P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Gentlemen, we can resume arguments in Breed against Jones.

Mr. Walker, you have 22 minutes remaining.

QUESTION: Mr. Walker, I am not certain whether under the California system there might be a transferal proceedings without first having an adjudicatory proceeding.

May there or not?

MR. WALKER: Well, certainly.

QUESTION: Does that happen?

MR. WALKER: Yes. As a matter of fact, in 1972, the California Supreme Court, in a case called Donald L., which is cited in our brief, stated that the preferred practice in California is to hold a fitness hearing before the adjudicatory hearing so not only does that happen, that is now the customary practice in California.

It is not required, as a matter of statutory law, but in the great majority of cases pursuant to that California Supreme Court decision, that is --

QUESTION: Well, when that practice is followed, does that avoid this issue?

MR. WALKER: That completely avoids the double jeopardy problem.

QUESTION: Well, it doesn't if they keep jurisdiction and adjudicate them and then the Youth Authority

rejects it, turns him back.

MR. WALKER: Well, that doesn't bear on the question of whether the fitness hearing should come before or after the jurisdictional hearing.

QUESTION: Exactly, but having it before doesn't cure that problem.

MR. WALKER: No, that is a separate problem.

QUESTION: No, but if you have the fitness hearing and it is decided at the fitness hearing to transfer, then there is never any juvenile adjudication.

MR. WALKER: That is correct. There is never any adjudication.

QUESTION: And we don't have this double jeopardy problem.

MR. WALKER: Correct.

QUESTION: Well, then, why -- what I am trying to get to is, why should we ever have a double jeopardy problem?

Why don't they always have the fitness hearing first?

MR. WALKER: I think they should always have a fitness hearing first. It just so happens that in this case they decided to hold the jurisdictional hearing first and I don't think there is any justification for that procedure.

As a matter of fact, Mr. Justice Brennan, all of the authorities in the juvenile area, including the National

Council on Juvenile Court Judges, the National Council on Crime and Delinquency and all of the model statutes and acts which address this question, state that the preferred practice from the standpoint of the best procedure for the juvenile and juvenile court is to hold the fitness hearing first.

QUESTION: Well, I take it, at the fitness hearing, if he has had a prior record, the judge who presides at the fitness hearing learns of the prior record.

MR. WALKER: That is true.

QUESTION: And then suppose he decides not to transfer and then proceeds to the jurisdictional hearing, knowing of the fellow's past record?

Are there any problems raised by that?

MR. WALKER: Yes. What the California Supreme Court has said in that instance is that the judge must disqualify himself.

QUESTION: And transfer to another judge.

MR. WALKER: And that is not a serious problem in California nor is it a serious problem in most jurisdictions.

In California the juvenile court is just a branch of the Superior Court so it is a very simple matter for another Superior Court judge to come in and hear the matter.

QUESTION: Surely there must be counties up in

those northern counties in your state, though, that don't have so many Superior Court judges in a county.

MR. WALKER: That is correct. There are some small little counties that might only have one superior court judge.

QUESTION: Right.

MR. WALKER: However, in California, we have a procedure where a Superior Court judge can be disqualified without cause and so it is very common that judges from adjoining counties come in and sit on those cases.

QUESTION: It is something of a burden in counties like --

QUESTION: Trumble.

QUESTION: -- the Sierra Counties and counties where you only have one Superior Court judge.

MR. WALKER: Yes, there is no question that it would be a burden. I don't think that it would be an insuperable burden or even a considerable burden.

I doubt that those counties account for very many transfer hearings.

As I mentioned yesterday, only one percent of the delinquency cases result in transfer and a great majority of those cases come from the urban counties.

QUESTION: Well, we are talking about cases in which there is not a transfer.

We are talking about the 99 percent of the cases

where there is a jurisdictional hearing and not a transfer.

MR. WALKER: Correct.

QUESTION: I mean a transfer hearing and not a transfer.

MR. WALKER: Yes. But my statement would also apply to those cases as well.

QUESTION: Well, except it is 99 percent, not one percent.

MR. WALKER: Well, no, I don't think that is true. The 99 percent of the cases would not involve transfer hearings. That is a very,very small percent of the cases in California in which there is a transfer hearing because, for example, a minor must be over the age of 16.

If any minor is over the age of 16, it cannot be a transfer hearing.

QUESTION: If he is under 16.

MR. WALKER: Under 16, excuse me. And in addition, in most cases where the minor is not charged with a serious offense, where he does not have a previous record, a transfer would not even be considered as a possibility.

QUESTION: Do you have any statistics as to the percentage of total juvenile cases and the percentage of -- in those that have transfer hearings?

MR. WALKER: Unfortunately, the only -- the statistics we have go to the number of cases that are

actually transferred.

QUESTION: Rather than where they have the hearings.

MR. WALKER: That is correct.

There was one point which came up during argument yesterday that I think bears some clarification.

We are not contending, of course, that the jeopardy attached at the fitness hearing. We are saying that jeopardy attached at the trial in the juvenile court which is called the jurisdictional hearing and at the trial in the adult court.

And, of course, this Court has held in Collins against Loisel that jeopardy does not attach at a preliminary hearing because that hearing does not involve an adjudication of guilt.

Similarly, jeopardy would not attach at a fitness hearing nor would jeopardy attach, for example, at a penalty hearing in a death penalty case if that hearing would be in the nature of a sentencing or disposition hearing rather than an adjudicatory hearing.

This does not mean that evidence relating to the offense would be inadmissible at the fitness hearing. It simply means that that evidence would be only relevant to the question of whether the minor should be retained in the juvenile system or transferred to the adult system.

Now, Petitioner relies quite heavily upon this

so-called "theory of continuing jeopardy," and as I understand that theory, it insists that the initial proceeding must culminate in a final disposition of the case before a second jeopardy could attach in the second prosecution.

Now, just yesterday in an opinion issued by this Court, United States against Jenkins, this Court, in a unanimous opinion, rejected the broad type of continuing jeopardy theory which has been espoused by Petitioner and stated that that theory, which was originated in a dissenting opinion by Justice Holmes in the Kepner case, has never been adopted a majority of this Court.

QUESTION: But in Kepner, the person had been found innocent originally, hadn't he?

MR. WALKER: That is correct. That was in appeal from an acquittal but I think that the reasoning of Kepner and a number of the other cases involving the continuing jeopardy principles demonstrate that that principle is limited to the situation where the prosecution -- excuse me, where the defendant has appealed and where there has been a reversal on appeal and where there is a reprosecution after that reversal.

That is not the same situation as we have in this case. Gary Jones did not ask to be retried in adult court.

It is certainly arguably fair in the case of -- in a case where a defendant actually asks for his prosecution

to be reversed, for the people to vindicate their rights by retrying him if, indeed, he does obtain the reversal which he sought.

But here we have an entirely different situation, a case where the reversal was not initiated or sought by the defendant. Now, it is not --

QUESTION: I gather that California, the Supreme Court has adopted the continuing jeopardy theory, at least for purposes of the California Constitution and also, in Bryan, ruled on it for purposes of the Federal Constitution.

MR. WALKER: Yes, that is true. They have accepted the continuing jeopardy theory in this context.

Now, it seems to me that the continuing jeopardy theory, at least this broad type of continuing jeopardy theory espoused by Petitioner, is inconsistent with a number of decisions by this Court in a whole line of cases where this Court has held that where an initial prosecution is aborted, for example, by a mistrial brought about by the prosecutor or improperly by the Court that there, even though there has not been a final culmination of the initial proceeding, nevertheless, jeopardy attaches for the purpose of barring the second prosecution.

If this Court were to reverse the Ninth Circuit in this case, I would suggest that it would be undermining a number of decisions and very basic policies that are

fundamental to double jeopardy protection.

QUESTION: Well, all those cases, of course are adult cases. I take it, our approach, due to the application of the juvenile system of some of the guaranties that otherwise are applied in adult prosecution, we have to take into account, don't we, the special values of the juvenile system and the extent to which applying those double jeopardy principles to the juvenile system may impair its effectiveness?

MR. WALKER: Well, I am not certain that you have to take that into account for the reason that this --

QUESTION: Well, we certainly did as to the jury trial in McKeiver.

MR. WALKER: Yes.

QUESTION: And Winship suggested that, didn't it?

MR. WALKER: Yes, the difference between this case and Winship, GAult and McKeiver is that in this case the minor has been convicted in adult court of a felony and suffers from all the disabilities of a felony conviction that any other person in California would suffer, whether he is a juvenile or an adult.

QUESTION: What I am thinking of particularly is the determination whether or not we should or shouldn't, for this purpose, adopt a continuing jeopardy theory.

MR. WALKER: Well, what I am suggesting, Mr. Justice

Brennan, is that if you adopted a continuing jeopardy theory in this case on the theory that this is a juvenile case, but I think you would -- of necessity, it would also be applied in the adult court context because this minor suffers all the same disabilities that any adult would suffer who has been convicted of a felony.

Under California law, Gary Jones, for example, cannot have his records sealed, whereas if he were adjudicated delinquent, he would have the right to have that --

QUESTION: But your California court thought that, that holding in Bryan thought that, saying that there was double jeopardy in this sort of a situation would undermine the juvenile system in the sense that judges would be less -- more likely to transfer to adult courts and to -- to direct out of the juvenile system more or a larger percentage of the juvenile cases.

MR. WALKER: I agree that the California Supreme Court made that statement. I would suggest, Mr. Justice White, that --

QUESTION: Well, you know more about how your system works than we do.

MR. WALKER: Yes, but it is the same California Supreme Court which, interestingly enough, held in Donald L. that the procedure that we are advocating is the preferred procedure. I would suggest that that statement in Bryan

was colored by the --

QUESTION: Well, I think that is consistent -- I think that is consistent enough because just because this would be the preferred procedure and you'd hold the transfer hearing first wouldn't avoid the double jeopardy problem that arose in Bryan.

MR. WALKER: Right. I think that the California statement in Bryan really was founded upon the peculiar factual situation where the minor had actually been sent to the California Youth Authority and was transferred back to juvenile court because they decided he -- they didn't have enough time to rehabilitate him and he was incorrigible and then they decided, even though he had already begun his treatment program as a juvenile, to transfer him for another prosecution.

Now, I would suggest that is perhaps an even more flagrant violation of the double jeopardy guarantee than we have in this case.

QUESTION: Well, I would think you would, yes, and I would also think, however, if you upheld that, this one would be afortiorari.

MR. WALKER: Yes, I agree.

I obviously don't agree with the Bryan decision.

But turning to some of these policy reasons concerning the juvenile court which you brought up,

Mr. Justice Brennan, it is our position that if you apply the double jeopardy protection in this context, you will actually be enhancing the fundamental fairness of the juvenile court system, whereas in McKeiver, the Court felt that that system would be threatened.

For one thing, this Court has frequently emphasized the absolute necessity of the juvenile court system operating in an informal manner and by an informal manner, I think that what was meant was that in most juvenile cases, the juvenile, if he is indeed guilty, will come in and admit his transgression.

There will not be the necessity of a formal adversary hearing with counsel and all the other trappings and then the Court will get on with its primary business, which is to rehabilitate the juvenile.

Now, that policy goal of informality is really largely frustrated if the juvenile contests the petition and decides to stand trial.

In that case, he will be represented by counsel. There will be a formal adversary hearing.

Now, I would point out that if you hold the jurisdictional hearing first, the minor does not at that point know whether he is going to be retained in the juvenile system or ultimately transferred to the adult court system.

So he will, as a consequence, be extremely

reluctant to admit his guilt -- as a result of that admission, he may later find himself in state prison.

Indeed, the volume on juvenile court practice which has been published by the California State Bar to advise juvenile court practitioners on how to handle these kinds of cases advises counsel not to encourage the minor to talk freely with the probation officer until he knows whether the juvenile will be retained in the juvenile system or transferred.

So that policy goal will be totally frustrated if you don't hold a fitness hearing first.

Secondly, the juvenile will be kept in a continuing state of anxiety-insecurity unless you hold the certification hearing or transfer hearing initially.

We believe that that from the rehabilitative point of view it is extremely vital that the juvenile know whether he is going to be treated as a juvenile or as an adult.

Certainly, this Court has found that the appearance as well as the actuality of fairness is crucial in terms of the rehabilitation of the juvenile and from the standpoint of a minor, he can't very well feel that he is being dealt with fairly if he is being exposed to a double prosecution which he knows has been held to be repugnant in the case of even the most hardened criminals.

QUESTION: But in this fitness hearing, is the juvenile not going to be reticent about discussing the details of his conduct for fear if he does discuss it, it will lead to his transfer?

MR. WALKER: That is a possibility, your Honor.

QUESTION: Isn't it a very great likelihood?

More than a possibility?

MR. WALKER: Well --

QUESTION: If he thinks that the truth of the matter will have an adverse impact on the judge in terms of making the decision to send him to an adult court, if he is either very bright or well advised, he is not going to talk.

Isn't that right?

MR. WALKER: That may be true but I would hasten to point out that after that fitness hearing is conducted, and if the judge determines to retain the minor in the juvenile system, then the minor will rather freely, in most instances, discuss his case with the juvenile probation officer after--

QUESTION: After the decision of fitness has been made.

MR. WALKER: Right. And the decision on the fitness would be made at a very early point in the proceedings.

As I pointed out, it is not a full trial and normally, it would be made rather soon after the juvenile is

taken into custody by the probation department.

QUESTION: Mr. Walker, I still can't quite visualize how you avoid having what, in effect, is a full adversary trial if the juvenile and his counsel wish to have it.

I think you agreed yesterday that he would be entitled to counsel.

You are representing the juvenile at a fitness hearing. The juvenile persuades you that he didn't commit whatever the offense may be with which he is charged.

If you do your duty as a lawyer, wouldn't you try to produce witnesses to satisfy the juvenile judge if you hought there was a chance of transfer, that he had not committed the offense and wouldn't the state then put on his witnesses to refute your testimony and wouldn't it all end up being an adversary hearing?

MR. WALKER: No, Mr. Justice Powell, I do not believe so.

I have seen a number of transcripts from California where, indeed, the juvenile's counsel had put on some evidence but that evidence normally will be character witnesses or evidence about a juvenile's rehabilitation.

Occasionally, in a rare case, a counsel may even produce someone from the California Youth Authority to testify that this juvenile can be dealt with as a juvenile.

It is extremely rare and unusual -- in fact, I've never seen the case in California where a juvenile would put on a defense at the fitness hearing.

For one thing, he realizes that he will have an opportunity to put on that defense later and he doesn't want to tip his hand, so to speak, to reveal his entire defense to the prosecution at that early stage.

I have even seen cases where the court has refused to hear evidence going to jurisdictional facts, stating that that was irrelevant under California law.

QUESTION: If a judge took that position, would that nullify the effectiveness or the validity of the transfer hearing? Suppose a judge just said, I am not going to hear any evidence that pertains as to whether or not the juvenile committed the offense.

MR. WALKER: Well, I think that some of -- I don't think that it would negate it. I think there is still the question of the juvenile's particular amenability to treatment programs available through the juvenile court.

I think that in most instances, the judge would allow in some evidence pertaining to the crime, such as he may want to consider whether the crime was of a particularly heinous character or whether it is a very serious type of offense but in most instances, the judge will say if the juvenile is charged for murder, if he is charged with a

robbery or a rape.

That is a serious crime and that is enough, from the standpoint of the California statute.

I point out that in California the legislature has not written any probable cause requirements into the fitness statute, which they could have done, which has been done in some states.

QUESTION: What is the practice, Mr. Walker?

Surely, there must be some evidence before there is a determination that he is to be transferred, that he did commit some crime, isn't there?

MR. WALKER: The evidence that normally is introduced is the police report. Occasionally there might be some other evidence. The police report is admissible at fitness hearing in California because hearsay is allowed to come in.

QUESTION: Well, what does that establish?

MR. WALKER: That establishes that so-and-so, you know, says --

QUESTION: Something more than just the charge, isn't it?

MR. WALKER: That is correct and normally in California, that is considered to be sufficient.

This may seem to be a peculiar procedure, but it is the procedure which is adopted in the great majority of

jurisdictions which -- only three jurisdictions in the entire United States require a showing of delinquency prior to a transfer and there are some other jurisdictions which require a showing of probable cause but the great majority of jurisdictions require neither at the fitness hearing.

QUESTIONS: How many jurisdictions in addition to California provide for a transfer hearing after a finding of delinquency?

MR. WALKER: Well, there are three jurisdictions which require that the delinquency hearing be held first, Massachusetts, West Virginia and Alabama.

There are 19 jurisdictions that require the fitness hearing to be held first and it is a little bit questionable about what is required in the other jurisdictions.

QUESTIONS: But the others seem to be like California. They are permitted to come in either order.

MR. WALKER: Permitted either way. However, it would seem, first of all, from the absence of cases challenging procedure on double jeopardy grounds and also from the fact of the legislatures have not even required -- in some jurisdictions, probable cause requirement or in other jurisdictions, the delinquency finding.

But the usual practice in those jurisdictions is to hold the fitness hearing first and that is recommended, as I have said, by all of the legal commentators except one, by

all of the model codes.

QUESTION: Well, the writer of the article in the University of Toledo Law Review disagrees with you.

MR. WALKER: That is the one commentator that I was referring to, yes, Professor Carr.

QUESTION: Just so I have it straight, when do you say that jeopardy attaches here? At the beginning of the hearing or at the end of it or when he was adjudicated?

MR. WALKER: Well, our position is, the jeopardy attaches at the jurisdictional hearing in juvenile court when the first witness is sworn and begins to testify and that, likewise --

QUESTION: That is at the adjudicatory hearing.

MR. WALKER: Right, the adjudicatory hearing.

And that jeopardy then attaches in criminal proceedings also when the first witness is sworn and begins to testify.

QUESTION: But it wouldn't -- and so the judge, if he even starts the adjudicatory hearing, according to you must either keep him in juvenile court or dismiss him.

MR. WALKER: That is right and the experts tell us that there is absolutely no reason why that decision can't be reached before the adjudicatory hearing and, as I pointed out, this is the practice in 19 of the 22 jurisdictions which require the hearing to be held at either one point or

another.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Walker. Thank you, gentlemen, the case is submitted.

[Whereupon, at 10:26 o'clock a.m., the case was submitted.]