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Constitutional Law--Constitutional Protection against Double Jeapordy is Extended to Juvenile Court Proceedings If the Final Action by the Court May Restrict the Juvenile's Liberty

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY IS EXTENDED TO JUVENILE COURT PROCEEDINGS IF THE FINAL ACTION BY THE COURT MAY RESTRICT THE JUVENILE'S LIBERTY. *Garrison v. Jennings*, 529 P.2d 536 (Okla. Crim. App. 1974).

On December 7, 1974, the Oklahoma Court of Criminal Appeals granted a writ of prohibition against a juvenile court judge to prevent him from certifying Wayne Garrison, a juvenile, to stand trial as an adult for the crime of murder.

The original proceedings were initiated in 1972 by a petition seeking to have Garrison adjudicated in juvenile court as a "delinquent."[1] In that petition facts were set forth alleging that Garrison caused the death of another by strangulation, using a cloth tied around the victim's neck. Subsequently the petitioner was sent to Central State Hospital at Norman, Oklahoma for an evaluation while the petition remained pending for six weeks. Upon peititoner's return another hearing was held at which time the state asked and was granted permission to amend the petition to read that Garrison was a "child in need of supervision" (CHINS).[2] The court expressly found that the amended petition was true after the defense counsel stipulated to the allegations set forth in the petition. Garrison was then sent to Central State Hospital

1. OKLA. STAT. tit. 10, § 1101(a) and § 1101(b) (1974) provide:
When used in this act, unless the context other wise requires:
(a) The term "child" means any person under the age of eighteen (18) years.
(b) The term "delinquent child" means (1) a child who has violated any federal or state law or municipal ordinancs, excepting a traffic statute or ordinance, or any lawful order of the court made under this act; or (2) a child who has habitually violated traffic laws or ordinances.

2. OKLA. STAT. tit. 10, § 1101(c) (1974) provides:
(c) The term "child in need of supervision" means a child who is habitually truant from school, or who is beyond the control of his parents, guardian or other custodian, or who habitually deports himself so as to injure or endanger the health or morals of himself or others.

for treatment for a period which could have lasted until he was 21 years of age.[3]

Two years later the Tulsa County District Attorney's Office filed an amended petition to have Garrison adjudicated a "delinquent" based upon the same facts as were alleged in the original 1972 petition. The legality of such an act was presented to the Oklahoma Court of Criminal Appeals by a petition seeking a writ of prohibition charging that to have Garrison adjudged a "delinquent" (a predicate to certification to stand trial as an adult)[4] on the same facts which two years earlier furnished the grounds for adjudging him a "child in need of supervision" would violate the constitutional protection against twice being placed in jeopardy for the same offense[5] as well as his constitutional right to a speedy trial.[6]

Historically the constitutional guarantee against being "twice put in jeopardy of life or liberty for the same offense"[7] has not been applied to juveniles as it has to adults. The ability of the courts to ignore juvenile rights stemmed from the *parens patriae* philosophy adopted by the first juvenile court in this country in 1899. The *parens patriae* theory was developed to accommodate concepts of rehabilitation rather than punishment, informal rather than formal proceedings, and the idea that the juvenile courts were civil or equitable in nature rather than criminal.[8] This "civil" theory provided the basis upon which the courts could ignore constitutional safeguards for juveniles but apply them to criminal proceedings where adults were concerned.[9]

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3. OKLA. STAT. tit. 10, § 1102 provides:
Jurisdiction of District Court—Transfer of proceedings. . . . When jurisdiction shall have been obtained over any child, it may be retained until the child becomes twenty-one (21) years of age. . . .

4. OKLA. STAT. tit. 10, § 1112(b)(8) (1974) provides:
[A]fter full investigation and a preliminary hearing, [the juvenile court] may in its discretion continue the juvenile proceeding, or it may certify such child capable of knowing right from wrong, and to be held accountable for his acts, for proper criminal proceedings to any other division of the court which would have trial jurisdiction of such offense if committed by an adult.

5. U.S. CONST. amend. V.

6. U.S. CONST. amend. VI.

7. *Supra* note 5.

8. M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 1-4 (1974).

9. FLEXNER & OPPENHEIMER, THE LEGAL ASPECT OF THE JUVENILE COURT 8-9 (1922); *see* People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953), where a minor was adjudged a ward of the court following a burglary charge, confined fifteen months to an institution, and then returned to juvenile court where he was certified to stand trial as an adult, convicted, and sentenced to prison. The court held that the protection against double jeopardy was not applicable because the juvenile proceedings were non-criminal. *See also* Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); *Ex parte* Sharp 15 Idaho 120, 96 P. 563 (1908); *In re* Santillanes 47 N.M. 140, 138 P.2d 503 (1943); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905).

Since the 1950's the state courts have gradually moved away from characterizing all juvenile proceedings as "civil," and in the 1960's several momentous United States Supreme Court decisions provided more impetus to this movement. *Application of Johnson* recognized the trend toward allowing "no greater diminution of the rights of a child, as safeguarded by the Constitution, than should be suffered by an adult charged with an offense equivalent to the alleged act of delinquency of the child."[10] Other courts have taken a middle course and maintained the civil label (perhaps because not all proceedings before the juvenile court concern merely delinquency problems) while applying the limitations and guarantees of the Constitution where a crime is charged.[11] *Hegwood v. Kindrick* put it this way:

> [S]ome, if not all, of the Bill of Rights criminal guarantees must be made available in juvenile court proceedings. Advocates of this view sweep aside technical distinctions between civil and criminal cases when the juvenile has been charged with an offense which, if committed by an adult, would render him liable to criminal prosecution. . . . Advocates of this approach have been impressed by the growing discrepancy between the theory of parens patriae and its actual practice in the juvenile courts.[12]

In 1961 *Mapp v. Ohio*[13] was the first step in the process of applying those portions of the Bill of Rights which concern criminal procedure to the states through the fourteenth amendment due process clause.

But it was not until 1966 that the Supreme Court heard its first due process appeal from a juvenile court. In *Kent v. United States*,[14] the juvenile court's jurisdiction over Kent was "waived," and he then stood trial as an adult and was found guilty of house-breaking. The waiver proceedings were attacked on the basis that there had been no hearing, no findings of fact, no counsel for the accused, and no reasons for waiving jurisdiction. The Supreme Court reversed the conviction on the grounds that "the hearing must measure up to the essentials of due process and fair treatment."[15]

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10. Application of Johnson, 178 F. Supp. 155, 160 (N.J. 1957).
11. *In re* Poff, 135 F. Supp. 224, 227 (D.D.C. 1955).
12. Hegwood v. Kindrick, 264 F. Supp. 720, 725 (S.D. Tex. 1967).
13. 367 U.S. 643 (1961).
14. 383 U.S. 541 (1966). Prior to *Kent*, in Haley v. Ohio, 332 U.S. 596 (1948) and Gallegos v. Colorado, 370 U.S. 49 (1962), the United States Supreme Court applied the voluntariness requirement to confessions obtained from juveniles, but the cases do not appear to have been juvenile court decisions.
15. 383 U.S. at 562.

The next year *In re Gault*[16] required the application of due process standards to the adudicatory hearings including adequate, timely written notice of the charges against the juvenile. Where the juvenile's liberty was at issue the Court ruled that he was entitled to notice, counsel, the privilege against self-incrimination, and the right to confront and cross-examine opposing witnesses under oath. The Court also attacked the "civil" label by saying:

> To hold otherwise [to deny the applicability of due process] would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."[17]

Proof beyond a reasonable doubt in juvenile delinquency proceedings is now required[18] and the method of taking confessions cannot violate the due process clause.[19]

McKeiver v. Pennsylvania[20] announced one limited but important exception to the extension of constitutional rights to juvenile proceedings. There the Court relied on the original juvenile court philosophy of informality and denied the juvenile the right to a trial by jury. The Court explained that it hoped to prevent juvenile proceedings from becoming like criminal trials.[21] In what seems almost paradoxical fashion the Court relied on *Gault* and *Winship* and reiterated the fundamental fairness test as the due process standard in juvenile court proceedings, while at the same time denying that all of the constitutional rights afforded adults are applicable to juveniles. The Court emphasized the fact-finding procedure, denied that a jury is a necessary part of that procedure, but upheld the requirements of notice, counsel, confrontation, cross examination, and standard of proof. The Court did not deal with double jeopardy.

As late as 1966 it was said that:

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16. 387 U.S. 1 (1967).
17. *Id.* at 49-50.
18. *In re* Winship, 397 U.S. 358 (1970).
19. Haley v. Ohio, 332 U.S. 596 (1948) and Gallegos v. Colorado, 370 U.S. 49 (1962).
20. 403 U.S. 528 (1971).
21. Oklahoma, by statute, has given juveniles the right to a jury trial in spite of *McKeiver*. Okla Stat. tit. 10, § 1110 provides:

> In hearings to determine whether a child is within the purview of this Act, the child informed against, or any person interested in such child, shall have the right to demand a trial by jury, which shall be granted as in other cases, unless waived, or the judge on his own motion may call a jury to try any such case. Such jury shall consist of six (6) persons.

> The least litigated issue in the area of procedural protections and constitutional rights in the juvenile courts is protection against double jeopardy. While there is some authority going each way, the great majority of cases hold there is no protection, and most of the contrary authority is rather recent.[22]

Although *Benton v. Maryland*[23] applied the double jeopardy protection to the states through the fourteenth amendment, there are no Supreme Court cases as yet specifically granting to juveniles this protection, but the trend is clearly reflected in recent state and lower federal court decisions. *United States v. Dickerson*[24] is perhaps the earliest case of significance regarding double jeopardy and the juvenile courts. Dickerson was charged with robbery in juvenile court. He admitted the facts in the petition. Later an indictment was brought against him for the same act and the district court dismissed it, finding that jeopardy attached when Dickerson admitted his guilt before the juvenile court in the earlier proceedings. The court of appeals interpreted the state statute and said that because the admission was made at a "detention" hearing before recommendations for disposition were available or a social study had been made jeopardy did not attach. In the District of Columbia, unlike Oklahoma, a finding of jurisdiction due to delinquency was a proper antecedent to waiver of jurisdiction. However, in reversing, the appellate court did not disagree with the lower court's recognition of double jeopardy as applied to juveniles:

> [T]he constitutional limitations are applicable if the final action of the court may result in depriving a person of his liberty. Whether the enforced incarceration may be in a jail, penitentiary, reformatory, training school, or other institution, is immaterial. What matters is the potential loss of liberty.[25]

This "loss of liberty" concept was relied on in the leading case of *Jones v. Breed*[26] which held that when, on the basis of the delinquency hearing, the juvenile court can impose severe restrictions upon the juvenile's liberty jeopardy attaches. The court referred to *Kent, Gault,* and *Winship* and held *McKeiver's* denial of the right to jury trial as inapplicable to the double jeopardy issue. Citing *Richard M. v. Superior Court,*[27] the court approved the decision that where a delinquency petition has

22. Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal,* 114 U. PENN. L. REV. 1171, 1212 (1966).
23. Benton v. Maryland, 385 U.S. 784 (1969).
24. 168 F. Supp. 899 (D.D.C. 1958), *rev'd,* 271 F.2d 487 (D.C. Cir. 1959).
25. 168 F. Supp. at 901.
26. 497 F.2d 1161 (9th Cir. 1974).
27. 93 Cal. Rptr. 752, 482 P.2d 664 (1971).

been dismissed pursuant to a hearing on the merits, this is tantamount to an acquittal, and a second prosecution is not allowed.[28]

Fain v. Duff[29] is another important case finding double jeopardy. There the juvenile was adjudged a delinquent based upon a petition alleging rape; nine days later he was indicted for the same act. He was kept in the school for boys following his adjudication as a delinquent but was not released when the school superintendent felt he had been rehabilitated because Fain would have been jailed following his release. The court said:

> Thus, Fain's "custody" is even more apparent than that of *Peyton*, since the existence of the outstanding indictment not merely threatens him with more incarceration in the future, it has a substantial effect on his present circumstances.[30]

Perhaps the best and most recent example of how far the courts are willing to extend the attachment of the double jeopardy concept to juveniles is found in a recent Arizona decision.[31] The juvenile was committed to a state hospital after a finding that he was mentally defective and disordered. Although he was not adjudicated a delinquent, the court expressly retained jurisdiction over him until he reached the age of 21. No adjudication hearing was held. The Arizona Supreme Court said:

> A court should look past the form to the substance of an action especially in view of the informal nature of juvenile proceedings then in effect. The entire philosophy of the juvenile court system would indicate that commitment to the State Hospital is tantamount to a determination of the juvenile status of the child. . . . Thus the petitioner was not only placed in jeopardy in the juvenile court but was in effect convicted and punished. Any attempt to try him as an adult would not only subject him to the harassment of an additional judicial proceeding but would subject him to the risk of being punished twice for the same offense.[32]

In criminal proceedings for adults the exact point in time at which jeopardy attaches can be determined fairly exactly. Generally it is when the jury is impaneled and sworn, or if non-jury, when the first witness is sworn.[33]

For juveniles the attachment of jeopardy varies depending upon

28. *See also* Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968).
29. 88 F.2d 218 (5th Cir. 1973). *See also* 26 U. FLA. L. REV. 603 (1974).
30. 488 F.2d at 222.
31. Coleman v. State, 519 P.2d 851 (Ariz. 1974).
32. *Id.* at 854.
33. 38 ST. JOHN'S L. REV. 158 (1963).

the statutes of the state. Due to the variance of these statutes from state to state as well as the wide latitude given the courts by the *parens patriae* theory which has a contiuing influence there is no exact or uniform point in time when jeopardy is considered to attach. But it is clear from the state and federal decisions within the last ten years that protection against double jeopardy does apply to juveniles and it attaches when the proceedings have reached the state at which the child's liberty and freedom can be decided. Pinpointing this stage remains a problem, but, clearly, the situation in *Garrison v. Jennings* falls within the range where a growing number of states have expressly required application of this constitutional guarantee to juvenile proceedings.

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