In the

Supreme Court of the United States

WILLIAM SWISHER, et al.,
Appellants,

v.

DONALD BRADY, et al.,
Appellees.

No. 77-653

Washington, D.C.
March 29, 1978

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v.	:	No. 77-653
DONALD BRADY, et al., Appellees.	:	

Washington, D. C.,

Wednesday, March 29, 1978.

The above-entitled matter came on for argument at 2:19 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GEORGE A. NILSON, ESQ., Deputy Attorney General of Maryland, One South Calvert Street, Baltimore, Maryland 21202; on behalf of the Appellants.

PETER S. SMITH, ESQ., Maryland Juvenile Law Clinic, 500 West Baltimore Street, Baltimore, Maryland 21201; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Swisher against Brady.

Mr. Nilson, I think you may proceed when you're ready.

ORAL ARGUMENT OF GEORGE A. NILSON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NILSON: Mr. Chief Justice, and may it please the Court:

I am here seeking reversal of the opinion of the three-judge federal court below which held that Maryland's juvenile justice system of delinquency hearings before a master, with review available from the juvenile court judge by way of exception, offends the constitutional bar against double jeopardy.

Under Maryland's present statutes and rules governing juvenile court proceedings, most of the more populous local jurisdictions in Maryland, as well as some of the rural counties, employ Masters for the purpose of conducting various hearings within the juvenile court system. The utilization of these Masters, which also characterizes the juvenile justice systems of approximately 34 other States, is designed both to assist the Circuit Court system in dealing with the extremely heavy caseload in the juvenile area, and also to provide for the involvement in the process of persons who, by virtue of their

interest, expertise and permanent assignment to the juvenile court system can bring to bear in the disposition of juvenile causes a familiarity with and sensitivity to the special needs and problems of juveniles charged with committing acts in violation of the State's criminal laws.

Under Maryland's system, the juvenile court judge hears originally all petitions for waive of jurisdiction to the criminal courts for trial as adults. And also generally hears originally the more aggravated charges, such as murder, rape or armed robbery; as well as cases where exceptions to a Master's proposal are anticipated in advance of the proceedings.

With certain other limited exceptions, other delinquency cases, including arraignment, detention, adjudication and disposition, may be assigned for the hearing of evidence to one of the full-time Masters employed by the court.

Under both the statute and under Maryland Rule 911, when a Master conducts an adjudicatory and a disposition hearing, he is required to transmit his proposed findings of fact, conclusions of law and recommendations, and proposed disposition orders to the juvenile court judge within ten days of the conclusion of the disposition hearing.

QUESTION: Are there two judges and seven Masters in Baltimore County?

MR. NILSON: In Baltimore City there is one judge and

seven Masters.

QUESTION: One and seven.

MR. NILSON: That is correct. In the other counties the ratio more closely approximates one to one, the figures both as to judges and Masters, I think, are given in our brief.

QUESTION: Unh-hunh.

MR. NILSON: Both the statute and the rule provide that these proposed findings, conclusions and recommendations do not constitute orders or final action of the court. And that final adjudication and disposition orders are only entered by the juvenile court judge following his consideration of any exceptions which may be filed within five days, or, if no exceptions are filed, following his concurrence in the Master's recommendations, if he agrees with them.

QUESTION: What would happen under Maryland law if the Master simply, by mistake, failed to transmit his findings to the juvenile court judge? Could the State go out and incarcerate the juvenile, on the basis of the Master's finding?

MR. NILSON: He could not. There would be no order of the court, on the basis of which the State could act. There would have been no disposition of that case. If there had been no transmittal of the findings and no orders, no order entered.

The only officer in the court system with the power to enter an order disposing of the case and providing for a

disposition of that juvenile is the judge.

Now, in terms of the submission of recommendations and findings, while, as I've just indicated, the rule and the statute do require that those recommendations and the findings of fact be transmitted to the judge, that is frequently waived by the parties. And this is pointed out on a number of occasions in the appellees' brief. That occurs in situations where the parties essentially are acquiescing in the Master's proposed disposition of the case, which he announces after hearing, and they will say that --

QUESTION: But still an order --

MR. NILSON: Pardon me?

QUESTION: Still an order is entered, signed by the judge in those cases?

MR. NILSON: Still an order is entered, signed by the judg.

QUESTION: Signed by the judge?

MR. NILSON: That's correct.

While, understandably, few recommendations were disturbed by the juvenile court judge in the absence of exceptions by either the State or the juvenile court. The judge does have the authority, sua sponte, to either remand to the Master for further hearing, to himself hold a non-evidentiary hearing, or to himself hold a supplemental evidentiary hearing if both the State and the juvenile agree to the taking of addi-

tional evidence.

This case focuses on the double-jeopardy implications of the review of the Master's recommendation on the filing of exceptions thereto by the State. Appellees argue that regardless of the basis for the exceptions and regardless of whether additional evidence is heard by the judge with the consent of all parties, including the juvenile, or whether the judge's review is solely on the record, the juvenile is placed in jeopardy at the evidentiary adjudicatory hearing before the Master, that that jeopardy concludes on the filing of the Master's recommendations, and that any consideration given by way of review of the juvenile court judge upon the filing of an exception by the State to a Master's recommendation of a non-delinquency finding constitutes a new and impermissible second jeopardy.

Obviously the State disagrees with all of the elements of that position taken by the appellees.

QUESTION: What consequence can flow from the Master's actions before the judge has acted on it?

MR. NILSON: In a situation where a Master has adjudicated that the child committed an act and is proposing detention of the child, for example?

QUESTION: Yes.

MR. NILSON: There may be certain consequences with respect to a contemporary continuation of a detention that is

already in place, pending the disposition of the matter, but no separate --

QUESTION: No final disposition?

MR. NILSON: No final disposition whatsoever can flow from that recommendation of the Master.

QUESTION: Are they usually in custody or not, or can't you generalize about that?

MR. NILSON: I think that in the majority of cases they are not, but I'm not certain I could generalize on that.

QUESTION: Help me out on another thing. It's the same judge involved in the counties and in the cities?

MR. NILSON: It would be different judges involved.

QUESTION: No, no. I mean, in Baltimore City you've got one?

MR. NILSON: That's correct. There's a specially assigned juvenile judge --

QUESTION: So, after the Master's report, it goes back to the same judge; am I right?

MR. NILSON: All Master's reports go to a single judge, that's correct.

QUESTION: In this case all we're talking about is one judge.

MR. NILSON: That is correct. I think Judge Hammerman was the juvenile judge in Baltimore City for some eight years, and then Judge Karwacki, and there's evidence

from both of those two judges in the record.

The appellees' initial attack on the Maryland system culminated in the decision of the Maryland Court of Appeals in the Matter of Anderson in 1974, and because there are several prior proceedings in this case that are relevant I thought it best to just describe them briefly to the Court.

In that case certain juveniles challenged the provisions of what was then Maryland Rule 908 and is now 911, which authorized the State to file exceptions to a Master's recommendation of non-delinquency. Contending there that the provision for a de novo hearing before the juvenile court judge violated applicable double-jeopardy principles. At that time the rules did permit a de novo hearing upon exception by the State.

Assuming, in correct anticipation of this Court's decision in Breed vs. Jones, the double-jeopardy principles apply to adjudications of delinquency in juvenile court, Maryland's Court of Appeals rejected the challenge to the rule permitting exceptions by the State on the grounds that the juvenile Master is a ministerial and not a judicial officer, that under the Maryland Constitution he is entrusted with no part of the judicial power of the State, that his recommendations are only that and do not become binding unless and until approved by the judge, and that, accordingly, a hearing before the Master is not such a hearing that places a juvenile in jeopardy

at the time that hearing occurs.

Following that decision, review of which was denied by this Court for want of a substantial federal question, the appellees filed this case and companion habeas corpus petitions in the U. S. District Court for the District of Maryland.

The habeas cases were heard and decided first, resulting in an opinion in June of 1975, in Aldridge vs. Dean, concluding that the ability of the State to file exceptions to the Master's finding and to obtain a de novo adjudicatory hearing before a judge, again under the former version of the Maryland rule, violated the rights of juveniles not to be twice placed in jeopardy for the same offense.

Immediately following the decision in the habeas cases, the Maryland Court of Appeals adopted amended juvenile court rules, which explicitly affirmed the holding in Matter of Anderson that the Master's recommendations are proposed only and are not binding or final orders of the court.

The new rules also denied to the State, when it takes exception to the Master's recommendation, the opportunity to educe any new evidence before the juvenile court judge without the consent of the juvenile.

Moreover, the juvenile court statute effective July 1, '75, required for the first time that proceedings before the Master be reported, thus making possible meaningful

review by the juvenile court judge on the record developed before the Master.

Appellees then filed a supplemental complaint in this case, alleging a violation of double-jeopardy, notwithstanding the changes in the rules, additional evidence was introduced and the opinion below followed in September of '77.

QUESTION: Mr. Attorney General, one point along with the other one I asked: If the judge tries the case without the Master, and says "I find no evidence of guilty" and "I quit" and "I release" or whatever the ruling is; there's nothing the State can do?

MR. NILSON: Well, there's nothing further within the State court system, that's correct.

QUESTION: There's nothing the State can do.

MR. NILSON: There's nothing -- I don't believe -- there's no appeal to --

QUESTION: But if the Master -- I think that's the point the other side is making, I wanted to get your view on it -- if the Master recommends that he be released, then the State can file exception?

MR. NILSON: The State can file exceptions with the juvenile court judge; that's correct.

QUESTION: And the reason that your answer -- excuse me --

QUESTION: Go right ahead.

QUESTION: -- to my brother Marshall's first question, there's nothing a State can do if the judge finds no delinquency or whatever it is. You said as a matter of State law. Well, it's a matter of constitutional double-jeopardy law, isn't it?

MR. NILSON: That's correct.

QUESTION: Because he just cannot be -- the juvenile could not be subjected to jeopardy before that judge for the same offense again.

MR. NILSON: That's right. You could not -- the State --

QUESTION: That's why.

MR. NILSON: -- could not then take that juvenile, for example, and do what was done in Breed vs. Jones, which is to attempt to try him in the adult court.

QUESTION: Right.

QUESTION: Or anywhere.

MR. NILSON: Or anywhere. Nor do I think they could go up and attempt to seek a reversal and bring it back down for a retrial or reconsideration back in the juvenile court system.

But what we've got here is confined entirely within the juvenile court system at the lower court level. And we would submit, essentially, is one continuous proceeding. Now, there are two parts to the State's argument on the double-

jeopardy point.

The first is that essentially jeopardy does not attach at the hearing before the Master, and the basis for that is that he is not the trier of fact, with authority to enter a judgment of conviction or acquittal or the equivalent thereof.

QUESTION: At what point do you fix its attachment?

MR. NILSON: Jeopardy would attach at the moment that that case file, the record in that case, that the evidence -- that the recommendations of the Master are given to the juvenile court judge.

QUESTION: Even before he signs an order?

MR. NILSON: That is correct. Once that is before the judge, then essentially evidence is before the trier of fact, that officer who has authority to enter an order of guilt or innocence or delinquency or non-delinquency in the case.

QUESTION: But then, General Nilson, is it your view that the State could complete its presentation of evidence before the Master and lose, and then instead of filing exceptions it would decide to start over and get some more evidence?

MR. NILSON: Before -- when you say "lose", you mean the Master?

QUESTION: Let's say the Master makes a recommendation of no finding of delinquency. And then instead of taking exception to that, I take it your view is the State could say, "let's go back and get some more witnesses and have another hearing".

MR. NILSON: Well, that is, I suppose, theoretically possible under the part of our argument that says that jeopardy would --

QUESTION: Under the first part of your argument.

MR. NILSON: Until it gets to the judge, that's correct. And I think the only way to respond to that in terms of suggesting that that might not be permissible is that there you would have the State interrupting a continuous process which is established. And then that continuous process moves from the Master to the judge.

The State, on its own initiative and working against that continuous process, would be interrupting it and taking it back and starting over again. And I can see, even under the first theory, that argument being made to the effect that that would constitute subjecting him to double jeopardy.

Under the State's second theory --

QUESTION: It wouldn't affect your second argument; I understand that.

MR. NILSON: That, I think clearly that would constitute double jeopardy, because he would no longer be within

the continuous process. He would have interrupted the continuous process, and the second part of our argument essentially begins with an assumption that, contrary to the Maryland Court of Appeals, this Court holds that jeopardy begins to attach at the hearing before the Master. And then the State's position is that it is a single jeopardy as long as you stay within that continuous process on through the stage of the case where the judge enters the order. But that if you interrupt that continuum then you would be violating double jeopardy under the State's statute.

QUESTION: I have a little trouble, maybe your procedure will help. When the juvenile is brought in before the juvenile judge, why is he in jeopardy then?

MR. NILSON: At what stage, Mr. Justice Marshall?

QUESTION: The beginning.

MR. NILSON: Well, he didn't --

QUESTION: Because, as I understand, you said the judge can try him then and there. Right?

MR. NILSON: Well, typically he would not be --

QUESTION: Right?

MR. NILSON: If he was brought before the judge for an adjudicatory hearing directly, yes; but typically that does not happen. Typically, the juvenile does not come into contact with the judge at a hearing until the final stage. Except in the cases that I mentioned earlier, which is a waiver hearing,

where the issue is whether jurisdiction should be waived, and the criminal court waives; an aggravated offense; or a situation where they anticipate in advance that exceptions would be taken to the finding of the Master.

But otherwise --

QUESTION: He was just told to appear before the magistrate.

MR. NILSON: That is correct. Generally speaking, he never appears before the judge --

QUESTION: And does the magistrate ask him if he's guilty?

MR. NILSON: Pardon me?

QUESTION: Is it the magistrate who asks him, "Did you do this?"

MR. NILSON: Well, it's the Master who presides over the taking of evidence.

QUESTION: Yes. That's who --

MR. NILSON: And that would involve testimony put on by the State's Attorney and testimony put on by the juvenile, which might include testimony by the juvenile.

Thirdly, and this is, I think, the third argument of the third argument of the State really relates to the first two, is that even if a system such as that embodied in Maryland's juvenile court statutes and rules would be viewed as violative of double jeopardy if applied to trials in the crimin-

al courts, special consideration of the need for some informality, flexibility, and experimentation in the juvenile justice setting, should lead to a conclusion that the entertainment by a judge of exceptions filed by the State, as we have here, does not violate principles of fundamental fairness and is not contrary to double-jeopardy prescriptions, in the context, the special context of juvenile court proceedings.

QUESTION: In Maryland, did you ever have a -- was there any period when, rather than having Masters take this first step and make the preliminary inquiry, this was done by interviews at the hands of trained social and behavioral professionals who were not lawyers?

MR. NILSON: That is still done to a considerable extent. There is a very elaborate, what we call an intake process in Maryland.

QUESTION: Was there a time when it went directly from -- without the intervention of a Master -- from this professional, no-lawyer however, to the juvenile judge? With a report.

MR. NILSON: I suspect that there was a time when that happened. Masters haven't been employed forever in Maryland. I think they date back to the middle Forties.

QUESTION: This is certainly common in many States even today, is it not? If you know?

MR. NILSON: The employment of intake officers in

these --

QUESTION: Yes.

MR. NILSON: It is common in many States, and, as I said, it is used frequently in Maryland. And there are many cases that are disposed of by these intake officers who are not lawyers, not Masters, no judges, before the case ever gets up to even the Master stage or the judge stage. So that a very large percentage of today's high volume of juvenile matters are disposedof through that intake process. And, thus, never get before, for any kind of adjudicatory hearing, before a Master or a judge.

The State's first argument on the question of when jeopardy attaches is both set forth in the first part of our brief and is reflected, as I indicated before, in the Maryland Court of Appeals decision in Matter of Anderson. It represents the approach adopted by several other State courts which have considered this issue.

Rather than attempt to fully restate that portion of our argument, I would like to simply focus on the implications of this Court's decisions in Breed vs. Jones relative to that particular argument and this particular case.

The holding in Breed was of course limited to the proposition that once a juvenile court finds that a juvenile has committed acts that violate a criminal law, the juvenile has been put in jeopardy and cannot thereafter be waived to the

adult criminal court system for trial, because such a criminal trial would constitute a second and impermissible jeopardy.

In its opinion in Breed, this Court made no distinction between the respective roles of the juvenile court referee and juvenile court judge in the California proceedings there at issue, but referred throughout to the actions of the juvenile court.

Under the California system, dispositions proposed by referees do not require the affirmative concurrence of the juvenile court judge, but become final upon the failure of the judge to disturb them within 20 days following the hearing before the referee.

This Court did not consider or discuss in Breed the relative roles of the referee and the judge since there was no need for it to do so. Appellees have correctly pointed out in their brief that an examination of the record in Breed indicates that the adjudicatory hearing which occurred in that case was in fact held before a referee, rather than a judge. And from this they have argued that the clear implication, if not the express holding of Breed, is that jeopardy attached in that case at the moment evidence was first presented to the California juvenile court referee.

While this Court could so conclude, if and when expressly presented with a question, we submit that the question was not presented or decided in Breed.

In essence, it is our position that when jeopardy attaches in juvenile court proceedings should be answered as I indicated earlier by holding that it attaches when evidence is first presented to that officer of the court who has the authority to decide factual questions and to dispose of the case by a finding of delinquency or non-delinquency.

Whatever the precise point in time at which jeopardy attaches in the California system might be, we submit that the point in time at which jeopardy attaches in Maryland is when the recommendations of the Master are presented to and considered by the juvenile court judge.

The fact that the Master has previously presided at an evidentiary hearing and formulated his own proposed findings should not have to be held to have accelerated the point in time at which jeopardy attaches.

Surely, the mere fact that evidence is presented before the Master should not result in a holding that jeopardy attaches when that occurs. What is critical is the presentation of evidence to the trier of fact.

The second part of the argument, as I indicated before, is premised on an assumption that the Court should hold that jeopardy did begin to attach at that first hearing. And it is our position that the limited review by the juvenile court judge of the Master's recommendation upon the filing of exception, at that point does not constitute a second and

impermissible jeopardy. When that exception has been filed, there has been at that point in time no adjudication of acquittal or its equivalent, such as would constitute a termination of the initial jeopardy. Regardless of the subjective perception and sense of relief that the juvenile, upon hearing a Master's proposed or recommended disposition of the case in his favor may have, the fact of the matter is that the Master's recommendation is nothing more than advisory to the court. It is not final unless and until approved by the juvenile court judge.

The correctness of that assertion is not altered in the least by the fact that Master's recommendations are generally adopted by the judge in the absence of exceptions by the parties.

Appellees in their brief have made a great deal out of the fact that judges approve the vast majority of Masters' recommendations that are presented before them, and move from that to argue that judges are a mere rubber stamp.

In the first place, I think it's terribly important for this Court to understand several thing about the facts that the appellees have brought to bear in dealing with that. No. 1, they are talking about situations where no exceptions are filed to the Master's recommendations. Therefore, it is natural that the judge would be inclined to accept and approve most of those recommendations.

Also, in the bulk of those cases, both parties have even waived the requirement that the Master prepare written findings, detailed written findings to submit to the judge.

I think it also must be borne in mind that those figures -- that the figures and the information in the record with respect to the amount of time spent by the juvenile court judge in reviewing Master's recommendations predate the current rules. The testimony of Judge Karwacki, which is included in the Appendix filed in this case, indicates that the judges do do a conscientious job of reviewing those cases that are presented to the judges with written recommendations from the Masters, and do on occasion listen to the recordings which are now made of the testimony and the proceedings before the Master.

Maryland Rules provide that prior to the time that the judge enters an order, either the State or the juvenile may note an exception to the Master's recommendation and have the matter considered by the judge before final disposition of the case.

When the juvenile notes an exception, the rule provides that he may elect either a hearing de novo or a hearing before the judge on the record established before the Master. When the State notes an exception, the controlling rules now assures the juvenile his right to insist, if he wishes, that the judge consider the case solely on the basis of

the record which was made before the Master and which caused the Master to recommend in his favor.

Alternatively, additional evidence may be presented to the judge, but only if he considers it relevant and if both the State and the juvenile consent to its introduction. Thus, the juvenile is able to prevent the State from presenting evidence which it did not present before the Master, or from re-trying its case again before the judge.

This is not a situation where there are separate proceedings before different tribunals, each of which can result in an adjudication for or against the juvenile.

There is only one proceeding before the juvenile court, which consists of the presentation of evidence before and the issue of recommendations to the court by the Master, and the final determination of the matter on behalf of the juvenile court by the judge. Either filing his consideration of any exceptions filed, or filing his concurrence in the recommendation of the Master in the absence of exceptions, if he chooses to concur.

The State's contention that the proceedings in Maryland juvenile court are continuous in nature and involve only a single jeopardy does not require this Court to now adopt the type of continuing jeopardy theory articulated first by Mr. Justice Holmes in Kepner v. United States.

The Holmesian continuing jeopardy view clearly involves

situations where the criminal justice process is punctuated by adjudications of innocence or guilt and thereafter proceeds to a contrary determination or a subsequent trial with the potential for producing another adjudication.

Here the process is not so punctuated, because the Maryland Rules provide that the first and only adjudication cannot and does not occur until after the completion of the entire process, when the juvenile court judge enters an appropriate order.

When the judge entertains an exception filed by the State to the Master's recommendation, he does so not in the context of a separate and distinct proceeding, but as the final stage in a continuous proceeding.

QUESTION: But he can remand to the Master, I take it?

MR. NILSON: The only situation under which a remand to the Master is provided for is where the judge disagrees with the Master's recommendation on his own initiative. Remand is not provided for in the situation where the matter goes to the judge on exception. That particular Maryland rule only provides for a hearing before the judge.

QUESTION: So when it gets to the judge on exceptions, the matter is voted up or down right there?

MR. NILSON: That is what the rule contemplates, and it's voted up or down on the basis of a non-evidentiary hearing when the State is the excepting party. A non-evidentiary

unless the juvenile and the State both consent to the introduction of additional evidence.

QUESTION: Well, if the juvenile does the excepting, and the judge finds in his favor on his exception, the show is over, I take it?

MR. NILSON: That's correct. The show is over then.

QUESTION: There's no sending back for a new trial?

MR. NILSON: There is no sending back for another trial before the Master at that point. The State has used up what I would submit is the one card it had available to it in the first place, and that is that single continuous proceeding.

To hold that Breed vs. Jones must be extended so as to bar the State from completing the process would represent, we submit, an unwarranted extension of double-jeopardy principles within the juvenile justice system.

Unless there are further questions at this point, I'd like to reserve the balance for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Smith?

ORAL ARGUMENT OF PETER S. SMITH, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SMITH: Mr. Chief Justice, may it please the Court:

Let me state what I think is the heart of this case. A child is tried at a trial -- and I'm going to talk

about that in a minute, because it's a real trial -- he's found not guilty. Witnesses testify; cross-examined; arguments, motions, legal points, exhibits, the whole bit, all pursuant to the procedural requirements that have been outlined by this Court in Gault and Winship and, to some extent, in Breed, although the first two are obviously the most relevant.

And at the end of it, the Master considers his decision and he reviews the facts and the law and he says: "Johnny, I find you not guilty." And John turns to his mother and smils and they go out of the courtroom, and everything is all finished.

QUESTION: Mr. Smith, you say the Master says, "I find you not guilty"; I got the impression from the State's counsel that the Master really makes a recommendation to the juvenile judge.

MR. SMITH: Well, both of those statements that you made, Mr. Justice Rehnquist, can be reconciled, and perhaps goes to the real heart of the case. Because the theory of it is that a paper goes to the judge which is a recommendation. But I --

QUESTION: Well, it would be consistent with the procedure, though, if the Master didn't say "I find you not guilty", but said, "Johnny, I'm going to recommend to the judge to find you not guilty."

MR. SMITH: Yes, but he doesn't do that.

QUESTION: Well, suppose he did, would you be making a different argument?

MR. SMITH: No, I would not making a different argument here. Because --

QUESTION: Well then, it still isn't very relevant.

MR. SMITH: Well, because --

QUESTION: Is the case going to turn on whether you have a loud-mouthed, large-headed Master?

MR. SMITH: No. Not all.

QUESTION: Well, you seem to suggest, though, that if he --

MR. SMITH: No.

QUESTION: -- if he presumes to pronounce a judgment, you're saying that makes him a judge.

MR. SMITH: No. No.

QUESTION: Therefore it creates jeopardy.

MR. SMITH: I do not think it turns on that at all.

What I think it turns on is what in fact actually happens.

Now, at the conclusion -- the record, incidentally, supports, although I'm not saying that it is by any means critical to our ultimate position, nonetheless the record supports the characterization of what the Master says, that I've just indicated.

QUESTION: Do all seven -- are you representing to the

Court that all seven magistrates at the conclusion of a hearing, where they're going to recommend, under the procedure, -- no prosecution, no further proceedings, that they are all to make the announcement of "You are not guilty"?

MR. SMITH: Well, one of the Masters, several Masters, three Masters testified in this, Mr. Chief Justice, and one Master, who has evidence -- we put in the record a stipulation of evidence, indicated that he completely agreed with -- he read the testimony of this first Master and he said that he agreed with it, and that in his experience as an Assistant Public Defender, before he was appointed to Master, he observed this going on in every single Master's courtroom.

So I think the answer is that the record does support that it happens like that in the courtroom.

QUESTION: Doesn't he say "non-delinquent" or -- there's no finding of guilt. Have they started that in there?

MR. SMITH: Well, of course, technically --

QUESTION: You don't find the child guilty or not guilty?

MR. SMITH: Technicaly you --

QUESTION: You find him delinquent or non-delinquent.

MR. SMITH: Technically in the statute, of course, it is delinquent and non-delinquent. What I'm saying is, and the record clearly supports this, that the Master explains it in the typical criminal lingo because obviously a child is not

going to understand the words delinquent or non-delinquent.

Now, after the decision -- after -- without trying to assume the conclusion -- after the Master makes this statement and the child and his parent leaves, the State's Attorney decides that he wasn't satisfied with the result. He thought the child should have been found guilty. And so what does he do? He files an exception and he then goes -- takes that exception and files it with the clerk, and there is then another hearing before the judge.

Now, it used to be that it was de novo, now it's restricted under the amendment that was made, it was on the record, and we deal in our brief with the fact we believe that distinction makes no difference under this Court's decision in the Jenkins case. And also, I might say, in the Kepner case of 1903.

And so what happens? There's a new trial, a new fact-finder. And this time a new fact-finder, whether it's with new evidence, which is what the statute provides, or the same evidence, or at least a tape recording of the evidence before the Master, that judge then decides whether he believes the child was guilty or not guilty.

QUESTION: Mr. Smith, what if the foreman of a grand jury, after a grand jury had deliberated, saw the defendant standing outside the grand jury room and came out and said, "Congratulations, we've just found you not guilty"? Do you

think that the defendant could plead that en bar to an indictment rendered by another grand jury when he was brought to trial before a court of competent jurisdiction?

MR. SMITH: Absolutely not. And --

QUESTION: Well, doesn't it really make some difference here whether the Master's recommendation is something on which the State could base punishment of the child, or whether it's just a recommendation to a judge?

MR. SMITH: Well, but the State does base punishment of the child on it; that's the whole point.

Now, this Court has said --

QUESTION: Before the judge has signed any piece of paper?

MR. SMITH: Well, in response to the question you asked earlier, Mr. Chief Justice, the record indicates that all the time children who are before a Master and the Master finds them guilty and decides that -- holds a disposition hearing and says they ought to go to training school, out the door they go to that training school that day. And five days later, or thereafter, but at least five days later, when the judge signs that order, that child is very much in the training school.

And I might say that if he's found not guilty, that child is very much at home. So, in that sense, there's real substantial power that the Master exercises.

QUESTION: Well, do you suggest that the detention of the child before the Master's hearing is unconstitutional?

MR. SMITH: No. No.

QUESTION: Then why does it become somehow unconstitutional or illegal afterward, in the interim between the Master's recommendations and the judge's actions?

MR. SMITH: I'm not suggesting that it's unconstitutional afterward.

QUESTION: I thought you did.

MR. SMITH: No. All I'm saying is that that in fact happens. Because you asked a question of Mr. Nilson earlier, getting at the point of what in fact happens to that child between the time that the Master's hearing ends and when the recommendation goes to the judge. All I'm saying is that in that interim time what happens is that in fact it's implemented. If the Master found the child guilty and says he should go to a training school, off he goes. If the Master says, "No, I find you not guilty", he goes home.

Now, again I don't suggest that that decides the ultimate attachment of double-jeopardy question, but certainly it gives a little background in terms of the reality of it.

QUESTION: Well, could a juvenile, found to be delinquent by a Master, and when the State agents come and say, "All right, now, you're going off to the training school", he'd say, "Wait a minute, I filed exceptions to the Master's

recommendation." Now, would he still go to the training school?

MR. SMITH: Assuming that he -- the child files an exception?

QUESTION: Yes. Yes. After a finding of delinquency.

MR. SMITH: If the child in that -- well, first of all he would have to file in that very courtroom at that moment. Now, he could. I mean, his lawyer could hand the Master a piece of paper and say --

QUESTION: And if he did that, would he still go off to training school?

MR. SMITH: At that point it would be up to the State to decide whether it wished to request detention between the time that the piece of paper is filed and when the hearing is held before the judge. And if the State wishes to request detention, then the Master can give it.

And I might say --

QUESTION: Well, would he commence serving whatever confinement in whatever place the Master had recommended, as punishment or correction for his delinquency?

MR. SMITH: Well, he wouldn't commence serving in the sense of the beginning of a post-conviction sentence.

QUESTION: He might be detained, just as a person can be detained after a prosecuting attorney files an information, unless he makes bail.

MR. SMITH: That's true, although I don't know that it's an essential difference, Justice Stewart, because now he --

QUESTION: Well, I think it does have to do with whether or not this is a final judgment. Or equivalent.

MR. SMITH: Well, in Maryland, in most States, a child is -- whether it's detained or committed, it's pursuant to an indeterminate commitment. At least it is in Maryland.

QUESTION: Unh-hunh.

MR. SMITH: And he goes to the same training school, and he may be in one cottage if it's detention and another cottage if it's commitment.

Now, it seems to me that --

QUESTION: Well, can't he say, "Look, I'm not ready to -- you have no right to make me begin serving the recommended period of confinement, because I've taken an exception to the finding of delinquency."

MR. SMITH: Well, he can't say that, for two reasons. One, because --

QUESTION: He can take an exception?

MR. SMITH: He can take an exception, but he can't say the first, for two reasons: One, because there's no such thing as a recommended period of commitment, because it's indeterminate. That's why --

QUESTION: Well, but that's a recommended period.

"You're committed to the training school until you're 18 years old", or something like that.

MR. SMITH: The child can say, "If Your Honor please, when I go to the training school, I want everybody at the training school to know that I'm there in detention rather than commitment." And certainly the order will say "detention" rather than "commitment". To that extent, the child can make that allegation.

But the child cannot say "I'm sorry, I don't want to go anywhere, because you have to wait for the judge to sentence me."

QUESTION: Well, take a child who has not been in detention but has been at home, and a considerable number are released to the custody of parents, is that not so? Or to a foster home?

MR. SMITH: That is correct. Both pre and --

QUESTION: But if the Master makes his recommendations, are you telling us that the child is immediately plucked out of his home and taken to a detention center? Or can that only be done as the Attorney General's Office informed us, after the judge has signed something?

MR. SMITH: He's plucked out of his home and taken to the detention center, absolutely.

QUESTION: But that's not this case?

MR. SMITH: Well, as a matter of fact -- I mean, there

are nine plaintiffs in this case, and I'm trying to think of whether -- I mean, in each of these cases, of course, they were found not guilty, and there wasn't any request by the State to detain them, pending, as far as I can recall it. So it's true that that's not this case, but what you just said has happened.

QUESTION: Your complaint, your grievance is not -- in this case, is not with the situation where the person is found to be delinquent by the Master, but rather when he's found to be non-delinquent by the Master?

MR. SMITH: Exactly.

Now, if I could just get into the law a moment. The fact --

QUESTION: Before you get to that -- because I still am a little puzzled by your answer to Mr. Justice Stewart over here. If there is a finding of delinquency, and if the child files exceptions, is there automatic taking him into custody or does the State have to request custody?

MR. SMITH: If he's found delinquent, then --

QUESTION: And he promptly files exception.

MR. SMITH: All right.

Now, under the present procedure in Baltimore City, and it appears a slight doubt, but we believe that the rule is fairly clear, the Statewide rule on this, an exception is not to be taken if a child is found -- if the delinquent act is

sustained. You see, there's a bifurcation between the delinquent act and the penal act, and the delinquent child, which is: Does he need care, treatment and supervision?

And in Maryland you're not allowed, under court rule, to take an exception until after the disposition hearing. Now, the disposition hearing may take place immediately after the trial.

QUESTION: Well, if the disposition hearing does not take place immediately, he won't be taken to a home right away, will he?

MR. SMITH: All right. If the disposition hearing does not take place immediately after the trial, then an exception could not be filed.

QUESTION: And also he wouldn't go into a home?

MR. SMITH: Well, what then happens depends on what the State's and the Master's desire is. The State may say, or the Master may say -- and they frequently do -- that pending disposition hearing, "I wish the child to be in detention", and if the Master so finds, he is in detention. And the Master enters an order.

And I would like to point this out --

QUESTION: Now, may the prosecutor say precisely the same thing at the beginning of the hearing?

MR. SMITH: At the beginning of the --

QUESTION: Yes.

MR. SMITH: -- of the disposition or the trial?

QUESTION: Well, the beginning of the whole proceeding.

MR. SMITH: And when you say "say the same thing", I'm not --

QUESTION: Can the prosecutor, by the same procedure, cause the child to be detained? During the hearing as well as immediately after?

MR. SMITH: Well, yes, if you mean that the hearing goes on for more than a day or a morning.

QUESTION: Yes.

MR. SMITH: Absolutely.

QUESTION: So that then, really, what is the great -- you're stressing the significance of the Master's finding of delinquency. It doesn't seem to me that that is a significant -- that is necessarily controlling in a case where exceptions are taken.

MR. SMITH: Well, my point is this: The significant fact, I believe, is that the Master conducts what is conceded to be under Maryland law and what has been found to be, by two federal district courts, I might say, a full trial. Then the child is found guilty or the Master says "You're guilty" or "not guilty" as the case may be.

Now, the question is this: Has he been -- two questions. Has he been in jeopardy during that period when he

is before that Master? That's --

QUESTION: Well, could the Master put him in -- could the Master sentence him?

MR. SMITH: Well, again, we get involved in --

QUESTION: Could the Master find him delinquent?

MR. SMITH: Again we get involved in the terminology problem.

QUESTION: No, no. No. Could the Master sign a piece of paper saying that "this child is delinquent"?

MR. SMITH: He does. He just doesn't sign the order.

QUESTION: No, he does not. As I understand, he recommends that the judge find him delinquent.

MR. SMITH: Well, the Master, until 1975, two years after the --

QUESTION: Could the Master commit him to training school until he's of age?

MR. SMITH: By signing an order? No. He may not sign the order.

QUESTION: No, that wasn't my question. Can he do it?

MR. SMITH: Yes.

QUESTION: How?

MR. SMITH: He does it by stating that he's going to do it, and it's perfunctory approved by the judge. Now, I know that one of the difficulties with this case -- let me

be very frank with you. I don't want to predict my own doom here.

But there have been fifteen judges that have heard this case so far. Five trial judges and ten appellate judges. And all the appellate judges have ruled against us; and all the trial judges have ruled in our favor, including the initial juvenile court trial judge.

And I think I may have an idea as to why that's happened. Because it takes a little bit of time to live with this case and realize the difference between whatever may have been the conceptions at one time or whatever may now be the conceptions of a Master in Chancery and a Master in civil areas versus what is happening in this case.

QUESTION: Judge Winter is an appellate judge, isn't he?

MR. SMITH: Well, he sat as -- you're right; he sat as a trial judge, though, in this case. I was referring to the judge in his capacity as trial judge at that moment.

Now, when you look at all the facts in this case, you eventually, I believe, have to come to the conclusion that however you dress it up, it boils down to the fact that a child in a big urban court system, such as Baltimore, with one judge and seven Masters, where the Masters hear 90 percent of the cases, they're tried in front of Masters for the most part, and they are full and complete trials.

Now, there are only two questions that then have to be asked legally, to determine whether or not that offense is double-jeopardy clause.

The first is --

QUESTION: Suppose you had three judges for each Master in Baltimore; would that change the constitutional situation?

MR. SMITH: Not if there was a full trial in front of the Master, not at all.

QUESTION: Full trial? By that you mean he must hear it de novo? Not do it on the record?

MR. SMITH: I said full trial before the Master. You know, in my view, if there was a full trial before the Master, that doesn't change the result, that if it then goes before the judge later on, that it's not double jeopardy.

QUESTION: Suppose the record showed that the judge spent an average of three hours on each set of recommendations, where there were exceptions?

MR. SMITH: Well, of course, if there are exceptions, Mr. Chief Justice, let's say there's an exception by the child. Normally, that's going to be a de novo hearing. It can be on the record, but normally the child will have requested a de novo hearing.

So that takes it wholly outside the framework of this case, because it's like the United States v. Ball, a child

didn't like what he got and he sought a new trial. If it's the other way around, then of course we're right back into our case, if the State takes an exception.

Now, if --

QUESTION: Well, how much -- does your case depend to any large extent on the perfunctory nature of the judge's review? Supposing -- following up the Chief Justice's question -- that each judge spent three hours on each juvenile case that the State appealed to him, just in considering it, and at least as much time as the Master had; would your legal position be any different?

MR. SMITH: No. Now, the record shows that the judge spends an average of less than one minute on each order, and most of whatever is spent in review actually is in connection with disposition memos, because those are the only cases in which the court gets disposition memos.

But my answer is no. Now, I think the facts of this case -- in a way, I can get strangled by facts in this case. If one assumes that my answer to your question were the other way around, that is, that it really depends on how much time the master -- the judge spends on the Master's findings.

We didn't put the facts in the case in the hopes that I would get strangled with them; we put the facts in the case so that this Court would have a good idea of what in fact goes on on in the juvenile system of a big city and what in fact

this role of the Master is, so that this Court would realize that the Master simply is not some judge's employee.

QUESTION: Well, would your case be different if 20 percent of the recommendations were not followed?

MR. SMITH: No. It would not.

QUESTION: Ninety percent?

MR. SMITH: It wouldn't make any difference in terms of whether the judge can re-try him; if it were 99 percent, our legal conception would not be any different. I think that it certainly makes our case factually much more appealing that 99.99 percent are perfuctorily signed off. But I don't think, as a matter of theory, it makes any difference.

Now, if I could turn for just a moment --

QUESTION: Why does it worry anybody? If it's so perfunctory and also 99.9 percent, why does it worry anybody? Why this 1983 suit?

MR. SMITH: This 1983 suit was brought, Your Honor, because nine juveniles were found not guilty and --

QUESTION: Well, you're not saying that in cases where the Master finds no delinquency and the State takes exceptions and brings it before the judge that in 99-plus percent of those cases the judge agrees with the Master's finding of no delinquency? You're not telling us that, are you?

MR. SMITH: What I'm saying is that in 99.9 percent of all matters that are tried in front of the Master, the judge

agrees with them. That's all I'm saying.

QUESTION: But your case -- your case -- my questions earlier threw us off the track, and I apologize. Your case is a case where the juvenile is found non-delinquent by the Master --

MR. SMITH: That's correct.

QUESTION: -- and the State takes an exception, and takes it to the judge. And certainly you're not telling us that in 99-plus percent of the cases the judge agrees that there's no delinquency, are you?

MR. SMITH: By no means. By no means.

QUESTION: Well, I didn't think so.

MR. SMITH: Absolutely.

QUESTION: But that's the only relevant statistic in your cases which is -- your case presupposes a finding of non-delinquency by the Master, and exceptions by the State. That's your case, isn't it?

MR. SMITH: Well, I understand that, but --

QUESTION: And that's the only issue raised, the issue posed by that factual situation.

MR. SMITH: That's correct. But I think that the facts in the record which indicate the relationship between the Master and the judge in terms of the number of cases the Master hears, and what actually happens to those cases, and the role thatthe judge plays, is not wholly irrelevant in terms of

basically understanding the way the system works. Which is the only point I'm trying to make.

QUESTION: Yes, but your 99 percent figure includes those in which there's no exceptions at all by either side.

QUESTION: Right.

MR. SMITH: That's correct.

QUESTION: In which it's some 95 percent of the 99.

QUESTION: Which is most of the cases.

MR. SMITH: That's correct, sir. The great bulk of the cases.

Now, if I could turn for a moment --

QUESTION: Mr. Smith, this Court occasionally appoints a Special Master, usually it's on a matter of great moment, and if there are no exceptions filed, would you say that our rather preemptory adoption of that is rubber-stamping, and that there's something wrong with it?

MR. SMITH: Well, I --

QUESTION: You seem to be saying that about the Masters over in Baltimore.

MR. SMITH: From reading the opinions of this Court, my impression is that the Court does not in fact rubber-stamp it. But I think it's a different question, Mr. Chief Justice, because we are dealing with proceedings that, under Gault and Winship and Breed, clearly come under a number of procedural protections of the Bill of Rights. And that's

why I think we're here.

Now, if I might for just a minute turn to the law in our case. We're making two points.

The first is that there is a first jeopardy that attaches, and that it attaches at the commencement of the Master's hearing.

Now, I submit, and it's elaborated in our brief, that with the decision of this Court in Jones v. Breed explicitly so holds. It was a Master in Jones v. Breed, jeopardy attached at the start, and it is simply not true, as the State pointed out, that in California the Master or the Referee, as they call him there, has the power to sign an order when a child is committed. He does not have to -- he does not have the power at all.

When a child is taken out of a home, that must be affirmatively signed by the judge.

Now, therefore, in our view, Jones v. Breed -- or Breed v. Jones squarely decides the first issue that the State has raised here. Remember, the State's got two arguments. The first is that jeopardy never attaches at all, and therefore there can't be a second one.

QUESTION: Until it gets to the judge.

QUESTION: Right.

MR. SMITH: Now, I might say that that represents -- what the State said in its argument represents a change

from what it says in its brief. Its brief does not say that jeopardy attaches when the file from the Master goes to the judge. Rather, it says that jeopardy can never attach until, on an exception hearing, the judge begins to hear the case de novo.

Which either one, we suggest, is not proper.

And in our view, Breed v. Jones simply decides that first question. Jeopardy does attach at the beginning of the fact-finder's hearing. That's the term that has always been used. This Court, in its opinion in Breed v. Jones, talked in terms of the risk of punishment, and surely when that child --

QUESTION: Well, what risk of punishment? You still have not answered my point. Is there any way that the Master can punish these children?

MR. SMITH: Well, Mr. Justice --

QUESTION: Any way -- I'm listening.

MR. SMITH: With all respect, the question can't simply be answered like that.

QUESTION: But you just said it, and I want to test out whether you want to stick with it or not.

MR. SMITH: Well, let me state --

QUESTION: Do you want to say that the --

MR. SMITH: If by "punish" you mean that child going off to a training school; the answer is yes.

QUESTION: You have even more than when a grand jury is ignored, a true bill.

MR. SMITH: Well, we have --

QUESTION: And has not indicted somebody.

MR. SMITH: We have a -- well, but I think we have more than that, Mr. Justice Stewart. We had a trial.

QUESTION: If there is an analogy, you have a case where a grand jury has not indicted somebody.

QUESTION: After a hearing.

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MR. SMITH: All right. If you draw the analogy to the grand jury --

QUESTION: If you think Breed v. Jones controls this case, why do you think we granted certiorari?

MR. SMITH: It controls the first half of the case, it doesn't control the second half.

QUESTION: Oh, I see.

MR. SMITH: Which is what I --

QUESTION: Mr. Smith, may I ask you this question? You've emphasized the size of Baltimore City, but I understand your argument to be an attack against the entire system. If this case had come up from Denton, for example, or Coopersville or Frederick, you'd be making thesame argument, or would you?

MR. SMITH: If a Master -- because Masters generally

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MR. SMITH: If a Master -- because Masters generally

are not used in the outlying smaller jurisdictions, but if they were --

QUESTION: Are they used any place other than Baltimore?

MR. SMITH: Yes. They're used in all of the major metropolitan counties except for Montgomery County, although they are being phased out this July in Prince George's. But they tend to be --

QUESTION: Where are they used in the county where you have one Master and one judge? You would still attack the system?

MR. SMITH: That is correct. Although I might say that, you know, the parties in this case involve plaintiffs from Baltimore City and the defendant, the State's Attorney from Baltimore City.

Now, the second half, and the reason, what admittedly is not covered by -- in terms by Jones v. Breed, is whether there is a second jeopardy that attaches when the case goes before the judge. And we think that there is, for two different -- alternatively for two reasons.

Either because the hearing before the Master, despite the fact that he has not signed his name, is sufficiently final for double-jeopardy purposes, when you consider that it was a trial, when you consider what double jeopardy is all about, and when you consider the realities of the system.

In which case, of course, it would be a second jeopardy.

Or if it's not final, surely there's only one alternative, and that is that it's not final; and if it's not final, we suggest that it nonetheless is a double jeopardy because, how does it come to be a second trial before the judge? It comes to be there because the State prevents the matter from going to its logical conclusion, which, as we all know, is going to be the strike of a pen, and indeed was in several of these cases; the judge mistakenly signed the order early, of acquittal.

Instead, because the State's Attorney says no, I want another crack; that doesn't happen. And what happens instead is a new trial before the judge.

QUESTION: It doesn't necessarily mean a new trial. Is it not correct the new trial --

MR. SMITH: Well, de novo or new trial.

QUESTION: But on that point what is the normal -- maybe the briefs tell us but I don't remember -- what is the normal time interval between the Master's -- conclusion of proceedings before the Master and the entry of the order by the judge?

MR. SMITH: At least five days has to go by, Mr. Justice Stevens, because that's the time that the party has to decide whether he wants to take an exception. And normally it would be immediately thereafter, if, as is virtually always

the case, written findings and conclusions are waived. So normally the answer would be in five days.

QUESTION: Five or six days.

MR. SMITH: Now, when it goes before the judge at this second trial, whether it be on the record or de novo, in our view that could only be justified by an exception to the normal double-jeopardy rule.

Now, obviously, the Ball exception has no application here, nor does the Bartkus exception. So what we're talking about is the Perez-Dinitz exception. Dinitz doesn't have any application either really, so it's the Perez exception.

And our position is that this does not represent manifest necessity to prevent the trial from going to its conclusion, because that's exactly what happened, the State's Attorney prevented it. Why? Because he didn't like the result that the Master believed the child was not guilty, and he wants to go it again before a judge.

And this is --

QUESTION: Well, a necessary part of your argument, as I now understand it, Mr. Smith, is that in the lion's share of cases, after a Master has recommended a finding of non-delinquency the judge does rubber-stamp it. That has to be a part of your argument, that you're now making.

MR. SMITH: Well, that -- it is part of our argument.

QUESTION: Yes.

MR. SMITH: But the -- if I could just have thirty seconds, Mr. Chief Justice, to --

QUESTION: Yes. I interrupted, and I'm sorry.

MR. SMITH: -- to conclude this point.

There must be some -- if jeopardy did attach the first time, there's got to be some reason for concluding that there's an exception for saying it didn't attach a second time. The continuing jeopardy doctrine, of course, has been rejected by this Court consistently, right up to the present.

And the only way that we can see that you can say that a second jeopardy does not attach is to claim that it's manifest necessity, and yet the very heart of this Court's manifest necessity decisions is that for a State's Attorney to say, "I'm not satisfied with the result" is not a manifest necessity.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Nilson?

REBUTTAL ARGUMENT OF GEORGE A. NILSON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NILSON: Very briefly, if I may use the few minutes to clarify several factual points.

In the colloquy with Mr. Smith, the question came up early on in his argument about what is said and how it is said by the Master at the conclusion of the case. I would

agree with some of the comments which indicated that that doesn't have a -- or may not have a terribly significant bearing on the legal outcome, but I think the record clearly establishes that in many cases the Master specifically advises the juvenile that the State does have the opportunity to take exception, even where the Master doesn't --

QUESTION: Well, if he says, "I find you not guilty", he's purporting to exercise an authority he doesn't have.

MR. NILSON: Well, he may be overstating it --

QUESTION: Well, he doesn't have the authority to find him not guilty.

MR. NILSON: He does not have the athority, in fact, whatever he says. But I don't think that this Court should be laboring under the impression that in all cases he overstates his authority, because that is not true. The record indicates that in many instances the juveniles are specifically informed by the Master that the State has the ability to take exceptions to the Master's proposals, and when they're not told by the Master, they are told by their own counsel, because all of the juveniles at these hearings are represented by counsel, by and large by the Public Defender's Office.

The subject of detention came up in the question of what action the Master could take with respect to detention at the time the adjudicatory hearing was over. The Master at that time, as at other times, does have the authority to

order interim detention of the juvenile. There is nothing special about that time, there is no special privilege or prerogative that the Master has at that time to order detention as opposed to some other time.

QUESTION: Well, then, having found him non-delinquent, the Master wouldn't have occasion to do that, would he?

MR. NILSON: Certainly, having found him non-delinquent, he is not going to order him detained.

QUESTION: That's this case.

MR. NILSON: And that is this case.

Mr. Smith has gone on at great length about the perfunctory nature of the judge's review of the Master's recommendations. Again, as has been pointed out, this case involves cases which go up on exception. They are heard, they are argued, they are considered extensively by the judges. They are not perfunctorily reviewed.

The other cases as to which no exceptions are filed, I would urge this Court to the extent that it feels that those -- that how those cases were handled, to look at page 49 of the Appendix, which is the stipulation of Judge Karwacki. Not, as Mr. Smith indicated, one minute per case; but a minimum of 15 to 20 minutes per case, sometimes hours, sometimes listening to the recording.

This again in cases where none of the parties are taking exceptions. Not this case.

Mr. Smith also, in talking about part one of our argument, on the question of when jeopardy attached, indicated that the State has changed its position from what it was in the brief. And said that in the brief we referred to the time at which the matter is heard before the Master upon the taking of exception.

Yes, that is the way we described it in the brief, because perhaps we were making a mistake of focusing at that point on what this case is all about. Cases where exceptions are taken.

There is no difference between the State's position in the brief and at argument. It is when the case gets before the judge, we say, that jeopardy attaches.

And when an exception is taken, that is when the exception is presented to the judge, and the case is heard.

In the other cases, in the lion's share of other cases, it is when the file goes before the judge with the Master's recommendation.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:21 o'clock, p.m., the case in the above-entitled matter was submitted.]

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