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JUVENILE WAIVER HEARINGS AND THE HEARSAY RULE—THE NEED FOR RELIABLE EVIDENCE AT THE CRITICAL STAGE

INTRODUCTION

Roscoe Pound once wrote, "[T]he powers of the Star Chamber were a trifle in comparison to those of our juvenile courts."[1] Although there have been vast improvements made in the juvenile justice system in the forty years since Dean Pound made this statement, to a large degree the assertion is still valid. Under the *parens patriae* doctrine, the juvenile justice system concentrates on the rehabilitation rather than punishment of juvenile offenders.[2] While in practice rehabilitation appears to be the more compassionate approach it affords the juvenile few of the procedural and evidentiary safeguards available to the adult criminal defendant. As the Supreme Court has noted, there is evidence that the juvenile often receives the worst of both worlds.[3]

Nowhere in the juvenile system is this more true than in the juvenile waiver hearing.[4] The waiver hearing is that unique judicial setting where it is determined whether the juvenile will be tried within the juvenile system or as an adult in an adult criminal court. The Supreme Court has characterized this hearing as critically important[5] and yet has held that the hearing may be informal.[6] This informal atmosphere has become a breeding ground for the deprivation of a substantial number of procedural and evidentiary safeguards usually accorded a defendant in a criminal prosecution.

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1. Pound, *Foreward* to P. YOUNG, SOCIAL TREATMENT IN PROBATION OF DELINQUENTS at xxvii (1937).

2. Statistically, the post-adjudication rehabilitative functions of the juvenile system are a failure. Approximately 75% of the juveniles who are incarcerated in juvenile training schools become repeat offenders. UNITED STATES DEP'T. OF JUSTICE, JUVENILE JUSTICE IN THE UNITED STATES 4-5 (1977).

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

4. "Waiver" is not the only word used to denote the decision to try the juvenile as an adult rather than retain him in the juvenile system. For examples of other terms, see State v. Jiminez, 109 Ariz. 305, 509 P.2d 198 (1973) (remand hearing); In re I.Q.S.'s Welfare, ___ Minn. ___ , 244 N.W.2d 30 (1976) (reference hearing); Brown v. State, 550 P.2d 963 (Okla. Crim. 1976) (certification hearing); In re P.B.C., 538 S.W.2d 448 (Tex. Civ. App. 1976) (transfer hearing). However, for uniformity's sake the term waiver will be employed throughout this note.

5. 383 U.S. at 553.

6. *Id.* at 561.

This note explores one such area of deprivation, the admissibility of hearsay evidence in waiver hearings. In general, jurisdictions openly admit many forms of hearsay for use in making the waiver decision. Under consideration here are only two of the various forms of hearsay: the oral testimony by a police officer with regard to his investigation of the alleged crime, and written social reports that detail the juvenile's social history and psychological condition. These two types of hearsay have been selected because they tend to be the most prejudicial and unreliable forms of hearsay found in waiver hearings. They are also the most commonly admitted. The numerous problems presented by the admission of this type of evidence will be thoroughly discussed and solutions to this troublesome legal issue will be proposed.

A certain amount of background knowledge of the areas of the law under consideration is necessary to effectuate a complete understanding of these problems and proposals. Therefore, the purposes and policies that underlie the juvenile justice system, the waiver hearing, and the hearsay rule must be briefly explored.

PURPOSES AND POLICIES OF THE JUVENILE JUSTICE SYSTEM

For almost eighty years the American legal system has recognized that juvenile offenders should be treated differently than adult criminals and has established an independent system of justice to deal with them.[7] The founding principle of the juvenile justice system was *parens patriae*.[8] Generally, *parens patriae* refers to the soverign power of guardianship over persons under a disability.[9] When applied to the juvenile system, *parens patriae* becomes a manifestation of the belief that children are to be protected, that despite wrongdoings they should not be treated as adults, and that because of their youth there exists a real potential for making them

7. The first American juvenile court opened in Chicago, Illinois on July 1, 1899, under the Illinois Juvenile Court Act. The Illinois Juvenile Court Act of 1899, 1899 Ill. Laws, p. 131-37.

8. The term had its origins in the chancery courts of medieval England. It conveyed the idea of protective jurisdiction through the power of the crown and was used to maintain the structure of feudalism. After the American Revolution the concepts of feudalism and the monarchy were no longer recognized in this country and correspondingly, the chancery courts were abolished. Nevertheless, *parens patriae* was retained. *See* Ex parte Crouse, 4 Whart. 9, 11 (Pa. 1839); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971), *reprinted in* F. FAUST & P. BRANTINGHAM, JUVENILE JUSTICE PHILOSOPHY 72 (1974).

9. *See* In re Turner, 94 Kan. 115, 145 P. 871 (1915); McIntosh v. Dill, 86 Okla. 1, 205 P. 917 (1922).

useful and productive citizens. Thus the goal of the early juvenile system was rehabilitiation, not retribution.[10]

The concept of *parens patriae* remains the primary justification for the present-day system's treatment of juveniles.[11] Modern decisions consistently reflect an attitude of benevolent paternalism toward youthful offenders. Significantly, the doctrine has been retained by the jurisdictions despite growing criticism and demands for the application of the safeguards afforded adults.[12]

As a corollary to *parens patriae*, most jurisdictions recognize a presumption in favor of disposing of the juvenile within the juvenile system.[13] However, it is widely felt that some juveniles are not deserving of, or would not be benefitted by, the rehabilitative functions of the juvenile court, and therefore, would best be dealt with as adults.[14] Consequently, almost all jurisdictions allow for waiver of certain juvenile offenders from the relative sanctity of the juvenile system to the potentially punitive arena of the adult criminal court.

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10. In Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909), the author stated:

> The problem for determination by the [juvenile] court is not Has this boy or girl committed a specific wrong?, but what is he?, How has he become what he is?, and What had best be done in his interest and in the interest of the state to save him from a downward career? [sic.]

Id. at 119-20.

11. In re Patterson, 210 Kan. 245, 499 P.2d 1131 (1972) (a juvenile proceeding is a protective proceeding entirely concerned with welfare of the child); In re Barker, 17 Md. App. 714, 305 A.2d 211 (1973) (most children will benefit from treatment by juvenile system); People v. Soto, 64 Misc. 2d 515, 315 N.Y.S.2d 30 (1969) (basic purpose of juvenile law is to avoid stigmatizing the worthy youth).

12. *See* Welch, *Delinquency Proceedings—Fundamental Fairness in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653 (1966); Whitebread and Batey, *Transfer Between Courts: Proposals of the Juvenile Justice Standards Project*, 63 VA. L. REV. 221 (1977) (the Juvenile Justice Standards Project has advocted a "junior criminal court"); Note, *Juveniles Tried as Adults: Waiver of Juvenile Court Jurisdiction*, 3 J. CONTEMP. L. 349 (1977).

The Supreme Court has perhaps best expressed this sentiment. In discussing the criticisms of the juvenile system the Court stated that "if the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).

13. *See, e.g.*, Atkins v. State, 259 Ind. 596, 290 N.E.2d 441 (1972).

14. Mikulousky v. State, 54 Wis. 2d 699, 196 N.W.2d 748 (1972) (although rehabilitation and treatment are the juvenile system's underlying philosophies, this does not mean that a juvenile is immune from criminal prosecutions).

Waiver Hearings

The waiver hearing is that stage of the juvenile process at which the decision is made whether to treat the minor within the juvenile system or to subject him to the adult criminal court. In making the waiver decision, the interests of the juvenile and the community in having the minor undergo rehabilitation are usually weighed against the juvenile's potential for future criminal activity and the need to protect the public from the resultant harm. Thus, the waiver decision seeks the best possible result for both the juvenile and the public. This goal has generally remained unchanged[15] throughout the evolution of the juvenile system.[16] However, this is not true with regard to the procedures used in deciding the waiver question.

The development of the juvenile system has witnessed an appreciation by most jurisdictions of the need for waiver. There were, however, no guidelines or constitutional requirements around which the jurisdictions and their respective legislatures could formulate procedures. This led to a wide variety of waiver practices among the jurisdictions.[17] Many of these practices contained blatant constitu-

15. *Compare*, The Illinois Juvenile Court Act of 1899, 1899 Ill. Laws, p. 131-37, *with*, Clemons v. State, ____ Ind. ____ , 317 N.E.2d 859 (1974), *cert. denied*, 423 U.S. 859 (1975).

16. Although most jurisdictions agree that the interests of the juvenile are to be weighed against the need for public safety, the jurisdictions often differ as to the weight to be given the two interests. For example, Oregon and Iowa appear to feel that the interests should be balanced equally. However, Oregon states that the purpose of waiver is to determine whether retaining in the juvenile court will best serve the interests of the juvenile *and* the public. State ex rel. Juv. Dept. of Marion Co. v. Johnson, 11 Or. App. 313, 501 P.2d 1011 (1972). Iowa holds that a juvenile should be waived if waiver would be in the best interest of the juvenile *or* the public. In re Brown, 183 N.W.2d 731 (Iowa 1971). Clearly, a juvenile has a potentially greater chance of being waived in Iowa than he would have in Oregon, despite the fact that the two interests are treated as of equal importance in both jurisdictions. Missouri, on the other hand, has announced that the purpose of waiver is to insure the protection of the public where rehabilitation is unlikely. State ex rel. Arbeiter v. Reagan, 427 S.W.2d 371 (Mo. 1968).

17. There were four main types of waiver procedures:

Judicial Waiver: This was, and remains the most common type of waiver procedure. Under this scheme the juvenile court was vested with exclusive jurisdiction over minors between certain ages, but it was also given the power to divest itself of this jurisdiction in favor of the adult court. This power was usually limited to the higher age groups over which the court had jurisdiction, and also depended on a number of independent criteria such as the type or severity of the crime, the juvenile's record, or previous rehabilitative attempts.

Legislative Waiver: Under some state statutes the juvenile court was absolutely prohibited from exercising jurisdiction over certain classes of juveniles. This was

tional violations and were the subject of much criticism and demand for change.[18] The Supreme Court did not respond until 1966 when it decided *Kent v. United States*.[19]

In *Kent* the Court noted the growing amount of criticism of the juvenile justice system but did not feel compelled to impose all the adult criminal safeguards on the juvenile courts.[20] Nevertheless, the Court held that the constitutional standard of fundamental fairness applies to waiver hearings. This standard requires that the juvenile be given a hearing, the right to counsel, access to any studies or reports considered by the court, and a statement of reasons for the waiver decision.[21]

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most often accomplished by setting a maximum age for juvenile court jurisdiction, or by removing from the juvenile system any minor who had allegedly committed a crime punishable by life imprisonment or death.

Prosecutor's Choice: Some jurisdictions gave the power of the waiver decision solely to the prosecutor by holding that the jurisdictions of the juvenile and criminal courts were concurrent. This gave the prosecutor the option of filing charges in either court. Other jurisdictions had similar provisions, but upon objection by the juvenile to the prosecutor's choice the final decision-making authority was given to the circuit court judge.

Waiver—Texas style: Under the Texas waiver statute adult court jurisdiction began at seventeen for boys and eighteen for girls. The Texas courts, however, held that age would be determined at the time of the trial and not the time of the offense. This practice effectively gave the Texas prosecutors absolute power over the waiver decision by allowing them to wait until the juvenile had reached the maximum age before filing charges. Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 581, 596-602 (1968) [hereinafter cited as Schornhorst].

18. *Id. See* citations contained therein.

19. 383 U.S. 541 (1966). Morris Kent was a sixteen year old boy who was charged with housebreaking, robbery, and rape. He was waived to adult court under an order that recited that a "full investigation" had been made. The order was entered without a ruling on the motion by the juvenile's counsel for a hearing and for access to social reports, and without notification to Kent, his counsel, or his parents.

Soon after the *Kent* decision, a question arose as to whether the case was of a constitutional dimension or whether the ruling applied only to the District of Columbia, where the case arose. A number of courts held it applied only to the District of Columbia. *See, e.g.*, Stanley v. Peyton, 292 F. Supp. 209 (W.D. Va. 1968); In re Harris, 67 Cal. 2d 876, 434 P.2d 615, 64 Cal. Rptr. 319 (1967). Today it is widely accepted that *Kent* is of a constitutional dimension. Schornhorst, *supra* note 17, at 585-92 and citations therein.

20. 383 U.S. at 556. Further, the Court endorsed the concept of *parens patriae* and stated that fundamental fairness did not mandate that the requirements of a criminal trial or even the usual administrative hearing be imposed on the waiver procedure. *Id.* at 562. *See also* Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959).

21. 383 U.S. at 557. The *Kent* decision also listed, by way of an appendix, eight criteria which could be considered by a juvenile judge faced with a waiver decision.

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

Both *Kent* and the criticism of the former waiver procedures have resulted in vast changes in the waiver practices employed by the jurisdictions. Today almost every jurisdiction requires a hearing as a prerequisite to waiver.[22] The hearing is typically composed of two phases.

First, the judge must decide whether there is probable cause to believe a crime has been committed and that the juvenile committed it. Secondly, it must be determined whether the juvenile is amenable to the rehabilitiative services available to the juvenile court.[23] In making the waiver decision the juvenile judge usually

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2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.

3. Whether the alleged offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in (an adult court).

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods or probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

This list was the result of consultations with judges, U.S. Attorneys, and representatives of the bar. It was later withdrawn due to criticism of its contents and disagreement as to its propriety. Comment, *Criminal Offenders in the Juvenile Court: More Brickbrats and Another Proposal*, 114 PA. L. REV. 1171, 1208 (1966).

22. At least two jurisdictions do not require a hearing. Nebraska allows the prosecutor to decide in which court the juvenile will be charged. State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974); NEB. REV. STAT. §§ 43-202(3)(b)-(c), 42-202.01 (Supp. 1975). New York, on the other hand, has no waiver statute. The juvenile courts of that state only have jurisdiction over children under sixteen. N.Y. FAM. CT. ACT § 712(a) (McKinney Supp. 1976-77).

23. Some jurisdictions consider only the amenability of the juvenile. *See, e.g.*, CAL. WELF. & INST. Code § 707 (West Cum. Supp. 1976-77); MD. CTS. & JUD. PROC. CODE ANN. § 3-817(a) (Supp. 1976). The vast majority, however, require that adverse findings of probable cause and amenability be made before the juvenile can be waived. *E.g.*, IND. CODE ANN § 31-5-7-14 (Burns Supp. 1976); MICH. COMP. LAWS ANN. § 712 A.4(4) (Supp. 1977-78).

considers a number of independent criteria. Typically, these include the nature and seriousness of the alleged crime, the aggression, violence, or premeditation with which the alleged crime was committed, and whether the alleged crime was directed toward persons or property. Also commonly considered are the juvenile's attitude, maturity, and degree of criminal sophistication, his social history, including home, school, or environmental studies, and the safety and interest of the public.[24] The juvenile judge generally must consider all the criteria listed in a particular waiver statute, but the weight given to each factor is usually left to the judge's descretion.[25]

A general knowledge of the purposes and procedures of a typical waiver hearing is essential to a full comprehension of the problems involved with the admission of hearsay evidence in waiver hearings. Of equal importance is a general understanding of the purposes and policies of the hearsay rule.

The Hearsay Rule

Hearsay may be defined as evidence of a statement, other than an in-court assertion of a witness, that is offered to prove the truth of the facts asserted.[26] For centuries the courts have recognized the potentially unreliable qualities of such untested assertions and have refused to consider them in reaching judicial conclusions.[27] This

24. The juvenile's age, his police record, and the availability of suitable rehabilitative programs are also criteria that can be found in waiver statutes.

No waiver statute requires that all of these criteria be taken into account in deciding waiver. Most often the statutes list between three and five of the criteria as relevant to the judge's decision. *See, e.g.*, IND. CODE ANN. § 31-5-7-14 (Burns Supp. 1976) (best interest of the public, aggravated character of the crime, and the juvenile's record); MICH. COMP. LAWS ANN. § 712 A. 4(4) (Supp. 1977-78) (prior record, seriousness of the crime, whether crime is part of repetitive pattern, best interests of society and juvenile).

For an excellent analysis of waiver criteria and standards, see Stamm, *Transfer of Jurisdiction in Juvenile Court*, 62 KY. L.J. 124 (1973).

25. *E.g.*, COLO. REV. STAT. § 19-3-108 (1973).

26. FED. R. EVID. 801(c). *See* Young v. Stewart, 191 N.C. 297, 131 S.E. 735, 737 (1926); State v. Ah Lee, 18 Or. 540, 23 P. 424, 425 (1890). *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 246 (2d ed. 1972), 5 WIGMORE, EVIDENCE § 1362 (Chadbourn rev. 1974); Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 768 (1961).

27. The hearsay rule first began to crystallize in the late 17th century. 5 WIGMORE, *surpa* note 26, at § 1364. Judge Musmanno of the Pennsylvania Supreme Court has perhaps best, and most eloquently, expressed the general feeling of both lawyers and judges to this type of evidence. "Hearsay is merely a legal term for an unconfirmed rumor. Pouring rumored scandal into the bent ear of blabbering busybodies in a pool room or gambling house is no more disreputable than pronouncing it with a clipped accent in a court of law." In re Holmes, 379 Pa. 599, 109 A.2d 523, 531 (Musmanno, J., dissenting), *cert. denied*, 348 U.S. 973 (1954).

recognition is manifest in the hearsay rule which requires that all evidence offered be subject to three conditions: oath, personal presence, and cross-examination.[28] These are the conditions under which evidence can be best examined for the potential errors, biases, and misconceptions which may render a statement inaccurate and unreliable. Evidence not susceptible to these three conditions cannot be adequately tested, and with notable exception,[29] is therefore not admissible.

THE PROBLEM OF HEARSAY EVIDENCE IN WAIVER HEARINGS

Every jurisdiction that provides for juvenile waiver hearings similar to the type set forth previously[30] must deal with the problem of whether or not to consider hearsay in deciding the waiver question. Hearsay in waiver hearings may take many forms. However, two

28. *Oath:* Generally, all witnesses who testify in a judicial proceeding are required to do so under oath. This practice can be seen as a ceremonial and religious symbol that induces a special obligation to tell the truth, and that impresses upon the witness the importance of his testimony and the potential sanctions for perjury. MCCORMICK, *supra* note 26, at § 245. Although this practice has lost some of its effectiveness and is today arguably nothing more than a meaningless formality, there is no apparent disposition to relax the tradition. *Introductory Note, Art. VIII Hearsay,* FED. R. EVID. [hearinafter cited as FED. R. EVID. *Intro.*].

Personal Presence: Personal presence in the courtroom allows the trier of the fact to observe the witness's demeanor. This has traditionally been considered of invaluable assistance in determining the witness's credibility and trustworthiness, and thereby, the proper weight to be given his testimony. Universal Camera v. N.L.R.B., 340 U.S. 474, 495-96 (1951); State v. Thomas, 110 Ariz. 120, 515 P.2d 865 (1973). *See also* Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables,* 47 A.B.A.J. 580 (1961). Also, it it reasonable to assume that any propensity for lying will be somewhat diminished by the presence of the party against whom the evidence is directed. FED. R. EVID. *Intro.*

Cross-Examination: Cross-examination is widely considered the most important condition under which evidence must be presented. In fact, Wigmore defines hearsay in terms of cross-examination, 5 WIGMORE, *supra* note 26, at § 1362, and has asserted that cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth." 5 WIGMORE, *surpa* note 26, at § 1367. Although every authority does not agree with the absoluteness of this contention, it is universally accepted that the power of cross-examination is one of the legal system's most effective stimuli for truth-telling, and is an essential tool in exposing bias and faults in a witness's perception and memory. FED. R. EVID., *Intro.;* MCCORMICK, *supra* note 26, at § 245.

29. There are many exceptions to the hearsay rule. However, there are two principles that underlie all the exceptions. The first is necessity, such as where the declarant is dead or otherwise unavailable. The second involves situations where there is a circumstantial probability of the trustworthiness of the evidence. 5 WIGMORE, *supra* note 26, at § 1420.

30. The most common form of waiver hearing has two phases: a finding as to probable cause, and a determination of amenability. It also consists of a consideration of a number of independent criteria. *See* notes 23-25 *supra* and accompanying text.

types of hearsay are most commonly admitted: testimony, usually by a police officer, with regard to his investigation of the crime that the juvenile has allegedly committed, and social reports. These reports are generally composed of environmental and psychological information that varies depending on the juvenile, the judge, and the jurisdiction. Before considering these specific forms of hearsay as they relate to waiver hearings it is necessary to note the vital importance of the waiver hearing to both the juvenile and to the community of which he is a part.

The Importance of the Waiver Hearing

In setting forth the constitutionally mandated prerequisites for a valid wavier order the landmark case of *Kent v. United States*[31] stressed the "tremendous consequence"[32] of this "critically important"[33] step in the juvenile process. The Court noted[34] that once a juvenile is waived to the adult criminal court he loses a large number of privileges and immunities available only within the purview of the juvenile system. Once waived the juvenile is no longer afforded the protection of anonymity[35] and becomes subject to the publicity that often surrounds a criminal trial.[36] Thus if guilty, it is at the waiver hearing that the juvenile faces the possibility of being publicly labeled a criminal. This causes future problems with employment, vocational or professional training, the loss of certain citizenship rights, and perhaps most importantly, the social stigmatization of being a convicted felon.[37]

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31. 383 U.S. 541 (1966).

32. *Id.* at 554.

33. *Id.* at 553.

34. *Id.* at 553-57. *See also* Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970); People v. Chi Ko Wong, 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976); R__ E__ M__ v. State, 541 S.W.2d 841 (Tex. Civ. App. 1976).

35. Anonymity is one of the keystones of the *parens patriae* doctrine. It is most obviously exemplified in the names that some jurisdictions give to juvenile cases. *E.g.*, In re J.S., 556 P.2d 641 (Okla. Crim. 1976); R__ E__ M__ v. State, 541 S.W.2d 841 (Tex. Civ. App. 1976); D.H. v. State, 76 Wis. 2d 286, 251 N.W.2d 196 (1977).

One Arizona case provides a particularly striking example. A juvenile was charged with felony murder for the arson of a hotel. He was waived and found guilty in an adult criminal court. His appeal to the Arizona Court of Appeals primarily concerned the validity of the waiver order. The citation for that decision, which upheld the waiver is: In re Anonymous, Juv. Ct. No. 6358-4, 14 Ariz. App. 466, 484 P.2d 235 (1971). The case was then taken to the Arizona Supreme Court. The Supreme Court's opinion was almost thirty pages long but devoted only one short paragraph to the waiver issue. *See* State v. Taylor, 112 Ariz. 68, 537 P.2d 938 (1975).

36. *See, e.g.*, ALASKA STAT. § 47.10.090 (1975).

37. *See* Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970).

There are also more immediate dangers that the juvenile faces. For example, most juvenile statutes prohibit the incarceration of a juvenile beyond his majority,[38] but if the juvenile is waived he is considered an adult and can be sentenced accordingly.[39] Further, because a waived juvenile is treated as an adult the waiver hearing may be his last opportunity to raise the defense of diminished responsibility.[40]

The waiver hearing is also of great importance to the community as a whole. Primarily, the juvenile justice system serves to rehabilitate juvenile offenders, not to punish them.[41] If a juvenile is waived no attempt at rehabilitation will be made and the community may lose a potentially productive citizen. On the other hand, if a youthful offender is retained in the juvenile system when there is little or no chance of rehabilitating him, the public may be exposed to a dangerous influence sooner than necessary.[42]

In light of the tremendous impact the waiver decision has on both the juvenile and the community, every precaution should be taken to insure that the evidence relied on at the waiver hearing be competent and reliable. The potential for error in the waiver process should be as small as possible, especially in those jurisdictions that do not allow for appellate review of the waiver decision until after conviction in the adult criminal court.[43] Despite the logic of these assertions, the majority of jurisdictions admit hearsay at waiver hearings. The next two sections are devoted to an analysis and critique of this practice in its most common forms—police testimony and social reports.

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38. Kent v. United States, 383 U.S. at 556. *See, e.g.* ALASKA STAT. §47.10.080(c)(1) (maximum period of juvenile commitment not to exceed twentieth birthday).

39. *E.g.*, TEX. FAM. CODE ANN. tit. 3, § 54.02(h) (upon waiver the child shall be dealt with as an adult in accordance with Texas Code of Criminal Procedure).

40. Kemplen v. Maryland, 428 F.2d 169, 175 (4th Cir. 1970).

41. *See* notes 7-12 *supra* and accompanying text.

42. For example, in Indiana a sixteen year old boy found guilty of rape in juvenile court may only be incarcerated for five years because the juvenile court loses it jurisdiction over him when he is twenty-one. IND. CODE ANN. § 31-5-7-7 (Burns 1973). However, if the juvenile is waived and found guilty of the same offense he may be imprisoned for up to fifty years. IND. CODE ANN. §§ 35-42-4-1, 35-50-2-4 (Burns Supp. 1977).

43. *E.g.*, Snellgrove v. Porter Circuit and Juvenile Courts et al., 777-S-529 (1977); In re Trader, 227 Md. 364, 325 A.2d 398 (1974). *Contra*, P.H. v. State, 504 P.2d 837 (Alaska 1972); In re I.Q.S. Welfare, ____ Minn. ____, 244 N.W.2d 30 (1976); State v. Evangelista, 134 N.J. Super. 64, 338 A.2d 224 (1975).

For a complete discussion of this problem and the available remedies, see Note, *Review of Imporper Juvenile Transfer Hearings*, 60 VA. L. REV. 818 (1974).

POLICE TESTIMONY AS TO THE INVESTIGATION OF THE ALLEGED CRIME

Most state waiver statutes require the juvenile judge to consider a number of criteria with regard to the nature and commission of the alleged crime.[44] These considerations can be of much assistance to the judge in at least partially determining the juvenile's attitude, his propenisty for crime, and the degree of threat the juvenile poses to the public. They are also necessary for the determination of probable cause.[45] Therefore, the nature of the crime and the circumstances surrounding its commission are of vital importance to a proper decision on the waiver issue.[46] This evidence usually has its source in the victims or eyewitnesses[47] of the crime that the juvenile has allegedly committed.[48] The problem is how to present this evidence at the waiver hearing.

The proper method of producing evidence at the waiver hearing as to the nature and commission of the alleged crime would be to require direct testimony from the victims and eyewitnesses of the crime. The juvenile court should require the state to produce each and every victim or eyewitness upon whom the prosecution intends to rely in proving its case for waiver. These witnesses should be required to testify under oath and in the presence of the juvenile. They should also be subjected to complete cross-examination by the juvenile's attorney. These are the conditions which our legal system has established as being the most conducive to the production of competent and reliable evidence.[49] In light of the critical importance

44. The most common of these are: 1) the nature and seriousness of the alleged crime, 2) the aggression, violence, or premeditation with which the crime was committed, and 3) whether the crime was directed toward persons or property. *See* notes 24-25 *supra* and accompanying text.

45. *See* note 23 *supra* and accompanying text.

46. A great many states recognize the importance of these criteria and specifically require consideration of them in their respective waiver statutes. *E.g.*, CAL. WELF. & INST. CODE § 707 (West Cum. Supp. 1976-77); ILL. REV. STAT. ch. 37 § 702-7 (1973); IND. CODE ANN. § 31-5-7-14 (Burns Supp. 1976); MICH. COMP. LAWS ANN. § 712 A.4 (Supp. 1974).

47. By "eyewitness" is meant not only persons who actually observed a crime take place, but also persons who have direct personal knowledge of any facts relevant to the commission of the crime.

48. *See, e.g.*, Clemons v. State, ___ Ind. App. ___ , 317 N.E.2d 859 (1974), *cert. denied*, 423 U.S. 859 (1975); Hazell v. State, 12 Md. App. 144, 277 A.2d 639 (1971); State v. Piche, 74 Wash. 2d 9, 442 P.2d 632 (1968), *cert. denied*, 393 U.S. 1041 (1969). In all these cases police officers testified as to their investigation of the alleged crime. For the most part, their information originated with either victims or eyewitnesses of the crime.

49. The hearsay rule requires that evidence be presented subject to these three conditions. *See* notes 26-29 *supra* and accompanying text.

of the waiver decision to both the child and the community,[50] the juvenile court would be justified in demanding that any evidence as to this important aspect of the waiver determination be in the most competent and reliable form.[51]

The vast majority of jurisdictions, however, allow evidence of the nature and commission of the alleged crime to be presented by way of a police officer's testimony.[52] In testifying, the officer will usually relate to the court, under prosecutorial questioning, the results of his investigation of the crime. To fully inform the court with regard to this evidence the officer must relate not only the type of crime allegedly committed, but also the details of the crime's commission. Thus unless the officer actually saw the crime take place he must rely in large part on statements from the victims and eyewitnesses.[53] This method of producing evidence for the juvenile court's consideration ignores the many potential problems in hearsay testimony of this type.

Statements to a police officer by an eyewitness or victim of a crime may contain a variety of inaccurate and unreliable information. A victim or eyewitness may be shocked by the traumatic experience of the crime and may feel a special kind of hostility toward its perpetrator.[54] An eyewitness may not have seen the entire crime or for a number of reasons may have been unable to get an accurate mental picture of the event.[55] Also, a victim or eyewitness may have

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50. *See* notes 31-43 *supra* and accompanying text.

51. A surprisingly small number of states have statutes or judicial decisions similar to the procedure advocated here. Alaska provides that hearsay evidence is not competent to establish either a finding of waiver or delinquency. ALASKA STAT. § 47.10.060 (1966) (Alaska R. Child. Pro. 3(e) & 17(a)). *See also* P.H. v. State, 504 P.2d 837 (Alaska 1972). Although it did not prohibit hearsay, the Wisconsin Supreme Court has held that when a juvenile judge receives material that would be inadmissible under the rules of evidence, and that material is challenged by the juvenile, the judge may require the proponent of the evidence to substantiate it. D.H. v. State, 76 Wis. 2d 286, 251 N.W.2d 196 (1977). At least one other court has questioned the propriety of relying on testimonial hearsay by police officers, but has nonetheless refused to hold it inadmissible. Hazell v. State, 12 Md. App. 144, 277 A.2d 639 (1971).

52. *See, e.g.*, Clemons v. State, ___ Ind. App. ___, 317 N.E.2d 859 (1974), *cert. denied*, 423 U.S. 859 (1975); In re Flowers, 13 Md. App. 414, 283 A.2d 430 (1971); Hazell v. State, 12 Md. App. 144, 277 A.2d 639 (1971); In re Honsaker, 539 S.W.2d 198 (Tex. Civ. App. 1976); State v. Piche, 74 Wash. 2d 9, 442 P.2d 632 (1968), *cert. denied*, 393 U.S. 1041 (1969).

53. *See* note 48 *supra*.

54. J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT (1966) [hereinafter cited as MARSHALL]; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948) [hereinafter cited as Morgan].

55. MARSHALL, *supra* note 54, at 43-53.

had previous contacts with the perpetrator and as a result may have previously formed opinions of him.[56] These emotions or conditions could lead to exaggeration, confusion, bias, or any number of inaccuracies in the statements given to police officers.[57] Although no police officer would knowingly take an inaccurate statement few policemen possess the training, legal knowledge, or inclination to ascertain the deficiencies of a statement to the same degree as would a competent defense counsel.[58] Thus when the police officer testifies at the waiver hearing the potential unreliability and inaccuracy of the eivdence is transmitted to the judge and is used in deciding the waiver question.

This problem is not solved by even extensive cross-examination of the police officer by the juvenile's counsel. Although deficiencies in the officer's investigative techniques will best be exposed by subjecting him to cross-examination, none of the deficiencies in the statements of the witnesses themselves are discoverable. All the police officer can do is recite what the people he interviewed have told him. Most police investigations, due to inherent time and talent restrictions, are incapable of uncovering the multitude of circumstances and prejudices that can render an out-of-court statement inaccurate. Thus cross-examination of the police officer does little to minimize the unreliability of his hearsay testimony.

Despite the problems with the admission of a police officer's testimony as proof of the nature and commission of the alleged crime most jurisdictions admit this type of evidence at waiver hearings.[59] A wide variety of reasons have been asserted to support this practice.[60] The most common of these rationales warrant a discussion and critical analysis.

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56. *See generally* MARSHALL, *supra* note 54, at 65.

57. MARSHALL, *supra* note 54; Morgan, *supra* note 54, at 185-188.

58. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE POLICE 126-30 (1967).

59. Clemons v. State, ___ Ind. App. ___, 317 N.E.2d 859 (1974), *cert. denied*, 423 U.S. 859 (1975); In re Murphy, 15 Md. App. 434, 291 A.2d 869 (1972); In re Flowers, 13 Md. App. 414, 283 A.2d 430 (1971); In re Waters, 13 Md. App. 95, 281 A.2d 560 (1971); In re Honsaker, 539 S.W.2d 198 (Tex. Civ. App. 1976); State v. Piche, 74 Wash. 2d 9, 442 P.2d 632 (1968), *cert. denied*, 393 U.S. 1041 (1969).

60. When discussing this problem the jurisdictions may often be concerned with testimonial hearsay in general. However, because a police officer's testimony of the type under consideration here is a form of testimonial hearsay the reasons given to support the admission of testimonial hearsay are applicable to a consideration of a police officer's hearsay testimony.

Rationales for the Admission of Hearsay Testimony by Police

It is often asserted that a judge, being a legally trained and competent individual, has the ability and knowledge to give generally inadmissible evidence, such as hearsay, only its proper weight.[61] Thus it is argued, the juvenile judge will recognize the testimony of a police officer as hearsay and, knowing the unreliable qualities of such evidence, will take this into account in considering the testimony.[62] Although this assertion may be correct in some contexts it is generaly inapplicable in a situation where the juvenile judge must base his finding, or at least an important part of his finding, totally on normally inadmissible evidence. Notwithstanding the highest degree of competence or experience no judge can unequivocally decide what evidence is accurate or which statement was biased when all the evidence before him is potentially unreliable.[63] Without the benefit of hearing the sworn and cross-examined testimony of the person who gave a statement, the judge's decision as to the weight to be given that statement may be little more than educated speculation.[64] In light of the importance of the waiver hearing,[65] speculation, no matter how educated, should not be used as a basis for the waiver decision.

One of the functions of the typical waiver hearing is to determine whether there is probable cause to believe that a crime has been committed and that the juvenile committed it.[66] This function is accomplished in the adult system in what is commonly called the preliminary hearing.[67] The Supreme Court[68] and a number of lesser courts[69] have held that hearsay evidence is admissible at preliminary

61. McDonald v. State, ___ Ind. App. ___, 382 N.E.2d 436 (1975); King v. State, 155 Ind. App. 361, 292 N.E.2d 843 (1973) (judge can separate the wheat from the chaff). *See also* Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407 (1965).

62. Clemons v. State, 317 N.E.2d at 866. *Cf.* Williams v. State, 219 S.W.2d 509 (Tex. Civ. App. 1949) (juvenile judge will not consider improper allegations).

63. "No matter how trained and experienced a Juvenile Court judge may be, he cannot by any magical fishing rod draw forth the truth out of a confused sea of speculation, rumor, suspicion, and hearsay. He must follow certain procedures which the wisdom of the centuries have established." In re Holmes, 379 Pa. 599, 603, 109 A.2d 523, 529 (Musmanno, J., dissenting), *cert. denied*, 348 U.S. 973 (1954).

64. *See* notes 26-29 *supra* and accompanying text.

65. *See* notes 31-43 *supra* and accompanying text.

66. *See* note 23 *supra*.

67. FED. R. CRIM. P. 5.1.

68. Gerstein v. Pugh, 420 U.S. 103 (1975).

69. *E.g.*, In re Walters, 15 Cal. 3d 738, 543 P.2d 607, 126 Cal. Rptr. 239 (1975); Schram v. State, ___ Del. ___, 366 A.2d 1185 (1976); People ex rel. Pierce v. Thomas, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (1972); Commonwealth v. Rick, ___ Pa. Super. Ct. ___, 366 A.2d 312 (1976).

hearings. The Federal Rules of Criminal Procedure have a provision to the same effect.[70] Since both waiver hearings and preliminary hearings seek to establish probable cause[71] it has been asserted that hearsay in the form of police testimony is admissible at waiver hearings for the purpose of establishing probable cause.[72] This reasoning effectively circumvents the requirement of sworn, personal, and cross-examined testimony of all victims and eyewitnesses. The better practice, however, would be to exclude hearsay for whatever purpose it is offered. As previously demonstrated the problems of exaggeration, misconception, bias, and confusion demand that hearsay evidence be excluded.[73] To require evidence to be in one form for one phase of the waiver hearing and then to require a different form for another phase of the hearing would be an extreme waste of judicial time with little apparent benefit to the juvenile or the court. The juvenile court's decision on probable cause will be rendered no less accurate by requiring all victims and eyewitnesses to testify. At the same time the court's energies will be maximized and the findings regarding the nature and commission of the alleged crime will be as reliable as possible.

Another commonly asserted reason for the admission of testimonial hearsay in waiver hearings is that the hearing must be informal. It is widely felt that the goals of *parens patriae* will best be met if the waiver hearing is conducted in a relaxed, informal atmosphere.[74] This type of atmosphere is often asserted to be the most conducive setting for determining what is best for the child.[75] It has also been asserted that the imposition of the strict rules of evidence would detract from this informal atmosphere and thereby conflict with the *parens patriae* doctrine and the best interests of the juvenile.[76] Although strict adherence to the rules of evidence may in-

70. FED. R. CRIM. P. 5.1(a).

71. *See, e.g.*, In re Pima Co. Juv. Action No. J-47734-1, 26 Ariz. App. 46, 546 P.2d 23 (1976). The court specifically discussed this similarity.

72. *Id.;* In re Anonymous, Juv. Ct. No. 6358-4, 14 Ariz. App. 466, 484 P.2d 235 (1971), *aff'd sub nom.* State v. Taylor, 112 Ariz. 68, 537 P.2d 938 (1975); In re B.T., 145 N.J. Super. 268, 367 A.2d 887 (1976), *appeal denied,* 73 N.J. 49, 372 A.2d 314 (1977) (mem.). *See also* Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1976) (holding hearsay admissible at juvenile detention hearings).

73. *See* notes 54-58 *supra* and accompanying text.

74. *E.g.*, People v. Chi Ko Wong, 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976). The Supreme Court in Kent v. United States, 383 U.S. at 561, announced that waiver hearings "may be informal."

75. People v. Chi Ko Wong, 18 Cal. 3d at 718-20, 557 P.2d at 988-90, 135 Cal. Rptr. at 404-05.

76. Harling v. United States, 295 U.S. 161 (D.C. Cir. 1961) (strict procedural safeguards are inappropriate to the informality and flexability required by *parens*

deed detract from the desired atmosphere, too much emphasis should not be placed on the need for informality.[77] When an evidentiary rule such as the hearsay rule is not merely technical, but exists to insure the accuracy of the evidence presented, it should be included in a judicial proceeding of the importance of the waiver hearing.[78]

Similar to the informality rationale, some courts have asserted that since guilt or innocence is not determined at the waiver hearing, the hearing is non-adversary and dispositional in nature. Therefore, these courts conclude, there is no need for the imposition of the hearsay rule.[79] Although a waiver hearing is non-adversary in the sense that under *parens patriae* the hearing seeks only to serve

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patriae); People v. Chi Ko Wong, 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976) (nature of waiver hearing precludes imposition of strict evidentiary standards). *See also* Whitlach, *Practice and Procedure in the Juvenile Court*, 21 CLEV. B.A.J. 118, 125 (1950): "[C]lose adherence to the strict rules of evidence might prevent the court from obtaining important facts as to the child's character and condition which could only be to the child's detriment."

77. *See* Kent v. United States, 383 U.S. at 554-55 (*parens patriae* is not an invitation to procedural arbitrariness); In re Holmes, 79 Pa. 599, 604, 109 A.2d 523, 530, *cert. denied*, 348 U.S. 973 (1954) (informality may at times result in confusion, sloppiness, and unreliability). *See also* Comment, *Representing the Juvenile Defendant in Waiver Proceedings*, 12 ST. LOUIS L.J. 424 (1968).

In In re Gault, 387 U.S. 1 (1967), the Supreme Court made the following statement while discussing juvenile adjudications:

> The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help to save him from a downward career. Then, as now, goodwill and compassion were admirably present. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short the essentials of due process—may be a more impressive and therapeutic attitude so far as the juvenile is concerned.

Id. at 25-26.

78. Note, *Juvenile Delinquents: The Police, State Courts and Individualized Justice*, 79 HARV. L. REV. 775 (1966). *See also* Welch, *Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653 (1966). In discussing delinquency proceedings the author asserts: "Whatever the court gains by a less oppressive atmosphere, more will be lost when the child is unjustly found delinquent." *Id.* at 685.

79. Clemons v. State, ___ Ind. App. ___, 317 N.E.2d 859 (1974), *cert. denied*, 423 U.S. 859 (1975); In re B.T., 145 N.J. Super. 268, 367 A.2d 887 (1976); State ex rel. Juv. Dept. of Marion Co. v. Johnson, 11 Or. App. 313, 501 P.2d 1101 (1972); In re Harbert, 85 Wash. 2d 719, 538 P.2d 1212 (1975); State v. Piche, 74 Wash. 2d 9, 442 P.2d 632 (1968), *cert. denied*, 393 U.S. 1041 (1969).

the best interests of the juvenile and the community, this function is accomplished in an essentially adversary manner. The only impartial participant in the waiver hearing is the judge. The prosecutor and defense counsel are no less adversaries in a waiver hearing than at any other stage of the juvenile process. That the hearing seeks to protect the best interests of those involved is a fact that supports the exclusion of hearsay evidence at waiver hearings. If the juvenile judge is to successfully and accurately balance the interests of the juvenile and the community it would seem that he should have the most reliable evidence available for his deliberations. Although most evidence presented at waiver hearings is dispositional in nature[80] this in not an excuse for the admission of testimonial hearsay. Dispositional evidence is similar to other types of evidence in the sense that if it is presented via hearsay testimony it suffers from potential unreliability.[81] In light of the tremendous consequences involved, it would be better if the waiver decision were not based on unreliable evidence, no matter what its type.

A final reason that is often employed for refusing to apply the hearsay rule to a police officer's testimony at waiver hearings is that *Kent v. United States*[82] did not expressly or impliedly require the prohibition of hearsay.[83] This reliance is somewhat misplaced. Although certain inferences may be drawn from the case, the issue of the admissibility of hearsay was not before the Court in *Kent*.[84] In fact, there has never been a Supreme Court decision on the propriety of hearsay evidence at any stage of the juvenile process.[85] It is dif-

80. Most of the juvenile court judge's considerations concern such things as the juvenile's attitude, emotional stability, environment, and his propensity for crime. *See* note 24 *supra* and accompanying text. However, even considerations that directly relate to the alleged crime have an impact on dispositional matters. *See* note 47 *supra* and accompanying text.

81. *See* notes 26-29 *supra* and accompanying text.

82. 383 U.S. 541 (1966).

83. The Court did require a hearing, the right to counsel, access to social reports, and a statement of reasons for the wavier decision.

The courts that hold that *Kent* did not require a hearsay prohibition rely heavily on this statement from the opinion: "We do not mean . . . to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even the usual administrative hearing. . . ." 383 U.S. at 562. *E.g.*, Clemons v. State, 317 N.E.2d at 864; State ex rel. Juv. Dept. of Marion Co. v. Johnson, 501 P.2d at 1015; State v. Piche, 442 P.2d at 635; Sheppard v. Rhay, 73 Wash. 2d 734, 440 P.2d 422, 425 (1968); Williams v. Rhay, 73 Wash. 2d 770, 440 P.2d 427, 428 (1968).

84. The only issues presented were those decided by the Court: right to hearing, right to counsel, access to social reports, and a statement of reasons. 383 U.S. at 552.

85. At the state level, In re Gault, 99 Ariz. 181, 187, 407 P.2d 760, 768 (1965), held a juvenile judge may consider hearsay at a juvenile adjudication if it was "of a

ficult, therefore, to understand how *Kent*, or any other Supreme Court decision, can be interpreted as endorsing the admission of testimonial hearsay at waiver hearings.

In light of the many potential problems with a police officer's repetition of the out-of-court statements of victims and eyewitnesses, the reasons most commonly asserted for the admission of this testimonial hearsay evidence may be inadequate to support the practice. But when properly presented, the officer's information is of vital importance to the waiver decision. Therefore, the best method of producing evidence as to the nature and commission of the alleged crime is to require the sworn, personal, and cross-examined testimony of all victims and eyewitnesses upon whom the state intends to rely in proving its case for waiver. In this way the juvenile court could most effectively prevent an improper decision on this vital aspect of the waiver hearing, and thereby serve the best interests of both the juvenile and the community.

THE USE OF SOCIAL REPORTS IN THE WAIVER HEARING

The second type of hearsay to be considered in the context of juvenile waiver hearings is the written evidence commonly characterized as social reports. These social reports are usually compiled by a juvenile probation officer or social worker and their contents may vary widely depending on the juvenile and the circumstances of the particular case. Typically the reports contain such things as environmental studies, family histories, results of psychological evaluations, and school and police records.[86] The sources of information for the social reports are usually interviews with family, friends, and professional people who have had contact with the juvenile.[87]

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kind on which reasonable men are accustomed to rely." The Supreme Court did not rule on this issue. In re Gault, 387 U.S. 1 (1966).

86. *See generally* Teitelbaum, *The Use of Social Reports in Juvenile Court Adjudications*, 7 J. FAM. L. 425, 433-37 (1967) [hereinafter cited as Teitelbaum].

87. The information for the social reports be obtained from a variety of sources. Typical examples include:

1) Interviews with the juvenile,
2) Visits to the home and interviews with the child's parents,
3) Interviews with relatives, neighbors, or companions,
4) Interviews with principals, teachers, and other school officials,
5) Interviews with past or present employers,
6) Interviews or reports from other social or public agencies that have had contact with the juvenile or his family.

H. LOU, JUVENILE COURTS IN THE UNITED STATES 116-17 (1927).

Potential problems arise when social reports are submitted to the juvenile court as evidence and the information contained in the reports is not subjected to the requirements of the hearsay rule.[88] The out-of-court statements made by third persons to the probation officer are untested and unsworn, and therefore, potentially unreliable.[89] Statements made or information obtained from the juvenile himself may also be unreliable if the reporting techniques used in making the report are questionable or the author of the report had biased or hostile feelings toward the juvenile. Moreover, poor reporting techniques may have an adverse effect on the accurate relation of not only the juvenile's statements but also the rest of the information contained in the report.

There are a number of potential problems involved in the preparation of a social report. Lack of sufficient time or various restrictions or demands imposed by the juvenile court on the probation officer may result in a precipitate or incomplete report.[90] The probation officer himself may be prejudiced toward the juvenile. Finally, the probation officer, like the police officer,[91] generally lacks the legal training and ability to uncover the bias or misconceptions that can underlie a third person's statement. Thus, rumor or other unreliable information may satisfy a probation officer and may be included in his report as fact.[92]

Even if a social report is well prepared and its author unbiased there remains a wide variety of potential problems with the statements themselves. The statements of neighbors, relatives, friends, and the like may be based on misconceptions, rumors, or inadequate personal knowledge.[93] There may also be a hostile attitude

88. As the Supreme Court has noted, "[t]here is no irrebuttable presumption of accuracy attached to staff reports." Kent v. United States, 383 U.S. at 563.

89. The case of In re J.S., 556 P.2d 641, 643, (Okla. Crim. 1976), stated that even the "benevolent intention" and "nonadversary role" of a juvenile probation officer cannot mitigate the potential dangers and inaccuracies of a social report. *See also* Teitelbaum, *supra* note 86.

90. Comment, *Representing the Juvenile Defendant in Waiver Proceedings*, 12 ST. LOUIS L.J. 424, 452 n. 113 (1968) [hereinafter cited as *Representing the Juvenile Defendant*]. At least one caseworker has stated that the conclusions and recommendations contained in her social reports are often based on little more than educated speculation.

91. *See* note 58 *supra* and accompanying text.

92. *Representing the Juvenile Defendant*, *supra* note 90, at 452.

93. MARSHALL, *supra* note 54; Krasnow, *Social Reports in the Juvenile Courts: Their Uses and Abuses*, 12 CRIME AND DELIN. 151, 155 (1966) [hereinafter cited as Krasnow].

toward the juvenile that is based on one or two isolated incidents.[94] This type of emotion is especially dangerous since a person with a hostile or negative feeling toward the juvenile may be more inclined to make an incriminating statement to a juvenile caseworker than to testify in court.[95]

Similar problems arise with regard to interviews with school personnel or special reports filed by school authorities. A student's demeanor, dress, hair, or associations may mean more to teachers and principals than specific acts of misconduct.[96] Thus, the student may be labeled a behavior problem on the basis of facts that are totally irrelevant to his behavior. This type of reputation may have a tendency to be self-perpetuating as new teachers and staff are warned of the "trouble maker."[97]

Often, when a question on the juvenile's sanity or general mental capacity is raised the juvenile judge will order extensive independent psychiatric testing of the child.[98] Serious problems may arise when the results of this testing are communicated to the juvenile court solely by way of a written report. The methods and objectivity of those conducting the tests may not be free from error. The information contained in the evaluations may be highly technical or couched in professional terms. Few juvenile judges possess the knowledge of medicine or the social sciences to properly evaluate this type of report without the guiding hand of its author.[99]

Despite all these potential problems with social reports the information contained in the reports is of considerable importance to a proper waiver decision. This information is especially important with regard to determining whether the youth is amenable to the rehabilitative services available to the juvenile court.[100] This impor-

94. MARSHALL, *supra* note 54; Krasnow, *supra* note 93.

95. Krasnow, *supra* note 93.

96. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 252 (1967).

97. *Id.*

98. *E.g.*, State v. Carmichael, 35 Ohio St. 2d 1, 298 N.E.2d 568 (1973) (reports from two psychiatrists, two psychologists, one medical doctor, and one psychiatric social worker), *cert. denied*, 414 U.S. 1161 (1974); In re Honsaker, 539 S.W.2d 198 (Tex. Civ. App. 1976) (written psychological evaluation).

99. *See* Smith, *A Profile of Juvenile Court Judges in the United States*, 25 JUV. JUST. 27 (1974).

100. Amenability is one of the two phases of a typical waiver hearing. *See* note 23 *supra* and accompanying text. Criteria such as the juvenile's social history, attitude, and degree of criminal sophistication are often employed in determining a juvenile's amenability to rehabilitation. *See* note 24 *supra* and accompanying text.

tance is reflected in a number of states through statutes which allow the juvenile judge to request and study such reports,[101] and in other states by requiring that a "full investigation" be held prior to the hearing.[102] In light of the importance of the information contained in social reports and the potential hearsay problems[103] in admitting the reports as evidence, the problem becomes how to present the information in a reliable competent form.

The better method of producing the evidence contained in social reports would be to allow the juvenile judge to consider the reports, but also to make available for sworn cross-examination all authors and third persons whose statements are contained in the reports. It is widely recognized that the most effective method of producing reliable and competent evidence is to subject the evidence to the conditions of oath, personal presence, and cross-examination.[104] In light of the crucial importance of the waiver decision,[105] it would seem that the critical aspects of the decision should be based, as much as possible, on accurate evidence. The important information that is contained in a social report, therefore, is best weighed and analyzed when it is presented via sworn cross-examined testimony.

By allowing for the sworn cross-examined testimony of the authors and interviewees of the social reports the juvenile court would be able to obtain the most accurate available picture of the juvenile's background and mental condition. A poorly prepared report has less value than no report at all as it is more likely to contain distortions of facts and opinions.[106] Through the use of sworn

101. *E.g.*, COLO. REV. STAT. ANN. § 19-3-108(3) (1973); FLA. STAT. ANN. § 39.09(d) (Supp. 1977); MD. ANN. CODE, CTS. & JUD. PROC. § 3-817 (Supp. 1976); TEX. FAM. CODE ANN. § 54.02 (a) (1975).

102. *E.g.*, IND. CODE ANN. § 31-5-7-14 (Burns Supp. 1976); ILL. ANN. STAT. ch. 37, § 702-7(3) (Smith-Hurd Supp. 1977). *See also* Kent v. United States, 383 U.S. at 553; Green v. United States, 308 F.2d 303, 305 (D.C. Cir. 1962); Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959).

"Full investigation" is usually interpreted to include the submission of social reports. Kent v. United States, 383 U.S. at 559, citing, Watkins v. United States, 343 F.2d 278, 282 (D.C. Cir. 1964). *See generally* Clemons v. State, 317 N.E.2d at 866-67. *See also* In re Patterson, 210 Kan. 245, 490 P.2d 1131 (1972).

103. Many decisions openly concede that the social reports are hearsay, but admit them nonetheless. *E.g.*, People v. Chi Ko Wong, 18 Cal. 3d 698, 557 P.2d 976, 136 Cal. Rptr. 392 (1976) (the reports are clearly hearsay).

104. These are the three conditions required by the hearsay rule. *See* notes 26-29 *supra* and accompanying text.

105. *See* notes 31-43 *supra* and accompanying text.

106. *See* Teitelbaum,*supra* note 86; *Representing the Juvenile Defendant*, *supra* note 90, at 451-53.

cross-examined testimony the court would be able to examine in detail and test the validity of the investigative and reporting techniques of the author of the report. The author's mere presence on the stand would also make it possible to clear up any ambiguities or misconceptions in the report. In addition, the sworn cross-examined testimony of the authors and interviewees would aid greatly in exposing any of the potentially biased, hostile, or misconceived feelings that can render a report inaccurate.[107]

To absolutely require the testimony of all authors and interviewees who contributed to the reports, however, may be contrary to good notions of judicial economy. Unlike evidence concerning the commission of the alleged crime where the number of victims and eyewitnesses is usually small and may be controlled by the prosecution,[108] there may be more than one author and many interviewees who had a part in the production of a report. Moreover, much of the information contained in the report may be accurate and the juvenile may not want to, or be able to, weaken certain author's procedures or an interviewee's statements. To require the testimony of all these people could result in an unwarranted waste of judicial time and cause needless hardship to the potential witnesses.

In order to assure accurate waiver decision-making and to protect the interests of judicial economy, the juvenile court judge should be allowed to consider the social reports. Yet his final decision should not rest on the reports alone. The juvenile should be given the power, through his counsel, to subpoena all persons whose testimony is necessary to refute statements in the report or to supplement the judge's understanding of it. The juvenile should be able to subpoena, in good faith, all authors whom he believes to have been biased, or whose reporting techniques were deficient, or whose presence is necessary to explain a report. The juvenile should also have the good faith subpoena power to require the presence and sworn cross-examined testimony of all persons whom he believes to have given a statement that was biased, hostile, or otherwise inaccurate and unreliable.[109]

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107. *See* notes 26-29 *supra* and accompanying text.

108. It has been advocated by this writer that sworn cross-examined testimony should be required only of those victims and eyewitness upon whom the state intends to rely in presenting its case for waiver. Thus, the number of persons called to the stand to give testimony as to the nature and commission of the alleged crime could be controlled in large part by the prosecutor.

109. A similar procedure has been advocated in *Representing the Juvenile Defendant*, *supra* note 90. "Witnesses who are willing to supply the social worker with information should be subpoenaed by the court to present the same information under

The good faith aspect of this procedure should be regarded as very important since it would act as a check on the number of persons subpoenaed. What consistutes good faith should be determined by a method similar to the *in forma pauperis* appeals procedure employed by the federal courts.[110] Under this procedure the trial court can deny leave for a pauper appeal if it finds that the appeal would not be filed in good faith.[111] Good faith in this context is defined as an appeal that is not frivolous, as determined by an objective standard and not by the subjective belief of the appellant.[112] The trial court must set out its finding of lack of good faith in writing and the decision is reviewable by the appellate court.[113] Applying this procedure to the waiver hearing, the juvenile court judge would have the power to quash any subpoena that he objectively finds to be frivolous or unreasonable. An affidavit or statement of reasons detailing why the juvenile or his counsel feels the testimony of a particular author or interviewee is necessary should be required as this would be of great assistance to the judge in ruling on the subpoenas. The judge should be required to state in writing his reasons for quashing any subpoena to facilitate appellate review of his decisions.

By allowing the juvenile, through his counsel, to subpoena those persons whose testimony he believes to be important to a full understanding of the evidence the juvenile court would be taking a great stride toward insuring that the information contained in social reports is reliable and accurate. At the same time, by allowing frivolous or unreasonable subpoenas to be quashed the important interest of judicial economy would be protected. Therefore, this method of presenting the evidence contained in social reports would serve the interests of the juvenile, the community, and the juvenile court.

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oath." *Id.* at 452. This, in effect, would require the sworn testimony of all authors and interviewees whose efforts or statements went into the composition of a report. The problem with this proposal is that it ignores the needless waste of judicial time that could result if all these people are required to testify.

110. 28 U.S.C. § 1915(a) (1970).

111. 28 U.S.C. § 1915(a) reads in pertinent part: "An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith."

112. Coopedge v. United States, 369 U.S. 438, 444-45 (1962); Miranda v. United States, 458 F.2d 1179, 1181 (2d Cir.), *cert. denied*, 402 U.S. 874 (1972); Harlem River Consumer's Co-op v. Assoc. of Grocers of Harlem, 71 F.R.D. 93, 97 (S.D.N.Y. 1976); Sherbicki v. United States, 366 F. Supp. 1290, 1294 (S.D.N.Y. 1973); Meyer v. New York, 344 F. Supp. 1377, 1378 (S.D.N.Y. 1971).

113. Coopedge v. United States, 369 U.S. 438, 445-47 (1962).

Current Procedures for the Presentation of Social Reports

The various jurisdictions have formulated no less than three procedures to deal with the problem of the admission of social reports at waiver hearings.[114] Each of these procedures suffers from a serious deficiency or oversight. The adopted methods either admit some type of potentially unreliable evidence or they ignore the need for reasonable judicial economy.

At least two states have statutorily prohibited the introduction of hearsay evidence at waiver hearings.[115] Under the broad language of these statutes[116] and the judicial interpretations of them,[117] the hearsay prohibition applies equally to oral and written evidence. Although the statutes effectively reduce the potential unreliability of both testimonial and written hearsay[118] they create serious problems with regard to social reports. In order to introduce the important information that is ordinarily contained in a social report the statutes indirectly require the testimony of all authors and interviewees. As previously mentioned, this could result in an unnecessarily large number of people being called to the stand, thereby wasting both the court's and the witnesses' valuable time.

A number of other states have statutory provisions that allow for the subpoenaing and direct testimony of the authors of social reports.[119] These statutes accomplish a laudable purpose in that they allow the juvenile and the court to examine and analyze the author's procedures and techniques and to uncover any bias on the part of the author. They also provide a means whereby the contents of a report can be fully explained. These statutes, however, ignore the

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114. *See* notes 116, 120, and 122-23 *infra* and accompanying text.

115. ALASKA RULES CHILD. PRO. 3(e), 17(a) (1966); KAN. STAT. ANN. §§ 38-813, 60-460 (Vernon 1973).

116. Alaska provides that the same rules for the admissibility of evidence at juvenile adjudications shall apply to waiver hearings. At the adjudicative phase hearsay is not competent evidence. ALASKA RULES CHILD PRO. 3(e), 17(a) (1966).

Kansas' statute states that the rules of evidence for civil proceedings, including the right of cross-examination are to be used in juvenile hearings. The Kansas rules of evidence for civil proceedings exclude hearsay subject to generally recognized exceptions. KAN. STAT. ANN. §§ 38-813, 60-460 (Vernon 1973).

117. *See* In re Harris, ____ Kan. ____ , 544 P.2d 1403 (1976) (waiver order rev'd for admission of written social report and letter).

118. *See* notes 54-58 *supra* and accompanying text.

119. *E.g.*, COLO. REV. STAT. § 14-3-108(3) (1973); FLA. RULES JUV. PROC. 8.110(b)(5). *See also* D.A.B. v. State, 329 So. 2d 40 (Fla. App. 1976) (counsel must make specific demand); State v. Carmichael, 35 Ohio St. 2d 1, 298 N.E.2d 568 (1973) (counsel could call and cross-examine authors under statute giving him access to the reports), *cert. denied*, 414 U.S. 1161 (1974).

many possible deficiencies that may taint an interviewee's statement.[120] Therefore, the statutes only partially insure that the judge's decision will be based on accurate and reliable evidence.

Under the final approach taken by some jurisdictions social reports are admissible over hearsay objections and the juvenile is provided with no opportunity to cross-examine either the authors or the persons whose statements are contained in the reports.[121] Many of the same reasons used to justify the admission of testimonial hearsay are employed to support this practice.[122] Therefore, the same refutations apply.[123] The courts, however, have come up with some unique justifications for the admission of social reports, despite their hearsay character.

Rationale for the Admission of Untested Social Reports

The Supreme Court in *Kent v. United States*[124] held that for a waiver order to be valid the juvenile's counsel must have access to all social reports prior to the hearing, and must be given an opportunity to examine and refute their contents.[125] This right of refutation has been interpreted by some jurisdictions to mean only that the juvenile may present evidence to contradict the reports, and not as a requirement that the authors and interviewees be available for sworn cross-examination.[126] Obviously, access to the reports and the right to present contrary evidence are essential if the juvenile is to even attempt to expose any of the evidence's potential deficiencies. Mere access and the power of extrinsic refutation, however, may not be sufficient to adequately insure the accuracy and reliability of the reports. It is well established that the potentially unreliable and inaccurate qualities of evidence are most effectively brought to light through sworn cross-examined testimony.[127] By ignoring this principle the courts that grant the juvenile only the right to examine the

120. *See* notes 93-96 *supra* and accompanying text.

121. *E.g.*, People v. Chi Ko Wong, 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976); In re Murphy, 15 Md. App. 434, 291 A.2d 869 (1972); In re Honsaker, 539 S.W.2d 198 (Tex. Civ. App. 1976); In re Harbert, 85 Wash. 2d 714, 538 P.2d 1212 (1975).

122. *See* notes 62-85 *supra* and accompanying text.

123. *See* notes 62-85 *supra* and accompanying text.

124. 383 U.S. 541 (1966).

125. *Id.* at 563.

126. People v. Chi Ko Wong, 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976); Clemons v. State, ___ Ind. App. ___ , 317 N.E.2d 859 (1974), *cert. denied*, 423 U.S. 859 (1975); In re Harbert, 85 Wash. 2d 719, 538 P.2d 1212 (1975). *See also* In re J.S., 556 P.2d 541 (Okla. Crim. 1975) (held juvenile must be given opportunity to criticize and refute the reports but declined to decide the proper procedure to be used).

127. *See* notes 26-29 *supra* and accompanying text.

reports and to present contrary evidence may be at least partially depriving both the juvenile and themselves of the best opportunity for a well-founded and accurate waiver decision.

A number of decisions reflect a belief that social reports must be admitted over hearsay objection because the reports are required by statute.[128] These courts are not to be faulted; they are merely complying with a statutory mandate. As previously demonstrated, much of the information contained in social reports may be potentially unreliable.[129] By merely stating that the juvenile court judge is to consider social reports in reaching his waiver decisions the legislatures have endorsed the practice of basing waiver decision on potentially inaccurate evidence. Considering the substantial benefits to the public derived from an accurate waiver decision[130] these statutes appear to be in conflict with the legislature's responsibility to protect the public welfare.[131]

Some courts have analogized waiver hearings to criminal sentencings.[132] Since a judge will usually consider reports at both a sentencing and a waiver hearing and since the reports are usually admissible at a sentencing,[133] these courts have concluded that social reports are likewise admissible at waiver hearings.[134] Such as assertion, it can be argued, merely compares one bad practice with another. The presentence reports are often roundly criticized by both commentators[135] and judges[136] as being a poor substitute for

128. In re Murphy, 15 Md. App. 434,. 291 A.2d 869 (1972) (Maryland rules contemplate use of reports despite their hearsay character); In re Honsaker, 539 S.W.2d 198 (Tex. Civ. App. 1976); Hughes v. State, 508 S.W.2d 167 (Tex. Civ. App. 1974) (court is duty bound to consider reports despite hearsay character).

129. *See* nots 88-99 *supra* and accompanying text.

130. The public has a substantial interest in a proper waiver decision in that if a juvenile is incorrectly waived, society may lose a potentially productive citizen. On the other hand, if a juvenile who is not likely to benefit from the rehabilitative services of the juvenile system is retained in the system the public may be exposed to a dangerous element sooner than necessary. *See* notes 41-42 *supra* and accompanying text.

131. *See, e.g.*, Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932) (paramount duty of the state is to protect the welfare of its citizens).

132. Clemons v. State, ___ Ind. App. ___ , 317 N.E.2d 859 (1974), *cert. denied*, 423 U.S. 859 (1975); Sheppard v. Rhay, 73 Wash. 2d 734, 440 P.2d 422 (1968); Williams v. Rhay, 73 Wash. 2d 770, 440 P.2d 427 (1968).

133. Williams v. New York, 337 U.S. 241 (1947) (court approved use of hearsay probation reports at sentencing).

134. *See* note 132 *supra*.

135. Shapiro & Clement, *Presentence Information in Felony Cases in the Massachusetts Superior Courts*, 10 SUFFOLK L. REV. 47 (1975) [hereinafter cited as Shapiro & Clement].

136. M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) [hereinafter cited as M. FRANKEL]. In discussing the pervasive use of presentence

reliable evidence.[137] In fact, one survey has shown that the most common judicial complaint about presentence reports is that they are inaccurate.[138] Rather than admitting social reports over hearsay objections at waiver hearings because they are admissible at sentencings, the better practice would be to require more reliable evidence at both waiver hearings and sentencings.[139]

Although there are substantial similarities between waiver hearings and sentencings there are also substantial differences. The two types of hearings are at opposite ends of the judicial spectrum. In a sentencing the defendant has already been convicted and all that remains to be determined is the appropriate punishment. At a waiver hearing the juvenile's guilt or innocence has not yet been ascertained, nor will it be until after the hearing.[140] Moreover, probable cause for the juvenile's arrest has not yet been determined.[141] In light of the benevolent purpose of the juvenile system[142] and the fact that the juvenile has merely been charged with a crime it would seem that he should be entitled to more procedural and evidentiary safeguards than an adult who has already been found in violation of the law.

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reports the author states, "[w]hat ought to be perfectly clear . . . is the intolerable risk of error when we rely for grave decisions of law upon untested hearsay and rumor." *Id.* at 32.

137. The potential dangers in a presentence report are vividly illustrated by a New Jersey case, State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (1960). The defendant had pleaded guilty to charges of forging seven checks worth a total of $1,400. He was twenty-six, married, and had two children. His only previous criminal conviction was for the theft of a car when he was 18. The presentence report stated that the defendant had "lived a life of crime" and had "spent the greater part of his life in penal institutions." The defendant was sentenced to seven *consecutive* terms totaling twenty-one to thirty-five years. The appellate court reversed and remanded the case, finding the presentence report to be "misleading and inaccurate." But this decision was not rendered until the defendant had spent nine years in the state prison.

138. Shapiro & Clement, *supra* note 135, at 58. *See also* Grygiar, *A Computer Made Device for Sentencing—Is Further Computing and Thinking Really Necessary?*, 8 J. RESEARCH CRIM & DELIN. 194, 200 (1969) (sentencing judges are overburdened with information which is often conflicting).

139. Judge Frankel has advocated the use of "sentencing counsels" and "mixed sentencing tribunals," as proposed by S. GLUECK, CRIME AND JUSTICE 225-26 (1936), and appellate review of sentencing to alleviate the problems in the sentencing process, among them the hearsay problems involved in presentence reports. M. FRANKEL, *supra* note 136, at 69-86.

140. Breed v. Jones, 421 U.S. 519 (1975) (adjudication of delinquency prior to waiver decision violates double jeopardy clause of the Constitution).

141. A determination of probable cause is one of the two main functions of the typical waiver hearing. *See* note 23 *supra* and accompanying text.

142. *See* notes 7-12 *supra* and accompanying text.

It has been argued here that the present methods of presenting the information usually contained in social reports either overlook the need for competent and reliable evidence at the waiver hearings, or they fail to adequately protect the interests of judicial economy. The reasons given in support of the practice of admitting untested social reports over hearsay objections may be inadequate to outweigh the need for competent and reliable evidence. The jurisdictions that prohibit any form of hearsay at waiver hearings, however, may create serious problems of judicial economy when their rulings are applied to social reports. Finally, the states that provide only for the testimony of the authors of the reports overlook the potential unreliability of an interviewee's statement to a juvenile probation officer. Clearly then, the best method of producing this type of evidence at waiver hearings would be to allow the juvenile judge to consider the social reports. However, the juvenile should be granted the power to subpoena all persons whose sworn cross-examined testimony he believes in good faith to be necessary to a full and accurate understanding of the reports. This procedure would aid greatly in producing accurate and reliable evidence at the waiver hearings and at the same time would mitigate the possibility of unwarranted judicial time being spent on the waiver question.

CONSISTENCY WITH EXISTING POLICIES

This note has advocated the use of methods for the introduction of evidence at waiver hearings that, in some cases, differ greatly from the established practices. It is submitted though, that these methods are consistent with the principal purpose of waiver hearings. These methods are also consistent with *McKeiver v. Pennsylvania*,[143] in which the Supreme Court discussed the criteria for determining what procedures are to be employed in the juvenile system.

The foundation of the current juvenile justice system is the doctrine of *parens patriae*. Under *parens patriae* every effort is made to rehabilitate the child and thereby transform him into a productive member of the community.[144] The concept of punishment is largely excluded. Once a juvenile is waived to adult court, however, all reasons for complying with the *parens patriae* philosophy disappear.[145] It follows that before a juvenile court waives a child and

143. 403 U.S. 528 (1971).

144. *See* notes 8-13 *supra* and accompanying text.

145. Once waived a juvenile is considered an adult and is treated the same as any other criminal defendant. *See* notes 38-40, 43 *supra*.

refuses to even attempt to rehabilitate him, every reasonable precaution should at taken to insure the inability of the system to deal with the child. By requiring the victims and eyewitnesses of the alleged crime to testify, and by allowing the juvenile to subpoena those pesons whose testimony is necessary to an accurate understanding of the social reports, a juvenile court would be taking such precautions. The paternally benevolent attitude that pervades the juvenile system under *parens patriae* is in accordance with this type of protection.

These precautions are also consistent with the principal purpose of the waiver hearing. In general terms, the waiver hearing functions to decide whether the best interests of the child and/or the community will be served by retaining the child within the juvenile system or by treating him as an adult criminal defendant.[146] This purpose may not be adequately served when crucial aspects of the waiver decision are based on potentially unreliable evidence. If a juvenile is improperly waived he obviously suffers;[147] but the community also suffers in the sense that it may lose a productive citizen.[148] Likewise, if a juvenile is improperly retained in the juvenile system the public may have a dangerous criminal in its ranks sooner than necessary.[149] Basing the waiver decision on potentially unreliable evidence only tends to increase the risk of an incorrect waiver decision. If the juvenile court were to require the testimony of the victims and eyewitnesses of the alleged crime, and grant the juvenile subpoena power over authors and interviewees of the social reports, the juvenile court would stimulate the production of reliable evidence, thereby serving the interests of both the child and the community.

In *McKeiver v. Pennsylvania*[150] the Supreme Court discussed the criteria for ascertaining what procedures are to be "superimposed" on the juvenile system. In general, these criteria are: whether application of the right is necessary to achieve fundamental fairness, and whether application of the right would disrupt the

146. *See* notes 15-16 *supra* and accompanying text.

147. The juvenile loses the prospects of rehabilitation, the protection of anonymity, the right to raise the defense of diminished responsibility, and he faces longer periods of incarceration. *See* notes 31-40 *supra* and accompanying text.

148. *See* note 41 *supra* and accompanying text.

149. *See* note 42 *supra* and accompanying text.

150. 403 U.S. 528 (1971). *McKeiver* concerned the adjudicative phase of the juvenile system and held there was no constitutional right to a jury trial in a juvenile adjudicatory hearing. *See also* Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959).

juvenile system. The practice of basing a decision of the magnitude and importance of the waiver decision on unreliable evidence would appear to be patently unfair when there are readily available procedures for testing the accuracy and reliability of the evidence. In fact, in applying the fundmental fairness standard to juvenile adjudications the emphasis of the Supreme Court has been on insuring the accuracy of fact-finding procedures.[151] In light of the fact that the procedures advocated here would tend to produce more accurate evidence, they are therefore consistent with the criterion of fundamental fairness. These procedures would do little to disrupt the juvenile system. Although in some cases these procedures may result in more juvenile court time being spent on deciding waiver petitons, it is submitted that the benefits derived from more accurate waiver decisions vastly outweigh this interest. The informality of the waiver hearing[152] would also not be drastically compromised by the implementation of the advocated procedures. The juvenile court functions in an informal atmosphere only to aid in a full understanding of the juvenile and the case before it.[153] Procedures that are designed to insure the accuracy and reliability of the evidence before the court are clearly not in conflict with such a purpose.

CONCLUSION

For centuries the Anglo-American legal tradition has recognized the need for reliable and competent evidence at all crucial stages of the judicial process and has produced the hearsay rule as one method of fulfilling this need. With the development of the juvenile system, particularly the waiver hearing, a controversy has arisen over the best methods with which to meet the benevolent purposes of the system while continuing to maintain the tradition of basing important judicial decisions on reliable evidence. The controversy has not been resolved. The present majority of jurisdictions favor the practice of admitting hearsay evidence at waiver hearings. Whether this practice does anything to fulfill the purposes of the juvenile system is highly questionable. What is relatively certain is that the practice allows for, and in fact encourages, the basing of the

151. In re Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt is constitutionality required in juvenile adjudications); In re Gault, 387 U.S. 1 (1966) (in an adjudication the juvenile has right against self-incrimination, right of confrontation, and right to sworn cross-examined testimony of all witnesses).

152. *See* notes 74-76 *supra* and accompanying text.

153. *E.g.*, People v. Chi Ko Wong, 18 Cal. 3d at 719, 557 P.2d at 989, 135 Cal. Rptr. at 405.

waiver decision on potentially unreliable and inaccurate evidence. This can be detrimental not only to the child, but also to the community of which he is a part.

It has been advocated that hearsay testimony by a police officer regarding his investigation of the alleged crime should be prohibited. This testimony should be replaced by the sworn and cross-examined testimony of the victims and eyewitnesses of the alleged crime upon whom the state intends to rely. By following this procedure the juvenile court would be taking the best available steps toward insuring that the evidence of the nature and commission of the alleged crime is of a reliable and competent character.

It has also been asserted that the mere submission of written social reports to the juvenile court judge is a practice that enhances the chance that the waiver decision may be incorrect. The information contained in social reports is important to a knowledgeable waiver decision, especially as it relates to the juvenile's amenability to rehabilitation. For this evidence to be reliable and accurate it should not be considered entirely in the form of hearsay. To require the presence and sworn cross-examined testimony of all authors and interviewees, however, may result in unwarranted hardships on the witnesses and in excessive court time being spent in waiver hearings. In response, it has been advocated that the juvenile judge continue to be allowed to consider the social reports. Additionally, however, the juvenile should be given the right to subpoena all persons whose testimony he believes in good faith to be essential to a fair and accurate understanding of the evidence contained in the reports.

Unless these methods are adopted the juvenile courts will continue to base waiver decisions on potentially unreliable and incompetent evidence. These courts will continue to run the risk of waiving juveniles who may be capable of becoming useful citizens, while retaining in the juvenile system minors who pose a threat to society. Such a result is not satisfactorily supported by the current judicial rationales, is in conflict with notions of justice under the juvenile system, and should no longer be tolerated.