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## Constitutional Law - Double Jeopardy - Juvenile Court Procedure - State Exceptions to Master's Proposals

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# RECENT DECISIONS

**CONSTITUTIONAL LAW—DOUBLE JEOPARDY—JUVENILE COURT PROCEDURE—STATE EXCEPTIONS TO MASTER'S PROPOSALS**—The Supreme Court of the United States has held that a Maryland juvenile rule that allows the state to file exceptions to a master's proposed findings and recommendations with a juvenile judge does not violate the double jeopardy clause even though the juvenile judge is free to accept, reject, or modify the proposals or to supplement the record, since the master's hearing and review by the judge constitutes a single proceeding.

*Swisher v. Brady*, 98 S. Ct. 2699 (1978).

In November of 1974, nine Maryland juveniles<sup>1</sup> filed a class action<sup>2</sup> in United States district court<sup>3</sup> under 42 U.S.C. § 1983,<sup>4</sup> seeking an injunction and declaratory relief against the State's Attorney for Baltimore City.<sup>5</sup> The complaint challenged the constitutionality of Rule 908e of the Maryland Rules of Procedure,<sup>6</sup> under the author-

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1. By the time of final argument before the district court, only one of the named plaintiffs still had an ongoing controversy against the state. The state had either withdrawn its exceptions against the other named plaintiffs or completed the adjudicatory process by securing a ruling from the juvenile court judge. *Swisher v. Brady*, 98 S. Ct. 2699, 2705 n.11 (1978).

2. The class action was filed pursuant to Rule 23 of the Federal Rules of Civil Procedure.

3. *Brady v. Swisher*, 436 F. Supp. 1361 (D. Md. 1977). Because an injunction was sought against the operation of certain Maryland statutes and rules upon the ground of their unconstitutionality, a three judge district court was convened pursuant to 28 U.S.C. § 2284 (1970) (amended 90 Stat. 1119 (1976)).

4. 42 U.S.C. § 1983 (1970) provides:

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

5. Also included as defendants were the operations chief of the State's Attorney's office for Baltimore City, the chief state attorney assigned to the Baltimore City juvenile court and the clerk of that court.

6. At the time the action was filed, the use of masters in juvenile proceedings was governed by Rule 908e, MD. ANN. CODE (1971), which provided in pertinent part:

1. Hearing Before Master.

The master shall hear such cases as may be assigned to him by the court and upon the conclusion of the hearing shall announce his findings and recommendations. All papers relating to the case together with the master's findings and recommendations shall then be transmitted to the judge.

ity of which the state had filed exceptions with the juvenile court to a master's findings that the charges against the juveniles were unsupported beyond a reasonable doubt.<sup>7</sup> In accordance with the rule, a juvenile court judge held *de novo* hearings on the exceptions and reversed the master's findings.<sup>8</sup> The juveniles alleged that this procedure violated the double jeopardy clause<sup>9</sup> made applicable to the states by the fourteenth amendment,<sup>10</sup> and sought to prevent the future operation of the rule.<sup>11</sup>

Before the class action was heard, the Maryland legislature en-

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2. Exceptions to Findings or Recommendations.

Exceptions by a petitioner after a delinquency hearing may only be taken by the State's Attorney.

3. Orders of Judge.

In the absence of exceptions, the master's findings and recommendations shall promptly be confirmed, modified or remanded by the judge. If within the specified time, exceptions are filed, the judge shall hear the entire matter or such specific matters as set forth in the exceptions *de novo*.

7. At the conclusion of the juvenile court trial, which is known in Maryland as the adjudicatory hearing, findings are made regarding the commission of a "delinquent act," which is an act that would be a crime if committed by an adult. If the juvenile court finds that a delinquent act was committed, a separate disposition hearing is held. Under Maryland law, a "delinquent child" is one who has committed a delinquent act and requires guidance, treatment or rehabilitation. See MD. CTS. & JUD. PROC. CODE ANN. §§ 3-801(k)(1), 3-820 (1977 Cum. Supp.).

8. Brief for Appellees at 19, *Swisher v. Brady*, 98 S. Ct. 2699 (1978) [hereinafter cited as Brief for Appellees]. Five of the juveniles were confined in juvenile detention centers, one was placed on probation and the other three faced potential confinement. At the same time that the class action was brought, the juveniles also sought federal habeas corpus relief. In *Aldridge v. Dean*, 395 F. Supp. 1161 (D. Md. 1975), habeas corpus relief was granted to the six petitioners already subjected to a *de novo* hearing. The petitions of the remaining three were dismissed without prejudice. *Id.* at 1173.

9. U.S. CONST. amend. V. The double jeopardy clause provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

10. *Swisher v. Brady*, 98 S. Ct. 2699, 2702 (1978). See *Benton v. Maryland*, 395 U.S. 784 (1969) (successive state prosecutions for the same offense barred by double jeopardy clause).

11. 98 S. Ct. 2703. Prior to seeking federal relief, the juveniles exhausted their appeals in the Maryland court system. In the case of juvenile defendant William Anderson, the juvenile court judge granted a motion to dismiss the notice of state's exceptions, concluding that a *de novo* hearing would violate his right to be free from double jeopardy. The judge granted the same relief to similarly situated juveniles. Several of those juveniles initiated the § 1983 action. *Id.*

The court of special appeals reversed the decision of the juvenile court judge. In *re Anderson*, 20 Md. App. 31, 315 A.2d 540 (1974). The court held that jeopardy attached at the proceeding before the master and terminated only upon the adjudication by the juvenile court judge. The juveniles appealed and the court of appeals affirmed on the basis that the defendants were not placed in jeopardy at the master's hearing since the master did not have the power to enter a final order. In *re Anderson*, 272 Md. 85, 321 A.2d 516 (1974).

acted a statute<sup>12</sup> which, for the first time, provided a legislative basis for the use of masters in juvenile proceedings.<sup>13</sup> The statute altered the existing procedure by providing that the juvenile, as well as the state, could take exceptions to the master's findings and explicitly stated that the master's proposals and recommendations do not constitute orders or final action of the court. The statute provided for a *de novo* hearing or a hearing on the record by the court<sup>14</sup> at the choice of the excepting party.

In *Aldridge v. Dean*,<sup>15</sup> a habeas corpus proceeding in which six of the *Swisher* plaintiffs were involved, the single-judge district court held that Rule 908e's provision for a *de novo* hearing on the state's exceptions to the master's findings violated the double jeopardy clause.<sup>16</sup> In response to the enactment of the statute and the *Aldridge* decision, the Maryland Court of Appeals promulgated Rule 911<sup>17</sup> which modified the role of masters in juvenile proceed-

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12. MD. CTS. & JUD. PROC. CODE ANN. § 3-813 (1977 Cum. Supp.).

13. 98 S. Ct. at 2704.

14. *Id.* § 3-813(b) required the master to record the proceeding and make his recommendations and proposals in writing to the juvenile court.

15. 395 F. Supp. 1161 (D. Md. 1975). See note 8 *supra*.

16. 98 S. Ct. at 2704.

17. Rule 911, MD. ANN. CODE (1977) provides:

a. *Authority*

1. Detention or Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters.

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. *Report of the Court.*

Within ten days following the conclusion of the disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers).

c. *Review by the Court if Exceptions Filed.*

Any party may file exceptions to the master's proposed findings, conclusions, recommendations and proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).

Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions.

ings.<sup>18</sup> The purpose of Rule 911 is to emphasize that the master's findings and recommendations are mere proposals and non-final in nature.<sup>19</sup> Under the rule, the state no longer has the power to secure a *de novo* hearing before the judge. It may still file exceptions, but the judge is limited to a consideration of the master's record and any additional evidence requested by the prosecution to which the juvenile agrees. The judge can also supplement the record for his own review with additional evidence to which there is no objection by either party.<sup>20</sup>

After the effective date of Rule 911, the juveniles amended their complaint to bring the new rule within its scope.<sup>21</sup> The district court certified the proposed class<sup>22</sup> to consist of all juveniles involved in the proceedings where the state filed exceptions to a master's proposed finding of non-delinquency.<sup>23</sup> The district court held that a

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An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

*d. Review by the Court in Absence of Exceptions.*

In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearings, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions.

18. 98 S. Ct. at 2704.

19. See Rule 911b set forth at note 17 *supra*.

20. 98 S. Ct. at 2704. See Rule 911c at note 17 *supra*.

21. 98 S. Ct. at 2705. The district court concluded that under Maryland law, Rule 911 superseded § 3-813 which was the earlier enactment of the state legislature governing juvenile proceedings. *Brady v. Swisher*, 436 F. Supp. 1361, 1365 (D. Md. 1977). Thus, only Rule 911 was involved in the constitutional challenge before the district court in the class action and in the Supreme Court. 98 S. Ct. at 2707 n.13.

22. Fed. R. Civ. P. 23(b)(2) provides that an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . ."

23. After final argument, but before the district court announced its decision, the state withdrew its exceptions to the master's proposals regarding the single remaining plaintiff with a live controversy. Thus, there was a mootness question involved with the class action. The district court nevertheless certified the class and the Supreme Court concluded that the state's withdrawal of the exceptions did not deprive the district court of the power to do so. 98 S. Ct. at 2705 n.11. See *Sosna v. Iowa*, 419 U.S. 393 (1975).

juvenile is placed in jeopardy at the master's hearing since a potential consequence includes the loss of liberty for several years.<sup>24</sup> In the district court's view, Rule 911 was unconstitutional because it granted the state more than one opportunity to convince a trier of fact of the juvenile's guilt. Thus, the juvenile court judge's review of the record constituted a second proceeding at which jeopardy attached.<sup>25</sup> The court rejected the state's contention that jeopardy continued from the master's hearing until a final adjudication by a juvenile court judge.<sup>26</sup> Accordingly, the court enjoined state officials from thereafter taking exceptions to either a master's proposed finding of non-delinquency or his proposed disposition.<sup>27</sup>

The Supreme Court noted probable jurisdiction<sup>28</sup> solely to determine whether the double jeopardy clause prohibits state officials, acting in accordance with Rule 911, from taking exceptions to a master's findings. In a 6-3 decision, the Court reversed.<sup>29</sup> Speaking through Chief Justice Burger, the Court initially addressed the threshold question of whether jeopardy attached at the hearing before the master.<sup>30</sup> In concluding that jeopardy did attach, the court relied on *Breed v. Jones*<sup>31</sup> in which it decided that a juvenile was exposed to double jeopardy when subjected to a proceeding in an adult court<sup>32</sup> following an adjudicatory hearing in juvenile court based on the same delinquency offense.<sup>33</sup> But the Court also distin-

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24. 436 F. Supp. at 1365-66. The district court based its decision on *Breed v. Jones*, 421 U.S. 519 (1975). For a discussion of *Breed* see notes 53-65 and accompanying text *infra*.

25. 436 F. Supp. at 1368-69.

26. *Id.* In reaching this conclusion, the district court relied primarily on *United States v. Jenkins*, 420 U.S. 358 (1975). For a discussion of *Jenkins* see note 41 and accompanying text *infra*.

27. 436 F. Supp. at 1370.

28. *Swisher v. Brady*, 434 U.S. 963 (1977).

29. *Swisher v. Brady*, 98 S. Ct. 2699, 2707-08 (1978). Justices Marshall, Powell, and Brennan dissented.

30. *Id.* at 2706 n.12. The dissenters agreed with the majority on this issue. See note 45 and accompanying text *infra*.

31. 421 U.S. 519 (1975). *Breed* extended double jeopardy clause protection to defendants in juvenile court proceedings. The Court decided that a juvenile was put in jeopardy "at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." *Id.* at 529.

32. The case in the adult criminal court was submitted to that court on the transcript of the preliminary hearing. *Id.* at 525. Thus, it was not the rigors of a jury trial that caused the adult proceeding to place the juvenile in jeopardy for a second time.

33. 98 S. Ct. at 2708. The majority stated that for the purpose of determining when jeopardy attached, a Rule 911 proceeding was not materially different from the California

guished *Breed* factually by holding that under Maryland Rule 911, a juvenile is only subjected to a single proceeding which begins at the master's hearing and terminates with the adjudication by a judge.<sup>34</sup>

The *Swisher* majority emphasized the non-final nature of the master's findings and recommendations. Regardless of the master's proposals, the judge alone is empowered to enter a final order. It was this factor, according to the Court, that distinguished the Maryland juvenile procedure from other schemes.<sup>35</sup> The Court also rejected the juveniles' argument that the prosecution was given the opportunity to convince two factfinders of the merits of the case against them since Maryland conferred the powers of both factfinder and adjudicator on the juvenile court judge.<sup>36</sup> Moreover, in addition to vesting adjudicatory power solely in the judge, the Court noted that Rule 911 did not provide the prosecution the opportunity to muster additional evidence for a second trial. The record of the master's hearing is closed and no new evidence can be received by the judge unless the juvenile consents.<sup>37</sup>

The juveniles, relying on *United States v. Jenkins*,<sup>38</sup> also contended that all proceedings on factual issues should be barred once there has been a ruling by the court on factual questions in a jeopardy producing proceeding.<sup>39</sup> The majority emphasized, however, that *Jenkins* was modified by the subsequent decision in *United*

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juvenile proceeding reviewed in *Breed*, which involved the use of a referee or master. *Id.* at 2706 n.12.

34. *Id.* at 2708.

35. *Id.* The *Swisher* Court distinguished *United States v. Jenkins*, 420 U.S. 358 (1975), since it involved appellate review of a final judgment of a trial court fully empowered to enter the judgment. 98 S. Ct. at 2708. The Court also distinguished on the same grounds *Kepner v. United States*, 195 U.S. 100 (1904). There, a Phillipine trial judge acquitted the defendant and the Phillipine Supreme Court reversed on the government's appeal. The United States Supreme Court rejected the theory that jeopardy continued until the final decision of the Phillipine Supreme Court. 98 S. Ct. at 2707 n.15.

36. 98 S. Ct. at 2707.

37. *Id.* See notes 16-19 and accompanying text *supra*.

38. 420 U.S. 358 (1975). In *Jenkins*, the district court dismissed the indictment and discharged the defendant on his motion to dismiss following a bench trial. The government appealed, and the Supreme Court concluded that even though it was unclear whether the dismissal was based on a resolution of the factual issues against the government, the double jeopardy clause barred the appeal since "further proceedings of some sort devoted to the resolution of factual issues would have been required." Even supplemental findings without the additional evidence would have violated the defendant's right. *Id.* at 369-70.

39. 98 S. Ct. at 2708.

*States v. Scott*.<sup>40</sup> Burger explained that in *Scott*, the Court decided that not all proceedings that require supplemental findings are barred by the double jeopardy clause.<sup>41</sup> The prohibition against further factfinding proceedings operates only when a previous trial has ended in acquittal, in a conviction that was reversed on appeal because of insufficient evidence,<sup>42</sup> or in a mistrial ruling that was not prompted by manifest necessity.<sup>43</sup> Since a juvenile court judge's hearing does not fall within any of these prescribed exceptions, his review does not violate the double jeopardy clause.<sup>44</sup>

Justice Marshall, speaking for the dissenters, agreed with the majority that jeopardy attached at the juvenile's hearing before the master.<sup>45</sup> He maintained however, that Rule 911 authorizes the master to perform a factfinding role since it does not require the judge to make an independent review of the record.<sup>46</sup> Therefore, even if the master's findings in favor of the juvenile are not regarded as an acquittal, a judge's factfinding review is precluded since the double jeopardy clause also protects a defendant's right to be judged by a particular tribunal.<sup>47</sup> Thus the Maryland scheme, in Marshall's

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40. 437 U.S. 82 (1978). *Scott* was decided on June 14, 1978. The Court's decision in *Swisher* was announced on June 28, 1978.

41. 98 S. Ct. at 2708. In *Scott*, the defendant's motion to dismiss the federal drug charges against him was granted on the grounds of pre-indictment delay before the jury reached a verdict. 437 U.S. at 84. The *Scott* Court said of *Jenkins*: "It placed unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury . . . so as to include those cases where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence. We have therefore decided to overrule *Jenkins* . . ." *Id.* at 87 (emphasis added). See notes 77 and 78 and accompanying text *infra*.

42. 98 S. Ct. at 2708. See *Burks v. United States*, 437 U.S. 1 (1978) (appellate court reversal of conviction based on insufficiency of evidence bars retrial). The *Swisher* Court also stated that if a conviction is not reversed on appeal, further proceedings on factual questions are also barred. See *Brown v. Ohio*, 432 U.S. 161 (1977) (double jeopardy clause protects against a second prosecution for the same offense after conviction, and from attempts to secure additional punishment).

43. 98 S. Ct. at 2708. See *Arizona v. Washington*, 434 U.S. 497 (1978) (retrial not prohibited if mistrial ruling terminating previous trial was required by manifest necessity).

44. 98 S. Ct. at 2708.

45. 98 S. Ct. 2699, 2709 (Marshall, J., dissenting).

46. The dissent noted that under the provisions of Rule 911b, the master was not merely used to develop a record for judicial review, since he was directed to make a written report of his proposed findings for transmittal to the judge. Also, Rule 911d provides that the juvenile court judge may base his order on the master's findings without reviewing the record. *Id.* at 2711 (Marshall, J., dissenting). See note 17 *supra*.

47. 98 S. Ct. at 2710 (Marshall, J., dissenting). See *Wade v. Hunter*, 336 U.S. 684 (1949) (absent manifest necessity for terminating the first proceeding, double jeopardy clause protects defendant's right to go to judgment before a particular tribunal).



view, circumvented the double jeopardy prohibition against affording the state the opportunity to convince two factfinders of the juvenile's guilt by merely designating the judge as the only factfinder and decisionmaker.<sup>48</sup>

The second premise upon which Justice Marshall based his dissent was the due process clause of the fourteenth amendment. He contended that the Maryland system of splitting the hearing of evidence between the master and the judge deprives the juvenile of the master's perception of the credibility of the testimony, and ignores the importance of the factfinders appraisal of the facts.<sup>49</sup> Thus, he maintained, the due process clause was violated by the Maryland procedure.<sup>50</sup> Marshall concluded by stressing that the majority had not held the Maryland system constitutionally valid in all respects in *Swisher*, but only that it did not offend the constitutional proscription against double jeopardy.<sup>51</sup>

For more than a decade, the Supreme Court has applied to the juvenile court system constitutional guarantees associated with traditional criminal prosecutions.<sup>52</sup> Most recently, in *Breed v. Jones*,<sup>53</sup> the Court extended double jeopardy protection to defendants in juvenile court proceedings. In *Breed*, the court held that jeopardy

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48. 98 S. Ct. at 2713 (Marshall, J., dissenting).

49. *Wingo v. Wedding*, 418 U.S. 461, 474 (1974) (procedures by which the facts of the case are determined are as important as the substantive rule of law to be applied).

50. 98 S. Ct. at 2715 (Marshall, J., dissenting).

51. *Id.* at 2714 (Marshall, J., dissenting). The majority also alluded to an additional constitutional question involved with Rule 911 when discussing the judge's power to disregard the master's proposals. *Id.* at 2707. Chief Justice Burger noted that although it is not usual in a criminal proceeding for evidence to be presented in the absence of the one authorized to determine guilt, any objections to such a system do not arise from the guarantees of the double jeopardy clause. *Id.* at 2707 n.14.

52. The Court extended the due process requirement of fundamental fairness to juvenile defendants in *In re Gault*, 387 U.S. 1 (1967). The Court held that the juvenile and his parents must have timely written notice of the hearing and the facts upon which the charge is based; that the juvenile has the right to be represented by counsel; that he and his parents must be notified of the right and also that if they could not afford an attorney, one would be appointed; that a juvenile has the right to remain silent at a delinquency hearing; and absent a valid confession, a juvenile has the right to confront and cross-examine the witnesses against him. *Id.* at 55-57.

The beyond a reasonable doubt standard of proof was held to be necessary in juvenile court proceedings in *In re Winship*, 397 U.S. 358 (1970). *But see* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (Court decided that trial by jury is not constitutionally required in the adjudicatory phase of state juvenile court delinquency proceeding).

53. 421 U.S. 519 (1975) (jeopardy attaches at adjudicatory hearing in juvenile court, and therefore defendant is placed in second jeopardy in criminal court proceeding for same offense).

attached at the adjudicatory hearing<sup>54</sup> in juvenile court. Since the purpose of the hearing was to determine whether the defendant had committed acts that violated a criminal law, and the potential consequences of the proceeding included the loss of liberty for many years, the risk inherent in the adjudicatory hearing was indistinguishable from that which is associated with traditional criminal prosecutions.<sup>55</sup> Juvenile proceedings and criminal proceedings were each found to engender the same elements of anxiety, insecurity, and heavy personal strain against which the double jeopardy clause is designed to protect.<sup>56</sup> The *Breed* Court then concluded that prosecution of the juvenile defendant in criminal court for the same offense for which he had been tried in juvenile court violated the double jeopardy clause. Even though the proceeding in the criminal court was based on the record of a preliminary hearing,<sup>57</sup> the Court found that the juvenile was twice put to the task of marshalling his resources against those of the state, and twice subjected to the heavy personal strain which accompanies a criminal prosecution.<sup>58</sup>

Because double jeopardy protection has been extended only recently to juvenile defendants, *Breed v. Jones* seemed to be the sole controlling precedent before the Court and the background against which *Swisher* must be decided. However, the majority in *Swisher* concluded that unlike the system in *Breed*, which exposed the juvenile to second jeopardy upon transfer to adult criminal court, the Maryland scheme did not subject the juveniles to more than a single proceeding.<sup>59</sup> The *Swisher* majority's characterization of the Rule 911 system as a single proceeding was based primarily on the master's inability to enter a final order. However, the juvenile court proceeding in *Breed v. Jones* was conducted by a referee, which is the California equivalent of Maryland's master.<sup>60</sup> A careful analysis of the roles of the sub-judicial officers in the two respective states indicates that they do not differ in any substantial way that justifies the disparate treatment afforded by the Court.

In the juvenile court structure before the *Breed* Court, the referee

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54. *Id.* at 529.

55. *Id.* at 529-30.

56. *Id.* at 530-31.

57. *Id.* at 525. See note 32 *supra*.

58. *Id.* at 533.

59. See notes 33-35 and accompanying text *supra*.

60. *Swisher v. Brady*, 98 S. Ct. at 2706 n.12. The proceedings in *Breed* commenced in the Superior Court of California, County of Los Angeles, Juvenile Court. 421 U.S. at 521.

was a subordinate judicial officer whose power to enter a final order was narrowly circumscribed. Under California law,<sup>61</sup> the only express situations in which a referee could issue a final order arose when the juvenile was found not guilty or the referee recommended probation.<sup>62</sup> In *Breed*, the defendant was found to have committed the acts alleged in the petition against him.<sup>63</sup> At the disposition hearing, however, the defendant was declared unfit for treatment as a juvenile and was therefore transferred for prosecution as an adult on the order of the referee.<sup>64</sup> Based upon California statutory and case law,<sup>65</sup> the presiding referee did not have the authority to enter a final order in either of these stages of the juvenile court proceeding. *Breed* and *Swisher* were therefore factually indistinguishable on the grounds of the finality of the initial factfinding proceeding.

The *Breed* Court did not discuss the role of the referee or his capacity to enter a final order.<sup>66</sup> Instead, the Court focused on the substance of the proceedings within the juvenile court system.<sup>67</sup> Chief Justice Burger, in delivering the unanimous *Breed* decision, admonished that the juvenile process must be candidly appraised and that in assessing the constitutionality of state juvenile practices, the courts must avoid analyzing them in terms of labels of convenience that have traditionally been used to characterize juvenile proceedings.<sup>68</sup> In light of these considerations, the *Swisher* decision seems clearly untenable due to the similar adjudicatory powers of the presiding officers at the juvenile proceedings. In addition, the *Swisher* Court's emphasis on the mechanical operation of the Maryland juvenile court system appears inconsistent with the concern for substance that the Supreme Court articulated in assessing the juvenile court scheme in *Breed*.<sup>69</sup>

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61. CAL. WELF. & INST. CODE § 250 (West 1977).

62. For a comparison of the statutory provisions and court interpretations of Maryland and California juvenile laws, see Brief for Appellees, *supra* note 8, at 50-51.

63. 421 U.S. at 522. The petition alleged that Jones had committed acts which would have constituted the crime of armed robbery if committed by an adult. *Id.* at 521.

64. *Id.* at 524.

65. See *Bradley v. People*, 258 Cal. App. 2d 253, 65 Cal. Rptr. 570 (1968) (referee's order conditional and subject to review and approval by judge).

66. In discussing the findings and orders issued as a result of the juvenile proceeding, the *Breed* Court spoke of the actions of the "juvenile court" or the "court," which was consistent with the language of the California statute. See, e.g., 421 U.S. at 521-22.

67. See text accompanying note 55 *supra*.

68. 421 U.S. at 529.

69. The *Breed* Court rejected the state's contention that jeopardy continued from the

In both *Swisher* and *Breed*, the sub-judicial officers lacked the authority to enter a final order prior to the stage in the proceedings at which the juvenile's case was submitted to a judge. Therefore, if the *Swisher* decision is to be distinguished from *Breed*, the distinction must be based on the difference in the procedures following the adjudicatory hearings. In *Breed*, the supplemental factfinding procedure that violated the double jeopardy clause was the submission of the preliminary hearing record to the adult criminal court.<sup>70</sup> In *Swisher*, Rule 911 allowed a review of the master's record by the juvenile court judge or the production of new evidence to which the juvenile did not object.<sup>71</sup> In each situation, a judge with similar powers makes his decision on the factual issues that had previously been determined by another factfinder. But in ruling that the supplemental factfinding procedure permitted by the Maryland scheme did not violate the double jeopardy clause, the *Swisher* Court inexplicably made no attempt to distinguish the proceeding in criminal court that took place in *Breed*.<sup>72</sup> Rather, the Court relied on its decision in *United States v. Scott*,<sup>73</sup> and concluded that the supplemental factfinding proceedings under Rule 911 were not barred by the double jeopardy clause.<sup>74</sup>

In emphasizing the *Scott* decision, the Supreme court rejected its decision in *United States v. Jenkins*,<sup>75</sup> which was highly favorable to the position of the *Swisher* juveniles. In *Jenkins*, the Court held that when a defendant is discharged after jeopardy has attached, further proceedings devoted to resolving factual issues are violative of the double jeopardy clause.<sup>76</sup> A close analysis of the *Scott* decision reveals that it apparently merely narrowed the *Jenkins* rule, and consequently Maryland Rule 911 should have been held violative of

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juvenile court proceeding to adult court and that therefore the defendant was subjected to only a single proceeding. The fact that the proceedings had not "run their full course" within the contemplation of the California statute at the time of the transfer did not satisfactorily explain why the juvenile should be deprived of constitutional protection against a second trial. 421 U.S. at 534.

70. 421 U.S. at 525. See note 32 *supra*.

71. See the text of Rules 911c and 911d set forth at note 17 *supra*.

72. 98 S. Ct. at 2708. The *Swisher* Court decided that since the master did not have the authority to enter a final order, the original jeopardy did not terminate. Thus, no second jeopardy could attach before the juvenile court judge.

73. 437 U.S. 82 (1978). See notes 40-44 and accompanying text *supra*.

74. 98 S. Ct. at 2708.

75. 420 U.S. 358 (1975). See note 38 and accompanying text *supra*.

76. *Id.* at 370.

the protection against double jeopardy.

*Scott* involved an adult criminal trial in which the defendant sought to terminate the proceedings against him prior to the resolution of the factual questions going to the offense with which he was charged.<sup>77</sup> The sole question before the *Scott* Court was the applicability of the double jeopardy clause to government appeals from orders granting *defense* motions to terminate the trial before verdict.<sup>78</sup> In deciding that such appeals were not prohibited, the *Scott* Court expressly overruled *Jenkins*.<sup>79</sup> However, *Scott* left intact the double jeopardy bar against further prosecution in those situations where the defendant was in no way responsible for having the charges against him dismissed.<sup>80</sup> Thus, the *Scott* decision was not directly applicable to the question before the *Swisher* Court, since the exceptions to the master's proposed findings were taken by the state after the close of the evidence and a decision by the master on its merits. It therefore appears that the majority's reliance upon its decision in *Scott* was misplaced.

In discussing *Scott*, the *Swisher* Court noted that a previous trial ending in acquittal precludes supplemental findings.<sup>81</sup> Based on the reasoning in *Breed v. Jones*, the Maryland master's decision in favor of the juvenile defendants should have been given the effect of an acquittal. Thus, under traditional double jeopardy standards, the state should have been precluded from taking exceptions to the master's decision.

In practical terms, the *Swisher* decision enables a prosecutor in juvenile court proceedings to buttress his case with new evidence if the master decides that the facts do not support a finding of delinquency. The fact that the juvenile can prevent additional evidence

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77. 437 U.S. at 94. In *Scott*, the defendant moved to dismiss two counts of an indictment for federal drug charges on the grounds that his defense had been prejudiced by pre-indictment delay.

78. *Id.* at 84. The Supreme Court was determining the effect of 18 U.S.C. § 3731 (1976), which allows the United States to appeal from a district court's dismissal of an indictment except where the double jeopardy clause prohibits further prosecution.

79. See note 41 *supra*.

80. When a trial court grants the prosecution's motion for a mistrial, a second prosecution is not barred if the government can demonstrate that the mistrial was precipitated by "manifest necessity." The purpose of the manifest necessity rule is to insure that the defendant's right to have his trial concluded by a particular tribunal is not lightly subordinated to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

81. 98 S. Ct. at 2708. See text accompanying note 42 *supra*.

from being presented does not totally remedy the double jeopardy implications. The juvenile's case can be subtly prejudiced because the juvenile court judge will know that the state has additional evidence and that the juvenile refused to allow its presentation. In addition, the prosecution is afforded the opportunity to convince a second factfinder of the juvenile's guilt. The presence of such unbridled power that enables a state to attain a guilty verdict is precisely the abuse that the double jeopardy clause was intended to foreclose.<sup>82</sup>

Finally, the juvenile court scheme upheld by the *Swisher* Court can foster and intensify a negative response by the juvenile toward the court's rehabilitation efforts.<sup>83</sup> The Supreme Court's past juvenile justice decisions stressed that the underlying purpose for creating a separate system for juvenile offenders was to promote rehabilitative possibilities.<sup>84</sup> Should conviction result because the judge did not agree with the master's conclusion on the facts, the juvenile may resist all treatment efforts as a result of his belief that he has been unfairly persecuted instead of justly prosecuted.<sup>85</sup>

*Swisher v. Brady* validated juvenile justice proceedings in which the state can obtain reversal or modification of a master's conclusions upon a review of the record and the receipt of additional unobjectionable evidence by a juvenile court judge.<sup>86</sup> Since the *Swisher* Court did not address the due process question,<sup>87</sup> that issue may be raised in the future, thus providing the opportunity to review the Maryland scheme in terms of the judge's power to make a decision based on a cold record. Nevertheless, the *Swisher* decision has curtailed the applicability of double jeopardy protection to juvenile defendants. The state can conduct factfinding on two levels within the juvenile justice system by characterizing the first factfinder's determination as a mere proposal. A system that would

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82. J. SIGLER, DOUBLE JEOPARDY 155 (1964).

83. Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. L. Rev. 1, 19 (1974) [hereinafter cited as *The Effect of the Double Jeopardy Clause*].

84. See, e.g., *In re Gault*, 387 U.S. 1, 26-27 (1967); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550-51 (1971). See also note 52 *supra*.

85. See *The Effect of the Double Jeopardy Clause*, *supra* note 83, at 19. See also Brief for Appellees, *supra* note 8, at 93-96.

86. In addition to Maryland, thirty-three states utilize sub-judicial officers in juvenile court proceedings. Because of variations in procedures, only seventeen of those states present the same double jeopardy issue raised in *Swisher*. Brief for National Juvenile Law Center as Amicus Curiae at 19-22, *Swisher v. Brady*, 98 S. Ct. 2699 (1978).

87. See notes 48-51 and accompanying text *supra*.

have been constitutionally invalid in a traditional criminal prosecution because of supplemental factfinding was upheld by the *Swisher* Court to meet the exigencies of the heavy juvenile caseload.<sup>88</sup> The Supreme Court's extension of double jeopardy protection to defendants in the juvenile justice system and the Court's application of the double jeopardy principle in traditional criminal prosecutions should have mandated a contrary result in *Swisher*.

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88. 98 S. Ct. at 2705.