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DOUBLE JEOPARDY IN JUVENILE PROCEEDINGS

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The 1960's was a decade in which the United States Supreme Court, under the leadership of Chief Justice Earl Warren, created a revolution in the field of criminal justice. During that period the Court vastly expanded the rights of individuals accused of committing crimes.[1] Although most of the decisions affected only adults, the Court did not ignore the rights of juveniles. In *Kent v. United States*,[2] decided in 1966, the Court held that due process of law required that the District of Columbia Juvenile Court Act provision for waiver of the juvenile court's exclusive jurisdiction in favor of the regular criminal courts[3] be inter-

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1. The Court expanded the rights of an accused in two ways. First, on a case-by-case basis it held most of the major provisions of the Bill of Rights applicable to the states through the due process clause of the fourteenth amendment. *See* Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment protection against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to a jury trial); Washington v. Texas, 388 U.S. 14 (1967) (sixth amendment right to compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (sixth amendment right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right to confrontation); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment protection against cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment exclusionary rule).

Second, the Court liberally construed those provisions of the Bill of Rights, as well as other provisions of the Constitution, to maximize their impact on the rights of an accused. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (scope of a search incident to an arrest is limited to the suspect's person and the area from which he might obtain either a weapon or something that could be used as evidence against him); United States v. Wade, 388 U.S. 218 (1967) (sixth amendment right to confrontation combined with sixth amendment right to counsel requires that an accused have the right to counsel at a pretrial identification confrontation); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination combined with sixth amendment right to counsel requires police to warn an accused prior to in-custody interrogation that he has the right to remain silent, that anything he says can be used against him, that he has the right to counsel, and that if he cannot afford an attorney one will be appointed by the state to represent him); Douglas v. California, 372 U.S. 353 (1963) (fourteenth amendment guarantee of equal protection requires the state to appoint counsel to represent an indigent defendant in an appeal which is taken as a matter of right).

2. 383 U.S. 541 (1966).

preted to provide for a full hearing[4] at which the juvenile is entitled to be represented by counsel.[5] And in the following year, the Court decided the landmark case of *In re Gault*,[6] in which it held that at a hearing conducted to determine whether a child is delinquent, the child is entitled to certain constitutional rights. The Court specifically held that: (1) prior to the hearing the child and his parents must be given timely written notice of the hearing and of the specific facts upon which the petition alleging delinquency is based;[7] (2) a juvenile has the right to be represented by counsel at a delinquency hearing, and both he and his parents must be notified of that right and also of the fact that if they cannot afford an attorney one will be appointed to represent the child;[8] (3) the fifth amendment privilege against self-incrimination[9] applies at delinquency hearings;[10] and (4) absent a valid confession, a juvenile has the right to confront and cross-examine the witnesses against him.[11] The *Gault* opinion also contained broad language

3. D.C. CODE §11-914 (1961). At the time of the Supreme Court's decision the section had been renumbered D.C. CODE §11-1553 (Supp. IV 1965). The provision has since been amended to state explicitly the rights held applicable by the Court in *Kent*. *See* D.C. CODE §16-2307 (Supp. V 1972).

4. The Court held that at the waiver hearing the child's counsel is entitled to access to the social records and probation reports which are considered by the judge and to a statement of reasons for the juvenile court's decision to waive jurisdiction. 388 U.S. at 557

5. *Kent* was not the first case involving a juvenile decided by the Warren Court. In Gallegos v. Colorado, 370 U.S. 49 (1962), the Court held that on the facts of the particular case it was a violation of due process of law to admit into evidence the confession of a 14-year-old boy on trial for murder. The Court relied heavily on Haley v. Ohio, 332 U.S. 596 (1948), in which a 15-year-old boy's confession was found to have been obtained in violation of due process. In both cases the age of the child was the primary factor leading to reversal of the conviction, but in neither case were the constitutional rights of a child *in a juvenile court* in issue.

6. 387 U.S. 1 (1967).

7. *Id.* at 33-34.

8. *Id.* at 41.

9. U.S. CONST., amend. V provides: "No person shall be compelled in any criminal case to be a witness against himself "

10. 387 U.S. at 55-57

11. *Id.* The appellants in *Gault* also raised the questions whether a juvenile has the right to appeal an adjudication of delinquency, whether the state is required to provide a transcript of the hearing, and whether the juvenile court judge must state the reasons for his decision, but the Court declined to decide those issues because of the other grounds for reversal. The Court did note, however, that it had never held that a state is required by the Constitution to provide a right to appellate review in criminal cases. On the other hand, the opinion strongly indicated that both a record of the hearing and a statement of reasons for the judge's decision were required. 387 U.S. at 57-58.

which indicated that many of the other constitutional rights guaranteed adults in criminal cases would be granted to juveniles in delinquency proceedings.[12] Indeed, the case has been so interpreted by most commentators.[13] Mr. Justice Black, in his concurring opinion, argued that *all* of the constitutional rights applicable in state criminal cases were required in delinquency proceedings.[14]

Gault, however, was the last case concerning the rights of juveniles decided by the Warren Court.[15] Prior to the 1969-70 term of the

12. The general tenor of the opinion indicated that the Court was concerned with more than just the specific constitutional rights involved in the case before it. The Court began its analysis of the juvenile court process by stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U.S. at 13. Then, after discussing the theory underlying the juvenile court system, the Court stated:

> The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedures, but in arbitrariness.

387 U.S. at 18-19.

It concluded its general analysis by quoting with approval its statement in *Kent*:

> We do not mean to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

387 U.S. at 30.

13. *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); Case Note, 19 CASE W RES. L. REV. 394 (1968); Note, *The Constitution and Juvenile Delinquents*, 32 MONT. L. REV. 307 (1971); Comment, *In re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts*, 47 NEB. L. REV. 558 (1968); Comment, *Beyond Gault and Whittington —The Best of Both Worlds?*, 22 U. MIAMI L. REV. 906 (1968).

14. 387 U.S. at 61. Two other justices apparently agree with Mr. Justice Black's conclusion in *Gault*. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), Mr. Justice Douglas, in a dissenting opinion in which Mr. Justice Black and Mr. Justice Marshall joined, stated:

> [W]here a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and order "confinement" until the child reaches 21 years of age or when the child at the threshold of the proceedings faces that prospect, then he is entitled to the same procedural protection as an adult.

403 U.S. at 559.

15. Subsequent to its decision in *Gault* the Court agreed to hear *In re* Whittington, 13 Ohio App. 2d 11, 233 N.E.2d 333, *cert. granted*, 389 U.S. 819 (1967), which raised the issues whether a child who is alleged to be delinquent is entitled to a jury trial, whether the standard of proof beyond a reasonable doubt is constitutionally required in delinquency proceedings, whether a juvenile has the right to bail pending disposition

Supreme Court, Warren Burger replaced Earl Warren as Chief Justice. Under the tutelage of Chief Justice Burger the criminal law revolution of the 1960's slowed down considerably [16] In the area of juvenile rights, however, the Court initially continued in the direction of the Warren Court. In 1970, in *In re Winship*,[17] the Burger Court held that the standard of proof beyond a reasonable doubt was constitutionally required in delinquency proceedings.[18] But the Court's expansion of the rights of juveniles ended in 1971 when, in the companion cases of

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of his case, and whether the privilege against self-incrimination applies to custodial interrogation of a child by the police. The Court, however, never decided the merits of the case. In *In re* Whittington, 391 U.S. 341 (1968), it remanded the case to the state courts for reconsideration in light of *Gault*.

16. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (in-custody statements that satisfy legal standards of trustworthiness, even though excluded by *Miranda* from the prosecution's case in chief, may be used to impeach a testifying defendant's credibility); Williams v. United States, 401 U.S. 646 (1971) (Supreme Court's holding in *Chimel* limiting the scope of a search incident to arrest is not retroactive); Williams v. Florida, 399 U.S. 78 (1970) (twelve-man jury not a constitutional requirement; notice-of-alibi statute does not violate fifth amendment privilege against self-incrimination).

17. 397 U.S. 358 (1970).

Winship actually was not the first case involving the rights of juveniles heard by the Court after Chief Justice Burger's appointment. In DeBacker v. Brainard, 396 U.S. 28 (1969), which raised the right to jury trial and standard of proof issues previously raised in *Whittington*, as well as the question of whether the unreviewable discretion of the prosecutor to proceed in juvenile court rather than in ordinary criminal proceedings is a denial of due process of law, the Court dismissed the appeal in a per curiam opinion because it found that the resolution of the issues would not be appropriate in the circumstances of the case. It declined to decide the jury trial issue because the delinquency hearing had occurred prior to the effective date of Duncan v. Louisiana, 391 U.S. 145 (1968), which held the right to a jury trial applicable to the states, and it refused to rule on the requisite standard of proof because the appellant's counsel had conceded during oral argument that the evidence had been sufficient to meet the standard of proof beyond a reasonable doubt. Finally, it held that since the issue of prosecutorial discretion had not been raised in the court below, it could not be subject to review on appeal.

Mr. Justice Black and Mr. Justice Douglas, in separate opinions, dissented from the decision of the Court. They both felt that Duncan v. Louisiana, *supra*, should be given complete retroactive effect, and that the Court should have reached the merits of the jury trial issue. On the merits, both justices would have held the right to a jury trial applicable in juvenile court proceedings. 396 U.S. 33-38.

18. Until the decision in *Winship*, most states merely required that a juvenile be found to have committed the unlawful act charged by a preponderance of the evidence. *See, e.g.*, Neb. Rev. Stat. §43-206.03(3) (Supp. 1967); N.Y. Family Ct. Act §744(b) (McKinney 1963). Several courts, however, relying heavily on *Gault*, had foreseen the Court's decision in *Winship* and had held the reasonable doubt standard applicable to delinquency proceedings. *See, e.g.*, United States v. Costanzo, 395 F.2d 441 (4th Cir.), *cert. denied*, 393 U.S. 883 (1968); *In re* Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

McKeiver v. Pennsylvania and *In re Burrus*,[19] it held that there is no right to a jury trial in delinquency proceedings.[20]

With the decision in *McKeiver*, it has become clear that the Supreme Court is unwilling to grant juveniles accused of delinquent offenses all of the constitutional rights accorded adults in criminal trials. The question left open by *Gault*, *Winship*, and *McKeiver* is which constitutional guarantees are required in juvenile delinquency proceedings. This Article will focus on the fifth amendment protection against double jeopardy and its relationship to delinquency proceedings. More specifically, it will attempt to determine whether the guarantee against double jeopardy bars a hearing on a delinquency petition based on acts which already have been the basis of one delinquency hearing, whether it bars a criminal prosecution based on the same acts which previously have been the basis of a delinquency proceeding, and whether it bars waiver of jurisdiction by the juvenile court to the criminal courts once a hearing on the merits of a delinquency petition has begun.

Constitutional Rights in the Juvenile Courts: The Relevant Test

The fifth amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb ..." This guarantee against double jeopardy "is one of the oldest ideas found in western civilization,"[21] and its history can be traced from Greek and Roman times to the common law of England and into the jurisprudence of this country.[22] It has been held to encompass several protections. It not only protects against multiple

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

In the interval between its decision in *Winship* and its decision in *McKeiver*, the Court granted certiorari in a case which raised the issue of the voluntariness of a juvenile's confession to two murders, and which also challenged the constitutionality of a provision of the New Jersey Juvenile Court Act. The Court, however, with Mr. Justice Marshall and Mr. Justice Douglas voting to reverse, dismissed the writ as improvidently granted. Monks v. New Jersey, 398 U.S. 71 (1970).

20. Since *McKeiver* and *Burrus* the Supreme Court has decided only one case involving the rights of juveniles accused of committing delinquent acts. In V v. City of New York, 92 S. Ct. 1951 (1972), the Court held that its decision in *Winship* requiring a standard of proof beyond a reasonable doubt in delinquency proceedings is to be given complete retroactive effect, because serious questions are raised as to the accuracy of adjudications of delinquency made under the lesser standard of proof.

21. Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting)

22. *See* Bartkus v. Illinois, *id.* at 151-55 (Black, J., dissenting); Benton v. Maryland, 395 U.S. 784, 795-96 (1969). *See also* J. Sigler, Double Jeopardy 1-37 (1969)

punishments for the same offense,[23] but also prohibits reprosecution following an acquittal,[24] following a conviction,[25] and, in some circumstances, even following a premature termination of a trial.[26] Two policy considerations generally have been stated as the basis for the provision. One consideration focuses on the inherent injustice of punishing a man twice for the same offense,[27] while the other stresses the dangers of permitting the state to subject a defendant to repeated trials for a single offense.[28] The latter rationale was perhaps best articulated by Mr. Justice Black, writing for the Court in *Green v. United States*.[29] He said:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[30]

The fundamental nature of the guarantee to the Anglo-American system of justice was recognized fully by the Supreme Court in *Benton v. Maryland*,[31] when it held the double jeopardy clause applicable to state criminal proceedings through the due process clause of the fourteenth amendment.[32]

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23. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

24. United States v. Sisson, 399 U.S. 267 (1970); Benton v. Maryland, 395 U.S. 784 (1969); Fong Foo v. United States, 369 U.S. 141 (1962); Green v. United States, 355 U.S. 184 (1957); Grafton v. United States, 206 U.S. 333 (1907); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662 (1896).

25. *In re* Nielsen, 131 U.S. 176 (1889).

26. United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963). For a discussion of the circumstances in which retrial is permitted following a premature termination of the trial *see* note 78 *infra* and accompanying text.

27. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873); North Carolina v. Pearce, 395 U.S. 711, 728-29 (1969) (Douglas, J., concurring). *See also* Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 267 (1965) [hereinafter cited as *Twice in Jeopardy*].

28. Bartkus v. Illinois, 359 U.S. 121, 154-55 (1959) (Black, J., dissenting); North Carolina v. Pearce, 395 U.S. 711, 733-34 (1969) (Douglas, J., concurring); Abbate v. United States, 359 U.S. 187, 198-99 (1959) (Brennan, J., separate opinion); United States v. Jorn, 400 U.S. 470 (1971); Benton v. Maryland, 395 U.S. 784 (1969). *See also Twice in Jeopardy, supra* note 27, at 267, 286-92.

29. 355 U.S. 184 (1957).

30. *Id.* at 187-88.

31. 395 U.S. 784 (1969).

32. U.S. CONST., amend. XIV provides: "[N]or shall any State deprive any person of

To say that the double jeopardy clause is binding on the states does not, however, answer the question whether it is also obligatory in juvenile delinquency proceedings, for, as *McKeiver v. Pennsylvania*[33] clearly illustrates, not all of the provisions of the Bill of Rights that are applicable to state criminal trials are required in delinquency proceedings. In *McKeiver*, the Court held that the sixth amendment right to a jury trial,[34] although held applicable to the states in *Duncan v. Louisiana*,[35] is not constitutionally required in juvenile court proceedings. The plurality opinion[36] was careful to point out that in *Gault* the relevant inquiry was whether the various constitutional rights involved in that case, most of which had previously been held binding on the states,[37]

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life, liberty, or property, without due process of law "

The test for determining whether a particular provision of the Bill of Rights is "incorporated" into the fourteenth amendment was explained by the Court in Duncan v. Louisiana, 391 U.S. 145 (1968). The Court stated:

> The recent cases have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.

Id. at 149 n.14.

The Court in *Benton* applied this test and concluded that the guarantee against double jeopardy "is clearly 'fundamental to the American scheme of justice.'" 395 U.S. at 796.

33. 403 U.S. 528 (1971).

34. U.S. CONST., amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury "

35. 391 U.S. 145 (1968).

36. Mr. Justice Blackmun wrote the opinion in which Chief Justice Burger and Justices Stewart and White joined. Justice Harlan concurred in the judgment because in his view the sixth amendment right to a jury trial was not binding on the states. Justice Brennan wrote an opinion in which he stated that the right to trial by jury is inapplicable to juvenile proceedings "so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve." 403 U.S. at 554 (footnote omitted). After stating that the purpose of the right to a jury trial is to protect an accused from government oppression and from a biased or eccentric judge, he found sufficient protection in the fact that Pennsylvania does not bar admission of the public to juvenile trials. *Id.* at 554-55. He therefore concurred in the judgment in *McKeiver*. However, in the companion case of *In re Burrus*, he dissented because the North Carolina Juvenile Act either permits or requires the exclusion of the public from delinquency proceedings. Justices Douglas, Black, and Marshall stated that *all* of the constitutional rights applicable in state criminal trials are applicable in juvenile delinquency proceedings. *Id.* at 559. *See* note 14 *supra*.

37. Pointer v. Texas, 380 U.S. 400 (1957) (right to confrontation and cross-examination); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).

were applicable to juvenile proceedings,[38] and that in *Winship* the Court conducted a two-step analysis, first determining whether the standard of proof beyond a reasonable doubt was required in state criminal trials, and then whether it was required in delinquency proceedings.[39] Thus, in determining whether the juvenile must be afforded protection against double jeopardy, the mere fact that the provision is binding on the states is not conclusive. A further analysis, under the test enunciated in *Gault*, must be conducted.

In *Gault* the Supreme Court stated that a hearing to determine delinquency " 'must measure up to the essentials of due process and fair treatment.' "[40] In so holding, the Court expressly rejected the notion that because the state in delinquency proceedings acts in a position of *parens patriae* and the proceedings are labeled "civil" rather than "criminal," a juvenile is not entitled to the procedural safeguards of due process.[41] Prior to the *Gault* decision, the *parens patriae* rationale often was used as the basis for decisions denying children various constitutional rights that were accorded adults in criminal trials,[42] including the protection against double jeopardy.[43] The courts which followed that approach reasoned that delinquency proceedings seek to define and ensure the best interests of the child rather than to prosecute or punish him for illegal conduct.

Under the original theory of the juvenile court system, such reasoning cannot be faulted. The informal procedures and the lack of constitu-

38. 403 U.S. at 541.

39. *Id.*

40. 387 U.S. at 30, citing Kent v. United States, 383 U.S. 541, 562 (1966).

41. *Id.* at 14-31.

See also Mr. Justice Blackmun's statement in *McKeiver* that: "Little is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal' The Court carefully has avoided this wooden approach." 403 U.S. at 541.

42. *See, e.g., Ex Parte* Daedler, 194 Cal. 320, 228 P 467 (1924) (right to jury trial); People *ex rel.* Weber v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955) (right to counsel); *In re* Magnuson, 110 Cal. App. 2d 73, 242 P.2d 362 (1952) (right to bail pending appeal); Cinque v. Boyd, 99 Conn. 70, 121 A. 678 (1923) (right to bail, right to confrontation, right to jury trial); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932), *appeal dismissed*, 289 U.S. 709 (1933) (privilege against self-incrimination); Childress v. State, 133 Tenn. 121, 179 S.W 643 (1915) (right to grand jury indictment).

43. People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953); *In re* McDonald, 153 A.2d 651 (D.C. Mun. Ct. App. 1959), *cert. denied* sub nom. Cooper v. District of Columbia, 363 U.S. 847 (1960); Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); *In re* Smith, 114 N.Y.S.2d 673 (Dom. Rel. Ct. Kings County 1952); State v. Smith, 75 N.D. 29, 25 N.W.2d 270 (1946); *Ex Parte* Martinez, 386 S.W.2d 280 (Tex. Crim. App. 1964) *Contra*, United States v. Dickerson, 168 F Supp. 899 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959).

tional safeguards were intended to benefit the child by removing him from the rigidities, technicalities, and harshness of the criminal court system.[44] But as the Court in *Kent* correctly noted, the expectations of the original proponents of the juvenile court system have not been fulfilled, and

> [t]here is evidence, in fact, that the child receives the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[45]

Moreover, the contention that the state is not punishing a youth for his illegal conduct when it commits him to a training school was appropriately answered by the Court in *Gault*:

> Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with white-washed walls, regimented routine and institutional hours. " Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[46]

It is apparent from these cases that the rationale which was used prior to *Gault* to deny juveniles the benefits of the guarantee against double jeopardy is no longer viable. Instead, in determining whether the protection does apply in delinquency proceedings, the courts must decide whether the protection is necessary to preserve "fundamental fairness."[47]

44. For a discussion of the original theory underlying the juvenile court system in this country see *In re* Gault, 387 U.S. at 14-17

45. 383 U.S. at 556 (footnote omitted).

46. 387 U.S. at 27 (footnotes omitted).

47. Although the Court never expressly mentioned the term "fundamental fairness" in *Gault*, that has been the interpretation given to the phrase the Court did use, *viz.*

An analysis of the Supreme Court's opinion in *Gault* shows that the Court was particularly concerned with four distinct factors in determining whether the constitutional rights involved in that case were essential to fundamental fairness in the juvenile court system: the underlying basis of the right; the effect that the right would have on the beneficial aspects of the juvenile court system; recommendations of various studies and model acts dealing with the juvenile court system; and the extent to which the right was already applicable to delinquency proceedings in the various states, either by statute or court decision. Primary emphasis was placed on the first two considerations. The Court analyzed the rights to notice, counsel, and confrontation, and the privilege against self-incrimination, in terms of the goal each of those rights was intended to achieve. It stressed the fact that timely notice is necessary to permit preparation to meet the state's case.[48] It also emphasized that counsel is necessary to cope with problems of law, to make a skilled inquiry into the facts, and to prepare and submit any defense that the child might have.[49] In its consideration of the applicability of the privilege against self-incrimination, the Court's major concern was the untrustworthiness of confessions, especially those made by children. After noting that one of the purposes of the privilege is to alleviate pressure on the accused so that he is not compelled to admit his guilt falsely, the Court concluded that granting juveniles the privilege would tend to increase the reliability of any confessions that are obtained.[50] In its discussion of the right to confrontation, the Court merely stated that there is no justification for

"due process and fair treatment." In *Winship* the Court agreed with the statement made by the dissenters in the state court opinion that:

> "[A] person accused of a crime would be at a severe disadvantage, a disadvantage amounting to a lack of *fundamental fairness,* if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."

397 U.S. at 363 (emphasis supplied).

And in *McKeiver,* Mr. Justice Blackmun stated: "[T]he applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship,* is *fundamental fairness.*"

48. 387 U.S. at 33, citing Report By The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) [hereinafter cited as President's Crime Commission Report].

49. *Id.* at 36, citing President's Crime Commission Report; CHILDREN'S BUREAU, U.S. DEP'T. OF HEALTH, EDUCATION AND WELFARE, PUB. NO. 437, STANDARDS FOR JUVENILE AND FAMILY COURTS (1966) [hereinafter cited as Children's Bureau Report]; National Council on Crime and Delinquency, STANDARD JUVENILE COURT ACT (1959) [hereinafter cited as STANDARD JUVENILE COURT ACT.] The Court also relied on the fact that more than one-third of the jurisdictions provided some type of right to counsel in juvenile proceedings. 387 U.S. at 37-38 & n.63.

50. *Id.* at 44-47, 52-55.

different rules regarding sworn testimony in juvenile courts and in adult tribunals.[51] The Court also noted that granting all of those rights to juveniles would "not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[52] It felt that the juvenile court system could continue to process and treat children separately from adults, conduct informal proceedings, avoid classifying delinquents as "criminals," maintain a policy of imposing no civil disabilities on delinquents, and maintain confidentiality of records concerning police contact and court action.

Similarly, an analysis of the *Winship* opinion shows that in determining whether the standard of proof beyond a reasonable doubt is necessary for fundamental fairness, the Court examined the rationale underlying the standard and the effect that such a standard would have on the juvenile court process. It concluded that the standard of proof beyond a reasonable doubt is "a prime instrument for reducing the risk of convictions resting on factual error"[53] and that "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child."[54] The Court also concluded that the standard would have no effect on the state's policies of avoiding the stigma of a criminal conviction and the resulting deprivation of civil rights; maintaining the confidentiality of juvenile proceedings and the informality, flexibility, and speed of the adjudicatory hearing; individualizing treatment for a child who has been declared delinquent, and maintaining the distinctive procedures employed prior to the adjudicatory hearing.[55]

Thus, the two factors emphasized in *Gault* were the only factors considered in *Winship*. The plurality opinion in *McKeiver*, however, introduced a new element into the determination of whether a constitutional right is necessary for fundamental fairness in the juvenile court process—the effect of the right on the factfinding process. This new factor was obtained from the plurality's interpretation of *Gault* and *Winship*. Mr. Justice Blackmun, writing for four members of the Court, stated:

> As [the] standard [of fundamental fairness] was applied in [*Gault* and *Winship*], we have an emphasis on factfinding procedures.

51. *Id.* at 56, citing Children's Bureau Report, *supra* note 49.
52. *Id.* at 21.
53. 397 U.S. at 363.
54. *Id.* at 365.
55. *Id.* at 366-67

> The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis.[56]

While it is true that *Gault* and *Winship* can be interpreted in this manner, it is submitted that the plurality in *McKeiver* read the two opinions too narrowly The Supreme Court's emphasis on the effect of the right on the factfinding process in *Gault* and *Winship* must be taken in the context of the various constitutional rights involved in those cases. Essentially, the Court was looking at the underlying rationale for each of the constitutional rights and determining whether that rationale was equally appropriate in juvenile court proceedings and whether there would be any adverse effects on the substantive benefits of the juvenile court process. By coincidence, or perhaps because the Court felt that rights affecting the factfinding process were the most important and hence should be dealt with first, the Court's examination of the matter revealed that all of the rights considered by the Court in *Gault* and *Winship* were to some extent based on the need for increased accuracy in the factfinding process. Nevertheless, there is no reason to believe that the Court will limit constitutional rights in delinquency proceedings solely to those rights which have an impact on the factfinding process. It is more likely that it will grant juveniles any constitutional right that will benefit them, so long as the right does not impair the beneficial aspects of the juvenile court system.

In any event, the plurality in *McKeiver* considered the effect of the right to a jury trial on the factfinding process in delinquency proceedings and concluded that it "would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner."[57] They reasoned that because juries are not required in many other types of proceedings, including military trials and those for minor criminal offenses, they are not a necessary component of accurate factfinding.[58] The opinion also noted that various studies and model statutes do not recommend that the right to a jury trial be made mandatory in juvenile

56. 403 U.S. at 543.

57. *Id.* at 547.

58. *Id.* at 543. The Court noted that, in addition to military trials and minor criminal cases, jury trials are not required in equity cases, in workmen's compensation, in probate, or in deportation cases. The Court also reasoned that since the right to a jury trial in state criminal proceedings has not been held retroactive, the integrity of a decision reached without a jury cannot seriously be questioned. *Id.*

cases,[59] that at least 35 jurisdictions, either by statute or court decision, deny juveniles the right to a jury trial,[60] and that the majority of courts which had decided the issue since the *Gault* and *Duncan* decisions had held that the right to a jury trial is not constitutionally required in delinquency proceedings.[61] Finally, the Court found that the imposition of the right would have an adverse impact on the juvenile court process by turning it into a fully adversary proceeding, with the resultant delay and formality, and by impeding experimentation by states in solving juvenile problems.[62]

Through its opinions in *Gault*, *Winship*, and *McKeiver*, the Supreme Court has provided a framework for analysis of the applicability of the Bill of Rights to juvenile court proceedings. In applying that analysis to the guarantee against double jeopardy, it is necessary to conduct a separate inquiry for each of the three contexts in which double jeopardy might arise in proceedings involving juveniles, since it is conceivable that fundamental fairness requires the guarantee in some situations but not in others.

Two Delinquency Petitions Based on the Same Act

The first context in which the question of double jeopardy can arise in juvenile proceedings occurs when a delinquency petition is filed and the same act has already been the subject of a prior delinquency hearing.[63] Since a finding of delinquency in the first proceeding would

59. *Id.* at 546, 549-50. The Court examined the 1967 Task Force Report of the President's Crime Commission, *Juvenile Delinquency and Youth Crime;* the Uniform Juvenile Court Act; the Standard Juvenile Court Act; and a publication by the Children's Bureau of the Department of Health, Education and Welfare, W Sheridan, Legislative Guide for Drafting Family and Juvenile Court Acts (1969) [hereinafter cited as Sheridan].

60. 403 U.S. at 548-49 & nn.7-9.

61. *Id.* at 549.

62. *Id.* at 545, 547

63. Most juvenile court acts provide for three distinct phases in a delinquency proceeding. Unless a stationhouse adjustment is reached, the child is brought before a juvenile court judge for a detention hearing. At that hearing the court determines whether there is probable cause to believe that the child is delinquent. If the court finds no probable cause, then it must release the child and dismiss the petition. However, if the court finds probable cause it can either order the child detained at a youth home or release him pending an adjudicatory hearing. *See, e.g.,* Ill. Rev. Stat. ch. 37, § 703-6 (Supp. 1972). The second phase of the proceeding is the adjudicatory hearing, at which the court hears evidence to determine whether the allegations of the delinquency petition are supported. If the court finds the child is not delinquent or that the best interests of the child and the public will not be served by adjudging him a ward of the court, the court must release the child and dismiss the petition. If the court

permit the court to commit the child to a state institution and thus eliminate the necessity for a second delinquency petition, the typical case involves a second petition filed after either a dismissal of the first petition by the juvenile court judge,[64] the declaration of a mistrial in the first proceeding because of some action chargeable to the state,[65] or a finding by the judge that the state did not meet its burden of proof in attempting to prove that the child committed the unlawful acts alleged in the first petition.[66]

It is clear that in any of the above-described circumstances the double jeopardy clause would bar reprosecution of an adult defendant.[67] Indeed, those courts which have considered the issue since *Gault* have been unanimous in holding that fundamental fairness similarly bars a hearing on a subsequent delinquency petition in juvenile court proceedings.[68]

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finds the child delinquent and that it is in the best interests of the juvenile and the public that he be made a ward of the court, the court must so adjudge him and set a time for a dispositional hearing. *See, e.g.*, ILL. REV. STAT. ch. 37, §§701-4, 704-2, -6, -8 (Supp. 1972). The final phase of the proceeding is the dispositional hearing, at which the juvenile court judge hears evidence to determine what disposition should be made in respect to the delinquent child. *See, e.g.*, ILL. REV. STAT. ch. 37, §§701-10, 705-1 (Supp. 1972).

For purposes of this Article, the terms "adjudicatory hearing" and "delinquency hearing" will be used interchangeably to refer to the hearing in juvenile court at which the judge determines whether the child is delinquent.

64. *In re* McDonald, 153 A.2d 651 (D.C. Mun. Ct. App. 1959), *cert. denied*, sub nom. Cooper v. District of Columbia, 363 U.S. 847 (1960) (petition dismissed because government refused to reveal the name of a government informer); Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968) (motion for nonsuit by government granted).

65. Tolliver v. Judges of Family Court, 59 Misc. 2d 104, 298 N.Y.S.2d 237 (Supreme Ct. Bronx County 1969) (mistrial declared because state's witness did not appear at hearing); Fonseca v. Judges of Family Court, 59 Misc. 2d 492, 299 N.Y.S.2d 493 (Supreme Ct. Kings County 1969) (mistrial declared after hearing had begun when prosecutor stated he was not ready for trial).

66. M. v. Superior Ct. of Shasta County, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971); *In re* P.L.V., 490 P.2d 685 (Colo. 1971); *In re* G.D.K., 491 P.2d 81 (Colo. App. 1971).

67. Downum v. United States, 372 U.S. 734 (1963) (mistrial because of failure of government's witnesses to appear); Fong Foo v. United States, 369 U.S. 141 (1962) (directed verdict of acquittal because of prosecutor's misconduct and lack of credibility of government witnesses); United States v. Ball, 163 U.S. 662 (1896) (jury verdict of not guilty).

68. M. v. Superior Ct. of Shasta County, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971); *In re* P.L.V., 490 P.2d 685 (Colo. 1971); *In re* G.D.K., 491 P.2d 81 (Colo. App. 1971); Fonseca v. Judges of Family Court, 59 Misc. 2d 492, 299 N.Y.S.2d 493 (Supreme Ct. Kings County 1969); Tolliver v. Judges of Family Court, 59 Misc. 2d 104, 298 N.Y.S.2d 237 (Supreme Ct. Bronx County 1969); Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968).

The reasoning of these courts, however, has not been very helpful. Most courts merely have stated that *Gault* requires that delinquency hearings be consistent with due process of law and that because the first hearing could have resulted in incarceration, the guarantee against double jeopardy is applicable. Although the conclusion of these courts seems correct, the Supreme Court's reasoning in *Gault*, *Winship*, and *McKeiver* indicates that a deeper analysis of the situation is required. In all three of those cases the Court examined numerous factors before deciding whether the various constitutional rights involved were required in delinquency proceedings. A similar sort of analysis would seem to be necessary before reaching the conclusion that fundamental fairness prohibits prosecution of a second delinquency petition based on acts which have already been the basis of a prior hearing.

The principal factor relied on by the plurality in *McKeiver*, and interpreted by them as having been emphasized in *Gault* and *Winship*, was the effect that the particular constitutional right would have on the factfinding process. Although the plurality's interpretation of *Gault* and *Winship* is questionable, even under their analysis the conclusion that the guarantee against double jeopardy bars a second delinquency proceeding after an initial finding that the child did not commit the alleged illegal acts is inevitable. In such circumstances, the guarantee against double jeopardy has a profound impact on the accuracy of the factfinding process. By preventing the prosecutor from retrying the case until he achieves a finding of delinquency, the guarantee minimizes the chance that an innocent child will be convicted.[69] One commentator has given an excellent illustration of this fact:

> [I]f the evidence were such that one in four [factfinders] would convict, and three in four acquit, the probability of conviction if the defendant is tried once is, of course, one in four (4/16). If two trials were permitted the defendant would have to convince two [factfinders] of his innocence and the probability of one of the two convicting would be $1 - (\frac{3}{4} \times \frac{3}{4}) = (7/16)$; assuming the independence of each [factfinder] and the absence of other variables. If he had to convince five [factfinders] his probability of conviction by one would rise to over three in four.[70]

That the guarantee against double jeopardy has an effect on the accuracy of the factfinding process should weigh heavily in favor of its

69. *Twice in Jeopardy*, *supra* note 27, at 278.
70. *Id.* at 278 n.74.

applicability to delinquency proceedings in the context now being discussed.

In addition, the protection is fundamental to the very integrity of the factfinding process. One of the theories underlying the guarantee against double jeopardy is that the accused need "run the gantlet only once." [71] As Mr. Justice Douglas stated:

> It serves the purpose of precluding the State, following *acquittal*, from successfully retrying the defendant in the hope of securing a conviction. "The vice of this procedure lies in relitigating the same issue on the same evidence before two different [factfinders] with a man's innocence or guilt at stake" "in the hope that [the second factfinder] would come to a different conclusion." [72]

This same rationale applies in juvenile proceedings. If the judge finds that the youth did not commit the offense alleged in the first petition, a second delinquency hearing would merely be an attack on the factfinding process in general. Its only purpose would be the hope that the judge would reach a different result the second time around, and its only rationale would be that the first fact-finding process was inaccurate. But if that reasoning is sound, any subsequent decision in the case would be open to similar criticism. It is therefore necessary, in order to protect the integrity of a factfinding system which on the whole appears accurate, to permit the state only one opportunity to convict a defendant or to have a juvenile declared delinquent and to abide by the decision of the factfinder.[73] Any other result would be tantamount to a statement that the factfinding process is unreliable and would necessitate a reexamination of an important theory of Anglo-American jurisprudence.

Thus, even if the statement in *McKeiver* is correct, that the Supreme Court in juvenile cases has been concerned primarily with the effect of a constitutional right on the accuracy of the factfinding process, it is inconceivable that the Court would be less concerned about a constitutional right which affects the very integrity of that same factfinding process. Therefore, the argument that the guarantee against double

71. North Carolina v. Pearce, 395 U.S. 711, 727 (1969) (Douglas, J., concurring)

72. *Id.* at 734-35, *quoting from* Hoag v. New Jersey, 356 U.S. 464 (Warren, C.J., dissenting).

73. This analysis, of course, applies only to those situations in which the state fails to meet its burden of proof after it has had an opportunity to introduce all of its evidence at a complete adjudicatory hearing. For an analysis of the situation in which the first delinquency proceeding ends prematurely, see text accompanying notes 78-85 *infra*.

jeopardy has grave impact on the factfinding process also would support application of the guarantee to juvenile cases in order to bar second delinquency proceeding on petition based on facts that already have been the subject of one complete adjudicatory hearing.

The second major factor considered by the Court in determining the applicability of constitutional right to juvenile proceedings is the effect the right would have on the juvenile court system's assumed ability to function in unique manner. An analysis of the consequences of holding the guarantee against double jeopardy applicable to delinquency proceedings in the present context reveals that would have no effect on the substantive benefits of the juvenile court system. Three elements generally have been regarded as the vital features of the juvenile process: the flexibility for adjustments without an adjudicatory hearing, the informality of non-adversary adjudicatory hearing, and the dispositional alternatives available to the judge if the child found delinquent.[74] The guarantee against double jeopardy would have absolutely no effect on the first delinquency proceeding. The possibility of stationhouse adjustment would remain; the adjudicatory hearing would not be reformulated into fully adversary proceeding, and if the child were found delinquent the same dispositional alternatives would be available to the judge. In addition, none of the traditional delay or clamor of the adversary system would be introduced into the juvenile proceedings, and the confidentiality of the proceedings would still be present. The only effect of the double jeopardy protection would be to prohibit the state from having second chance at an adjudication of delinquency

Other factors that were considered in *Gault* and in *McKeiver* were embodied in recommended legislation and in governmental study reports. These sources also indicated that the guarantee against double jeopardy should bar second delinquency proceeding for the same acts. Although the President's Crime Commission Report, the Uniform Juvenile Court Act, and the two Standard Acts did not mention anything about preventing second delinquency hearing, the Children's Bureau of the Department of Health, Education and Welfare recommended the adoption of traditional constitutional law concepts as to when jeopardy attaches. The Bureau also recommended that second juvenile proceeding based on the same conduct be barred once the juvenile court begins taking

74. McKeiver Pennsylvania, 403 U.S. 528, 545, 550 (1971). *In re* Winship, 397 U.S. 358, 366 (1970); *In re* Gault, 387 U.S. 1, 25 (1966).

evidence in the first proceeding.[75] And while New Mexico is the only state that expressly prohibits a second delinquency proceeding,[76] this fact might be explained on the ground that a second delinquency hearing is so fundamentally unfair that it was thought unnecessary to include such a provision. Indeed, an analysis of those court decisions which have decided the issue since *Gault* indicates that the courts have felt it obvious that the double jeopardy protection applies in these situations.[77]

In any event, the major factors as interpreted by the plurality in *McKeiver*—the impact of the right both on the factfinding process and on the substantive benefits of the juvenile court process—weigh heavily in favor of holding the guarantee applicable to delinquency proceedings. Consequently it seems likely that the guarantee against double jeopardy, at least in the context of a delinquency petition based on the same acts that had previously been the subject of one complete adjudicatory hearing, is necessary for fundamental fairness in the juvenile court system.

The remaining question is whether the guarantee should also apply when the first adjudicatory hearing ends prematurely In an ordinary criminal proceeding, the double jeopardy clause does not prohibit reprosecution of a defendant if a mistrial is declared with the defendant's consent or because of a "manifest necessity"[78] Conversely, reprosecu-

75. SHERIDAN, *supra* note 59, at §27 and comment.

76. N.M. STAT. ANN. §13-14-25 (Supp. 1972).

77. M. v. Superior Ct. of Shasta County, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971); *In re* P.L.V., 490 P.2d 685 (Colo. 1971); *In re* G.D.K., 491 P.2d 81 (Colo. App. 1971); Fonseca v. Judges of Family Court, 59 Misc. 2d 492, 299 N.Y.S.2d 493 (Supreme Ct. Kings County 1969); Tolliver v. Judges of Family Court, 59 Misc. 2d 104, 298 N.Y.S.2d 237 (Supreme Ct. Bronx County 1969); Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968).

78. The "manifest necessity" test was formulated by Mr. Justice Story in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), which raised the question whether the fifth amendment prohibited reprosecution of a defendant following a mistrial declared because of the jury's inability to reach a verdict. He stated:

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases,

tion generally is barred when premature termination of a trial is caused by some action chargeable to the state or by an abuse of discretion by the trial judge.[79] An analysis of the situations in which the problem has arisen in juvenile court proceedings leads to the conclusion that the same rules that apply in criminal cases should apply in delinquency proceedings. The premature ending of a delinquency hearing can result from several causes—a motion for nonsuit by the government,[80] the failure of the state's main witness to appear at the hearing,[81] an admission by the state that it is not ready for trial,[82] or the failure of the government to reveal the name of an informer.[83] It is clear that in each of the first three situations the government would be unable to meet its burden

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upon the responsibility of the judges, under their oaths of office.

Id. at 579 (emphasis supplied).

Since then, the *Perez* test has been applied in a variety of instances. *See, e.g.*, Wade v. Hunter, 336 U.S. 684 (1949) (wartime tactical necessity in a court-martial proceeding); Keerl v. Montana, 213 U.S. 135 (1909) (hung jury); Dreyer v. Illinois, 187 U.S. 71 (1902) (hung jury); Thompson v. United States, 155 U.S. 271 (1894) (disqualification of a juror because he had served on the grand jury which indicted the defendant); Logan v. United States, 144 U.S. 263 (1892) (hung jury); Simmons v. United States, 142 U.S. 148 (1891) (reprosecution permitted following a mistrial declared because of a possibility of prejudice on the part of a juror). In addition, the Court held in Gori v. United States, 367 U.S. 364 (1961), that a mistrial declared because of the judge's desire to protect the defendant from prejudicial evidence did not bar reprosecution, even though the trial was aborted without the defendant's consent, because the judge was acting in the sole interest of the defendant. However, this line of reasoning was expressly rejected by the plurality in United States v. Jorn, 400 U.S. 470 (1971), when it stated:

> [W]e think that a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision.

Id. at 483.

79. United States v. Jorn, 400 U.S. 470 (1971) (reprosecution barred following mistrial declared because of trial judge's fear that government's witnesses had not been adequately warned of their constitutional rights); Downum v. United States, 372 U.S. 734 (1963) (reprosecution barred following mistrial declared because of failure of government witnesses to appear at trial); Fong Foo v. United States, 369 U.S. 141 (1962) (reprosecution barred following directed verdict of acquittal during government's case because of supposed improper conduct by the prosecutor and lack of credibility of government witnesses)

80. Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968).

81. Tolliver v. Judges of Family Court, 59 Misc. 2d 104, 298 N.Y.S.2d 237 (Supreme Ct. Bronx County 1969).

82. Fonseca v. Judges of Family Court, 59 Misc. 2d 492, 299 N.Y.S.2d 493 (Supreme Ct. Kings County 1969).

83. *In re* McDonald, 153 A.2d 651 (D.C. Mun. Ct. App. 1959), *cert. denied*, sub nom. Cooper v. District of Columbia, 363 U.S. 847 (1960).

of proof if the hearing were permitted to run its course, in which event it would be barred by the double jeopardy provision from bringing a second delinquency petition based on the same acts.[84] If that is true, there is no legitimate reason why the government should be permitted to avoid that result by prematurely ending the proceeding. Therefore, in order to prevent the state from circumventing a child's constitutional protection against double jeopardy, that protection must be extended to cover those situations in which the state causes the premature ending of an adjudicatory hearing on grounds which indicate that it would be unable to meet its burden of proof if the proceeding had continued to completion.

The fourth situation listed above—premature termination of the initial proceeding due to a failure of the government to reveal the name of an informer—must be analyzed differently, since there is no indication that the state would be unable to meet its burden of proof if the hearing continued. The result, however, is the same. The government's conduct in that situation has an adverse effect on the fact-finding process, since the name of the informer might be essential in learning the truth.[85] Such situations fall within the purview of the Supreme Court's attempts to increase the accuracy of the factfinding process in juvenile court proceedings. Therefore, the guarantee against double jeopardy should also be available to a child whenever the first adjudicatory hearing is terminated prematurely due to conduct by the state which would reduce the accuracy of the factfinding process if the hearing were allowed to continue.

Criminal Prosecution Following an Adjudication of Delinquency and Commitment to a State Institution

The second context in which the guarantee against double jeopardy is relevant to juvenile court proceedings is when the state seeks to prosecute a youth in a criminal action for the same acts which have already been the subject of an adjudicatory hearing in the juvenile court.[86]

84. *See* text accompanying notes 63-77 *supra.*

85. Roviaro v. United States, 353 U.S. 53 (1957)

86. A review of the appellate decisions on this subject reveals no cases in which the state attempted to prosecute a child after the juvenile court had found that he was not delinquent. This section therefore focuses only on those cases in which the criminal prosecution follows an adjudication of delinquency If, however, a criminal prosecution does follow a finding of non-delinquency, the analysis and result would be identical to that of the case where a second delinquency petition is filed based on the same conduct which has already been the subject of one adjudicatory hearing. *See* text accompanying notes 63-85 *supra.*

The decision whether to so prosecute a juvenile is usually based on either the seriousness of the offense allegedly committed by the child[87] or misconduct by him while he is institutionalized.[88] Many instances of subsequent criminal prosecution arose under former provisions of the Texas Juvenile Court Act.[89] Under that statute, the juvenile court was vested with exclusive jurisdiction over children under the age of 17 years who were accused of violating penal statutes.[90] And since the act contained no provision for waiver of jurisdiction to the criminal courts,[91] it was impossible to prosecute criminally a child under the age of 17.[92] As a result, if a person who was too young to be prosecuted criminally was suspected of a serious offense, the state would first file a delinquency petition in the juvenile court alleging either that unlawful act or a less serious, but still unlawful, contemporaneous act. If the evidence supported the allegations in the petition, the child typically was adjudicated delinquent and committed to a state industrial school. Then, after the youth reached the age of 17, the state would prosecute him

87. Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968) (murder); Sawyer v. Hauck, 245 F.Supp. 55 (W.D. Tex. 1965) (murder); People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953) (burglary); State v. R.E.F., 251 So. 2d 672 (Fla. App. 1971) (forcible rape and aggravated assault); *In re* Smith, 114 N.Y.S.2d 673 (Dom. Rel. Ct. Kings County 1952) (statutory rape); Commonwealth *ex rel.* Freeman v. Superintendent of State Correctional Inst'n, 212 Pa. Super. 422, 242 A.2d 903 (1968) (rape); Garza v. State, 369 S.W.2d 36 (Tex. Crim. App. 1963) (murder).

88. Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958) (child ran away from psychiatric institution and eloped); Brooks v. Boles, 151 W Va. 576, 153 S.E.2d 526 (1967) (child failed to obey rules of industrial school).

89. Tex. Rev. Civ. Stat. art. 2338 (1948).

90. Tex. Rev. Civ. Stat. art. 2338-3 (1948) defined a delinquent child as a child over 10 years of age and under 17 years of age (females under 18) who violated a penal statute of the state. Exclusive jurisdiction over actions governing delinquent children was granted to the juvenile courts by Tex Rev. Civ. Stat. art. 2338-5 (1948). In addition, Tex. Rev. Civ. Stat. art. 2338-12 (1948) required the criminal courts to transfer to the juvenile courts any case involving the prosecution of a child under the age of 17 (females under 18).

91. For a discussion of the concept of waiver of jurisdiction, see text accompanying notes 128-33 *infra.*

92. The Texas Juvenile Court Act was amended in 1967 to correct this situation. First, the exclusive jurisdiction of the juvenile courts was limited to children under the age of 15; and second, a provision was added permitting the juvenile courts to waive jurisdiction to the criminal courts in cases involving children 16 years of age or older. Tex. Rev. Civ. Stat. art. 2338-5, 2338-12 (1971). The purpose of the amendatory act was "to prevent children from being proceeded against in both the juvenile court and district court or criminal district court for offenses committed while of juvenile age." Texas Acts 1967, 60th Leg. ch. 475, §1. For a more detailed discussion of the history of these provisions of the Texas Juvenile Court Act, see Frey, *The Evolution of Juvenile Court Jurisdiction & Procedure in Texas,* 1 Tex. Tech. L. Rev. 209, 262-66 (1970).

criminally for either the same act upon which the adjudication of delinquency was based or, if the more serious offense had not been alleged in the delinquency petition, for the more serious offense. For many years the Texas Criminal Court of Appeals rejected the contention that the double jeopardy guarantee barred the subsequent criminal prosecution.[93] In those cases where criminal prosecution was for a more serious offense than that alleged in the delinquency proceeding, the court reasoned that even if the double jeopardy clause were applicable to juvenile court proceedings, that guarantee did not bar a subsequent prosecution for a separate and distinct offense, even if committed at the same time as the offense which constituted the basis for the juvenile court's finding of delinquency And in those cases where the criminal prosecution was for the same offense as that alleged in the delinquency proceeding, the court's reasoning was the same as that generally used to deny application of the double jeopardy protection to juvenile proceedings, that is, since the proceeding was civil in nature and could not result in conviction or punishment for the crime, no jeopardy arose by virtue of the proceeding. In 1963, however, in *Garza v. State*,[94] the court changed its position on the latter point and held that the subsequent prosecution for the same offense was a denial of due process of law The court stated:

> To affirm this conviction would be to hold that, for an offense committed before he reached the age of 17 years, the offender who has committed no other offense against the law may, upon petition of the district attorney, be adjudged a delinquent child and held in custody as such, and without regard to how he may respond to the guidance and control afforded under the Juvenile

93. Foster v. State, 400 S.W.2d 552 (Tex. Crim. App. 1966) (prosecution for murder following adjudication of delinquency based on theft); *Ex Parte* Sawyer, 386 S.W.2d 275 (Tex. Crim. App. 1964) (prosecution for murder following adjudication of delinquency based on violation of the penal law of the grade of felony); Martinez v. State, 171 Tex. Crim. 443, 350 S.W.2d 929 (1961) (prosecution for murder following adjudication of delinquency based on assault with intent to rob the murder victim); Hultin v. State, 171 Tex. Crim. 425, 351 S.W.2d 248 (1961) (prosecution for murder following adjudication of delinquency based on the same offense); Perry v. State, 171 Tex. Crim. 282, 350 S.W.2d 21 (1961) (prosecution for murder following adjudication of delinquency based on unlawful possession of weapon at time and place of murder); Dearing v. State, 151 Tex. Crim. 6, 204 S.W.2d 983 (1947) (prosecution for murder following adjudication of delinquency based on burglary committed at the same time as the murder). *See also* Johnson v. State, 3 Md. App. 105, 238 A.2d 286 (1967) (prosecution for murder of robbery victim following adjudication of delinquency based on the same robbery).

94. 369 S.W.2d 36 (Tex. Crim. App. 1963).

> Act, be indicted, tried and convicted for the identical offense after he reaches the age of 17
>
> [S]uch a conviction violates the principles of fundamental fairness and constitutes a deprivation of due process under the 14th Amendment.[95]

Following the decision in *Garza*, the federal courts reached the same conclusion in habeas corpus cases involving several of the same persons whose claims the Texas courts had previously rejected.[96] Moreover, the federal courts extended the rationale of the Texas court. In *Martinez v. Beto*[97] the Court of Appeals for the Fifth Circuit held that a subsequent criminal prosecution was barred even if based on a separate and distinct offense, so long as the separate offense was committed during the same criminal transaction as that which resulted in the prior adjudication of delinquency However, the result reached in *Martinez* is questionable in light of the Supreme Court's statement in *Hoag v. New Jersey*[98] that the state is not always forbidden "to prosecute different offenses at consecutive trials even though they arise out of the same occurrence."[99]

Other cases of criminal prosecutions after an adjudication of delinquency have arisen because of misconduct by the delinquent child while he is institutionalized.[100] For example, in *Moquin v. State*[101] a 16-year-old boy was found delinquent and committed to an institution on the basis of a petition alleging that he set fires to houses and committed an assault. After two months in the institution the youth escaped. The juvenile court then rescinded the commitment order and waived jurisdiction to the criminal court where the child was tried, convicted, and sentenced for arson, burglary, and assault with intent to murder. Both the trial court and the appellate court rejected the child's double jeopardy claim. The appellate court reasoned that the concept of double jeopardy applied only when the first trial was before a court that had the power to convict and punish the accused, and since the Maryland Juvenile Court Act did not contemplate punishment of the child, no jeopardy attached at the delinquency proceeding.[102]

95. *Id.* at 39.

96. Hulin v. Beto, 396 F.2d 216 (5th Cir. 1968); Sawyer v. Hauck, 245 F Supp. 55 (W.D. Tex. 1965).

97. 398 F.2d 542 (5th Cir. 1968).

98. 356 U.S. 464 (1958).

99. *Id.* at 467. *See also* Ciucci v. Illinois, 356 U.S. 571 (1958).

100. Brooks v. Boles, 151 W Va. 576, 153 S.E.2d 526 (1967); Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958).

101. 216 Md. 524, 140 A.2d 914 (1958).

102. *Id.* at 916.

The Supreme Court has not decided the double jeopardy issue where there has been a criminal prosecution based on the same acts which previously gave rise to a finding of delinquency. However, in *Gault* it gave some indication that such a prosecution would be a denial of due process of law In a footnote to the opinion, the Court implicitly approved the holding of a federal district court declaring the practice unconstitutional. The Court stated:

> The impact of denying fundamental procedural due process to juveniles involved in "delinquency" charges is dramatized by the following considerations: . (4) In some jurisdictions a juvenile may be subjected to criminal prosecution for the same offense for which he has served under a juvenile court commitment. However, the Texas procedure to this effect has recently been held unconstitutional by a federal district court judge, in a habeas corpus action.[103]

Since the decision in *Gault*, three appellate courts have considered the issue. Two of the cases were decided prior to the Supreme Court's decision in *Benton v. Maryland*,[104] which held the fifth amendment guarantee against double jeopardy applicable to the states. In *Hultin v. Beto*,[105] a federal habeas corpus action, the Court of Appeals for the Fifth Circuit, relying heavily on the Texas Criminal Court of Appeals' decision in *Garza*, held that it is fundamentally unfair to adjudicate a child delinquent, deprive him of his liberty, and subsequently try and convict him for the identical offense. And in *Commonwealth ex rel. Freeman v. Superintendent of State Correctional Institution*,[106] where two boys who had been found delinquent for raping a young girl were transferred for criminal prosecution for the same offense one month after their commitment to an institution on the delinquency charge, the court held that the juvenile court could not waive jurisdiction to the criminal courts after an adjudication of delinquency. However, the most recent decision on the issue concluded that a criminal prosecution for the same offense could take place after a finding of delinquency and commitment to a state institution. In *State v. R.E.F.*,[107] which was decided after all

103. *In re* Gault, 387 U.S. 1, 20 n.26 (1967). It should be remembered that at the time of the decision in *Gault*, the fifth amendment guarantee against double jeopardy was not applicable to the states. *See* notes 31-32 *supra* and accompanying text.

104. 395 U.S. 784 (1969).

105. 396 F.2d 216 (5th Cir. 1968).

106. 212 Pa. Super. 422, 242 A.2d 903 (1968).

107. 251 So. 2d 672 (Fla. App. 1971)

of the relevant Supreme Court cases involving juveniles and also after the Court's decision in *Benton*, a 16-year-old boy charged with forcible rape and aggravated assault was adjudicated delinquent by a Florida juvenile court and committed to the Division of Youth Services for an indefinite period. Eleven days after that judgment was rendered, the boy was indicted by a grand jury for rape. The trial court granted the defendant's motion to quash the indictment on the ground that the criminal proceeding would constitute a breach of fundamental fairness and due process of law The appellate court reversed, holding that it would not be fundamentally unfair to try the defendant criminally after the adjudication of delinquency

Although the court's decision was based partly on a peculiarity of a state statute which ousted jurisdiction from the juvenile court if an indictment was returned charging a capital offense,[108] the court's major concern was the welfare of the community as a whole. The court stated that a balance should be struck between fair treatment of the juvenile defendant and fair consideration of the juvenile's victims and society's right to be free from lawless acts; it concluded that the federal courts which had considered the issue had failed to consider adequately the interests of the latter.[109] It then held that since the indictment immediately followed the juvenile court adjudication and the defendant was promptly taken into custody by criminal court authorities, there would be no violation of fundamental fairness in prosecuting the child criminally [110]

The approach taken by the court in *R.E.F.*, while it might have popular appeal, seems inconsistent with the approach taken by the Supreme Court in *Gault*, *Winship*, and *McKeiver* In those cases the Court only looked at what was fundamentally fair to the child; nowhere did it indicate that a child could be stripped of his constitutional rights through a balancing process.[111] Applying the Supreme Court's approach to the problem at hand leads to the conclusion that fundamental fairness does require that the guarantee against double jeopardy be available to bar a criminal prosecution based on the same acts for which the accused

108. FLA. STAT. §39.02(6)(c) (1971).

109. *Id.* at 680.

110. *Id.*

111. It is true, of course, that in determining whether a right is fundamental to the juvenile court process, the Court has balanced various factors, namely, the importance of the right and its impact on the beneficial aspects of the juvenile court system. However, once the Court concluded that the right was fundamental, it did not then balance that fact against any interest of the community-at-large.

has already been adjudicated delinquent and committed to a state institution.

The plurality in *McKeiver*, because of its interpretation of *Gault* and *Winship*, applied a test that emphasizes the effect that a constitutional right would have on the factfinding process. It is apparent that, in the context now being discussed, the protection against double jeopardy has no bearing whatsoever on the accuracy or integrity of the factfinding process, since the state is not being given a second chance to convict after one factfinder has concluded that the child was innocent. Yet this conclusion does not mean that it would be fair to deny application of the double jeopardy provision to juvenile proceedings. A proper reading of *Gault* and *Winship* indicates that the interpretation placed on those cases by the plurality in *McKeiver* is much too narrow The Court's real concern in *Gault* and *Winship* was the applicability of the underlying rationale of a constitutional right to the juvenile court process. If that rationale is equally applicable to delinquency proceedings, and if the right would have no adverse effect on the claimed benefits of the juvenile court system, *Gault* and *Winship* held that the right should be obligatory on the juvenile courts. Although the rights involved in *Gault* and *Winship* affected the Court's desire for increased accuracy in the factfinding process, there was no indication in either case that other bases would be held insufficient to support the grant of a right considered necessary for fundamental fairness in the juvenile court system.

One of the underlying rationales of the guarantee against double jeopardy is the theory that it is inherently unfair to punish a man twice for the same offense.[112] The Supreme Court long ago recognized that fact when it stated:

> Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution.[113]

A second reason is the feeling that the state should not be allowed to harass an individual by subjecting him to successive trials for the same offense. A defendant should be able to consider the matter closed once

112. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).
113. *Id.* at 173.

he has been exposed to the rigors of one trial. He should not be forced to live in a state of continuing fear that he will "have to marshal the resources and energies necessary for his defense"[114] in a second trial for the same offense.[115]

The fundamental nature of the guarantee against double jeopardy can be seen by the fact that, unlike the right to a jury trial, the protection has been held applicable to *all* criminal prosecutions.[116] It is also apparent that the underlying theories of the guarantee are, in the present context, equally applicable to proceedings originating in the juvenile courts: a youth who is punished as a delinquent for acts committed while he is a child should not be punished a second time in the criminal courts for the same acts, nor should he be forced to go to the trouble and expense of defending himself a second time for the same offense.

In addition, granting juveniles the protection against double jeopardy in the present context would have no adverse effect on the substantive benefits of the juvenile court system. As previously discussed, the double jeopardy provision would have no impact on the original proceeding in the juvenile court. All of the same opportunities for an informal adjustment and a prompt, informal adjudicatory hearing, as well as the wide range of dispositional alternatives, would still be available to the juvenile court judge. It is only after the juvenile court has had the opportunity to apply its assumed benefits that the double jeopardy provision would be relevant, and at that point it could not be argued that the juvenile court system, which by then has fulfilled its function, would be affected adversely in any manner. In fact, William Sheridan, the Assistant Director of HEW's Children's Bureau Division of Juvenile Delinquency Service, has stated in this regard:

> [T]he concept of double jeopardy appears to be in conformity

114. Abbate v. United States, 359 U.S. 187, 198-99 (1959) (Brennan, J., separate opinion).

115. United States v. Jorn, 400 U.S. 470, 479 (1971); North Carolina v. Pearce, 395 U.S. 711, 733-34 (1969) (Douglas, J., concurring); Green v. United States, 355 U.S. 184, 187-88 (1957); Abbate v. United States, 359 U.S. 187, 198-99 (1959) (Brennan, J., separate opinion). *See also* J. SIGLER, DOUBLE JEOPARDY 39-40 (1969).

116. The fact that the right to a jury trial is not applicable in all criminal prosecutions and the fact that the applicability of the right to the states was not held retroactive were major factors relied upon by the plurality in *McKeiver* 403 U.S. at 543, 547 In contrast, the guarantee against double jeopardy has been held applicable in all criminal prosecutions, and the Supreme Court's decision holding the guarantee applicable to the states has been given full retroactive effect. *See* Ashe v. Swenson, 397 U.S. 436, 437 n.1 (1970); Waller v. Florida, 397 U.S. 387, 391 n.2 (1970); Price v. Georgia, 398 U.S. 323, 330 n.9 (1970).

> with the purposes underlying the juvenile court approach, namely, protection and rehabilitation of the child, and its application to delinquency proceedings does not appear to create problems in the attainment of these objectives.[117]

The two major factors considered by the Court in *Gault* and *Winship* therefore indicate that the guarantee should be applicable in the present context. And an examination of the other factors considered by the Court in *Gault* and the plurality in *McKeever* helps to substantiate that conclusion. At least 31 states have some sort of statutory provision which would prevent a criminal prosecution following an adjudication of delinquency.[118] The majority of these statutes provide that no evidence given in a juvenile court proceeding is admissible against the youth in any proceeding in any other court.[119] While this language does not

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117. Sheridan, *Double Jeopardy and Waiver in Juvenile Delinquency Proceedings*, 23 FED. PROB. 43, 47 (1959) [hereinafter cited as *Double Jeopardy and Waiver*]. *See also* 43 MINN. L. REV. 1253, 1255 (1959).

118. ALASKA STAT. §47.10.080(g) (1971); ARK. STAT. ANN. §45-204 (1964); CAL. WELF. & INST'NS CODE §606 (West 1966); COLO. REV. STAT. ANN. §22-1-9 (Supp. 1967); DEL. CODE. ANN. tit. 10, §982(c) (1953); GA. CODE ANN. §24A-2401(b) (1971); HAWAII REV. STAT. §571-49 (Supp. 1968); ILL. REV. STAT. ch. 37, §§702-7(3), 702-9(1) (Supp. 1972); IND. ANN. STAT. §9-3215 (Supp. 1972); IOWA CODE ANN. §232.73 (1969); KY. REV. STAT. ANN. §208.350 (1969); MD. ANN. CODE art. 26, §70-16(d) (Supp. 1971); MASS. GEN. LAWS ANN. ch. 119, §60 (1969); MICH. COMP. LAWS ANN. §712A.23 (1968); MINN. STAT. ANN. §260.211 (1971); MISS. CODE ANN. §7185.09 (Supp. 1971); MO. ANN. STAT. §211.271(3) (Supp. 1971); MONT. REV. CODES ANN. §10-611 (Supp. 1971); N.J. REV. STAT. §2A:4-39 (1952); N.M. STAT. ANN. §13-14-25(I) (Supp. 1972); N.D. CENT. CODE §27-20-33(b), 27-20-34(2) (Supp. 1971); OHIO REV. CODE ANN. §2151.26(c), 2151.358 (Page Supp. 1971); OKLA. STAT. tit. 10, §1127(a) (1971); PA. STAT. ANN. tit. 11, §261 (1965); R.I. GEN. LAWS ANN. §14-1-40 (Supp. 1971); S.D. COMPILED LAWS ANN. §26-8-57 (Supp. 1971); TENN. CODE ANN. §§37-233(b), 37-234(c) (Supp. 1971); TEX. REV. CIV. STAT. arts. 2338-1(6)(i), 2338-1(13)(e) (Supp. 1971); UTAH CODE ANN. §55-10-105(3) (Supp. 1971); VT. STAT. ANN. tit. 33, §662(e) (Supp. 1971); WIS. STAT. ANN. §§48.38, 48.39 (1957).

119. ALASKA STAT. §47.10.080(g) (1971); ARK. STAT. ANN. §45-205 (1964); COLO. REV. STAT. ANN. §22-1-9 (Supp. 1967); DEL. CODE ANN. tit. 10, §982(c) (1953); GA. CODE ANN. §24A-2401(b) (1971); HAWAII REV. STAT. §571-49 (1968); ILL. REV. STAT. ch. 37, §702-9(1) (Supp. 1972); IND. ANN. STAT. §9-3215 (Supp. 1972); KY. REV. STAT. ANN. §208.350 (1969); MASS ANN. LAWS ch. 119, §60 (1965); MICH. COMP. LAWS ANN. §712A.23 (1968); MINN. STAT. ANN. §260.211 (1971); MISS. CODE ANN. §7185.09 (Supp. 1971); MO. ANN. STAT. §211.271(3) (Supp. 1971); MONT. REV. CODES ANN. §10-611 (Supp. 1971); N.J. REV. STAT. §2A:4-39 (1952); N.D. CENT. CODE §27-20-33(b) (Supp. 1971); OHIO REV. CODE ANN. §2151.358 (Page Supp. 1971); OKLA. STAT. tit. 10, §1127(a) (1971); PA. STAT. ANN. tit. 11, §261 (1965); R.I. GEN. LAWS ANN. §14-1-40 (Supp. 1971); S.D. COMPILED LAWS ANN. §26-8-57 (Supp 1971); TENN. CODE ANN. §37-233(b) (Supp. 1971); TEX. REV. CIV. STAT. art. 2338-1(13)(e) (Supp. 1971); UTAH CODE ANN. §55-10-105(3)

expressly prohibit a subsequent criminal prosecution, the limitation on the use of the evidence seems to make it virtually impossible to obtain a conviction in the criminal proceeding.[120]

Provisions in other statutes go further than the mere restriction on the use of evidence. Several statutes provide that once a petition is filed in the juvenile court, the child is not thereafter subject to criminal prosecution based on the facts giving rise to the petition unless the juvenile court waives jurisdiction to the criminal courts in accordance with the procedure specified in the state juvenile court act.[121] Since most of these

(Supp. 1971); VT. STAT. ANN. tit. 33, §662(e) (Supp. 1971); WIS. STAT. ANN. §48.38 (1957).

Many of these statutes provide exceptions for subsequent proceedings under the juvenile court act and/or for pre-sentence hearings in the criminal courts.

120. There are few cases interpreting the restriction on the use of evidence introduced at a juvenile court hearing, which may be some indication that the clear language of the restriction is observed by most prosecutors. One court, however, has stated that the intent of the limitation is to proscribe the actual testimony taken at the juvenile proceeding, and not to exclude a witness who testified at the juvenile proceeding from testifying on the same subject matter at a subsequent trial for the same offense. People v. Hammond, 27 Mich. App. 490, 183 N.W.2d 623 (1970). Such an interpretation would give a juvenile no protection against double jeopardy It should be noted, however, that the statement by the court in *Hammond* was dictum. The precise issue before the court was whether certain evidence introduced at a hearing conducted to determine whether the juvenile court should waive jurisdiction to the regular criminal courts was admissible at the criminal trial which followed the juvenile court's waiver of jurisdiction. In concluding that it was, the court reasoned that if the evidence presented at a waiver hearing were barred, the waiver proceeding would be meaningless because the prosecutor would no longer have any witnesses or evidence to present at the criminal trial. 183 N.W.2d at 626. Under the circumstances in *Hammond*, the court's reasoning clearly is correct, but the case of a criminal trial following a waiver hearing is clearly distinguishable from the case of a criminal prosecution following a full adjudicatory hearing in the juvenile court. In the former situation the state has not had a hearing on the merits of the complaint prior to the criminal trial, whereas in the latter situation it has. If a witness at a waiver hearing were precluded from testifying at the criminal proceeding conducted after a waiver of jurisdiction, the child could never be subject to punishment or rehabilitation for his unlawful conduct. On the other hand, if the hearing in juvenile court went to the merits of the delinquency petition and the child was institutionalized for his unlawful acts, he would not escape punishment or rehabilitation even if the witnesses who testified against him at the delinquency proceeding were barred from testifying at a subsequent criminal prosecution for the same unlawful acts. Indeed, in Commonwealth v. Wallace, 346 Mass. 9, 190 N.E.2d 224 (1963), the court interpreted the Massachusetts Juvenile Court Act in just this manner. If the prior juvenile proceeding was a full adjudicatory hearing, the unambiguous and comprehensive language of the statute would bar the use at a subsequent criminal trial of *any evidence* introduced at the delinquency hearing; however, if the prior juvenile proceeding was merely a waived hearing, the evidence introduced there would not bar its use at a subsequent criminal prosecution. *Id.* at 15-16, 190 N.E.2d at 228.

121. CAL. WELF. & INST'NS CODE §606 (West 1966); MD. ANN. CODE art. 26, §70-16(d)

statutes permit waiver only prior to or during the adjudicatory hearing,[122] the practical effect is to bar a criminal prosecution following an adjudication of delinquency and commitment to an institution. The Illinois and New Mexico statutes are perhaps the most explicit in providing juveniles protection against double jeopardy Both provide that the taking of evidence in an adjudicatory hearing is a bar to criminal prosecution based upon the conduct alleged in the petition.[123]

The weight to be given these statutes was expressed by Mr. Justice Blackmun in *McKeiver* He stated:

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'[124]

Even under this standard, it should not be inconsequential that 31 states provide a juvenile with some protection against a subsequent criminal prosecution for the same offense for which he was adjudicated delinquent.

In addition to the provisions in these 31 states, the Standard Juvenile Court Act, the Standard Family Court Act, and the Uniform Juvenile Court Act all contain provisions which would apply the guarantee against double jeopardy to juvenile proceedings. All three model acts would bar a criminal prosecution based on the same facts which gave

(Supp. 1971); N.M. STAT. ANN. §13-14-25 (Supp. 1972); N.D. CENT. CODE §27-20-34(2) (Supp. 1971); OHIO REV. CODE ANN. §2151.26(c) (Page Supp. 1971); TENN. CODE ANN. §37-234(c) (Supp. 1971); TEX. REV. CIV. STAT. art. 2338-1(6)(i) (Supp. 1971); WIS. STAT. ANN. §48.39 (1957).

122. MD. ANN. CODE art. 26, §70-16(a) (Supp. 1971); N.M. STAT. ANN. §13-14-27 (Supp. 1972); N.D. CENT. CODE §27-20-34(1) (Supp. 1971); OHIO REV. CODE ANN. §2151.26(a) (Page Supp. 1971); TENN. CODE ANN. §37-234(a) (Supp. 1971). In addition, the Iowa Juvenile Court Act, IOWA CODE ANN. §232.72 (1969), has been interpreted to bar a criminal prosecution once an adjudicatory hearing in the juvenile court has begun. *See* State v. Halverson, 192 N.W.2d 765 (Iowa 1971).

Although CAL. WELF. & INST'NS CODE §707 (West Supp. 1972) states that transfer must occur *during* an adjudicatory hearing, it has been interpreted to permit transfer *after* an adjudication of delinquency. *See In re* J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971).

The Texas and Wisconsin acts make no mention of when transfer to the criminal courts can occur.

123. ILL. REV. STAT. ch. 37 §702-7(3) (Supp. 1972); N.M. STAT. ANN. §13-14-25 (Supp. 1972).

124. 403 U.S. at 548.

rise to the delinquency petition, unless the juvenile court waived jurisdiction to the criminal courts in accordance with the procedure described in the statute, and all three require that the waiver hearing be held prior to the hearing on the merits of the petition.[125] Similarly, the Model Rules for Juvenile Courts[126] and the Children's Bureau publication, Family and Juvenile Court Acts,[127] provide that jeopardy attaches once the adjudicatory hearing begins. In the past, the Supreme Court has relied heavily on such model statutes as an indication of what rights are necessary for fundamental fairness. The fact that there has been general acceptance by the specialized agencies which formulated these model acts should weigh in favor of applying double jeopardy protection to delinquency proceedings.

When all of the relevant factors are considered, it seems evident that the guarantee against double jeopardy should operate to preclude criminal prosecution based on facts which were the basis for a previous adjudication of delinquency The underlying rationales of the protection have been deemed so essential that it is applicable to all criminal cases, and both theories have as much merit in the juvenile court system as they do in the regular criminal process. In addition, holding the right applicable to juvenile proceedings would have no effect on the substantive benefits of the juvenile court system. That system would be able to function in exactly the same manner as it does now The fact that over three-fifths of the jurisdictions in this country have statutory provisions which have the effect of barring a subsequent criminal prosecution for the same offense also indicates that the principle is deeply rooted in the jurisprudence of this country Although the most recent court to consider the issue concluded that the guarantee is not applicable to delinquency proceedings, the clear trend, even prior to the Supreme Court's decision in *Gault*, is to bar the subsequent criminal prosecution. Finally, the fact that the model acts in the field recommend such a provision, when taken with all of the other factors, leads to the conclusion that the guarantee against double jeopardy should be held applicable to juvenile

125. UNIFORM JUVENILE COURT ACT §34 (1968). Although §13 of both the Standard Juvenile Court Act and the Standard Family Court Act is somewhat ambiguous as to when the waiver hearing must be held, when read in conjunction with Rule 9 of the Model Rules for Juvenile Courts, which is published by the same agency which formulated both Standard Acts, it is clear that those acts require the waiver hearing to precede the hearing on the merits of the delinquency petition. MODEL RULES FOR JUVENILE COURTS, Rule 9.and Comment (1969).

126. MODEL RULES FOR JUVENILE COURTS, *supra* note 125, at Rule 9 and Comment.

127. SHERIDAN, *supra* note 59, at §27

court proceedings to bar criminal prosecution of a delinquent child for the same acts which have already served as the basis for trial and punishment in the juvenile court system.

Double Jeopardy and the Decision to Waive Jurisdiction to the Criminal Courts

The final context in which the question of double jeopardy can arise in proceedings involving juveniles is when the juvenile court waives its jurisdiction over a child after the start of an adjudicatory hearing and transfers the case to the regular criminal courts for prosecution. This context is closely related to the one just discussed, since waiver can sometimes occur following the commitment of a child to a state institution. This discussion will be limited to a consideration of the situation where a criminal prosecution follows a waiver of jurisdiction after the start of a hearing on the merits of the delinquency petition, but *before* any punishment has been imposed on the child. It should be noted that if the waiver occurs *after* commitment of the juvenile to a corrective institution, the discussion in the previous section applies as well as the present analysis.

At least 44 jurisdictions have provisions in their juvenile court statutes which permit waiver of jurisdiction in cases involving all or a limited category of offenses.[128] The purpose of these provisions is to provide

128. Ala. Code tit. 13, §364 (1958); Alaska Stat. §47.10.060 (1971); Ariz. Juv. Ct. R. 12, 14 (Supp. 1971); Cal. Welf. & Inst'ns Code §707 (West Supp. 1972); Colo. Rev. Stat. Ann. §22-1-4(4)(a), 22-3-8(1) (Supp. 1969); Conn. Gen. Stat. Ann. §17-60a (Supp. 1972); D.C. Code §16-2307 (Supp. V 1972); Fla. Stat. Ann. §39.02(6) (Supp. 1972); Ga. Code Ann. §24A-2501 (1971); Hawaii Rev. Stat. §571-22 (Supp. 1971); Idaho Code §16-1806 (Supp. 1971); Ill. Rev. Stat. ch. 37, §702-7(3) (Supp. 1972); Ind. Ann. Stat. §9-3214 (Supp. 1972); Iowa Code Ann. §§232.72.73 (1969); Kan. Stat. Ann. §38.808 (Supp. 1971); Ky. Rev. Stat. Ann. §208.170 (1969); Me. Rev. Stat. Ann. tit. 15, §2611(3) (1964); Md. Ann. Code art. 26, §70-16 (Supp. 1971); Mass. Gen. Laws Ann. ch. 119, §§61, 75 (1965); Mich. Comp. Laws Ann. §712A.4 (Supp. 1972); Minn. Stat. Ann. §260.125 (1971); Miss. Code Ann. §7185-15 (1953); Mo. Ann. Stat. §211.071 (1962); Mont. Rev. Codes Ann. §10-603 (Supp. 1971); Nev. Rev. Stat. §62.08 (1969); N.H. Rev. Stat. Ann. §169.21 (1964); N.J. Rev. Stat. §2A:4-15 (1952); N.M. Stat. Ann. §13-14-27 (Supp. 1972); N.C. Gen. Stat. §7A-280 (1969); N.D. Cent. Code §27-20-34 (Supp. 1971); Ohio Rev. Code Ann. §2151.26 (Page Supp. 1971); Okla. Stat. tit. 10, §1112(b) (1971); Ore. Rev. Stat. §§419.482, 419.507, 419.533 (1971); Pa. Stat. Ann. tit. 11, §260 (1965); R.I. Gen. Laws Ann. §14-1-7 (Supp. 1971); S.C. Code Ann. §§15-1281.12 to .13 (1962); S.D. Compiled Laws Ann. §§26-8-22.7, 26-11-4 (Supp. 1971); Tenn. Code Ann. §37-234 (Supp. 1971); Tex. Rev. Civ. Stat. art. 2338-1(6) (Supp. 1971); Utah Code Ann. §55-10-86 Supp. 1971); Va. Code Ann. §§16.1-176, -177.1, -178 (Supp. 1971); W Va. Code Ann. §49-5-14 (1966); Wis. Stat. Ann. §48.18 (Supp. 1972); Wyo. Stat. Ann. §14-115.38 (Supp. 1971).

flexibility in the handling of certain older adolescents who, because of their social and emotional development, will not benefit from the programs of the juvenile court which are designed for the treatment and rehabilitation of children.[129] To achieve this end, most of the statutes provide that a child above a specified age who is within the jurisdiction of the juvenile court can be transferred to the criminal courts if, after a full hearing at which the child is represented by counsel,[130] the juvenile court concludes that such transfer is in the best interests of the child or the public.[131] Many of the statutes additionally require a finding of

129. *Double Jeopardy and Waiver, supra* note 117, at 44.

130. This was the requirement set forth by the Supreme Court in Kent v. United States, 383 U.S. 541 (1966). *See* notes 2-4 *supra* and accompanying text.

131. Eleven of the statutory provisions are to the effect that the juvenile court must find that it would be in the best interests of *both* the child and the public before transfer to the criminal courts is allowed. CONN. GEN. STAT. ANN. §17-60a (Supp. 1972); GA. CODE ANN. §24A-2501 (1971); KY. REV. STAT. ANN. §208.170 (1969); MD. ANN. CODE art. 26, §70-16 (Supp. 1971); N.M. STAT. ANN. §13-14-27 (Supp. 1972); N.D. CENT. CODE §27-20-34 (Supp. 1971); OHIO REV. CODE ANN. §2151.26 (Page Supp. 1971); ORE. REV. STAT. §419.533 (1971); TENN. CODE ANN. §37-234 (Supp. 1971); W VA. CODE ANN. §49-5-14 (1966); WYO. STAT. ANN. §14-115.38 (Supp. 1971). The Georgia, Maryland, and New Mexico acts have defined the requirements more precisely They direct the juvenile court to find that the child is not amenable to treatment or rehabilitation through the facilities available to the juvenile court and that the interests of the community or the safety of the public require that the child be placed under legal restraint or disciplined.

Ten other states require a finding that *either* the interests of the child or the interests of the public would best be served by a waiver of jurisdiction before transfer is permitted. COLO. REV. STAT. ANN. §§ 22-1-4(4)(a), 22-3-8(1) (Supp. 1969); HAWAII REV. STAT. §571-22 (Supp. 1971); IDAHO CODE §16-1806 (Supp. 1971) (children over 18 within the jurisdiction of the juvenile court); IOWA CODE ANN. §232.72 (1969); MINN. STAT. ANN. §260.125 (1971); N.C. GEN. STAT. §7A-280 (1969); S.C. CODE ANN. §15-1281.13 (1962); S.D. COMPILED LAWS ANN. §26-11-4 (Supp. 1971); UTAH CODE ANN. §55-10-86 (Supp. 1971); WIS. STAT. ANN. §48.78 (Supp. 1972).

Several statutes contain a standard which looks solely at the interests of the child. *See* ALA. CODE tit. 13, §364 (1958) (transfer permitted if a delinquent child cannot be made to lead a correct life and cannot properly be disciplined under the juvenile court act); ALASKA STAT. §47.10.060 (1971) (transfer permitted if the child is not amenable to treatment or rehabilitation through the facilities available to the juvenile court); CAL. WELF. & INST'NS CODE §707 (West Supp. 1972) (transfer permitted if the child is not amenable to treatment or rehabilitation through the facilities available to the juvenile court); D.C. CODE §16-2307 (Supp. V 1972) (transfer required if there are no reasonable prospects for rehabilitation of the child); KAN. STAT. ANN. §38.808 (Supp. 1971) (transfer permitted if the child is not amenable to treatment or rehabilitation through the facilities available to the juvenile court); MO. ANN STAT. §211.071 (1962) (transfer permitted if the child is not a proper subject to be dealt with under the juvenile court act); VA. CODE ANN. §16.1-177.1 (Supp. 1971) (transfer permitted in misdemeanor cases if the child cannot be adequately controlled or induced to lead a correct life through measures available to the juvenile court).

reasonable grounds to believe the child committed the offense alleged in the delinquency petition.[132] Two statutes go even further and require an actual finding of delinquency before the juvenile court can transfer the case.[133] But regardless of the precise requirements, if the juvenile court does transfer the case to the regular criminal courts, the timing of the transfer in relation to the adjudicatory hearing on the merits of the delinquency petition may have double jeopardy ramifications.

The juvenile court statutes of 11 states provide that if a waiver hearing is held, it must occur prior to a hearing on the merits of the delinquency petition.[134] Twelve other states apparently permit the juvenile court to

Other statutes contain a standard which looks solely at the interests of the state or the public. *See* FLA. STAT. ANN. §39.02(6) (Supp. 1972); ME. REV. STAT. ANN. tit. 15 §2611 (1964); MASS. GEN. LAWS ANN. ch. 119, §61 (1965); MONT. REV. CODES ANN. §10-603 (Supp. 1971); N.J. REV. STAT. §2A:4-15 (1952); PA. STAT. ANN. tit. 11, §260 (1965); TEX. REV. CIV. STAT. art. 2338-1(6) (Supp. 1971); VA. CODE ANN. §16.1-176 (Supp. 1971) (in felony cases the prosecutor may present the case to the grand jury if he deems it in the public interest).

Several other statutes merely state that transfer is permitted after "investigation" or "full investigation." *See* IDAHO CODE §16-1806 (Supp. 1971); IND. ANN. STAT. §9-3214 (Supp. 1972); MICH. COMP. LAWS ANN. §712A.4 (Supp. 1972); MISS. CODE ANN. §7185-15 (1953); NEV. REV. STAT. §62.080 (1969); N.H. REV. STAT. ANN. §169.21 (1964); OKLA. STAT. tit. 10, §1112(b) (1971); R.I. GEN. LAWS ANN. §14-1-7 (Supp. 1971); VA. CODE ANN. §16.1-176 (Supp. 1971).

The Illinois Juvenile Court Act apparently permits the prosecutor to decide whether to prosecute the action in the juvenile court or the criminal court. If the juvenile court judge objects to a criminal prosecution, the matter is decided by the Chief Judge of the Circuit Court. No standards for this decision are set forth in the statute. *See* ILL. REV. STAT. ch. 37, §702-7(3) (Supp. 1972).

132. ALASKA STAT. §47.10.060 (1971); CONN. STAT. ANN. §17-60a (Supp. 1972); GA. CODE ANN. §24A-2501 (1971); KY. REV. STAT. ANN. §208.170 (1969); ME. REV. STAT. ANN. tit. 15, §2611 (1964); MONT. REV. CODES ANN. §10-603 (Supp. 1971); N.C. GEN. STAT. §7A-280 (1969); N.D. CENT. CODE §27-20-34 (Supp. 1971); OHIO REV. CODE ANN. §2151.26 (Page Supp. 1971); TENN. CODE ANN. §37-234 (Supp. 1971); WYO. STAT. ANN. §14-115.38 (Supp. 1971).

ARIZ. JUV. CT. R. 14 (Supp. 1971) sets forth "probable cause" as the only standard required for transfer.

Several statutes also require the juvenile court to find that the child is not committable to an institution for the mentally ill or retarded before transfer is allowed. *See* GA. CODE ANN. §24A-2501 (1971); HAWAII REV. STAT. §571-22 (Supp. 1971); N.M. STAT. ANN. §13-14-27 (Supp. 1972); N.D. CENT. CODE §27-20-34 (Supp. 1971); OHIO REV. CODE ANN. §2151.26 (Page Supp. 1971); TENN. CODE ANN. §37-234 (Supp. 1971); WYO. STAT. ANN. §14-115.38 (Supp. 1971).

133. ALA. CODE tit. 13, §364 (1958); W VA. CODE ANN. §49-5-14 (1966).

134. D.C. CODE §16-2307 (Supp. V 1972); GA. CODE ANN. §24A-2501 (1971); ILL. REV. STAT. ch. 37, §702-7(3) (Supp. 1972) (the taking of evidence at an adjudicatory hearing bars a subsequent criminal prosecution for the conduct alleged in the delinquency petition); MD. ANN. CODE art. 26, §70.16 (Supp. 1971); N.H. REV. STAT. ANN. §169.21 (1964); N.M. STAT. ANN. §13-14-27 (Supp. 1972); N.C. GEN. STAT. §7A-280 (1969); N.D. CENT.

conduct the two hearings simultaneously Of these 12, six permit transfer at any time prior to an adjudication of delinquency,[135] while six permit the juvenile court to waive jurisdiction after a finding of delinquency [136] In the remaining 21 states, the juvenile court statutes make no mention of when transfer to the criminal courts can occur.[137] It should be evident that a decision to waive jurisdiction made prior to an adjudicatory hearing raises no double jeopardy problems, since the subsequent criminal prosecution will be the only hearing on the question of the child's alleged misconduct. In such cases the waiver hearing is akin to a preliminary hearing in the regular criminal court process. No jeopardy attaches because there is no danger of punishment resulting from that proceeding.[138] There is no possibility that the child will be found delinquent and committed to a state institution. The only issue before the court is the proper manner in which to proceed with the complaint. On the other hand, a waiver of jurisdiction following a decision on the merits of a delinquency petition, but before punishment, or even following the introduction of some evidence in a hearing on the merits of a petition, might constitute "jeopardy" and preclude a subsequent criminal prosecution for the same offense.

CODE §27-20-34 (Supp. 1971); OHIO REV. CODE ANN. §2151.26 (Page Supp. 1971); TENN. CODE ANN. §37-234 (Supp. 1971); WYO. STAT. ANN. §14-115.38 (Supp. 1971)

135. ALASKA STAT. §47.10-060 (1971); ARIZ. JUV. CT. R. 12 (Supp. 1971); KAN. STAT. ANN. §38.808 (Supp. 1971); KY. REV. STAT. ANN. §208.170 (1969); ME. REV. STAT. ANN. tit. 15, §2611(3) (1964); PA. STAT. ANN. tit. 11, §260 (1965) (as interpreted in Commonwealth *ex rel.* Freeman v. Superintendent of State Correctional Inst'n, 212 Pa. Super. 422, 242 A.2d 903 (1968) and *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954)).

136. ALA. CODE tit. 13, §364 (1958) (as interpreted in Seagroves v. State, 279 Ala. 621, 189 So. 2d 137 (1966); CAL. WELF. & INST'NS CODE §707 (West Supp. 1972) (as interpreted in *In re* J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971)); MO. ANN. STAT. §211.071 (1962) (as interpreted in Carter v. Murphy, 465 S.W.2d 28 (Mo. Ct. App. 1971)); ORE. REV. STAT. §419.507 (1971); VA. CODE ANN. §16.1-178 (Supp. 1971); W VA. CODE ANN. §49-5-14 (1966).

137. COLO REV. STAT. ANN. §§22-1-4(4)(a), 22-3-8 (Supp. 1969); CONN. GEN. STAT. ANN. §17-60a (Supp. 1972); FLA. STAT. ANN. §39.02(6) (Supp. 1972); HAWAII REV. STAT. §571-22 (Supp. 1971); IDAHO CODE §16-1806 (Supp. 1971); IND. ANN. STAT. §9-3214 (Supp. 1972); IOWA CODE ANN. §232-72 (1969); MASS. GEN. LAWS ANN. ch. 119, §61 (1965); MICH. COMP. LAWS ANN. §712A.4 (Supp. 1972); MINN. STAT. ANN. §260-125 (1971); MISS. CODE ANN. §7185-15 (1953); MONT. REV. CODES ANN. §10-603 (Supp. 1971); NEV. REV. STAT. §62.080 (1969); N.J. REV. STAT. §2A:4-15 (1953); OKLA. STAT. tit. 10, §1112 (1971); R.I. GEN. LAWS ANN. §14-1-7 (Supp. 1971); S.C. CODE ANN. §15-1281.13 (1962); S.D. COMPILED LAWS ANN. §26-8-22.7 (Supp. 1971); TEX. REV. CIV. STAT. art. 2338-1(6)(b) (Supp. 1971); UTAH CODE ANN. §55-10-86 (Supp. 1971); WIS. STAT. ANN. §48.18 (Supp. 1972).

138. In Collins v. Loisel, 262 U.S. 426 (1923), the Supreme Court held that jeopardy does not attach at a preliminary hearing.

In an ordinary criminal proceeding, jeopardy "attaches" once the accused is put to trial before the trier of fact.[139] Thus, the fifth amendment guarantee against double jeopardy not only prohibits reprosecution for the same offense following either conviction[140] or acquittal;[141] it also bars reprosecution if the former trial aborted prior to a verdict, so long as the defendant did not consent to the termination which resulted in the absence of a "manifest necessity" [142] It would therefore seem to follow that if the guarantee against double jeopardy is applicable to juvenile proceedings in the context now being discussed, it would bar a subsequent criminal prosecution whenever the decision to waive jurisdiction is made after the juvenile court began hearing evidence on the merits of the delinquency petition.

The majority of courts which have considered the issue, however, have concluded that a subsequent criminal prosecution does not violate the protection against double jeopardy [143] These courts typically have

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139. In a jury trial, jeopardy attaches when the jury has been impaneled and sworn. Newman v. United States, 410 F.2d 259, 260 (D.C. Cir.), *cert. denied*, 396 U.S. 868 (1969); United States v. Lawson, 334 F. Supp. 612, 614 (E.D. Pa. 1971); People v. Fraison, 22 Ill. 2d 563, 177 N.E.2d 230 (1961). In a bench trial, jeopardy attaches when the court has begun to hear evidence. United States v. Lawson, *supra* at 614. There is a question, however, whether this occurs when the first witness has been sworn or when the first witness has been placed on the stand and has begun to testify. *Compare* People v. Fritz, 140 Cal. App. 2d 618, 295 P.2d 449 (1956) *with* Newman v. United States, *supra*.

140. *In re* Nielsen, 131 U.S. 176 (1889). The state is, however, permitted to retry a defendant whose conviction is reversed on appeal. *See* United States v. Ball, 163 U.S. 662 (1896).

141. Fong Foo v. United States, 369 U.S. 141 (1962); Grafton v. United States, 206 U.S. 333 (1907); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662 (1896).

The bar against retrial is applicable even if the acquittal in the first trial was implicit. For example, when a defendant charged with first degree murder is convicted of a lesser included offense, the state is barred from retrying him on the first degree murder charge, even if the conviction for the lesser offense subsequently is reversed on appeal by the defendant. *See* Green v. United States, 355 U.S. 184 (1957).

142. United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963). For a discussion of the "manifest necessity" rule, see note 78 *supra*.

143. United States v. Dickerson, 271 F.2d 487 (D.C. Cir. 1959); *In re* J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971); People v. McFarland, 17 Cal. App. 3d 807, 95 Cal. Rptr. 369 (1971); People v. Brown, 13 Cal. App. 3d 876, 91 Cal. Rptr. 904 (1970), *cert. denied*, 404 U.S. 835 (1971); Carter v. Murphy, 465 S.W.2d 28 (Mo. Ct. App. 1971); *In re* Mack, 22 Ohio App. 2d 201, 260 N.E.2d 619 (1970) (dictum); *In re* Whittington, 17 Ohio App. 2d 164, 245 N.E.2d 364 (1969).

The California courts reached this conclusion despite the fact that the guarantee against double jeopardy had previously been held by the state supreme court to bar a second delinquency proceeding based on the same acts which had previously been the

reasoned that the decision to waive jurisdiction is merely a preliminary proceeding at which the juvenile court determines which type of proceeding, either juvenile or criminal, will best protect society and rehabilitate the child; thus, until either the juvenile court or the criminal court reaches a final disposition of the case, only a single jeopardy is involved.[144] It is submitted, however, that the result reached by these courts is wrong, and that an analysis under the approach taken by the Supreme Court in juvenile cases leads to the conclusion that once a hearing begins on the merits of a delinquency petition, jeopardy attaches and a subsequent criminal prosecution is barred by the guarantee against double jeopardy

Under the Supreme Court's approach in *Gault* and *Winship*, the main factors to consider in determining whether a right is necessary for fundamental fairness in the juvenile court system are whether the rationale underlying the right is equally applicable to delinquency proceedings, and if so, whether the right would have any adverse effect on the beneficial aspects of the juvenile court system. As previously discussed, the guarantee against double jeopardy is intended to prevent the state from punishing an individual twice for the same offense and to prevent the state from using the criminal process as a means for harassing an accused by subjecting him to successive trials for the same

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subject of one delinquency proceeding. *See* M. v. Superior Ct. of Shasta County, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971)

Two courts have stated that the guarantee against double jeopardy prohibits waiver *after* a finding of delinquency, but these courts did not decide whether jeopardy attaches at the start of an adjudicatory hearing. *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954) (dictum); Commonwealth *ex rel.* Freeman v. Superintendent of State Correctional Inst'n, 212 Pa. Super. 422, 242 A.2d 903 (1968)

In addition, two courts have interpreted their state's juvenile court act as requiring a finding of delinquency before the proceeding may be transferred to the criminal courts. In neither case did the court indicate that any double jeopardy problems were raised by such a procedure. Seagroves v. State, 279 Ala. 621, 189 So. 2d 137 (1966); *In re* Jackson, 21 Ohio St. 2d 215, 257 N.E.2d 74 (1970).

On the other hand, in State v. Halverson, 192 N.W.2d 765 (Iowa 1971), the court concluded on statutory grounds that transfer is prohibited once a hearing on the merits of a delinquency petition begins.

144. United States v. Dickerson, 271 F.2d 487 (D.C. Cir. 1959); *In re* J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971); Carter v. Murphy, 465 S.W.2d 28 (Mo. Ct. App. 1971); *In re* Whittington, 17 Ohio App. 2d 164, 245 N.E.2d 364 (1969).

One court, in dictum, stated that no jeopardy attaches at an adjudicatory hearing because the proceedings in juvenile court are civil and not criminal in nature. *In re* Mack, 22 Ohio App. 2d 201, 204, 260 N.E.2d 619, 621 (1970). It is clear, however, from the Supreme Court's language in *Gault*, *Winship*, and *McKeiver*, that such reasoning is no longer valid. *See* note 41 *supra* and text accompanying notes 40-46 *supra*

offense.[145] In the context of a criminal prosecution following a waiver of jurisdiction by the juvenile court, the former rationale is applicable only in those cases where the waiver occurred *after* the child had been committed to a state institution. In that event, the analysis conducted in the previous section of this Article would apply The latter rationale, however, is applicable even if the waiver of jurisdiction occurred *before* the child had been punished by the juvenile court. At a hearing on the merits of a delinquency petition, a child is in danger of being found delinquent and committed to a state training school. The child must therefore marshal the resources and energies necessary for his defense. During the adjudicatory hearing, he is subject to the fear and anxiety that he will spend the next few years of his life in a state institution. Such burdens are, of course, a necessary part of the juvenile court and criminal court processes. But in the ordinary criminal justice system, unless the first trial ends prematurely with the defendant's consent or because of a "manifest necessity", or unless a conviction in the first trial is reversed upon appeal by the defendant,[146] the guarantee against double jeopardy protects an accused from being forced to go through the ordeal of a trial a second time for the same offense. Certainly there is no legitimate reason to subject a child to greater ordeal than would be permitted with respect to an adult defendant. Fundamental fairness would seem to dictate that children, like adults, should be free from the burdens of defending themselves twice for the same offense.[147]

145. *See* text accompanying notes 27-30, 112-115, *supra*.

146. *See* notes 78 and 140, *supra*.

147. Mention should be made at this point of the practice followed in some states of combining the hearing on the merits of a delinquency petition with a hearing on the issue of waiver. Such a practice is not only at odds with the underpinnings of the guarantee against double jeopardy, but it is also fundamentally unfair for a second reason. The purposes of the two hearings are quite distinct. In an adjudicatory hearing the issue is whether the child committed the acts alleged in the delinquency petition. In a waiver hearing the issue is whether the interests of the child or the public would best be served by a proceeding in the juvenile court or a proceeding in the regular criminal courts. As a result, the evidence may not be the same. But by conducting the two hearings simultaneously the child is compelled to defend against two separate issues, often not knowing until the decision is made which issue is foremost in the judge's mind. If the child stresses the waiver issue at the expense of the merits of the petition, he might end up being committed to a state institution as a delinquent because the judge was more concerned with the question of guilt or innocence. Conversely, if the child stresses the merits of the petition at the expense of the waiver issue, he might wind up in a criminal court facing the possibility of a long prison sentence because the juvenile court judge had been more concerned with the waiver issue. Even if it is possible for the child to stress both issues equally, he might find himself in the position of having to introduce certain evidence to meet the state's case on the question of guilt or inno-

The Supreme Court also has been concerned with the effect that a constitutional right would have on the beneficial aspects of the juvenile court system. One of those beneficial aspects is the waiver hearing itself. At that hearing the juvenile court can examine the social history of an allegedly delinquent child and can determine whether the child can be rehabilitated or treated through the facilities available to the juvenile court and whether the interests of the community will best be served by a delinquency proceeding or a criminal prosecution. In light of the Supreme Court's reluctance to abandon completely the juvenile court system, it is unlikely that the Court would be willing to eliminate a procedure which introduces an element of flexibility into the system. But holding the guarantee against double jeopardy applicable to delinquency proceedings would not require such a harsh result. Eleven states have adopted procedures which provide juveniles with the protection against double jeopardy while maintaining the prerogative of the juvenile court to waive jurisdiction if the interests of the child or the public so require. In these states if a waiver hearing is held, it must take place prior to a hearing on the merits of the delinquency petition.[148] Thus, it is not necessary to eliminate waiver hearings in order to provide juveniles with the guarantee against double jeopardy By simply restructuring the order of the proceedings, the juvenile courts can provide both the double jeopardy protection and the flexibility of a waiver hearing.

In certain circumstances, however, prohibiting a waiver of jurisdiction after commencement of the adjudicatory hearing might reduce the flexibility now available to the juvenile courts. In a limited number of cases, evidence that a child cannot be rehabilitated or treated through the juvenile court system (or that the public interest requires the child be prosecuted criminally) might not come to light until the adjudicatory hearing has begun. This can occur even if the juvenile

cence which is unfavorable to him on the waiver issue and which would not have been brought up in a hearing to consider only the waiver issue. Or, conversely, he might be forced to introduce evidence which is favorable to him on the waiver issue, but which is harmful to him on the question of guilt or innocence and which would not have been introduced at a hearing solely on the merits of the petition. *See* State v. Halverson, 192 N.W.2d 765 (Iowa 1971).

148. D.C. CODE §16-2307 (Supp. V 1972); GA. CODE ANN. §24A-2501 (1971); ILL. REV. STAT. ch. 37, §702-7(3) (Supp. 1972); MD. CODE ANN. art. 26, §70.16 (Supp. 1971); N.H. REV. STAT. ANN. §169.21 (1964); N.M. STAT. ANN. §13-14-27 (Supp. 1972); N.C. GEN. STAT. §7A-280 (1969); N.D. CENT. CODE §27-20-34 (Supp. 1971); OHIO REV. CODE ANN. §2151.26 (Page Supp. 1971); TENN. CODE ANN. §37-234 (Supp. 1971); WYO. STAT. ANN. §14-115.38 (Supp. 1971).

court held a waiver hearing prior to the hearing on the merits. Prohibiting a criminal prosecution at this point would mean that some of the flexibility now contained in the system would be lost. It would also seem to negate the purpose of the juvenile court to deal only with those children who can be aided by its programs. If it appears that the juvenile cannot be treated through the facilities of the juvenile court, there would seem to be no reason to continue the proceeding in that court. But if waiver were not permitted at this point, the only alternatives would be to continue with the delinquency proceeding or dismiss the petition and release the child—neither of which would be in the best interests of the child and the public.

Although this argument against the application of the double jeopardy provision to the juvenile courts appears superficially meritorious, it ignores the fact that a complete waiver hearing was held, or could have been held, prior to the start of the adjudicatory hearing. As the Supreme Court of Iowa stated in *State* v. *Halverson*:[149]

> [I]f a county attorney is causing juvenile cases to be investigated properly he will know in advance whether he desires to prosecute criminally and he can so move the court at or before the outset of the hearing. He has available the investigative facilities of the probation officer, the law enforcement officers, and the social services staff. Moreover, if, after hearing the county attorney's preliminary statement at the outset of a juvenile hearing, the juvenile court believes that transfer may be indicated, it can, sua sponte, thereupon restrict the hearing to the question of transfer.[150]

Far from being harmful to the juvenile court process, the prohibition of waiver after the taking of evidence at an adjudicatory hearing might actually be beneficial, because it would force prosecuting authorities to tighten their procedures and to conduct more thorough social investigations prior to the adjudicatory hearing. In all cases where the preliminary investigation indicates that there is a possibility that the best interests of the child or the public require a criminal prosecution, a waiver hearing should be held. Borderline cases should be resolved in favor of a waiver hearing. In this way the juvenile court can minimize the number of cases in which evidence suggesting transfer is overlooked until the hearing on the merits. In the vast majority of cases the correct decision on how to proceed with the delinquency petition will have been made prior to the

149. 192 N.W.2d 765 (Iowa 1971).
150. *Id.* at 769.

start of the adjudicatory hearing. It would therefore seem anomalous to deny all children the guarantee against double jeopardy simply because of the ineptitude of the state in its preliminary investigation. The potential harm of such a rationale seems clearly to outweigh the social utility of ensuring that those individuals who mistakenly pass the initial screening process can be transferred for criminal prosecution after the adjudicatory hearing has begun.

A second argument has been advanced against the practice of conducting a waiver hearing prior to the adjudicatory hearing. The California Court of Appeals has contended that a transfer hearing following an adjudication of delinquency is beneficial to the child because it prevents the juvenile court judge from being affected by evidence of the child's character which is not relevant to the determination of guilt.[151] While this result is indeed desirable,[152] it should be noted that only two states require that any transfer hearing be conducted after a finding of delinquency.[153] Even in California the juvenile court is permitted to consider the questions of guilt and transfer simultaneously.[154] If California were

151. *In re* J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971).

152. The President's Crime Commission Report *supra* note 48, recommended:

> Juvenile court hearings should be divided into an adjudicatory hearing and a dispositional one, and the evidence admissible at the adjudicatory hearing should be so limited that findings are not dependent upon or unduly influenced by hearsay, gossip, rumor, and other unreliable types of information.
>
> To minimize the danger that adjudication will be affected by inappropriate considerations, social investigation reports should not be made known to the judge in advance of adjudication.

153. ALA. CODE tit. 13, §364 (1958); W VA. CODE ANN. §49-5-14 (1966).

154. CAL. WELF. & INST'NS CODE §707 (West Supp. 1972) provides:

> At any time *during* a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, [within the jurisdiction of the juvenile court], when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney . . . to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition . . .

(emphasis supplied).

In People v. McFarland, 17 Cal. App. 3d 807, 95 Cal. Rptr. 369 (1971), and People v. Brown, 13 Cal. App. 3d 876, 91 Cal. Rptr. 904 (1970), *cert. denied*, 404 U.S. 835 (1971), the California Court of Appeals upheld the procedure of determining the merits of a delinquency petition and the issue of waiver at one hearing.

genuinely concerned with the possibility that character evidence might influence the determination of guilt, it would *require* that any waiver hearing be conducted after an adjudication of delinquency But even that procedure is not necessary in order to eliminate the possibility of prejudice. Many of those states which require that any waiver hearing be conducted prior to the hearing on the merits have reached a balance which protects both the child's interest in avoiding two hearings on the merits and his interest in avoiding any prejudice which might occur through the judge's study of the child's social record prior to a determination of the merits of the delinquency petition. In those states, if the juvenile court decides at the waiver hearing not to transfer the case to the criminal courts, upon objection by the child, the judge who presided at the waiver hearing is automatically disqualified from hearing the case on its merits.[155] Since this approach protects both of the child's interests, it is highly preferable to a procedure which protects only his interest in an adjudicatory hearing free from prejudice.

In considering the effect of a constitutional right on the juvenile court system, the Supreme Court has also been concerned about whether the right would introduce delay into the system. In the great majority of cases, prohibiting transfer to the criminal courts once the adjudicatory hearing begins would not cause any added delay, since only the timing of the waiver hearing is affected. Only in those borderline cases where the juvenile court retained jurisdiction after it had conducted a waiver hearing would there be some additional delay. However, if the goal of the juvenile court is to attempt to rehabilitate only those children who are amenable to treatment through the juvenile court's facilities and to transfer to the criminal courts those children who are not amenable to such treatment or who pose a threat to the community, the added assurance that the juvenile court is the correct tribunal to handle the case should outweigh any slight delay that might arise in a small minority of cases because of the waiver hearing.

The remaining substantive benefits of the juvenile court system would not be affected at all by application of the guarantee against double jeopardy to delinquency proceedings in the present context. The informality of the adjudicatory hearing would remain, regardless of when the waiver hearing took place. Similarly, the distinctive procedures employed prior to the adjudicatory hearing, such as the stationhouse adjust-

155. D.C. Code §16-2307(g) (Supp. V 1972); GA. CODE ANN. §24A-2501(e) (1971); N.M. STAT. ANN. §13-14-27(1) (Supp. 1972); N.D. CENT. CODE §27-20-34(5) (Supp. 1971); TENN. CODE ANN. §37-234(e) (Supp. 1971); WYO. STAT. ANN. §14-115.38 (Supp. 1971).

ment, would still be available to the juvenile court authorities. It is only after the decision is made to proceed with the complaint against the child that the double jeopardy protection would be relevant. The juvenile court could continue to process and treat those children who are likely to benefit from the facilities available to the juvenile court. Application of the double jeopardy provision to juvenile court proceedings would also have no effect on the policy of avoiding the label of "criminal", nor would it require the imposition of civil disabilities on children found to be delinquent. And finally, the states could continue to maintain the confidentiality of juvenile court proceedings and records.

It is also noteworthy that all of the model acts dealing with the juvenile court system require that any decision to waive jurisdiction be made prior to the taking of evidence at an adjudicatory hearing. The Uniform Juvenile Court Act, which was the model for the statutes in many of the 11 states requiring that any waiver hearing precede a hearing on the merits, protects a child from the ordeal of defending himself for the same offense in two separate tribunals and from any prejudice which might result from the juvenile court judge's examination of the child's social record prior to a determination of guilt.[156] The Standard Juvenile Court Act and the Standard Family Court Act, which are silent as to when waiver can occur,[157] must be read in conjunction with the Model Rules for Juvenile Courts,[158] a guideline published by the same agency that formulated the two Standard Acts. Rule 9 of the Model Rules provides that any waiver hearing be conducted "before the commencement of the adjudicatory hearing."[159] The comments to that rule state: "Once the adjudicatory hearing begins, the child is in fact 'in jeopardy,' and to transfer him to criminal court for another trial on the facts alleged in the petition would constitute a deprivation of due process of law"[160]

The Children's Bureau's Legislative Guide for Drafting Family and Juvenile Court Acts is equally emphatic as to when jeopardy attaches.

156. UNIFORM JUVENILE COURT ACT, *supra* note 59, at §34.

The Georgia, New Mexico, North Dakota, Ohio, Tennessee, and Wyoming juvenile court acts are based on the UNIFORM JUVENILE COURT ACT.

157. STANDARD JUVENILE COURT ACT, *supra* note 49, at §13, and STANDARD FAMILY COURT ACT, *supra* note 49, at §13, merely provide that waiver is permitted "if the court after full investigation and a hearing deems it contrary to the best interest of the child or the public to retain jurisdiction."

158. MODEL RULES FOR JUVENILE COURTS, *supra* note 125, at Rule 9.

159. *Id.*

160. *Id.* at comment to Rule 9.

In one section it states that a criminal prosecution for the same offense or an offense based on the same conduct is prohibited once the juvenile court has begun taking evidence on the merits of a delinquency petition or once the juvenile court has accepted a child's plea of guilty;[161] and, in another section, it states that waiver of jurisdiction is permitted only prior to a hearing on the merits of a petition.[162]

A negative factor that must be considered on the question whether the guarantee against double jeopardy is applicable to juvenile proceedings in the present context is the conclusion reached by the majority of courts which have considered the issue since *Gault*. All five appellate cases in which the issue was directly raised concluded that the double jeopardy provision does not prohibit waiver of jurisdiction by the juvenile court after the adjudicatory hearing has begun.[163] In addition, one court has discussed the issue in dictum and stated that no jeopardy attaches at the adjudicatory hearing;[164] two other courts have held that under the juvenile court statutes of their states, a finding of delinquency is required before the juvenile court can waive jurisdiction.[165] Neither of the latter two courts hinted that the required procedure created any double jeopardy problems. No appellate decisions have held that waiver of jurisdiction is prohibited by the guarantee against double jeopardy once a hearing on the merits of a delinquency petition begins, although one court has barred such waiver on statutory grounds.[166]

The significance of these decisions must, however, be tempered by the fact that one-fourth of the states which permit the juvenile court to transfer a case to the criminal courts prohibit by statute a transfer

161. SHERIDAN, *supra* note 59, at §27.

162. *Id.* at §31(a).

163. People v. McFarland, 17 Cal. App. 3d 807, 95 Cal. Rptr. 369 (1971); *In re* J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971); People v. Brown, 13 Cal. App. 3d 876, 91 Cal. Rptr. 904 (1970), *cert. denied*, 404 U.S. 835 (1971); Carter v. Murphy, 465 S.W.2d 28 (Mo. Ct. App. 1971); *In re* Whittington, 17 Ohio App. 2d 164, 245 N.E.2d 364 (1969) (finding of probable cause that child committed the unlawful acts charged is enough for court to waive jurisdiction).

164. *In re* Mack, 22 Ohio App. 2d 201, 260 N.E.2d 619 (1970).

165. Seagroves v. State, 279 Ala. 621, 189 So. 2d 137 (1966); *In re* Jackson, 21 Ohio St. 2d 215, 257 N.E.2d 74 (1970).

It should be noted, however, that the Ohio court stated that a finding of delinquency for waiver purposes could be made on a lesser standard of proof than would be required in an adjudicatory hearing. In those cases where only probable cause to believe the child committed the delinquent acts was shown, no double jeopardy problems would seem to arise.

166. State v. Halverson, 192 N.W.2d 765 (Iowa 1971).

after the start of the adjudicatory hearing.[167] In these states the clear language of the statutes eliminates any need for court action to protect the double jeopardy rights of a juvenile. It is also significant that the eight courts which have permitted transfer after the start of an adjudicatory hearing represent only four separate jurisdictions; of these four jurisdictions, one has recently amended its juvenile court act to require that any waiver hearing must take place prior to a hearing on the merits of the delinquency petition.[168]

The conflict among the factors considered relevant by the Supreme Court makes the question whether the guarantee against double jeopardy prohibits the juvenile court from waiving jurisdiction after the taking of evidence at a hearing on the merits of a delinquency petition the most difficult to answer of any of the questions involving the applicability of the protection against double jeopardy to juvenile court proceedings. Unlike the application of the protection in the context of a second delinquency petition for the same acts or in the context of a criminal prosecution for the same acts for which the child has already been found delinquent and committed to a state institution, application of the guarantee in the present context would, in the small minority of cases where the child's unamenability to treatment by the juvenile court or the interests of the community in a criminal prosecution do not come to light until sometime during the adjudicatory hearing, run counter to some of the aims of the juvenile court system. A value judgment must therefore be made as to whether all children accused of committing delinquent acts should be denied the guarantee against double jeopardy so that the juvenile court is never required to handle the case of a child who might be handled more properly by the criminal courts, or whether the double jeopardy interests of all children should be protected even though the juvenile court might sometimes have to proceed against a child who is not amenable to treatment through the facilities of the juvenile court.

In making this judgment it must be remembered that if the guarantee against double jeopardy is held applicable, the juvenile court still will be able to conduct a waiver hearing in every case where it deems it necessary, thereby providing the juvenile court judge with the opportunity to make a thorough examination of the child's social history before determining whether to proceed with the delinquency hearing. The number of cases which pass this screening process and which re-

167. *See* note 134 *supra* and accompanying text.

168. OHIO REV. CODE ANN. §2151.26 (Page Supp. 1971).

main in the juvenile court when they actually should be transferred to criminal court will indeed be small. Because of this fact, it is submitted that all juveniles accused of committing unlawful acts should be protected against double jeopardy even if it means that a few children who cannot be treated by the juvenile court and who pass the initial screening process of a waiver hearing are also protected from a criminal prosecution for the same acts. Support for this position can be gathered from provisions of all of the model acts dealing with juvenile courts and from the fact that one-fourth of the states which permit waiver of jurisdiction, including most of those which have recently reformulated their juvenile court acts, do not permit waiver after the taking of evidence at an adjudicatory hearing. Even though courts of several states have reached the opposite conclusion, the clear trend of juvenile court experts, as evidenced by the recently-formulated Uniform Juvenile Court Act and the many states which have adopted the provisions of that act, is toward the requirement that any waiver hearing take place before the hearing on the merits of a delinquency petition has begun.

Conclusion

During the past several years, the Supreme Court has vastly expanded the rights of juveniles by granting them many of the same constitutional rights accorded adult defendants in criminal trials. One question which the Court has not yet answered is whether the fifth amendment guarantee against double jeopardy is applicable to juvenile court proceedings. An analysis of the issue, using the framework fashioned by the Supreme Court in *Gault*, *Winship*, and *McKeiver*, leads to the conclusion that fundamental fairness requires that the guarantee against double jeopardy be available to juveniles in order to bar a second delinquency petition against a child based on the same acts which have previously been the subject of one delinquency proceeding. Similarly, subsequent criminal prosecution for the same acts which have previously served as a basis for an adjudicatory hearing in the juvenile courts should be barred, and waiver of jurisdiction to the regular criminal courts after the taking of evidence at a hearing on the merits of a delinquency petition should not be permitted.