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Juvenile Law- Double Jeopardy

Juvenile Law—DOUBLE JEOPARDY—*Lewis v. Commonwealth*, 214 Va. 150, 198 S.E.2d 629 (1973).

Both the United States Constitution[1] and the Constitution of Virginia[2] recognize the right of an individual to be protected against successive prosecutions for the same crime. While the concept of double jeopardy is rooted in the English common law[3] and early case law of the United States,[4] it has been predominant in the criminal law,[5] and has gained little acceptance in the area of juvenile law, which has been regarded as a civil proceeding.[6]

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1. ". . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb". U.S. CONST. amend. V, § 3.
2. ". . . [N]or be put twice in jeopardy for the same offense". VA. CONST. art. 1, § 8.
3. ". . . [T]he plea of *auterfoits acquit*, or former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offense. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 W. BLACKSTONE'S COMMENTARIES 335 (10th ed. 1786).
4. In *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), the Court stated:
   Why is it that, having once been tried and found guilty, he can never be tried again for that offense? 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. *Id.* at 173.

Accord, Green v. United States, 355 U.S. 184 (1957); Ball v. United States, 163 U.S. 662 (1896). The protection against double jeopardy was made applicable to the states through the due process clause of the fourteenth amendment in 1969. Benton v. Maryland, 395 U.S. 784 (1969); *accord*, Waller v. Florida, 397 U.S. 387 (1970).

In Price v. Commonwealth, 74 Va. (33 Gratt.) 819 (1880), the Virginia Supreme Court stated that "no man can be twice lawfully punished for the same offence." *Id.* at 824.

5. The guarantee against double jeopardy has reference to criminal prosecutions only, *e.g.*, Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Ball, 163 U.S. 662 (1896); State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951). It does not apply to civil proceedings. Commissioner v. Mitchell, 303 U.S. 391 (1938); United States v. Bridges, 86 F. Supp. 922 (N.D. Cal. 1949).

6. Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959) (a child who commits an offense falls under the care of the state. Such child is not deemed a criminal, nor is he punished as such; he is exempt from the criminal law). *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) (proceedings in juvenile court are governed by the rights and procedures followed in civil actions). In Virginia, this view was enunciated in Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946). The rationale behind the exemption of the juvenile from the criminal law is that a child who commits an offense is not a criminal, but merely a misguided ward of the state, who needs encouragement and assistance. The state, as much as possible, attempts to act as the child's parents would in accomplishing the prescribed goals of childhood, such as proper growth, education, and behavior. Thomas v. United States, 121 F.2d 905, 907 (D.C. Cir. 1941); POUND, THE JUVENILE COURT AND THE LAW (1944), *reprinted in* CRIME & DELINQUENCY 490, 498 (1964).

The civil nature of a juvenile proceeding originated in the chancery practice of England, where the doctrine of *parens patriae* was introduced.[7] Adherence to this doctrine has prompted courts to deny various constitutional rights to the juvenile,[8] rights which have been accorded the adult in criminal proceedings.[9] A radical change in the juvenile law, however, was initiated when the United States Supreme Court held, in *In re Gault*,[10] that the juvenile offender was entitled to "some" constitutional rights.[11] This decision has cast doubt upon the application of the doctrine of *parens patriae* as the primary consideration for determining the status of the

7. The concept of *parens patriae* developed in the chancery practice of England, where the King assumed general protection of all infants in his kingdom under the auspices of his chancellor. This protection was assumed because the state acts as the ultimate parent of all infants requiring its care and protection resulting from having parents who were unfit, unwilling or unable to provide such care and protection. In these situations the state became a quasi-parent acting as the guardian of the child. *See* Cowls v. Cowls, 8 Ill. 435 (1846); Creuze v. Hunter, 30 Eng. Rep. 113 (Ex. 1790); Eyre v. Shaftsbury, 24 Eng. Rep. 659 (Ex. 1722).

In assuming these quasi-parental duties, the state seeks to provide what the infant has not been given, an education and protection from a criminal career. To accomplish this the state must provide training, corrective care and supervision to the wayward child, unimpeded and unrestrained by the procedures which result in criminal punishment. *See* Note, *Misapplication of the Parens Patriae Power in Delinquency Proceedings*, 29 IND. L.J. 475 (1954); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

In furtherance of these objectives, the juvenile court system was established. It was and is a system designed to determine the needs of the child and of society rather than adjudicating criminal conduct; the goal has been rehabilitation and guidance, not the fixing of criminal responsibility, guilt and punishment. Hence the title, civil proceeding rather than criminal. Kent v. United States, 383 U.S. 541 (1966).

8. *See, e.g.*, 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); *Ex parte* Daedler, 194 Cal. 320, 228 P. 467 (1924) (right to jury trial); Cinque v. Boyd, 99 Conn. 70, 121 A. 678 (1923) (right to bail, right to confrontation, right to jury trial); Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913) (right to jury trial); *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954) (right to confrontation); *In re* Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954) (right to speedy and public trial); Childress v. State, 133 Tenn. 121, 179 S.W. 643 (1915) (right to grand jury indictment).

See generally Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266 (1972).

9. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (right against double jeopardy made applicable to the states); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial made applicable to the states); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel); Patton v. United States, 281 U.S. 276 (1930) (right to jury trial).

10. 387 U.S. 1 (1967).

11. The Court was faced with the issue of whether to apply certain constitutional safeguards to juveniles, including notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to a transcript of the proceedings and right to appellate review. The Court held that all rights at issue were to be applied in juvenile proceedings except the right to a transcript and the right to appellate review, for reasons discussed therein. *Id.* at 12, 58.

juvenile offender.[12] While the majority in *Gault* was satisfied with the substitution of the due process standard of fundamental fairness[13] for the *parens patriae* doctrine, other jurists have felt that the majority did not go far enough.[14] These advocates emphasize that since the juvenile's liberty is also placed in jeopardy, he should be afforded the same constitutional

12. In *Gault*, the Court held that the juvenile offender should not be deprived of the procedural safeguards of due process simply because the state has acted in a position of *parens patriae* and called the juvenile proceeding civil in nature rather than criminal. *Id.* at 16-29.

13. In *Gault*, the majority felt that the application of the appropriate due process of law to the juvenile proceeding would bring a degree of order and regularity to the juvenile court proceedings. In determining the essentials of due process, the Court included among them, the actuality of fairness, impartiality and orderliness. The Court felt, however, that the juvenile hearing did not have to conform with all the requirements of a criminal trial, only that it "measure up to the essentials of due process and fair treatment." *Id.* at 26-27, 30-31.

While the majority never actually defined the term "fundamental fairness," in his dissenting opinion, Mr. Justice Harlan attempted to do so. He said that a primary consideration of our constitutional system is the obligation to conduct any proceeding in which an individual may be deprived of liberty or property in a fashion consistent with the "traditions and conscience of our people" as to be ranked as fundamental. *Id.* at 67, *quoting* Snyder v. Massachusetts, 291 U.S. 97 (1934). He further emphasized that the test applied should be based upon the fundamental principles of liberty and justice which lie at the foundation of all our civil and political institutions, and the character and requirements of the circumstances presented in each instance. *Id.* at 68. Justice Harlan felt that it was these considerations which were necessary if fundamental fairness were to accompany the proceeding, regardless of its level. *Id.* at 72.

In considering which practice accords with due process, the Court in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), following reasoning similar to that of Mr. Justice Harlan in *Gault*, said that it would follow a practice which will not offend a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Id.* at 548.

It was to this idea of what practice accords with due process, that the Virginia Supreme Court followed in Lewis v. Commonwealth, 214 Va. 150, 153, 198 S.E.2d 629, 631 (1973).

For other theories of what consitutes "fundamental fairness" see Duncan v. Louisiana, 391 U.S. 145 (1968) (Black, J., concurring) (Harlan, J., dissenting); Wolf v. Colorado, 338 U.S. 25 (1949); Palko v. Connecticut, 302 U.S. 319 (1937).

14. The view that all guarantees and limitations of the Federal Constitution should be accorded the juvenile offender, has been advanced prior to and since *Gault*. *See In re* Poff, 135 F. Supp. 224, 227 (D.D.C. 1955) (when a juvenile is charged with a crime, he must be accorded the guarantees and limitations of the Constitution). *Accord*, Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960).

In *Gault*, Mr. Justice Black, in his concurring opinion emphasized that when a child is sentenced to confinement for extended periods of time in violation of a state criminal law, he should be accorded all provisions of the Bill of Rights made applicable to the states through the fourteenth amendment. Denying the child and not the adult these rights would be a denial of equal protection of the laws. 387 U.S. 1, 61 (1967). *Contra*, Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959) (a juvenile's constitutional safeguards are determined from the requirement of due process and fair treatment, not by direct application of the United States Constitution). *See, e.g., In re* Winship, 397 U.S. 358 (1970); Kent v. United States, 383 U.S. 541 (1966).

safeguards that are afforded an adult in criminal proceedings.[15] It is this divergence of opinion that has created varying philosophies within the Court.[16] In its most recent decision concerning juvenile rights,[17] the Court felt it incumbent not to go beyond the standard set forth by the majority in *Gault*.[18]

In the recent case of *Lewis v. Commonwealth*,[19] the Virginia Supreme Court confronted the issue of whether the prohibition against double jeopardy applies to juvenile proceedings.[20] Lewis was tried and convicted in the Eighth Regional Juvenile and Domestic Relations Court of the City of Charlottesville on two petitions of grand larceny and another petition of feloniously breaking and entering with intent to commit larceny.[21] Following this conviction, the court determined that disposition of the case should remain within the juvenile court rather than with the court of record.[22] The Commonwealth Attorney for the City of Charlottesville there-

15. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (Douglas, J., dissenting); United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1959), *rev'd on other grounds*, 271 F.2d 487 (1959); Fain v. Duff, No. 73-1933 (5th Cir. Dec. 7, 1973).

16. This divergence that currently exists and that has existed since *Gault*, lies among the varying philosophies of the Justices of the Court, past and present. It is apparent from the opinions and the philosophies therein espoused, that Justices Douglas, Marshall, and the late Mr. Justice Black, agree that the juvenile should be afforded the same rights afforded the adult in criminal proceedings, since he too has his liberty at stake in the juvenile proceeding. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (Douglas, Marshall, & Black, JJ., dissenting); Debacker v. Brainard, 396 U.S. 28 (1969) (Black & Douglas, JJ., dissenting); *In re* Gault, 387 U.S. 1 (1967) (Black, J., concurring). These same thoughts, however, have not been expressed by other Justices, who feel that the due process standard of fundamental fairness is an adequate criteria for determining which rights are to be made applicable to the juvenile offender. Included within this group are Justices White, Blackmun, Brennan, and the late Mr. Justice Harlan. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (White, Harlan, & Brennan, JJ., concurring); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967) (Harlan, J., dissenting).

17. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

18. In *McKeiver*, the Court reaffirmed the view of the majority in *Gault* by indicating that the juvenile has not yet been afforded all of the rights constitutionally assured to an adult accused of a crime, therefore it is necessary only that the juvenile hearing measure up to the essentials of due process and fair treatment. *Id.* at 533-34.

19. 214 Va. 150, 198 S.E.2d 629 (1973).

20. The collateral issue of whether the trial court had jurisdiction to try the case after removal from the juvenile court was answered in the affirmative by the Virginia court. *Id.* at 152, 198 S.E.2d at 631.

21. *Id.* at 150, 198 S.E.2d at 629.

22. The court made this determination pursuant to statutory provisions which provided:

> If a juvenile sixteen years of age or over, who has been previously committed to any juvenile training school in this state or any other state, is charged with an offense which, if committed by an adult, could be punishable by death or confinement in the penitentiary, the case shall be certified for proper criminal proceedings, if probable cause be found, to the appropriate court of record having jurisdiction of such offense

after presented the matter[23] to the grand jury which resulted in Lewis' indictment, trial and conviction of the offenses charged. Lewis appealed the conviction, contending that since the juvenile court had assumed jurisdiction, the subsequent grand jury indictment against him was a denial of his due process rights and placed him in jeopardy twice for the same offenses.[24]

The Virginia Supreme Court, affirming the judgment for the Commonwealth, held that Lewis was not denied his due process rights prohibiting double jeopardy.[25] In so deciding, the Virginia court placed substantial weight upon *McKeiver v. Pennsylvania*[26] wherein the United States Supreme Court reaffirmed the applicability of the due process standard of fundamental fairness to juvenile proceedings.[27] The Virginia court held that giving the Commonwealth Attorney the discretionary power to remove Lewis from the jurisdiction of the juvenile court did not deny Lewis the "essentials of due process and fair treatment."[28]

In arriving at this decision, the Virginia court acknowledged the results reached in *In re Gault*[29] and subsequent cases.[30] These cases focused primarily upon the elimination of the "civil" or non-criminal label attached to juvenile proceedings,[31] and the application of the test of fundamental

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if committed by an adult, unless the juvenile and domestic relations court shall find and shall certify in its order that it is in the public interest for the matter to be disposed of therein. VA. CODE ANN. § 16.1-176 (1960).

23. The Commonwealth's Attorney made the decision to present the case to the grand jury pursuant to the VA. CODE ANN. § 16.1-176 (a), which provides in part:

> [I]n the event the juvenile court does not so certify a child fourteen years of age or over, charged with an offense which, if committed by an adult, would be punishable by death or confinement in the penitentiary for life or a period of twenty years or more, the Commonwealth's Attorney of the city or county, if he deems it in the public interest, may present the case to the grand jury of the proper court of record. . . . If the grand jury returns a true bill upon such indictment the jurisdiction of the juvenile court as to such case shall terminate.

24. 214 Va. at 153, 198 S.E.2d at 632.

25. *Id.* at 154, 198 S.E.2d at 632.

26. 403 U.S. 528 (1971).

27. *Id.* at 543.

28. 214 Va. at 153, 198 S.E.2d at 631.

In arguing that the statute in question was inequitable, Lewis stated that the Virginia General Assembly, in recognition of this fact, in its last session passed a bill amending the statute to prevent the Commonwealth's Attorney from arbitrarily removing juvenile cases from the juvenile court.

29. 214 Va. at 153, 198 S.E.2d at 631 (acknowledging the results reached in *Gault*).

30. *Id.* at 153, 198 S.E.2d at 631.

31. The Court in *Gault*, pointed out that juvenile proceedings to determine "delinquency," which may result in confinement in a state institution, must be regarded as "criminal" when the privilege against self-incrimination is involved. To hold differently would be to disregard

fairness to such proceedings.[32] The *Lewis* court concluded, however, that these cases did not command a complete reappraisal of Virginia's juvenile court concept in light of subsequent Supreme Court decisions.[33] The Court, in *McKeiver*, while not satisfied with the "civil" label approach,[34] was not inclined to attach to the juvenile proceeding a "criminal" label.[35] Accordingly, the Virginia court concluded that the juvenile proceeding would continue to be civil in nature, thus making the prohibition against double jeopardy inapplicable.[36] This conclusion, however, disregards the holding

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the substance of the proceeding in deference to the "civil" label attached to juvenile proceedings. 387 U.S. at 49-50.

It is submitted that an analogous argument can be made to the application of the guarantee against double jeopardy in juvenile proceedings, since disregard of double jeopardy rights may also lead to confinement in a state institution. The other two cases discussed in *Lewis*, *Winship* and *Cradle*, seem to be in concurrence with the above view taken in *Gault*. *See In re* Winship, 397 U.S. 358, 365-366 (1970); Cradle v. Peyton, 208 Va. 243, 251, 156 S.E.2d 874, 880 (1967).

32. In regard to fundamental fairness, the Court in *Gault* held that the juvenile hearing did not have to conform with all of the requirements of a criminal trial or even an administrative hearing. But it is necessary that the juvenile hearing measure up to the essentials of due process and fair treatment which is part of the due process clause of the fourteenth amendment. 387 U.S. at 30-31. As a result of this reasoning, the majority of subsequent cases decided in the juvenile law area have applied this standard of fundamental fairness. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970); Brown v. Cox, 467 F.2d 1255 (4th Cir. 1972); Cradle v. Cox, 327 F. Supp. 1169 (E.D. Va. 1971).

33. 214 Va. at 154, 198 S.E.2d 632.

34. 403 U.S. at 541.

35. *Id.* at 551. Mr. Justice Blackmun, speaking for the majority, said:

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.

It should be pointed out, however, that Mr. Justice Douglas, in his dissent, made a strong rebuttal argument for applying all constitutional safeguards to the juvenile offender. He pointed out that to make a distinction between the adjudication of delinquency and the criminal process is spurious. When an individual commits a crime, it is a criminal, not civil offense, whether the offender is a child or an adult. *Id.* at 571-72.

This was the gist of the argument advanced by Mr. Justice Black in his concurring opinion in *In re* Gault, 387 U.S. at 61, and his dissenting opinion in DeBacker v. Brainard, 396 U.S. 28, 33-35 (1969).

36. 214 Va. at 154, 198 S.E.2d at 632. The view that juvenile proceedings are civil, not criminal in nature has been frequently stated by Virginia courts and the courts of other jurisdictions. *See* Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946); Mickens v. Commonwealth, 178 Va. 273, 16 S.E.2d 641 (1941); *accord*, Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941); State *ex rel.* Arbeiter v. Reagan, 427 S.W.2d 371 (Mo. 1968); *Ex parte* Sawyer, 386 S.W.2d 275 (Tex. 1965). *Compare* Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973), *with* Brooks v. Boles, 151 W.Va. 576, 153 S.E.2d 526 (1967), wherein the court was faced with the same issue which faced the Virginia Supreme Court, *i.e.*, should double jeopardy attach in juvenile proceedings? The West Virginia Supreme Court answered by stating:

of the Court in *In re Winship*[37] which rejected this civil label approach when the proceeding is comparable in seriousness to a felony prosecution and the loss of the child's liberty is at stake.[38] Furthermore, *McKeiver* took the view that little could be achieved by an attempt to simplistically call the juvenile court proceeding either "civil" or "criminal."[39]

The *Lewis* decision fails to acknowledge the vast number of cases[41] and applicable statutes[42] from thirty-one other states which guarantee protec-

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> The proceedings before the juvenile court were not criminal and could not therefore operate to place him in jeopardy. A juvenile court does not possess criminal jurisdiction and is not empowered to sentence a juvenile for the commission of a crime. . . .
> . . . In as much as the proceedings in the juvenile court were not criminal in nature, the action taken by the Intermediate Court of Ohio County, pursuant to the indictment and the petitioner's plea thereto, did not constitute double jeopardy. . . . 151 W.Va. at ____, 153 S.E.2d at 530, 531.

Contra, Anonymous v. Superior Court, 10 Ariz. App. 243, 457 P.2d 956 (1969) (dictum). The court pointed out that, while not deciding, they would accept that the Double Jeopardy clause does apply to juvenile proceedings, when charges are serious enough to carry a risk of the child being placed in an institution for juvenile offenders. *See, e.g.*, People v. G.D.K., 491 P.2d 81 (Colo. App. 1971). The court said that while the Children's Code is civil in nature, a respondent child is entitled to certain constitutional safeguards afforded in criminal prosecutions. One such safeguard is the protection against being put in jeopardy twice for the same offense. Tolliver v. Judges of Family Court, 59 Misc. 2d 104, 298 N.Y.S.2d 237 (Sup. Ct. 1969) (because it is a cornerstone of our jurisprudence, the constitutional safeguard against successive trials for the same offense may be invoked by the young who face institutionalization, as well as by adults subject to incarceration); Collins v. State, 429 S.W.2d 650 (Tex. 1968) (while the juvenile proceeding is civil in nature, if it seeks to deprive the youth of his liberty, he will be guaranteed all of the privileges and immunities which he would have if it were a criminal proceeding, including immunity from being twice placed in jeopardy for the same offense); Van Hattan v. State, 260 S.W. 581 (Tex. Crim. 1924) (when a juvenile is proceeded against as a delinquent child, because he violated a felony statute, and the charge leads to a conviction of delinquency, he may not again be prosecuted by the state); *see generally* Comment, 11 J. FAM. L. 603 (1971); Note, 29 U. PITT. L. REV. 756 (1968).

37. 397 U.S. 358 (1970).

38. *Id.* at 365-66.

39. McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971).

40. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967). In relying upon these decisions, the Virginia court placed great weight upon Mr. Justice Blackmun's refusal, in *McKeiver*, to label the juvenile proceeding criminal in nature. In addition, reliance was placed upon his acceptance of the applicability of the test of fundamental fairness in juvenile proceedings, which was set forth first in *Gault* and then in *Winship*.

41. *See, e.g.*, United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1959), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959); M. v. Superior Court, 4 Cal. 3d 370, 93, P.2d 664 (1971); Cal. Rptr. 482, 752; *In re* People v. P.V.L., 164 Colo. 572, 490 P.2d 685 (1971); State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972); Fonesca v. Judges of Family Court, 59 Misc. 2d 492, 299 N.Y.S.2d 493 (1969).

42. While New Mexico is the only state that expressly prohibits a second delinquency proceeding, N.M. STAT. ANN. § 13-14-25 (Supp. 1973). At least 30 other states have some type of statutory provision which would prevent a criminal prosecution following an adjudication of delinquency.

tion in some form against double jeopardy to the juvenile offender. In addition, the Virginia court failed to consider the second aspect of the two-fold test set forth in *McKeiver*.[43] The first aspect, whether the application of the right in question, the prohibition against double jeopardy, is necessary to achieve "fundamental fairness," was answered in the negative by the Virginia court;[44] the second aspect, whether the right in question will disrupt the juvenile court system was never considered.[45] The disruptive effects which the Court in *McKeiver* sought to guard against were primarily the movement to transform the juvenile proceeding into an adversary process and attempts to end what has been an idealistic goal of intimate, informal and protective proceedings.[46] It has been suggested, however, that the application of the prohibition against double jeopardy to the juvenile offender would not have such disruptive effects.[47]

ALASKA STAT. § 47.10.080 (g) (1971); ARK. STAT. ANN. § 45-204 (1964); CAL. WEL. & 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. § 712 A.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), 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), 2338-13(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).

In addition to these 31 states, the Standard Juvenile Court Act, the Standard Family Court Act, and the Uniform Juvenile Court Act contain provisions which would apply the guarantee against double jeopardy to juvenile proceedings. The Model Rules for Juvenile Courts and the Children's Bureau publication, Family and Juvenile Court Acts, contain similar provisions. *See* Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 296 (1972). For the most recent Virginia legislation in this area, see VA. CODE ANN. § 16.1-176 (Cum. Supp. 1973).

43. 403 U.S. 528 (1971). The test for ascertaining to what extent constitutional requirements are to be followed in a juvenile proceeding is a two-fold one; whether the application of the right is necessary to the achievement of "fundamental fairness;" and whether it will have a disruptive effect upon the juvenile court system. *Id.* at 547, 550-51.

44. 214 Va. at 153, 198 S.E.2d at 631.

45. A thorough search of the opinion indicates that this issue was never recognized by the court.

46. 403 U.S. 528, 545-46.

47. In reponse to the question of whether the application of the guarantee against double jeopardy would disrupt the purposes of the juvenile system, William Sheridan said:

> The concept of double jeopardy appears to be in conformity 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

While recent cases have been split[48] on the issue of whether to apply the prohibition against double jeopardy to the juvenile offender, the most recent developments[49] indicate that this prohibition will apply in juvenile proceedings. While *Lewis* denies to the juvenile offender the guarantee against double jeopardy, the effect of *Lewis* may be moderated in light of recent legislation by the Virginia General Assembly[50] and two recent Circuit Court of Appeals decisions.[51] Accordingly, *Lewis* should be carefully scrutinized when appealed before the United States District Court on a writ of habeas corpus.[52]

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attainment of these objectives. Sheridan, *Double Jeopardy and Waiver in Juvenile Delinquency Proceedings*, 23 FED. PROB. 43,47 (1959).

See also Brown v. Cox, 481 F.2d 622 (4th Cir. 1973). The court affirmed the two-fold test set forth in *McKeiver*, stating that if the guarantee against double jeopardy were applied to the test, there would be no disruptive effects on the juvenile system. Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 292 (1972).

48. Cases that have held the guarantee against double jeopardy inapplicable in a juvenile proceeding include: *In re* Bradley, 259 Cal. App. 2d 253, 65 Cal. Rptr. 570 (1968); Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958); State *ex rel.* Arbeiter v. Reagan, 427 S.W.2d 371 (Mo. 1968); *Ex parte* Sawyer, 386 S.W.2d 275 (Tex. 1965); *Ex parte* Martinez, 386 S.W.2d 280 (Tex. 1964); Brooks v. Boles, 151 W.Va. 576, 153 S.E.2d 526 (1967).

For cases holding that the guarantee against double jeopardy is applicable in a juvenile proceeding see note 41 *supra*.

49. *See* notes 48 and 49 *supra*. *See also* Tennessee v. Jackson, ___ Tenn. ___, 503 S.W.2d 185 (1973).

50. *See* VA. CODE ANN. § 16.1-176 (Cum. Supp. 1973). The Virginia General Assembly added provisions which prevent the Commonwealth's Attorney from arbitrarily removing the juvenile from the jurisdiction of the juvenile court to that of the grand jury.

51. Brown v. Cox, 481 F.2d 622 (4th Cir. 1973). In dictum, the court emphasized that had the juvenile court, in a Lewis type situation, taken jurisdiction and made an adjudication of commitment or confinement under the test established in *McKeiver* jeopardy would attach and a later prosecution of the juvenile as an adult in the criminal court would violate "fundamental fairness." *Id.* at 630.

Fain v. Duff, No. 73-1933 (5th Cir., Dec. 7, 1973). This case rejected the reasoning on the issue of double jeopardy applied by the trial court in State v. R.E.F., 251 So. 2d 672 (Fla. App. 1971), *aff'd*, 265 So. 2d 701 (Fla. 1972), which was relied upon by the *Lewis* court. The *Fain* court reasoned that regardless of the goals confinement or committment seek to accomplish, the child is still being incarcerated. Therefore, the guarantee against double jeopardy should apply in any court proceeding which may result in incarceration, whether the accused is an adult or a juvenile. In light of these recent developments, Lewis should be granted his writ of habeas corpus.

52. Lewis v. Howard, Civil No. 73-C-25-C (W.D. Va., filed Sept. 11, 1973).