In the

Supreme Court of the United States

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T. M. "JIM" PARHAM, Individually and as Commissioner of the Department of Human Resources, W. DOUGLAS SKELTON, Individually and as Director of the Division of Mental Health, and W. T. SMITH, Individually and as Chief Medical Officer of Central State Hospital, Appellants, Vs. J. L. and J. R., Minors, Individually and as representatives of a class of persons similarly situated, Appellees	No. 75-1690

Washington, D. C.
December 6, 1977

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Washington, D.C.
Tuesday, December 6, 1977

The above-entitled matter came on for argument at 11:12 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

R. DOUGLAS LACKEY, Assistant Attorney General, 132 State Judicial Building, Atlanta, Georgia 30334; for the Appellants.

JOHN L. CROMARTIE, JR., Esq., 101 Marietta Tower, Suite 2121, Atlanta, Georgia 30303; for the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1690, Parham against J. L. and J. R., Minors.

Mr. Lackey, I think you may proceed. But before you proceed, in case you were not in hearing when I announced it, Mr. Justice Brennan is unavoidably detained for parts of these cases but will participate in the consideration on decision--on the record, of course.

You may proceed.

ORAL ARGUMENT OF R. DOUGLAS LACKEY, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LACKEY: Mr. Chief Justice, may it please the Court:

This case comes to this Court from the United States District Court for the Middle District of Georgia. At issue is the constitutionality of the Georgia statute which recognizes the right of parents and guardians to make application for admission of their minor children to state mental health facilities.

This lawsuit is predicated upon two grounds. The first ground is that these children have a constitutionally protected right to challenge their parents' decisions as to what medically indicated treatment will be provided to children and that the challenged statute here, which provides for neither notice nor hearing before hospitalization deprives them

of that right without due process of law.

The second ground is thatmentally ill children have a constitutional right, when they receive treatment from the state, to receive that treatment only in the treatment setting which is most appropriate to their condition.

This lawsuit was brought by two boys, age 12 and 13 at the time of this litigation. Each had been in a state mental health facility for over five years. Each had been admitted under the challenged code section, one by his parents, the other by his guardian, a state agency.

At the time of the trial of the litigation, we admitted that these two boys as well as 44 other children who were then in the mental health facility could be treated for their condition in other facilities which we considered more appropriate.

Two facts which do not appear in the record but which I want to bring to the Court's attention are that one of the plaintiffs is now deceased, J. L. The other is that some of these children are still in the hospital.

The District Court in essence agreed with the appellees on both grounds, finding that in fact the children had a liberty interest and that they were deprived of it by the operation of this statute, and finally that the children had a substantive due process right which was violated by the operation of the statute.

There are in essence two issues before the Court then. The first is whether these children are entitled to procedural due process rights and whether they receive it under the statute; and the second is whether the children have a right, if they are to receive treatment from the state, to receive that treatment only in the best facility.

Turning to the first issue--

Q I thought earlier you had said something to the effect the request, the demand, was for treatments suitable to their needs, or something to that effect. Do you mean that to be the same as the best treatment available?

MR. LACKEY: The language that the District Court used was the treatment setting most appropriate to the child's condition, and we interprat that to mean the best, that anything less than the best would not be the most appropriate.

Q Do you read the District Court's decree as to the 46 individuals with whom it entered specific instructions as to placement to foreclose the state from simply releasing them entirely?

MR. LACKEY: No, sir, I do not.

Q I may be getting this case confused with the preceding case. Is there any claim for damages on behalf of the children against the parents?

MR. LACKEY: Yes, sir. The complaint asks for $10,000 damage for each child. The District Court did not

address that issue.

Q From the parents?

MR. LACKEY: No, from the state employees.

Q But they are not asking for damages against their parents for the decisions and actions of the parents?

MR. LACKEY: No, sir. The parents are not parties to this lawsuit.

There are in essence, with respect to the procedural due process issue, three subissues, one of which the Court itself advanced, that being the question of state action here. The other two are the question of whether a child has in fact a liberty interest in this situation and, if a child does have a liberty interest, there is state action, what process is due.

Turning first to the liberty interest, we have looked to the District Court's analysis of the case. The District Court said in essence that children have a liberty interest, for the Supreme Court of the United States said so in its decision in the case of In Re Gault. Hospitalization is a massive curtailment of that liberty for again the Supreme Court said so in Humphrey v. Cady. The District Court then put the two together and concluded that these children were deprived of a liberty interest without due process of law.

Our position is that the District Court's analysis is flawed because the District Court focused on the wrong interest. It is a fundamental or threshold issue in any

litigation where what is challenged or what is alleged is a deprivation of a constitutionally protected interest that you must look to the interest itself to see whether in fact it can be fairly said, as in this case, to fall within the ambit of the Fourteenth Amendment.

What we suggest to the Court that the interest is here is the interest in the child to challenge his parents' medically indicated decision, for that is exactly what the District Court is allowing the child to do by asserting that the child is deprived of a liberty interest by being hospitalized. It is our position that this analysis is inconsistent with both the inferences that can be drawn from this Court's opinions, state court decisions, as well as the history of Western civilization.

In our civilization, in our society, we have determined that children cannot make certain decisions for themselves. One of these areas in which we have made this determination is in the area of selecting medically indicated treatment. Both at common law and in the case law of this country we have said that parents select medically indicated treatment for their children. Their children do not select that treatment themselves.

Q Is there a difference between mental and ordinary hospital?

MR. LACKEY: Is there a difference? Yes, sir, there

is a difference.

Q For example, in a mental hospital you are restrained.

MR. LACKEY: Yes, sir, you are restrained in a sense. There is no denying that. I think the record in this case discloses that--

Q That the parent has a right to restrain the child.

MR. LACKEY: A parent has a right to restrain a child independent of this case. But I think what the record discloses here--

Q For how long?

MR. LACKEY: I suppose parents restrain children until they reach their majority.

Q You could not restrain the child then from school.

MR. LACKEY: No, that is correct, you could not.

Q So, it is not that broad, is it?

MR. LACKEY: It is not absolute; of course not.

Q But you do recognize the difference between the family's right to see that a child's tonsils are taken out as contrasted to being committed for the rest of his life?

MR. LACKEY: I can see a difference in those two extremes, certainly, Your Honor. The point I am trying to make here quite honestly, sir, is that if there is a liberty

interest in the child at all to challenge his parents' decision to hospitalize him, that liberty interest must cut completely across the whole spectrum. It is not plausible to say that a constitutional right exists in a child when the child's parent wants to place him in a mental hospital.

Q I take it you do not suggest--maybe you do--that the parents' consent or decision is sufficient in itself.

MR. LACKEY: I am sorry, sir, I did not understand your question.

Q Is it your submission that the child lacks a liberty interest to such an extent that the parents' decision standing alone is enough?

MR. LACKEY: No. In this circumstance the parents' decision standing alone is not enough. In actuality in any case, where whar we are speaking of is medically indicated treatment, the parents' decision is not enough. The state--

Q What else must there be besides the parents' decision to hospitalize the child?

MR. LACKEY: In this specific case there must be the concurrence of a physician that what the parent desires for a child is actually what is in the child's best interest.

Q So, somebody should look over the shoulder of the doctor and the parents or not?

MR. LACKEY: Our position is that no one should look over the shoulder of the doctor and the parent or the doctor

and the child.

Q If they act together.

MR. LACKEY: Pardon me, sir?

Q If they act together.

MR. LACKEY: If they act together.

Q And this physician could be an obstetrician?

MR. LACKEY: Yes, sir.

Q Trained in--

MR. LACKEY: The law in Georgia and in most other states makes no difference between different practitioners of medicine. It simply defines them as physicians.

Q So, I mean, an obstetrician can say that this child is dangerous and needs mental treatment.

MR. LACKEY: No, sir, he would not have to say that the child is dangerous. All he would have to say is that the child is mentally ill and suitable for treatment.

Q He is still an obstetrician.

MR. LACKEY: Yes, sir, he could be an obstetrician.

Q What is done in practice as a matter of fact? Do they use obstetricians for this purpose?

MR. LACKEY: No, sir, they do not.

Q Going back to this dichotomy between mental and other diseases, if a parent puts a nine-year-old child in the hospital to have his appendix or tonsils taken out, do you suggest that that child could be released from the hospital by

anyone except the consent of the parents and the hospital?

MR. LACKEY: No, sir, and I do not think that that surgery could be authorized by anyone other than the parents. If the Court found that the parents were acting in bad faith in denying the child the treatment he needed, of course the Court could.

Q And if the hospital let the child out on the child's request while still under care in the recuperative stages from the surgery, the hospital would surely be exposed to a malpractice suit, would they not?

MR. LACKEY: Yes, sir, and I would expect that they would lose.

Q A hospital does not release any minor without the signature of the parents when a child has been in the hospital for treatment; is that not so?

MR. LACKEY: I believe so.

Q Do you know what the law in Georgia is on that?

MR. LACKEY: The law in Georgia requires--I am sorry, I do not have the specific cite. I think it is Title 88, Chapter 19. Has a consent law and requires the consent of parents before medical treatment can be rendered to children. Georgia Code, Section--

Q And before they can be released from the hospital?

MR. LACKEY: Georgia Code, Section 74-104 makes

parents explicitly responsible for the welfare and care of their children. There is no law that says that before a hospital can release a patient--I am sorry, I am going around your question, sir. I cannot say and I do not believe that there is a law that says with respect to any facility a hospital has to have parents' permission. There is a law here that says that if a child wants to leave, his leaving can be conditioned upon the consent of his parents. In this lawsuit there is that statute.

Q That is a mental law?

MR. LACKEY: That is correct, sir.

Q Which is the one that is before us.

MR. LACKEY: That is correct, and I am not familiar with any similar requirement in the state in the medical treatment area.

Let me get back to your question or your point, Mr. Chief Justice. What our point is is if you say there is a liberty interest here, then similarly there is a liberty interest in that child who is going to have his tonsils taken out. I think we perhaps used a rather gruesome example in our reply brief, but I think it is appropriate. And that is the situation where a parent takes a child to a physician and the physician says, "Your child is exhibiting signs of cancer, the treatment for which is the removal of his leg." Under the very liberal definition of liberty that the District Court

applied, clearly the consequence of that parental decision is going to deprive the child of his liberty, again as the District Court has defined it. And as the United States noted in its amicus brief, it would be unprecedented to argue that the child has a liberty right, a right to be processed in that situation. And in fact no one argues that. They are simply arguing that in this particular case, mental illness, this child has a right to due process. No one argues that he would have that right in any other area. And we suggest that that is just simply inconsistent with the way constitutional rights have been defined.

Q To put it strictly, everybody has the right to due process. If they are going to be denied a liberty or property, you never reach a conclusion that the Due Process Clause is not applicable. You can say that what was done did not deprive them of any liberty or property.

MR. LACKEY: That is correct, sir. But at the point we are in the argument right now, it is our position that the child does not have a liberty right at all at this point vis-a-vis his parents, not vis-a-vis the state. Constitutional rights I believe you can say do not exist in the abstract. They exist because of relationships. You might say there is a constitutional right when you have got the child versus the state as in the case of In Re Gault. But when you are talking about the parent and the child and the parent making a decision

for the child, we say there is no liberty interest. And that is where the Court should have focused first and did not, the District Court.

Q Why do you not narrow it? The child still has some liberty rights. You are just talking about the one liberty that is involved here.

MR. LACKEY: Yes, sir, that is correct.

Q You keep broadening it. I would not broaden it too much.

MR. LACKEY: I certainly would not intend to say that the child does not have any liberty interest--only a liberty interest not to challenge his parents' medically indicated decisions. That is how narrowly I want to define it, and I do not mean to broaden it any more.

However, even if the Court decides that in fact there is a liberty interest here that could be protected, the second question is the one that was advanced by the Court itself and that was whether or not there is state action involved in this case.

The best way to address the state action question, from our perspective, is to consider what this Court said in Burton v. Wilmington Parking Authority, and that is that you have to look at the case and sift the facts and circumstances to determine whether there is state action here.

What we can say is that the challenged statute here

does not authorize parents to provide medically indicated treatment for their children. It does not encourage it. We do not go out and seek the children. The best characterization of what we do is we provide a resource, and that is it. We provide a resource just as any private hospital would be a resource. We simply are fulfilling a proprietary function in this case. And, as I said, our position is that it ought to be looked at from a practical standpoint. It seems impractical--

Q But you do not take the child just on the say-so of the parent and the parent's doctor.

MR. LACKEY: That is correct, sir. We will not.

Q So, you go through still a further procedure.

MR. LACKEY: The way we have characterized it is that we do in fact have a gate keeper. We do in fact have a gate keeper. But what we do is we decide--

Q And you decide that it is medically indicated or that treatment is indicated.

MR. LACKEY: That is correct. We decide that the child meets the criteria of being mentally ill and suitable for treatment. But of course that is the same function that any doctor provides in any hospital. And what we are saying is that it seems illogical to say that if a parent has money, if he has assets, if he has resources, he can go to a private facility; and if the psychiatrist or the physician or whatever

agrees with him, he can put his child in that hospital without going to a juvenile court proceeding, without going through an adversarial hearing. But if he does not have the money, if he does not have the assets, we are going to make him go to an adversarial proceeding. If he has to go to our juvenile court, get a lawyer, get a lawyer for his child or the court will appoint one, of course.

Q As to your gate keeper, he can say no as to admission to a state facility where the parents and their doctor have said yes. But he cannot say yes if the parents and their doctor say no.

MR. LACKEY: That is correct. That really follows from what the Court said in Jackson v. Metropolitan Edison. What we are doing is we are allowing a choice that the parent has to initiate. The parent has to initiate the action or the guardian has to initiate the action that leads the child to the hospital.

Q What due process protection does the child have in your view if the parents are affluent and simply take the child to their own private psychiatrist or child specialist and that doctor recommends commitment and the commitment takes place in a private hospital? Any hearing--

MR. LACKEY: No. That child receives absolutely nothing. He does what his parents tell him, and the parents of course decide what to do based on the doctor's advice. I

think that is our main point, that in that case that parent can put that child in that hospital, but here he is going to have to go through an adversarial process to achieve the same result, which is simply to get mental health treatment for his mentally ill child.

Q A private hospital is also subject to habeas corpus, is it not?

MR. LACKEY: Yes, sir. And I think that the law would allow you to challenge the place and the reason for your detention, even in a private facility.

Q Apart from that, what would you think about the claim of the child that he was wrongfully committed for improper reasons in a malpractice suit against the physician?

MR. LACKEY: He would certainly have a false imprisonment suit against the physician. He could not sue his parents in Georgia.

Q Even if he did not have one against his parents?

MR. LACKEY: That is correct. That is correct.

Q Because of the existence of that possible liability, do not the private institutions follow precisely the same procedure that the state institution does? Do they not examine before they admit?

MR. LACKEY: Yes, sir.

Q So, what is the discrimination?

MR. LACKEY: The discrimination that I was addressing,

if it exists at all, is one based on wealth. And it is simply that--

Q But the wealthy parent can commit the child if the doctor of the committing institution will receive the child. That is exactly what happens here. But you are saying that will continue to be the case, whereas the District Court changed the rule.

MR. LACKEY: If the District Court's order stands unchanged, that will not be the instance with respect to the public hospitals. It will continue to be so with the private hospitals. There would be no reason for them to change that I am aware of.

The second issue with respect to state action of course is what happens once the child is in. I just wanted to briefly touch that and make the point that we made in our brief, that our position is that once the child is in the facility, as long as he continues to meet the minimum criteria, we simply act as does any custodian of the child that the parent has entrusted his child to. We release the child when the parent wants the child. We do not release the child, assuming these minimal conditions are met, if the parent wants the child to stay in.

Even if the Court finds there is a liberty interest in state action here of course, you have still got the issue of what process is due.

Q One of these named plaintiffs--and I realize one of them is now deceased--but some members of this class were committed at the behest of the state as guardian.

MR. LACKEY: That is correct.

Q In that category there clearly is state action, I suppose. The state initiates it.

MR. LACKEY: I concede state action.

Q You do concede it.

MR. LACKEY: Yes, sir.

Q So, really your argument is kind of moot, is it not?

MR. LACKEY: Sir, if I lose the argument on the children who were placed by state agencies and prevail on the state action on those children that are not, I will have succeeded since the vast majority are admitted by their parents.

Q Even when the parents bring the child to the hospital, as soon as the state-employed physician, psychiatrist, enters and participates in the commitment, would you say that is or is not state action?

MR. LACKEY: I would say that that is of course state action. I would say that it does not rise to the level necessary to implicate the Fourteenth Amendment.

Q But it is state action at that stage.

MR. LACKEY: I cannot deny that it is state action.

Q The same way that it is state action if the state

was proceeding as a guardian ad litem for the child.

MR. LACKEY: There is a different level or a different quantum of state action. But yes, sir, state action in both.

Q Then it is part of your position that that participation by the state--namely, the doctor at the institution takes a look at the child--that is an essential condition to the deprivation of liberty, assuming it is a liberty.

MR. LACKEY: Assuming it is a deprivation, it cannot be accomplished without the physician's approval or denial.

Q It is essential because it is part of the regular procedure. Are you still arguing that it is not state action?

MR. LACKEY: I am saying that all--it is not a progression. The parents have already decided that the child needs to be in the hospital.

Q But he cannot get in the hospital unless the state examines him and says yes, you can come in.

MR. LACKEY: That is correct. But what the state is doing is that the state is saying--is simply affirming the parents' decision.

Q But your argument on the merits is that that is an essential part of the procedure.

MR. LACKEY: I agree. That is correct, sir.

Q And you still say it is not state action?

MR. LACKEY: It makes the state action very difficult.

Q I would think so.

Q And they not only do not let them in unless they agree but they implement the decision.

MR. LACKEY: That is correct. They treat them. They treat them.

Even if you find that there is liberty in state action, the question is , What processes do? Our position on this is similar to Judge Roney's in his opinion in Drummond v. Fulton County Department of Family and Children Services where he said due process does not require in every instance an adversary proceeding. It simply requires a rational decision-making process. In this case what happens is a parent decides that a child is mentally ill for one reason or another. He decides it because of the child's outward behavior. He decides it because a physician tells him so. He brings the child to a hospital. I am simplifying the procedure. The record clearly discloses that almost uniformly children are taken from the parents to the community mental health centers and if they can be treated as outpatients, they are treated there and then only if that fails are they brought to the hospital. I am simplifying it just for explanation.

They bring the child to the hospital. The record

clearly discloses that at the hospital the child is examined by a team. They use a team approach, which may include a psychiatrist, a--

Q The parent does not necessarily come to the hospital armed already with a physician's decision?

MR. LACKEY: No, that is correct, sir; he does not.

Q He may come with the family physician but then that is subject to screening by the state authority.

MR. LACKEY: That is correct.

Q But the state will examine the child and take the child even though there is no other medical opinion but the state's?

MR. LACKEY: That is correct. That is correct.

Q Is it not true that in the average case the only qualified psychiatrist is the state psychiatrist?

MR. LACKEY: Yes, I would agree.

Q So, I mean, the ultimate decision as to the mentality of the child is made by the state doctor.

MR. LACKEY: That is correct.

Q I am not going to say that harms your case or not, but that is true.

MR. LACKEY: That is correct. I do not deny that.

The point I was making is that it is a team approach when they come to the hospital. You have got, as I said, psychiatrists, psychologists, social workers, mental health

therapists, who the record discloses contact schools, the community, the courts, the police, trying to get a picture. They talk to the child. They talk to his parents. And then they decide to admit him. And that is probably our biggest difficulty here. It just seems that that is clearly a rational decision-making process. The state has no stake in admitting the child. There is no proof that the child or the state gets anything if the child is admitted. The record is clear that we do not operate at capacity in our hospitals. The record is replete with evidence on that basis.

But even the child is mistakenly hospitalized, even if the child's parents have the wrong motives and bring that child to the hospitalized, even if the doctors just completely do the wrong thing and admit the child, the child still has access to the courts. And I think that that ought to be considered if it has not been considered yet.

Q By what processes do you mean, habeas corpus?

MR. LACKEY: No, sir. Of course they have habeas corpus, but that is not what they need to rely on. There is specific provision in Georgia Code, Chapter 88-5, the mental health code, that the children or that any patient can go to the probate court of the county and claim that the chapter is being abused, the code chapter.

Q How does a seven-year-old child set those proceedings in motion?

MR. LACKEY: Your Honor, I do not want to appear flip with my answer, but I would refer the Court to its decision in Bellotti v. Baird where the Court of course had an abortion decision where the Massachusetts statute said that parents could be required to consent to the abortion or the child could be required to get his parents' consent. But if the child could not get his parents' consent, he could then go to the courts and get an order. She could then go to the courts and get an order authorizing the abortion, and it would be appear that the ten or eleven or twelve year old child who is in this case would get to court the same way the ten, eleven or twelve, thirteen year old girl would get to court in Bellotti. The child need not rely expressly on that. There is also the provision in the Code that requires DHR to provide access to counsel if the patients need it. The record will disclose--and I do not think the appellees dispute--that we provided office space for these attorneys in our mental health facility and that it was our staff that referred these children to these lawyers. I think that the system in its totality demonstrates that children can get into court.

Q Let me take the reverse of Mr. Justice Marshall's hypothetical statement. Suppose the family physician and two private practitioners of psychiatry bring the child to the state and say, "We think the child should be committed," and the state psychiatrist makes the usual examination and says,

"No, I think this child just needs outpatient treatment, and I will not commit." That would be the end of the matter, would it not?

MR. LACKEY: That is correct, sir.

Q No one could force the state to take the child?

MR. LACKEY: That is correct, sir.

Q You do not have mandamus down there?

MR. LACKEY: Yes, but you cannot mandamus someone to perform a discretionary function, and that is what this would be. They could mandamus him to perhaps examine the child, but they could not mandamus to be admitted.

There is one issue that I do not want to get away from. I do not want to sit down without addressing it, and that is the substantive due process issue because that--I know I have spent a lot of time on the procedure question, but that is the nut of this case. That is why this case was brought in the first instance. And we think that the District Court's decision there was incorrect and has to be reversed.

What the District Court has said to us in this substantive due process question is that if a parent brings a child to a state mental hospital and our physician examines that child and he says, "This child is mentally ill. I can treat him in my hospital. I can give him some benefit. But if I had my choice, I would send him to a group home or a specialized foster home," then we cannot provide treatment for

that child if we do not have that specialized foster home or that group home. What the District Court has said is that if we are going to provide treatment for these children, we have to provide the treatment in the most appropriate treatment setting. And if we do not have it, we cannot provide the treatment.

The absurdity of this is that if an adult comes to our hospital, he has got schizophrenia, paranoiac type, even if he is not appropriate for hospitalization in this case--they have adult foster homes--even if he is not appropriate for hospitalization, he can go into that hospital because he is presumed to be able to assume the risk of going into the hospital. But under the District Court's decision, if a child comes to that hospital with that exact same condition, we cannot put that child in the hospital. His parents cannot waive his constitutional rights under the District Court's opinion. And that child will go without treatment until that child either degenerates to the point where hospitalization is appropriate or until the parent is able to find some private care for him. And it just does not seem to be a logical result to us. And it is certainly one that should not be allowed in this case. It is a result that should be avoided.

I know in our reply brief I accused the--I think that is perhaps the wrong word--but I mentioned a parade of horribles, and I do not want the Court to think that that is what I am

doing here. Any fair reading of that District Court's decision, particularly when coupled with the order denying the stay, makes it absolutely clear that the District Court said, "I find that every moment of inappropriate hospitalization of a child denies that child a substantive due process interest. Every moment of inappropriate hospitalization." And he found that it was inappropriate when we could think of some other treatment setting that was more appropriate.

Q Do you think under the under--I think you were asked this earlier--the state may completely release the 46 children?

MR. LACKEY: Yes, sir, there is no question in my mind that we can do that.

Q The state has not been ordered to provide them with the more appropriate setting?

MR. LACKEY: No, sir, but we do have a slight problem. Some of the 46 children that were at issue here are already in our custody. That is why this issue is ripe. I noticed that several amici suggested that it is not, but they obviously were not aware of this thing, that we do have custody of--

Q With respect to them, the state has been ordered to provide a different treatment center.

MR. LACKEY: Yes, the most appropriate treatment center, sir. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Cromartie.

ORAL ARGUMENT OF JOHN L. CROMARTIE, JR., ESQ.,

ON BEHALF OF THE APPELLEES

MR. CROMARTIE: Mr. Chief Justice, may it please the Court:

The issues in this case are very narrow although difficult. I would like in my argument to deal first with the procedural due process issue and then deal with the substantive process issue, if the Court will permit.

Q Very specifically would you explain, at least to my benefit, why the presentation of the child by the parents to the state psychiatrist and the processes that then occur is not sufficient due process.

MR. CROMARTIE: Your Honor, we feel that the process of examination by the superintendent is inadequate as a due process substitute, for several reasons.

Q The claim is not that it is a due process substitute but that it is adequate under what is required by the Constitution, that it is due process.

MR. CROMARTIE: Yes, Your Honor.

Q That it is all the process which is due.

MR. CROMARTIE: Yes, Your Honor, I stand corrected on that. We feel that for several reasons though it is inadequate.

First of all, it is not really a hearing at all. It

is not processed. There is no notice to the child of what will happen during this interview. There is no requirement of looking at other resources in the test under the Georgia law. Virtually all of the information comes from the parents. And later in my argument I will develop the conflicts of interest inherent between the parent and the child. That information is unverified and frequently inadequate that comes through that process. In essence, there is no structure whatsoever.

Secondly--

Q Are you suggesting that there is inherently and universally a conflict of interest between parent and child in this setting?

MR. CROMARTIE: We feel that there is a substantial chance of conflicts of interest between parent and child inherently, yes, Your Honor. And I can get into that argument now and jump from the superintendent's argument.

Q Do it in your own order.

MR. CROMARTIE: The superintendent's decision though is inadequate for a number of other reasons. The state has contended that the informality is adequate because of a comprehensive screening process that happens prior to coming to the hospital. The state's own witnesses establish that that screening process is inadequate. Dr. Filley testified that it is not mandatory, that that screening process can be and is sometimes ignored. Dr. Filley testified that the development

of community screening resources are lagging far behind those of adults. And finally you have the facts involving J. L. and J. R. Both of them were screened by a community screening process. And yet--and the recommendations of their therapist was that they should not be hospitalized--and yet that recommendation was not even considered by the admitting physician. I think that those facts go to show how inadequate that community screening process is.

Next, we are relying on the fact of the uncertainty of diagnosis that this Court has noted before in terms of psychiatrists, the tentativeness of professional judgment. We had expert witnesses who testified to the institutional biases that are reflected through the decision of institutional psychiatrists. And finally the District Court went to these facilities, looked at the admissions process, and they found that the admission process as set up does not provide due process protection. So, for all of those reasons we do not feel the superintendent's decision is sufficient.

Q When you say the District Court went to the hospital and looked at the procedures, did one or more of the judges sit in on, say, an interview between a psychiatrist and the family?

MR. CROMARTIE: I do not know of any interviews that they sat in on. All three judges--Judge Bell and Judge Bootle and Judge Owens--visited two of the facilities, one at the

choice of the defendant and one at the choice of the plaintiff. And they state in their decision that during those days that they were visiting the facilities that they talked with state employees and talked with patients and, during that process, talked about the admissions procedures, about the treatment in there, all of these issues. But I do not think there is anything in the record to indicate that they actually sat in on the interviews themselves.

Q Did either of the parties have an opportunity to cross-examine the judges about their observations? Was there any adversary process attending the judges' view?

MR. CROMARTIE: No, Your Honor, other than the exchanges that occurred during the hearings--there were several hearings that took place, but there was no right to cross-examine the judge, and I know of no such right.

Q What would your idea be of an adequate hearing? Starting off, do you need a judge?

MR. CROMARTIE: Your Honor, we do not feel that the Court needs to reach that issue. But if the Court decides to reach the issue we think that at least some sort of deliberation, some impartial hearing examiner, whether they be a judge or whether they be other professional, might well suffice. We focus in on--

Q The state psychiatrist?

MR. CROMARTIE: It perhaps could even be a state

psychiatrist.

Q Do you not have that at times?

MR. CROMARTIE: Your Honor, you have a state psychiatrist in the same institution. And Dr. Messinger testified very clearly that there are institutional biases at work there.

Q What is the bias, that they want more people?

MR. CROMARTIE: Your Honor, the testimony from Dr. Messinger was that frequently psychiatrists in an institution tend to overinstitutionalize. They tend to--

Q Did he also testify that it is hardly possible to get two psychiatrists to agree on anything?

MR. CROMARTIE: That is a part of the liability of the whole process, the danger--I would much prefer that the hearing be held in front of a judge or at least some other substitute such as that.

Q All of these defects and doubts that you are now talking about are equally applicable, I suppose, when the question is whether an adult shall be received into one of these hospitals, is it not?

MR. CROMARTIE: Yes, Your Honor.

Q I mean, the same uncertainty about the science of psychiatry and the same biases--

MR. CROMARTIE: Yes, Your Honor.

Q --institutional biases on the part of

psychiatrists and so on. And there is no claim when an adult presents himself, after having consulted with a doctor, that anything is required beyond what is presently accorded, is there?

MR. CROMARTIE: You are speaking of a voluntary admission?

Q Yes, I am speaking of a voluntary admission. So, this case really boils down, parses down, does it not, to the claim that the understanding of the law that has existed for centuries that a parent makes decisions for his minor child is invalid?

MR. CROMARTIE: Your Honor, we do not feel that parents have been able to institutionalize their children in state mental institutions for centuries.

Q Has that not been the presumption of the law forever, the Anglo-Saxon law, that--now, there are matters of definition. What is a child? I suppose the law has never said that a person 35 years old is still a child. But setting aside those problems of definition, has not the law always been that a parent makes decisions for his or her minor child, where that child is going to be educated, how that child is going to be punished, when and if the child is going to go to the hospital, what time the child is going to go to bed, what time he is going to get up, what time he is going to have breakfast, lunch, and dinner?

MR. CROMARTIE: Yes, Your Honor.

Q Has that not always been the implicit recognition of the law in our society?

MR. CROMARTIE: The explicit recognition, I would think.

Q Both.

MR. CROMARTIE: The traditional way that we protect children is through the parent. And we are asking the Court here under these very narrow circumstances--that is, institutionalization in a mental hospital--that the traditional way we protect children is not valid here. And we think that the evidence in this case clearly leads to that sort of conclusion. If I may review--

Q So, the gist here is that your attack is on that basic presumption in this context, is it not?

MR. CROMARTIE: I think it has to be.

Q Because it is no attack at all on the procedures in so far as they are applicable to adults.

MR. CROMARTIE: No, Your Honor, it is not. Of course the difference between those two I think is in the case of an adult of course it is truly voluntary.

Q This is voluntary if you presume that a parent can speak for his child.

MR. CROMARTIE: Yes, Your Honor.

Q This is purely voluntary also.

MR. CROMARTIE: Part of our argument is that the traditional protections though for the child are not here under these instances. And let me review for you--

Q Before you get to that review, tell me, if you would--or if you prefer to do it after the review--how you distinguish the hospitalization at a mental facility from hospitalization for the tonsillectomy or for appendectomy and that sort of thing.

MR. CROMARTIE: There are a number of reasons that it is different. One, the stigma of institutionalization in a mental institution far transcends any stigma that might be attached to the regular hospital. And, secondly, the very essence of treatment in a mental institution is confinement. That is the purpose of putting somebody in a maximum security mental hospital, is to confine them, to deprive their liberty.

Q Certainly while you are recovering from a serious operation you are confined in a hospital in the same way you are confined in a mental institution.

MR. CROMARTIE: That is incidental to the treatment. And historically we have treated the two very differently.

Q Is not confinement in a mental hospital incidental too in the very function of the treatment?

MR. CROMARTIE: I think not. I think that the reason you would be in a state mental institution rather than some alternative facility, less restrictive facility, would be for

the confinement itself, and there is testimony from Dr. Hodges and others that that is what you are talking about in the mental facility itself. I am not talking about the community facilities or that sort of thing. But historically the law has treated the two differently.

Sam Brakel in his book for the American Bar Association has pointed that historically our law has required very strict requirements in terms of placing people in state mental institutions.

Q Is this true for so-called voluntary commitment because that is what we are dealing with here?

MR. CROMARTIE: Voluntary commitment is a relatively new phenomenon.

Q Has the law set up all sorts of processes in connection with voluntary commitment?

MR. CROMARTIE: Not for adults.

Q No. So, your attack is on the basic proposition that has been accepted that a parent makes decisions for his child?

MR. CROMARTIE: Yes, Your Honor.

Q Do you say that the parent cannot make the decision here?

MR. CROMARTIE: Yes, Your Honor.

Q Who can?

MR. CROMARTIE: We think that a hearing examiner or

whoever the state decides should make the decision right now under the--

Q The state has decided.

MR. CROMARTIE: There are different ways. Like we--

Q You are not satisfied with the person the state has picked? The state has already picked somebody.

MR. CROMARTIE: We do not think that it is adequate. I mean, our two named plaintiffs are perfect examples of why it is not adequate too. Both of them were recommended by their primary therapist not to go in an institution, and yet this process provided them with absolutely no protections. And if I might get to--

Q They did have protections. They could have gone to a lawyer.

MR. CROMARTIE: He finally did after five years in a mental institution, yes, sir.

Q I did not want to put that extra icing on it. But he did get a lawyer.

MR. CROMARTIE: Fundamentally we do not think that a young child, six or seven years old, could be expected--

Q Who should speak for that child that is six and seven years old?

MR. CROMARTIE: If there were a hearing, there can be a lawyer appointed, there can be a guardian ad litem appointed. There would be somebody.

Q How would that be brought about?

MR. CROMARTIE: Through a process of automatically giving hearings.

Q So, the state appoints somebody to be the guardian. You could not go behind that, could you?

MR. CROMARTIE: No, Your Honor, unless the guardian--

Q The state here said that this committee at the institution shall determine it.

MR. CROMARTIE: Yes, Your Honor.

Q Now you tell me that that is wrong. I want to know why. Why is not that group as expert as the parent on the question of insanity and mental illness.

MR. CROMARTIE: The Court found that the process in and of itself was inadequate because of the institutional biases, because of the tentativeness of judgment, those reasons; the Court found that it was inadequate.

Q And they are going to turn the children loose?

MR. CROMARTIE: That is not the only alternative here. There are other alternatives. The question is whether they are in need of treatment in a maximum security mental hospital. No question there are other places that the children could be placed. There are other alternatives.

Q But your whole argument from the outset makes parents as such a suspect class by saying--your statement that there is an inherent conflict between the interests of the

child and the interests of the parent and that that must be flushed out in some proceeding.

MR. CROMARTIE: Yes, Your Honor. If I might address that for a minute. My evidence in this case shows that all of these situations involve stressful home situations, emotionally charged home situations. That was the testimony of all of the experts. Parents cannot under those circumstances be expected to be totally objective about the process.

Secondly, every expert in this case, including all of the superintendents of the hospitals, testified that the pathology of a child is inextricably related to the pathology of the parents? That is, the parents themselves are a part of the problem that is going on here in the vast majority of cases.

Q The state, your colleague, your friend on the other side does not contend that the state can just take the parents' word and put the child in the hospital.

MR. CROMARTIE: There is that further step, Your Honor.

Q There is always going to be medical advice. I think your problem is to convince us that the medical advice or the procedures at the hospital are not adequate because none of those people take the word of the parent and just say, "Do you want your child treated? We will treat him."

MR. CROMARTIE: Your Honor, we feel that the record

is replete with instances of where that stage is inadequate. For instance, a psychiatrist does not necessarily even see the child before the child is placed in the institution. Dr. Gates testified that sometimes no psychiatrist even sees the child until later, until the decision is already made to commit the child. They rely so heavily on this elaborate community screening to provide them with adequate information. They themselves admit that the procedure at the hospital itself is very, very informal and I think subject to error. What they claim though to substitute for that is this elaborate community screening process outside the hospital. And yet Dr. Filley, who is head of the thing, testified that that component is lagging way, way behind. It is not always followed. In fact, frequently it is not followed.

Q What you have really said here is that the parents are suspect, the institutional psychiatrists are suspect. Would it satisfy your notions of due process if the Court had designated in each community a panel of ten psychiatrists or as many as were available and that the institutional psychiatrists, plus one of the outside psychiatrists picked at random would make the decision? Would that take care of due process? You can respond to that after you have had a chance to think about it during lunch hour.

[A luncheon recess was taken at 12:00 o'clock noon.]

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AFTERNOON SESSION - 1:00 o'clock

MR. CHIEF JUSTICE BURGER: Mr. Cromartie, you may resume. I think we have a question pending.

MR. CROMARTIE: Yes, Your Honor. May it please the Court:

Prior to the break, the Chief Justice had asked me the question as to whether it would be different if there were a panel of 12 psychiatrists and one of those 12 participated in the decision-making process; would that satisfy our need for a hearing?--if I understood the question correctly.

Q It was only ten.

MR. CROMARTIE: Only ten, all right. I do not think that the two would be material anyway.

My response to that would be no, not as long as the process were set up the same as it is right now. Our basic position is that the process right now does not protect the child's interests in terms of sifting the facts, sifting through the facts; there is no opportunity for the child to cross-examine what has allegedly been his conduct. There are no statewide standards of procedure where the child knows what the rules of the game are.

Q You are assuming of course two things there. The child is concerned with what you call the rules of the game and, second, that rules in the sense that implies an adversary type proceeding may be the worst thing in the world for a child

in these circumstances.

MR. CROMARTIE: Yes, Your Honor, because we do not feel that the Court has to reach the issue of the rules because all the Court said was, "Your procedure has no protections in it whatsoever, and look to other state laws that do provide some protection for children and do involve commitment of children to mental institutions," and said use those in the interim. If the legislature wants to come in and set up other provisions, then they are free to do that under the Court's decision. But the Court pointed to the Juvenile Court Code, which does allow the child to have a hearing and yet takes care of the very trauma issues that you raise--that is, it has provisions in there to help deal with any alleged trauma that might take place.

There is a provision there for excusing the child from the hearing at certain times. There is a provision for appointment of a guardian ad litem to make sure that the child's interests are adequately protected.

The Court did not specify what additional protections would be needed. It simply said the Georgia procedure, as it presently exists, is not enough. There needs to be more.

Q It certainly implied that the Juvenile Court procedures were adequate, did it not?

MR. CROMARTIE: That they were available and that they did provide some type of hearing, yes.

In fact, one-third of the children in Georgia--

Q Are committed through those procedures.

MR. CROMARTIE: Yes, Your Honor.

Q Then there is another procedure, the Ordinary Court?

MR. CROMARTIE: Yes, Your Honor. That is how adults are normally institutionalized.

Q What is that called, the Ordinary Court?

MR. CROMARTIE: Court of Ordinary.

Q Court of Ordinary?

MR. CROMARTIE: Yes, Your Honor.

Q What is that, like a probate court?

MR. CROMARTIE: It is a probate court, yes, sir.

And children could be committed through that. In fact, they are frequently.

Q Your objection to a panel of psychiatrists, 10 or 12, I suppose would be that they had this pro-institutional bias and that they would not be neutral hearing officers; is that it?

MR. CROMARTIE: If they were non-institutional psychiatrists--

Q Outside--outside psychiatrists.

MR. CROMARTIE: I think that it might well comport with due process as long as there were some procedures, some opportunity for the child or the child's representative--

Q I thought your point was that there ought to be a procedure for cross-examining the experts, the psychiatrists.

MR. CROMARTIE: Cross-examining whatever data is brought before those psychiatrists. Right now the child is institutionalized because of data that comes from the community that says the child did such and so. His demeanor has been such and such in school. And there is no chance for the child to confront that and to say, "No, that is not the way it was."

Q You mean a four-year-old child?

MR. CROMARTIE: Or a representative for that child.

Q How can a representative say what the child did or did not do?

MR. CROMARTIE: The representative can investigate and cross-examine the people and see whether that is--it is done every day. And we feel strongly that in terms of the age of the children, that a four or a five or a six year old, that there has to be protection there too. It is dramatically illustrated by the two children that are named plaintiffs.

Q If the two children that are named plaintiffs are wrongfully there, there are two other ways that you could have gotten them out in Georgia--

MR. CROMARTIE: Yes, Your Honor.

Q --in very short order.

MR. CROMARTIE: Habeas corpus would--

Q But you did not do it.

MR. CROMARTIE: No, Your Honor, we did not. We feel that preventing inappropriate hospitalization would not be accomplished by a case-by-case habeas approach. The children are not going to know about those remedies. They are not going to have the wherewithal to use those remedies. A lot of the balancing that I am talking about right here under the Mathews-Eldridge test requires that you look at all elements, and I really have not talked about the magnitude of the child's interests. What we are talking about here are two children that were hospitalized for five and a half years in an institution, and now their own psychiatrists are saying they do not even need to be there. Their outpatient therapist said they did not need to be there in the first place. That is a rather enormous interest that we are talking about right here.

Q Maybe--I say maybe--while they do not need to be there, conceiveably that might be the best place for them among the various options now available in Georgia, including their own family or some other hospital or some other institution or possibly a foster family, but maybe it would be impossible to find a foster family.

MR. CROMARTIE: It is ironic to me that I was furnished a list this morning--there were 46 kids that the state has consistently said, "There is nothing we can do with

these children. There is no alternative for them." And yet all but two of them are out of the institution now, and they have not built any new facilities. There are other alternatives available, and I think that this due process hearing that we are talking about--whatever the particular form might be--would center in on that one thing, it would be well worth the effort. That is, in the community to look at what other alternatives are available and to look at that in the community and to see if there are other alternatives available.

Q How does Georgia define a child, what age? What age are we talding about, up to what age?

MR. CROMARTIE: We are talking about through age 17.

Q Through age 17. Is that the statutory definition?

MR. CROMARTIE: Yes, Your Honor.

Q In Georgia, up to the 18th birthday?

MR. CROMARTIE: Yes, Your Honor.

Q And from then on, over 18 it is an adult for this purpose under Georgia law?

MR. CROMARTIE: Yes, Your Honor.

Q What you are postulating here is some sort of at least quasi-adversary proceeding which, as I hear your argument, would be a four-sided sort of procedure--the parents, the child, the experts, the doctors, the medical experts, the clinical psychologists, and the guardian ad litem. And you

suggest that putting a child through that four-sided kind of adversary procedure is not going to have an irreversible traumatic effect on the child?

MR. CROMARTIE: Your Honor, I cannot imagine any more trauma on a child than what J. L. and J. R. have gone through for the past five years, to be dumped--and literally dumped--

Q That is an overstatement, is it not?

MR. CROMARTIE: Your Honor, the testimony of Dr. Messinger is that he had never seen a more classic, more clearcut example of parents dumping a child than the case of J. L. But getting to your question, there is an amicus curiae brief before the Court right now. The New Jersey Supreme Court has mandated just such a procedure there, and their experience has been that in fact these hearings have been therapeutic in terms of the parent-child relationship. It is no mystery to children that there are conflicts within the family. I mean, children's judgment may not be totally intact, but children's--and I know from asking several of them--that children's perceptions are very good. I mean, even a five year old has very good perception. They can pick up conflict. They know there is conflict with their parents. They know there is conflict there. The hearing can actually be therapeutic if done say the way we do it in our juvenile court right now. Now, I cannot say how juvenile courts work around

the country, but I know in Georgia our juvenile court works and it works well. I mean, I think we have kept the best of both, and I have had a lot of practice in juvenile courts. We have managed to keep it informal enough to where nobody is traumatized by the process. And yet it is formal enough to adequately protect the rights of the people. Your Honor, I think it can be done.

Q Mr. Cromartie, may I ask you whether you expect to reach what has been called the substantive due process issue?

MR. CROMARTIE: I will now, Your Honor.

Q You do not have very much time left.

MR. CROMARTIE: I will now. We do not feel that the state has categorized the issue correctly. At page 135 of the Court's opinion, it made very clear that what it was finding here was that by the state's own admission that there were 46 children who did not need to be in hospital; and, secondly, that they were being harmed by a continued stay in that hospital. And what the Court did, it took the Jackson v. Indiana test and said that if you are going to hold children, there has got to be some relationship between the holding and what you are trying to do for them.

I think that the Court's holding is very, very limited, much more limited than what the state would categorize it as. It is a very limited holding.

Q You do not read the decree then--particularly the italicized portion on page 54A--as requiring the state to spend money, if necessary, to build these facilities as something that must be complied with even though the state would prefer to simply turn the children loose from any confinement?

MR. CROMARTIE: It was a ruling that applied to 46 named specific children.

Q With respect to them, how do you construe the ruling?

MR. CROMARTIE: That they were to do what was necessary to relieve the unconstitutional condition that existed.

Q Could they relieve it by simply releasing them from custody?

MR. CROMARTIE: I think they probably could.

Q Is that the way you read the decree?

MR. CROMARTIE: That is the way the state has.

Q Is that the way you read it?

MR. CROMARTIE: Yes, Your Honor.

Q Mr. Cromartie, what is the source of the Court's power to order the State of Georgia to spend money for this project?

MR. CROMARTIE: I think the Court was convinced in its own mind that the State of Georgia did not have to spend

anything, that it would actually be cheaper to have these children in less expensive resources.

Q But they did command them to spend money, did they not?

MR. CROMARTIE: No, Your Honor, they said if that was what was necessary, spend money. The Court had told them several times, "We do not think that you have to spend any money. We think it is cheaper to have these children in less restrictive, less confining environments.

Q Mr. Cromartie, I might just ask one question about what is going to happen next after this case leaves this Court. One of the briefs filed by one of the associations suggests that there should be an exemption for intact families, pre-adolescent children and for commitments for short periods of time, at least when all those conditions are met. Could that be done consistently with the manner in which the case was disposed of below, or does that require--how much flexibility is there in what goes on next? I guess that is what I am really asking.

MR. CROMARTIE: There is a good bit of flexibility in what the Court did because it really did not say, "This is what is required, X, Y, and Z," because the APA brief agreed that the Georgia procedures were invalid. What they said was with an intact family, for a short period of time, for an accredited institution, for a pre-adolescent child, the balancing

may be different there. Included the District Court--

Q But under the holding of the District Court, is the procedure invalid even as applied to that narrow category? I suppose it is, is it not?

MR. CROMARTIE: Yes, Your Honor, it is.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[The case was submitted at 1:15 o'clock p.m.]

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