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## Retroactivity in Criminal Procedure: The Supreme Court as Monday Morning Quarterback

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# RETROACTIVITY IN CRIMINAL PROCEDURE: THE SUPREME COURT AS MONDAY MORNING QUARTERBACK

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*[T]he United States Supreme Court has now, after the game is over and the score is in, said the rules are changed and the game must be played again. The trial judge was right at the time of the trial, but wrong at the time of the appeal.<sup>1</sup>*

In recent years, on almost an annual basis, the United States Supreme Court has announced significant changes in the constitutional rights of the accused criminal. One question confronting state courts every time a new right is announced is whether the right is to be applied retroactively or prospectively. At common law *all* overruling decisions were applied retroactively.<sup>2</sup> However, it is currently established law that "the Court may in the interest of justice make the rule prospective."<sup>3</sup>

This comment will analyze recent decisions of the United States Supreme Court with a view to discovering why one particular new right is applied retroactively while another is not. This writer further hopes to determine what "common threads," if any, may be found running through these recent decisions so as to provide some aid in gauging whether future decisions should be applied retroactively. Lastly, this comment will examine a recent decision by the Supreme Court of Florida concerning retroactivity, to determine whether or not it comports with the criteria set forth by the United States Supreme Court.

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1. Lament of Judge Overton in *Branch v. State*, 212 So.2d 29, 33 (Fla. 2d Dist. 1968), where the court was forced to apply a recent retroactive decision.

2. *Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965).

3. *Id.* at 628.

## I. THE RETROACTIVITY FORMULA

The announced test for determining retroactivity, deceptive in its simplicity, is:

- (a) the purpose to be served by the new standards, (b) the extent of the reliance of law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.<sup>4</sup>

Generally, it is factor (a) which weighs in favor of retroactive application and factors (b) and (c) which militate against it. Thus, the formula really breaks down to a "weighing process" to determine whether the purpose served by the new right is so critical as to outweigh the severe impact which retroactive application might have.

The United States Supreme Court has found the "scales" to be tipped in favor of retroactivity in those instances in which the purpose of the new right is an enhancement of the integrity of the fact-finding process. Thus, if the new right provides an added protection against "the clear danger of convicting the innocent,"<sup>5</sup> it relates to the integrity of the fact-finding, *i.e.*, the guilt-determining, process and will be entitled to retroactive application.

[R]etroactivity depends upon a pragmatic balancing of the public interests against the gravity of the right involved. Thus, if the rule or newly established standard goes to the very integrity of the fact-finding process by which liberty is taken . . . retroactivity should be accorded even though it may result in wholesale [re]consideration of the standards by which factual determinations are made.<sup>6</sup>

The foregoing also indicates that certain other factors are *not* important in determining retroactivity. The first of these is the "importance" of the right involved. In *Johnson v. New Jersey*<sup>7</sup> it was emphasized "that the choice between retroactivity and non-retroactivity in no way turns on the value of the constitutional guarantee involved."<sup>8</sup> For example, the Fourth Amendment right to privacy, which protects a citizen against unreasonable searches and seizures, has been characterized as "the most comprehensive of rights and the right most valued by civilized men."<sup>9</sup> However, even though the protection of the Fourth Amendment is critically important, a violation of it does not affect the integrity of the fact-finding, *i.e.*, the truth-determining process. In short, the fact that the prosecution has introduced at trial evidence damaging

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4. *Stovall v. Denno*, 388 U.S. 293, 296-97 (1967).

5. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).

6. *Heryford v. Parker*, 396 F.2d 393, 396-97 (10th Cir. 1968).

7. 384 U.S. 719 (1966).

8. *Id.* at 728.

9. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

to an accused which was acquired by a flagrant violation of the Fourth Amendment in no way affects the probative value of that evidence on the issue of the accused's guilt or innocence. Violation of the right does not present a danger of convicting the innocent. While the right is important, its purpose is not an enhancement of the integrity of the fact-finding process.

The second factor which is irrelevant in determining retroactivity is the particular amendment of the Constitution involved. The United States Supreme Court has stressed that the "retroactivity . . . of a rule is not automatically determined by the provision of the Constitution upon which the dictate is based."<sup>10</sup> For example, retroactivity has most frequently been accorded to rights under the Sixth Amendment right to counsel.<sup>11</sup> However, the right to have an attorney present during police interrogations does not affect the integrity of the fact-finding process. The fact that an accused confessed without having an attorney present, so long as the statement is a voluntary one, does not create a danger of convicting the innocent. Thus, the purpose served by the presence of counsel at interrogations is not to enhance the integrity of the fact-finding process.

It therefore becomes apparent that the decision to apply a new right retroactively requires a "weighing" of the factors involved in the formula and a finding that the purpose of the new standard is to prevent conviction of the innocent and would therefore outweigh the impact which retroactivity would have.<sup>12</sup>

## II. APPLICATIONS OF THE FORMULA BY THE UNITED STATES SUPREME COURT

### A. *The Right to Counsel in the Adjudicatory Stages*

It is manifestly evident that the right to counsel at the trial relates to the very integrity of the fact-finding process. The indigent layman defendant who is forced to defend himself clearly stands a greater risk of improper conviction than an accused who has the benefit of counsel:

Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against

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10. *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966).

11. See note 18 *infra*.

12. In this area at least, the Court appears to be undeserving of critic's charges that it sets free "guilty" persons. No matter how important the new right may be, it will not be retroactively applied if its only result would be to set free criminals who were *reliably* found to be guilty.

him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>13</sup>

Thus, when an absolute right to counsel was applied to state criminal trials,<sup>14</sup> it was applied retroactively<sup>15</sup> because the "basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help . . . is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent."<sup>16</sup>

It should further be emphasized that the fact-finding process as it relates to the necessity of counsel is not "confined to . . . the trial on the merits."<sup>17</sup> It is readily apparent that the Supreme Court has considered the entire adjudicatory process (as opposed to the investigatory process) to be a part of the fact-finding process as it relates to the retroactive application of the right to counsel. The right to counsel at a preliminary hearing, arraignment, trial, sentencing, probation revocation, or appeal has always been retroactively applied.<sup>18</sup> In a recent decision in which the Court applied the right to counsel to sentencing and probation revocation it was stated:

There was no occasion in *Gideon* to enumerate the various stages in a criminal proceeding at which counsel was required but, [prior decisions of this Court], when the *Betts* requirement of special circumstances is stripped away by *Gideon*, clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of the accused may be affected.<sup>19</sup>

In dealing with this same issue, *i.e.*, the right to counsel at sentencing and probation revocation, it was made clear that the retroactivity of the right to counsel applies uniformly throughout the adjudicatory process. The Court held:

The right to counsel at sentencing is no different. As in these other cases, the right . . . relates to "the very integrity of the fact-finding process" . . . . The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of adjudication.<sup>20</sup>

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13. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

14. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

15. *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963).

16. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).

17. *Moore v. Michigan*, 355 U.S. 155, 160 (1957).

18. See *Arsenault v. Massachusetts*, 393 U.S. 5 (1968); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *McConnell v. Rhay*, 393 U.S. 2 (1968); *Douglas v. California*, 372 U.S. 353 (1963).

19. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

20. *McConnell v. Rhay*, 393 U.S. 2 (1968).

From these decisions the actual definition of the fact-finding process becomes clear. It is not simply the "trial" where guilt or innocence is determined, but *every stage* of the adjudicatory process where the *substantial rights* of the accused may be affected. An application of the right to counsel to any one of these stages will be effective retroactively.

### B. *The Right to Counsel in the Investigatory Stages*

The United States Supreme Court has consistently refused to retroactively apply its right to counsel decisions to the investigatory stages. This clear distinction between the right to counsel in the investigatory versus the adjudicatory process is ample illustration of the fact that retroactivity is not automatically determined by the constitutional provision involved, *e.g.*, the Sixth Amendment. The basic reason why retroactivity has been denied in this area is that the absence of counsel in the investigatory stages does not materially increase the danger of convicting the innocent.

In *Escobedo v. Illinois*<sup>21</sup> and *Miranda v. Arizona*,<sup>22</sup> accused persons were granted a right to counsel during police custodial interrogations. In *Johnson v. New Jersey*,<sup>23</sup> a divided Court refused to accord these decisions retroactive effect.

Two major factors militated against retroactive application. The first of these was that the purpose served by the presence of counsel at interrogations was not to prevent the innocent from being convicted, but to

guarantee full effectuation of the privilege against self-incrimination . . . [and to] assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it.<sup>24</sup>

Thus, the real purpose of these decisions was not an enhancement of that all-important factor in determining retroactivity—the integrity of the fact-finding process.

The second factor which militated against retroactivity was the existence of previously-announced safeguards which did avert the danger of convicting the innocent. Specifically, the Court emphasized that all prisoners could "invoke a substantive test of voluntariness which . . . has become increasingly meticulous through the years"<sup>25</sup> in order to attack the use of coerced confessions which "may well be untrustworthy by their very nature."<sup>26</sup>

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21. 378 U.S. 478 (1964).

22. 384 U.S. 436 (1966).

23. 384 U.S. 719 (1966).

24. *Id.* at 729-30.

25. *Id.* at 730.

26. *Id.* at 729.

It was only *after* the Court concluded that because of the two foregoing factors failure to retroactively apply *Escobedo* and *Miranda* would not increase the danger of leaving innocent persons in prison, that attention was directed to another factor—the reliance which law enforcement authorities had placed on prior law. Stating that “[p]rior to *Escobedo* and *Miranda*, however, we had expressly declined to condemn an entire process of in-custody interrogation solely because [counsel was not provided],”<sup>27</sup> the Court concluded that the heavy impact which retroactive application of these decisions would have, when contrasted with their minimal enhancement of the integrity of the fact-finding process, would tip the scales of the weighing process against the retroactive application of *Escobedo* and *Miranda*.

In *United States v. Wade*<sup>28</sup> and *Gilbert v. California*<sup>29</sup> an absolute right to counsel was applied to lineups and other pre-trial confrontations for identification purposes. However, in *Stovall v. Denno*<sup>30</sup> the Court refused to apply this right retroactively.

The purpose served by the *Wade* and *Gilbert* standards was the prevention of mistaken identifications achieved through suggestive confrontations,<sup>31</sup> e.g., a one man “lineup” or placing a Negro in a lineup with four Caucasians. In this regard the Court appeared to be on shakier ground, in denying retroactivity, than in the confession cases. An unfairly conducted lineup would impair the integrity of the fact-finding process by creating a danger of convicting the innocent. However, the Court, as in the confession cases, avoided this pitfall by referring to other safeguards which did apply retroactively.

If a lineup conducted prior to *Wade* and *Gilbert* “was so unnecessarily suggestive and conducive to irreparable mistaken identification”<sup>32</sup> as to amount to a deprivation of due process, a prisoner could obtain relief.<sup>33</sup> Thus, as in the confession cases, the reliability of the fact-finding process was protected by independent safeguards which did apply retroactively. This being the case, the reliance which “law enforcement officials of the Federal Government and all the 50 states”<sup>34</sup> had placed on the prior rule not requiring counsel again tipped the scales against retroactivity.

In summary, the right to counsel at police interrogations and lineups was not retroactively applied because other safeguards, which did apply retroactively, protected the integrity of the fact-finding process and thereby prevented the innocent from being convicted. In these situa-

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27. *Id.* at 731.

28. 388 U.S. 218 (1967).

29. 388 U.S. 263 (1967).

30. 388 U.S. 293 (1967).

31. *Id.* at 297.

32. *Id.* at 302.

33. *Foster v. California*, 394 U.S. 440 (1969).

34. *Stovall v. Denno*, 388 U.S. 293, 299 (1967).

tions, the reliance of law enforcement authorities on the prior rule and the serious impact of retroactivity combined to outweigh the first factor (to enhance the integrity of the fact-finding process) and thus prevent a retroactive application.

### C. *The Search and Seizure Cases*

*Mapp v. Ohio*<sup>35</sup> required all states to exclude from evidence materials which were the product of an unreasonable search and seizure. In *Linkletter v. Walker*<sup>36</sup> the Court refused to apply the exclusionary rule retroactively. The purpose served by the exclusionary rule was not the prevention of convicting innocent persons, *i.e.*, enhancement of the integrity of the fact-finding process; rather, it was "the enforcement of the Fourth Amendment [by providing] an effective deterrent to lawless police action."<sup>37</sup> Since the lawfulness *vel non* of the manner in which the evidence was seized in no way affected its relevancy and reliability, the impact and reliance factors clearly were sufficient to outweigh the non-existent impact on the integrity of the fact-finding process; in other words, the fact that the search was unreasonable did not lead to the conviction of innocent persons.<sup>38</sup>

In a related area, the Court held in *Lee v. Florida*<sup>39</sup> that a state must exclude from evidence wiretap conversations which its police have obtained in violation of the Federal Communications Act. The Court refused to apply this rule retroactively in *Fuller v. Alaska*,<sup>40</sup> basing its holding on the reasoning used in the *Linkletter* case; that the purpose of the rule is the enforcement of federal rights, not the enhancement of the fact-finding process.

Thus, since the exclusionary evidence rules do nothing to enhance the integrity of the fact-finding process, retroactivity has not been accorded them. In these cases the reliance and impact factors prevent retroactive application.

### D. *The Fifth Amendment Cases*

In *Jackson v. Denno*<sup>41</sup> the Court held that the voluntariness of a confession must initially be determined by the trial judge out of the presence of the jury. This rule was applied retroactively.<sup>42</sup>

The purpose of the *Jackson* rule was to insure that the jury does not consider a coerced confession in determining the accused's guilt.<sup>43</sup>

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35. 367 U.S. 643 (1961).

36. 381 U.S. 618 (1965).

37. *Id.* at 636-37.

38. *Id.* at 638-39.

39. 392 U.S. 378 (1968).

40. 393 U.S. 80 (1968).

41. 378 U.S. 368 (1964).

42. *Johnson v. New Jersey*, 384 U.S. 719, 727-28 (1966).

43. *Id.* at 729.

The right to have only truly voluntary confessions considered by the jury does relate to the integrity of the fact-finding process, since "if coerced they may well be untrustworthy by their very nature."<sup>44</sup> Because the right went to the very integrity of the fact-finding (guilt-determining) process, the reliance and impact factors did not operate to prevent a holding of retroactivity.

In *Griffin v. California*<sup>45</sup> it was held that state prosecutors could no longer comment upon the defendant's failure to take the stand and testify. The Court refused to apply the "no comment" rule retroactively in *Tehan v. United States ex rel. Shott*<sup>46</sup> because the purpose of the new rule was not the correction of a serious flaw in the fact-finding process.

The reasons behind the "no comment" rule "do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder[s] the entire load'."<sup>47</sup> In fact, the Court had previously stated that the defendant's failure to testify may well be a reasonable indicator of guilt or innocence.<sup>48</sup> Thus again, when the Court was confronted with a new rule the purpose of which was not to correct a serious defect in the fact-finding process, the other two factors combined to prevent retroactive application.

#### E. Other Cases

The use of a non-testifying defendant's confession which implicates a co-defendant in a joint trial was condemned in *Bruton v. United States*.<sup>49</sup> This new standard was applied retroactively because it was designed to correct a serious flaw in the fact-finding process<sup>50</sup> of the old standard, which was that an instruction to the jury to consider the confession only against its maker was sufficient to protect the non-confessing defendant's rights.<sup>51</sup> In *Bruton* the Court recognized that, as a practical matter, the jury often cannot, instruction notwithstanding, ignore the reference to the non-confessor.<sup>52</sup> Here again, because the danger of convicting the innocent was present, retroactive application was required.

It should also be noted that the Court took this occasion to reiterate that if the new rule does correct a serious flaw in the fact-finding process,

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44. *Id.*

45. 380 U.S. 609 (1965).

46. 382 U.S. 406 (1966).

47. *Id.* at 415.

48. *Adamson v. California*, 332 U.S. 46, 56 (1947).

49. 391 U.S. 123, 88 S. Ct. 1620 (1968).

50. *Roberts v. Russell*, 394 U.S. 440 (1968).

51. *Delli Paoli v. United States*, 352 U.S. 232 (1957).

52. *Bruton v. United States*, 381 U.S. 123 (1968).

then all the prior reliance in the world will not prevent a retroactive application. The Court stated that "even if the impact of retroactivity may be significant, the constitutional error [herein] presents a serious risk that the issue of guilt or innocence may not have been reliably determined."<sup>53</sup>

The right to trial by jury under federal standards was extended to state criminal trials and criminal contempt hearings in *Duncan v. Louisiana*<sup>54</sup> and *Bloom v. Illinois*.<sup>55</sup> This right was held not to be retroactive in *DeStefano v. Woods*.<sup>56</sup> The key reason retroactivity was denied was, again, that the decisions did not involve a serious flaw in the fact-finding process. The purpose of the right to jury trial is that "in the context of the institutions and practices by which we adopt and apply our criminal laws, . . . [it] generally tends to prevent arbitrariness and repression."<sup>57</sup> This general tendency was not sufficient to outweigh the prior reliance by officials and the heavy impact of retroactivity.

### III. GUIDELINES FOR GAUGING FUTURE DECISIONS

It should be readily apparent from the foregoing decisions that the retroactivity formula is deceptive in its simplicity. Although the same formula is applied to every new right, the results achieved have been something less than uniform. However, there are certain constant threads which may be used to determine whether a new right may or may not be applied retroactively.

The first and most constant trend is an application of the right to counsel to any one of the steps in the adjudicatory process—the right to an attorney in a court room. Every time the Court has applied this right to any one of these steps it has applied the right retroactively.

The second important guideline is the purpose of the new rule as it relates to preventing the possibility of convicting innocent persons, a factor closely related to the first right. If the rule does relate to this goal, the Court will simply ignore the reliance and impact factors and apply the right retroactively.

Thirdly, if the new standard is not really intended to protect the innocent from conviction, then the new rule will not be retroactively applied. The search and seizure cases clearly demonstrate this point.<sup>58</sup>

Fourthly, in case of doubt, it should be determined whether there are certain safeguards already existing in the area. If any exist, this may tip a questionable issue in favor of non-retroactivity. The existence of other safeguards appeared to weigh heavily in the Court's decision

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53. *Roberts v. Russell*, — U.S. —, 88 S. Ct. 1921, 1922 (1968).

54. 391 U.S. 145 (1968).

55. 391 U.S. 194 (1968).

56. 392 U.S. 631 (1968).

57. *Id.* at 2095.

58. See text at notes 35-40 *supra*.

not to apply *retroactively* the right to counsel in the investigatory stages.<sup>59</sup>

These four guidelines may well be as deceptive in their simplicity as the retroactivity formula itself. However, they are based upon the patterns which the Supreme Court has exhibited in specific applications of the formula. A better understanding of the rules might well be achieved by examining a recent decision of the Supreme Court of Florida on the issue of retroactivity.

#### IV. AN APPLICATION OF THE FORMULA BY THE SUPREME COURT OF FLORIDA

##### A. Introduction

In the decision of *In Re Gault*<sup>60</sup> the United States Supreme Court imposed an absolute right to counsel at juvenile delinquency hearings. Florida had not previously recognized this right, since such hearings were considered civil in nature.<sup>61</sup> Florida was therefore confronted with the issue of whether *Gault* was to be retroactively applied to vitiate juvenile hearings which were held prior to *Gault* and without the benefit of counsel.

This was not the first time a right to counsel decision posed serious problems for the administration of justice in Florida. When the United States Supreme Court, in *Gideon v. Wainwright*,<sup>62</sup> announced an absolute right to counsel at criminal felony trials and applied the right retroactively,<sup>63</sup> convicted felons flocked to the courts in such a rush as to practically equal the one which occurred when gold was discovered in California. Within ten months of the *Gideon* decision, "nine hundred seventy-six prisoners had been released outright from Florida penitentiaries, the authorities feeling that they could not successfully be retried. Another five hundred were back in the courts, and petitions from hundreds more were awaiting consideration."<sup>64</sup>

The first time the Supreme Court of Florida was confronted with the issue of retroactivity as applied to juveniles was in *State v. Steinhauer*,<sup>65</sup> where it decided, perhaps understandably in view of its prior agonies,<sup>66</sup> that "Gideon's Trumpet" would not sound again. The *Steinhauer* case dealt not with a delinquency hearing but with a waiver

59. See text at notes 21-34 *supra*.

60. 387 U.S. 1 (1967).

61. *In re T.W.P.*, 192 So.2d 482 (Fla. 1966); *State v. Dennis*, 185 So.2d 12 (Fla. 3d Dist. 1966).

62. 372 U.S. 335 (1963).

63. *Doughty v. Maxwell*, 376 U.S. 202 (1964).

64. A. LEWIS, *GIDEON'S TRUMPET* 205 (1964).

65. 216 So.2d 214 (Fla. 1968).

66. The flood of habeas corpus petitions filed in the Supreme Court of Florida became so overwhelming that they forced the promulgation of a new collateral remedy, to wit: FLA. R. CRIM. P. 1.850. See *Roy v. Wainwright*, 151 So.2d 825 (Fla. 1963).

of jurisdiction hearing. Under Florida law the juvenile court has exclusive jurisdiction to try all juveniles under seventeen years of age for violations of the law.<sup>67</sup> The juvenile court does, however, have discretionary authority to waive its jurisdiction and allow the juvenile to be tried as an adult when the juvenile is fourteen or over and it appears that he has committed a felony.<sup>68</sup>

It should be emphasized that it is in regard to waiver of jurisdiction hearings that the retroactivity *vel non* of *Gault* is crucial. In Florida, even though a delinquent may theoretically be incarcerated until his majority,<sup>69</sup> delinquents are, in fact, not committed for more than six months due to the overcrowding of facilities.<sup>70</sup> Thus the retroactivity of *Gault* as applied to delinquency adjudications is essentially now a moot issue, since *Gault* was decided over two years ago and pre-*Gault* delinquency commitments would have long since expired. However, when juvenile jurisdiction is waived the juvenile is tried as an adult and faces adult-length commitment. Since jurisdiction is waived in cases involving serious felonies and recidivists, most of those juveniles who were tried as adults prior to *Gault* are still subject to incarceration.<sup>71</sup> The *Steinhauer* decision of the Supreme Court of Florida was, therefore, a vitally important one.

#### B. *The Factual Setting of the Steinhauer Decision*

In 1966, Jerry Lee Steinhauer, a sixteen year old juvenile, broke and entered two dwellings in Dade County. Jurisdiction for these offenses was waived by the Juvenile and Domestic Relations Court for Dade County, and Jerry was convicted in the Criminal Court of Record and sentenced to ten years in prison. Jerry subsequently filed a motion to vacate judgment and sentence alleging, *inter alia*, that he did not have counsel at the waiver of jurisdiction phase and that he had not been informed of his right to counsel. The motion to vacate was summarily denied on the ground that Jerry did not have a right to counsel at the waiver of jurisdiction phase of the juvenile proceedings. The Third District Court of Appeal of Florida reversed the lower court, holding that the right to counsel announced in *Gault* applied retroactively to juvenile waiver of jurisdiction proceedings.<sup>72</sup> On certiorari, the Supreme Court of Florida reversed and remanded, holding that *Gault* did not apply retroactively to "the mere waiver of jurisdiction phase," although the court suggested that it might apply retroactively to a hearing on an adjudication for delinquency.<sup>73</sup>

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67. FLA. STAT. §§ 39.01(6), 39.02(2) (1967).

68. FLA. STAT. § 39.02(6) (1967).

69. FLA. STAT. § 39.11(3) (1967).

70. Record at 250, *Richardson v. State ex rel. Milton*, 219 So.2d 77 (Fla. 3d Dist. 1969).

71. For an analysis of the factors which decide the waiver question see *In re B.P.W.*, 214 So.2d 365, 367-68 (Fla. 3d Dist. 1968).

72. *Steinhauer v. State*, 206 So.2d 25 (Fla. 3d Dist. 1967).

73. "The right to counsel cases . . . all recognized the essentiality of the assistance of

It is this writer's opinion that the court was correct when it suggested that *Gault* applied retroactively to delinquency hearings.<sup>74</sup> It is submitted, however, that the court was incorrect in holding that a waiver of jurisdiction hearing was significantly distinguishable in this regard.

### C. *The Rationale of the Steinhauer Decision*

The first problem confronting the court was to decide whether the case involved a constitutional issue. The waiver of jurisdiction in question occurred on August 23, 1966. This was seven months *after* the United States Supreme Court decision of *Kent v. United States*,<sup>75</sup> which, in reversing a District of Columbia criminal case, held in part that an absolute right to counsel existed at the previously held juvenile waiver of jurisdiction hearing. The Florida Supreme Court concluded, however, that *Kent* did not directly apply since it was based on an interpretation of the District of Columbia Code.<sup>76</sup>

Jerry, however, was not yet out of court. Proceeding to analyze the *Gault* decision, the Florida court concluded that the numerous references to *Kent* meant that the United States Supreme Court had "adapted its views on statutorily created protections to broad constitutional protected guaranties. By a process of judicial metastasis it proliferated *Kent* implications into *Gault* mandates."<sup>77</sup> Since this "metastasis" occurred almost a year *after* Jerry was bound over to the criminal courts, the court concluded that it was forced to decide whether *Gault* applied retroactively to void his conviction.<sup>78</sup>

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counsel . . . in the fact-finding and truth determining process. They could be analogous to juvenile court hearings for determination of delinquency . . ." *State v. Steinhauer*, 216 So.2d 214, 219 (Fla. 1968).

74. This issue will not be discussed at length, since this writer submits that *Gideon* is determinative of the matter. For an excellent discussion of opposing views on this point compare the dissenting opinion of Judge Swann in *Richardson v. State ex rel. Milton*, 219 So.2d 77, 81 (Fla. 3d Dist. 1969) with the opinion of Judge Barns in *Sult v. Weber*, 210 So.2d 739 (Fla. 4th Dist. 1968). Judge Swann felt that the impact which the absence of counsel has on the integrity of the fact-finding process commanded retroactivity, while Judge Barns was of the opinion that the reliance law enforcement authorities had placed on pre-*Gault* law precluded it.

75. 383 U.S. 541 (1966).

76. "The Court [in *Kent*] specifically announced that the 'Juvenile Court Act and the decisions of' the Court of Appeal 'provide an adequate basis for decision . . . and we go no further' 383 U.S. at 556 . . ." *State v. Steinhauer*, 216 So.2d 214, 217-18 (Fla. 1968).

77. *Id.* A contrary view was expressed by the Supreme Court of Appeals of Virginia which stated that "we take the references to *Kent* in *Gault* as intended to describe the development of statutory law respecting the right to counsel in juvenile court proceedings; not as intended to extend the *Kent* decision beyond what it originally stood for." *Cradle v. Peyton*, 208 Va. 243, 247, 156 S.E.2d 874, 877 (1967).

Undeterred by this two-way split of authority, a federal district court recently compounded the confusion by holding that *Gault* did not apply retroactively to waiver hearings even though it expressed no opinion as to whether *Gault* did elevate *Kent* to a constitutionally-based decision. *Kemplen v. Maryland*, 295 F. Supp. 8 (D. Md. 1969).

78. This writer is of the opinion that the retroactivity issue could have been avoided, and Jerry granted relief, if the court would simply have recognized that *Kent* did, in fact,

Proceeding to apply the approved formula for determining retroactivity,<sup>79</sup> the court concluded that, since the right to counsel was at issue, the impact which the presence or absence of counsel would have on "the integrity of the fact-finding process" was determinative of the retroactivity *vel non* of *Gault*.<sup>80</sup> Stating that the ultimate fact, *i.e.*, Jerry's guilt or innocence, was determined at the criminal trial where Jerry had the assistance of counsel, the court concluded

The purpose of the new standard as applied to waiver [of jurisdiction] hearings is merely to accomplish a broad aspect of fairness and to guard against possible abuses of juveniles in preliminary stages of the juvenile court proceedings. Actually, at this stage of the proceeding the fact-finding process, in the sense of a truth-determining medium, is seldom involved.<sup>81</sup>

The court concluded, then, that since the integrity of the fact-finding process was not affected by what occurred at the "mere waiver of jurisdiction phase," *Gault* did not apply retroactively. Jerry was "out of court."

#### D. *The Waiver Hearing as a Part of the Fact-Finding Process*

As previously emphasized, the United States Supreme Court has denominated the entire adjudicatory process, from preliminary hearing to appeal, as part of the fact-finding process in regard to retroactive application of the right to counsel.<sup>82</sup> In this regard it appears that in *Steinhauer* the Supreme Court of Florida gave an unduly restrictive definition to the fact-finding process, considering it to occur only at the trial on the merits. Based upon analogies to the criminal adjudicatory process, it is submitted that the juvenile waiver of jurisdiction hearing is clearly a step in the fact-finding process.

The court appears to have analogized the waiver of jurisdiction hearing to a criminal preliminary hearing,<sup>83</sup> which exists *solely* to determine

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have a constitutional basis. *Kent* admittedly was based on an interpretation of the District of Columbia juvenile statute; however, the interpretation was a *constitutional* one. The court there emphasized "We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." *Kent v. United States*, 383 U.S. 541, 557 (1966). Thus the Court of Appeals of Kentucky, prior to *Gault*, concluded: "In the light of the foregoing language we think there is no room for debate on the question whether the present appellant was entitled to counsel in the juvenile court [waiver] proceedings." *Smith v. Commonwealth*, 412 S.W.2d 256, 259 (Ky. 1967).

79. See note 4 *supra* and accompanying text.

80. "The Supreme Court [has indicated] that a critical element in determining retroactivity is the impact of the new rule on the reliability of the fact-finding process." *State v. Steinhauer*, 216 So.2d 214, 218 (Fla. 1968).

See note 5 *supra* and accompanying text.

81. *State v. Steinhauer*, 216 So.2d 214, 219 (Fla. 1968).

82. See note 18 *supra*.

83. The court qualified its holding by stating that if, for example, the juvenile had

if probable cause for detention and trial are present.<sup>84</sup> In this analysis the court finds support in a recent federal decision which stated that the juvenile waiver of jurisdiction hearing "partakes more of a preliminary hearing establishing probable cause for the initiation of further action."<sup>85</sup>

It is submitted that such an analogy is erroneous and that a waiver of jurisdiction hearing is best analogized to a *sentencing* hearing. In *Kent*, the United States Supreme Court emphasized that the waiver hearing actually determines the type of punishment the child is to receive. Under the District of Columbia statute,

[t]he Juvenile Court is vested with "original and exclusive jurisdiction" of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age . . . . The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment.<sup>86</sup>

The Florida statute is no different. The juvenile court has original and exclusive jurisdiction over all juveniles.<sup>87</sup> The juvenile may not be incarcerated beyond his majority.<sup>88</sup> He does not suffer any of the normal disabilities of a criminal conviction.<sup>89</sup> He is protected from publicity.<sup>90</sup>

Thus, the waiver of jurisdiction hearing does not merely determine if there exists probable cause for further proceedings. It determines *qualitatively*: whether a juvenile is to face four, five or six years of incarceration or ten years, life or possibly forfeiture of life itself; whether he is to face the prospect of possibly being a convicted felon with all of the disabilities thereunto appertaining; and whether his transgression is to be kept confidential or broadcast to the world at large. In short, while the hearing does not adjudicate guilt, it most certainly does adjudicate the range of permissible sentences to be imposed if guilt is eventually determined.

The true nature of the waiver hearing as a sentencing hearing is made even clearer when one examines the evidence considered in determining whether jurisdiction is to be waived. In deciding whether it

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made a damaging admission at the waiver hearing which was subsequently used against him then the absence of counsel would be critical. This is the rule which generally applies to preliminary hearings. See *White v. Maryland*, 373 U.S. 59 (1963); *Montgomery v. State*, 176 So.2d 331 (Fla. 1965).

84. *Baugus v. State*, 141 So.2d 264 (Fla. 1962).

85. *Kempen v. Maryland*, 295 F. Supp. 8 (D. Md. 1969).

86. 383 U.S. 541, 556-57 (1966).

87. FLA. STAT. § 39.02 (1967).

88. FLA. STAT. § 39.11(3) (1967).

89. FLA. STAT. § 39.10(3) (1967).

90. FLA. STAT. § 39.12 (1967).

will waive jurisdiction, the juvenile court considers the seriousness of the offense and any aggravating facts surrounding it, the prior record of the juvenile, the juvenile's prospects for rehabilitation, etc.<sup>91</sup> At a preliminary hearing, however, the sole issue to be considered is whether probable cause exists to hold the accused for trial.<sup>92</sup>

Thus, in both outcome and substance, the waiver of jurisdiction hearing amounts to a sentencing hearing. At such hearings, "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case . . . is apparent."<sup>93</sup> It is also retroactive.<sup>94</sup>

Even assuming the best analogy is to a preliminary hearing, it is still evident that Jerry should have been retroactively given the benefit of counsel. Although the accused does not normally have an absolute right to counsel at a preliminary hearing, a right to counsel will be deemed critical if something occurred at the preliminary hearing which prejudiced him at later stages of the proceedings.<sup>95</sup> This right is also retroactive.<sup>96</sup> Because of something which occurred at the waiver hearing, *i.e.*, the waiver itself, Jerry, aside from the disabilities of a felony conviction, is presently in Raiford Prison suffering five years of prejudice.<sup>97</sup> It is thus apparent that Jerry was entitled to the retroactive benefit of counsel whether the waiver hearing is considered a sentencing hearing or a preliminary hearing. The trend of the United States Supreme Court is to make the right to counsel retroactive at every stage of the adjudicatory process.

### E. Conclusion

In *Steinhauer*, the Supreme Court of Florida refused to accord the right to counsel retroactive application by holding that the fact-finding process is limited to the trial on the merits. In so doing, it ignored an undeviating line of United States Supreme Court decisions. The Court further distinguished the waiver hearing from an adjudicatory hearing, calling it "the mere waiver of jurisdiction phase," and stating that it is not attended by "awesome consequences."<sup>98</sup> In so doing it ignored the unequivocal statement of the United States Supreme Court that it is "clear beyond dispute that the waiver of juris-

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91. *In re B.P.W.*, 214 So.2d 365, 367-68 (Fla. 3d Dist. 1968).

92. See text at note 82 *supra*.

93. *Mempa v. Rhay*, 389 U.S. 128, 135 (1967).

94. *McConnell v. Rhay*, 393 U.S. 2 (1968).

95. *White v. Maryland*, 373 U.S. 59 (1963).

96. *Arsenault v. Massachusetts*, 393 U.S. 5 (1968).

97. Jerry received a ten year sentence in the criminal court. If the juvenile court had not waived jurisdiction, Jerry, as a sixteen year old, would have faced a maximum possible detention of five years. FLA. STAT. § 39.11(3) (1967).

98. 216 So.2d at 218.

diction is a 'critically important' action determining vitally important statutory rights of the juvenile."<sup>99</sup>

It is submitted that the decision of the Florida Supreme Court in *Steinhauer* was motivated primarily by a desire to avoid the catastrophic situation which occurred after *Gideon*, when literally hundreds of Florida prisoners had to be retried or released outright.<sup>100</sup> Such fears are unfounded. There would be no need to wholly retry the cases of juveniles who were bound over to criminal courts without the assistance of counsel. The failure to have counsel at the waiver hearing would in no way vitiate the adjudication of the criminal court that the juvenile did in fact commit the illegal act. The sole issue for determination (assuming that he committed the illegal act) would be whether his prior record, the severity of the offense, and his prospects for rehabilitation were such as to warrant treatment as an adult offender. The juvenile court need simply hold a new waiver hearing with counsel, and if it decides that the initial waiver was proper it should leave the juvenile where he presently stands, *i.e.*, on the adult side. On the other hand, if it finds waiver to be unwarranted it should simply order the felony adjudication vacated and all records transferred to the juvenile court. It would only need to decide whether the juvenile had already "served enough time" for his transgression in light of juvenile standards and then either release him or commit him to the industrial school. In short, even if "Gideon's Trumpet" were to sound again, its reverberations would not have the same impact as before.

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99. *Kent v. United States*, 383 U.S. 541, 556 (1966).

100. See note 62 *supra*.