
**FAMILY COURT OF NEW YORK
NASSAU COUNTY**

*In re S.S.*¹
(decided May 25, 2007)

S.S., a juvenile, was charged with acts, which, if he were an adult, would constitute criminal mischief and attempted criminal mischief in the second, third, and fourth degrees, and arson in the fourth degree.² After calling four witnesses to testify at the fact-finding hearing, the Presentment Agency rested its case and the defendant moved to dismiss.³ The Family Court of Nassau County granted the motion and the charges were dismissed.⁴ The Presentment Agency filed a motion to reargue, which presented the family court with a case of first impression: whether a juvenile was entitled to the protections of the Double Jeopardy Clause under either the United States Constitution⁵ or the New York Constitution,⁶ “whe[n] a juvenile delinquency fact-finding hearing ha[d] been held, and the petition ha[d] been dismissed at the conclusion of the

¹ 837 N.Y.S.2d 863 (Nassau County Fam. Ct. 2007).

² *In re S.S.*, 837 N.Y.S.2d at 864.

³ *Id.* at 865. The Presentment Agency is responsible for initiating and prosecuting a juvenile delinquency proceeding.

⁴ *Id.*

⁵ U.S. CONST. amend. V, states, in pertinent part: “No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb”

⁶ N.Y. CONST. art. I, § 6, states, in pertinent part: “No person shall be subject to be twice put in jeopardy for the same offense”

Presentment Agency's case."⁷ The court held jeopardy attached when the defendant's charges were dismissed and denied the motion accordingly.⁸

The Presentment Agency moved to reargue pursuant to section 2221 of the New York Civil Practice Law and Rules ("CPLR Rule 2221"),⁹ arguing the evidence presented at the fact-finding hearing was sufficient to uphold the charges against the defendant.¹⁰ The agency advanced three cases in support of its contention that CPLR Rule 2221 was applicable in juvenile delinquency proceedings.¹¹ In addition, the agency "submitted a reply, emphasizing that [its] motion [wa]s not for a 'retrial' and that if . . . granted, the Presentment Agency would not be permitted to present its case again, and would be precluded from offering any further

⁷ *In re S.S.*, 837 N.Y.S.2d at 864.

⁸ *Id.* at 869.

⁹ *Id.* at 864. See N.Y. C.P.L.R. 2221 (McKinney 1999) which states, in pertinent part:

A motion for leave to . . . reargue a prior motion . . . shall be made, on notice, to the judge who signed the order A motion for leave to reargue: shall be identified specifically as such; shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and shall be made within thirty days after service of a copy of the order

¹⁰ *In re S.S.*, 837 N.Y.S.2d at 864. The fact-finding hearings were held on four separate occasions, and a total of four witnesses were called to testify, two of which were detectives. *Id.* at 865.

¹¹ *Id.* at 866; *Eveready Ins. Co. v. Farrell*, 757 N.Y.S.2d 859 (App. Div. 2d Dep't 2003) ("[a] motion for leave to reargue is addressed to the sound discretion of the court which made the original determination and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or for some other reason mistakenly arrived at its earlier determination."); *Hoey-Kennedy v. Kennedy*, 742 N.Y.S.2d 573 (App. Div. 2d Dep't 2002) (indicating the motion to reargue was granted because the "Family Court did not base its decision on new facts, but rather, found that the prior order . . . was based on a misapprehension of the facts"); *Long v. Long*, 675 N.Y.S.2d 557 (App. Div. 2d Dep't 1998) (holding the motion for reargument was appropriate because the trial court "mistakenly arrived at its earlier decision").

evidence [T]herefore double jeopardy would not attach”¹²
The agency reasoned that if the dismissal was reversed, it would merely lead to the continuation of the initial hearing, which would not violate double jeopardy.¹³

In response, S.S. argued CPLR Rule 2221 was procedurally improper and inapplicable to the case at bar.¹⁴ The defendant reasoned that an “ ‘order dismissing the petition . . . is only appealable by a presentment agency to the Appellate Division as of right if the dismissal was made before the commencement of the fact-finding hearing.’ ”¹⁵ Further, the defendant filed a sur-reply, contending that if the motion to reargue was granted it would be in violation of the Double Jeopardy Clauses of the federal and state constitutions.¹⁶

The court rejected both parties’ arguments regarding the application of CPLR Rule 2221 to juvenile proceedings, dismissing the Presentment Agency’s supporting cases as inapplicable, and because they merely reiterated the rule’s conditions.¹⁷ Nor did the family court find these cases resolve the double jeopardy issue as the

¹² *In re S.S.*, 837 N.Y.S.2d at 865.

¹³ *Id.* at 864.

¹⁴ *Id.* at 865 (The rule “does not apply to dispositional orders in juvenile delinquency proceedings”).

¹⁵ *Id.* at 867 (citing *In re Leon H.*, 633 N.E.2d 1102 (N.Y. 1994)).

¹⁶ *In re S.S.*, 865. *See generally* Held v. Kaufman, 694 N.E.2d 430 (N.Y. 1998) (stating the court will consider arguments raised in a sur-reply even if the argument is not raised in the initial reply).

¹⁷ “[A] motion for reargument is addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or . . . mistakenly arrived at its earlier decision.” *In re S.S.*, 837 N.Y.S.2d at 866-67.

agency suggested.¹⁸ Likewise, the defendant was unsuccessful in establishing that the rule was inapplicable.¹⁹ Notwithstanding the applicability of CPLR Rule 2221, the court indicated the double jeopardy issue still remained.²⁰

The family court found that jeopardy attached upon dismissal of the charges and any rehearing would violate the New York Family Court Act section 303.2²¹ and New York Criminal Procedure Law sections 40.20²² and 40.30,²³ the United States Constitution and the New York Constitution.²⁴ It was mentioned that if the Presentment Agency moved to reargue “during the continuation of the fact-finding hearing” then double jeopardy would not have been a concern.²⁵ However, when the motion was filed, the case was no longer before the court, and thus the motion was denied.²⁶

The family court addressed the double jeopardy issue under the Federal Constitution by referring to the United States Supreme

¹⁸ *Id.*

¹⁹ *Id.* at 867 (“Although [In re Leon H.] illustrates the Presentment Agency’s right to appeal in a juvenile delinquency proceeding, it does not show that CPLR Rule 2221 does not apply to this case.”).

²⁰ *Id.* at 867.

²¹ N.Y. FAM. CT. ACT § 303.2 (McKinney 1999) (“The provisions of article forty of the criminal procedure law concerning double jeopardy shall apply to juvenile delinquency proceedings.”).

²² N.Y. CRIM. PROC. LAW § 40.20 (McKinney 2006) states, in pertinent part: “A person may not be twice prosecuted for the same offense.”

²³ N.Y. CRIM. PROC. LAW § 40.30 (McKinney 2006) states, in pertinent part: “[A] person ‘is prosecuted’ for an offense within the meaning of section 40.20, when he is charged . . . by an accusatory instrument filed in a court of this state [and] . . . : [I]n the case of a trial by the court without a jury, a witness is sworn.”

²⁴ *In re S.S.*, 837 N.Y.S.2d at 869. “Double jeopardy also bars post-acquittal fact-finding Family Court proceedings, whether those proceedings be a second trial or the resumption of a trial which has already been commenced.” *Id.* at 868 (citing *In re Jose R.*, 632 N.E.2d 1260, 1262 (N.Y. 1994)).

²⁵ *In re S.S.*, 837 N.Y.S.2d at 868.

²⁶ *Id.*

Court's decision in *Green v. United States*.²⁷ In *Green*, an adult male was found guilty of arson and murder in the second degree.²⁸ The defendant appealed the murder conviction and the Court of Appeals for the District of Columbia Circuit reversed and remanded for further proceedings.²⁹ On remand, Green was convicted of first degree murder, which the jury was specifically unable to convict him of during his first trial.³⁰ Green appealed, arguing jeopardy attached to his first trial when he was tried and that he was acquitted of murder in the first degree. The circuit court affirmed the conviction and the Supreme Court granted certiorari.³¹

The Supreme Court reversed the conviction, finding Green's constitutional rights afforded under the Fifth Amendment were violated when he was put on trial twice for murder in the first degree.³² The Court explained, "double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."³³ Further, the Double Jeopardy Clause operates to prevent an individual from being subjected to "embarrassment, expense and ordeal and compel[s] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."³⁴ The Court found the acquittal

²⁷ 355 U.S. 184 (1957).

²⁸ *Green*, 355 U.S. at 186.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 186.

³² *Id.* at 198.

³³ *Green*, 355 U.S. at 187.

³⁴ *Id.*

was a final determination which prevented the defendant from being prosecuted a second time for the same offense, even though no judgment was made.³⁵ When Green was initially put on trial, he was convicted of murder in the second degree, but the jury was silent with regard to the charge of murder in the first degree, and eventually dismissed without rendering a verdict as to that charge.³⁶ The Court reasoned the jury's silence and subsequent dismissal constituted an implied acquittal and accordingly that charge could not be retried.³⁷ For that reason, Green's conviction was overturned.³⁸

Similarly, in *Smalis v. Pennsylvania*,³⁹ the Supreme Court addressed whether the Double Jeopardy Clause precluded an appeal when the trial court dismissed the charges at the conclusion of the prosecution's case for "insufficient [evidence] to support a conviction."⁴⁰ In *Smalis*, two adult landlords, a husband and wife, were charged with criminal homicide, reckless endangerment, and causing a catastrophe, when a building they owned burned down, resulting in the deaths of two tenants.⁴¹ After the prosecution rested its case, the defendants filed a demurrer, which was granted.⁴² The prosecution appealed, but the Superior Court of Pennsylvania affirmed, finding the Double Jeopardy Clause precluded an appeal.⁴³ The Supreme Court of Pennsylvania reversed, holding a demurrer

³⁵ *Id.* at 188.

³⁶ *Id.* at 190-91.

³⁷ *Id.* at 190.

³⁸ *Green*, 355 U.S. at 198.

³⁹ 476 U.S. 140 (1986).

⁴⁰ *Smalis*, 476 U.S. at 141.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 142.

was a ruling on the law, not on the facts, and thus may be appealed.⁴⁴ The United States Supreme Court granted certiorari.⁴⁵

The Supreme Court reversed the state supreme court's decision, and agreed with the Superior Court of Pennsylvania that when evidence is inadequate to support a conviction, the subsequent dismissal constitutes an acquittal subject to the Double Jeopardy Clause.⁴⁶ The Court reasoned that "[w]hat the demurring defendant [sought was] a ruling that as a matter of law the State's evidence [was] insufficient to establish his factual guilt."⁴⁷ Thus, when the demurrer was granted, it was the equivalent of an acquittal for double jeopardy purposes and the commencement of a second trial or further proceedings after an acquittal violated the Double Jeopardy Clause. Accordingly, after the demurrer was granted, the prosecution's appeal was barred.⁴⁸

In *Serfass v. United States*,⁴⁹ the United States Supreme Court summarized the point at which jeopardy attached in a criminal proceeding. "[J]eopardy does not attach . . . until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge."⁵⁰ When the trier was a jury, jeopardy attached as soon as the jury was empaneled and sworn; when the trier was a judge, jeopardy attached when the first evidence was introduced.⁵¹

⁴⁴ *Id.* at 143 (citing *Commonwealth v. Zoller*, 490 A.2d 394, 401 (1985)).

⁴⁵ *Smalis*, 476 U.S. at 143.

⁴⁶ *Id.* at 142.

⁴⁷ *Id.* at 144.

⁴⁸ *Id.* at 146.

⁴⁹ 420 U.S. 377 (1975).

⁵⁰ *Serfass*, 420 U.S. at 388 (internal citation and quotations omitted).

⁵¹ *Id.*

Moreover, in *In re Gault*,⁵² the United States Supreme Court found the Due Process Clause requires that some procedural requirements must be made available to juveniles in delinquency proceedings because, were the juvenile an adult, he would be guaranteed certain rights and protections.⁵³ However, the Court concluded children should be distinguished from adults and should not be subjected to the harsh retributive penalties for the wrongful acts they commit; a greater emphasis should be placed on rehabilitation.⁵⁴ The Court did not extend the application of jury trials to juvenile proceedings as held in *McKeiver v. Pennsylvania*,⁵⁵ where the Court reasoned due process did entitle juveniles to a trial by jury because it would not enhance the fact-finding process, nor improve the court's efficiency.⁵⁶ However, it is at the discretion of the juvenile court justice to use an advisory jury if necessary.⁵⁷

Further, in *Breed v. Jones*,⁵⁸ the United States Supreme Court held that jeopardy attached to juvenile delinquency proceedings.⁵⁹ In *Breed*, a seventeen-year-old boy, considered a juvenile under California law, was charged with acts equivalent to the adult charge of armed robbery.⁶⁰ After an adjudicatory hearing, the juvenile court

⁵² 387 U.S. 1 (1967).

⁵³ *In re Gault*, 387 U.S. at 29.

⁵⁴ *Id.* at 15-16. "On this basis, proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty." *Id.* at 17.

⁵⁵ 403 U.S. 528 (1971).

⁵⁶ *McKeiver*, 403 U.S. at 547.

⁵⁷ *Id.* at 548.

⁵⁸ 421 U.S. 519 (1975).

⁵⁹ *Breed*, 421 U.S. at 541.

⁶⁰ CAL. WELF. & INST. CODE § 602 (West 1966) (amended 1971) ("Any person who is under the age of 18 years when he violates any law of this state . . . is within the jurisdiction

accepted the petition's charges, and a dispositional hearing was scheduled.⁶¹ At the dispositional hearing, the court declared the "respondent unfit for treatment as a juvenile, and ordered that he be prosecuted as an adult."⁶² The juvenile court, the California Court of Appeals, and the Supreme Court of California denied the defendant's petition for a writ of habeas corpus, which raised a double jeopardy defense.⁶³ Ultimately, the juvenile was tried before the Superior Court of California and convicted of robbery in the first degree.⁶⁴

Subsequently, the defendant's guardian ad litem filed a petition for a writ of habeas corpus in federal court, seeking to reverse the defendant's second conviction for the same offense on the grounds that jeopardy attached when the juvenile court sustained the charges at the adjudicatory hearing.⁶⁵ The district court rejected the petition, but the Ninth Circuit Court of Appeals reversed, holding jeopardy attached to the adjudicatory hearing.⁶⁶ The Supreme Court granted certiorari.⁶⁷

The Supreme Court held that when the juvenile was put on trial in the Superior Court of California, his constitutional rights under the Fifth Amendment were violated.⁶⁸ The Court rejected the arguments that the Double Jeopardy Clause was not violated because a final decision was not rendered when the case was transferred to the

of the juvenile court . . . "); *Breed*, 421 U.S. at 521.

⁶¹ *Breed*, 421 U.S. at 521.

⁶² *Id.* at 524.

⁶³ *Id.*

⁶⁴ *Id.* at 525.

⁶⁵ *Id.*

⁶⁶ *Breed*, 421 U.S. at 526.

⁶⁷ *Id.* at 527.

⁶⁸ *Id.* at 541.

Superior Court of California, and that precluding such transfers after the commencement of an adjudicatory hearing would negatively affect the juvenile-court system.⁶⁹ Further, the juvenile's constitutional rights should not be deprived because "the proceedings . . . had not run their full course . . . at the time of transfer."⁷⁰

In addition, the Court recommended that if a transfer was sought, a hearing on that decision should be conducted "prior to the adjudicatory hearing," which the Court deemed to be a manageable and even beneficial alternative.⁷¹ The Court reasoned that, "in terms of potential consequences, there is little to distinguish an adjudicatory hearing . . . from a traditional criminal prosecution. For that reason, it engenders elements of anxiety and insecurity in a juvenile, and imposes a heavy personal strain."⁷² The Court found jeopardy attached when evidence was presented to the trier of the facts.⁷³ Accordingly, jeopardy attached to the adjudicatory hearing in the juvenile court, and the Fifth Amendment barred any further proceedings.

In addition to the state constitutional double jeopardy provision, New York provides expanded protections by statute.⁷⁴ The

⁶⁹ *Id.* at 532 ("[I]t would diminish the flexibility and informality of juvenile court proceedings without conferring any additional due process benefits upon juveniles charged with delinquent acts." (internal quotations omitted)).

⁷⁰ *Id.* at 534.

⁷¹ *Breed*, 421 U.S. at 536. The Court stated that when a transfer is considered and rejected, any burden placed on the juvenile court can be alleviated by substituting judges. Also, there was no indication that the juvenile court system lacked sufficient resources. *Id.* at 537-38. "Knowledge of the risk of transfer after an adjudicatory hearing can only undermine the potential for informality and cooperation which was intended to be the hallmark of the juvenile-court system." *Id.* at 540.

⁷² *Id.* at 530 (citation omitted).

⁷³ *Id.* at 531.

⁷⁴ N.Y. FAM. CT. ACT § 303.2 (McKinney 1999) ("The provisions of article forty of the

state's double jeopardy standards are set forth in its criminal procedure law.⁷⁵ The New York Family Court Act also expressly provides that the double jeopardy provisions codified in the New York Criminal Procedure Law are applicable to juvenile delinquency proceedings.⁷⁶

The family court in *In re S.S.* was persuaded by a decision issued by the Family Court of Kings County in *Malik O.*,⁷⁷ which did not present a double jeopardy argument, but raised double jeopardy concerns in its analysis. The decision was relevant because it involved a motion to reargue stemming from a juvenile proceeding. In *In re Malik O.*, the family court addressed whether it was permitted to unseal the records of a dismissed juvenile delinquency proceeding when considering the Presentment Agency's motion to reargue.⁷⁸

In *Malik O.*, the respondents were charged with acts equivalent to the adult charges of criminal possession of stolen property in the fifth degree and petit larceny.⁷⁹ After the complainant failed to appear at the fact-finding hearing, the respondents moved for a dismissal. The motion was granted and the records were sealed.⁸⁰ "The presentment agency . . . move[d] by means of Order to

criminal procedure law concerning double jeopardy shall apply to juvenile delinquency proceedings."); *In re Richard S.*, 761 N.Y.S.2d 779, 781 (N.Y. Fam. Ct. Queens County 2003).

⁷⁵ See *supra* notes 22-23. See also *In re Richard S.*, 761 N.Y.S.2d 779, 781 (Queens County Fam. Ct. 2003).

⁷⁶ *In re Richard S.*, 761 N.Y.S.2d at 782.

⁷⁷ 598 N.Y.S.2d 688 (Nassau County Fam. Ct. 1993).

⁷⁸ *In re Malik O.*, 598 N.Y.S.2d at 689.

⁷⁹ *Id.*

⁸⁰ *Id.*

Show Cause to have the records unsealed to allow the court to hear reargument pursuant to CPLR § 2221 on whether the court should vacate its dismissal orders and amend the petitions.”⁸¹ The Presentment Agency argued the dismissal should be vacated because the complainant was absent as a result of a scheduling mistake, which was a sufficient reason to adjourn the proceeding.⁸² In response, the respondents argued the reason advanced by the agency was “not a basis for a good cause adjournment,” and that the motion to reargue was inapplicable to juvenile delinquency proceedings.⁸³

The Presentment Agency’s motion was denied “[d]ue to the quasi-criminal nature of juvenile delinquency proceedings and the importance of the right to a speedy trial, [which made] a motion to vacate sealed orders of dismissal inappropriate.”⁸⁴ New York Family Court Act section 165⁸⁵ granted the family court judge complete discretion to determine whether CPLR should apply to juvenile delinquency proceedings.⁸⁶ The court was unable to discover any authority to suggest that CPLR Rule 2221 was applicable in a juvenile delinquency proceeding for the purposes of vacating a dismissal.⁸⁷

⁸¹ *Id.* at 689.

⁸² *Id.*

⁸³ *In re Malik O.*, 598 N.Y.S.2d at 689.

⁸⁴ *Id.* at 693.

⁸⁵ N.Y. FAM. CT. ACT § 165 (McKinney 1999) states, in pertinent part: “[W]here the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed . . . the provisions of the civil practice law and rules shall apply to the extent they are appropriate to the proceedings involved.”

⁸⁶ *In re Malik O.*, 598 N.Y.S.2d at 691. “The wide latitude courts claim in determining the applicability of the CPLR is circumscribed by at least two major considerations: (1) substantial rights and due process of law, and (2) equal protection of law.” *Id.* at 692.

⁸⁷ *Id.* at 692.

An order issued in a juvenile proceeding may be vacated in a number of ways, but the Presentment Agency failed to establish a basis for any of them.⁸⁸ First, pursuant to New York Family Court Act section 355.1,⁸⁹ an order of dismissal may be vacated. It was the legislature's intent, however, to bar the presentment agency from using this remedy, because it could prompt double jeopardy concerns.⁹⁰ Second, a court, "in the interests of justice," may vacate an order of dismissal, but this method does not pertain to dismissed cases that are "no longer before the court."⁹¹ Third, the court may vacate a dismissal if the motion to reargue was made "in the context of a continued proceeding."⁹² The New York Court of Appeals highlighted the third procedure in *In re Lionel F.*,⁹³ when it held the Double Jeopardy Clause was not violated when the Family Court of Queens County vacated its earlier dismissal at a fact-finding hearing and continued with further proceedings.⁹⁴

In re Lionel F. concerned a juvenile who was charged with five delinquent acts, which would have constituted criminal violations had he been an adult.⁹⁵ At the fact-finding hearing, the defendant entered a motion to dismiss at the conclusion of the

⁸⁸ *Id.*

⁸⁹ N.Y. FAM. CT. ACT § 355.1 (McKinney 1999) states, in pertinent part:

Upon a showing of a substantial change in circumstances, the court may on its own motion or on motion of the respondent or his parent or person responsible for his care: grant a new fact-finding hearing or dispositional hearing; or stay execution of, set aside, modify, terminate or vacate any order issued in the course of a proceeding under this article.

⁹⁰ *In re Malik O.*, 598 N.Y.S.2d at 692.

⁹¹ *Id.* at 693.

⁹² *Id.*

⁹³ 558 N.E.2d 30 (N.Y. 1990).

⁹⁴ *In re Lionel F.*, 558 N.E.2d at 31.

⁹⁵ *Id.* at 30.

Presentment Agency's case. The family court dismissed four of the five counts, but after reserving its decision on the fifth count, the court denied its dismissal and vacated the dismissal of the other four. A few weeks later, the case proceeded and the defendant was found guilty on three counts in the original indictment after failing to call a witness.⁹⁶ The appellate division held the Double Jeopardy Clause was not violated when the family court vacated its dismissal of four of the charges.⁹⁷ The New York Court of Appeals affirmed.⁹⁸

The New York Court of Appeals found that "at the time the court vacated its earlier ruling, the proceeding was still pending before it," because the fifth count was still under consideration.⁹⁹ Therefore, since the proceeding was still pending, and no further evidence was advanced by the Presentment Agency after the dismissal was vacated, the court reasoned that under the terms of the Double Jeopardy Clause, the juvenile was not put in jeopardy twice, but rather his initial proceeding merely continued.¹⁰⁰ Accordingly, the conviction was upheld.¹⁰¹

Conversely, in *In re Frank K.*,¹⁰² the Appellate Division, Fourth Department, held that a juvenile "was placed in jeopardy twice when the fact-finding hearing was reopened to receive . . . excluded evidence after an order of dismissal had been entered."¹⁰³

⁹⁶ *Id.*

⁹⁷ *Id.* at 31.

⁹⁸ *Id.*

⁹⁹ *In re Lionel F.*, 558 N.E.2d at 31.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 30.

¹⁰² 450 N.Y.S.2d 129 (App. Div. 4th Dep't 1982).

¹⁰³ *In re Frank K.*, 450 N.Y.S.2d at 130.

At the conclusion of the prosecution's case, the juvenile defendant argued the charges brought against him were not supported by legally sufficient evidence and he moved to dismiss.¹⁰⁴ The motion was granted, however, the case was reopened after the prosecution presented the family court with new probative evidence. Subsequently, the family court deemed the defendant to be a juvenile delinquent.¹⁰⁵

On appeal, the appellate division held a juvenile proceeding may not be reopened to hear additional evidence after the case concluded in favor of the defendant.¹⁰⁶ At the initial hearing the defendant moved pursuant to New York Family Court Act section 751,¹⁰⁷ suggesting the prosecution did not advance sufficient evidence in support of its proposition that the juvenile was a delinquent.¹⁰⁸ The family court rendered a decision in favor of the juvenile based upon the merits of the claim and therefore when the defendant's motion was granted the case was no longer before the court.¹⁰⁹ Accordingly, the prosecution was barred from reopening the fact-finding hearing.¹¹⁰

Similarly, in *Fonseca v. Judges of Family Court*,¹¹¹ the Supreme Court of Kings County held the Double Jeopardy Clause applies to juvenile delinquency proceedings pursuant to the Due

¹⁰⁴ *Id.* at 129.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 130.

¹⁰⁷ N.Y. FAM. CT. ACT § 751 (McKinney 1999) states, in pertinent part: "If the allegations of a petition under this article are not established, the court shall dismiss the petition."

¹⁰⁸ *In re Frank K.*, 450 N.Y.S.2d at 130.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 299 N.Y.S.2d 493 (Kings County Sup. Ct. 1969).

Process Clause.¹¹² In *Fonseca*, a juvenile was charged with an act equivalent to the crime of unauthorized use of a vehicle.¹¹³ At the fact-finding hearing, the prosecution was unprepared to proceed with its case, after the arresting police officer testified that he did not observe the juvenile inside the vehicle.¹¹⁴ A mistrial was declared, but the juvenile objected, and the prosecution continued questioning the police officer before finally admitting it was unprepared.¹¹⁵ The prosecution stated it had an identification witness, although the witness was not present. In response, the court granted the prosecution an adjournment, but also declared a mistrial.¹¹⁶ Subsequently, the juvenile filed a petition to prevent the prosecution from commencing another fact-finding hearing.¹¹⁷ The petition was granted due to double jeopardy concerns.¹¹⁸

A distinction was drawn between the rules of attachment in the federal courts and those in the state courts, whether before a jury or a judge. The court declared:

It is the law of this State that a person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, when a jury has been impaneled and when some evidence is taken. . . .

. . . . The federal rule is that a defendant is subjected

¹¹² *Fonseca*, 299 N.Y.S.2d at 498.

¹¹³ *Id.* at 494.

¹¹⁴ *Id.* at 495.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Fonseca*, 299 N.Y.S.2d at 494.

¹¹⁸ *Id.* at 498.

to jeopardy after a jury has been selected and sworn but . . . [the New York State courts] require[] not only that the jury be sworn but that evidence be taken.¹¹⁹

As for bench trials, New York followed a similar approach as the federal courts by subjecting a defendant to jeopardy when evidence is heard.¹²⁰ Accordingly, the court determined that the defense of double jeopardy must be upheld.¹²¹ The court reasoned jeopardy attached following the officer's testimony of the details of the arrest.¹²² Further, there was insufficient evidence to convict the juvenile and the prosecution's late discovery of an absent key witness was not enough to declare a mistrial.¹²³

Since the United States Supreme Court's decision in *Breed*, where the protections of the Double Jeopardy Clause of the Fifth Amendment were afforded to juveniles in adjudicatory hearings, the underlying issue has become the period at which jeopardy attaches. The Due Process Clause of the Fourteenth Amendment requires states to honor the Double Jeopardy Clause. However, the states may choose to expand its afforded protections. New York expands the protections constitutionally, but by also statutorily, through provisions in the New York Family Court Act and in the New York Criminal Procedure Law.¹²⁴

¹¹⁹ *Id.* at 495-96 (citations omitted). *See also* Smith v. Marrus, 826 N.Y.S.2d 263, 264 (App. Div. 2d Dep't 2006) ("In a jury trial, once the jury is empaneled and sworn, jeopardy attaches.").

¹²⁰ *Fonseca*, 299 N.Y.S.2d at 496.

¹²¹ *Id.* at 498.

¹²² *Id.* at 496.

¹²³ *Id.* at 498.

¹²⁴ *In re S.S.*, 837 N.Y.S.2d at 867.

The federal courts have adhered to the rule that jeopardy attaches to a jury trial as soon as the selected jury takes an oath, and to a bench trial when evidence is heard.¹²⁵ On the other hand, states have differed on when jeopardy attaches in state court proceedings, especially because a jury trial is not a guarantee in a juvenile proceeding.¹²⁶ For example, New York adheres to the federal rule for bench trials, but for jury trials, not only must the jury be “selected and sworn,” but evidence must also be heard for jeopardy to attach.¹²⁷ By contrast, in Texas, “the constitutional guarantee that jeopardy attaches when the jury is empaneled and sworn . . . applies equally to a juvenile proceeding.”¹²⁸ On the other hand, in California, “jeopardy does not attach until the first witness has been sworn.”¹²⁹ Therefore, depending on the state, jeopardy attaches at different points in time during an adjudicatory proceeding.

New York protects juveniles charged with quasi-criminal acts to a greater degree than that afforded under the Federal Constitution and the New York State Constitution by virtue of statutory protections.¹³⁰ Accordingly, a juvenile’s right to be shielded, under these statutory protections, from multiple prosecutions for the same offense remains intact in New York. In fact, juveniles facing multiple state prosecutions may receive an even greater degree of protection in the future, depending on the preference of the New

¹²⁵ *Fonseca*, 299 N.Y.S.2d at 496.

¹²⁶ *See McKeiver*, 403 U.S. at 547.

¹²⁷ *Fonseca*, 299 N.Y.S.2d at 496.

¹²⁸ *State v. C.J.F.*, 183 S.W.3d 841, 848 (Tex. App. 2005).

¹²⁹ *Richard M. v. Superior Court*, 482 P.2d 664, 668 (Cal. 1971).

¹³⁰ *In re S.S.*, 837 N.Y.S.2d at 867.

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DOUBLE JEOPARDY

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Steven Fox