No. 22-1013

In the Supreme Court of the United States

J.R.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONER

GLENN GERDING
WYATT ORSBON
Office of the Appellate Defender
123 W. Main St.
Suite 500
Durham, NC 27701

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

REPLY BRIEF FOR PETITIONER

1. Suppose a state, to save money, decides to stop sending prosecutors to criminal trials. Instead, the state will rely on the trial court to present the state's case, after which the court will determine whether the case it has just presented satisfies the state's burden of proof, and if so, the court will order the defendant incarcerated.

Would such a scheme be consistent with due process? We don't think it would. Due process requires "both the appearance and reality of fairness" on the part of the judge. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). But "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). This is the reason our adversary system is premised on the separation of judicial and prosecutorial roles.

The same is true for involuntary commitment proceedings. Confining a person in a psychiatric hospital against his will is another form of incarceration. It is "a massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). Just like imprisonment for crime, it involves the loss of freedom and it entails considerable stigma. *Vitek v. Jones*, 445 U.S. 480, 492 (1980). Just like imprisonment for crime, it is intended to rehabilitate the person incarcerated and to protect the public from him. And just like imprisonment for crime, it can be imposed only by a neutral judge who is not simultaneously the lawyer for the state.

North Carolina thinks differently. If the state's argument were accepted, judges could take over the presentation of the state's case at criminal trials too,

so long as the judges avoid explicit advocacy. After all, the judge in a criminal trial could also ask "basic, open-ended questions to facilitate the orderly presentation of evidence." BIO 1. Our view, by contrast, is that due process does not permit the judge to fill in for a missing prosecutor, even if the judge acts outwardly neutral.

The real problem is not the judge's outward behavior but rather his internal decision-making. It is simply too much to expect that a person can fairly assess the case for incarceration after presenting that case himself. "A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 44 (1950) (internal quotation marks omitted).

As Judge Aldrich once observed for the First Circuit, a judge forced to assume the role of the state's representative is placed in an impossible position.

> [W]hen interrogating a witness he is examining for the people, but when listening to the answer to the question he has propounded, he is weighing it as judge, and at the same time considering what question, as prosecutor, to ask next. Correspondingly, when he listens to the answer to a question put by the defense, he must, as judge, impartially evaluate the answer, but, simultaneously, as prosecutor, he must prepare the next question for cross-examination. The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two

> personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men.

Figueroa Ruiz v. Delgado, 359 F.2d 718, 720 (1st Cir. 1966).

2. North Carolina also errs (BIO 10, 15-16) in characterizing involuntary commitment proceedings as litigation merely between two private parties, with a doctor on one side and a patient on the other. Only the state has the power to incarcerate a person against his will. Doctors, no matter how well-meaning, would commit a crime if they tried to do it themselves. The state is therefore the real party in an involuntary commitment proceeding. The psychiatrist who petitions for commitment is like the complaining witness in a criminal case. She is the one who gets the process started, and she may appear in court as a witness for the state, but she is not a party. The state is the party, just like in a criminal case. Now that North Carolina has stopped sending prosecutors to these proceedings, the proceedings are missing a *party*, not merely a lawyer for one side, just as if the state had stopped sending prosecutors to criminal trials.

The state's error causes the brief in opposition to misunderstand our argument at times (e.g., BIO 14). We're not saying that a *lawyer* must appear for the state at involuntary commitment proceedings. All we're saying is that *someone* other than the judge must represent the state, because it is inconsistent with due process for the judge to wear both hats at once. Most states send prosecutors, as North Carolina once did, but it would also be constitutional to

have non-lawyers represent the state. The Court's parole revocation cases (cited at BIO 14) thus support our argument, not North Carolina's. Non-lawyers may represent the government at parole revocation hearings, but the key point is that the person representing the government is not the person who makes the decision as to whether parole will be revoked. *See Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973). That decision is made by a neutral arbiter. Decisions to incarcerate people in psychiatric hospitals should be made by neutral arbiters as well.

3. Finally, the brief in opposition errs twice (BIO 10, 15) in alleging that aspects of our argument were waived below. In both of the passages the state cites from the briefing below, we were making the same point we just made—that the Due Process violation does not consist in the absence of a prosecutor to represent the state, but rather in the court's assumption of the absent prosecutor's role. Anyone except the court can represent the state. It doesn't have to be a prosecutor, or even a lawyer. It just has to be someone other than the person responsible for deciding whether J.R. will be incarcerated against his will.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GLENN GERDING
WYATT ORSBON
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Durham, NC 27701

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