PROSECUTORIAL DISCRETION AND THE DECISION TO WAIVE JUVENILE COURT JURISDICTION

United States v. Bland
No. 71-1761 (D.C. Cir., Sept. 6, 1972)

The defendant, a sixteen year old boy, was charged with armed robbery. He was indicted as an adult pursuant to 16 District of Columbia Code section 2301(3)(A), which excludes from the jurisdiction of the Family Court individuals between the ages of sixteen and eighteen charged with certain crimes.[1] The defendant moved to dismiss the indictment, alleging that the statutory basis for trying him as an adult denied him procedural due process. The district court granted this motion, holding section 2301(3)(A) unconstitutional as an arbitrary legislative classification.[2] The United States appealed. The Court of Appeals for the District of Columbia Circuit reversed and *held*: A statute does not violate the federal Constitution because it gives the prosecutor discretionary power to deprive the juvenile court of jurisdiction over an individual by charging him with a certain crime.[3]

The juvenile court system in the United States arose from a belief that the treatment accorded children in the criminal system was harsh and inequitable.[4] The philosophy of the juvenile system emphasized

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1. D.C. CODE ANN. § 16-2301(3)(A) (Supp. IV, 1971):
The term "child" means an individual who is under 18 years of age, except that the term "child" does not include an individual who is sixteen years of age or older and—(A) charged by the United States Attorney with (i) murder, forcible rape, burglary in the first degree, robbery while armed, or assault with attempt to commit any such offense, or (ii) an offense listed in clause (iii) and any other offense properly joinable with such an offense. . . .

2. United States v. Bland, 330 F. Supp. 34 (D.D.C. 1971).

3. United States v. Bland, No. 71-1761 (D.C. Cir., Sept. 6, 1972).

4. Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQUENCY 97, 99 (1961). Professor Ketcham lists four major trends that led to the enactment of the first juvenile court act in Illinois:

1. The equitable concept of parens patriae;
2. The increased use of legislation to obtain humanitarian social ends;
3. The growing horror at the traditional judicial practice of treating children over 7 as criminals; and
4. The mounting number of specialized correctional facilities for dealing with children.

For further discussion on the evolution of juvenile courts, *see In re* Gault, 387 U.S. 1, 14 (1966); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Comment, *Waiver of Jurisdiction in Juvenile Court*, 30 OHIO ST. L.J. 132 (1969); *The Philosophy and Theory of the Juvenile Court, Original Concepts and Theories*, 23 JUV. CT. J. 1, 4-7 (1972).

the humanitarian policies of protection, understanding, and rehabilitation[5] rather than punishment and retribution.[6] Juvenile court action is more informal than criminal action and allows the court broad discretion in the decision-making process.[7] For these reasons juvenile court action is considered "civil" rather than criminal,[8] and the application of this "civil" action theory has been used to deny constitutional rights to the juvenile.[9]

See generally F. MILLER, R. DAWSON, G. DIX & R. PARNAS, CRIMINAL JUSTICE ADMINISTRATION AND RELATED PROCESSES 1157-1223 (1971).

5. *See, e.g., In re* Gault, 387 U.S. 1 (1966); Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); Mack, *supra* note 4, at 119-20; Paulsen, *supra* note 4, at 547-48; *The Philosophy and Theory of the Juvenile Court, Original Concepts and Theories,* 23 JUV. CT. J. 1 (1972).

6. *See, e.g., In re* Gault, 387 U.S. 1, 15 (1966); THE CHALLENGE OF CRIME IN A FREE SOCIETY, REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 79-80 (1967) [hereinafter cited as PRESIDENT'S COMMISSION]; Paulsen, *Kent v. U.S.: The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167, 170-73; Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547-48 (1957).

7. PRESIDENT'S COMMISSION 79-80:

> They differ from adult criminal courts in a number of basic respects, reflecting the philosophy that erring children should be protected and rehabilitated rather than subjected to the harshness of the criminal system. Thus they substitute procedural informality for the adversary system, emphasize investigation of the juvenile's background in deciding dispositions, rely heavily on social sciences for both diagnosis and treatment, and are committed to rehabilitation of the juvenile as the predominant goal of the juvenile system.

See, e.g., In re Gault, 387 U.S. 1, 75 (1966) (concurring opinion); Paulsen, *Kent v. U.S.: The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167, 173.

Juvenile court statutes are said to be based on the state's power as parens patriae. Parens patriae is a "doctrine of the English Court of Chancery by which the King, through his chancellors, assumed the general protection of all infants in the realm." Ketcham, *supra* note 4, at 97. *See In re* Gault, 387 U.S. 1 (1966); Kent v. United States, 383 U.S. 541, 554 (1966); Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941); White v. Reid, 125 F. Supp. 647 (D.D.C. 1954); Antieau, *Constitutional Rights in Juvenile Courts,* 46 CORNELL L. REV. 387 (1966); Furlong, *The Juvenile Court and the Lawyer,* 3 J. FAMILY L. 1 (1963); Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547 (1957); Rubin, *Protecting the Child in Juvenile Court,* 43 J. CRIM. L.C. & P.S. 425 (1952); Comment, *Juvenile Courts—Juvenile Delinquent Entitled to Hearing on Question of Waiver of Jurisdiction,* 19 VAND. L. REV. 1385-86 (1966).

8. *See, e.g., In re* Gault, 387 U.S. 1, 17 (1966); Kent v. United States, 383 U.S. 541, 555 (1966); Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959) (App. A); Thomas v. United States, 121 F.2d 905, 907 (D.C. Cir. 1941); Comment, *Juvenile Courts—Juvenile Delinquent Entitled to Hearing on Question of Waiver of Jurisdiction,* 19 VAND. L. REV. 1385-86 (1966).

9. Paulsen, *Kent v. U.S.: The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167, 173:

> The aim of the criminal process is the imposition of stigma and pain for the

Recently the juvenile justice system has come under attack[10] because it has allegedly failed to deal effectively with juvenile crime.[11] Furthermore, it has often failed to provide the juvenile with the protective, understanding treatment for which it was designed, while at the same time being harsher in its application than its philosophy would indicate.[12] Therefore, with the emphasis on practical problems rather than social ideals, the courts have begun to apply basic constitutional rights to the juvenile court system.[13] At the same time the courts have expressed a desire to retain the juvenile court's uniqueness in the belief that its rehabilitative processes do reach and benefit some juvenile offenders.[14]

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purposes of punishment, deterrence, or reformation. The aims of the new juvenile process were protection, education, and salvation. . . . To such beneficient purposes constitutional guarantees had little or nothing to contribute.

See In re Gault, 387 U.S. 1 (1966); Kent v. United States, 383 U.S. 541 (1966); Comment, *Juvenile Courts—Juvenile Delinquent Entitled to Hearing on Question of Waiver of Jurisdiction*, 19 VAND. L. REV. 1385-86 (1966). *See generally* Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959) (App. B).

10. "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 556 (1966). *See, e.g., In re* Gault, 387 U.S. 1, 18 (1966); Harling v. United States, 295 F.2d 161, 164 (D.C. Cir. 1961); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7.

11. *See, e.g.*, H.R. REP. No. 91-907, in D.C. CODE LEGISLATIVE AND ADMINISTRATIVE SERVICE 444 (1971); *Hearings on S. 2981 Before the Senate Committee on the District of Columbia*, 91st Cong., 1st Sess. 1800-1810 (1969); *In re* Gault, 387 U.S. 1, 20 n.26 (1966).

12. PRESIDENT'S COMMISSION 80:

> The limitations both in theory and execution, of strictly rehabilitative treatment methods, combined with public anxiety over the seemingly irresistible rise in juvenile criminality, have produced a rupture between the theory and practice of juvenile court disposition. While statutes, judges, and commentators still talk the language of compassion and treatment, it has become clear that in fact the same purposes that characterized the use of the criminal law for adult offenders—retribution, condemnation, deterrence, incapacitation—are involved in the disposition of juvenile offenders too.

13. *See In re* Gault, 387 U.S. 1 (1966); Kent v. United States, 383 U.S. 541 (1966); Paulsen, *Kent v. U.S.: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; *The Constitution, Due Process and Changing Times*, 23 JUV. CT. J. 1, 12-16 (1972).

14. *In re* Gault, 387 U.S. 1, 22-23 (1966); Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 592-96 (1968).

One basis for the belief that the waiver proceeding, a procedure to determine whether a child should be tried as a juvenile or transferred to the criminal court and tried as an adult, is a critically important stage is an understanding that the juvenile

Juveniles considered beyond the rehabilitative processes of the juvenile justice system create a very special problem. Juvenile court statutes traditionally have dealt with this problem by creating a waiver of jurisdiction procedure[15] that enables the juvenile court to transfer certain individuals to the jurisdiction of the adult criminal court.[16]

In *Kent v. United States*[17] the United States Supreme Court placed

court system does offer benefits that do not exist in the criminal court system. In fact many state statutes have made the waiver decision depend upon the criteria of whether the juvenile under consideration is amenable to the special rehabilitative processes of the juvenile courts. *See, e.g.*, ALASKA STAT. § 47.10.060 (1971); CAL. WELF. & INST'NS CODE § 707 (1969); N.M. STAT. ANN. § 13-14-27 (Supp. 1972); OHIO REV. CODE ANN. § 2151.26 (Supp. 1971).

15. Sargeant & Gordon, *Waiver of Jurisdiction—An Evaluation of the Process in Juvenile Court*, 9 CRIME & DELINQUENCY 121, 122-24 (1963). The authors list three reasons given for waiver of jurisdiction: (1) some children are not really children; (2) certain cases are "hopeless"; (3) the lack of facilities.

For other sources dealing with the philosophy of the waiver procedure, *see* Harris v. United States, 359 F.2d 214 (D.C. Cir. 1963); Burd, *Waiver of Jurisdiction in Juvenile Court: Another Gault Question Still Unanswered*, 15 S.D.L. REV. 376 (1970); Paulsen, *Kent v. U.S.: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 182; Schornhorst, *supra* note 14; Comment, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure*, 40 S. CAL. L. REV. 158 (1968).

16. *See, e.g.*, ALA. CODE tit. 13, § 364 (1959); ALASKA STAT. § 47.10.060 (1971); MO. REV. STAT. § 211.071 (1969); ORE. REV. STAT. § 419.533 (1971).

The Supreme Court in Kent v. United States, 383 U.S. 541 (1966), dealt with the former District of Columbia waiver provisions in D.C. CODE ANN. § 11-914 (1961):

> If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any other child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult . . . .

Alternatively, statutes may either extend concurrent jurisdiction to the criminal court, *e.g.*, IOWA CODE ANN. § 232.62 (1969), or under some circumstances grant exclusive jurisdiction to the criminal court, *e.g.*, IND. ANN. STAT. §§ 9-3103 & 9-3204 (Supp. 1972).

17. 383 U.S. 541 (1966).

Much controversy has arisen concerning whether the decision in *Kent* rested on a purely statutory or on a constitutional basis. Judge Wright in his dissenting opinion in United States v. Bland, No. 71-1761 (D.C. Cir., Sept. 6, 1972), emphatically states that *Kent* was based on constitutional grounds.

For sources stating *Kent* was based on statutory grounds, *see, e.g.*, United States v. Dockery, 447 F.2d 1178 (D.C. Cir. 1971); Stanley v. Peyton, 292 F. Supp. 209 (W.D. Va. 1968); People v. Handley, 51 Ill. 2d 229, 282 N.E.2d 131 (1972); People v. Bombacino, 51 Ill. 2d 17, 28 N.E.2d 697 (1972); State v. Acuna, 78 N.M. 119, 428 P.2d 658 (1967); Paulsen, *Kent v. U.S.: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; Comment, *Juvenile Court—The District of Columbia Waiver of Jurisdiction Statute—Statutory Due Process—Constitutional Law*, 12 HOW. L.J. 360 (1966); Comment, *Separating the Criminal from the Delinquent: Due Process*

certain procedural safeguards on the waiver proceedings in the District of Columbia in an attempt to limit arbitrary and indiscriminate decision-making.[18] The Court held that the traditionally informal "civil" nature of juvenile court proceedings must be amended at this "critically important"[19] stage to provide for a hearing, access by the juvenile's counsel to social records, and a statement of reasons for the juvenile court's decision to waive jurisdiction.[20]

Four years after *Kent*, Congress reformed the court system in the District of Columbia.[21] In addition to a reformed juvenile waiver pro-

in Certification Procedure, 40 S. CAL. L. REV. 158 (1968); 52 A.B.A.J. 476 (1966).

For sources stating *Kent* was based on constitutional grounds, *see, e.g.*, Strickland v. United States, 449 F.2d 1131, 1139 (D.C. Cir. 1971) (dissenting opinion); Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969); Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); 52 IOWA L. REV. 139 (1966).

Many court decisions have held that *Kent* and *In re Gault*, taken together, form a constitutional imperative as to juvenile waiver proceedings. *See, e.g.*, Powell v. Hocker, 453 F.2d 652 (9th Cir. 1971); Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970).

18. Kent v. United States, 383 U.S. 541, 561-64 (1966). *See* note 16 *supra* for the text of the statute. Many states have reformed their juvenile statutes to conform to the *Kent* standards. *See, e.g.*, GA. CODE ANN. § 24A-2501 (1971); WIS. STAT. § 48.18 (Supp. 1972).

19. Kent v. United States, 383 U.S. 541, 556 (1966). *See* Black v. United States, 355 F.2d 104 (D.C. Cir. 1965); Watkins v. United States, 355 F.2d 104 (D.C. Cir. 1964). The court in *Kent* emphasized the different consequences of a conviction before a criminal court rather than before a juvenile court. Under D.C. CODE ANN. § 22-3202 (Supp. IV, 1971), the penalty for armed robbery may include a sentence up to thirty years. Under D.C. CODE ANN. § 16-2320 (Supp. IV, 1971), the dispositions for a finding of delinquency include: permission to remain with his parents; placement under protective supervision; transfer to legal custody of a public agency; or probation.

20. Some judicial decisions and authors have emphasized that certain standards must guide the determination of waiver of juvenile jurisdiction. These standards emerge from juvenile court philosophy and the particular statute under consideration. In Harrison v. United States, 359 F.2d 214 (D.C. Cir. 1965), the court stated:

> Particularly vexing are the problems presented by the sixteen or seventeen year old adolescents precocious in criminal propensity. The problem of which of them should be waived is of such breadth and complexity that the responsibility for the waiver determination was deliberately assigned to the judge of the Juvenile Court and not to the prosecutorial arm of government. The "full investigation" by the judge, specified in the statute [D.C. CODE ANN. § 11-914 (1961)], is not confined to an awareness of the offense at hand, but includes evaluation of the juvenile and his record, made by the judge with the benefit of the contribution of assistants with special background in the social sciences.

See, e.g., Croxton, *The Kent Case and Its Consequence*, 7 J. FAMILY L. 1 (1967); Schornhorst, *supra* note 14; *Committee on the Standard Juvenile Court Act of the National Probation and Parole Association*, 5 N.P.P.A.J. 353 (1959).

21. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.

cedure,[22] the jurisdiction of the new Family Court was altered by a change in the definition of the term "child."[23] This reformation, in effect, granted exclusive and original jurisdiction to the criminal court over individuals who were previously subject to the waiver proceedings of the juvenile court.[24] The United States Attorney's decision[25] to charge a person with an enumerated offense became the deciding factor in determining whether an individual would receive the "care and rehabilitation" of the juvenile court or the "punitive measures" of the criminal court.[26]

L. No. 91-358, 84 Stat. 473 (1970) (pertinent provisions codified at D.C. CODE ANN. ch. 23 (Supp. IV, 1971)).

22. D.C. CODE ANN. § 16-2307 (Supp. IV, 1971).

23. D.C. CODE ANN. § 16-2301 (Supp. IV, 1971). Section 16-2301 was enacted "[b]ecause of the great increase in the number of serious felonies committed by juveniles and because of the substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law. . . ." H. REP. No. 91-907, in D.C. CODE LEGISLATIVE AND ADMINISTRATIVE SERVICE 446 (1971).

See Hearings on S. 2981 Before the Senate Committee on the District of Columbia, 91st Cong., 1st Sess. 1800-1810 (1969); Darling, *Youthful Offenders and Neglected Children Under the D.C. Crime Act,* 20 AM. U.L. REV. 373 (1971); Lawton, *Juvenile Proceedings—The New Look,* 20 AM. U.L. REV. 342 (1971).

24. In this respect the D.C. Code is not unlike many state statutes that limit the original exclusive jurisdiction of the juvenile court. *See, e.g.,* FLA. STAT. ANN. § 39.02 (Supp. 1972); W. VA. CODE ANN. §§ 49-4-2, 49-4-3 (Supp. 1972). In dealing with the Indiana statute, the court in Riner v. State, 281 N.E.2d 815, 817 (Ind. 1972), stated:

> Appellants next claim error because the prescriptions of In re Gault . . . and Kent v. United States . . . were not followed in this case. Appellants' contention is properly disposed of upon the reflection that this was not a juvenile trial in a juvenile court. Instead, the original jurisdiction was in the Circuit Court. Jurisdiction in the juvenile court exists only in cases where a juvenile "commits an act which, if committed by an adult, would be a crime *not punishable by death or life imprisonment.*" (our emphasis). Burns' Ind. Stat. Anno. § 9-3204(1) (1971 Supp.).

See, e.g., United States *ex rel.* Walken v. Maroney, 444 F.2d 47 (3d Cir. 1971); United States *ex rel.* Imel v. Municipal Court, 225 Ind. 23, 72 N.E.2d 357 (1947); Mason v. Henderson, 337 F. Supp. 35 (E.D. La. 1972); Walker v. State, 235 So. 2d 714 (Miss. 1970).

25. A few courts have considered the issue of prosecutorial discretion in the waiver procedure or the determination of jurisdiction. *See* Mason v. Henderson, 337 F. Supp. 35 (E.D. La. 1972); United States v. Alexander, 333 F. Supp. 1213 (D.D.C. 1971); People v. Handley, 51 Ill. 2d 229, 282 N.E.2d 131 (1972); People v. Carlson, 108 Ill. App. 2d 463, 247 N.E.2d 919 (1969); De Backer v. Sigler, 185 Neb. 352, 175 N.W.2d 912 (1970); Lehmann v. Warden, Nevada State Prison, 87 Nev. 24, 480 P.2d 155 (1971). *See also* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); Paulsen, *supra* note 4, at 553; Schornhorst, *supra* note 14, at 598-99.

26. The majority and dissent disagreed in *United States v. Bland* over whether the charge from the United States Attorney determined the court of original jurisdiction or

Traditionally, once a suspect is arrested, the decision whether to charge lies primarily with the prosecutor. In addition to screening the sufficiency of the evidence, the prosecutor is expected to individualize justice and to consider several factors in making his decision to prosecute: the limited resources of the criminal justice system; public opinion; the willingness of the victim to prosecute; judicial attitudes on the propriety of prosecuting certain crimes; and police efforts.[27] Since the prosecutor alone must weigh these various factors, his discretion in the charging is very broad.

Recognizing this reasoning, the majority in *Bland* agreed with the government that the procedural requirements of *Kent* need not apply, since the prosecutor traditionally has been permitted to make charging decisions that have serious consequences.[28] The court stated that judicial interference with prosecutorial discretion was rare and existed only when the prosecutor acted arbitrarily. The majority also accepted the government's argument that the procedural standards enumerated in *Kent* were inapplicable since section 2301(3)(A) is a purely jurisdictional statute and does not involve a question of waiver.[29]

Judge Wright, dissenting on both points, argued that the prosecutor's decision to charge a juvenile, thus determining the court of jurisdiction, is unlike a traditional charging decision. He contended that the juvenile charging decision was essentially a waiver decision and, since *Kent* demanded that due process standards be followed in the judicial waiver decision, these standards are even more necessary if the decision is made by the less neutral prosecutor.[30] Judge Wright's dissenting opinion also emphasized that the decision to subject the juvenile to the jurisdiction of the adult court has such severe consequences that the decision is, in substance, the critically important stage that *Kent* meant to

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removed the jurisdiction from the juvenile court. For a discussion of this issue, *see generally* Darling, *supra* note 23, at 381-82; Lawton, *supra* note 23, at 346-50.

27. *See* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970). *See also* F. MILLER, R. DAWSON, G. DIX & R. PARNAS, CRIMINAL JUSTICE ADMINISTRATION AND RELATED PROCESSES 531-611 (1971).

28. *See* Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1966); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

29. *See* note 24 *supra.*

30. The Illinois waiver statute provides an interesting example of procedural checks on prosecutorial discretion in the waiver proceeding. Waiver of juvenile jurisdiction is determined by the state's attorney unless the juvenile judge objects. 37 ILL. ANN. STAT. § 702-7 (Smith-Hurd 1972).

protect.[31] Therefore, the constitutional standards[32] of *Kent* must apply, regardless of how section 2301(3)(A) is labeled.

Although Judge Wright's argument apparently is not based on an absolute right to treatment for the juvenile,[33] he does seem to say that when the legislature gives someone[34] the discretion to determine whether certain individuals are subject to the jurisdiction of the adult criminal court, procedural safeguards must be placed on the exercise of that discretion.[35]

It may be argued that the determination whether an individual is

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31. For an interesting case revealing some of the problems that arise from allowing prosecutorial discretion in the Nevada certification procedure, *see* Lehmann v. Warden, Nevada State Prison, 87 Nev. 24, 27, 480 P.2d 155, 156 (1971), in which the court stated:

> In this case Lehmann was 17 years of age when indicted by the grand jury on the open charge of murder, which is a capital offense. There was no need for certification by the juvenile court. Lehmann argues now that such a certification became necessary once the district attorney filed the information charging second degree murder. We do not agree. Admittedly, the certification proceeding is mandatory in all cases of juveniles except capital cases. Second degree murder is not a capital offense, and a certification would have been required if Lehmann had been initially so indicted by the grand jury. The district attorney should not have filed an information in this case. The court procedure would have been to follow NRS § 174.420, sub-section 2, which permitted a defendant accused of murder to plead to the lesser degree with consent of the district attorney and approval of the district judge. Although the procedure selected was wrong, the effect was the same as though the correct method had been followed, and we find the procedural error harmless.

32. *See* cases cited note 17 *supra.*

33. Judge Wright stated in the beginning of his dissenting opinion that *Kent* "held, in unmistakable terms, that before a child under 18 can be tried in adult court the Constitution requires a hearing 'sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness . . . .'" This statement appears overbroad, for nowhere in the Constitution do people under 18 receive special mention. Further, the first juvenile statute was adopted in the 1890's, and no amendment concerning juveniles has been added to the Constitution since the juvenile court's inception.

34. Judge Wright conceded that Congress could shift the waiver decision from the juvenile judge to the United States Attorney. It is uncertain why he chose not to challenge the prosecutor's authority to make such a decision. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court held that a prosecutor could not initiate the issuance of a warrant, for due process required that such a procedure be handled by an impartial magistrate. Constitutional control of warrant proceedings is included in the fourth amendment. The waiver decision, however, is governed by the more general constitutional requirements of due process, and Judge Wright may have felt that these general requirements could not serve as a basis for a requirement of neutrality.

35. This procedural right may be a constitutional right, especially in light of the decisions in *Kent* and *In re Gault.*

amenable to the juvenile rehabilitative processes, a decision normally made at the waiver hearing, has been previously made by the legislature. In the instant case this would mean that Congress has decided that persons between the ages of sixteen and eighteen who have committed certain crimes are not amenable, and all that remains is a determination whether the person has committed the offenses. The prosecutor, however, could easily circumvent this legislative determination by charging only those juveniles, otherwise covered by section 2301, whom he personally considers unamenable to rehabilitation in the juvenile process. On the other hand, he could, rather than charging those he considers amenable, file a delinquency petition against them in juvenile court or merely refer them to the proper juvenile authorities. In effect, the prosecutor's discretion still controls the waiver decision, and, according to Judge Wright's analysis, the need for due process safeguards remains compelling.

Judge Wright's arguments appear persuasive, and his attempt to place procedural safeguards on discretionary waiver decisions is desirable. His analysis, however, does not preclude a legislative determination of non-amenability. A statute could be drafted which would accomplish this objective and yet satisfy the due process requirements urged by Judge Wright. Such a statute would have to determine juvenile versus criminal treatment on the basis of conduct rather than the crime charged. The statute would have to exclude from the juvenile court's jurisdiction conduct which would constitute one of the statutorily enumerated offenses despite the prosecutor's failure to charge such an offense.[36]

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36. For example, a statute that may fit these qualifications is IND. STAT. ANN. §§ 9-3103 & 9-3204 (Supp. 1972).

> § 9-3103 The juvenile courts . . . shall have original and exclusive jurisdiction . . . in all cases in which a child is alleged to be a delinquent. . . .
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> § 9-3204 The words "delinquent child" shall include any boy under the full age of eighteen [18] years and any girl under the full age of eighteen [18] years who: (1) Commits an act which, if committed by an adult, would be a crime not punishable by death or life imprisonment. . . .

Though the Indiana statute does not explicitly limit the juvenile court's jurisdiction in the suggested manner, it is more susceptible to such an interpretation than the statute in *Bland*. *See also* DEL. CODE ANN. tit. 10, §§ 921 & 938 (Supp. 1972).