Florida Law Review

Volume 26 | Issue 2 Article 8

January 1974

Juvenile Court: Due Process, Double Jeopardy, and the Florida Waiver Procedures

Michael A. Fogarty

to activate the "gotcha" provisions of section 357(c). On the contrary, by allowing an incorporator to transfer rather than liquidate payables, the *Bongiovanni* court has upheld the purpose of section 351—to permit tax-free incorporations.

EDWARD O. SAVITZ

JUVENILE COURT: DUE PROCESS, DOUBLE JEOPARDY, AND THE FLORIDA WAIVER PROCEDURES

The history of American freedom is, in no small measure, the history of procedure.[1]

The independent juvenile court system is the modern answer to the ancient problem of disposition of juveniles accused of criminal violations.[2] Although the doctrine of *parens patriae* traditionally justified equity jurisdiction over neglected or dependent children,[3] common law criminal tribunals dealt with offenders over seven years of age as adults, and imprisoned or hanged juvenile law violators under sentence of law.[4] The harshness of this style of prosecution, together with increased acceptance of concepts of rehabilitative treatment,[5] led reformers to include the criminally delinquent child within the informal processes of the juvenile courts.

The transition from criminal prosecution of juvenile offenders to treatment within the juvenile court system, however, has never been completed. In Florida, for example, tension and overlap between the juvenile and criminal systems exist through statutory provisions permitting waiver of jurisdiction over felony offenders by the juvenile courts[6] and the transfer of juveniles charged with serious felonies to criminal authorities by grand jury indictment.[7]

---

1. Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

2. *See generally* Pound, *The Juvenile Court and the Law*, 10 CRIME & DELIN. 490, 493 (1964).

3. Under this doctrine the state has jurisdiction as the ultimate protector of any of its citizens found to be in need. *See* Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. FAMILY L. 151, 152-53 (1961).

4. "So it was that a twelve-year-old boy named James Guild was tried . . . . A jury found him guilty of murder, and he was sentenced to death by hanging. . . . It was all very Constitutional." *In re* Gault, 387 U.S. 1, 80 (1967) (Harlan, J., dissenting). *See also* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

5. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *The Administration of Juvenile Justice*, in JUVENILE DELINQUENCY AND YOUTH CRIME 1-9 (1967), *reprinted in* SOCIETY, DELINQUENCY AND DELINQUENT BEHAVIOR 345, 347 (Voss ed. 1970) [hereinafter cited as PRESIDENT'S COMM'N].

6. Fla. Laws 1973, ch. 231, §3, *amending* FLA. STAT. §39.02(6)(a); FLA. R. JUV. P. §8.100(c).

7. Fla. Laws 1973, ch. 231, §3, *amending* FLA. STAT. §39.02(6)(c).

Moreover, the informal adjudication system of the juvenile court has recently been the subject of intense criticism due to failure of its rehabilitative techniques[8] and the inequalities of its summary procedures.[9] The Supreme Court has attempted to rectify procedural inequities of the juvenile system by applying procedural safeguards through the due process clause,[10] while seeking to retain the benefits of the informal, non-prosecutorial system. Application of due process has resulted in the inclusion of certain criminal standards into the adjudicatory phase of the juvenile court process.[11] One standard not yet specifically required by Supreme Court decision is the fifth amendment protection from double jeopardy.[12] This commentary will attempt to show that application of double jeopardy to the juvenile adjudication process can benefit the juvenile system by more fully implementing concepts of fundamental fairness to the juvenile accused and by removing much of the tension and confusion between juvenile and criminal authorities regarding adjudication and disposition of juveniles accused of felony violations.

DUE PROCESS: THE RELEVANT TEST

Criminal procedural safeguards were most fully extended to juvenile court proceedings in the Supreme Court decision of *In re Gault*.[13] Stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[14] the *Gault* majority applied certain safeguards to the adjudicatory phase of delinquency proceedings by holding that the juvenile court process

---

8. Critics have stressed the juvenile court system's practical failure to implement its rehabilitative theory, as well as a tendency toward use of the juvenile process for condemnation, deterrence, and incapacitation rather than for rehabilitation. *See* PRESIDENT'S COMM'N, *supra* note 5, at 355-57. Despite its criticisms, however, the Commission recognized that return to full criminal treatment for juvenile offenders was not a valid alternative. *Id.*

9. *See, e.g., In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 544 (1966). *See also* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7 (1965).

10. *See* Neigher, *The* Gault *Decision: Due Process and the Juvenile Courts*, 31 FED. PROB. 8 (1967). Rather than revert to criminal prosecution, the due process applications seeks to "insure that the juvenile court will operate in an atmosphere which is orderly enough to impress the juvenile with the gravity of the situation . . . and at the same time informal enough to permit the benefits of the juvenile system to operate." *In re* Terry, 438 Pa. 339, 347, 265 A.2d 350, 354 (1970).

11. Florida juvenile proceedings consist of four distinct hearing phases: detention (concerning pre-adjudication custody); waiver (concerning possible transfer to criminal jurisdiction); adjudication (concerning proof of delinquency); and disposition (concerning commitment). FLA. R. JUV. P. §8.110(a)-(d).

12. This safeguard seeks to protect an individual from double punishment for a single offense, *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873), and from the rigors of excessive prosecution, Green v. United States, 355 U.S. 184 (1957).

13. 387 U.S. 1 (1967). The *Gault* decision was foreshadowed by Kent v. United States, 383 U.S. 541 (1966), which relied on due process considerations in interpreting a Washington, D.C. statute to require a hearing prior to a juvenile judge's waiver decision.

14. 387 U.S. at 13.

must meet the standards of due process.[15] In reaching its decision the Court refused to apply criminal standards in toto, instead weighing the nature and purpose of each protection against possible detrimental effects to the orderly functioning of the juvenile system.[16] Though the *Gault* Court specifically limited its holding to particular phases of the adjudicatory process,[17] the decision was heralded as the first step toward complete application of criminal procedures to the juvenile court system.[18] The Court, however, failed to meet the expectations following *Gault* by refusing in *McKeiver v. Pennsylvania*[19] to apply the right to trial by jury to juvenile adjudication proceedings.

The *McKeiver* court interpreted *Gault* as emphasizing the validity of the adjudicatory factfinding process,[20] and found the jury not to be a "necessary component of accurate factfinding."[21] The Court further expressed fear that:[22]

> [T]he jury trial . . . will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.

Under the due process standard outlined by *McKeiver,* determination of the applicability of a procedural safeguard to the juvenile process must take into consideration the fundamental nature of the protection,[23] the potential harm to the operation of the juvenile court,[24] and the effect of the protection on the accuracy of the juvenile factfinding process.[25]

The double jeopardy safeguard may be applied to the juvenile court system under the tests enunciated in *McKeiver.*[26] The right to protection from successive prosecutions is fundamental,[27] and though some reduction in flex-

---

15. *Id.* at 30-31. The *Gault* decision specifically applied right to counsel, right to confrontation and cross-examination, right to notice of charges, and the privilege against self-incrimination.

16. *Id.* at 31-59.

17. *Id.* at 13.

18. *See, e.g.,* George, *Juvenile Delinquency Proceedings: The Due Process Model,* 40 U. COLO. L. REV. 315 (1968); Milton, *Post-*Gault, *A New Prospectus for the Juvenile Court,* 16 N.Y.L.F. 57 (1970); *cf.* Neigher, *supra* note 10.

19. 403 U.S. 528 (1971).

20. *Id.* at 543. *See also* Comment, *Constitutional Law: The Jury and the Juvenile Court,* 24 U. FLA. L. REV. 385 (1972).

21. 403 U.S. at 543.

22. *Id.* at 548. The *McKeiver* Court also was persuaded by the fact that few states apply jury trials to juvenile proceedings.

23. *Id.* at 540-41.

24. *Id.* at 545.

25. *Id.* at 543.

26. Though double jeopardy protection appears to meet all criteria enunciated in *McKeiver,* it has also been argued that the *McKeiver* plurality's emphasis on the juvenile court factfinding process was an overly narrow construction of *Gault,* and that the applicable standard should be a balance between the benefit of a particular safeguard and potential disruption of juvenile court functions through its application. *See* Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 WM. & MARY L. REV. 266 (1972).

27. Double jeopardy protection was held applicable to state criminal prosecutions as a fundamental right in Benton v. Maryland, 395 U.S. 784, 794 (1969).

ibility might result from applying double jeopardy to the adjudicatory process, the juvenile system would not be interrupted as it would by requirement of a jury trial.[28] Further, application of double jeopardy would enhance the validity of the factfinding process by forcing all parties to litigate relevant factual issues in a single juvenile hearing.[29]

Application of the double jeopardy safeguard to the Florida juvenile system would also have a significant effect on provisions concerning transfer of youthful offenders to criminal court jurisdiction.[30] To gauge this effect it is necessary to view the historical development of these procedures and their present operation.

DEVELOPMENT OF FLORIDA TRANSFER PROVISIONS

Florida's first juvenile court system was instituted in 1911,[31] eleven years after introduction of the juvenile court concept in the United States.[32] Though Florida juvenile courts were given jurisdiction over many phases of delinquency,[33] state constitutional provisions vesting criminal jurisdiction in other courts[34] precluded juvenile treatment for a great number of youthful offenders.

The jurisdictional problem was emphasized by the Supreme Court of Florida in *Ex parte Kitts*.[35] There, a sixteen-year-old boy, charged before a justice of the peace with a criminal offense, was transferred to the custody of juvenile authorities without prior criminal conviction. Upholding the boy's demand for habeas corpus relief, the supreme court held that adjudication of guilt through criminal prosecution was a necessary prerequisite to juvenile court treatment where a criminal offense was the sole basis for delinquent status.[36]

---

28. The *McKeiver* plurality feared the possibilities of delay, formality, and the clamor of a public trial inherent in trial by jury. 403 U.S. at 550. These possibilities could not be engendered by application of double jeopardy, which would affect only the number of juvenile court proceedings that could be brought against an individual. *See* Rudstein, *supra* note 26, at 282.

29. *See* Rudstein, *supra* note 26, at 305.

30. Fla. Laws 1973, ch. 231, §3, *amending* FLA. STAT. §39.02(6)(a-c) (1971); FLA. R. JUV. P. §8.100(c).

31. Fla. Laws 1911, ch. 6216, at 181. This provision was held constitutional under the state's general police power. Board of Comm'rs v. Savage, 63 Fla. 337, 58 So. 835 (1912). Under this statute, county judges were authorized to act as judges of the juvenile court. Subsequently a 1914 state constitutional amendment empowered the Florida Legislature to create separate juvenile court systems. FLA. CONST. art. V, §1.

32. The first juvenile court was founded in Chicago, Illinois. *See* Pound, *supra* note 2, at 493.

33. Fla. Laws 1911, ch. 6216, §1, at 181. Juvenile jurisdiction extended to any child "who is a persistant truant from school, or who associates with criminals, or reputed criminals, or vicious or immoral persons, or who is growing up in idleness or crime, or who frequents, visits, or is found in any disorderly house, bawdy house, or house of ill fame, or any house or place where spirituous liquors . . . are sold." *Id.* at 182.

34. FLA. CONST. art. V, §§6-8.

35. 109 Fla. 202, 147 So. 573 (1933).

36. *Id.* at 203-04, 147 So. at 574.

The court further stressed that a system not providing for trial prior to juvenile adjudication of delinquency would be of dubious constitutionality.[37]

This interpretation of the Florida juvenile system gave law enforcement officers and committing magistrates a choice of forums for disposition of juvenile offenders, as many youths who could be criminally prosecuted could also be committed to juvenile custody as a result of separate actions.[38] Further, under the system created by the Florida statutes and the *Kitts* decision, a criminal court judge had the discretion either to sentence a convicted juvenile to the state prison or to commit him to juvenile authorities.[39] Should the judge choose to remand the child to juvenile custody he retained the jurisdiction to resentence any juvenile offender later found to be "incorrigible, or incapable of reformation, or dangerous to the welfare of the community."[40]

Subsequent statutes creating county juvenile courts narrowed judicial discretion as to commitment by providing for mandatory transfer of convicted juveniles to juvenile court authorities.[41] Nevertheless, a major statutory exception to mandatory transfer exempted juveniles accused of certain serious felonies.[42] A state court interpreting this exception justified it by stating:[43]

> We cannot attribute to the Legislature the intent to place that class of dangerous, though youthful criminals . . . beyond the reach of the criminal courts of this state and to deprive the criminal courts of jurisdiction to . . . punish such offenders under the terms of our criminal statutes.

The result of these early juvenile statutes and interpretations given them by Florida courts was that many youthful criminal offenders were subjected to public criminal trials[44] and eventually committed to adult prisons.[45] A

---

37. *Id.*

38. *See* Waybright, *A Proposed Juvenile Court Act for Florida*, 4 U. FLA. L. REV. 16, 20 (1951).

39. Fla. Laws 1911, ch. 6216, §9, at 186. *See also Ex parte* Kitts, 109 Fla. 202, 205, 147 So. 573, 575 (1933).

40. Fla. Laws 1911, ch. 6216, §9, at 186. By failing to define specifically the type of conduct that could subject a juvenile to resentencing, the statute vested broad discretion in the trial judge to construe the general public welfare.

41. *See, e.g.*, Fla. Laws 1921, ch. 8663, at 111, establishing a juvenile court for Dade County. This statute was interpreted as precluding a municipal court judge from imposing a prison sentence on a juvenile after adjudication of guilt. State *ex rel.* Johnson v. Quigg, 83 Fla. 1, 90 So. 695 (1922).

42. Fla. Laws 1911, ch. 6216, §10 at 186. "The provisions (relating to commitment) shall not apply to children accused or guilty of the crimes of rape, murder, manslaughter, robbery, arson, burglary, or the attempt to commit any of these crimes."

43. State *ex rel.* Interlandi v. Petteway, 114 Fla. 850, 854, 155 So. 319, 320 (1934). The *Petteway* court held, however, that this provision did not remove a trial judge's discretion to commit a juvenile convicted of one of the exempted crimes to juvenile custody after a criminal trial. *Id.*

44. The fact of public criminal trials was itself a main focus of attack by juvenile court reformers. *See, e.g., In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).

45. Statistics for the year 1949 alone showed 72 children between the ages of eight and

1950 amendment to the Florida constitution[46] removed the jurisdictional stumbling block, however, by allowing the state legislature to vest exclusive, original jurisdiction over criminal cases involving juveniles in the juvenile court system. This amendment led to passage of Florida's Juvenile Court Act,[47] which applied the informal equity procedures of the existing juvenile courts to all phases of delinquency.

Although the Juvenile Court Act eliminated mandatory criminal trials for youthful offenders, it also rejected criminal procedural safeguards by labelling its proceedings civil in nature[48] and operating under the *parens patriae* rationale.[49] Further, despite its innovative provisions, the Act did not terminate the possibility of criminal prosecution of juveniles. Rather, through provisions relating to permissive[50] and mandatory[51] waiver of juvenile court jurisdiction over youths charged with certain felony offenses, it retained the tension between the two court systems and the possibility of multiple adjudications of guilt.

Pursuant to present waiver provisions a juvenile judge may waive jurisdiction over any child fourteen years of age or older whose offense constitutes a violation of Florida law.[52] Furthermore, the criminal courts automatically assume jurisdiction upon demand by the accused and his guardian,[53] or upon grand jury indictment charging an offense punishable by death or life imprisonment.[54]

---

seventeen sentenced to the Florida State Prison at Raiford. This figure does not include those juveniles imprisoned in various county jails. Waybright, *supra* note 38, at 23.

46. FLA. CONST. art. V, §12.

47. FLA. STAT. §§39.01-20 (1971), *as amended by* Fla. Laws 1973, ch. 231, §§1-23.

48. *See* Waybright, *supra* note 38, at 25-26.

49. "[N]ot with the awe-inspiring and frigid methods of a criminal court, but informally and intimately, like a wise and gentle elder brother." State v. Scholl, 167 Wis. 504, 509, 167 N.W. 830, 831 (1918). *See* Waybright, *supra* note 38, at 19. The few procedural rights granted in juvenile proceedings were usually based on the vested rights of the parents of the juvenile. *See, e.g.*, Noeling v. State, 87 So. 2d 593 (Fla. 1956).

50. Fla. Laws 1951, ch. 26,880, §6, at 987, *as amended,* Fla. Laws 1973, ch. 231, §13, *to be codified as* FLA. STAT. §39.02(6)(a).

51. Fla. Laws 1951, ch. 26,880, §6, at 987. This provision, which required a juvenile judge to waive jurisdiction over children who would be charged with certain felonies in criminal courts, was amended in 1967 to require grand jury indictment before termination of juvenile court jurisdiction. *See* Fla. Laws 1967, ch. 71, §1, at 137.

52. Fla. Laws 1973, ch. 231, §3, *amending* FLA. STAT. §39.02(6)(a). Formerly, this provision restricted waiver to offenses that would constitute felony violations. Fla. Laws 1967, ch. 71, §1, at 137. Under the amended provisions, therefore, it appears that the juvenile courts may waive jurisdiction over misdemeanor offenses. *But see* FLA. R. JUV. P. 8.100(c) (providing waiver only in felony situations).

53. Fla. Laws 1973, ch. 231, §3, *amending* FLA. STAT. §39.02(6)(b). A recent Florida decision noted that any juvenile seeking the full protections of criminal safeguards could demand transfer to the criminal courts. *In re* V.D., 245 So. 2d 273 (4th D.C.A. Fla. 1971). However, any system requiring an accused to forego the benefits of juvenile status in order to obtain due process rights might be held unconstitutional. *Cf.* Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968). *Compare In re* A.J., 241 So. 2d 439 (3d D.C.A. Fla. 1970), *with* V.D.B. v. State, 261 So. 2d 857 (1st D.C.A. Fla.), *aff'd,* 210 So. 2d 6 (Fla. 1972).

54. Fla. Laws 1973, ch. 231, §3, *amending* FLA. STAT. §39.02(6)(e). This provision is not

The waiver decision of the juvenile judge is based on a determination of the reasonable prospects of rehabilitating the child through the juvenile system prior to his reaching the age of majority,[55] and results from consideration of the interests of the public as well as the accused.[56] Neither a state attorney nor a grand jury can adequately assess the potential for rehabilitation through juvenile treatment, and therefore the decision to transfer through indictment lacks the range of relevant information available to the juvenile judge. Since the public interest is best served by an informed decision as to rehabilitation potential, the provision requiring transfer upon indictment does not further the general welfare and may also interfere with the proper function of the juvenile court.

The indictment provision, analogous to the exemption of serious felonies from mandatory juvenile commitment contained in the pre-1950 statutes,[57] has been criticized as a reversion to common law retributive justice, inconsistent with the rehabilitative model of the juvenile system.[58] This criticism seems to be sustained by the fact that grand jury indictment is an assumption that a juvenile guilty of a serious offense is, because of his crime alone, not capable of rehabilitation through the juvenile system.[59] A more informed decision, weighing the public interest on the basis of all relevant factors, can be made by the juvenile judge through the waiver process and therefore the

---

included within the Florida Rules of Juvenile Procedure, promulgated by the Florida supreme court. Since these rules require all juvenile court delinquency petitions to be filed by the state attorney there may be less recourse to transfer through indictment in the future. Nevertheless, the juvenile procedure rules supersede only those statutory provisions that are in conflict, and the indictment provision was reenacted in 1973 by the Florida Legislature and is still in force. *See In re* Transition Rule 11, 270 So. 2d 715 (Fla. 1972).

55. Fla. Laws 1973, ch. 231, §15, *amending* FLA. STAT. §39.09(2)(c). The statute provides for studies, prepared by the Division of Youth Services, to be submitted to the juvenile judge prior to his decision. Fla. Laws 1973, ch. 231, §15, *amending* FLA. STAT. §39.09(2)(e). Further, it states that factors such as the nature of the offense, past delinquency records, and the child's past response to treatment efforts shall be considered in determining the prospects for rehabilitation. *Id., amending* FLA. STAT. §39.09(2)(e). The nature of the offense, while not determinative, has been a prime consideration in past waiver decisions. *See, e.g.,* J.E.M. v. State, 217 So. 2d 135 (3d D.C.A. Fla. 1968) (rape, robbery, kidnapping); B.P.W. v. State, 214 So. 2d 365 (3d D.C.A. Fla. 1968) (murder). Jurisdiction has been waived, however, in cases involving less serious offenses. *See, e.g.,* State v. Bryant, 276 So. 2d 184 (1st D.C.A. Fla. 1973) (lewd and lascivious behavior).

56. Prior to the 1973 amendment, §39.02(6)(a) specifically stated that a waiver decision was to result from consideration of the public interest. Fla. Laws 1967, ch. 71, §1 at 137. By deleting this phrase, and establishing reasonable possibility of rehabilitation through the juvenile system as the main criterion for waiver, the amended statute appears to recognize that both the public interest and that of the accused are served by juvenile court handling wherever there is a reasonable possibility of rehabilitation. *See* Fla. Laws 1973, ch. 231, §§3, 15, *amending* FLA. STAT. §§39.02(6)(a), .09(2)(c).

57. Fla. Laws 1911, ch. 6216, §10, at 186. *See* text accompanying notes 41-43 *supra.*

58. *See* Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 COLUM. L. REV. 281, 312 (1967).

59. "[T]he ability of the juvenile courts to aid a youth cannot properly be made a function of the nature of his offense." *Id.*

statutory requirement of transfer to criminal court through indictment should be repealed.

Transfer through indictment is not the only factor obstructing smooth operation of the juvenile court regarding juveniles accused of felony violations. The lack of procedural safeguards against successive adjudications of guilt, in addition to its immediate negative effects on the accused, may further interfere with the proper functioning of the juvenile court as an independent body.

DOUBLE JEOPARDY AND THE WAIVER PROCESS

Florida's juvenile court provisions do not specify the point at which the hearing and decision concerning waiver of jurisdiction must take place,[60] nor are time limitations imposed on a state attorney's right to terminate juvenile court jurisdiction through indictment.[61] Where the waiver or indictment decisions are made subsequent to adjudication of delinquency, the fundamental fairness of subsequent criminal prosecution must be closely scrutinized.

The leading Florida decision concerning double jeopardy and the juvenile process is *State v. R.E.F.*,[62] decided after *McKeiver v. Pennsylvania.*[63] In *R.E.F.* a juvenile was indicted by a grand jury for rape six days subsequent to his adjudication as a delinquent based on the same act. The district court of appeal reversed a trial judge's dismissal of the indictment on double jeopardy grounds, finding that the double proceedings did not violate the standard of fundamental fairness.[64] Holding that jeopardy did not attach to an adjudicatory hearing because of the civil nature of the process,[65] the *R.E.F.* court established a test for consideration of fundamental fairness by stating:[66]

---

60. Fla. Laws 1973, ch. 231, §15, *amending* FLA. STAT. §39.09(2) 1971. While this provision outlines the routine procedure, in which a motion for waiver hearing is made before the petition is heard on the merits, it does not specifically preclude motion for waiver, or waiver action by a juvenile judge, after adjudication of delinquency.

61. Fla. Laws 1973, ch. 231, §3, *amending* FLA. STAT. §39.02(6)(c). This provision also establishes routine time guidelines, but fails to preclude grand jury indictment and consequent criminal court jurisdiction after expiration of the time periods provided.

62. 251 So. 2d 672 (1st D.C.A. Fla. 1971), *aff'd*, 265 So. 2d 701 (Fla. 1972).

63. 403 U.S. 528 (1971). *See* text accompanying notes 19-25 *supra.*

64. 251 So. 2d. at 680.

65. *Id.* at 675. This holding was rejected by a federal district court in a petition by the *R.E.F.* defendant for habeas corpus relief. The court held: "When a person is put before a juvenile court, and that court is competent to act, and has the authority to threaten this person with loss of liberty, jeopardy attaches to the proceeding." Fain v. Duff, 364 F. Supp. 1192, 1196 (M.D. Fla. 1973), *aff'd*, 488 F.2d 218 (5th Cir. 1973). Rather than applying the due process balance, the federal district court strictly applied the fifth amendment protection, equating the juvenile court with the municipal court considered in Waller v. Florida, 397 U.S. 387 (1970). The holding lacked any reference to the civil label stressed in the Florida state court opinion.

66. 251 So. 2d 672, 680 (1st D.C.A. Fla. 1971).

> The time has long since passed when the courts of our country should start striking a balance between what is fundamentally fair for a juvenile guilty of committing a criminal act, as compared to what is fundamentally fair for the juvenile's victims, their families, and society's right to be free from lawless acts.

Considering the actions of the accused within this framework, the court held that due process did not preclude the subsequent criminal prosecution.[67]

The test developed by the *R.E.F.* court to assess fundamental fairness of prosecution following juvenile adjudication has a crucial weakness: by balancing the rights of a "guilty" juvenile and a victim, the test assumes the guilt of the accused prior to any criminal trial. Since *Gault,* the juvenile adjudicatory process has taken on many procedural qualities of the criminal process. The accused must be proved guilty of a delinquent act beyond a reasonable doubt,[68] afforded the right to counsel,[69] and adjudged on the basis of a specific charge,[70] in a hearing presided over by a judicial officer.[71] In fact, as a recent Florida decision noted, the adjudicatory process "partakes of the nature of a criminal proceeding rather than a proceeding in which the state is *parens patriae.*"[72] However, as the *R.E.F.* court held in its refusal to apply the double jeopardy standard strictly, the juvenile adjudication process is not a criminal proceeding.[73] This fact is codified in the Florida Juvenile Court Act, which states:[74]

> An adjudication by a juvenile court that a child is dependent or delinquent shall not be deemed a conviction, nor shall the child be deemed to have been found guilty . . . by reason of that adjudication . . . .

Thus, application of the *R.E.F.* balancing test to an accused whose only adjudication has been through the juvenile system would itself be fundamentally unfair, as the accused would receive the presumption and stigma of criminal guilt, without being afforded the jeopardy protection available through the criminal process.

The *R.E.F.* decision, then, failed to recognize the inherent unfairness of successive accusatory proceedings. The requirement of fairness, along with the possibilities of excessive strain and expense engendered by multiple accusa-

---

67. *Id.* The *R.E.F.* court also feared a conspiracy between the juvenile court and the accused to enter adjudication of delinquency over the objection of the state. *Id.* This fear has been rendered moot by the new requirement that delinquency petitions be initiated by the state attorney. FLA. R. JUV. P. §8.060(1). *See* note 54 *supra.*

68. State v. V.D.B., 270 So. 2d 6 (Fla. 1972).

69. *In re* V.D., 245 So. 2d 273 (4th D.C.A. Fla. 1971).

70. D.M.M. v. State, 275 So. 2d 308 (2d D.C.A. Fla. 1973).

71. K.M. v. State, 277 So. 2d 577 (3d D.C.A. Fla. 1973).

72. *Id. See also* FLA. R. JUV. P. §8.180, which applies nonconflicting Florida criminal procedural rules to proceedings involving delinquent children.

73. State v. R.E.F., 251 So. 2d 672, 679 (1st D.C.A. Fla. 1971).

74. FLA. STAT. §39.10(3) (1971).

tions, makes the double jeopardy safeguard crucial to the juvenile system's proper operation from the standpoint of the accused.

The negative effects of successive proceedings may also seriously interfere with many of the beneficial aspects of the juvenile process itself. The primary danger is that the possibility of prosecution subsequent to juvenile court adjudication will create a lack of respect for the juvenile court process.[75] Conscientious defense counsel may be unwilling to present all facts favorable to their clients at the adjudicatory hearing for fear of exposing weaknesses to future prosecutors.[76] Likewise, the state may well seek to accomplish adjudication with as little presentation of evidence as possible, looking forward to the possibility of future waiver of juvenile jurisdiction or grand jury indictment. Given the insecurity as to their finality, juvenile proceedings involving felonies may eventually become little more than preliminary hearings. Consequently, the defendant himself must balance the benefits of the juvenile system against the effect of his adjudication upon a future prosecution whenever the nature of his act or his age make waiver or indictment a possibility.

The possible loss of respect for the juvenile process directly contradicts the desired function of the juvenile court as an independent body seeking to apply rehabilitative techniques. The option of the juvenile court judge to waive jurisdiction over certain individuals serves the salutary function of determining the desirability of juvenile treatment in a specific situation,[77] within the context of the general public interest. Proper functioning of the juvenile adjudicatory process, as well as fairness to the individual subjected to it, nevertheless require that the waiver determination take place prior to the adjudicatory phase of the juvenile proceedings. To accomplish this, safeguards in the nature of protection against double jeopardy must be implemented.

RECOMMENDATION

Recently amended provisions of Florida's Juvenile Court Act,[78] while outlining procedures that avoid double prosecution in the average case, do not actually protect against the possibility of future double jeopardy situations.[79]

---

75. *See generally* Rudstein, *supra* note 26. Waiver hearings held prior to the adjudicatory phase of the juvenile process are free of double jeopardy overtones, since the accused is not subjected to more than one adjudication of his guilt or innocence. *See* People v. Brown, 13 Cal. App. 3d 876, 91 Cal. Rptr. 904 (1970), *cert. denied,* 404 U.S. 835 (1971). A pre-adjudication waiver hearing is more analogous to a criminal preliminary hearing, as only probable cause is determined. FLA. R. JUV. P. §8.110(b)(5).

76. Florida statutory provisions, while they protect the juvenile court record from use in subsequent prosecution, do not protect against use of evidence introduced or testimony given in a juvenile hearing. *See* Fla. Laws 1973, ch. 231, §18, *amending* FLA. STAT. §39.12(6); *cf.* N.D. CENT. CODE §27-20-33.2 (Supp. 1973).

77. *See* PRESIDENT'S COMM'N, *supra* note 5.

78. Fla. Laws 1973, ch. 231, §§1-18, *amending* FLA. STAT. §39.01-.20.

79. *See* notes 60-61 *supra*. Though these provisions do not specifically preclude the possibilities of double prosecution, it can be argued that Florida courts should construe them as restricting waiver or indictment to the pre-adjudicatory stages. Since double proceedings violate the due process clause as fundamentally unfair—*see* text accompanying notes 67-75

Many states, however, have dealt with the possible injustice of prosecution subsequent to juvenile adjudication through statutory provisions.[80] Since the legislative approach is able to effectuate more completely the required protections, it is superior to piecemeal judicial applications of due process standards.

Provisions of the Uniform Juvenile Court Act offer the best procedural safeguards against double jeopardy.[81] This Act provides that:

> (1) no evidence obtained in or offered in an adjudicatory hearing may be introduced in a subsequent proceeding;[82]
> (2) a waiver determination by the juvenile court must take place before a petition alleging delinquency is heard on the merits;[83]
> (3) no child may be prosecuted for any offense committed before the age of eighteen, unless jurisdiction is properly waived by the juvenile court.[84]

No single procedural step can correct the present problems of the juvenile court system. Nevertheless, by assuring that all possible steps are taken within the present system to solidify the procedures of the juvenile court it is possible to protect more fully both the public interest and the individual accused. Inclusion of the protections of the Uniform Juvenile Court Act within the Florida Juvenile Court Rules along with repeal of the transfer through indictment provision[85] will greatly reduce harmful overlap between the juvenile and criminal court systems and improve the present haphazard treatment of juvenile criminal offenders in Florida.

MICHAEL A. FOGARTY

---

supra — the amended statutes should be construed in this manner so as to preserve them from constitutional objection. *Cf.* Graham v. Richardson, 403 U.S. 365, 382-83 (1971); United States v. Vuitch, 402 U.S. 62, 70 (1971).

80. Most of these statutes preclude the use of evidence obtained in an adjudicatory proceeding in any subsequent criminal action. *See, e.g.,* MINN. STAT. §260.211 (1971); N.D. CENT. CODE §27-20-33.2 (Supp. 1973). Others provide that the accused juvenile may not be subjected to criminal prosecution except through a valid waiver procedure. *E.g.,* N.D. CENT. CODE §27-20-34.2 (Supp. 1973); TEX. REV. CIV. STAT. art. 2338-1(j) (Supp. 1973).

81. This Act has at present been adopted in North Dakota and has served as the model for several other state juvenile court acts. *See* N.D. CENT. CODE §§27-20-1 to 59 (Supp. 1973). *See also* Note, *Uniform Juvenile Court Act,* 48 N.D.L. REV. 93 (1971).

82. Uniform Juvenile Court Act §33(B).

83. *Id.* §34(1)(a).

84. *Id.* §34(3).

85. Fla. Laws 1973, ch. 231, §3, *amending* FLA STAT. §39.02(6)(c).