Volume 78 | Issue 3 Article 9

May 1976

# Juvenile Courts--Waiver of Juvenile Jurisdiction after Adjudication of Delinquency Violates Double Jeopardy Clause of Fifth Amendment

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# CASE COMMENTS

## JUVENILE COURTS — WAIVER OF JUVENILE JURISDICTION AFTER ADJUDICATION OF DELINQUENCY VIOLATES DOUBLE JEOPARDY CLAUSE OF FIFTH AMENDMENT

Protection against double jeopardy in criminal proceedings is guaranteed to all persons by the fifth amendment of the Constitution of the United States.[1] Although originally construed by the United States Supreme Court to be inapplicable to the states,[2] in 1969 the Court reversed itself, holding that the due process clause was binding on the states through the fourteenth amendment on the ground that the double jeopardy prohibition was a fundamental ideal of the Constitution.[3]

The constitutional prohibition against double jeopardy is based on the principle that the state should not be permitted to invoke all its resources and power in repeated attempts to convict an individual for an alleged offense. A person must not twice be

[1] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Constitution of West Virginia also provides no person shall "in any criminal case . . . be twice put in jeopardy of life or liberty for the same offence." W. VA. CONST. art. 3, § 5. For a general background of double jeopardy, see J. SIGLER, DOUBLE JEOPARDY (1969).

[2] Palko v. Connecticut, 302 U.S. 319 (1937). Under a state statute allowing appeal by the state in a criminal proceeding, Palko's conviction of second degree murder was appealed and reversed. His case was remanded; Palko was found guilty of first degree murder and sentenced to death. In holding that the double jeopardy prohibition of the Constitution of the United States did not apply to the states through the fourteenth amendment, the United States Supreme Court asked, "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it?" *Id.* at 328. A negative answer was given, differentiating the prohibition of double jeopardy from those rights, such as freedom of speech, applied to the states because they are "found to be implicit in the concept of ordered liberty." *Id.* at 325.

[3] Benton v. Maryland, 395 U.S. 784 (1969). Petitioner had been indicted for both larceny and burglary but had been convicted only of burglary. His trial had been held under an invalid constitutional provision, so petitioner was given the option of reindictment and retrial. He chose to be reindicted and retried and the second time was convicted of both larceny and burglary. The United States Supreme Court agreed the larceny conviction violated the double jeopardy prohibition in the Constitution of the United States. The Court further held the protection should apply to the states through the fourteenth amendment.

subjected to "embarrassment, expense and ordeal" and be compelled to "live in a continuing state of anxiety and insecurity."[4] The double jeopardy concept has proven to be an important and often contested aspect of American criminal proceedings.[5] One controversial consideration lies in defining that point in the trial at which jeopardy attaches. The question arises because jeopardy relates to a "potential" of conviction; a final judgment is not required.[6] Consequently, if the trial is stopped or disposed of by other than a final judgment, whether jeopardy has yet attached becomes a critical consideration.[7] The West Virginia Supreme Court of Appeals has held that an individual is in jeopardy when he "has been placed on trial on a valid indictment, before a court of competent jurisdiction, has been arraigned, has pleaded, and a jury has been impaneled and sworn."[8] West Virginia is in accord with the general rule set out by the United States Supreme Court in *Kepner v. United States*.[9]

Both the Constitution of the United States and the Constitution of West Virginia specify that no "person" shall be subjected to double jeopardy.[10] However, until the recent landmark decision of *Breed v. Jones*,[11] double jeopardy protection was denied to youths close to the maximum age limit for juvenile court jurisdiction, who were tried first in the juvenile court and then again as adults.[12] The juveniles were subjected to trial in both the juvenile

[4] Green v. United States, 355 U.S. 184, 187 (1957).

[5] *E.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Green v. United States, 355 U.S. 184 (1957); United States v. Tateo, 377 U.S. 463 (1964); Price v. Georgia, 398 U.S. 323 (1970); Illinois v. Somerville, 410 U.S. 458 (1973); State v. Taylor, 130 W. Va. 74, 42 S.E.2d 549 (1947); State v. Holland, 149 W. Va. 731, 143 S.E.2d 148 (1965); State v. Carroll, 150 W. Va. 765, 149 S.E.2d 309 (1966).

[6] Price v. Georgia, 398 U.S. 323, 326 (1970).

[7] For a more in-depth view of the questions surrounding attachment of jeopardy, see Sigler, *Federal Double Jeopardy Policy*, 19 VAND. L. REV. 375, 376-82 (1966).

[8] Brooks v. Boles, 151 W. Va. 576, 583, 153 S.E.2d 526, 530 (1967).

[9] 195 U.S. 100, 128 (1904). In *Kepner*, the Court, referring to a trial without a jury, stated jeopardy attaches when the individual is "regularly charged with a crime before a tribunal properly organized and competent to try him." *Id.* This is important, because the United States Supreme Court has held a jury is not constitutionally required in a juvenile trial. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). West Virginia, however, has statutorily given juveniles the right to demand a jury trial. W. VA. CODE ANN. § 49-5-6 (Cum. Supp. 1975).

[10] U.S. CONST. amend. V; W. VA. CONST. art. 3, § 5. *See* note 1 *supra*.

[11] 95 S. Ct. 1779 (1975).

[12] *E.g.*, Seagroves v. State, 279 Ala. 621, 189 So. 2d 137 (1966); State v. R.E.F.,

and the criminal courts because of a waiver procedure adopted by many jurisdictions,[13] which enables the juvenile judge to waive jurisdiction after adjudicating the defendant to be delinquent, transfering the youth to the criminal court. This waiver procedure has been a questioned, but generally accepted, practice in the juvenile justice system.[14]

The American juvenile court system, conceived in idealism, has become a complexity of frustration and change. The juvenile court originated with the goal of rehabilitating, rather than punishing, wayward youths.[15] The theoretical concept had developed from the chancery courts of fifteenth century England, which were created by the king, "the father of his country," to protect those children who today would be considered "neglected" or "dependent."[16] The chancery court dealt with questions of property and financial support, rather than with criminal activity. The attitude of *parens patraie*,[17] was incorporated into the criminal juvenile proceedings of the United States in the nineteenth century. A separate juvenile court system was formed to consider the welfare of the child as opposed to issues of innocence or guilt. The court was to understand and analyze the problems of the child and to provide treatment that would restore him to a constructive role in society.[18]

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251 So. 2d 672 (Dist. Ct. App. Fla. 1971), *aff'd* 265 So. 2d 701 (Fla. 1972); Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963); Brooks v. Boles, 151 W. Va. 576, 153 S.E.2d 526 (1967).

[13] In 1972, 44 jurisdictions had some sort of waiver provision in their juvenile court statutes. Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 297-300 (1972).

[14] Regarding the accepted practice, see Stamn, *Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law*, 62 KY. L.J. 122 (1973). For articles questioning the practice, see Comment, *Juvenile Court: Due Process, Double Jeopardy, and the Florida Waiver Procedures*, 26 U. FLA. L. REV. 300 (1974); Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266 (1972).

[15] For an insight into the origins of the juvenile court system, see S. BARROWS, CHILDREN'S COURTS IN THE UNITED STATES, H.R. DOC. No. 701, 58th Cong., 2d Sess. (Reprint 1973, Comm. Print 1904).

[16] M. HASKELL & L. YABLONSKY, CRIME AND DELINQUENCY 226 (1970). For the legal definition of a "neglected" child in West Virginia, *see* W. VA. CODE ANN. § 49-1-3 (1966).

[17] *Parens patraie* is the Latin term denoting that the king, as "father of his country," was the protector of orphaned and neglected children.

[18] M. HASKELL & L. YABLONSKY, CRIME AND DELINQUENCY 225-28 (1970). *See*

The juvenile proceedings were to be flexible and informal; in order to obtain such qualities, most criminal trial procedures were discarded. In exchange for this fatherly, sympathetic court, youths relinquished many of their constitutional rights.[19]

Experience has proven the idealistic juvenile justice system somewhat of a failure. The juveniles often are not easily reformed first offenders, and the judges are not the psychologists once envisioned. Communities cannot or will not furnish the time, finances, and interest needed to render the juvenile system a success.[20] Society has realized that all juvenile delinquents are not harmless children and that some pose actual threats to public security. In order to protect its superior interest in public security, society has been forced to recognize the shortcomings of the purely paternalistic approach to delinquency cases. To meet the deficiencies of the juvenile justice system, revisions have been and must continue to be made.[21]

With realism has come a demand for constitutional guarantees in juvenile proceedings. In *Kent v. United States*,[22] the United States Supreme Court recognized, "[t]he admonition to function in a 'parental relationship' is not an invitation to procedural arbitrariness."[23] One of the most notable progressions came in the 1967 decision of *In re Gault*.[24] The Court incorporated five basic rights into juvenile proceedings: 1) the right to adequate notice of the charge,[25] 2) the right to counsel,[26] 3) the right to confrontation,[27] 4) the right to protection against self-incrimination,[28] and 5) the

*also*, Note, *Juvenile Courts: Kentucky Law in Need of Revision*, 59 KY. L.J. 719 (1971).

[19] *See* Note, *Juvenile Courts: Kentucky Law in Need of Revision*, 59 KY. L.J. 719, 724 (1971), where the exchange is characterized as a fictional contract.

[20] *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55-89 (United States Gov't Printing Office ed. 1967). For example, few communities have established the Youth Services Bureaus recommended by the President's Commission. *Id.* at 83, proposing the recommendation.

[21] *Id.*

[22] 383 U.S. 541 (1966).

[23] *Id.* at 555.

[24] 387 U.S. 1 (1967).

[25] *Id.* at 33.

[26] *Id.* at 36.

[27] *Id.* at 56.

[28] *Id.* at 55.

right to cross-examination.[29] The Court pointed out that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[30] In 1970, the requirement of proof beyond a reasonable doubt was added.[31] Though recognition of these constitutional guarantees in juvenile proceedings has eroded the doctrine of *parens patraie*, the concept has not been totally rejected. In *McKeiver v. Pennsylvania*,[32] the Court emphasized it had not yet held that all constitutional guarantees assured in an adult criminal proceeding are enforceable in a juvenile trial.[33] Balancing the fundamentality of the right with the right's effect on the flexibility and informality of juvenile proceedings, the Court denied youths the constitutional right to a trial by jury in juvenile proceedings.[34] Since the trend had been toward incorporating constitutional rights into the juvenile court system, the decision of *McKeiver* caused some comment.[35] The case, easily misinterpreted or misapplied, has been viewed as an abrupt halt to the expansion of juvenile rights by the Court.[36] One major concern of critics favoring further expansion was the fact that the Court had not yet spoken to the issue of double jeopardy with regard to the waiver procedure.[37]

In the California case of *Breed v. Jones*,[38] the United States Supreme Court, in a unanimous decision, once again extended the realm of constitutional guarantees in juvenile proceedings. The Court held Jones' criminal trial, which followed waiver of juvenile court jurisdiction after an adjudication of delinquency, violated the double jeopardy clause of the fifth amendment.[39]

In the *Breed* case seventeen-year old Gary Steven Jones was brought before the juvenile court on a petition alleging he had committed acts which, if committed by an adult, would constitute a felony.[40] A jurisdictional hearing was initially held, determining

[29] *Id.* at 57.
[30] *Id.* at 13.
[31] *In re* Winship, 397 U.S. 358 (1970).
[32] 403 U.S. 528 (1971).
[33] *Id.* at 533.
[34] *Id.* at 545.
[35] *See* 8 U. RICH. L. REV. 601 (1974); 1971 WASH. U.L.Q. 702, 708-09.
[36] *See* 8 U. RICH. L. REV. 601 (1974).
[37] *See* Note, *Juvenile Court: Due Process, Double Jeopardy, and the Florida Waiver Procedures*, 26 U. FLA. L. REV. 300 (1974).
[38] 95 S. Ct. 1779 (1975).
[39] *Id.*
[40] The act committed by Jones would have constituted robbery under the California Penal Code. PEN. C.A. § 211 (1971).

that Jones was a minor described by the juvenile court statute.[41] The allegations of delinquency were found to be true, and the proceedings were continued for a dispositional hearing.[42] The juvenile court found Jones "unfit for treatment as a juvenile";[43] he was then prosecuted as an adult and convicted.

Contending that he had been subjected to double jeopardy by the procedure, Jones sought a writ of habeas corpus. The United States district court rejected Jones' petition for the writ.[44] The court of appeals reversed the district court, finding double jeopardy "fully applicable to juvenile court proceedings."[45] The United States Supreme Court held that Jones' trial as an adult, following a waiver of juvenile court jurisdiction after an adjudication on the merits, violated Jones' right to protection against double jeopardy.[46] The Court directed the writ of habeas corpus to be issued, vacated the criminal conviction, and ordered that Jones either be set free or be remanded to the juvenile court.[47]

In reaching its decision, the Court dealt with several important issues. The Court stressed that jeopardy refers to "risk" and not to punishment.[48] Although "risk" has traditionally been regarded as the risk of proceedings which may end with criminal punishment, the term is equally applicable to the processes of a juvenile hearing, since both proceedings subject the accused to

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[41] W. & I.C.A. § 602 (Supp. 1975):

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime . . . is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

[42] At the dispositional hearing, the juvenile court announced its intention to find Jones "not . . . amenable to the care, treatment and training program available through the facilities of the juvenile court." 95 S. Ct. at 1782, quoting the language of the juvenile court. Jones' attorney moved "to continue the matter on the ground of surprise," contending Jones had not been informed "it was going to be a fitness hearing." *Id.* at 1783, quoting the language of Jones' attorney before the juvenile court. The matter was continued for one week. Then, having considered the report and having heard the testimony of Jones' probation officer, the juvenile court found the youth "unfit for treatment as a juvenile" and ordered that he be prosecuted as an adult. *Id.*, quoting the language of the juvenile court.

[43] *Id.* at 1783, quoting the language of the juvenile court.

[44] Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972).

[45] 497 F.2d 1160, 1165 (9th Cir. 1974).

[46] 95 S. Ct. 1779 (1975).

[47] *Id.* at 1791.

[48] *Id.* at 1785.

heavy pressures and to the possibilities of grave sanctions.[49] Thus, as in a criminal court, jeopardy attaches when the juvenile court, as the "trier of facts," begins to hear evidence.[50]

Having found that jeopardy attaches at the juvenile stage, the Court then dealt with the question of whether subsequent criminal trials subject youths to double jeopardy.[51] The State contended that the jeopardy which attaches at the adjudicatory hearing "continues" until the adult conviction. This concept of "continuing jeopardy," first expounded by Mr. Justice Holmes in his dissent in *Kepner v. United States*,[52] has never been adopted by a majority of the Court.[53] Though continuing jeopardy has been used to explain why an accused whose conviction was reversed on appeal may be retried for the same offense, the Court stated that "a more satisfactory explanation [for allowing the second trial] lies in analysis of the respective interests involved."[54] Similarly, continuing jeopardy was not a sound explanation for subjecting a youth to two trials. If the Court were to refuse recognition of double jeopardy in juvenile proceedings, a more satisfactory reason than continuing jeopardy was required. Consequently, the Court based its decision on an analysis of the "respective interests involved."[55] The Court found Jones to have been placed in double jeopardy, even though the proceedings against Jones had not "run their full course,"[56] on the grounds that his criminal trial was a second trial for the same offense, against which there is constitutional protection.[57]

Thus, the Court found that juveniles are subjected to double jeopardy by a criminal trial subsequent to an adjudication of delinquency. The Court then determined whether or not the constitutional prohibition against double jeopardy should be enforced in juvenile proceedings.[58] In making this determination, the Court applied the balancing test set forth in *McKeiver*, balancing

[49] *Id.* at 1786.
[50] *Id.* at 1787.
[51] *Id.* at 1788.
[52] 195 U.S. at 134-37.
[53] United States v. Jenkins, 95 S. Ct. 1006, 1013 (1975).
[54] 95 S. Ct. at 1788.
[55] *Id.*
[56] *Id.*, quoting from Price v. Georgia, 398 U.S. 323, 326 (1970).
[57] 95 S. Ct. at 1788.
[58] *Id.* at 1788-91.

the fundamentality of the right to protection against double jeopardy with the right's effect on the flexibility and informality of the juvenile proceedings.[59] The Court acknowledged that transfer of jurisdiction is an important aspect of the juvenile court's flexibility and is a viable alternative for those youths who cannot profit from the guidance and treatment of the juvenile system.[60] However, the Court also stated that granting protection against double jeopardy would not significantly hamper the informality and other benefits derived from the waiver procedure.[61] The effective use of waiver has not been hindered in the large number of jurisdictions[62] which presently require transfer before any adjudication of delinquency.[63] Further, the objectives of the juvenile system should be aided by the granting of the right against double jeopardy, since the juvenile and his attorney, rather than being concerned with tactics and the risk of transfer, can concentrate on establishing innocence or seeking the most suitable disposition for the youth.[64]

As a result of the *Breed* decision, the United States Supreme Court requires that

> a State determine whether it wants to treat a juvenile within the juvenile court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings.[65]

The *Breed* decision will have a profound effect upon juvenile proceedings in West Virginia. In *Breed*, the Court emphasized that adjudicating juvenile delinquency is equal in gravity to a criminal trial[66] because it imposes psychological, physical, and financial

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[59] *Id.* at 1789.

[60] 95 S. Ct. at 1788.

[61] *Id.* at 1789.

[62] *See* Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 297-300 (1972).

[63] 95 S. Ct. at 1790. One method of preventing envisioned burdens is through the use of two judges, one presiding over the waiver hearing and another over the adjudication of delinquency. This alleviates the problem of prejudice in the second proceeding. Such a bifurcated proceeding was recommended by the President's Commission with regard to the adjudication of delinquency and the disposition of the case. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 232-33 (1968).

[64] 95 S. Ct. at 1791.

[65] *Id.* at 1790.

[66] *Id.* at 1786.

burdens equal to those in an adult proceeding.[67] The Court did not go so far as to declare juvenile hearings are criminal proceedings per se, but merely held that there is no persuasive distinction between the two on the aspect of risk which invokes jeopardy.[68]

West Virginia has never recognized any relationship between criminal and juvenile proceedings with regard to jeopardy. The settled rule in West Virginia has been that the trial of a juvenile for delinquency is definitely not a criminal trial, but rather a proceeding designed to relieve the youth of a criminal trial.[69]

In the important case of *Brooks v. Boles*,[70] the West Virginia Supreme Court of Appeals, basing its decision on the non-criminal character of a juvenile trial, refused a contention of double jeopardy. In *Brooks*, the youth was not only adjudged delinquent, but had also been committed to the industrial school.[71] Upon his return to the juvenile court for misbehaving at the school, the youth was transferred to the criminal court and retried for the original offense.[72] His trial and conviction as an adult were deemed not to violate his fifth amendment protection on the ground that jeopardy had not attached in the first proceeding or even upon the final adjudication of delinquency and disposition of the case.[73] In *Breed*, not only did the United States Supreme Court declare juveniles have constitutional protection against double jeopardy, but also that jeopardy attaches when the juvenile court, as the trier of fact, begins to hear evidence.[74] Thus, West Virginia must now give recognition to the attachment of jeopardy in juvenile proceedings. The " 'civil' label of convenience"[75] which has characterized the juvenile court system must no longer be used to deny youths their constitutional guarantees.[76]

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[67] *See* Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 CRIME & DELINQUENCY 180 (1971).

[68] 95 S. Ct. at 1786.

[69] *E.g.*, State v. Skeen, 138 W. Va. 116, 75 S.E.2d 223 (1953); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192; Brooks v. Boles, 151 W. Va. 576, 153 S.E.2d 526 (1967).

[70] 151 W. Va. 576, 153 S.E.2d 526 (1967).

[71] *Id.* at 578, 153 S.E.2d at 528.

[72] *Id.*

[73] *Id.* at 582-84, 153 S.E.2d at 530-31.

[74] 95 S. Ct. at 1787.

[75] *In re* Gault, 387 U.S. 1, 50 (1967).

[76] 95 S. Ct. at 1785.

Ultimately, in light of the *Breed* decision, a portion of the West Virginia juvenile judicial code is unconstitutional. As one method of disposition in a juvenile proceeding in West Virginia, the juvenile judge may, "after the proceedings," waive jurisdiction.[77] Other statutory methods of disposition include commitment of the child to an industrial home or placing him under the supervision of a probation officer.[78] The "proceedings," therefore, must refer to the adjudication of delinquency. Though not always complied with in practice,[79] West Virginia requires that a youth be adjudged delinquent before he may be transferred to the adult court.[80]

West Virginia was cited in the footnotes of the *Breed* decision as one of "two jurisdictions [which] appear presently to require a finding of delinquency before the transfer of a juvenile to adult court."[81] The other state listed was Alabama;[82] thus, the Alabama

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[77] W. VA. CODE ANN. § 49-5-11 (Cum. Supp. 1975):

> With a view to the welfare and interest of the child and of the State, the court or judge may, after the proceedings, make any of the following dispositions:
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> . . .
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> . . .
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> (3) If the child be over sixteen years of age at the time of the commission of the offense the court may, if the proceedings originated as a criminal proceeding, enter an order showing its refusal to take jurisdiction as a juvenile proceeding and permit the child to be proceeded against in accordance with the laws of the State governing the commission of crimes or violation of municipal ordinances.

[78] W. VA. CODE ANN. § 49-5-11 (Cum. Supp. 1975).

[79] For example, see Crow v. Coiner, 323 F. Supp. 555 (N.D.W. Va. 1971). In *Crow*, the youth escaped from forestry camp and stole a truck. The juvenile court, upon determining Crow lacked funds to employ counsel and was over sixteen years old, appointed counsel, refused to accept jurisdiction, and transferred the case to the criminal court for further proceedings. Crow was indicted for grand larceny and referred back to the juvenile court, which again refused jurisdiction. *Id.* at 557. In the subsequent habeas corpus action, the federal district court found it apparent that the juvenile court's handling of the case complied with West Virginia law. *Id.* at 558. No discussion, however, was given the "after the proceedings" phrase in the West Virginia waiver statute. W. VA. CODE ANN. § 49-5-14 (1966), *as amended* W. VA. CODE ANN. § 49-5-11 (Cum. Supp. 1975).

[80] W. VA. CODE ANN. § 49-5-11 (Cum. Supp. 1975).

[81] 95 S. Ct. at 1789, n.16. The section to which the opinion referred was W. VA. CODE ANN. § 49-5-14 (1966). In 1975 the juvenile code was revised, and the section on dispositions was renumbered W. VA. CODE ANN. § 49-5-11 (Cum. Supp. 1975). As will be discussed later in this comment, the alterations have no effect on the impact of *Breed* in West Virginia.

[82] ALA. CODE tit. 13, § 364 (1958):

experience should be probative in interpreting West Virginia's statute.

The Supreme Court of Alabama has found transfer to be a two step consideration.[83] Initially, the court determines whether the child is delinquent, an action similar to the "proceedings" under the West Virginia statute.[84] Then, after "thorough investigation or exercise of its disciplinary measures,"[85] the juvenile court decides whether or not the child can be reformed. As in West Virginia,[86] if the court determines the youth will not benefit from treatment within the juvenile system,the judge waives jurisdiction and transfers the child to the criminal court.[87] Thus, although no West Virginia case can be found on point, the West Virginia statute, like the Alabama procedure, must be construed as requiring the waiver hearing to follow the adjudication of delinquency.

The 1975 revision of West Virginia's juvenile code has altered the waiver provision in form but not in substance. The thrust of the change was to delete any reference to a "juvenile court";[88] this was necessary to make the article conform with the 1974 Judicial Reorganization Amendment.[89] The new judicial amendment vests non-appellate judicial power in only the circuit courts and the magistrate courts. This restriction would have invalidated the juvenile jurisdiction previously granted to inferior tribunals.[90] Thus,

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If, at any time, after thorough investigation or exercise of its disciplinary measures, the juvenile court or judge thereof shall be convinced that a delinquent child, more than fourteen years of age, brought before it under the terms of this chapter cannot be made to lead a correct life and cannot be properly disciplined under the provisions of this chapter, the juvenile court or judge thereof shall have authority to transfer the care of such delinquent to the jurisdiction of any other court in the county having jurisdiction of the offense with which said child is charged, there to be proceeded against according to law.

[83] Seagroves v. State, 279 Ala. 621, 189 So. 2d 137 (1966).

[84] W. VA. CODE ANN. § 49-5-11 (Cum. Supp. 1975).

[85] ALA. CODE tit. 13, § 364 (1958).

[86] *See* Brooks v. Boles, 151 W. Va. 576, 153 S.E.2d 526 (1967).

[87] ALA. CODE tit. 13, § 364 (1958).

[88] The Judicial Reorganization Amendment was the reason for the revision of the juvenile court statutes given by Legislative Services of the West Virginia Legislature in a letter dated September 30, 1975.

[89] W. VA. CONST. art. 8, § 1. "The judicial power of the state shall be vested solely in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereinafter established by the legislature, and in the justices, judges and magistrates of such courts."

[90] W. VA. CODE ANN. § 49-5-1 (1966):

original jurisdiction for juvenile proceedings now lies only in the circuit court of the county.[91]

The Reorganization Amendment prompted the elimination of the language in the old juvenile disposition statute referring to a "court other than a juvenile court"[92] and providing for transfer to the "court of origin, or to any court in the county having juvenile jurisdiction."[93] The circuit court is now the sole court with jurisdiction over juveniles and, with the exception of the magistrate court, over criminal proceedings.

The Judicial Reorganization Amendment did not eliminate the juvenile justice system; its effect was to make juvenile proceedings one function of the circuit court. Thus, waiver is no longer the transfer of a youth from the juvenile court to a criminal court, but is simply the circuit court's refusal to take jurisdiction as a juvenile proceeding. The refusal cannot take place until "after the proceedings" which determine whether or not the youth is a delinquent.[94] The subsequent criminal proceedings held by the circuit court constitute double jeopardy, as would trial in a criminal court after actual transfer from a separate juvenile court, where the case was heard on its merits. Therefore, the revision of West Virginia's juvenile judicial code has no effect on the impact of the *Breed* decision upon the state's proceeding.

The procedures followed by the juvenile court in California and giving rise to the dispute in *Breed*, though not statutorily

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The circuit court of the county shall have original jurisdiction in proceedings brought by petition under this article. If, however, a court of record in addition to the circuit court has been or is subsequently created in a county, proceedings under this article shall be held in the additional court with right of appeal to the circuit court as follows:

(1) The domestic relations court, or if there is none,

(2) The court of common pleas or intermediate court having chancery jurisdiction, or if there is none,

(3) The criminal court.

Such a grant was in accord with W. VA. CONST. art. 8, § 1 (1880). "The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace."

[91] W. VA. CODE ANN. § 49-5-1 (Cum. Supp. 1975). "The circuit court of the county shall have original jurisdiction in proceedings brought by petition under this article."

[92] W. VA. CODE ANN. § 49-5-14(3) (1966).

[93] *Id.*

[94] W. VA. CODE ANN. § 49-5-11 (Cum. Supp. 1975).

required, were similar to those used in West Virginia.[95] After the allegations of delinquency were found to be true, the court, having found Jones "unfit for treatment as a juvenile," transferred him to an adult court.[96] Therefore, in light of the *Breed* decision, the juvenile waiver statute of West Virginia, when challenged, must be declared unconstitutional, violative of the constitutional prohibition against double jeopardy.

The West Virginia Legislature must once again revise the state's juvenile judicial code. The Uniform Juvenile Court Act and other model codes should be examined and the *Breed* decision followed in making the revision. The option of waiver to a criminal trial must be removed from the *post*-adjudication methods of disposition available to the court. A statute must be drafted providing that the decision to waive jurisdiction, if at all, must be made before the allegation of delinquency is heard on its merits.[97] The changes must be made if West Virginia is to afford every person his constitutional right to protection against double jeopardy.

*Taunja Willis Miller*

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[95] *Id.*

[96] 95 S. Ct. 1779 (1975).

[97] UNIFORM JUV. CT. ACT § 34(a) (1968).