The Burger Court Opinion Writing Database

Swisher v. Brady

438 U.S. 204 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 2, 1978

MEMORANDUM TO THE CONFERENCE:

Re: 77-653 Swisher v. Brady

I am enclosing a Wang draft in the above case, which has been completed under some handicaps this week. I anticipate some modification before it is in final format, but nothing that will bear on the essence of the holding.

Regards,

WEB

fc

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 2 1976

Recirculated: _____

No. 77-653 - Swisher v. Brady

Mr. Chief Justice Burger delivered the opinion of the Court.

This is an appeal from a three-judge district court for the District of Maryland. Nine minors, appellees here, brought an action under 42 U.S.C. § 1983, seeking a declaratory judgment and injunctive relief to prevent the State from filing exceptions with the Juvenile Court to proposed findings and recommendations made by masters of that court. The minors' claim was based on an alleged violation of the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1978

Re: 77-653 Swisher v. Brady

Dear Potter:

Your suggestion regarding Jenkins is entirely acceptable.

You also urge that the opinion state that jeopardy attaches at the outset of the hearing before the master. I believe, with you, that jeopardy attaches when the State calls the first witness. Given our result, however, I see no reason to decide that issue categorically. I believe we need not do more than the following, as a new footnote 12:

"12/ The State contends that jeopardy does not attach at the hearing before the master. Our decision in Breed v. Jones, 421 U.S. 519 (1975), however, suggests the contrary conclusion. "We believe it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." Id., at 529. The California juvenile proceeding reviewed in Breed involved the use of a referee, or master, and was not materially different -- for purposes of analysis of attachment of jeopardy -- from a Rule 911 proceeding. See generally In re Edgar M., 14 Cal.3d 727, 537 P.2d 406 (1975); cf. Jesse W. v. Superior Court, 20 Cal.3d 893, 576 P.2d 963 (1978).

It is not essential to decision in this case, however, to fix the precise time when jeopardy attaches."

To go beyond this would be to court problems regarding, for example, attachment of jeopardy at a hearing on competency to stand trial -- and doubtless other areas I do not envisage at the moment.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

CHANGES AS MARKED: 7, 10-12, 14

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

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SUPREME COURT OF THE UNITED STATES

No. 77-653

William Swisher et al., Appellants, v. Donald Brady et al. | On Appeal from the United States District Court for the District of Maryland.

[June —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is an appeal from a three-judge District Court for the District of Maryland. Nine minors, appellees here, brought an action under 42 U. S. C. § 1983, seeking a declaratory judgment and injunctive relief to prevent the State from filing exceptions with the Juvenile Court to proposed findings and recommendations made by masters of that court. The minors' claim was based on an alleged violation of the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. The District Court's jurisdiction was invoked under 28 U. S. C. §§ 1343, 2281, and 2284 (as then written); this Court's jurisdiction, under 28 U. S. C. § 1253.

I

In order to understand the present Maryland scheme for the use of masters in juvenile court proceedings, it is necessary to trace briefly the history both of antecedent schemes and of this and related litigation.

Prior to July 1975, the use of masters in Maryland juvenile proceedings was governed by Rule 908.e, Maryland Rules of Procedure. It provided that a master "shall hear such cases as may be assigned to him by the court." The Rule further

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 3, 1978

RE: No. 77-653 Swisher v. Brady

Dear Thurgood:

I thought I should let you know that in the above, in which you and I are the only dissenters, I am contemplating a concurrence instead. It would be based upon my concurrence in McKeiver v. Pennsylvania, 403 U.S. 528, at 553. I there took the view that in these juvenile cases the test is not the specific guarantee but rather the "essentials of due process and fair treatment."

Sincerely,

Bill

Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1978

RE: No. 77-653 Swisher v. Brady

Dear Chief:

I'll await the dissent in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1978

77-653 - Swisher v. Brady

Dear Chief,

I fully agree with the result you reach, and basically with your opinion for the Court. I have, however, two suggestions.

(1) Since it seems to me entirely clear that jeopardy attaches when the State begins to present evidence before the Master, I hope that you can at least delete the phrase in footnote 12, beginning "solely for purposes . . ."

(2) As you point out on page 17, the appellees rely on the language you quote from the Jenkins opinion. While it is true, as you go on to say, that Jenkins has now been modified by Scott, it seems to me that the primary reason that the reliance on the Jenkins language is misplaced is that that case involved appellate review of the final judgment of a trial court, precisely the situation that your opinion emphasizes was not present here.

Sincerely yours,

P.S.

The Chief Justice

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1978

No. 77-653 - Swisher v. Brady

Dear Chief,

The new footnote 12 that you propose is entirely satisfactory to me.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 8, 1978

Re: No. 77-653, Swisher v. Brady

Dear Chief,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 6, 1978

Re: 77-653 - Swisher v. Brady

Dear Chief,

I join but look with favor on

Potter's suggestions.

Sincerely yours,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 6, 1978

Re: No. 77-653 - Swisher v. Brady

Dear Chief:

I shall try my hand at a dissent in this one.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

16 JUN 1978

No. 77-653, Swisher v. Brady

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Appellees are a class of juveniles who, following adjudicatory hearings on charges of criminal conduct, were found nondelinquent by a "master." Because the State has labelled the master's findings as "proposed," the Court today allows the State in effect to appeal those findings to a "judge," who is empowered to reverse the master's findings and convict the juvenile. The Court's holding is at odds with the constitutional prohibition against double jeopardy, made applicable to the States by the Due Process Clause of the 14th Amendment, Benton v. Maryland, 395 U.S. 784 (1969), and specifically held to apply to juvenile proceedings in Breed v. Jones, 421 U.S. 519 (1975).

FOOTNOTES

1/

Thus, unlike a preliminary hearing (to which the State analogizes the master's hearing), where the inquiry is one of probable cause, the adjudicatory hearing conducted by the master is the beginning of the unitary process designated by the State of Maryland to determine the truth of the charges. The Maryland Court of Appeals has rejected the State's argument that masters hearings are not adjudicatory:

> We think it within the clear contemplation of the Maryland law that the 'adjudicatory hearing' is that phase of the total proceeding whereto witnesses are summoned; whereat they are sowrn, confronted with the alleged delinquent, examined and cross-examined; whereat their demeanor is observed, their credibility assessed and their testimony . . . transcribed by a court reporter; whereat the alleged delinquent is represented by counsel and where he enjoys the right to remain silent . . .; whereat the State's Attorney marshals and presents the [State's] evidence . . . ; and whereat the presiding judge or master makes and announces his finding . . . .
>
> Conversely, we think it . . . equally clear . . that the 'adjudicatory hearing' is not that phase of the proceeding, frequently conducted ex parte and . . . in camera . . . whereat the supervising judge ratifies, modifies or rejects the finding and recommendations of the master." In re Brown, 13 Md. App. 625, ---, 284 A. 2d 441, 444-445 (1971).

Although the Brown opinion was rendered prior to Maryland's revision of its rules relating to the use of masters, see ante at 4-5, the record before us indicates that the character of

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SUPREME COURT OF THE UNITED STATES

No. 77-653

William Swisher et al., Appellants, v. Donald Brady et al. | On Appeal from the United States District Court for the District of Maryland.

[June —, 1978]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, dissenting.

Appellees are a class of juveniles who, following adjudicatory hearings on charges of criminal conduct, were found nondelinquent by a "master." Because the State has labelled the master's findings as "proposed," the Court today allows the State in effect to appeal those findings to a "judge," who is empowered to reverse the master's findings and convict the juvenile. The Court's holding is at odds with the constitutional prohibition against double jeopardy, made applicable to the States by the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), and specifically held to apply to juvenile proceedings in *Breed* v. *Jones*, 421 U. S. 519 (1975).

The majority does not purport to retreat from our holding in *Breed*. Yet the Court reaches a result that it would not countenance were this a criminal prosecution against an adult, for the juvenile defendants here are placed twice in jeopardy just as surely as if an adult defendant, after acquittal in a trial court, were convicted on appeal. In addition to violating the Double Jeopardy Clause, Maryland's scheme raises serious due process questions because the judge making the final adjudication of guilt has not heard the evidence and may reverse the master's findings of nondelinquency based on the judge's review of a cold record. For these reasons, I dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1978

Re: No. 77-653 - Swisher v. Brady

Dear Chief:

For now, I shall wait for the dissent.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1978

Re: No. 77-653 - Swisher v. Brady

Dear Chief:

Please join me.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1978

No. 77-653 Swisher v. Brady

Dear Thurgood:

Although my tentative vote at the Conference was "the other way", I am now persuaded to the contrary by your opinion.

Please add my name to your dissent.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1978

Re: No. 77-653 Swisher v. Brady

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 5, 1978

Re: 77-653 - Swisher v. Brady

Dear Chief:

On the assumption that you will accept Potter's suggestions, please join me.

Respectfully,

The Chief Justice

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