

# SERIOUS YOUTH OFFENDER PROCESS

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MARCH 2012

Under the Serious Youth Offender Act, sixteen and seventeen-year-olds charged with any of the offenses listed in Utah Code § 78A-6-702(1)<sup>1</sup> can be transferred from the juvenile justice system to the criminal justice system for prosecution as an adult in district court following a first appearance<sup>2</sup> and a subsequent preliminary hearing in juvenile court. At the preliminary hearing the State need only show probable cause that the crime was committed and that the defendant committed it.<sup>3</sup> Once the State meets this burden, transfer is then mandatory unless the defendant

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<sup>1</sup> Aggravated arson, aggravated assault involving serious bodily injury (the second degree felony variant, not the third degree felony variant), aggravated kidnapping, aggravated burglary, aggravated robbery, aggravated sexual assault, felony level discharge of a firearm from a vehicle, attempted aggravated murder, or a felony level weapons related offense other than those listed above and the minor has previously been adjudicated or convicted of a felony level weapons related offense. Other offenses committed along with one of these crimes can be charged and transferred together, provided there is probable cause. Utah Code § 78A-6-702(7).

Charges are brought by filing an information or by the return of an indictment; the latter procedure is rare, as filing an information is much more straightforward than going through a grand jury process. Post-charging issuance of a warrant of arrest or a summons is governed by Utah Rule of Juvenile Procedure 21.

Occasionally a juvenile probation officer will try to handle SYO charges through the juvenile court procedure for normal delinquency cases. The juvenile court's old JIS computer system would not allow juvenile probation officers to petition SYO charges. However, the new CARE computer system lack flags to catch such mistakes. Nevertheless, SYO charges are entirely within the province of the prosecutor. POs and prosecutors should make immediate contact with each other when either learns of a new SYO case, so that the case can be handled expeditiously and properly. Prosecutors will likely want to attend the initial detention hearing to make sure the defendant is held, and will want to gather details on the crime as quickly as possible so that an information can be filed expeditiously.

<sup>2</sup> Under Utah Rule of Juvenile Procedure 22(c)(d)(e) and (f), when a defendant is brought before the court for a felony first appearance hearing the court does not call upon the defendant to enter a plea. The court informs the defendant of the defendant's charges and rights, allows the minor to consult with counsel, and then determines whether the defendant wishes to schedule a preliminary hearing (the rule calls it a preliminary examination, but it is commonly called a preliminary hearing) or wishes to waive the preliminary hearing and agree to be bound over.

According to the rule, "(d) The court shall, upon the minor's first appearance, inform the minor: (d)(1) of the charge in the information or indictment and furnish the minor with a copy; (d)(2) of any affidavit or recorded testimony given in support of the information and how to obtain them; (d)(3) of the right to retain counsel or have counsel appointed by the court without expense if the minor is unable to obtain counsel; (d)(4) of rights concerning detention, pretrial release, and bail in the event the minor is bound over to stand trial in district court; and (d)(5) that the minor is not required to make any statement, and that any statements made may be used against the minor in a court of law. (e) The court shall, after providing the information under paragraph (d) and before proceeding further, allow the minor reasonable time and opportunity to consult counsel and shall allow the minor to contact any attorney by any reasonable means, without delay and without fee."

If the defendant opts to have a preliminary hearing, rather than waiving the hearing and accepting transfer without a fight, the preliminary hearing should be held within ten days of the initial appearance (if a minor is not in custody the preliminary hearing should be held within thirty days, although since SYO minors will almost always have been placed in detention, and since it would almost always be unconscionable to release a minor being held on SYO charges, the ten day deadline usually applies).

<sup>3</sup> Utah Code § 78A-6-702(3)(a) (2000); Utah R. Juv. P. 21-23A. If the allegation requires the State to show a previous weapons adjudication then the presence of that previous adjudication must be proven by a preponderance of the evidence. Utah Code § 78A-6-702(3)(a); Utah R. Juv. P. 23A(e).

can prove by clear and convincing evidence that all of a list of conditions specified in section 78A-6-702(3)<sup>4</sup> apply. The entire process is weighted heavily toward transfer—most if not all defendants charged as serious youth offenders will be transferred.<sup>5</sup> At the end of the hearing, the juvenile court judge enters a warrant for arrest and sets bail.<sup>6</sup>

The State's burden of proof at the preliminary hearing had been most definitively explained in *State v Pledger*,<sup>7</sup> the leading case on the subject until early 2001. Then, the Utah Supreme Court reworked the description of the preliminary hearing evidentiary burden by issuing its decision in *State v. Clark*.<sup>8</sup> Under *Clark* the State must show the same level of probable cause that is needed to obtain an arrest warrant; the court called this the “reasonable belief” standard.<sup>9</sup>

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<sup>4</sup> “(3)(b) If the juvenile court judge finds the state has met its burden under this subsection, the court shall order that the defendant be bound over and held to answer in the district court in the same manner as an adult unless the juvenile court judge finds that all of the following conditions exist: (i) the minor has not been previously adjudicated delinquent for an offense involving the use of a dangerous weapon which would be a felony if committed by an adult; (ii) that if the offense was committed with one or more other persons, the minor appears to have a lesser degree of culpability than the codefendants; and (iii) that the minor's role in the offense was not committed in a violent, aggressive, or premeditated manner.” It is exceedingly difficult to prove that the third retention factor applies, since aggravated offenses tend to be violent or aggressive or premeditated.

<sup>5</sup> The SYO Act creates a “strong presumption” that minors who commit SYO offenses should be tried as adults, and makes it clear that amenability to rehabilitation is irrelevant. *In re. A.B.*, 936 P.2d 1091, 1098, 1101 (Utah Ct. App. 1997). When passing the Act, the Legislature knew that “the majority of, if not all, juveniles charged under the serious youth offender statute would be transferred to the district court.” *Id.* at 1101. A transferred defendant will stay in district court unless acquitted, and any future charges will be handled in the adult system. Utah Code § 78A-6-702(10)(11).

Sometimes defendants try to avoid transfer by approaching the prosecutor to seek a juvenile court resolution under which the prosecutor would agree to amend the charge and keep the defendant in the juvenile justice system provided the juvenile court disposition would be sufficiently stringent to protect the community. Once the prosecution prevails at the SYO preliminary hearing, though, it is far too late to attempt such a resolution.

<sup>6</sup> Utah Code § 78A-6-702(5) (“[a]t the time of bind over to district court a criminal warrant of arrest shall issue”). At this point the defendant goes to jail. In 2010, Utah Code §§ 62A-7-201 and 78A-6-702 were amended to make this even more clear (but note that if a transferred defendant has an older, pre-SYO offense in juvenile court, the juvenile judge could have the defendant held in juvenile detention on that older offense if the defendant bails out of jail on the SYO crime). If the defendant somehow escapes bindover, the juvenile court either orders the defendant held for trial as a minor and will proceed on the information as if it were a petition, Utah Code § 78A-6-702(5) and Utah R. Juv. P. 23A(g) (applicable if the court finds that the minor committed the offense but also finds that the retention factors apply), or will dismiss the information and discharge the minor, Utah R. Juv. P. 22(k) (applicable if there is no probable cause; note that under this rule dismissal “does not preclude the state from instituting a subsequent prosecution for the same offense.”).

<sup>7</sup> 896 P.2d 1226 (Utah 1995) (stating that the bindover standard “is lower, even, than a preponderance of evidence standard applicable to civil cases.”).

<sup>8</sup> 2001 UT 9, 20 P.3d 300.

<sup>9</sup> The court in *Clark* first made this general observation about the purpose of preliminary hearings and about the magistrate's role:

To bind a defendant over for trial, the State must show “probable cause” at a preliminary hearing by “present[ing] sufficient evidence to establish that ‘the crime charged has been committed and that the defendant committed it.’” *State v. Pledger*, 896 P.2d 1226, 1229 (Utah 1995) (quoting Utah R. Crim. P. 7(h)(2)). At this stage of the proceeding, “the evidence required [to show probable

The State must present enough evidence to support a reasonable belief that an offense was committed and that the defendant committed the offense.

The *Clark* court also made it clear that when there are disputes about evidence, the magistrate must view the evidence and all reasonable inferences that can be drawn from it in the light most favorable to the prosecution.<sup>10</sup>

In addition, the court noted the Utah Constitution's provision allowing use of reliable hearsay at preliminary hearings, as defined by statute or rule.<sup>11</sup> In 1999, Utah Rule of Evidence 1102 was created, which specifically allows—among other things—use at preliminary hearings of written witness statements in lieu of testimony, provided those statements are made under oath or affirmation, or with a warning that a false statement is punishable.<sup>12</sup>

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cause] . . . is relatively low because the assumption is that the prosecution's case will only get stronger as the investigation continues." *Evans v. State*, 963 P.2d 177, 182 (Utah 1998) (citing *Pledger*, 896 P.2d at 1229). Accordingly, "[w]hen faced with conflicting evidence, the magistrate may not sift or weigh the evidence . . . but must leave those tasks 'to the fact finder at trial.'" *State v. Hester*, 2000 UT App 159, ¶ 7, 3 P.3d 725 (quoting *State v. Wells*, 1999 UT 27, ¶ 2, 977 P.2d 1192). Instead, "[t]he magistrate must view all evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution." *Id.* (citing *Pledger*, 896 P.2d at 1229). Yet, "[t]he magistrate's role in this process, while limited, is not that of a rubber stamp for the prosecution. . . . Even with this limited role, the magistrate must attempt to ensure that all 'groundless and improvident prosecutions' are ferreted out no later than the preliminary hearing." *Id.* (quoting *State v. Anderson*, 612 P.2d 778, 783-84 (Utah 1980)).

*Id.* at ¶ 10.

Next, the *Clark* court reviewed the various approaches taken to describe the quantum of evidence required for bindover, and determined that the State must meet the same probable cause standard applicable to arrest warrants. *Id.* at ¶ 10; *see also State v. Hawatmeh*, 2001 UT 51, ¶ 15, 26 P.3d 223 (stating "[r]ecently, in *State v. Clark*, we specified that at the preliminary hearing stage, the magistrate should apply the same probable cause standard as that applied at the arrest warrant stage." (footnote omitted)). The court called this a "reasonable belief" standard. *Clark* at ¶ 12 ("the prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it."). This standard is lower than the *Pledger* standard. *Id.* at ¶¶ 12, 15, 16.

<sup>10</sup> *Clark* at ¶ 20; *see also Hawatmeh* at ¶ 20 ("[i]n making our determination, we '[v]iew[] the evidence, and all reasonable inferences drawn therefrom, in a light most favorable to the prosecution.'" (citation to *Clark* omitted)). Note that in *State v. Virgin*, 2006 UT 29, 137 P.3d 787, the *Virgin* court addressed the question of whether, given the requirement that magistrates resolve conflicting evidence in the prosecution's favor, magistrates can make credibility determinations: "magistrates' ability to make credibility determinations is not limited to only disregarding testimony that cannot possibly be true . . . when evidence becomes so contradictory, inconsistent, or unbelievable that it is unreasonable to base belief of an element of the prosecutor's claim on that evidence, magistrates need not give credence to that evidence."

<sup>11</sup> *Clark* at ¶ 16 n.3; *see Utah Const. art I, § 12* ("[n]othing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause"); *see also Utah R.Crim.P. 7(h)(2)* (allowing the magistrate's finding to be "based on use of hearsay in whole or in part"), and *Utah R. Juv. P. 22(j)* (stating that "[t]he finding of probable cause may be based on hearsay in whole or in part" and adding that "[o]bjections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination").

<sup>12</sup> Rule 1102 states that "[r]eliable hearsay is admissible at criminal preliminary examinations," and then provides a list of the sort of things that constitute reliable hearsay, which includes "(8) a statement of a declarant that is written, recorded, or transcribed verbatim which is: (A) under oath or affirmation; or (B) pursuant to a notification to the declarant that a false statement made therein is punishable." Utah Code § 76-8-504.5 was created to provide the form of the warning and the penalty. The police now commonly provide witness forms with the statutory warnings printed on the forms, so that those statements can be used at preliminary hearings without the State having to bring in

The Utah Constitution's article I, section 12 provision now also limits the reach of earlier case law that was sometimes used by defense attorneys to try to turn preliminary hearings into discovery gathering devices. Section 12 expressly states that "the function of [the preliminary hearing] is limited to determining whether probable cause exists unless otherwise provided by statute."

Once probable cause is shown, the second part of the proceedings begins, in which the defendant can attempt to prove by clear and convincing evidence that all of the retention factors apply. This is difficult to do successfully. Consequently, defense attorneys tend to dislike the Serious Youth Offender Act. However, all attacks on the constitutionality of the Act have been rebuffed by the courts. The existing case law on the Act tends to focus on application of the retention factors.<sup>13</sup>

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the witness. Some of the other kinds of reliable hearsay admissible under Rule 1102 in preliminary hearings include lab reports, medical records, and statements of non-testifying police officers made to the testifying police officer. If it turns out that the hearsay evidence is insufficient for bindover, or if the defendant convinces the magistrate that the defendant is substantially disadvantaged by the hearsay, Rule 1102(c) allows the preliminary hearing to be continued to allow production of more reliable hearsay or of live witnesses.

<sup>13</sup> Among other things, defendants have complained about having to assume the burden of proving that the retention factors apply to them. However, the *In re. A.B.* decision noted that although it may be "difficult" to prove the retention factors without self-incrimination, that fact does not violate any rights: "the right against self-incrimination protects accused persons from compelled self-incrimination, not from hard choices." *In re. A.B.* at 1100-01. In addition, requiring a defendant to undertake the difficult task of proving the retention factors does not violate any fundamental right, as "the right to a juvenile court proceeding is not fundamental." *Id.* at 1100. *In Re. Z.R.S.*, 951 P.2d 1114 (Utah Ct. App. 1998) (per curiam), elaborated on the third retention factor, making it clear that although the factor conceivably provides a means for retention, applying it to a case does not involve any kind of balancing test. *Id.* at 1116. For more discussion of the retention factors, see *In re M.E.P.*, 2005 UT 227, 114 P.3d 596 (approving transfer of a minor who was sent to the adult system because during a convenience store beer theft, a co-defendant punched a clerk). (Although in *State ex rel. W.H.V.*, 2007 UT App 239, 164 P.3d 1279, the Utah Court of Appeals discussed the premeditation aspect of the third retention factor, it included dicta that could be misinterpreted as saying that in *State v. Lara*, 2005 UT 70, 124 P.3d 243, it said that the third retention factor weighs the violence and aggression aspects of that factor relative to the conduct of co-defendants. *Lara* ultimately went before the Utah Supreme Court, which did not discuss any retention factors in its *Lara* decision, it only discussed a right to appeal issue. The Utah Court of Appeals decision below in *Lara* had discussed the second retention factor, relative culpability. 2003 UT App 318, 79 P.3d 951. In *In re M.E.P.*, the Utah Court of Appeals clarified *Lara*, stating that the plain language of the Serious Youth Offender Act does not require that the crime in question be more violent or aggressive than the violence inherent in the offense itself, to qualify for transfer.) *Houskeeper v. State*, 2008 UT 78, 616 Utah Adv. Rep. 35, found ineffective assistance of counsel in a case where a defense attorney supposedly did not try hard enough to establish that the retention factors applied, and that decision may prompt defense attorneys to call more witnesses to SYO hearings.