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Juvenile Law--Waiver of Jurisdiction of the Juvenile Court in Missouri

Robert S. Bogard

COMMENTS

JUVENILE LAW—WAIVER OF JURISDICTION OF THE JUVENILE COURT IN MISSOURI

I. INTRODUCTION

At common law no distinction was made between an adult criminal and a juvenile criminal if the juvenile had reached the age of criminal responsiblity.[1] The procedures for arrest, indictment, trial, and punishment were identical.[2] Beginning in 1899 with the passage of the first modern juvenile act in Illinois,[3] American jurisdictions took a new approach to juvenile crimes. The ideas of social reformers and social scientists, that children should not be subjected to criminal punishment and that the causes of criminal or anti-social behavior, particularly of the young, could be identified and corrected, were fused into the legal concept of *parens patriae*.[4] The concept developed that where a juvenile's parents failed to exercise control over his behavior, the state had a responsibility to act as a surrogate parent and to correct the juvenile's deviant behavior.[5]

In recent years, this philosophy has come under increasing attack. The President's Commission on Law Enforcement and Administration of Justice concluded that the "great hopes originally held for the juvenile courts have not been fulfilled."[6] Despite this criticism, for a juvenile guilty of conduct which but for the juvenile code would be a felony, the juvenile system is probably preferable to the adult criminal justice system.[7]

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1. The age of criminal responsibility was seven in some jurisdictions, ten in others, with a chance of escape up to the age of twelve if the child was lacking in mental and moral maturity. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1910).

2. *Id.* at 106.

3. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971).

4. *See generally* Winnet, *Fifty Years of the Juvenile Court: An Evaluation*, 36 A.B. A. J. 363 (1950); Lipsitt, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 BOSTON U.L. REV. 62 (1969).

5. *See* Mack, *supra* note 1, at 107.

6. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7 (1967).

7. Thus, for example David L. Bazelon, Chief Judge, U.S. Court of Appeals for the District of Columbia, a prominent critic of juvenile justice systems, still argues that they should be maintained, albeit reformed. *See* Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. J. 42, 45 (1970).

In virtually all juvenile codes there is a statutory provision allowing particular juveniles to be tried as adults.[8] The more serious the crime, the more advantages the juvenile justice system offers to an offender.[9] However, it is precisely when a juvenile has committed a serious crime that he is most likely to be tried as an adult.[10]

The decision to try a juvenile as an adult represents an abandonment of the ideals of the juvenile system. The consequences for the juvenile may be serious: incarceration, both pre- and post-conviction, is likely to be under harsher conditions than within the juvenile system; the juvenile will undergo the stigmatization of a public adult criminal trial, even if he is ultimately found innocent of the alleged crime; the length of commitment may be longer, if the crime is a serious one; and, the emphasis on treatment during incarceration is likely to be less than within the juvenile system.

It should be noted that there may be advantages to a juvenile in being tried as an adult: the chances of obtaining a favorable verdict may be enhanced in an adult criminal court because the right to a jury trial exists and more formal court procedures are enforced; the length of his actual commitment is likely to be shorter than the indefinite commitments possible under juvenile codes if the charge in the criminal court is a minor one; and the juvenile will have a right to bail if he is tried as an adult, which he does not have if he is tried as a juvenile. Although these factors may be important to a juvenile,[11] transfer out of the juvenile system normally is initiated when the defendant is accused of a serious crime. Therefore, he normally will not agree with a decision that he be tried as an adult, because of the chance of a much longer commitment after conviction.

II. THE MISSOURI STATUTORY SCHEME

Section 211.031, RSMo 1969, vests the juvenile court with original and exclusive jurisdiction in proceedings where a juvenile is alleged to

8. Apparently all American Jurisdictions have a statute allowing a juvenile to be tried as an adult with the exception of New York and Vermont. *See* NATIONAL JUVENILE LAW CENTER, LAW AND TACTICS IN JUVENILE CASES 251 (2d ed. 1974).

9. Note that in this respect the brunt of the attack upon juvenile justice systems has been largely directed at their involvement with so called "status offenses," that is conduct which would not be criminal except for the offender's age, and not at its jurisdiction over juvenile felons. *See* Bazelon, *supra* note 7, at 42.

10. Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts: A Policy Statement*, 8 CRIME AND DELINQUENCY 3, 10-11 (1962).

11. An issue not dealt with herein is whether a juvenile has a right to initiate a hearing to determine if he should be tried as an adult. The new Missouri Juvenile Court Rules suggest that although the juvenile may petition the court, the decision of whether to initiate proceedings lies with the Juvenile Judge. Mo. Juv. Ct. R. 118.01 and comments thereto.

have violated a state law. A juvenile charged with a crime in a circuit court properly should move for dismissal of the charge for want of jurisdiction. A limited statutory exception to the general rule of section 211.031 is made by section 211.071, RSMo 1969. Under that section the juvenile court may waive its jurisdiction if it finds that the juvenile is at least fourteen years of age, that the acts which he is alleged to have committed would have been a crime if he were an adult, and that he is "not a proper subject to be dealt with" under the juvenile code. It should be observed that waiver of juvenile jurisdiction does not automatically subject the juvenile to criminal prosecution, nor can the juvenile court compel prosecution.[12] The procedure of section 211.071 merely provides for waiver of the exclusive jurisdiction of the juvenile court so that criminal prosecution may be commenced.

The Missouri statute must be read in conjunction with the decision of the United States Supreme Court in *Kent v. United States*.[13] In *Kent* the waiver of juvenile court jurisdiction was held to be a "critically important action determining vitally important statutory rights of the juvenile."[14] As such, the juvenile was entitled to a hearing and a statement of the reasons for transfer out of the juvenile system. The reviewing court "should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts."[15] Since *Kent*, there has been controversy whether the requirements there laid down are constitutionally necessary or were merely the product of an interpretation of the District of Columbia statute.[16] However, the Missouri Supreme Court has held repeatedly that the requirements of *Kent* apply to the application of the Missouri statute.[17]

III. The Waiver Hearings

At a waiver hearing, the juvenile's counsel may present a wide range of evidence to show that the juvenile court should retain its jurisdiction.

12. State v. Ford, 487 S.W.2d 1, 5 (Mo. 1972), *cert. denied*, 411 U.S. 983 (1973).

13. 383 U.S. 541 (1966).

14. *Id.* at 556.

15. *Id.* at 561.

16. The Court noted that the District of Columbia statute "gives the Juvenile Court a substantial degree of discretion . . ." but that "[i]t does not confer . . . a license for arbitrary procedure." *Id.* at 553. The Court's use of this language plus a general recognition that there is not a constitutional right to be tried as a juvenile has led many to the conclusion that *Kent* is merely statutory in its prescriptions. *See* Note, *Sending the Accused Juvenile to Adult Criminal Court: A Due Process Analysis*, 42 Brooklyn L. Rev. 309, 320 (1975).

17. State *ex rel.* T.J.H. v. Bills, 504 S.W.2d 76 (Mo. En Banc 1974). *See also* State *ex rel.* D-V- v. Cook, 495 S.W.2d 127 (Mo. 1973); State *ex rel.* Arbeiter v. Reagan, 427 S.W.2d 371 (Mo. En Banc 1968); State v. Williams, 473 S.W.2d 382 (Mo. App., D.K.C. 1971).

A showing that the juvenile is not fourteen years of age or that the alleged act or acts would not have been a crime if committed by an adult should, according to section 211.071, bar a juvenile court from waiving its jurisdiction.

In most situations these conditions are verified prior to the hearing and are not contested. The central issue at most waiver hearings is whether the juvenile is a "proper subject" to be dealt with under the juvenile code. Evidence of the juvenile's past involvement with police and juvenile authorities, of mitigating circumstances surrounding the alleged commission of the crime, of the programs and facilities available in the juvenile system, of the emotional and physical maturity of the juvenile, and expert testimony as to the probabilities of rehabilitation within the juvenile system as compared with the adult system are all relevant to this issue.[18]

As will be discussed below, review of the juvenile court's waiver is extremely limited in scope. This makes the disposition of the transfer hearing itself quite important. Counsel often enter juvenile cases by court appointment. Further, the juvenile's counsel is likely to believe that the juvenile judge and prosecutor are concerned with the welfare of the child. There is a temptation for counsel to make his own judgment as to the proper disposition of the juvenile and to act upon that judgment in his representation of the juvenile. However, the duty to represent a client zealously[19] may be more critical in a juvenile proceeding than in other areas. In juvenile matters the court and the juvenile authorities often work very closely with one another toward what they perceive to be the "best interest" of the juvenile. If counsel for the juvenile begins to view himself other than as an advocate, the entire waiver process is likely to be completed without a critical examination of the merits. Therefore, counsel for the juvenile should be a zealous advocate of the juvenile's position[20] and should leave questions concerning the "best interest" of the juvenile to the court. It will be a very unusual case in which counsel for a juvenile should advocate waiver of juvenile court jurisdiction.[21]

IV. Challenging the Juvenile Court's Order Waiving Jurisdiction

A. *Motion to Dismiss in the Criminal Trial*

It is beyond dispute that a juvenile court order waiving jurisdiction pursuant to section 211.071 may not be appealed directly. It is an interlocutory order from which appeal is unavailable.[22]

18. *See* Mo. Juv. Ct. R. 118.04 and comments thereto. *See also* State *ex rel.*, T.J.H. v. Bills, 495 S.W.2d 722 (Mo. App., D.K.C. 1973).
19. Mo. Sup. Ct. R. 4.15.
20. *Id.*
21. *See* text accompanying notes 45 and 46 *infra.*
22. *In re* T.J.H., 479 S.W.2d 433, 434 (Mo. En Banc 1972).

Once the waiver order has been issued and criminal prosecution of the juvenile has commenced in circuit court, the first opportunity to challenge the order waiving the jurisdiction of the juvenile court is by a motion to dismiss for lack of jurisdiction in the criminal case.[23] This procedure creates a very peculiar form of "review." If the circuit court finds the waiver procedure of the juvenile court defective in any particular, it should grant the defendant's motion to dismiss because the circuit court is without jurisdiction to proceed.[24] The net effect is that one trial court is reviewing the decision of another. This is a problem in smaller Missouri circuits where the same judge may sit both in the criminal division and in the juvenile division. The solution for a juvenile's counsel in that situation is to move for a change of venue in the criminal case. Some judges do not realize that when the motion to dismiss is filed they may look behind the order waiving jurisdiction to the procedures of the waiver hearing and the evidence presented there. Moreover, because an order cannot be appealed until after the criminal trial is completed, there is a temptation for the judge to resolve all doubt in favor of the validity of the order. A partial solution to this problem may be for the juvenile's counsel to file detailed suggestions in support of his motion to dismiss. These suggestions should show not only the alleged defects in the section 211.071 procedures, but also the propriety and necessity of the criminal court's review of the juvenile court's order,[25] the procedures used at the hearing, the court's substantive reasons for transfer, and the evidence in support of those reasons. In the absence of well-reasoned and supported suggestions in support of the motion, the criminal court is likely to deny the motion summarily. It should be added that for reasons discussed below "review" by means of a motion to dismiss is in some respects the only satisfactory method of challenging the waiver order. Therefore, it should be pursued diligently.

There is some language in Missouri case law suggesting that the filing of a motion to dismiss in the criminal prosecution is a condition precedent to any subsequent challenge to the waiver proceedings. In *Jefferson v. State*[26] the defendant pleaded guilty to second degree murder. He appealed to the Missouri Supreme Court from a denial of his motion to vacate the sentence and judgment. The basis of the motion was that the procedure at the waiver hearing was constitutionally defective under the standards of *Kent*,[27] *In re Gault*,[28] and *Black v. United States*.[29] The

23. Mo. R. CRIM. P. 25.06.
24. § 211.031, RSMo 1969.
25. This showing is grounded in § 211.031, RSMo 1969, granting exclusive jurisdiction to the juvenile court unless that jurisdiction is waived by the procedure outlined in § 211.071, RSMo 1969.
26. 442 S.W.2d 6 (Mo. 1969).
27. 383 U.S. 541 (1966).
28. 387 U.S. 1 (1967).
29. 355 F.2d 104 (D.C. Cir. 1965).

court briefly reviewed the waiver procedure and concluded that it probably was constitutionally defective. However, the court affirmed the conviction. The waiver hearing had taken place in 1957, before the decision in *Kent*.[30] The Missouri court could have based its decision upon a refusal to give *Kent* retrospective effect, but declined to use this ground.[31] Instead, the court found that the issues had been waived by the defendant: "He . . . waived any objections he might otherwise have had to the proceedings in the juvenile court when . . . he failed to file a motion in the general criminal division requesting dismissal of the information."[32] The issues were held to be waived, even though the decisions of *Gault*, *Kent*, and *Black* were, at the time of the criminal trial, some eight years in the future. The court distinguished *Kent*, *Black*, and *Gault* by observing that "in all three cases defendant unsuccessfully protested and objected to the . . . proceedings in the juvenile court and in none of them did he submit to or acquiesce in or in any way waive the deficiencies in the juvenile proceedings."[33]

The effect of *Jefferson* may be that the filing of a motion to dismiss has become a condition precedent to obtaining any subsequent review of the juvenile court order. If the procedure followed by the juvenile court was defective, the juvenile court had no jurisdiction under the Missouri statutory scheme. The Missouri Supreme Court's basis for the holding that a jurisdictional defect had been waived is unclear. Perhaps if the argument was placed directly before the court, the holding would be overturned. Until such a case is presented to the court, prudent counsel will file a motion to dismiss in the criminal action if the waiver hearing is at all suspect.

B. *Writ of Prohibition*

A second method of challenging a juvenile court's waiver order is provided by the use of a writ of prohibition. In *In re T.J.H.*[34] the Missouri Supreme Court held that the juvenile could not appeal directly from the juvenile court order waiving its jurisdiction because it was not a final order. After this holding, the same juvenile subsequently sought a writ of prohibition against the circuit court to prevent its exercise of jurisdiction. The Missouri Supreme Court held that the writ would lie in *State ex rel. T.J.H. v. Bills*.[35] The key to the holding was the finding that the remedy at law was inadequate: "Where . . . the court is wholly wanting in jurisdiction to proceed in the case, appeal is not an adequate rem-

30. *Kent*, note 27 *supra*, was not decided until 1966.
31. 442 S.W.2d 6, 12 (Mo. 1969).
32. *Id.*
33. *Id.*
34. 479 S.W.2d 433 (Mo. En Banc 1972).
35. 504 S.W.2d 76 (Mo. En Banc 1974).

edy because any action by the court is without authority and causes unwarranted expense and delay to the parties involved."[36] If limited to its facts, the holding of *State ex rel. T.J.H.* would provide only a narrow exception to the policy of *In re T.J.H.*,[37] that no appeal may be had from the juvenile court waiver order until the criminal trial is completed. In *State ex rel. T.J.H.* the order of the juvenile court waiving its jurisdiction was "void on its face as a matter of law because it gave no statement of reasons for that determination, in violation of the due process requirements of the United States Supreme Court and this court."[38] In these special circumstances, the court held that a writ of prohibition would lie.

The court's reasoning in *State ex rel. T.J.H.* appears to have a greater potential impact upon the policy of *In re T.J.H.* The court stated that the writ would lie wherever the criminal court was "wholly wanting in jurisdiction." Section 211.031 grants exclusive jurisdiction to the juvenile court. Section 211.071 provides the only procedure whereby the juvenile court can waive its jurisdiction. Thus, if the waiver hearing under Section 211.071 is defective in any particular, it can be argued that the criminal court is "wholly wanting in jurisdiction" and that a writ of prohibition should lie.

Although logically sound, this argument seems unlikely to succeed because it would mean an effective overruling of the court's policy underlying *In re T.J.H.*; a defendant would be provided review of the waiver order before a final judgment in the criminal case. Instead, the court seems to have limited the use of the writ of prohibition to juvenile court waiver orders which are facially void. A "writ of prohibition goes to the sufficiency of the order to transfer, not to its correctness."[39] The limitation is a difficult one to understand. A writ of prohibition is supposed to lie to test jurisdiction of the criminal court to proceed. It is an unusual definition of jurisdiction which is limited to errors apparent on the face of the order. It is unclear which errors go to the "sufficiency" of an order and which go only to its "correctness." It is clear that a failure to state any reasons for the transfer order goes to its sufficiency.[40] At the opposite side of the continuum, it seems unlikely that a failure of the evidence to support the findings would go to the sufficiency of the order.[41] Failure to hold a proper investigation, giving reasons for the

36. *Id.* at 79.
37. *See* text accompanying note 19 *supra.*
38. 504 S.W. 2d at 79.
39. *Id.*
40. *Id.* The origin of the substantive requirement is Kent v. United States, 383 U.S. 541 (1966).
41. The author was involved in the latter stages of a case arising in New Madrid County. After the juvenile court waived its jurisdiction and a motion to dismiss in the criminal trial had been denied, a writ of prohibition was sought against the judge in the criminal case. The writ alleged that the circuit court was without jurisdiction because: (1) the reasons stated by the juvenile court for waiv-

waiver of jurisdiction which are improper either under the statute, the Supreme Court rule, or the case law, failure to afford counsel to a juvenile, or failure to give notice are all examples of error which under the rule of *In re T.J.H.* may or may not be subject to challenge by the use of a writ of prohibition. This indicates that the Missouri Supreme Court will draw a line somewhere within this gray area, but it is unclear where it will be drawn.

C. *Appeal from a Conviction in the Criminal Trial*

The third method of challenging a juvenile court's waiver order is to wait for a verdict in the criminal trial and take an appeal assigning as error the trial court's lack of jurisdiction.[42] Assuming that all issues are preserved for appeal, this method of challenging the waiver order provides *substantively* the most complete review. From a practical standpoint, however, post-conviction appeal is often the least desirable form of challenge. In order to obtain this appeal, the juvenile is subjected to an adult criminal trial. Even if the appeal is ultimately successful and the defendant is returned to the juvenile system, he has undergone the stigmatization of an adult criminal trial and quite possibly a substantial period of incarceration with adult felons.[43]

The other problem of post-conviction appeal is suggested by Judge Seiler's concurring opinion in *Jefferson v. State*.[44] The majority in *Jefferson* held that the defendant juvenile had waived any constitutional defects in the waiver procedure by failing to file a motion to dismiss in the general criminal division. Judge Seiler's concurrence was based on the fact that at the time of the appeal, the defendant was twenty-seven years old and therefore no longer within the jurisdiction of the juvenile court. Judge Seiler did not explain why this fact made a violation of the defendant's constitutional rights innocuous. If this view represents the law in Missouri,[45] the implications for a juvenile defendant are ominous. He

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ing its jurisdiction were contrary to the statutory and case law of Missouri; (2) the reasons given for the waiver were mere conclusions, not supported by findings of fact; (3) the reasons given for waiver were not supported by the evidence; and (4) no social investigation or report was made. In State *ex rel.* Glynn Owens v. Craig, No. 10615 (Mo. App., D. Spr. Jan. 1977) the court of appeals granted the writ of prohibition. Unfortunately the writ was issued without an opinion and the reasons for the court granting the writ remain a matter of speculation.

42. Not discussed here is the use of federal habeas corpus. In an appropriate case this remedy should be considered by a juvenile's counsel.

43. Avoidance of criminal trials and incarceration of juveniles are two of the primary purposes of the juvenile codes. *See, e.g.*, F. FAUST & P. BRANTINGHAM, JUVENILE JUSTICE PHILOSOPHY (1974); Davis, *The Jurisdictional Dilemma of the Juvenile Court,* 51 N.C.L. REV. 195 (1972); Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 STAN. L. REV. 1187 (1970).

44. 442 S.W.2d 6, 14 (Mo. 1969).

45. Apparently this is not the law in all jurisdictions. *See* Note, 4 ST. MARY'S L.J. 405 (1974).

cannot obtain effective appellate review until he is tried and convicted.[46] Even if it is determined that the juvenile court improperly waived its jurisdiction, the juvenile would have no remedy if he has passed the jurisdictional age limit of the juvenile code. This will create a premium on delay by the prosecutor. Because it is more likely to be an older juvenile who is tried as an adult,[47] Judge Seiler's reasoning provides the prosecutor with a method for effective insulation from appellate review.

There is one situation where it might be advantageous for a juvenile to wait for a post-conviction appeal.[48] This would occur if the juvenile has an objection to the waiver proceedings and a defense to the charges in the criminal prosecution. In circuit court, because of his right to a jury and to more formal courtroom procedures, the juvenile might have a better chance for a favorable verdict than he would in juvenile court.[49] If his defense on the merits is successful then he would obviously not want to appeal the waiver order. If, however, he loses on the merits, he could appeal alleging that the circuit court was without jurisdiction. If his claim for relief is recognized, the circuit court's conviction and sentence will be vacated and the case remanded to the juvenile court where he will have a second chance to avoid waiver.

V. Who Is Not a Proper Subject To Be Dealt With under the Juvenile Code

Section 211.071 requires that if the juvenile court's jurisdiction is to be waived, there must be a finding that the juvenile is not a proper subject to be dealt with under the juvenile code. In theory, this required finding should be a limit on the ability of a juvenile court to waive its jurisdiction. In practice, however, it has not placed a limit on the juvenile courts at all. No Missouri case has ever held that a juvenile court erred in considering or failing to consider any particular factor or factors. The reason for this approach stems from a belief in the juvenile area that a judge should be free to dispense individualized justice. The effect of this seemingly unlimited discretion on the juvenile's counsel is twofold. First, it is unclear what factors counsel should argue on behalf of his client at the waiver hearing. Second, if the juvenile court's decision is to waive jurisdiction, counsel has no substantive basis for a challenge to that action.

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46. The exception to this rule is the use of a writ of prohibition. However, as suggested *infra* it is probable that the writ of prohibition will provide little meaningful review. *See* text accompanying notes 30-33 *supra.*

47. In Missouri the juvenile must be at least 14. § 211.071, RSMo 1969.

48. It should, however, be remembered that even if this result is desired, it may be necessary to make a motion to dismiss in the criminal case. *See* text accompanying notes 24-30 *supra.*

49. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Gault, 387 U.S. 1 (1967).

In *State v. Williams*[50] the defendant argued that the lack of statutory standards and the failure of the courts to develop a meaningful definition of who is a "proper subject" to be dealt with under the juvenile code rendered the statute constitutionally vague. The Missouri Supreme Court noted that the juvenile code was passed as an integrated and comprehensive statutory scheme. The court indicated that if the waiver statute was not in the juvenile code the Missouri Legislature would not have been willing to enact the remainder of the act. The court concluded that if section 211.071 were held invalid, they would be constrained to declare the entire juvenile code invalid. Thus, if a juvenile defendant successfully challenged section 211.071 on constitutional grounds, he then would be tried as an adult.[51] Therefore, the language in this case should be carefully examined before a constitutional attack is made upon section 211.071.

This entire argument, however, was dictum as the court ultimately concluded that the statute was not vague: "The requirement that the juvenile court find 'such child ... is not a proper subject to be dealt with' under the Juvenile Code is a direction that the Court look to the other provisions of the Juvenile Code in making that determination."[52] This, of course, adds little to an understanding of who is not a proper subject to be dealt with under the juvenile code. It does not state which sections of the code must be scrutinized. In *Williams* the court looked to section 211.011, which states that the purpose of the code is to: "facilitate the care, protection and discipline of children within the jurisdiction of the juvenile court and to provide such care, guidance and control, 'as will conduce to the child's welfare and the best interest of the State.'"[53] The court seems to have stated little more than the obvious. The interests of both society and the juvenile must be considered. The exact nature of those interests and how they are to be balanced is not made clear.

Other Missouri cases dealing with section 211.071 have been of little help in defining who is a proper subject to be dealt with under the juvenile code. Most decisions state in dictum the appropriate factors to be considered. Perhaps the most clearly written of these opinions is *State ex rel. T.J.H. v. Bills*,[54] the third of the "T.J.H. trilogy." The Missouri Court of Appeals, Kansas City District, stated:

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50. 473 S.W.2d 382 (Mo. 1971).

51. This result would necessarily follow. In the absence of a juvenile code the defendant could be tried as an adult. The fact that the juvenile was subject to transfer means that he must be at least fourteen years old. Therefore, in Missouri he is prima facie capable of possessing criminal intent. State *ex rel.* Cave v. Tincher, 258 Mo. 2, 166 S.W. 1028 (En Banc 1914).

52. 473 S.W.2d at 384.

53. *Id.*

54. 495 S.W.2d 722 (Mo. App., D.K.C. 1973).

> A juvenile court might reasonably exercise its discretion to relinquish jurisdiction over a child when, from the totality of circumstances, it appears: 1) the child's "age, maturity, experience and development" are such as to require prosecution under the general law . . ., 2) the nature and seriousness of child's conduct constitutes a threat to the community . . ., 3) the conduct was committed in a violent and vicious manner . . ., 4) there is reasonable likelihood that like future conduct will not be deterred by continuing the child under the "care, protection, and discipline" of the juvenile process. . . .[55]

These factors, in combination with any factor which tends to predict the suitability or unsuitability of the juvenile law process for rehabilitation of the child are relevant[56] to the determination of whether he is a proper subject to be dealt with under that law.[57]

Perhaps the most thoughtful standards suggested are those given by the United States Supreme Court in *Kent v. United States*.[58] The Court stated that the juvenile court should consider:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint . . . .
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .
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 in other jurisdictions, prior periods of 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 . . . by the use of procedures, services, and facilities currently available to the Juvenile Court.[59]

These criteria are not controlling in Missouri. They were given as an appendix to the opinion as an example of factors that should be consid-

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55. *Id.* at 728.

56. *Id.* at 728. See State v. Thompson, 502 S.W.2d 359 (Mo. 1973) and State v. Brown, 404 S.W.2d 179 (Mo. 1966) for other Missouri cases which suggest appropriate factors to consider in a waiver hearing.

57. *See also* Arbeiter v. Reagan, 427 S.W.2d 371 (Mo. En Banc 1971); State *ex rel.* D-V- v. Cook, 495 S.W.2d 127 (Mo. App., D.K.C. 1973).

58. 383 U.S. 541 (1966).

59. *Id.* at 566-67.

ered under the District of Columbia statute. However, they are helpful in pointing out the type of comprehensive judicial interpretation that is desirable when the statute is silent as are both the District of Columbia and Missouri statutes.

The various standards suggested in the cases above are helpful to a juvenile judge who must decide if a juvenile is a proper subject to be dealt with under the juvenile code. They may also be helpful to the juvenile's counsel to decide what evidence to introduce on behalf of his client at a waiver hearing. However, they are of little value to counsel who wishes to challenge the validity of a waiver hearing on the grounds that the juvenile court erred in finding that his client was not a proper subject to be dealt with under the juvenile code; there is no authority in Missouri suggesting that any of these factors *must* be considered. Presumably there is a limit to the juvenile court's discretion. However, no Missouri case has reversed a juvenile court's waiver order either on the ground that the evidence did not support a finding that the juvenile was not a proper subject to be dealt with under the juvenile code, or that the juvenile court failed to consider certain necessary factors.

The most hopeful development in this respect is in the new Missouri Juvenile Court Rules that became effective August 1, 1976. They provide that in reaching the decision to waive jurisdiction over the juvenile:

> The court *shall* consider all evidence relevant to whether the juvenile is a proper subject to be dealt with under the provisions of the Juvenile Code, including but not limited to:
> (1) whether the offense alleged involved viciousness, force or violence; and
> (2) whether the offense alleged is part of a repetitive pattern of offenses which indicates that the juvenile may be beyond rehabilitation under the Juvenile Code; and
> (3) the record of the juvenile; and
> (4) the programs and facilities available to the juvenile courts.[60]

The official comments to this section suggest that the rule is not intended to change the substantive law. The comment would seem accurate to the extent that all four of the criteria suggested in the rule are mentioned in prior Missouri case law. However, the rule is a significant change in the prior case law in its use of the words "shall consider." If enforced, this rule would for the first time require a Missouri juvenile judge to consider particular factors. This should create a more meaningful basis for challenge of a juvenile court order waiving jurisdiction on the grounds that the judge failed to consider one of the four factors mentioned in the rule, or that the judge's findings are not supported by the evidence.

The first two of the rule's four criteria are unambiguous and often have been suggested by Missouri courts as appropriate criteria to deter-

60. Mo. Juv. Ct. R. 118.04 and comment thereto (*emphasis added*).

mine who is a proper subject to be dealt with under the juvenile code.[61] The third criterion is less clear. It commands the juvenile court to "examine the record of the juvenile." It is unclear whether this is a reference to the juvenile's court record, or whether it is intended to include his record with juvenile authorities, police, or school. It probably would not be error for a juvenile judge to examine any such records. The question is whether under the new rule it would be error for a juvenile court to fail to consider such records.

The fourth criterion of the new rule requires the juvenile courts to examine "the programs and facilities available. . . ." If the juvenile correctional system does not have the appropriate facility for a particular juvenile, it is difficult to argue that the juvenile court should retain jurisdiction. If a juvenile is a risk to himself or to others, society has a legitimate interest in high security detention. If there is no such facility available and the danger is real, it may justify prosecution of the juvenile as an adult. If unlimited funds and the public willingness to spend those funds on juvenile facilities existed, the juvenile system would have facilities to deal with the dangerous juvenile offender. Adequate facilities do not now exist. This problem is particularly acute in Missouri regarding the dangerous female juvenile offender.[62]

Although this criterion is relevant to the waiver of juvenile jurisdiction in a practical sense, it is potentially open to challenge on "right to treatment" grounds. The basic concept of this argument is that the lack of appropriate juvenile facilities should not be a justification for the waiver of juvenile jurisdiction. It could be argued that the state should be required to provide appropriate juvenile facilities or it should be required not to prosecute the juvenile at all.

The concept of a right to treatment first gained judicial recognition in *Rouse v. Cameron*.[63] The legal argument is that the law exempts certain persons from criminal responsibility. Although these persons may not be prosecuted criminally, the state may require confinement in an institution for treatment. Treatment, it is argued is the *quid pro quo* for confinement.[64] In *Rouse* the court held that if there was inadequate treatment provided at a facility where such persons were confined, the confinement itself was unlawful. This argument has reached its most sophisticated development in the area of mental health. Recently, how-

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61. *See* cases cited notes 56-57 *supra.*

62. The highest security juvenile facility for females in Missouri is the center located in Chillicothe. This facility does not even have a fence surrounding the grounds.

63. 373 F.2d 451 (D.C. Cir. 1966).

64. For a full and critical development of this argument see Renn, *The Right to Treatment and the Juvenile*, 19 CRIME AND DELINQUENCY 477 (1973).

ever, there has been argument for the extension of the right to treatment to the juvenile area.[65]

It would seem, however, that the right to treatment argument would have little chance of success in a waiver hearing under Missouri law. There is a substantial distinction between the way the Missouri Supreme Court has conceptualized the position of a juvenile charged with commission of a crime and the way the District of Columbia Circuit Court in *Rouse* viewed the position of the mental patient. The court in *Rouse* saw treatment as the *quid pro quo* for confinement. The mental patient's condition exempted him from criminal responsibility. In contrast, the Missouri Supreme Court seems to view treatment within the juvenile system as a *substitute* for criminal responsibility. The juvenile court's exclusive jurisdiction over a juvenile charged with an act which but for the juvenile code would be a crime is a matter of legislative grace which vests no rights in the juvenile. The state, therefore, has a right to confine such a juvenile with or without treatment; treatment is *not* the *quid pro quo* of confinement.

The Missouri Supreme Court's view of the juvenile justice system was evident in *State v. Williams,*[66] where the court was presented with a constitutional attack on the waiver statute. In that opinion, the court stated that if it were to hold the waiver procedure unconstitutional, it also would void the section granting jurisdiction to the juvenile courts,[67] thereby causing all juveniles to be tried as adults.[68] The logic of this approach would be clearly inconsistent with a recognition of a juvenile's right to treatment in a waiver situation. If the Missouri Supreme Court is faced with a right to treatment challenge to the waiver procedure, it seems likely that it will uphold the right of the juvenile courts to waive their jurisdiction.

VI. Conclusion

There are two related problems facing a juvenile's attorney in a waiver hearing: the lack of an adequate method to challenge the juvenile court's order waiving jurisdiction, and the lack of substantive standards to be used by the court in reaching the waiver decision. As discussed above, the only substantively satisfactory method of challenging a juvenile court order waiving jurisdiction is to take an appeal from a conviction in the criminal trial. The problem with this procedure is that it is much too slow. The alternative remedy is the writ of prohibition. It has the advantage of speed but is very limited in its scope.[69] The three

65. *Id.* at 478-79. *See also* Note, *The Nascent Right to Treatment,* 53 U. Va. L. Rev. 1134 (1967).

66. 473 S.W.2d 382 (Mo. 1971).

67. § 211.071, RSMo 1969.

68. 473 S.W.2d at 383-84.

69. *See* text accompanying note 37 *supra.*

T.J.H. cases[70] suggest that, absent an outright judicial reversal, the solution to the juvenile's dilemma is unlikely to be resolved in the courts. Without an effective method to challenge the juvenile court's order, consistency in the substantive standards of waiver will not develop. Absent an expansion of the limits of *State ex rel. T.J.H.*[71] or a complete judicial reversal of *In re T.J.H.*, the only avenue of resolution will be by a legislative act declaring the order of the juvenile court waiving its jurisdiction to be a final appealable order.

The lack of an adequate method of challenging a juvenile court's waiver order has helped to create the lack of substantive standards. A number of Missouri cases establish appropriate factors for consideration, but no case has held that a court *must* consider any particular factor. Moreover, the standard of proof required at the waiver hearing is not entirely clear.[72] It is suggested that a legislative act declaring the waiver order final for purpose of appeal would create a meaningful opportunity for appeal, and this in turn would lead to more definite substantive standards.

ROBERT S. BOGARD

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70. *See* text accompanying notes 22-38 *supra.*
71. *See* part IV B of this comment.
72. Apparently a defendant must show an abuse of discretion. *See* Jefferson v. State, 442 S.W.2d 6 (Mo. 1969).