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## Prosecutorial Waiver Of Juveniles Into Adult Criminal Court: The Ends of Justice ... Or TheEnd of Justice? State v. Cain.

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## **Abstract**

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**KEYWORDS:** waiver, juveniles, criminal court

## Prosecutorial Waiver Of Juveniles Into Adult Criminal Court: The Ends of Justice . . . Or The End of Justice? State v. Cain.

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The State of Florida appealed the decision of an Osceola County circuit court which dismissed the prosecution of a juvenile in adult criminal court. Mark Cain, a minor, had been charged with two counts of armed burglary, and two counts of grand theft. In his motion to dismiss, Cain attacked the constitutionality of Florida Statute § 39.04(2)(e)4.<sup>1</sup> This statute vests the state attorney with authority to prosecute juveniles, who are 16 years of age or older, in the adult criminal courts when they have committed two past delinquent acts, one of which was a felony.<sup>2</sup> Cain contended that the statute unconstitutionally delegates to the state attorney unfettered discretion to prosecute juveniles as adults.<sup>3</sup> Further, he argued that the statute violates due process of law in that juveniles are transferred to the adult criminal court system without a hearing.<sup>4</sup> The circuit court agreed with Cain, granted his motion to dismiss, and held the statute unconstitutional.<sup>5</sup> The state appealed.

This case represents an attempt by the Supreme Court of Florida to decide whether the legislature can constitutionally vest the state attorney with the power to terminate the juvenile court of its exclusive

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1. State v. Cain, 381 So. 2d 1361, 1362 (Fla. 1980).

2. FLA. STAT. § 39.04(2)(e)4 (1979 & Supp. 1980):

The State attorney may . . . with respect to any child who at the time of commission of the alleged offense was 16 or 17 years of age, file an information when in his judgment and discretion, the public interest requires that adult sanctions be considered or imposed. Upon motion of the child the case shall be transferred for adjudicatory proceedings as a child pursuant to s. 39.09(1) if it is shown by the child that he had not previously been found to have committed two delinquent acts, one of which involved an offense classified under Florida law as a felony.

3. 381 So. 2d at 1362.

4. *Id.*

5. *Id.*

jurisdiction over minors, and prosecute them as adult criminals.

The Florida legislature acted in chapter 39 of the Florida Statutes to create the Juvenile Justice Act.<sup>6</sup> Pursuant to this chapter the juvenile division of the circuit court is given the exclusive jurisdiction to handle proceedings involving minors.<sup>7</sup> However, there are three statutory exceptions to this exclusive jurisdiction which allow the juvenile to be thrust into the adult criminal court system. First, the juvenile court, in a waiver hearing, may waive its jurisdiction over any child fourteen years of age or older<sup>8</sup> where the criteria delineated in Florida Statute § 39.09(2)(c)1-8 are fulfilled. Second, adult criminal prosecution can be pursued by the return of a grand jury indictment. The indictment must charge the child with a crime punishable by death or life imprisonment.<sup>9</sup> Finally, the state attorney may divest the juvenile court of its jurisdiction by filing an information against the child. The state attorney through § 39.04(2)(e)4 is given discretion to file informations against minors when he believes the public interest will be served best by the imposition of adult sanctions.<sup>10</sup> This last exception was at issue in *Cain*.

The Florida Supreme Court in *Cain*, upheld the constitutionality of Florida Statute § 39.04(2)(e)4<sup>11</sup> which pertains to a waiver invoked by the prosecution. The decision of the court can be questioned on three particular grounds. First, in order to uphold the present waiver statute, the court used past precedent involving the constitutionality of waiver by grand jury indictment. To view these two types of waiver as comparable mistakes the inherent differences between the office of the state attorney and that of the grand jury. Second, in upholding the present waiver statute, the court sanctioned the use of prosecutorial discretion. This action by the court is dubious in light of the United States Supreme Court's opinion of *United States v. Kent*.<sup>12</sup> Third, the court asserted that a juvenile's rights are not lessened when he is transferred

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6. FLA. STAT. § 39.001(1) (1979).
  7. FLA. STAT. § 39.02(1) (1979).
  8. FLA. STAT. § 39.02(5)(a) (1979).
  9. FLA. STAT. § 39.02(5)(c) (1979).
  10. FLA. STAT. § 39.04(2)(e)4 (1979).
  11. 381 So. 2d at 1368.
  12. 383 U.S. 541 (1966).

to criminal court.<sup>13</sup> This statement underestimates the advantages offered by the juvenile system.

In *Cain*, the court rejected the juvenile's due process attacks by relying on *Johnson v. State*<sup>14</sup> and *Woodward v. Wainwright*.<sup>15</sup> These cases upheld the constitutionality of Florida Statute § 39.02(5)(c)<sup>16</sup> which allows adult prosecution of juveniles upon the return of a grand jury indictment charging the juveniles with an offense punishable by death or life imprisonment. The *Cain* court stated that there was no difference between a state attorney's ability to file an information against a juvenile and the power of the state attorney, as upheld in *Johnson*, to refer the case to a grand jury for possible indictment.<sup>17</sup> Justice Sundberg, writing the *Cain* opinion, reasoned that since the present case was indistinguishable from *Johnson*, a conclusion that the present statute is constitutional must follow.

The court's finding that there is no difference between the prosecutor's power to file an information and his ability to refer the case to a grand jury is dubious at best. First, in filing an information, it is the state attorney who formulates the charge against the minor.<sup>18</sup> When the case is referred to the grand jury, it is the grand jury and not the state attorney who charges the juvenile.<sup>19</sup> Second, the office of the state attorney is an entity separate and distinct from that of the grand jury, with decision-making processes which are totally dissimilar.

13. 381 So. 2d at 1366.

14. 314 So. 2d 573 (1975).

15. 556 F.2d 781 (5th Cir. 1977).

16. FLA. STAT. § 39.02(5)(c) (1979) reads in part:

A child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the court as set forth in s. 39.067 unless and until an indictment on such charge is returned by the grand jury. When an indictment is returned, the petition for delinquency, if any, shall be dismissed and the child shall be tried and handled in every respect as if he were an adult.

17. 381 So. 2d at 1364.

18. 17 FLA. JUR. *Indictments and Informations* § 3 (1964), which reads in part: "An information is a written accusation of crime preferred by a grand jury."

19. *Id.* "An indictment is a written accusation or charge of a crime, against one or more persons, presented upon oath or affirmation by a grand jury legally convoked." *Id.*

This latter notion was espoused in the case of *Gerstein v. Pugh*.<sup>20</sup> One issue in *Gerstein* was whether a person arrested on an information was entitled to a judicial determination of probable cause, prior to detention. State Attorney Gerstein attempted to defend the power of the prosecutor to charge non-capital offenders by information, without a preliminary hearing, by arguing that the prosecutor's decision to file an information is, itself, a judicial determination of probable cause.<sup>21</sup> He further asserted that this identical procedure was practiced by the grand jury.<sup>22</sup> The United States Supreme Court rejected his argument and revoked the power of the state attorney to charge non-capital offenders by information without a hearing.<sup>23</sup> However, it allowed this procedure to continue with regard to the grand jury.

*Gerstein* illustrates the inherent differences between the state attorney and the grand jury. The grand jury was permitted to substitute its judgment on probable cause for that of the court because of its relationship to the courts and its historical role of protecting individuals from unjust prosecution.<sup>24</sup> This same substitution of judgment was not granted to the state attorney because the prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate.<sup>25</sup>

The *Gerstein* court's finding was based on the premise that the decision-making process of the grand jury is clothed with restraint, while the state attorney operates unrestrained. A grand jury impanelment by the court<sup>26</sup> operates as a check on its decision-making process. Furthermore, the diverse membership of the grand jury creates a cer-

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20. 420 U.S. 103 (1974).

21. *Id.* at 116-17.

22. *Id.* at 113.

23. *Id.* at 114.

24. *Id.* at 117 n.19.

25. *Id.* at 117.

26. 15 FLA. JUR. *Grand Jury* § 2 (1964) states:

A grand jury is an agency of the state, and a part of its judicial system. . . . In essence it is a creature of the court since it cannot constitute itself on its own initiative but can act as a grand jury . . . only when summoned, impaneled and convened by the court.

§ 5 states: "Courts invested with criminal jurisdiction have long been regarded as having a resulting and implied power with reference to the organization of the grand jury."

tain internal policing of its actions. However, the state attorney proceeds without any of these restraints and with practically unfettered discretion.

Therefore, to state that there is no difference between the state attorney's power to file an information and his ability to refer the case to the grand jury mistakes the fact that two separate institutions are formally accusing the juvenile, and that each entity arrives at its decision to charge in very different ways. It logically follows that *Johnson v. State*,<sup>27</sup> which upheld waiver through grand jury indictment, cannot be relied upon to uphold the constitutionality of the present statute.

The Supreme Court in *Cain* also resisted the juvenile's due process attacks by sanctioning the use of prosecutorial discretion, as created by § 39.04(2)(e)4. This action by the court seems to run against the landmark juvenile case *United States v. Kent*.<sup>28</sup>

In *United States v. Kent*, Morris Kent, a juvenile, was apprehended and interrogated concerning a housebreaking and rape.<sup>29</sup> Without conducting an investigation, as required by statute,<sup>30</sup> the juvenile court judge transferred Kent to the criminal jurisdiction of the circuit court. Kent was found guilty of housebreaking and sentenced to the psychiatric ward of the local hospital. The case was eventually appealed to the United States Supreme Court, which held that although a minor has no constitutional right to be treated in a separate juvenile court system, once such a system is authorized by statute a juvenile may not be transferred away from it until due process requirements are met.<sup>31</sup> The court in *Kent* asserted that the waiver process has tremendous consequences for the juvenile, thus due process requires that no transfer to criminal court should occur without a hearing, ceremony, or a statement of reasons.<sup>32</sup>

In its decision, the court did not specifically enumerate the reasons which should be considered before a juvenile judge transfers a minor to the adult criminal system. However, the decision cited the eight standards for review of waiver which were included in the appellee's appen-

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27. 314 So. 2d 573 (1975).

28. 383 U.S. 541 (1966).

29. *Id.* at 543.

30. D.C. CODE ANN. § 11-914 (1961). This is set forth at 383 U.S. at 547-48.

31. 383 U.S. at 557.

32. *Id.* at 554.

dix.<sup>33</sup> These standards came from the District of Columbia courts and are as follows:<sup>34</sup>

1. The seriousness of the alleged offense to the community.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the offense was against persons or against property.
4. The merit of the complaint.
5. Where the codefendants are adults, the desirability of trying the entire action at one trial.
6. The sophistication and maturity of the juvenile.
7. Previous contact with juvenile court.
8. The likelihood of reasonable rehabilitation of the juvenile.

These District of Columbia standards have been adopted in subsequent judicial decisions<sup>35</sup> and state statutes.<sup>36</sup> Florida adopted these standards almost verbatim and in 1975 incorporated them into their statutes.<sup>37</sup> These standards have gone a long way to protect the basic

33. *Id.* at 565-67.

34. *Id.* at 566-67.

35. *See, e.g.* State v. Lemmon, 110 Ariz. 568, —, 521 P.2d 1000, 1004 (1974); Miklousky v. State, 54 Wis. 699, 196 N.W.2d 748 (1972).

36. The Pennsylvania Juvenile Act Pub. L. 1464, No. 333, § 28(4), 11 Pa. Stat. 50-325(a) (1972).

37. FLA. STAT. § 39.09(2)(c)1-8 as amended in 1978 states as the criteria for transfer:

1. The seriousness of the alleged offense to the community and whether the protection of the community is best served by transferring the child for adult sanctions.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful 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 prosecutive merit of the complaint.
5. The desirability of trial and disposition of the entire offense in one court when the child's associates in the alleged crime are adults or children who are to be tried as adults who will be or have been charged with a crime.
6. The sophistication and maturity of the child, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living.
7. The record and previous history of the child, including:

premise of our juvenile court which is, whenever possible, a minor should be treated, not punished, and that rehabilitation, not retribution is the goal to be attained.<sup>38</sup>

In the instant case, the threshold question becomes: what effect does prosecutorial discretion, as created by § 39.04(2)(e)4, have on the *Kent* guidelines for transferring juveniles to criminal court? The answer is clear. The statute permits the state to file an information against a juvenile and thrust the minor into adult criminal court, without ever considering the *Kent* standards. Should the Florida Supreme Court have sanctioned such power?

Consider the effects of this discretion. First, the state attorney operates free and unrestrained in making his decision regarding waiver.<sup>39</sup> Second, he is the only party who evaluates that decision; as most courts have held, the prosecutor's use of this discretion is non-reviewable.<sup>40</sup> Third, the juvenile court judge, a neutral and detached arbiter of justice, is required by Florida Statute<sup>41</sup> to consider the eight *Kent* guidelines before effectuating waiver. Yet, the state attorney, who is an advocate within the system, may bypass these standards, subjecting the

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- a. Prior periods of probation or community control;
  - b. Previous contacts with the department, other law enforcement agencies, and courts;
  - c. Prior adjudication that the child committed a delinquent act or violation of law, greater weight being given if the child had previously been found by a court to have committed a delinquent act involving an offense classified as a misdemeanor; and
  - d. Prior commitments to institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child, if he is found to have committed the alleged offenses, by the use of procedures, services, and facilities currently available to the court.

38. See *In re Gault*, 387 U.S. 1, 16 (1967); *TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME* (1967); FLA. STAT. § 39.001(1)(2)(3) (1979).

39. FLA. STAT. § 39.04(2)(e)4 (1979 & Supp. 1980) reads in part that: "The state attorney may . . . file an information when in his judgment and discretion the public interest requires that adult sanctions be considered or imposed."

40. See *Woodward v. Wainwright*, 556 F.2d 781 (5th Cir. 1977); *Russel v. Parratt*, 543 F.2d 1214 (8th Cir. 1976); *United States v. Bland*, 472 F.2d 1329 (D.C. Cir. 1972); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965).

41. See FLA. STAT. § 39.09(2)(c) (1979).

minor to the adult system by the single act of filing an information.

Are these effects compatible with the *Kent* holding that a decision of such tremendous consequences should not be rendered without a hearing, ceremony, or a statement of reasons? Does prosecutorial discretion safeguard the basic premise of the juvenile system which is treatment, not punishment; rehabilitation, not retribution? Will the state attorney, as an adversary, consider the welfare of the accused in making his waiver decision, or will he seek transfer of juveniles in response to political pressure or society's demand for retribution? It is suggested that these questions answer themselves.

The Florida Supreme Court should have, at least, endeavored to reconcile the statute directly with *Kent*. Instead, the court attempted to evade *Kent*, holding that its safeguards were applicable only to judges in judicial proceedings and not to prosecutors.<sup>42</sup> It indeed seems puzzling to assert that procedural safeguards should be applicable to a judge, who is a neutral magistrate, and yet contend that these same safeguards do not apply to the prosecutor, who is an advocate. Should not procedural requirements be more carefully guarded when the unfettered prosecutor is the decision maker?<sup>43</sup>

Judge Skelly Wright, dissenting in *United States v. Bland*,<sup>44</sup> wrote that the statutory vesting of waiver authority in the prosecutor could only be created to countermand the Supreme Court's decision in *United States v. Kent*.<sup>45</sup> He stated that such a statute played fast and loose with fundamental rights and concluded that this blatant attempt to evade the force of the *Kent* decision should not be permitted to succeed.<sup>46</sup> One can conclude, therefore, that the Florida Supreme Court's sanctioning of prosecutorial discretion through § 39.04(2)(e)4, rests upon questionable grounds.

The justices in *Cain* bolstered their finding of statutory constitutionality by stating that the minor loses very few advantages when he is transferred to adult criminal court.<sup>47</sup> This statement underestimates the advantages offered by the juvenile justice system.

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42. 381 So. 2d at 1365-66.

43. See *United States v. Bland*, 472 F.2d 1329, 1338 (D.C. Cir. 1972).

44. *Id.*

45. 383 U.S. 541 (1966).

46. 472 F.2d at 1341.

47. 381 So.2d at 1366-67.

Flexibility is an asset unique to juvenile court. There are a myriad of different programs to which a juvenile offender can be directed. Those include projects centered around diversion,<sup>48</sup> plans directed at reinforcing family support<sup>49</sup> and community based programs.<sup>50</sup> The justices in *Cain* suggested that the adult criminal court is not precluded from resorting to these programs.<sup>51</sup> However, the statute presently in issue provides that a prosecutor should file an information when he feels adult sanctions should be imposed against the juvenile.<sup>52</sup> It must be concluded, that once in the adult criminal system, the juvenile will be deprived of access to these valuable programs.

Statistics clearly suggest that shorter periods of incarceration exist in the juvenile system.<sup>53</sup> In *Kent*, the maximum period of incarceration the defendant would have received as a juvenile would have been five years, while as an adult, the maximum would have been life imprisonment. In conjunction with this fact, two prominent sociologists have conducted studies which indicate that longer periods of incarceration create greater criminality among juveniles.<sup>54</sup>

Finally, it must be remembered that the intent of the juvenile system is treatment and rehabilitation. The adjudication of a minor in the juvenile system turns not upon the issue of guilt,<sup>55</sup> but upon such factors as the child's maturity, his susceptibility to rehabilitation, and the needs of society. When the juvenile is projected into the adult criminal court system, these factors, unlike the paramount issue of guilt, are absent from consideration.<sup>56</sup>

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48. See Juv. & Fam. Court J. 53 (August 1980).

49. See Juv. & Fam. Court J. 49 (May 1980).

50. *Id.* at 54.

51. 381 So. 2d at 1367.

52. FLA. STAT. § 39.04(2)(e)4 (1979 & Supp. 1980).

53. *Supra* note 49.

54. Yochelson and Samenow reported these studies in *Juvenile & Family Court Journal* 24 (May 1980).

55. 383 U.S. at 554-55.

The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. The juvenile court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance . . . not to fix guilt.

56. 472 F.2d at 1349.

It is clear that the juvenile system, by design, offers many opportunities to the juvenile that simply don't exist in the adult criminal system. Any statement by a court to the contrary is groundless.

The Florida Supreme Court has sanctioned prosecutorial waiver of juveniles into the adult criminal court system. It has done so with perplexing statements and doubtful logic. The effect of the supreme court's action will be that many 16 and 17 year olds will be sent to adult prisons where they will serve time with hardened criminals.<sup>57</sup> As Judge Wright states, these children will be sentenced without any meaningful inquiry into the possibility of rehabilitation through humane juvenile disposition.<sup>58</sup> He states further that we will hear from these juveniles again, and that the kind of society we have in the years to come will depend, in no small measure, upon our treatment of them now.<sup>59</sup>

*Tim Day*

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57. *Id.*

58. *Id.*

59. *Id.*