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The Waiver of Juvenile Court Jurisdiction; State v. Adams

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*The Waiver of Juvenile Court Jurisdiction**State v. Adams*

69 Ohio State 2d 120, 431 N.E.2d 326 (1982)

SINCE ILLINOIS CREATED the first juvenile court system by statute in 1899,¹ every state has enacted a juvenile justice system philosophically designed to help rather than to punish children who violate the law.² The juvenile court from its inception has advocated the protection of misbehaving children from the harsh retributive philosophy of the adult criminal law. Instead of punishment it has attempted to provide methods by which to assist them to develop into mature, responsible adults.³

Yet, from its inception, the proponents of the separate, specialized juvenile justice system have presumed that some children would not respond positively to its philosophy of treatment and rehabilitation.⁴ This presumption is reflected in the fact that all states but two have within their juvenile system a procedure by which the juvenile court may waive its jurisdiction over such minors by transferring them to the common pleas court to be tried and punished as adults.⁵

Historically, the juvenile system gave the juvenile judge great, if not sole discretion, to determine whether such a child should be transferred.⁶ The child

¹Juvenile Court Act, ILL. LAWS, 1899.

²NATIONAL JUVENILE LAW CENTER, LAW AND TACTICS IN JUVENILE CASES § 11.2 (1974).

³Gasper & Katkin, *A Rationale for the Abolition of the Juvenile Court's Power to Waive Jurisdiction*, 7 PEPPERDINE L. REV. 937, 938 (1980).

⁴Note, *Waiver of Juvenile Jurisdiction and the Hard-Core Youth*, 61 N.D. L. REV. 655, 656 n.6 (1975). This article cites both Mack, *The Juvenile Court* 23 HARV. L. REV. 104, 108-09 (1909), and Stamm, *Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law*, 62 KY. L. J. 122, 146 (1973), for the proposition that serious youthful offenders were considered beyond the therapeutic reach of the juvenile court.

⁵NATIONAL JUVENILE LAW CENTER, *supra* note 2, at § 11.2. In this article, the authors note: "This process is referred to by many statutes as 'transfer of jurisdiction'. Others use the terms 'waiver' or 'declination of jurisdiction,' 'dismissal of the juvenile court petition,' 'certification,' 'remand' or 'removal' of the case to criminal court." New York and Vermont, the two states which do not provide for waiver of juvenile court jurisdiction, place children older than fifteen years of age under the jurisdiction of the common pleas court automatically. *Id.*

⁶Comment, *Waiver of Jurisdiction in Juvenile Courts*, 30 OHIO ST. L. J. 132 (1969):

The power of the state to step in and take the child in hand is justified by the doctrine of *parens patriae*. . . . Under the *parens patriae* doctrine, the state has the unquestioned right to deny to the child many procedural rights available to adults. The rationale was that a child has a right 'not to liberty, but to custody'.

Comment, *Juvenile Court and Direct Appeals from Waiver of Jurisdiction in Ohio*, 8 AKRON L. REV. 499, 501 (1975):

This philosophy [*parens patriae*], of course, resulted in an enormous amount of power being centered in the juvenile courts, particularly in the individual juvenile judges. . . .

had no right to complain or object to his removal.⁷ However, in 1966, in *Kent v. United States*,⁸ the United States Supreme Court expressed its concern that the broad authority permitted the juvenile court in waiver decisions resulted too often in procedural arbitrariness.⁹

In *Kent*, therefore, the Supreme Court moved to curb the juvenile court's substantial discretion. This was done by providing the child with due process rights and protections which he could use to assert his interest in opposing his transfer.¹⁰ The net effect of the *Kent* decision was to make the transfer of the child to the adult court more difficult.¹¹

With the *Kent* decision, the Court decided the first of a line of cases that would expand the rights of children in juvenile court proceedings.¹² In an effort to comply with the mandates set forth by the Supreme Court regarding the waiver of juvenile court jurisdiction, the Ohio legislature enacted Ohio Revised

It is almost axiomatic that where great discretion exists, abuses of discretion, or at least major inequities will also exist. The juvenile justice system is no exception.

⁷See *supra* note 6 and accompanying text.

⁸383 U.S. 541 (1966).

⁹*Id.* at 553.

¹⁰*Id.* at 557. The Supreme Court concluded by stating: "that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision." *Id.* The opinion set out eight basic criteria that can be used by the juvenile judge when considering a waiver of jurisdiction. The following criteria were set out by the Court:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or wilful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prospective merit of the complaint, *i.e.*, whether there is evidence upon which a Grand Jury may be expected to return an indictment. . . .
5. The desirability of trial and disposition of the entire offense in one court where the juvenile's associates in the alleged offense are adults who will be charged with a crime. . . .
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile. . . .
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation. . . . *Id.* at 566-67.

The rights granted to the juvenile in *Kent* and most, if not all, of the concerns addressed by the above criteria have been incorporated into Section 2151.26 and Juvenile Rule 30, the statutes governing the waiver of juvenile jurisdiction in Ohio. See *infra* notes 13 and 14.

¹¹See Note, *supra* note 4, at 657.

¹²383 U.S. at 557. See *supra* note 10 for the specific due process rights the Supreme Court outlined for juvenile transfers in *Kent*. Other cases expanding the rights of children in juvenile proceedings include *In re Gault*, 387 U.S. 1 (1967). In *Gault*, the Supreme Court held that the fifteenth amendment requires that in proceedings that may lead to limitations on a juvenile's freedom, the child and his parents must be notified and told that the minor has a right to counsel. If they are unable to afford counsel, the child will be represented by a court appointed attorney. The child is also to be protected from self incrimination and permitted to confront and examine witnesses. See also *In re Winship*, 397 U.S. 358 (1970), in which the Court held that proof beyond a reasonable doubt is needed to adjudicate a child a delinquent; *Breed v. Jones*, 421 U.S. 519 (1975), where the Court concluded that the waiver of jurisdiction after an adjudication of delinquency violates the double jeopardy clause of the fifth amendment.

Code Section 2151.26.¹³ This statute, together with Juvenile Rule 30,¹⁴ outlines the procedural requirements for the waiver of juvenile court jurisdiction in Ohio. The statutory procedures were enacted by the Ohio Legislature as an attempt to implement the Supreme Court's intention that youthful offenders are not arbitrarily removed from the juvenile court to be tried and punished as adults. In Ohio, only the most serious juvenile offenders, defined as children fifteen years of age or older,¹⁵ charged with felonies¹⁶ and not reasonably believed to

¹³OHIO REV. CODE ANN. § 2151.26 (Page 1982). This statute, together with JUV. R. 30, *see infra* note 14, sets out the procedural requirements in Ohio for the transfer of minors from the juvenile court to the common pleas court for the purpose of criminal prosecution. The statute was first enacted in 1969. In 1971, it was amended to comply with the *Kent* and *Gault* mandates. *See supra* notes 10 and 12 for those specific requirements. In 1978, the Legislature added subdivision (B) that requires the juvenile court to consider a finding that the minor had committed the alleged felony against an elderly or disabled person as a factor in favor of transfer of jurisdiction. An additional subdivision, (G), became effective November 23, 1981. *See infra* note 56 for text of amendment (G). Relevant portions of the text of Section 2151.26 include:

- (A) After a complaint has been filed alleging that a child is delinquent by reason of having committed an act which would constitute a felony if committed by an adult, the court at a hearing may transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, after making the following determinations:
- (1) The child was fifteen or more years of age at the time of the conduct charged;
 - (2) There is probable cause to believe that the child committed the act alleged;
 - (3) After an investigation, including a mental and physical examination of such child . . . , that there are reasonable grounds to believe that:
 - (a) He is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
 - (b) The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority.
- (E) No child, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen, unless the child has been transferred as provided in this section. . . .
- (F) Upon such transfer the juvenile court shall state the reasons for the transfer . . . before the appropriate court for any disposition that the court is authorized to make for a like act committed by an adult. The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint.

¹⁴OHIO R. JUV. P. 30. This rule, together with OHIO REV. CODE ANN. § 2151.26, *see supra* note 13, sets out the statutory procedure to be followed by the juvenile court in waiving its jurisdiction over minors. Relevant portions of this rule include:

- (A) Preliminary hearing. In any proceeding where the court may transfer a child fifteen or more years of age for prosecution as an adult, the court shall hold a preliminary hearing to determine . . . probable cause. . . . Such hearing may be upon motion of the court, the prosecuting attorney or the child.
- (B) Investigation. If the court finds probable cause, it shall continue the proceedings for full investigation. Such investigation shall include a mental and physical examination of the child. . . . When the investigation is completed, a hearing shall be held to determine whether to transfer jurisdiction. Written notice of the time, place and nature of the hearing shall be given to the parties at least three days prior to the hearing.
- (C) Prerequisites to transfer. *See supra* note 13. (Provisions for this section are identical to OHIO REV. CODE ANN. § 2151.26 (A)(3)(a) and (b).)
- (E) Determination of amenability to rehabilitation. In determining whether the child is amenable to the treatment or rehabilitative processes available to the juvenile court, the court shall consider:
 - (1) The child's age and his mental and physical health;
 - (2) The child's prior juvenile record;
 - (3) Efforts previously made to treat or rehabilitate the child.
 - (4) The child's family environment; and
 - (5) School record.
- (G) Order of transfer. The order of transfer shall state the reasons therefor.

¹⁵*See supra* note 13, for text of OHIO REV. CODE ANN. § 2151.26 (A)(1).

¹⁶*See supra* note 13 for text of OHIO REV. CODE ANN. § 2151.26 (A).

be amenable to rehabilitation,¹⁷ may be removed from the juvenile court's jurisdiction, and only after adherence to the requirements of due process.¹⁸

In other states, there has been a backlash reaction to the *Kent* mandate requiring that the juvenile court extend such elaborate due process considerations to youth offenders. This is especially true concerning those juveniles charged with committing the more heinous crimes.¹⁹ Some states and the District of Columbia have successfully amended their statutes to provide for legislative and prosecutorial discretion to transfer minors automatically to an adult court if they commit serious felonies.²⁰ Since this excludes such children from the jurisdiction of the juvenile court, the *Kent* safeguards do not apply to them.²¹

In January, 1982, the Ohio Supreme Court decided *State v. Adams*,²² and its companion case, *State v. White*.²³ The conclusions reached by the Court in *Adams* suggest that the decision represents a similar, although less intense, judicial backlash to the *Kent* mandates by the Ohio Supreme Court. Although the Court did not seek to circumvent or tamper with the specific due process safeguards guaranteed juveniles by Ohio Revised Code Section 2151.26²⁴ and Juvenile Rule 30,²⁵ its opinion implies that in Ohio such protections are to be permitted to youthful felons only once.

In *Adams*, the Court held that once a juvenile has been properly transferred to the common pleas court in any county in Ohio, such a child remains in that court's jurisdiction for any concurrent and/or subsequent offenses committed anywhere in Ohio.²⁶ Prior to the *Adams* decision, a child was returned to the jurisdiction of the juvenile court each time he violated the law, even if previous cases involving him had been removed to the common pleas court.

State v. Adams concerned the appeals of two male juveniles from their convictions as adults for a spree of felonies. Terrance Adams and Anthony White, acting in concert, had perpetrated five armed robberies in two Ohio counties on November 7 and 8, 1977.

¹⁷See *supra* note 13 for text of OHIO REV. CODE ANN. § 2151.26 (A)(3)(a).

¹⁸See *supra* note 13 for text of OHIO REV. CODE ANN. § 2151.26.

¹⁹See Note, *supra* note 4, at 657 nn. 12, 13.

²⁰*Id.* at 662. The casenote discusses the significance of *United States v. Bland*, 472 F. 2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1974). In *Bland*, the Court of Appeals upheld the D.C. statute which gave the prosecutor discretion to automatically exclude from the jurisdiction of the juvenile court a child charged with certain statutorily enumerated offenses. Since the Supreme Court denied the petition for a writ of certiorari, *Bland* suggests that a statute excluding the youth charged with certain crimes from juvenile court or permitting the prosecutor discretion to do so, may be used to deny such youth the due process protections of *Kent*.

²¹*Id.*

²²69 Ohio St. 2d 120, 431 N.E. 2d 326 (1982).

²³*Id.*

²⁴See *supra* note 13 for the text of OHIO REV. CODE ANN. § 2151.26.

²⁵See *supra* note 14 for the text of OHIO R. JUV. P. 30.

²⁶69 Ohio St. 2d at 123-24, 431 N.E. 2d at 329.

On November 7, the two robbed and assaulted a gas station attendant in Willoughby before robbing and shooting a victim in a motel parking lot in Wickliffe. Both of the above crimes were committed within the jurisdiction of the Lake County Juvenile Court. The next day the pair continued their rampage, committing three similar robberies in Summit County where they were arrested. The juveniles were first charged in Summit County Juvenile Court for the acts committed in that jurisdiction. Hearings were held in accordance with the provisions of Section 2151.26²⁷ and Juvenile Rule 30.²⁸

The Summit County Juvenile Court decided to transfer the pair and to try them as adults on the charges filed against them. Thus, on February 28, 1978, each juvenile entered a guilty plea to three counts of aggravated robbery in common pleas court. Each was sentenced to serve concurrent terms of five to twenty-five years in the Ohio State Reformatory.

Adams and White also faced charges in Lake County. In early January, 1978, however, the authorities there were unaware that the two boys had jointly committed the two robberies in that county. Therefore, officials originally charged Adams only with the Willoughby crime and White only with the Wickliffe offense.

After complying with the required statutory procedures,²⁹ the Lake County Juvenile Court, like that in Summit County, decided to waive its jurisdiction over the pair and to transfer them to common pleas court. Each juvenile, however, was bound over to the Lake County Common Pleas Court for only one of the two aggravated robberies that both had committed.

During the subsequent grand jury proceedings, authorities learned the pair had acted in concert. Therefore, on November 14, 1978, each defendant was indicted by the grand jury for both of the robberies. Juvenile court journal entries concerning the transfers were updated on November 24, 1978, to reflect the joint involvement of the boys in both crimes.

Adams and White were convicted in Lake County Common Pleas Court of both aggravated robberies. The defendants appealed, in part, on the ground that the failure to transfer each juvenile to the adult court on both counts of aggravated robbery was erroneous and prevented the conviction of each boy for both crimes.

The Court of Appeals granted the defendants' appeals in regard to the juvenile court's failure to transfer both juveniles on both counts. That court reversed White's conviction for the aggravated robbery committed in Willoughby and reversed Adams's conviction for the aggravated robbery and felonious

²⁷See *supra* note 13.

²⁸See *supra* note 14.

²⁹See *supra* notes 13 and 14.

assault committed in Wickliffe.³⁰ The State of Ohio appealed both reversals to the Ohio Supreme Court, while the defendants cross appealed on other issues which the majority chose not to discuss and the dissent considered to be without merit.³¹

The Ohio Supreme Court stated that the central issue for decision was "whether the defendants were effectively bound over on all the offenses for which they were ultimately indicted, thus rendering all of their convictions valid, including the Lake County robbery for which each was never formally charged in Juvenile Court."³² The Court concluded that the defendants had been properly transferred as to all the counts with which they were charged and thus reversed that part of the decision of the Court of Appeals.³³

Rather than immediately moving into a discussion of the rationale underlying its central holding, the majority opinion, written by Justice Krupansky, turned its attention to the hearing on the waiver of juvenile court jurisdiction held in Summit County. The court stated that since the defendants never questioned the relinquishment of jurisdiction by the Summit County Juvenile Court, the decision that the boys would not be responsive to treatment within the juvenile justice system was *res judicata* in any adult court in Ohio.³⁴

The court cited *Whitehead v. General Telephone Co. of Ohio*³⁵ as authority for the *res judicata* proposition without any discussion of that precedent. The court stated that the interest of "judicial economy" made it unnecessary for another county to make the same transfer decision for "the same juveniles for like or similar crimes committed within a reasonably short period of time; especially since the defendants were incarcerated for three counts of aggravated robbery at the Ohio State Reformatory pending the proceedings in Lake County."³⁶

Although the majority appeared to pronounce a relatively narrow rule, the court, in fact, went on to state a proposition limited only by its reference to felonies. The general rule laid down in *Adams* is that once a child is properly transferred from the juvenile court to the common pleas court in any county in Ohio under the provisions of Section 2151.26 and Juvenile Rule 30, that transfer is permanent. As a result, the child remains in the jurisdiction of the adult court for any concurrent felonies committed in the transferring county and in other counties in the state as well. This transfer also applies to any future felonies that the child may commit.³⁷ The majority's central rationale for this

³⁰69 Ohio St. 2d at 122, 431 N.E. 2d at 328.

³¹*Id.* at 132, 431 N.E. 2d at 334.

³²*Id.* at 123, 431 N.E. 2d at 329.

³³*Id.* at 123-24, 431 N.E. 2d at 329.

³⁴*Id.*

³⁵20 Ohio St. 2d 108, 254 N.E. 2d 10 (1969).

³⁶69 Ohio St. 2d at 124, 431 N.E. 2d at 329.

³⁷*Id.* at 127, 431 N.E. 2d at 331.

decision was that once the determination has been made that it is not reasonable to believe the child can be rehabilitated in juvenile facilities, it is senseless to relitigate the question when the child commits future felonies.³⁸

After enunciating the *res judicata* doctrine, however, the Court went on to recognize that the juvenile courts of both Summit and Lake Counties had complied with proper statutory procedures for transferring jurisdiction over the defendants in their respective counties.³⁹ As a result, the Lake County Common Pleas Court and Grand Jury obtained jurisdiction over the defendants without any need to rely on the doctrine of *res judicata*. Therefore, the central issue before the Court was not whether the authority of the Lake County Grand Jury and Common Pleas Court arose automatically from the initial transfer in Summit County.⁴⁰

Justice Sweeney, joined in dissent by Justice William Brown, questioned the majority's "new found *res judicata* theory."⁴¹ Justice Sweeney felt that the theory was contrary to his interpretation of the intent of Section 2151.26. Justice Sweeney maintained that the case, and not the child was transferred, and he pointed to the language in subdivision (A), (E), and (F)⁴² of the statute to support his position.

The dissent also argued that the statute required a case-by-case decision thereby retaining the juvenile justice system's historical flexibility to re-evaluate the child in different contexts. A permanent waiver of juvenile court jurisdiction would totally remove such flexibility from the system.

The dissent posed a hypothetical fact situation to highlight the lack of flexibility inherent in the *res judicata* theory.⁴³ Justice Sweeney noted that the theory failed to consider the plight of a juvenile bound over to the adult court, found innocent of the charges upon which he was transferred, yet permanently placed in the jurisdiction of the adult court. The dissent found no intent in Section 2151.26 to have the juvenile court waive jurisdiction permanently to condone such a situation,

In essence, Justice Sweeney argued that the majority, in the name of "judicial economy," was willing to ignore the statutory procedural protections for minors established by the General Assembly. The dissent also questioned the majority's reliance upon *Whitehead*⁴⁴ as precedent for its *res judicata* theory in regard to juvenile transfers. *Whitehead*, the dissent noted, was a civil action

³⁸*Id.*

³⁹*Id.* at 124, 431 N.E. 2d at 329.

⁴⁰*Id.* at 127, 431 N.E. 2d at 331.

⁴¹*Id.* at 130, 431 N.E. 2d at 333.

⁴²See *supra* note 13 for text of OHIO REV. CODE ANN. § 2151.26 (A), (E), (F).

⁴³69 Ohio St. 2d at 130, 431 N.E. 2d at 333.

⁴⁴20 Ohio St. 2d 108, 254 N.E. 2d 10 (1969).

that dealt with the derivative claim of the parents of an injured child, not the rights of a juvenile offender.

After propounding its *res judicata* theory, the court returned to the central issue assigned as error by the defendants. The defendants maintained that the Lake County Grand Jury lacked authority to indict the defendants on charges arising during its proceedings and not originally filed in juvenile court. The Court rejected the defendants' contention as "patently illogical" under *State v. Klingenberger*.⁴⁵ In that case, the court had held that "grand juries have plenary and inquisitorial powers and may lawfully upon their own motion originate charges against offenders."⁴⁶ The majority thus affirmed *Klingenberger* in concluding that the Lake County Grand Jury's "plenary power" included the authority "to return any indictment which conformed to the facts submitted in evidence": that both defendants committed both robberies in that county.⁴⁷

The majority also found no merit in the defendants' contention that *Klingenberger* was irrelevant to the instant case because it was decided under Ohio General Code Section 1681 rather than its successor, the present applicable law, Section 2151.26. The Court cited *Klingenberger* as dispositive on the rationale that Ohio General Code Section 1681 differed from Section 2151.26 only in its wording, not in its purpose of transferring the child charged with a felony to the common pleas court.⁴⁸

The dissent, in turn, rejected the majority's effort to reinvigorate *Klingenberger*. Justice Sweeney distinguished the precedent from the instant case on both facts and the law. *Klingenberger*, he pointed out, concerned a single criminal offense that gave rise to one charge in juvenile court and a different charge in common pleas court. The instant case involved a series of offenses in two counties. Additionally, the dissent argued that *Klingenberger* was inapplicable because it predated *Kent v. United States*⁴⁹ and Section 2151.26.⁵⁰ As noted earlier, the Ohio legislature responded to the *Kent* mandates by enacting Section 2151.26 to succeed General Code Section 1681.⁵¹ Justice Sweeney emphasized that the procedural requirements outlined in *Kent* were significantly more stringent than those required by General Code Section 1681, the statute under which *Klingenberger* was decided.⁵²

⁴⁵113 Ohio St. 418, 149 N.E. 395 (1925).

⁴⁶*Id.* at 425, 149 N.E. at 397.

⁴⁷69 Ohio St. 2d at 125, 431 N.E. 2d at 330.

⁴⁸*Id.*

⁴⁹383 U.S. 541 (1966). See *supra* note 10 for the specific due process rights assured the juvenile in *Kent*.

⁵⁰See *supra* note 13 for history and text of OHIO REV. CODE ANN. § 2151.26.

⁵¹*Cf. supra* note 10, the specific due process rights granted the juvenile in *Kent*, with *supra* note 13, the provisions of OHIO REV. CODE ANN. § 2151.26.

⁵²69 Ohio St. 2d at 125 n.1, 431 N.E. 2d at 330 n.1. GEN. CODE § 1681 read:

When any information or complaint shall be filed against a delinquent child under these provisions, charging him with a felony, the judge may order such a child to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance before the

The majority, however, did not rely solely on the precedent of *Klingenger* to reject the defendants' contention that the grand jury lacked jurisdiction as to the charges arising during its proceedings and not originally filed in juvenile court. The court used its analysis of the intent of Section 2151.26 and Juvenile Rule 30 as the second leg of its rationale. The court had earlier justified the res judicata procedure it espoused as one intended by those statutes.

The majority pointed to language in Section 2151.26 (E)⁵³ and Juvenile Rule 30⁵⁴ as intending the transfer of the child and not the transfer of a particular case or cause of action. The court agreed with the defendants that Section 2151.26 (F)⁵⁵ states that the transfer of the juvenile to common pleas court ends the jurisdiction of the juvenile court in regard to the offenses alleged in the complaint. However, the majority rejected the defendants' contention that the implication of subdivision (F) is, therefore, that the juvenile court regains jurisdiction over future felonies the juvenile commits as a minor.

The majority made mention in a footnote,⁵⁶ that Section 2151.26 had been amended effective November 23, 1981, to include a new subdivision, (G). That amendment states that a juvenile transferred pursuant to the statute and convicted shall thereafter be prosecuted as an adult if he commits certain specified felonies in the future. Although the court noted that this new subdivision was not applicable law at the time of the transfers in the instant case, the majority pointed to it as evidence that even the latest legislative mandate did not intend the juvenile court to regain jurisdiction over a transferred child for future offenses.

The dissent, on the other hand, argued that the intent of the statutes was the transfer of the cases not the child. The dissent's analysis of Section 2151.26 relied upon the language of subdivisions (A), (E), and (F).⁵⁷ The dissent had earlier used this interpretation of the intent of the statute as grounds for rejecting the majority's res judicata doctrine.⁵⁸ Justice Sweeney also found the court's reference to subdivision (G), the 1981 amendment to Section 2151.26, detracted from the majority's holding that the statute intended a permanent transfer. Justice Sweeney suggested that the fact that the legislature specifically added

court of common pleas at the next term thereof. . . .

Cf. the lack of due process requirements in GEN. CODE § 1681 with those mandated in *Kent*, *see supra* note 10; in *Gault*, *see supra* note 12; in OHIO REV. CODE ANN. § 2151.26, *see supra* note 13.

⁵³*See supra* note 13 for text of OHIO REV. CODE ANN. § 2151.26 (E).

⁵⁴*See supra* note 14 for text of OHIO R. JUV. P. 30. *See esp.* subdivision (A) which speaks of the transfer of the child.

⁵⁵*See supra* note 13 for text of OHIO REV. CODE ANN. § 2151.26 (F).

⁵⁶69 Ohio St. 2d at 126 n.3, 431 N.E. 2d at 331 n.3. The Court quoted OHIO REV. CODE ANN. § 2151.26 (G).

Any child whose case is transferred for criminal prosecution pursuant to this section and who is subsequently convicted in that case shall thereafter be prosecuted as an adult in the appropriate court for any future act he is alleged to have committed . . . the offense of murder or aggravated murder, or [any act that] would constitute a felony of the first or second degree.

⁵⁷*See supra* note 13 for text of OHIO REV. CODE ANN. § 2151.26 (A), (E), (F).

⁵⁸69 Ohio St. 2d at 128, 431 N.E. 2d at 332. *See supra* pp. 9-10 of this Note.

subdivision (G) implied that the permanence of prior juvenile transfers was not initially settled under the law.

Moreover, the dissent pointed out that the majority's holding on the permanence of the transfer is not consistent with Section 2151.26 (G). In essence, Justice Sweeney argued that the court had rewritten the new subdivision and applied it prior to its effective date.⁵⁹

There is no question that the dissent correctly concluded that the judicial rule of *Adams* and the legislature rule of Section 2151.26 (G) are not consistent. The court in *Adams* held that the mere waiver of jurisdiction by the juvenile court is sufficient to complete a permanent transfer of the child to the adult court. Yet, the rule may be no more than dicta.⁶⁰ Section 2151.26 (G), on the other hand, requires not only a transfer of the child but also his conviction in common pleas court in addition to his committing specified felonies in the future in order to make the waiver irreversible. The new statutory amendment reflects a legislative intent to permanently deprive the child of the protective shield of the juvenile court only if he continues to commit serious felonies after conviction. Section 2151.26 (G) therefore, applies in a much narrower context than *Adams* as the dissent pointed out. The *Adams* decision, in contrast, reflects a judicial intent to sever irreversibly the minor felon's juvenile status earlier in time and to punish him as an adult thereafter.

How the court will reconcile the inconsistency between the judicial and statutory rules in deciding future juvenile transfer cases is presently unclear. The true significance of the *Adams* decision, therefore, may have to await further judicial interpretation. Which rule might prevail and when? The *Adams* rule would very likely control the future felonies of any juvenile transferred prior to November 23, 1981, the date upon which Section 2151.26 (G) became effective law. However, the future felonies of a juvenile transferred on or after that date would seem to be controlled by the statute.

In *Adams* the Court held that a juvenile properly bound over in any county in Ohio is considered transferred for any pending felonies in other counties as well. How Section 2151.26 (G) will affect this portion of the *Adams* rule is also unclear. Subdivision (G) speaks to future acts, not pending felonies. Therefore, the court might limit the amendment's requirement that the juvenile be convicted before the transfer is permanent to future felonies only. The court might still consider a transfer that did not result in conviction as permanent for any pending felonies in other counties. Likewise, the court might find the central holding of *Adams* regarding the plenary powers of a grand jury to indict the juvenile on any charges called for by the evidence to be unaffected by subdivision (G).

The above mentioned discrepancies between the *Adams* decision and Section

⁵⁹*Id.* at 131, 431 N.E. 2d at 333-34.

⁶⁰See *supra* p. 9 of this Note.

2151.26 (G) suggest certain explanations as to why the court decided the case as it did. First, the decision reached by the court suggests, if not a judicial backlash against the *Kent* mandates, at least a judicial crackdown on juveniles fifteen years of age or older charged with felonies. With the *Adams* decision, the court has signaled its intent to sever such children permanently from the rehabilitative philosophy of the juvenile court system the first time that the court finds it reasonable to believe that they are not amenable to the care its facilities can provide.

Second, the court shows no intention of circumventing or tampering with the due process safeguards which such children are entitled to before being transferred to common pleas court under existing statutes. However, such children would appear to be entitled to such considerations only once.

Third, the *Adams* decision implies a judicial belief that the legislature erred in enacting Section 2151.26 (G) which permits older juvenile felons to remain under the jurisdiction of the juvenile court unless charged with specified felonies after an initial felony conviction. The opinion suggests a judicial belief that the legislature is thus allowing such serious young offenders to remain too long under the protective shield of the juvenile court. Therefore, by holding that the initial transfer of such children is permanent in regard to concurrent and pending felonies anywhere in Ohio, the court could significantly undercut the effectiveness of Section 2151.26 (G) in authorizing only the permanent transfer of repeat juvenile felons.

Moreover, the court's position that a minor's failure to question the juvenile court transfer makes the matter *res judicata* in any adult court in Ohio⁶¹ deserves closer scrutiny in light of other existing Ohio law. *Adams* requires that a juvenile give greater consideration to appealing a waiver decision than the court would permit to strip him permanently of his rights under the juvenile justice system.

For example, under *Adams*, a minor not convicted of the charges on which he was transferred in one county will still remain in the jurisdiction of the common pleas court in that county and in any other county for any pending offenses because of the initial transfer. Yet, the juvenile's efforts to immediately appeal the initial waiver of juvenile court authority will prove futile. Ohio is among a minority of states that permit no direct appeal from a waiver order.⁶²

Therefore, a juvenile's first opportunity to challenge the decision that he

⁶¹9 Ohio St. 2d at 123-24, 431 N.E. 2d at 329.

⁶²In *re Becker*, 39 Ohio St. 2d 84, 314 N.E. 2d 158 (1974). In *Becker*, the Court held that a transfer order was not a final appealable order on the grounds that such an appeal would be an unnecessary delay in reaching the ultimate decision of the child's innocence or guilt of the offense charged. Thus the Court placed a priority upon the determination of guilt or innocence and not upon the child's loss of significant rights and protections statutorily available to him only in the juvenile court. The majority view, permitting the direct appeal of waiver orders, places the emphasis upon the loss of the child's rights. *But see infra* note 64, at 53, for the view that the Ohio position that the waiver order is not a final appealable order may be a majority view.

would not be responsive to treatment in any facility in the juvenile system will not occur until he files a motion to dismiss the charges in common pleas court. If the motion is overruled, the minor must defend himself in a criminal trial against the charges upon which he was transferred as well as any charges added by the grand jury.

Assuming a conviction, he must appeal both the conviction and the initial waiver of juvenile court jurisdiction. The child's position in regard to his amenability to rehabilitation in juvenile facilities may be irreparably weakened after a conviction has been handed down in a criminal court. Thus, the alternatives available to a minor attempting to appeal his transfer have been called "hollow remedies."⁶³

The finality of the waiver of juvenile court jurisdiction over any minor under *Adams* suggests an even greater need to modify Ohio law to permit a direct appeal of such a decision. The Institute of Judicial Administration of the American Bar Association supports such a juvenile justice standard.⁶⁴ Additionally, the model standards of the Institute recommend that the jurisdiction of the criminal court should not begin until the time for filing an appeal has passed or until the final decision of the appellate court has been handed down.⁶⁵

The primary purpose of an immediate appeal is to have another judicial body consider, before the effects of the decision are compounded, whether the juvenile court decision to transfer a minor was arbitrary or mistaken. How much likelihood is there that a waiver decision made by a juvenile judge will be arbitrary or mistaken? A 1969 Ohio study,⁶⁶ conducted prior to the legislature's updating of Section 2151.26⁶⁷ to meet the mandates of *Kent*⁶⁸ and *In re Gault*,⁶⁹ revealed that whether a child was treated as a juvenile or as an adult was determined primarily by the judge before whom the juvenile appeared. Of the forty-eight judges responding, thirty-one transferred from zero to three percent of the children appearing before them who had allegedly committed felonies; twelve judges transferred between five and fifty percent; and five judges transferred over fifty percent of such children.⁷⁰

⁶³Comment, *supra* note 6, at 518.

By not providing direct appeal from orders of waiver, Ohio has, in a sense, left the door open to the possibility that a decision on waiver which is arbitrary or even due to mistake, will not be corrected until the juvenile has been exposed to the criminal system.

⁶⁴INSTITUTE OF JUDICIAL ADMINISTRATION OF THE AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRANSFER BETWEEN COURTS § 2.4 (1980).

APPEAL: (A) The juvenile or prosecuting attorney may file an appeal of the waiver decision with the court authorized to hear appeals from final judgments of the juvenile court within [seven] court days of the decision of the juvenile court. *Id.*

⁶⁵*Id.* at § 2.4C.

⁶⁶Comment, *supra* note 6, at 136.

⁶⁷See *supra* note 13 for enactment and amendment dates relating to OHIO REV. CODE ANN. § 2151.26, as well as for the text of the statute.

⁶⁸383 U.S. 541 (1966). See *supra* note 10 for *Kent* mandates.

⁶⁹387 U.S. 1 (1967). See *supra* note 12 for *Gault* mandates.

⁷⁰Comment, *supra* note 6, at 136.

A more recent 1974 study⁷¹ tellingly reveals the discrepant manner in which some juvenile judges in California exercised their discretion with regard to waiver. Of the 660 juvenile cases transferred to the adult courts in California that year, juvenile judges in Los Angeles accounted for nineteen cases, less than three percent of the total. Juvenile judges in San Diego, a city less than a quarter the size of Los Angeles, on the other hand, transferred 288 cases, over forty-three percent of the total.⁷²

Statistics such as the above lend continuing support to the Supreme Court's reasoning in *Kent* that arbitrary judicial discretion must be replaced by due process guarantees in juvenile transfers. Therefore, judicial acts, such as the *Adams* decision, that permit juvenile transfers to become permanent automatically, may be viewed as a return to a form of arbitrary judicial discretion that existed prior to *Kent*.

Such attempts to irreversibly sever Ohio's most troubled youth from the one institution designed to assist them, the juvenile court, implies a sense of hopelessness regarding the ability of such children to change for the better. As a result, punishment becomes the ultimate solution.

The need to modify Ohio law to permit children to directly appeal their transfer from juvenile court and its accompanying loss of rights and immunities has become imperative in light of the *Adams* decision. The direct appeal would permit a branch of the judiciary outside the juvenile system a second chance to consider whether prison, punishment, and exposure to hardened adult criminals is the only remaining way to deal with juvenile felons. A more humane and constructive long-range solution might emerge from the direct appeal of juvenile court waiver decisions. At the least, the court of appeals would escape the potential prejudice of having to reconsider the transfer decision after the criminal court had already found the child guilty and convicted him.

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⁷¹Gasper & Katkins, *supra* note 3, at 939 & n. 11. This article cites CALIF. DEP'T. OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, JUVENILE JUSTICE ADMINISTRATION IN CALIFORNIA 32-33 (1974).

⁷²*Id.*

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