ORIGINAL

LIBRARY
SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

JAMES PARHAM, INDIVIDUALLY AND AS COMMISSIONER OF DEPARTMENT OF HUMAN RESOURCES, ET AL.,

APPELLANTS,

V.

J. L. AND J. R., MINORS, ETC.,

APPELLEES.

No. 75-1690

Washington, D. C.
October 10, 1978

Pages 1 thru 57

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

JAMES PARHAM, INDIVIDUALLY AND AS COMMISSIONER OF DEPARTMENT OF HUMAN RESOURCES, ET AL.,	:	
Appellants,	:	
v.	:	No. 75-1690
J. L. AND J. R., MINORS, ETC.,	:	
Appellees.	:	

Washington, D. C.
Tuesday, October 10, 1978

The above-entitled matter came on for argument at 10:02 o'clock, a.m.

BEFORE:

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

APPEARANCES:

R. DOUGLAS LACKEY, ESQ., Assistant Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, on behalf of the Appellants.

JOHN L. CROMARTIE, JR., ESQ., Suite 909, 15 Peachtree Street, N.E., Atlanta, Georgia 30303, on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 1690, Parham against several minors.

Mr. Lackey, you may proceed whenever you are ready.

ORAL ARGUMENT OF R. DOUGLAS LACKEY, ESQ.,

ON BEHALF OF THE APPELLANTS

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

The cause of this case is here for reargument, and I realize that the Court is familiar with this case. With the Court's permission, I would like to begin by simply setting the issues before the Court and proceeding directly to my argument.

At issue in this litigation, of course, is the constitutionality of the Georgia statute which recognizes the rights of parents of mentally ill children to make application for those children to state mental health facilities.

The statute was attacked on essentially two grounds. The Appellees argued that children have a constitutionally protected liberty interest and that this statute which authorizes their hospitalization without prior notice and hearing deprives them of that liberty interest without due process of law.

Second, the Appellees argued and the district court found that children who are mentally ill and who receive treatment from the state have a constitutional right to receive treatment for their mental illness in only that treatment setting which is most appropriate to their condition.

Turning to the first issue, the foremost and threshold question which should have been addressed in the district court and wasn't, was an examination of the interests sought to be protected to see whether in fact it has a constitutional dimension. That is, do children have a constitutional right to challenge the medically indicated decisions of their parents?

What the district court did was simply look and see that parents make decisions for their children and as a result of this decision-making process that oftimes the child is subjected to potentially grievous injury, here hospitalization, as the district court characterized it. And what he said was -- what the district court said was, that because of the injury here this parental decision-making process can only be done in a constitutionally permissible fashion.

We submit that this is the point where the district court made the error upon which its entire opinion is predicated. It is our position that a proper analysis of this case

should have begun with the parent-guardian and child relationship. It is our position that based on this Court's previous decisions, as well as the history of our Western civilization, that we have decided -- and by "we" I mean society and not the state -- that we have decided that there are certain decisions that children cannot make for themselves, that there are certain decisions that an adult has to make for a child. And among these decisions are medically indicated decisions, with very few exceptions. That is, it is our position that in our society parents, with the advice of a physician, routinely make decisions which range from whether a child is to have a tonsillectomy to decisions which have life and death consequences for the child.

One example, which I like to use, is the situation where the parent is faced with the child who has a heart defect, a young child, and a doctor says, "Of course, the child can live without an operation. The child will be an invalid for his or her entire life. I can operate. If the operation is successful the child will lead a normal life. If the operation is not successful the child will die."

That kind of decision, that kind of decision-making process occurs in the family routinely, yet no one, has ever suggested that that kind of a decision, which clearly could have the consequences which are much more adverse than what we have here -- no one has ever suggested successfully

except in a few recent district court decisions, that that kind of a decision-making process is required to be subjected to an adversarial proceeding, such as what was mandated here by this district court decision.

QUESTION: I want to be sure I understand you, Mr. Lackey. Are you suggesting that the Constitution of the United States would prohibit the intervention by the state in that sort of situation?

MR. LACKEY: I believe, sir, that it would prohibit it to the extent that the state did not have a compelling state interest to interfere --

QUESTION: The Constitution would absolutely prohibit the intervention by the state in that sort of a situation?

MR. LACKEY: Yes, sir, after the showing of a --

QUESTION: Or are you suggesting that it is constitutionally permissible for a state to leave that decision to the parent? Those are two quite different propositions, aren't they? Which are you suggesting?

MR. LACKEY: It would be our position that it would not be constitutionally permissible for the state to interfere with the family in that situation, absent the demonstration of a compelling state --

QUESTION: You don't need to go nearly that far in arguing this case, do you?

QUESTION: You need stand on only the second leg, don't you?

MR. LACKEY: I certainly could. I believe I could. Perhaps I don't understand your question.

QUESTION: I think it is rather important, because those are two quite different propositions. First, the claim, based upon cases like Meyer v. Nebraska and Pierce v. Society of Sisters and, to an extent, Yoder, that a state would be constitutionally prohibited from intervening in the parent-child relationship. That's one proposition.

MR. LACKEY: Yes, sir, I understand.

QUESTION: Another is that a state may constitutionally leave such a decision up to the parent, but need not constitutionally do so.

MR. LACKEY: I see that the second point would be easier and --

QUESTION: Well, that's all you need in this case, isn't it?

MR. LACKEY: Yes, sir, that would resolve this case from that standpoint.

QUESTION: If you rely on the first point, I suppose it would be unconstitutional for a state to say an operation has to be performed by a doctor. Parents could use self-help on a heart operation. You don't really maintain that.

MR. LACKEY: No, sir, I wouldn't maintain that.

My difficulty here is that it was our original position that the issue was not constitutionally based, that we were tieing everything here to a parent acting on medical advice, and stating that that was something which had been reserved with the family and with which we could not constitutionally interfere. But I certainly agree that it is not necessary to get to that.

QUESTION: Your position here is that the Constitution of the United States doesn't require any more than what Georgia has provided.

MR. LACKEY: That's absolutely correct, sir. Either for the reason that the child does not have a liberty interest or if the child does have a liberty interest in this particular situation, because of the process which we provide him, meets all the basic requirements that the Constitution would mandate.

QUESTION: Of course, the whole procedure has as its end result the confinement of the child. Do you suggest that doesn't involve a liberty interest?

MR. LACKEY: No, sir. It is our position that the confinement is secondary and a necessary incident --

QUESTION: That wasn't my question.

MR. LACKEY: I am sorry, sir.

QUESTION: My question is: Are you suggesting that the child does not have a liberty interest at stake?

MR. LACKEY: Yes, sir, my first position is that in

this case, where the parent makes the decision and there is confinement as a necessary result of that decision, that the child does not have a liberty interest. It is our position that constitutional rights arise out of relationships and the relationship that is here is between parent and child, not between the child and the state.

QUESTION: But it is the child who is locked up, not the parent.

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

QUESTION: You are not, surely, -- or are you -- suggesting in answer to my brother, Brennan's question, that there is not a deprivation of liberty?

MR. LACKEY: Not in the constitutional sense. Certainly the child is restrained in the hospital.

QUESTION: Are you saying that it is the same kind of deprivation involved -- different in degree only -- as having an appendix operation, heart bypass or confinement for smallpox?

MR. LACKEY: Yes, sir, that was my whole point, exactly, in response to Mr. Justice Brennan. I evidently wasn't answering his question. The confinement in the hospital is just a necessary incident, incidental to the treatment itself.

QUESTION: Mr. Lackey, if I understand you correctly, it would be constitutional for a state to say to

a parent, "If you want to keep your child in the basement for the next three years because you think it would be healthy to keep him out of the sunlight," or something like that, that would be perfectly constitutional. We just have to rely on the wisdom of the legislature not to pass such statutes, but you say if they did there would be no constitutional objection to it.

That's a rather difficult position to maintain.

MR. LACKEY: It is a difficult position to maintain. I don't believe I could maintain it.

QUESTION: You would have a problem there as to whether or not it was the state that was depriving the child of liberty or a private person, the parent.

MR. LACKEY: Yes, sir.

QUESTION: Isn't your basic problem of equating putting a person in a mental institution indefinitely with going in the hospital overnight for a tonsillectomy? They are two different animals.

MR. LACKEY: They are certainly different in terms of duration.

QUESTION: And everything else. I mean if you want to walk out from the tonsillectomy, you can walk out.

MR. LACKEY: From a tonsillectomy you, of course, could, sir, the next day, but from open-heart surgery, for instance, you couldn't.

QUESTION: I didn't say open-heart surgery. I said you would equate it with a tonsillectomy or ingrown toenail. I mean this is liberty. When you lock somebody up and turn the key, that's liberty. That's a basic denial of liberty in any sense of the word, when you turn the key. And in all the other hospital cases you mentioned, you don't turn a key on a person.

MR. LACKEY: I believe, sir, that children who go to other types of hospitals for other kinds of surgery are just as restrained as the children in these cases who go to mental hospitals, perhaps the duration is different.

QUESTION: That's what you think.

MR. LACKEY: Yes, sir.

The resolution of the liberty question, of course, is not in the case, except, of course, if you find a liberty interest.

Before we get to the question of what processes do, we have the Court's question of whether this case implicates or has that quantum of state action necessary to implicate the Fourteenth Amendment.

Our position on this is simply that due process is an amorphous concept and perhaps the best thing that can be said about it is that it requires a case by case examination. It is our position that in this case what we have is, we have private parties, here parents, availing themselves of a

resource from the state which is substantially identical to a resource which could be provided and could be obtained in the private sector, and that is -- perhaps we can best state it by saying -- illogical to have a decision where the result is simply to create two classes of parents. One class of parents who, by reason of their wealth and their assets and the finances that they have, can go to a private facility and can avoid all the process which has been mandated by the district court. And another class of parents who because of their poverty or their inability to pay and who are therefore forced to rely upon the state for treatment for their children, that these parents have to go through an adversarial proceeding, such as that mandated by the district court, in order to simply obtain mental health treatment for their child.

Of course, this has another aspect, too. The essence of state action here, if you find it, is that the hospital is a state facility and that the physician, who is the psychiatrist in this case, but the physician who is authorizing the admission is a state employee. If that is sufficient to create state action, then this means that in all of our public hospitals in the State of Georgia, as elsewhere, that the admission of any child to a state hospital for any reason is state action. And the question will thereafter always be whether the risk of deprivation that flows from that is sufficient to warrant some sort of hearing.

And, of course, numerous medical treatments, as I've indicated previously, have potential consequences which are certainly as grievous as these.

We simply state to the Court that we believe that it is a matter of logic, when we simply offer a choice, that that is not a sufficient amount of state action to invoke the Fourteenth Amendment.

QUESTION: Mr. Lackey, it doesn't necessarily follow, does it, that if the Fourteenth Amendment applies even to the heart operation, that there must be a hearing? It may mean that there must be due process, but would it not be at least logical to say that the doctor and the parent provide adequate process in that situation, but that there are perhaps at least arguments why a different process might apply where there is a possible conflict of interest between the child and his parent. You don't always have to have a hearing if you just find the Fourteenth Amendment applies.

MR. LACKEY: No, sir, and if I said that, I should not. You would in those instances have to provide whatever minimum amount of due process this court or other courts would deem necessary.

Which brings me, really, to the due process question which is raised when you find that there is a liberty interest and when you find there is state action. The analysis which we have used is the analysis set forth by this Court in

Matthews v. Eldridge which, of course, is a three-step process, requiring an examination of the interests of the parties; as a second step, an evaluation of the risk of error under the present procedures, as well as an evaluation of the benefit of additional procedures, and, thirdly, an examination of the burdens imposed on the state by these additional procedures.

I've already spoken about the first issue, the interests involved, and I'd like to turn to the second issue.

In order to understand the resolution of this, I believe that I have to explain to the Court how we perceive that the system works in Georgia now and how it does work and did at the time of this litigation; for we believe, as the Fifth Circuit said in Drummond v. Fulton Co. Dept. of Family and Children Services, due process only requires a rational decision-making process.

In Georgia, under our statutes, the parent first makes the decision that the child is mentally ill, either because they have had the advice of a physician or because they notice some aberrant behavior on the part of the child or, I suppose, for a number of other reasons. Normally, although admittedly not always, the parent takes the child then to the community mental health center, where the child is examined and if found to be mentally ill, where the child is treated if that is possible.

QUESTION: What triggers the examination, the original examination by the physician?

MR. LACKEY: The parent taking the child to the mental health center.

QUESTION: So, it is the parent who triggers it.

MR. LACKEY: It is all parent or guardian initiated.

QUESTION: Parent or somebody in loco parentis.

MR. LACKEY: Yes, sir.

QUESTION: Sometimes it might be the family physician who is involved.

MR. LACKEY: That's correct, sir.

QUESTION: Is it the parent's decision?

MR. LACKEY: It is the parent's decision to take the child in the first instance. And the only place that the state would become involved, other than where the state is a guardian, is where it was brought to the attention of our juvenile court system that the child was mentally ill and not receiving proper treatment, in which case it could be taken to juvenile court, the state could take it in.

QUESTION: What would initiate those juvenile court proceedings?

MR. LACKEY: A petition in the juvenile court which can be filed under our law by any person alleging that the child has been deprived.

QUESTION: A neighbor, or --

MR. LACKEY: A neighbor or a welfare worker, if you will, someone from the local mental health agency could do it. Under Georgia law any person could file that petition in juvenile court.

QUESTION: Mr. Lackey, I don't want to be capias at all, but "mentally ill," can a layman determine that? Isn't there another phrase you want to say, "appears to be," or something?

MR. LACKEY: Yes, sir. The way I prefaced it was if the parent believes the child is mentally ill because a doctor has told him so, a physician has told him so, or because he notices some aberrant behavior on the part of the child. I thought I said that. If I didn't, I should have. But, in any event, the child is treated, at the first level, is treated in the community if that is possible in most circumstances. And then, only then, if that fails, is the child taken to the mental health center, to the hospital, if you will, and there the child --

QUESTION: Treated in the community by whom?

MR. LACKEY: The State of Georgia has approximately 50 community mental health centers where children can be treated as out-patients. To demonstrate the scope of this, in 1974, fiscal year 1975 --

QUESTION: May I take one of your hypotheticals. A parent observes what parent regards as aberrant behavior

on the part of the child, and takes him now, I gather, to a local community health center; is that it?

MR. LACKEY: Yes, sir, usually, but I want to caveat that by saying not always. I wouldn't want to mislead the Court on that. Usually the parent takes the child to the community mental health hospital.

QUESTION: Now, who are the professionals on duty there?

MR. LACKEY: Those are state paid, generally, mental health professionals.

QUESTION: Not doctors?

MR. LACKEY: Yes, sir, they have -- it is my understanding. I,quite frankly, don't believe the makeup of that team is in the record -- but it is my understanding that they have a full range of mental health services that they provide in the community.

QUESTION: And whoever it is, one or more is it? One or more professionals?

MR. LACKEY: Generally, sir, is what the record indicates.

QUESTION: And one or more professionals make a diagnosis, is that it?

MR. LACKEY: Yes, sir.

QUESTION: And if the diagnosis is the child may be mentally ill, then what happens?

MR. LACKEY: Then, if the child can be, the child is treated in the community, either at home as an out-patient or through whatever local facilities they have in the community, group homes and that sort of thing.

QUESTION: But again, who are the professionals involved, if it is treatment as an out-patient?

MR. LACKEY: They are state-paid or county-paid mental health professionals, psychiatrist, psychologist, social workers. It is my understanding, again, that there is a full gamut of mental health professionals.

QUESTION: And if that doesn't work, then what happens?

MR. LACKEY: Then the child is referred to the state mental health facility, the hospital.

QUESTION: Is there one in the state or more?

MR. LACKEY: There are eight regional hospitals in the State of Georgia, seven of which have been built within the ten years preceding this litigation.

QUESTION: These are nothing but mental hospitals?

MR. LACKEY: Those are mental hospitals, yes, sir.

QUESTION: For confinement as well as treatment?

MR. LACKEY: They do confine the patients there.

QUESTION: What happens if the child is referred to one of those hospitals?

MR. LACKEY: When a child is referred to a hospital,

he is again evaluated by a team of mental health professionals which, the record indicates, are psychiatrists, psychologists, social workers -- one even had a director of education in those evaluations. That's a separate evaluation and it is only at that point when that team makes the separate determination that the child is mentally ill or shows evidence of mental illness and is suitable for treatment in the hospital, that the child is admitted to the hospital.

So, our position in this respect is --

QUESTION: You say "admitted," or "committed," which?

MR. LACKEY: Admitted. We treat it as a voluntary admission. He is not committed.

QUESTION: My hypothetical was that the parent initiated this. So this makes it a voluntary admission?

MR. LACKEY: Yes, sir. Under our statute, if the parent, say, -- using a hypothetical -- decides that the child will not go in the hospital -- say, the child has been brought to the hospital and evaluated and the doctors want to admit him and the parent decides not to admit him, then the child is not admitted unless the state can go through the juvenile court proceeding or through the involuntary commitment proceeding to get the child in. The parent holds the strings, so to speak, not to get him in, because that takes -- to initiate getting him in, of course, but not to

physically get him in because that, of course, relies on a medical determination.

QUESTION: And of course, all along the line there is no procedure for questioning the judgments which result, ultimately, in what you style "admission," the professional judgments.

MR. LACKEY: By questioning, you mean appeal to a judicial body?

QUESTION: To anyone.

MR. LACKEY: Well, we believe that each succeeding step acts as a check on the previous one, of course; that is, the parent makes the initial determination, usually the community mental health center makes the second stage of determination. Of course, if the child is not mentally ill there, they don't get into the system. And, thirdly, the hospital checks the community and the parent. So we contend that each succeeding level is, in fact, almost a form of appeal, if you will. And, of course, not only do they have this, but there is a provision under our law for access to the courts in Georgia for these children.

QUESTION: At what stage is that?

MR. LACKEY: At any stage, sir. Let me explain, and I want to be very careful about this.

We have a state statute that requires the Department of Human Resources to see that all patients have access to

counsel for assistance in legal matters in which they are involved. We have statutes that provide three courts that these children can go to. I hadn't thought of it as being at any stage of their commitment, but I know of no reason why it could not be. That is, the children can go to the Superior Court on a writ which, of course, anyone could do in any situation like that.

QUESTION: Is that habeas?

MR. LACKEY: That's a habeas, yes, sir.

Second, the Mental Health Code -- our Georgia Mental Health Code -- specifically provides that the probate court has jurisdiction to review cases of people in state mental health facilities to make sure the provisions of the Mental Health Code are being complied with.

And thirdly, with respect to children, they have access to the Juvenile Court which has jurisdiction over children placed in violation of law, over children who have been abandoned and over children who are deprived, which is defined as not receiving proper treatment.

QUESTION: In our hypothetical, how would it occur to the youngster involved to go to court? at whatever stage?

MR. LACKEY: That is, perhaps, the most difficult question that you could ask. My answer to you is that -- I can only illuminate by this case. In this case it was our staff that referred these children to their lawyer. It was

our Department of Human Resources that furnished office space in our hospital to these lawyers. I would submit that an examination of the District Court order, in this case, does not reveal that so much as a single child had ever been inappropriately hospitalized.

QUESTION: I gather, as you have described it, Mr. Lackey, it is rather happenstance that they were referred to lawyers. There is no champion, so called, for the child as the child goes through this procedure.

MR. LACKEY: We have two things that I can offer in response to that. I don't know if it is satisfactory but -- We have an Advocacy Unit within the Department itself that advocates for patients.

QUESTION: But how does the child get to that Advocacy Unit?

MR. LACKEY: We have -- At the hospitals, we have two things. We have a pamphlet that every patient receives. It is a handbook on patients' rights, which is -- I don't know how to describe it to you. The Appellees asked one of our witnesses whether it was written in children's language, and I don't know exactly what that is.

QUESTION: If you have a child five or six years old, is that a very practical thing?

MR. LACKEY: I don't know whether it is or not, sir, but I think in that case an adult is going to have to make the

decision for the child in any event. And I think that this case demonstrates that our mental health people there in the hospital, when it is appropriate, do, in fact, refer patients who don't need to be in the hospital, in their opinion, to lawyers.

That really is the due process that we see in this case.

QUESTION: Before you get too far away from your description of this procedure, with respect to the voluntary commitment of the child, it would be helpful to me if you could just trace very briefly the comparable procedure for the voluntary commitment of an adult.

MR. LACKEY: The voluntary commitment of an adult requires only -- The adult, normally, goes to the community also. We have a community based program --

QUESTION: What triggers that? Let's assume he is -- Does the Georgia law presume that even though he is putatively mentally ill that he is capable of making the decision to voluntarily commit himself?

MR. LACKEY: Yes, sir. No person in Georgia is deemed to be incompetent unless he has been judicially -- has been adjudicated incompetent. We presume that they are all competent to seek admission to a hospital.

QUESTION: Even though at the same time you admit him to a mental hospital?

MR. LACKEY: That's correct, sir, because being admitted as a voluntary patient requires only that you be mentally ill and suitable for treatment in a hospital. It requires no dangerousness or finding of inability to care for yourself, which really gets to the incompetency question.

QUESTION: So, only if he goes voluntarily to a physician, does the process of a voluntary commitment begin, with respect to an adult?

MR. LACKEY: That is initiated by the adult, yes, sir.

QUESTION: Yes, and then what?

MR. LACKEY: He goes to the hospital or he goes to the community mental health center. If he goes to the community mental health center, they try to treat him in the community. If they can't treat him there, he goes to the hospital. And if he comes to the hospital and says, "I am sick and I want in," and the doctor examines him and says, "Yes, you are showing evidence of mental illness and we think we can treat you here," he is admitted to the hospital.

QUESTION: And then after he is inside the hospital, does he have available to him those two resources that you mentioned, the advocate and the booklet?

MR. LACKEY: Yes, sir, he does.

MR. LACKEY: He has all the procedures except for the Juvenile Court, is that it?

MR. LACKEY: That is correct, sir. And, of course, he has one more. An adult can walk out. That is, he can say, "I want to leave," and the state either has to release him or has to begin involuntary commitment procedures.

QUESTION: And that's the same with respect to the child, if his parent does it?

MR. LACKEY: Yes, sir, with the one difference that you just noted. If the parent says, "I want to leave," then the dismissal of the child would, of course, be conditioned on his parent's approval of that discharge.

QUESTION: That whole Georgia procedure, as I understand it, simply substitutes the parent for the individual in a voluntary commitment, if the voluntary commitee is a non-adult; is that it?

MR. LACKEY: That is correct, sir. That is precisely it.

QUESTION: And what is the definition of a child, for this purpose in Georgia?

MR. LACKEY: A person under the age of 18 years.

QUESTION: Eighteen or under?

MR. LACKEY: Yes, sir.

QUESTION: If he is 18, he is still a child?

MR. LACKEY: If he is 18 he is an adult. It is under 18.

QUESTION: On his 18th birthday, he no longer is

a child.

MR. LACKEY: He becomes an adult on his 18th birthday.

QUESTION: So, relying on the parents is really critical in the case where you are committing just for treatment rather than because someone is dangerous?

MR. LACKEY: Yes, that is correct.

QUESTION: I take it you regularly commit purely for purposes of treatment, at the request of the parent.

MR. LACKEY: As long as I can caveat that by saying we admit at the request of the parents, but only after our doctors have said the child is mentally ill and suitable for treatment.

There is another part of that test and that is, of course, the benefits of the adverse procedures advocated here. I think that we have addressed them in our brief, unless the Court would like me to discuss them. Because I would like to turn, just briefly, to the other issue. And that is the question of the District Court's mandating that we provide treatment for these mentally ill children in only the most appropriate treatment setting.

What the District Court found -- because we told the District Court -- is that there are certain children who are in the hospital who are mentally ill but for whom there are conceivable other types of treatment settings, group homes

and this sort of thing.

Going from this, the District Court mandated that we either discharge these children -- in particular these 46, but, of course, it applies to all children similarly situated -- either discharge these children from our custody or provide for them the most appropriate treatment setting conceivable, that is, the best treatment setting. I bring this to the Court because we think this is, perhaps, as important as the other issue, maybe even more important. Because what the District Court has said, in essence, is that if I, or anyone, takes their child to a state mental health facility and the doctor there says, "Your child is sick. I can treat your child here in the hospital and he will get benefits from it, but if I had my preference I would like to have him in a group home," and there isn't any group home for that child. Then, under this District Court decision that child cannot be admitted to a state mental health facility. And, of course, if we have no group home, he can't go there. Which means there is going to be, under this decision, in our opinion -- and we think it is an inescapable conclusion -- there are going to be children who are mentally ill who are not going to get treatment for their mental illness in a timely fashion.

The record is absolutely clear that we provided these children with the most appropriate treatment setting which we had available at the time. That is, there was no

finding and no evidence that we have wrongfully kept any child in the hospital when we had another treatment setting which anyone thought -- our physicians thought was more appropriate for him.

This mandate by the District Court is simply going to result in us being unable to serve the children to the limited extent that we already do, and for this reason we urge the Court to overturn that portion of the decision, as well.

Thank you.

QUESTION: Mr. Lackey, does this involve only the mentally ill, or does it also involve the mentally retarded?

MR. LACKEY: This lawsuit only involves the mentally ill.

QUESTION: Mr. Lackey, I take it before us in the Georgia case there are only state hospitals. There are no private ones, as I think is the case in the Pennsylvania situation.

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

QUESTION: Secondly, perhaps you answered this in your colloquoy with Justice Brennan -- In Georgia may habeas be used to gain release on the ground that a child is no longer ill?

MR. LACKEY: I cannot cite you to a case, sir, but it would be our position that that would be correct for the

reason that if the child is no longer ill, the superintendent is under a duty to discharge him from the hospital, and thus holding him when he is no longer mentally ill -- which, of course, is not the fact in this case -- but holding him when he was no longer mentally ill would be illegally detaining him. I cannot cite you to a case, but we believe a habeas would lie.

QUESTION: Habeas wouldn't lie if at the behest of the child -- Say, a seventeen year-old child who is confined called up a lawyer and asked him to file for habeas and the parents came in and asked for dismissal.

MR. LACKEY: Yes, sir. I'll have to assume several facts with your question.

QUESTION: If the parents want him out, under the law, he is to be released.

MR. LACKEY: Yes, sir. But if he is not mentally ill and not suitable for treatment in the hospital, then the superintendent can't hold him. The only way the superintendent can hold him, in that instance, is when the alternatives that are available would threaten his safety. Which means, in your hypothetical --

QUESTION: But they will entertain habeas at the behest of a child who makes the claim that he is no longer mentally ill, even though the parents object?

MR. LACKEY: I cannot cite you to a case, but I

believe, as I understand habeas, that would have to be the case.

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, and may it please the Court:

In oral argument, I would like to deal with what I view as the three central issues in this case. But, before getting into those three central issues, I would like to deal with two collateral issues that arise out of the last oral argument.

Just very, very briefly, one is a legislative change during the last session of the General Assembly. The State Legislature passed a new mental health code. The portion dealing with juveniles was accompanied by what we call a "sunrise provision." That is, if this case is affirmed by this Court, then those provisions would take effect. There was a great deal of interest on the part of the District Court about what would happen if we strike down this statute. Would there be practical alternatives available for parents, for hospitals, in terms of placing children in mental hospitals.

This new statute seems to comply with all of the mandates of the District Court, and thus, it seems to us,

would be constitutional. So I bring that --

QUESTION: How about the children who were ordered to be differently placed? Are they still in the case?

MR. CROMARTIE: Your Honor, it is my understanding, by my last conversation with the state on this, that there are two of those children still within the terms of that order, that is, they are still confined within mental hospitals.

QUESTION: And to comply they would have to be placed in different contexts, different environments?

MR. CROMARTIE: Yes, Your Honor.

QUESTION: What does the statute do about them? Does it provide any additional facilities, or not?

MR. CROMARTIE: As I understand the new statute, it mandates that children be provided with care in the least restrictive environment; that is, if there were a choice between a foster home and a mental institution, they would be placed in the foster home.

I don't think that the new statute specifically addresses the question that you are asking.

Secondly --

QUESTION: Mr. Cromartie, before you leave it, do I correctly understand that the new statute does not have any effect at all if the decision is reversed?

MR. CROMARTIE: That is correct, Your Honor.

QUESTION: So, it is fair to say the judgment of the state is that the District Court is all wrong?

MR. CROMARTIE: That was on the advice of the Attorney General. We felt like the statute was going to be passed by the Legislature and supported the passage of it, but on the advice of the Attorney General, the committee added in the sunrise provision. So, I don't know whether it would be fair to say that it is the judgment of the State Legislature that the court was all wrong. I am not sure --

QUESTION: But it makes no change in the pre-existing statute, unless there is an affirmance.

MR. CROMARTIE: Yes, Your Honor, on the advice of the Attorney General.

QUESTION: I don't care where they get the advice, that's their judgment.

MR. CROMARTIE: Well, they certainly did not put into effect a new statute, that is correct.

QUESTION: The state has appealed the decision in this case and that alone is evidence that the state thinks it is a wrong decision, isn't it?

MR. CROMARTIE: There is no question about that, and clearly, in my judgment, the statute that was passed would have mooted out those aspects of the case.

The second preliminary question I would like to deal with is a question put to me by Mr. Justice Stevens right

at the end of the argument.

I believe that you asked me the question as to whether the Georgia procedures are invalid under the District Court's holding, even as to those children who were within the American Psychiatric Association's four criteria. And I am not sure whether, in our exchange, that you ended up with the answer that I meant to give to you.

What I meant to say to you there was -- is that under the APA standard all of the children under the present Georgia law are in indefinitely, and therefore the APA position is that all of those children would be entitled to hearings.

Secondly, the District Court did not deal expressly with the other three criteria that the APA set forth, although I see nothing inconsistent in what the District Court's order was from those other criteria.

I, personally, have some problems with the specific four criteria that the APA set forth, but I guess the bottom line is, no, the District Court decision is not inconsistent with the APA position.

The three issues that I would like to deal with are, first, in the circumstances of this case, that is, commitment of a child to a mental institution, does the doctrine of parental autonomy or family unity, or however that doctrine may be characterized, does this preclude additional protection

for the child?

Secondly, does the process at the institution, itself, adequately protect the child, or is there a need for more procedures?

Thirdly, will the procedures ordered by the District Court act as a reducer of risk? Will they have a tendency to prevent inappropriate institutionalization?

I have no intention of spending time on the substantive due process issue, although I would certainly answer any questions. I feel like I address those --

QUESTION: What do you think the substantive due process issue is?

MR. CROMARTIE: It is whether the District Court was correct in holding that the two -- that the forty-six children should be taken out of the state mental institutions, when they were faced with evidence from the state, itself, that these children did not need to be in a state mental institution and that they were being positively harmed by being in that institution. And, in the face of that, it seems to me that the court had little other choice but to order that they be taken out of the institution.

It is not --

QUESTION: The court held that the United States Constitution requires that the State of Georgia provide that a mentally ill child must be treated in the setting considered

most appropriate to his condition, either -- That the State of Georgia must either do that or else not treat them at all. And your adversary claims that that leaves no room for the second or third or fourth most appropriate -- It is either the most appropriate or nothing, and that the court held that the Constitution requires that.

MR. CROMARTIE: Your Honor, I believe that the term "optimal" was used by the court. I believe that they picked up that phrase from the 1973 study commission.

QUESTION: Where does the 1973 study commission get into the Constitution?

MR. CROMARTIE: Well, it is a part of the evidence in this case that said a great deal about the conditions within the mental institutions within this state. And the District Court felt that that study was consistent with its own observations and with the testimony in this case.

QUESTION: How does that bear on the circumstances of confinement, to say that the word "optimal" came out of a study commission report, and therefore the Constitution requires, quote, "optimal," close quote, confinement or none at all?

MR. CROMARTIE: I don't think that that is what the District Court ordered in the case. I think if you will look further in the opinion, where the Court actually ordered relief, that you will find that what the court said was,

"was to provide necessary physical resources and personnel for whatever non-hospital facilities are deemed by them to be most appropriate."

I think that the District Court was a great deal more flexible than that, in terms of what it ordered. I think that what it ordered was -- is that if these children are going to be harmed by being in the institution, and the state admitted this, then they had to get them out of there.

I merely was referring to the optimal as what I think was unfortunate language. That does not suggest the true intent of the court.

QUESTION: Do you think the District Court's opinion and judgment expressly or implicitly says that anyone who is confined, any child who is confined under this law is entitled to treatment at the hands of the state?

MR. CROMARTIE: I don't understand.

QUESTION: Do you think the District Court held that a child who is committed at the request of the parents and checked out by the state doctor is entitled to treatment while he is confined?

MR. CROMARTIE: Yes, I think that is implicit, that at least the child not be harmed.

QUESTION: It certainly is implicit in the second -- with respect to these 40, I take it.

MR. CROMARTIE: I think it is, Your Honor.

QUESTION: Are there some cases that would support that?

MR. CROMARTIE: That would support the treatment of the children?

QUESTION: Treatment in addition to confinement.

MR. CROMARTIE: I think the case of Jackson v. Indiana and Shelton v. Tucker, and others, speak to the issue of not harming people; that is, whatever restrictions you place on children --

QUESTION: Say there is no harm, there is just confinement. The state just confines at the request of the parent.

MR. CROMARTIE: That is certainly not the evidence in this case. The evidence of the state's own doctors is that the children were being positively being harmed by being in the institution; that is certainly not the evidence that was before the court.

QUESTION: And does the evidence show the existence of institutions in Georgia that would not harm them?

MR. CROMARTIE: There were many children in Georgia who were in institutions that were not being harmed. There were many other children, other than the forty-six, who were actually being treated.

QUESTION: There were institutions available in Georgia that could treat these forty-odd children -

satisfactorily and not hurt them?

MR. CROMARTIE: The state's position was that there were no such institutions. It is remarkable to me that of the forty-six -- there have been no new facilities built -- and yet forty-four of those children have been placed in these non-existent facilities. This would suggest to me that the facilities are, in fact, present, but the state has not gone to the trouble to locate them. And that was the conclusion of the District Court also.

QUESTION: How much time has gone by since -- between the entry of the District Court's decree and the present time?

MR. CROMARTIE: I believe that the decree was entered around February of 1976.

QUESTION: So, isn't it conceivable that in two and one-half years there could be a movement of the institutional population so that vacancies would open up in existing facilities?

MR. CROMARTIE: That is somewhat possible, although forty-four of the forty-six were out at the time this case was last argued --

QUESTION: That could be because the parents requested it.

MR. CROMARTIE: The information that I have is not to that effect. Many of the children were placed in

foster homes and other facilities.

It was the District Court's finding that the state had made little or no effort to find alternative facilities. I see no evidence in the record to rebut that finding by the court.

QUESTION: Do we have something in the record that indicates that forty-four of the forty-six are now out, and why?

MR. CROMARTIE: No, that is information that was furnished to me by counsel for the state during the last oral argument of this case. There is nothing in the record to suggest that, no, Your Honor.

Dealing first with the issue of parental autonomy, I would point out first that at least a portion of the class -- it seems to me that the parental autonomy doctrine has no application to. That is, those are the children that were wards of the state and who were actually institutionalized by the state, themselves.

QUESTION: There are children like that in this case?

MR. CROMARTIE: Yes, Your Honor, about 20%of the class would be; in fact, one of the main Plaintiffs, J. R. was a ward of the state since near birth.

QUESTION: For what reason? The parent or parents were either dead or had been declared to be unfit as parents?

MR. CROMARTIE: One of these two, yes, Your Honor.

QUESTION: Now, may I ask you -- since I've already interrupted you -- is there a provision in Georgia law for the involuntary commitment of a child? Let's assume his parent doesn't take the initiative and, indeed, if it is suggested to the parent that he do take the initiative, he says, "Absolutely no. I will not. As far as I'm concerned, my child is either perfectly well or, if not well, he is going to stay home. I am not going to have anything to do with his being admitted to a hospital."

Is there a provision for the involuntary commitment of a child, in circumstances such as that?

MR. CROMARTIE: Yes, Your Honor. About one-third of the children that are committed in the state are committed through judicial proceedings of some kind.

QUESTION: And through an involuntary commitment procedure.

MR. CROMARTIE: Yes.

QUESTION: Or in my brother, Stewart's hypothetical, who initiates the commitment?

MR. CROMARTIE: I think Mr. Lackey addressed that issue. I think anyone can initiate the involuntary commitment.

QUESTION: He said anyone could initiate a juvenile court proceeding. This is a little different.

MR. CROMARTIE: I believe the same is true, under the involuntary commitment, that anyone can initiate.

QUESTION: You mean a neighbor may?

MR. CROMARTIE: A neighbor may.

QUESTION: Social worker.

MR. CROMARTIE: Friend, social worker, whoever, yes.

In fact, back in my years as County Attorney, when I was in private practice, all of the juveniles, children 17 and under, were involuntarily committed rather than voluntarily committed, because the probate judge didn't have a lot of confidence in the voluntary commitment. And it is that experience that convinces me that those hearings that we are suggesting should be held,can be held in a way that is not traumatic --

QUESTION: There are hearings -- I suppose the involuntary commitment of a child is no different from the involuntary commitment of an adult, basically; is that correct?

MR. CROMARTIE: That's true, yes.

QUESTION: And there are hearings when there is a voluntary commitment of an adult. There are hearings when there is an involuntary commitment of an adult, and there are no hearings when there is a voluntary commitment, there are simply these same checks on it. Is that correct?

MR. CROMARTIE: Yes.

QUESTION: If you want to analogize, there is a jury

trial; you have a right to a jury trial if you plead not guilty, you waive it if you plead guilty, analogizing it, as you do, to a criminal proceeding.

MR. CROMARTIE: We are not suggesting that a jury trial should be made available.

QUESTION: I know you are not.

MR. CROMARTIE: The court has precluded that in the juvenile delinquency --

QUESTION: But you do analogize this through your reliance on cases, such as In re Gault, and others, to a criminal proceeding.

MR. CROMARTIE: Yes.

We rely very heavily, in this case, on the magnitude of the child's interest. The magnitude is simply enormous. We are talking about children being locked within the sterile walls of institutions, where --

QUESTION: That's also true when an adult voluntarily commits himself to a hospital; isn't it?

MR. CROMARTIE: But an adult can turn around and say, "I want out," and he must be let out or involuntarily committed. A child does not have that option.

QUESTION: The same option that put him in can take him out, i.e., the desire of his parent, isn't that correct?

MR. CROMARTIE: That is a disagreement that, I think

that, we had in the last oral argument about whether the placement of a child in an institution is truly voluntary.

QUESTION: Well, Georgia has said that it is voluntary. And the question is whether or not Georgia can, agreeably to the Constitution, adhere to the centuries-old Common Law rule that a parent speaks for his child, and the Common Law presumption that there is a community of interest between child and parent. That's the basic question in this case; isn't it?

MR. CROMARTIE: Well, I find absolutely no authority for the proposition that a parent has ever been able to institutionalize a child in a state mental institution. I find no authority to support that proposition.

QUESTION: What about tuberculosis? How is it developed in tuberculosis or smallpox?

MR. CROMARTIE: The child would be carried to a doctor or to a hospital and treated there and we --

QUESTION: Well, confined --

MR. CROMARTIE: It is not my understanding that tuberculous treatment is confined in the same sense that you are confined in a mental institution.

QUESTION: What's the difference, in the sense, if he is placed there by his parents and the parents say to the doctors, "Keep him here until he is well" -- or she is well -- and they go to see him twice a week?

MR. CROMARTIE: Well, for centuries, the courts have treated physical care and physical treatment different from mental commitment.

QUESTION: Who has treated it differently?

MR. CROMARTIE: The courts have. The Georgia courts have. In Morton v. Sims, and other cases, have said mental commitment is by its very nature coercive. It is coercive by its nature, plus it is not -- there are not commonly accepted medical norms --

QUESTION: On your first point, that mental care is coercive by its nature, it is surely no more coercive than to put a child in a hospital and have his leg amputated because he has the kind of cancer that might spread. Would you agree with that?

MR. CROMARTIE: I would agree to that, yes, Your Honor.

QUESTION: So that doesn't distinguish physical care from mental care, at all.

MR. CROMARTIE: I think it distinguishes the vast majority of cases. I am sure that there are cases at the far extreme which, in the extreme might --

QUESTION: Would you say that the parents have to have a hearing and the child must have a lawyer before the parent of an eight year-old child can decide whether or not to have its leg amputated because of a possibility of spreading

cancer?

MR. CROMARTIE: There are cases that have held that that is subject to judicial scrutiny.

QUESTION: There are cases that hold that the state is not prohibited by the Constitution from interfering in such a situation. That is quite a different holding.

MR. CROMARTIE: Yes.

QUESTION: Would you say the Constitution requires that of Georgia, if Georgia chooses to come down otherwise?

MR. CROMARTIE: Requires which, now?

QUESTION: Would you say that the United States Constitution requires that in Georgia before a parent can have a child put in the hospital to amputate a leg, the sort of hearings that you are contending for here in mental cases be had?

MR. CROMARTIE: No, Your Honor. We feel like there is enough protection in the hypothetical that you have given me, so that that is not required.

QUESTION: Protection from where?

MR. CROMARTIE: Protection from erroneous decision-making. In the case of the cancer, there are medical tests that can be run that can tell you one way or the other whether there is cancer there, or not.

QUESTION: Well, your first argument, about the coercive nature of mental care as opposed to physical care,

breaks down and you have to rely on --

MR. CROMARTIE: Oh, no. It's a combination of those two arguments plus our stigma argument, and --

QUESTION: But your coercive argument doesn't wash in the cancer case.

MR.CROMARTIE: There are circumstances where it does not wash. It washes, I would contend, in the vast majority of cases. But we look on it as a combination of all three of those elements, in terms of deciding whether the two are, in fact, distinct or not.

QUESTION: Now, once an adult voluntarily gets himself admitted to a mental hospital, he is locked up there, isn't he?

MR. CROMARTIE: He can get out.

QUESTION: And a child can get out on the wish of his parent.

MR. CROMARTIE: Yes.

In the case of J. L. and J. R., they wanted out right after they got in. They didn't want to go in. If they had been an adult, they could have requested of the superintendent that they be let out and the superintendent would either have had to let them out --

MR. CROMARTIE: If they had been an adult and didn't want in, then they would not have voluntarily gotten themselves admitted to the hospital; would they?

MR. CROMARTIE: That's true.

QUESTION: State statutes in most states require that children attend school for a certain period of time. Anything in the Constitution of the United States to forbid that confinement, that limitation on liberty?

MR. CROMARTIE: We look on that in terms of its magnitude of any deprivation as just far different from the magnitude of the deprivation we are talking about right here. The courts have always looked suspiciously on physical confinement, and that's what we are talking about right here. That's the essence of mental health treatment. It is what distinguishes commitment in a mental hospital from, say, a group home. It is the physical confinement feature that distinguishes it.

QUESTION: What if the parents decide that a military academy is the best place, as many parents have for borderline incorrigible children, and they place him in a private military academy where they must keep rigid hours, they can't leave the grounds, a whole series of restraints; what about that?

MR. CROMARTIE: I can't imagine this Court holding that there was a need for due process protection there. For one thing, I would not find the presence of state action there. And secondly, it is readily distinguishable from our case here. We are talking about a situation where the parents

have gone to the state and said, "We cannot handle the child. State, you take the child and lock the child up," in effect. That would not happen in the military school situation.

QUESTION: What's the difference between that -- your institution and a tuberculosis sanitarium, where the state commits people every day? They used to when there was a great --

MR. CROMARTIE: If it was a situation --

QUESTION: -- You didn't walk out, either.

MR. CROMARTIE: I would then argue there that any person was entitled to a hearing before they were placed there, because we are talking about long-term --

QUESTION: In the meantime, you walk around spreading your germs? Do you think a state is powerless to stop that?

MR. CROMARTIE: We have always conceded that emergencies --

QUESTION: Oh, I see.

MR. CROMARTIE: -- that the hearing can occur afterwards, that the state's hand is not tied. In tuberculosis situations, certainly there could be a hearing afterward.

QUESTION: I had thought a good deal of your case depended upon evidence, of which the record contains a good deal, that because of the relative unreliability of psychiatry,

as contrasted with the more conventional forms of medical practice, a hearing was appropriate because of the consequent risk of incorrect decisions. And, that, therefore, you would distinguish the tuberculosis situation on that basis.

MR. CROMARTIE: That is a part of our argument.

QUESTION: I thought it was.

MR. CROMARTIE: I think that the more basic argument we have is that when there is a deprivation of liberty as extreme as right here, that, traditionally, our courts have regarded at least notice and a hearing to the person involved, and that --

QUESTION: That would require, I would suppose, logically, for you to contend that the Constitution requires notice and hearing with respect to a leg amputation or admission to a tuberculosis sanitarium.

MR. CROMARTIE: I think I would concede the tuberculosis sanitarium, that it would probably require a hearing there. We don't feel like in the leg amputation that the elements involved that we have in this case, distinguishing it in terms of family autonomy and breaking into the family autonomy, would be present in the leg amputation situation, where they are here. The potential for conflict of interest, the request by the family itself that the child be taken out of the home -- we feel like those are different for those reasons.

QUESTION: Mr. Cromartie, don't you have a lot of difficulty trying to distinguish on the basis of the magnitude of the deprivation? I thought your case rested on the point Mr. Justice Stewart made earlier that the Common Law presumption rests on the notion that there is a community of interest between the parent and the child, where there would be in the tuberculosis case, the leg amputation, and all the rest. But your point, as I understood you in your brief, was in part that you can't be so sure there is that community of interest in the mental institution context when the parent is asking that the child be placed in the home, because there well may be a family conflict as the source of the problem.

So, isn't the scope of your argument limited to the case in which the basis for the Common Law presumption is no longer applicable?

MR. CROMARTIE: There were several points that we made. That was one of them. The other was that this situation was different because the parent had gone to the state and asked the state to intervene, and in the Wyman v. James sense had ceded some of its authority that it traditionally would have to the state. But also our argument was because of the manifest potential for conflicts of interest; just by nature, this is a stressful situation, emotion situation.

QUESTION: That point really doesn't apply to any

of these other hypothetical examples, as I understand it.

MR. CROMARTIE: It might well not, Your Honor. I was more troubled by the tuberculosis situation, because of the stigma, and that sort of thing, involved in that situation, than I was with the amputation.

QUESTION: Would you think it possible, Mr. Cromartie, that the child, that is, someone under eighteen, might be so emotionally disordered, disturbed that they couldn't participate, couldn't contribute anything, in the same sense that some defendants in criminal cases are determined to be not competent to assist in their own defense? Now, is that possible that that kind of a situation could arise with a seriously disturbed child, age sixteen or fifteen?

MR. CROMARTIE: I think it would be very rare. The evidence showed that most of the children are mildly diagnosed here. They are not severely mentally ill.

QUESTION: There could be psychotics at age sixteen, couldn't there?

MR. CROMARTIE: There can be. The evidence is that it is not as frequent with children and adolescents.

QUESTION: Let's assume for a minute that you have the very seriously disturbed psychotic, psychopathic person. You are going to have to have, first, a preliminary hearing to determine whether they are competent to assist and take

part in a hearing?

MR. CROMARTIE: Well, Your Honor, in Jackson v. Indiana, you had a person who, by all evidence, was incapable of participating in that proceeding. And yet the court felt it was important to provide procedural protections to that person. The Code of Professional Responsibility speaks to that also. Cannon 7 says that "an attorney's responsibility is to do everything that he or she can to adequately get input from the client into the client's wishes, but there may be circumstances where the client is not able to participate, and in that case the attorney still has the obligation to fully represent that person."

Getting on toward the end of my argument, we feel that the cases of J. L. and J. R., very dramatically, illustrate how some sort of hearing process, informal though it may be, could have prevented both of them from spending over five years of their lives in a mental institution. In the case of J. L., his primary out-patient therapist had recommended only a month or so before that he not be institutionalized. And yet, Janet Scott's recommendation was not even considered when J. L. was placed into that mental institution. Of course, also the evidence shows that J. L. was placed in the institution -- the decision was made three days before he ever showed up at the institution.

QUESTION: Assuming that I agree with what you say,

what's going to happen if we end up with a hearing with three psychiatrists on one side and three on the other? Then what does the court do?

MR. CROMARTIE: Somebody is going to have to make a decision. That is typical --

QUESTION: Have you ever tried to make one with three psychiatrists on one side and three on the other? If you ever try it, you will be committed.

MR. CROMARTIE: I made them many a time as County Attorney, when I sat in and was one of the three members of an interdisciplinary team that sat and listened to evidence such as that. It is the same role that any judge performs in any trial, where you have to weigh the different evidence presented to you and make a decision based on that.

QUESTION: What is the issue of fact that would be determined in the hearing that District Court has ordered be had?

MR. CROMARTIE: Mental illness is grounded, basically, in behavior. And there are lots of issues of fact as to what the person has done that allegedly gives rise to the conclusion of mental illness.

QUESTION: That's the ultimate issue.

QUESTION: The ultimate issue that the finder of fact would have to pass on is whether or not the child is or is not mentall ill?

MR. CROMARTIE: With expert testimony, yes.

And secondly, there is the important -- and this may well be the most important issue in this case -- and that is, should the child be here or should the child be somewhere else? And right now, when you have a physician, or someone else, at an institution,making that decision, they have really only two choices. They can either say, "Child, go home, we can't treat you at all," or "We are going to put you in this institution."

QUESTION: What type of person makes this decision? Is it a psychiatrist?

MR. CROMARTIE: I conceded in the last oral argument that the question of who was not so important as the question of how.

QUESTION: It could be a lay person?

MR. CROMARTIE: It could be. I would not recommend that, but I think it could be.

QUESTION: What would you recommend?

MR. CROMARTIE: I think that the best, and what is done in the new Act is, the juvenile court judge would make the decision. But now that's a matter for the legislature, it seems to me, and it is not an issue that we have addressed, nor that we have taken a position on.

QUESTION: Could I just make sure. In Georgia now, if the state doctor determines that the child is mentally ill,

does he also have to determine that he would benefit from treatment?

MR. CROMARTIE: Yes, Your Honor. That frequently is not done. The record is very clear.

QUESTION: Would that be an issue on remand, under the District Court's remand?

MR. CROMARTIE: Yes, Your Honor.

QUESTION: And does the doctor also have to find that there is some advantage to treating in the state institution, rather than at home?

MR. CROMARTIE: I think that that is implicit in that standard. Yes, that that treatment is appropriate in an institution, as opposed to being in a home or --

QUESTION: So, you think under the present Georgia law, if the parent says, "Well, I know all that, but I just am -- I just can't handle him at home. I agree with you that he could be treated at home, but we just can't get along with him at home," under the present Georgia law, the state must reject him?

MR. CROMARTIE: They may not, but it is my position that they should; but they frequently don't, and the record is clear on that, that they frequently don't.

QUESTION: So the law permits them to take that kind of a child, just because -- although he could be treated at home, the parents don't want to treat him at home?

MR. CROMARTIE: That's my construction of the law, that it does not allow that. Obviously, that is not shared by the psychiatrists.

QUESTION: Could they not put him in a foster home?

MR. CROMARTIE: Could the parents?

QUESTION: No, the state, if they thought something less than institutional care was indicated.

MR. CROMARTIE: Yes, they could.

QUESTION: Mr. Cromartie, would the new statute require a finding that the juvenile would benefit from treatment?

MR. CROMARTIE: Yes.

QUESTION: An affirmative finding?

MR. CROMARTIE: Yes.

QUESTION: You said, in answer to Mr. Justice White's question, that the present Georgia law does not allow an institution to receive a patient if the psychiatrist finds that he could be treated at home. Is that right?

MR. CROMARTIE: That's my construction, that if a child could be treated in the home and would not appropriately be treated in the institution, then they cannot accept that child.

QUESTION: But, suppose he could be appropriately treated in the institution, in the sense that you can administer

the treatment there?

MR. CROMARTIE: Okay. If that's the question, then, no, I don't think the law requires that he be in the home rather than the institution. I am sorry.

QUESTION: So, if the parent comes to the state and says, "I know we could treat him at home, but I know, I think and my doctor says he could be treated in the institution also," the state may take them?

MR. CROMARTIE: Under the present law, yes, they could. If they can be --

QUESTION: How about under the new law?

MR. CROMARTIE: It's my construction of the new law that it would not be appropriate there.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon at 11:10 o'clock, a.m., the case was submitted.)