Time limits for the provision of services are governed by the "reasonable promptness" provision and are separate. Medicaid eligibility does not qualify an individual automatically for ICF/DD services; federal and state regulations mandate a separate, additional eligibility determination. Here, the district court impermissibly compressed both eligibility determinations into the 90-day waiting period for service delivery.

Second, the district court usurped the defendants' authority to determine eligibility criteria for ICF/DD services. In early 1999, the defendants determined that certain individuals who could function independently did not need the intensity and level of services provided in an ICF/DD facility. In short, ICF/DD services for these individuals were not medically necessary, a determination federal law permits the defendants, and not the courts, to make.

IV.

The district court abused its discretion in finding the present defendants, in contempt for the actions of their predecessors in office. The present defendants took office during the transition from the Chiles to the Bush administrations. They ***18** had effectively just a month to act to comply with the final judgment. It was an abuse of discretion to require these defendants to divine, in just a month, what the district court meant by the "spirit" of the final judgment.

The sanctions imposed were an abuse of discretion because they were criminal in nature, and the defendants had no realistic way to purge themselves of contempt. The key factor in compliance was the acquisition of $118 million in additional funds beyond $100 million acquired during the 1999 legislative session. Only the Florida Legislature could appropriate these funds. Yet the district court's timetable -- giving the defendants only 10 days from October 7, 1999 -- permitted no realistic chance of compliance because the legislative session does not start until March 2000.

The court also abused its discretion by failing to determine, as it must, whether the individual defendants have the ability to pay the sanction imposed.

Finally, the fine is criminal in nature because the actions involved occurred outside court over a long period of time and the fine is serious. Under *International Union, United Mine Workers of American v. Bagwell*, 512 U.S. 821 (1994), the defendants were entitled to the due process protections afforded criminal defendants, such as a jury trial and proof beyond a reasonable doubt.

***19 V.**

Although the district court's contempt order apparently applies to Governor Bush, the governor is not a proper party in this case. The district court dismissed all claims against the governor in 1992, long before entry of the final judgment, as this court noted in its 1998 opinion.

***20 ARGUMENT**

I. THE TRIAL COURT EXCEEDED ITS AUTHORITY IN HOLDING GOVERNOR JEB BUSH AND OTHER DEPENDANTS IN CONTEMPT FOR FAILURE TO TAKE ACTIONS THAT WERE NOT REQUIRED BY THE FINAL JUDGMENT, AS AFFIRMED *AND NARROWLY APPLIED* BY THE HOLDING OF THIS COURT.

The final judgment required only that the defendants' predecessors in office establish a reasonable waiting list time period for

persons eligible for and requesting residential placement in ICF/DD institutional care facilities.

It is well established that a finding of contempt must be based on a specific, unambiguous decree or final judgment. See *Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989) (to hold a party in contempt, the district court must be able to point to a decree that sets forth in specific detail an unequivocal command which the party violated); *CF&I Steel Corporation v. United Mine Workers of America*, 507 F.2d 170, 173 (10th Cir. 1974) (order is vague if it lacks particularity). What is required should not be implied; it should be clearly spelled out. *National Labor Relations Board v. Heck's Inc.*, 388 F.2d 668, 670 (4th Cir. 1967).

***21** Moreover, on remand, a trial court may not expand the scope of the litigation or the relief accorded in the final judgment, as affirmed by the appellate court. To do so is to violate the mandate of the appellate court:
A district court when acting under an appellate court's mandate, "cannot vary it or examine it for any purpose other than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or to intermeddle with it, further than to settle so much as has been remanded."

Litman v. Massachusetts Mutual Life Ins. Co., 825 F.2d 1506, 1510-1511 (11th Cir. 1987) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)).

As affirmed by this court, the final judgment is narrow:
In the present case, the district court's Final Judgment reads: "Accordingly, it is ORDERED AND ADJUDGED that defendants shall, within 60 days of the date of this Order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities." *This, language means only that the appellants must incorporate into their present scheme of providing services procedures that insure a waiting list period of not more than ninety days. Consequently, the Eleventh Amendment poses no bar to this lawsuit or to the injunctive relief the district court imposed against the appellants*.

Doe 1-13 v. Chiles, 136 F.3d 709, 720-721 (11th Cir. 1998) (emphasis added).

***22** Thus, pursuant to the final judgment, the plaintiffs had an enforceable right to residential placement in ICF/DD facilities with reasonable promptness, *i.e.*, within a period not exceeding 90 days. Defendants were also required to amend the Medicaid State Plan to reflect such a waiting period.

In fact, the state plan was amended in April 1998 to incorporate the prescribed waiting period and the Health Care Financing Administration approved the amendment in July 1998. R-602 p. 126. Moreover, the district court's contempt order does not anywhere find that any of the plaintiffs were not provided appropriate services.

Going far beyond what it had specifically ordered --amendment of the Medicaid State Plan -- and beyond the mandate of this court, the trial court attempted to use post judgment contempt proceedings and "findings" to expand the relief previously ordered, seeking in effect to dictate both the structure and content of the Florida Medicaid program for the provision of ICF/DD *and* community-based services, and the numbers to be served. It has held defendants in contempt for failing to take measures that the final judgment, as affirmed, not only does not *unambiguously* require, but does not require at all.

The trial court fined defendants $10,000 a day "to continue until a *comprehensive plan*, which comports with the letter and spirit [sic] of the judgment entered August 28, 1996, is ***23** submitted, *ready for implementation*." R-587 p. 15 (emphasis added). As the contempt order makes clear, the comprehensive plan, which must be ready for implementation, essentially means class-wide relief, *i.e.*, relief for every developmentally disabled person in Florida that might need or want services, whether or not the person or services demanded are covered by Medicaid, whether they are ICF/DD or community-based, and regardless of the appropriations consequences.

The final judgment of August 28, 1996, in no way required the submission of a "comprehensive plan," regardless of what the scope or content of such a plan might be. In relevant part, that judgment required only amendment of the Medicaid State Plan to incorporate a specified waiting period. Clearly, the district court exceeded its authority in holding Governor Bush and the

other defendants in contempt for failing to comply with the final judgment and failing to submit a "comprehensive plan."

*24 II. THE TRIAL COURT DID NOT HAVE JURISDICTION TO ORDER THE DEFENDANTS TO PROVIDE CLASS-WIDE RELIEF (TO AN UNDEFINED CLASS THAT WAS NEVER CERTIFIED) WHICH WOULD CONSTITUTE A COMPREHENSIVE RESTRUCTURING OF THE STATE'S MEDICAID PROGRAM FOR THE DEVELOPMENTALLY DISABLED AND ALL SERVICES AND REQUIRE SUBSTANTIAL LEGISLATIVE APPROPRIATIONS TO IMPLEMENT.

The trial court exceeded its jurisdiction on remand for a number of reasons. First, ignoring the requirements of Fed.R.Civ.P. 23 and vastly expanding the scope of the case, the court ordered relief that was essentially class-wide and for a class that was never defined or certified. Second, it embarked on a crusade to produce system-wide restructuring in the form of a "Comprehensive Plan" that was far outside the scope of the final judgment entered in 1996. And, third, it transformed this suit into one against the state by demanding substantial appropriations to support this plan. In so doing, it exceeded its authority and jurisdiction.

A. In the Absence of Class Certification, the Court Had No Jurisdiction to Find the Defendants in Contempt for Allegedly Failing to Implement Class-wide Remedies.

The contempt order attempts to enforce class-wide relief, apparently for all developmentally disabled people in Florida wanting services. The district court neither defined (and hence appropriately limited) this class, nor did it certify the class. ***25** Not having done so, the court had no jurisdiction to require a comprehensive plan ready for implementation for literally untold numbers of developmentally disabled persons.

Because Rule 23 is imbued with Article III case or controversy concerns, strict compliance with its requirements is essential. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982) ("careful attention to the requirements of Fed.R.Civ.P. 23 remains indispensable," and "actual, not presumed conformance with Rule 23(a) remains, however, indispensable.") The rule itself requires that class certification orders should come early in the litigation and that the class be clearly defined in both the certification order *and* in the judgment. See Fed.R.Civ.P. 23(c)(1) and (3). See also *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1389 (11th Cir. 1998).

In *Board of Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975), the court held a case was not a class action because "there was inadequate compliance with the requirements of Rule 23(c)." The court further ruled that, "Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated" for mootness. *Id.* 95 S.Ct. at 850. See also *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 1554 n. 1 (1976) ***26** (without certification and identification of the class, the action was not properly a class action and was moot); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 2702, 49 L.Ed. 599 (1976) (the fact the trial court and the parties treat a case as a class action does not make it one in the absence of a class certification order); *Brody v. Spang*, 957 F.2d 1108, 1113-1114 (3d Cir. 1992) (lack of class certification affects standing, to litigate class claims).

In this case the district court never clearly defined or certified a class.[5]

Under *Jacobs*, *Baxter v. Palmigiano*, and *Pasadena City Board of Education v. Spangler*, the court must do both. The failure to do both deprives the named plaintiffs of the ability to litigate on behalf of a class. In short, this case is not a class action and cannot be treated as such.

The court's contempt order, R-587, focused only on purported systemic defects, including the need for an additional $118 million. It did not focus on the situations of the named plaintiffs, and the court made no findings of fact about them. In ***27** the absence of such findings of fact, and in the absence of a class certification order, the court lacked jurisdiction to find the defendants in contempt and to impose sanctions. *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 539 (7th Cir. 1997) (the failure to make findings that racial discrimination occurred precluded remedial order).

Both before and after the hearing but before rendition of the order, the defendants proffered evidence, which the district court disregarded,[6] that the named plaintiffs, had all received or have been offered ICF/DD services. R-532 and 585 (McGarrity affidavits).

The court's refusal to consider this evidence and to focus on the *named* plaintiffs was an abuse of discretion. *Lawson v. Singletary*, 85 F.3d 502, 507 n. 5 (11th Cir. 1996); *Webb v. Missouri Pacific R.Co.*, 98 F.3d 1067, 1068-1069 (8th Cir. 1996) (court can't enter injunction based on evidence rendered stale by the passage of time).

***28 B. The Trial Court's Requirement of a "Comprehensive Plan" Essentially Means a Complete Restructuring of the State's Medicaid Program for the Developmentally Disabled.**

The district court's contempt order nowhere specifies the content of the comprehensive plan the defendants have been ordered to submit under pain of sanctions. It says only that this plan must comport with "the letter and spirit of the [final] judgment." R-587 p. 15. It is, obviously enough, impossible to know what the court meant by the phrase "letter and spirit" of the final judgment as that order mandated only amendment of the Medicaid State Plan to include a specific and limited waiting period.

The contempt order read in its entirety can only mean that the state of Florida must completely restructure its Medicaid program for the developmentally disabled. The court found the compliance plan and the Florida Status Tracking Survey (FSTS) wholly unsatisfactory. R-587 The court expressly found that "inadequate funds were sought," R-587 p. 6, for some 23,000 individuals "currently on waiting lists for over the 90-day time period." *Id.*[7] The court took the state to task for not obtaining ***29** in the 1999 legislative session some $118 million to "reduce this list." *Id.* pp. 5-6.[8] The court prevented the state from changing eligibility standards by purporting to find that the state had engaged in unlawful rulemaking. *Id*. at 6-7. It also decreed that the 90-day period for determination of Medicaid eligibility should run simultaneously with the 90-day waiting period for ICF/DD services. *Id.* at 12.

Plainly, the district court has gone far beyond what the 1996 final judgment mandated and now intends to determine the scope, structure and eligibility requirements of the state's Medicaid services for the developmentally disabled as well as the numbers to be served. None of these matters were addressed in the final judgment. The court exceeded its jurisdiction and authority in attempting to revamp the program to its own satisfaction. Moreover, many of the 23,000 are not even Medicaid eligible and certainly have no federal or constitutional right at issue in this case. R-601 pp. 78-79, 115; R-602 p. 73. The. court cannot ***30** hold defendants in contempt for failing to provide services to these individuals.

C. The Trial Court Has Transformed this Action into a Suit Against the State and Ordered Relief That Is Barred by the Eleventh Amendment.

In this court's previous opinion, it expressly sought to. avoid the potential Eleventh Amendment implications of the final judgment by recognizing that the judgment required only amendment of the state plan -- *i.e.*, defendants had to incorporate procedures "to insure a waiting list period of not more than ninety days." *Doe 1-13 v. Chiles*, 136 F.3d at 720-721. "Consequently, the Eleventh Amendment poses no bar to this lawsuit . . ." *Id.* As this language expressed acknowledged, the defendant state officials were not ordered to create a new system with funds they did not have *or* to produce needed funds; they were ordered only to amend the state plan. They did that. R-602 p. 126.

Now, however, the district court has held defendants in contempt for failing to obtain all the appropriations the court thinks are needed not only for the ICF/DD program but also for community-based services. Defendants have no power to increase their budgets, as such a decision is an exclusively legislative prerogative. Appropriations must come from the legislature. Sec. 12, Art. III, Fla. Const.

***31** This Court recognized in *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994), *aff'd* 116 S.Ct. 1114 (1996), that the fiction of *Ex Parte Young*, 209 U.S. 123 (1908), that may allow suits by private citizens against

state officers does not apply if the suit is in reality against the state. This suit is now against the state to the extent the defendants are being held accountable, through the use of the district court's contempt power, for failing to provide the additional resources the district court believed were needed --here $118 million -- this amount being for a "class" that was not even certified and for community-based services that were never an issue in this case. When private citizens are plaintiffs, however, the Eleventh Amendment "bars a suit against state officials when 'the state is the real substantial party in interest.' " *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). The general rule "is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id*. at 101.

The district court's expansive interpretation of its final judgment, which is contrary to the narrow construction this court gave it, has now transformed the instant suit into one that is against the state. The court has required defendants, under pain of contempt, to come up with appropriations. Such relief, at the behest of private plaintiffs, is barred by the Eleventh ***32** Amendment. The court cannot order such relief directly, nor can it order it indirectly through the exercise of its power to hold the defendants in contempt.[9]

***33 III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE DEFENDANTS MOST DETERMINE MEDICAID ELIGIBILITY AND PROVIDE ICF/DD SERVICES WITHIN 90 DAYS CONTRARY TO FEDERAL REGULATIONS, AND IMPROPERLY USURPED THE DEFENDANTS' AUTHORITY TO SET ELIGIBILITY REQUIREMENTS FOR MEDICAID SERVICES BASED ON "MEDICAL NECESSITY."**

In addition to exceeding the mandate of this court, the district court made two critical errors of law.

A. The 90-day Time Period to Provide ICF/DD Services Should Run Only after Both a Determination of Eligibility and a Request for ICF/DD Placement Are Made.

The court found that the defendants' policy of starting the 90-day waiting list period running only after both a finding of eligibility and a request for ICF/DD services violated the final judgment.[10] The court concluded that the clock must start to run upon an individual's *request* for ICF/DD services, regardless of whether they had been determined to be eligible. R-587 p. 12-13. The district court concluded that 90 days was enough time both to determine eligibility and to make a placement. *Id.* The court used this conclusion to find the defendants in contempt.

***34** This interpretation of the final judgment as a basis for finding the defendants in contempt was an abuse of discretion for two reasons.

First, the court's conclusion overlooked or misapplied the law governing eligibility determinations. Eligibility determinations are a two-step process. R-602 p. 148. The first step is determination of eligibility for Medicaid. *Id.* The time periods for making this determination are governed by law. See 42 C.F.R. s. 435.911(a)(1) (90-day deadline for determining Medicaid eligibility involving a disability); s. 65A-1.205(1) (c), Fla. Admin. Code. (adopting the 90-day deadline).

The second step is to determine whether a Medicaid recipient is eligible for ICF/DD services. R-602 p. 148. And see ss. 59G-4.170(3), 59G-4.171, 59G-4.180. Fla. Admin. Code. Merely because one is eligible for Medicaid does not mean that one is eligible for ICF/DD placement. Only when an applicant passes both reviews is he or she "eligible" for ICF/DD placement. R-602 p. 148. Medicaid law then tacks on an additional time period for the actual provision of services -- reasonable promptness[11], the period at issue in this case and governed by the final judgment.

These deadlines are meant to be serial: the time for doing one thing follows another. However, in the Order on Motion for Contempt, the court merges them. R-587 pp. 12-13. The deadline ***35** for determining Medicaid and ICF/DD eligibility and providing a placement thus become the same. This is contrary to federal law.

Even if the defendants erred in their interpretation of the law, however, being wrong on the law is hardly a proper basis on which to hold a party in contempt, particularly in the circumstances of this case. The final judgment provided:

> Defendants shall, within 60 days of the date of this order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are *eligible* for placement in ICF/DD institutional care facilities.

R-449 p. 1, emphasis added.

In issuing a contempt finding, the court is held to the precise language of its underlying order. (See cases cited at page 20, *supra)* If there is an ambiguity, it must be construed in the defendants' favor.[12] In fact, there was *no* claim, evidence or judicial finding in this case that the defendants were remiss in making timely eligibility determinations. Hence, because the final judgment is at the very least ambiguous with respect to the sequence of determination, defendants cannot be held in contempt ***36** for determining eligibility for ICF/DD services *after* deciding Medicaid eligibility.

B. The Court Exceeded its Authority in Interfering with the Defendants' Right to Set ICF/DD Eligibility Criteria.

The district court wrongly concluded that the defendants lack statutory authority to set ICF/DD eligibility criteria so that only those actually needing institutional level care are admitted. R-587 p. 10-11, 14. It cited no authority for this conclusion.

The defendants set eligibility criteria by evaluating what sorts of people need to be in ICF/DDs, and thus by determining for whom ICF/DD services were *medically necessary*. R-602 p. 53; R-603 p. 186. Federal law authorizes them to do so.

Federal law and federal regulations set no eligibility criteria for ICF/DD admission. In fact, federal law gives the states wide latitude in designing their Medicaid programs, including the establishment of eligibility requirements. For instance, 42 C.F.R. s. 430.0 says, "Within broad Federal Rules, each state decides eligible groups, types, and range of services, payment levels for service and administrative operating procedures."

***36** 42 C.F.R. s. 440.230(d) says states "may place appropriate limits on a service based on such criteria as medical necessity . . ." See also *Rush v. Parham*, 625 F.2d 1150, 1155 (5th Cir. 1980) (Medicaid statutes and regulations permit a state to define medical necessity in a way tailored to its own Medicaid program).

"Medical necessity" is an appropriate benchmark. Not everyone with developmental disabilities needs the level of services of an ICF/DD, just as (to use an extreme example) an individual with a cold does not need to be in a hospital. See R-603 p. 156.[13] Federal regulations recognize this fact when they say, "Active treatment does not include services to maintain *generally independent* clients who are able to function *with little supervision* . . ." 42 C.F.R. s. 483.440(a)(2).

In Florida, ICF/DD services are intended for people who need "24-hour observation and care and the constant availability of medical and nursing treatment and care . . ." Sec. 59G-4.180(2) (a), Fla.Admin.Code. See also 42 C.F.R. s. 435.1009 (definition of "institution for the mentally retarded or persons with related conditions") and 42 U.S.C. s. 1396d(d) ("the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded individuals"). ICF/DD services are not intended for individuals ***38** who, despite their disability and accompanying medical and behavior problems, do not need 24-hour medical and nursing attention.

Florida sought, and the Health Care Financing Administration approved, a Medicaid state plan amendment permitting determinations of need for ICF/DD services based on medical necessity. R-602 p. 126. See also, s. 59G-1.010(166), Fla.Admin.Code, defining medical necessity.

The question of the amount and scope of a state's Medicaid program is a matter of state public policy and state discretion. *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 714 (1985); *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 2371, 53 L.Ed.2d 464 (1977); *Cleary v. Waldman*, 167 F.3d 801, 811 (3rd Cir. 1999). Neither a state nor Congress is bound to continue a benefit program at the same level. *Bowen v. Gilliard*, 483 U.S. 587, 107 S.Ct. 3008, 3019, 97 L.Ed.2d 485 (1987). State officials are free, within applicable restraints, to make public policy choices that may include reducing, restricting or

eliminating benefits, and no matter how much suffering those decisions may cause, the courts are not empowered to interfere. *Id.* 107 S.Ct. at 3014-3015.

Here, the trial court usurped the defendants' authority in attempting to fix the scope of ICF/DD benefits in its sanction order.

***39 C. The Court's Concerns about the Defendants' Compliance with Rulemaking Requirements Are Mistaken.**

The court was also mistaken in its analysis' of whether the defendants complied with state and federal rulemaking requirements. It is well established that federal courts lack jurisdiction to require state officials to comply with state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 919, 79 L.Ed.2d 67 (1984). Thus, the court had no authority to inquire into the defendants' compliance with state laws applicable to rulemaking.

Because the defendants made a global policy change by amending the ICF/DD eligibility requirements, federal law does not require notice and hearing. The court also overlooked Medicaid regulations *permitting* such a global policy change without the need to provide notice and hearing. See 42 C.F.R. s. 431.230(a)(1), 42 C.F.R. s. 431.220(b). Both these rules state that when the contemplated change is one of state law or policy (see s. 432.230) that globally affects a group, notice and hearing are not required.

***40 IV. THE TRIAL COURT ABUSED ITS DISCRETION IN USING COERCIVE PUNITIVE CONTEMPT SANCTIONS AGAINST THE DEFENDANTS FOR ACTIONS TAKEN (OR NOT TAKEN) BY THEIR PREDECESSORS IN OFFICE, SPECIFICALLY WHERE THE COURT'S VARIOUS ORDERS CONSTITUTE A COMPLEX SCHEME OF ENFORCEMENT AND WHERE THE INDIVIDUAL DEFENDANTS HAVE NO ABILITY TO COMPLY OR PURGE THEMSELVES OF CONTEMPT.**

A. The Trial Court Abused its Discretion by Basing its Contempt Finding on the Actions of the Defendants' Predecessors in Office Rather than on the Actions of the Defendants Themselves.

In large part, the district court found the present defendants in contempt and imposed sanctions on them for the actions or inactions of their predecessors in office. This was a clear abuse of discretion.

The current defendants took office only in early 1999, during the changeover from the Chiles to the Bush administrations. See e.g., R-601 pp. 40, 81, 94, 97 (Deputy Secretary in Department of Children and Families took joined the department on January 11, 1999). They were then confronted with the trial court's "Memorandum Findings" and Order of November 10, 1998, mandating that "[b]y February 12, 1999, defendants shall fully comply with the Final Judgment as to all members of the ***41** numbered [sic] class." R-530 p: 3. The court did not explain what it meant by the "numbered class."

As we now know, the final judgment, in the district court's mind, required far more than an amendment specifying a waiting period, and the defendants had approximately one month from the time the new administration took office -- until February 12, 1999 -- to decipher and satisfy that order. To hold them accountable for the perceived failures of their predecessors to understand and to comply with the vastly expanded scope of this action is a clear abuse of discretion.

B. The trial court abused its discretion by imposing a criminal sanction because the defendants have no realistic way to purge the contempt.

The defendants had no realistic possibility of purging the contempt within the brief 10-day time allowed by the district court in its contempt order, nor in fact until the Legislature appropriated sufficient funds to satisfy the court. R-587 p. 15. That alone makes the sanction punitive and criminal in nature.

The defendant's ability to purge a contempt by complying with an injunction, thus avoiding sanctions, is a key distinction

between civil and criminal contempt. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); *Shillitani v. U.S.*, 384 U.S. 364, 370 n. 6, 86 S.Ct. 1531, 1536 n. 6, 16 L.Ed.2d 622 (1986).

***42** Whether a contempt is denominated civil or criminal historically has dictated the level of due process afforded. *Bagwell*, supra; *Mercer v. Mitchell*, 908 F.2d 763, 769 (11th Cir. 1990) (requiring at least notice and hearing for civil contempt); *Mackler Productions Inc. v. Cohen*, 146 F.3d 126, 130 (2d Cir. 1998) (lack of a purge provision made $10,000 contempt sanction criminal, requiring procedural protections appropriate to a criminal proceeding).

In this case, the defendants had no realistic way to avoid imposition of the fine, and thus to purge the contempt. The district court ordered the defendants to file "a comprehensive plan, which comports with the letter and spirit of the judgment entered August 28, 1996 [that is] ready for implementation." R-587 p. 15. The district court gave the defendants a mere 10 days to file this ready-to-go plan.

The trial court made clear that securing the additional $118 million in appropriations to serve all 23,000 individuals who seek some state-funded service was essential to making the comprehensive plan "ready for implementation," However, the defendants have no authority to come up with $118 million absent an act of the Florida Legislature. The executive branch in Florida cannot appropriate funds. Sec. 12, Art. III, Fla. Const.; s. 3, Art. II, Fla. Const.; s. 20.02(1), Fla. Stat.; R-602 p. 50 ("The budget is set by the Legislature."). Furthermore, the ***43** Florida Legislature does not meet until March 2000. Sec. 3(b), Art. III, Fla. Const.

Moreover, the sanctions order, requiring a plan in compliance with the "letter and spirit" of the final judgment is so vague[14] that the defendants could not realistically draft a comprehensive plan within 10 days that satisfied the court, if they ever could. The divergence of the October 1999 contempt order and the final judgment illustrates how expansively the court reads the "spirit" of its final judgment. The defendants cannot anticipate how the court will interpret "the spirit of the judgment" in the future.

Last, compliance -- and therefore the ability to purge the contempt -- is impossible for any of these defendants. None of them have the ability to comply with the court's pivotal finding that an additional $118 million must be obtained to meet the "spirit" of the final judgment. To the extent that the district court requires the defendants to do something beyond their ability individually or collectively to accomplish, the *Ex Parte Young*[15] exception to Eleventh Amendment immunity does not apply, and the court lacks jurisdiction. *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998); *American Civil* ***44** *Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1490-1491 (11th Cir. 1993).

The district court thus has set the compliance bar so high that the defendants cannot pass it at all, let alone within the 10 days specified in the order. R-587 p. 15. Because the defendants cannot purge the contempt by complying with the order within the time limits imposed by the court, the sanctions are inherently punitive. The district court erred as a matter of law by failing to afford the defendants the due process protections provided in a criminal proceeding such as jury trial and proof beyond a reasonable doubt.

C. The Court Abused its Discretion by Failing to Determine Whether the Defendants Had the Ability to Pay the Sanction Imposed.

The trial court also abused its discretion because it failed to determine whether the defendants had the financial ability to pay the sanction imposed, $10,000 a day. The court never considered this factor at all.

In imposing contempt sanctions, the court must use the least possible power to obtain compliance. *Jove Engineering Inc. v. IRS*, 92 F.3d 1539, 1558 (11th Cir. 1996). Prospective fines, in particular, "should only be imposed to remedy what the court has determined to be 'flagrant' violations of an order. And then only when lesser remedies have been determined to be likely to fail." ***45** *Chairs v. Burgess*, 143 F.3d 1432, 1438 n. 12 (11th Cir. 1998). The court must also consider the defendant's individual financial resources. *U.S. v. United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 701, 91 L.Ed. 677 (1947); *In re Trinity Industries*, 876 F.2d 1485, 1494-1495 (11th Cir. 1989). Monetary sanctions that are excessive and disproportionate to the defendant's financial resources are punitive. *In re Trinity Industries*, 876 F.2d at 1493-1494.

Here, the court made no findings that lesser sanctions would be likely to compel compliance or conclude that the sanction was reasonable and within the defendants' financial resources, as it must do.

The amount imposed, $10,000 a day, is more than enough to quickly bankrupt any individual or small group of individuals (assuming that the sanction is joint and several, which is not specified in the order, R-587 p. 15). Clearly, as imposed on individuals, such an amount is excessive, punitive and criminal in nature.

***46 D. The Defendants Were Not Accorded the Due Process Protections to Which Contemnors Are Entitled When the Court Seeks to Impose Criminal Sanctions for Violations of a Complex Injunction.**

The contempt order makes no finding that the defendants failed to amend the Medicaid State Plan to specify a 90-day waiting period for ICF/DD placement or that defendants denied appropriate services to any of the *named* plaintiffs, the only command of the final judgment. It could not have made such findings.

Because the court treated the final judgment as a mandate to expand and restructure the entire Medicaid program for individuals with developmental disabilities, what was a relatively straightforward and simple judgment became a complex injunction that required many different activities. When serious sanctions are imposed pursuant to such an order, they are regarded as criminal, particularly when they occur out of court and over a period of time. They can only be imposed if the defendants are accorded a jury trial and proof beyond a reasonable doubt. See *International Union. United Mine Workers of America v. Bagwell*, 512 U.S. 821, 833-834 (1994). The defendants did not receive these basic due process protections.

In *Bagwell*, the Supreme Court ruled that the defendants were entitled to a jury trial and proof beyond a reasonable doubt. As ***47** that decision stated, "[C]ontempts involving out-of-court disobedience of complex injunctions often require elaborate and reliable factfinding." *Id.*, 512 U.S. at 833-834. In such situations, the judge has no personal knowledge of the facts, a hearing must be held, and witnesses must be called. Further, "the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. . . Under these circumstances, criminal procedural protections such as the rights of counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." *Id.*, at 834, (emphasis added).

Thus, the Supreme Court said, where the district court has imposed a complex injunctive order, alleged out-of-court violations occurring over time must be determined using criminal law due process guarantees. *Id.*, at 836-838. "Under such circumstances, disinterested factfinding and evenhanded adjudication [are] essential, and petitioners were entitled to a criminal jury trial." *Id.* at 837-838.

Bagwell applies to this case because the injunction at issue is complex. Indeed, it has become a directive by which the district court can examine the entire state Medicaid program for individuals with developmental disabilities. The district court has interpreted this order, among other things, to require the ***48** defendants to have obtained appropriations sufficient to reduce waiting times to no more than 90 days for some 23,000 individuals in a class that it never defined or certified.

Because of this complexity, the *Bagwell* case applies to the sanctions imposed below, which at $10,000 a day are serious.[16] The defendants were entitled to criminal due process protections. The district court abused its discretion and erred as a matter of law in not according the defendants a jury trial and requiring proof beyond a reasonable doubt.

V. THE GOVERNOR IS NOT A DEFENDANT AND NOT SUBJECT TO CONTEMPT SANCTIONS.

The contempt: order appears to hold the Florida governor in contempt. R-587 p. 1 n. 1. However, the governor is not a party. He was dismissed as a defendant in December 1992, a fact noted by the court of appeals in its opinion, *Doe 1-13 v. Chiles*, 136 F.3d at 711, n. 4; R-171 (finding no claim for relief stated against Governor Chiles). Therefore, the district court abused its discretion if the order is read to find Governor Bush in contempt and to impose sanctions on him.

Although the governor was dismissed as a party, his name never left the case style ✓ a fact reflected by the case name in the court of appeals years after his dismissal. Governor Bush's ***49** name appeared in the case as a routine ministerial amendment to the case style pursuant to Fed.R.Civ.P. 25(d)(1), the provision permitting the automatic substitution of parties upon their replacement in public office. R-586. This ministerial change did not constitute a concession to jurisdiction by the current governor.

Therefore, the district court is in error if the October 1999 contempt order is read to impose sanctions on the governor.

*50 CONCLUSION

The defendants complied with the final judgment. Therefore, this court should vacate both the Order on Motion for Contempt and the "Memorandum Findings" of November 10, 1998, in their entirety, and remand with instructions to the district court to dismiss this action.

In the alternative, if this court believes it is necessary for the district court to make findings of fact concerning whether the defendants have provided the named plaintiffs with ICF/DD services to which they may be entitled, it could remand the case for that narrow purpose.

Footnotes

1 See, for instance R-84, 85, 117, 122, 170, 278, 281, 321, 322, 351, 355, 390, 403.

2 Charles Auslander later replaced Ms. Herald, but he has not been formally substituted as a party.

3 "*Medical necessity* is one of the basic tenets of the Medicaid program and that for a service to be provided and for to us pay for it, it has to be medically necessary. The Medicaid program does not pay for services that the individual does not need. It does not pay for instance for prescriptions that an individual does not need. It does not pay for elective surgery that an individual does not need. It does not pay for nursing home care that an individual does not need. *It does not pay for ICF DD care that an individual does not need*." R-602 pp. 20-1, emphasis added.

4 The district court has a related case involving the adequacy of community-based Medicaid services for individuals with developmental disabilities in which it has certified a class. That certification order is on interlocutory appeal to this court. See *Prado-Steiman v. Bush*, Eleventh Circuit docket number 99-11034-EE.

5 The Eleventh Circuit's opinion on appeal in this case did not constitute approval of the court's failure to certify a class.
The court of appeals noted the lack of class certification, *Doe 1-13 v. Chiles*, 136 F.3d 709, 712 (11th Cir. 1998). However, the court never ruled on the effect of a lack of class certification. *Id*, at 722.
In any event, the defendants did not raise jurisdictional arguments as they do now.

6 R-587 p. 14 n. 4.

7 These 23,000 people are not waiting for ICF/DD services. The number represents a ballpark estimate of all individuals with developmental disabilities who have potentially unmet needs--individuals both eligible and ineligible for Medicaid who may need services in *any* state supported program. R-601 pp. 78-79, 115; R-602 p. 73. These people, moreover, are not on a "waiting list," let alone a waiting list for ICF/DD services. R-602 p. 183. The court's characterization is clearly erroneous and without evidence in the record.

8 The court's focus on the need for an additional $118 million is also misplaced. The $118 million, which is anticipated to be obtained during the 2000 legislative session, is targeted to pay for Medicaid waiver and *non*-Medicaid services in the community. R-601 p. 59; May 25, 1999, p. 81-82, also 67, 117. Furthermore, the court got the 53 percent figure from plaintiffs' counsel, not from the testimony of any witness. R-601 pp. 86-87.

9 Interestingly, the court seems to have recognized this constraint on its authority at an earlier date when in its Memorandum of Findings and of November 1998 it found the defendants not in compliance with the Final Judgment and in breach of the federal-state contract for Medicaid services. R-30 p. 2. The enforcement measures the court then threated to take were "freezing

expenditures of Medicaid funds or a diverting of Medicaid funds from other programs so as to provide services to the developmentally disabled." R-530 p. 3. It did not suggest it would hold defendants in contempt for failing to obtain appropriations. Of course, if the state fails to provide sufficient funds to meet its obligations under the Medicaid laws, the Eleventh Amendment is no bar to a suit by the United States or one of its agencies to vindicate federal law. *See United States v. Texas*, 143 U.S. 621, 644-645 (1892) (finding such power necessary to the permanence of the Union); *Employees of Public Health & Welfare v. Missouri*, 411 U.S. 279, 285-286 (1973) (failure to properly abrogate the states' Eleventh Amendment immunity operates to foreclose private enforcement suits only; enforcement of federal act by appropriate federal agency is still available).

[10] See R-601 p. 114 for the defendants' position.

[11] 42 U.S.C. s. 1396a(a) (8).

[12] "[W]e must read any 'ambiguities' or 'omissions' in such a court order as 'redound[ing] to the benefit of the person charged with contempt.' " *NBA Properties Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990); *Guilday v. Dubois*, 124 F.3d 277, 286 (1st Cir. 1997) (party must be able to determine from the four corners of the order what acts are forbidden; ambiguities construed in favor of the alleged contemnor).

[13] "Not all developmentally disabled [individuals require] ongoing continuous active treatment, which is the standard of eligibility for ICF DD."

[14] *Stotler & Co. v. Able*, 870 F.2d at 1163.

[15] 209 U.S. 123 (1908).

[16] See *Bagwell*, apparently holding in part because the sanctions at issue in that case were "serious." *Id.*, 114 S.Ct. at 2562.

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