

2016

State of Utah, Petitioner/ Appellee, v. Supreme Court Case No. 20170304 Court of Appeals Case No. 20140602-Ca District Court Case No. 131902542 Juvenile Court Case No. 1003447 Cooper John Anthony Van Huizen, Respondent/ Appellant.

Utah Supreme Court

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Petitioner/Appellee,

v.

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HUIZEN,

Respondent/Appellant.

Supreme Court Case No. 20170304
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District Court Case No. 131902542
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BRIEF OF RESPONDENT

This is the respondent's brief to the State's opening brief on certiorari to the Utah Court of Appeals.

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JURISDICTION

Utah Code Ann. § 78A-3-102(3)(i) and (5) provide the Court's jurisdiction over the juvenile court's rulings and the court of appeals' decision.

ISSUES PRESENTED, STANDARDS OF REVIEW, AND PRESERVATION

1. Are Van Huizen's preservation and prejudice analyses correct?

This Court reviews the court of appeals' legal analysis for correctness. E.g. D.J. Inv. Group, LLC v. DAE/Westbrook, LLC, 2006 UT 62, ¶10, 147 P.3d 414.

The court of appeals reached these issues that are thus preserved. See, e.g. State v. Hansen, 2002 UT 114, ¶ 16, 61 P.3d 1062.

2. Was counsel ineffective during the Serious Youth Offender preliminary hearing?

This Court addresses claims of ineffective assistance of counsel not ruled on by lower courts as matters of law. E.g., State v. Ellifritz, 835 P.2d 170, 175 (Utah App. 1992).

3. Do the juvenile court's misinterpretations of the Serious Youth Offender statute constitute plain error and establish prejudice from the failure to self-recuse?

The juvenile court's statutory interpretations and applications of the Serious Youth Offender Act are legal conclusions entitled to no deference on appeal. E.g. In re F.L., 2015 UT App 224, ¶17, 359 P.3d 693.

The plain error doctrine requires proof of an obvious and prejudicial error, and provides relief from less obvious but highly prejudicial errors. See, e.g. State v. Eldredge, 773 P.2d 29, 35 n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

Issues 2 and 3 were raised in the adult district court after sentencing (R. 80-99, 110-112, 219-235, 414-456, 472-92, 508-524). The district court refused to hold a hearing or reach the merits of the claims (R. 464-65, 586-98).

DETERMINATIVE STATUTE AND RULES

Utah Code Ann. §78a-6-702 (2013), Utah Code Jud. Admin R. 1.2 and 2.11.

SUMMARY OF ARGUMENTS

Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252 (Utah 1992), and State v. Van Huizen, 2017 UT App 30, 392 P.3d 933, correctly hold it is the duty of our judges to protect the integrity of our judicial system by identifying the judges' relationships that might pose conflicts of interest and require their disqualification.

Reichert, at 257 n.7; Van Huizen, ¶ 17.

Van Huizen correctly applied In re D.B., 2012 UT 65, ¶ 34, 289 P.3d 459, a case decided under the exceptional circumstances doctrine, in ruling that because Cooper was not aware of the juvenile court judge's marriage to the Chief Deputy of the Criminal Division of the prosecuting office in time to move for disqualification, Cooper would not be faulted for failing to preserve the disqualification issue. Van Huizen, ¶ 50 n.15.

The court correctly applied Reichert, in granting relief absent a traditional showing of prejudice. The court recognized that the burden did not shift to Cooper to establish prejudice on appeal under State v. Neeley, 748 P.2d 1091, 1094 (Utah 1988), and State v. Alonzo, 973 P.2d 975, 979 (Utah 1998), because Cooper was unaware of and thus had no opportunity to raise the disqualification issue through the Rule 29 disqualification process, wherein a reviewing judge would have vetted the disqualification issue. Van Huizen at ¶¶ 53-56. The court properly applied Reichert because the bindover decision was made solely by the judge and did not have a jury or intervening decision maker to ameliorate the effects of any partiality of the judge. Van Huizen at ¶¶ 57-59, 63-64.

Plain errors in the bindover order provide alternate bases for affirmance and establish prejudice from the court's failure to self-recuse.

Ineffective assistance of counsel at the SYO preliminary hearing provides alternative bases for affirmance of the reversal of the bindover order. Trial counsel's performance was objectively deficient, as counsel failed to prepare and advocate

properly in the SYO preliminary hearing. Counsel failed to investigate the facts and the law, and did not inform the court that the SYO statute changed drastically in juveniles' favor over seven months prior to Cooper's SYO preliminary hearing. His omissions were not conceivably reasonably strategic. There is a reasonable likelihood of a more favorable result absent counsel's objectively deficient performance.

Individually and cumulatively,¹ the foregoing errors justify affirmance.

ARGUMENTS

I. VAN HUIZEN IS CORRECTLY DECIDED.

A. VAN HUIZEN SQUARES WITH THIS COURT'S PRECEDENTS ON PRESERVATION.

1. Van Huizen Correctly Applies D.B.

The preservation requirement ensures that trial courts have the opportunity to correct errors prior to appeal, and prevents parties from taking advantage on appeal of claims they opted not to raise in the trial courts. E.g. Scott v. Scott, 2017 UT 66, ¶ 15, ___ P.3d ___. Neither function would be served by applying the preservation rule to Cooper's failure to move to disqualify the judge, because Cooper was unaware of and the court did not disclose her marriage to the Chief Criminal Deputy of the prosecuting office in time for Cooper to move for the judge's disqualification (R. 428, 657, 659-662).

¹ The cumulative error doctrine involves consideration of all identified and assumed errors, and requires reversal if the errors undermine the Court's confidence in the fairness of the proceedings. See, e.g., State v. Bair, 2012 UT App 106, ¶ 13, 275 P.3d 1050.

The State faults the court of appeals for not applying the preservation rule. State's brief at 17-32. It fails to acknowledge that Van Huizen is applying In re D.B., 2012 UT 65, ¶ 34, 289 P.3d 459, in holding the general burden to preserve the disqualification claim is not fairly cast on Cooper, because he did not have notice of the disqualifying facts, and thus had no opportunity to raise the disqualification claim in juvenile court. Van Huizen, 2017 UT App 30, ¶¶ 6, 37, 50 and 56 and nn. 12, 15 and 19. As this Court acknowledged in State v. Johnson, 2017 UT 70, D.B. is properly read as an example of the Court's utilizing the exceptional circumstances doctrine to avert manifest injustice to remedy an error that arose in the lower court's final judgment, a rare procedural anomaly wherein D.B. had no opportunity to object and preserve his claim in the lower court. Id. at ¶ 34. D.B. and the cases cited therein hold that a party is not fairly expected to have objected to legal errors that arose when the party had no opportunity to object. See D.B., 2012 UT 65 at ¶ 17 and n.2 (discussing exceptional circumstances doctrine) and at ¶¶ 34-35 (holding juvenile was not required to preserve claim of error in court's imposition of accomplice liability because juvenile had no notice or opportunity to object to the error that arose for the first time in court's final order; citing similar cases).

The rationale of D.B. applies here, as the court of appeals correctly found that Cooper was not aware of the judge's marriage to the Chief Criminal Deputy until after Cooper was bound over to district court (R. 428, 657, 659-662). Compare D.B. (juvenile was not aware of objectionable ruling until weeks after it issued). Cooper's learning of the issue when it was too late to object constitutes a rare procedural

anomaly that justifies relieving him of the preservation requirement, particularly given the manifest injustice that otherwise would result, and significant constitutional rights and liberty interest at stake.² See Johnson, ¶ 37 (exceptional circumstances doctrine allows courts to relieve parties of preservation requirement to avert manifest injustice, protect constitutional rights and liberty interests, and serve interests in judicial economy when rare procedural anomalies arise).

2. The Record Shows the Juvenile Judge and Juvenile Defense Counsel Were Not Acquainted.

In discussing the preservation issue, the State asserts its factually erroneous and oft-repeated claim that the juvenile court may have known that Cooper's juvenile court counsel knew of her marriage to the Chief Deputy of the Criminal Division of the Weber County Attorney's Office, thus alleviating the duty to disclose. State's brief at 2, 12, 15, 21, 24, 30, 31, 32, 35, 36.

The judge had no reason to know that Cooper's juvenile court counsel was aware of her marriage, as the judge and Cooper's lawyer were not acquainted. Juvenile counsel Rex Bray entered his appearance in the Weber County Juvenile

²A child's liberty interest is at stake in proceedings designed to move the child from the juvenile to the adult system. State v. Angilau, 2011 UT 3, ¶ 15, 245 P.3d 745. Given that children prosecuted in adult court may be housed and endangered in adult facilities, life may also be at stake. See, e.g., Katz Levi, "State v. Mohi: State Sanctioned Abuse," 10 Journal of Law and Family Studies 173, 174-76 and accompanying notes (2007) (explaining how incarcerating children in adult jails endangers children, and increases the risk of suicide).

The service of an impartial and competent judge is required by Due Process Clause of the federal constitution and Article I § 12 of the Utah Constitution. Caperton v. A.C. Massey, Inc., 556 U.S. 868 (2009); Arizona v. Fulminante, 499 U.S. 279, 309-310 (1991); Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945).

Court in Ogden, listing his Sandy office address, on November 13, 2013. The first time he appeared before the juvenile court, when he told the judge his name, she responded, “I’m sorry?” and then he restated his name and spelled his last name for her and then she thanked him (T. 11/19/13: 2). When they were scheduling preliminary hearing, Mr. Bray informed the court he was coming from Draper in Salt Lake County (T. 11/19/13: 8). When the court asked Mr. Bray his position on detention, she did not address him by name, but addressed him, “Sir – Counsel” (T. 11/19/13: 10). Mr. Bray did not attend the four detention hearings that followed the November 19 hearing before the preliminary hearing (T. 11/25/13; 12/2/13; 12/9/13; 12/10/13). At preliminary hearing, the court accidentally addressed Mr. Bray as Mr. Van Huizen (PH 118). This record disposes of the State’s repeated assertions that the judge may have had no duty to disclose her marriage as she had reason to know that Cooper’s counsel was aware of the marriage.

The State incorrectly asserts the court of appeals “surmised the juvenile court likely presumed that Defendant’s counsel was aware of the relationship.” State’s brief at 10. Van Huizen indicates the juvenile court judge may have assumed counsel’s awareness but could not legally have rested on this assumption, as it was Cooper’s decision whether to assert the disqualification issue. Id. at ¶37 n.11.

3. Cooper Is Not Bound by his Attorney’s Unknowing Purported Waiver.

The State incorrectly contends that Cooper should be bound on a theory of agency by his lawyer’s failure to raise the disqualification issue. State’s brief at 21.

No agency theory would apply in this criminal case wherein it would have been ineffective assistance of counsel had counsel knowingly forfeited Cooper's right to move for disqualification. Cf., e.g., Menzies v. Galetka, 2006 UT 81, ¶ 77, 150 P.3d 480 (finding agency theory does not apply when an attorney in a capital post-conviction case commits ineffective assistance of counsel). A criminal defense attorney's forfeiture of a client's rights is not properly treated as a knowing and intelligent or constitutionally valid waiver of the rights by the client. See, e.g., State v. Pedockie, 2006 UT 28, ¶ 31, 137 P.3d 716.

The State notes that Elizabeth Hunt did not raise a claim of ineffective assistance against Mr. Bray for not moving to disqualify the judge, State's brief at 18 n.3. As Mr. Bray was not acquainted with the judge and the judge did not disclose her marriage (e.g. T. 11/19/13: 2, PH 118), there is no factual basis for such a claim.

B. VAN HUIZEN SQUARES WITH THIS COURT'S PRECEDENTS ON PREJUDICE.

1. The State's Factual Positions are Incorrect.

The State's argument as to the inapplicability of Reichert hinges on its factually incorrect positions that the juvenile judge may have had reason to believe that Cooper's juvenile court counsel was aware of her marriage to the Chief Criminal Deputy, alleviating the need to disclose the disqualifying facts, and that the judge's husband was screened from participation in Cooper's case. State's brief at 35-37. The judge had no reason to think Cooper's lawyer knew of her marriage; the lawyer and judge were not acquainted (T. 11/19/13: 2-10).

The record shows the Chief Criminal Deputy was acting as a lawyer on the case at least in the adult court proceedings (R. 635, docket entries on 5/21/14, R. 523). The Chief Criminal Deputy contacted Elizabeth Hunt to address Cooper's case on Weber County Attorney Dee Smith's behalf on May 19, 2014, after Hunt began contacting Mr. Smith and the juvenile court prosecutor Brody Flint in efforts to settle the case and obtain discovery (R. 523).

Page 8 of the district court docket also shows on May 21, 2015, the Chief Deputy ordered recordings of the hearings on March 19, 2014 and May 7, 2014 (R. 635, docket entries on 5/21/14).³ The State argues incorrectly that the Chief Deputy requested the copies of the proceedings only in response to Hunt's document requests, State's brief at 13, 24, and 26. Hunt had the hearings transcribed by May 18, 2014, three days before the Chief Deputy ordered the recordings on May 21, 2014, and cited the transcripts in her memoranda filed on May 19, 2014. See R. 627 (reporter's certificate for two transcripts); R. 82-92, 102-112 (memoranda citing transcripts). Contrary to page 26 of the State's brief, when Hunt asserted in the opening brief in the court of appeals that the judge's husband ordered portions of the

³ The court of appeals erroneously indicated it was the same day the juvenile judge signed the bindover order that the Chief Deputy ordered digital copies of proceedings. Van Huizen, ¶ 37. The record shows the judge signed the bindover order roughly four months before the Chief Deputy ordered recordings (R. 28-31, R. 635, docket entries on 5/21/14). The State emphasizes this error, State's brief at 14, 26, but does establish its materiality. Regardless of when the Chief Deputy ordered the records, and particularly because he was the attorney who first contacted Hunt on behalf of the Weber County Attorney (R. 523), his involvement confirms he was an attorney working on and in the chain of command in Cooper's case, who was not screened from his wife's cases. Van Huizen, ¶ 40.

record after Hunt began challenging Cooper's convictions, Hunt described the order of events and did not concede that the judge's husband ordered the records in response to her request.

The assertion in the record that the Chief Deputy had no supervisory role or involvement in the juvenile court portion of the case, State's brief at 8-9, 11, 16, 24-25, 29, is not "evidence" as the State claims on page 25 of its brief. It appears in an unsworn argument of the juvenile court prosecutor (R. 505) that was unsupported by a declaration, even after the absence of supporting evidence was raised (R. 515).

The record disproves the State's assorted positions that the record shows that the Chief Deputy was mostly likely screened from this case, most likely would not have been involved in this case, was not involved in the case, and had nothing to do with this case, State's brief at 2, 11, 12-13, 22, 24, 27, 29, 30, and 36.

2. Van Huizen Properly Applies Reichert, which Should Not Be Overruled.

The State contends that under Van Huizen and Reichert, litigants will be encouraged to take unfair advantage on appeal by sitting silent when their cases are presided over by unqualified judges. State's brief at 15-17, 33, 38-40. Reichert remains controlling, as the State does not ask the Court to overrule it, cf. e.g. MAA Prospector v. Palmer, 2017 UT 68, ¶¶ 18-19, ___ P.3d ___ (declining to revisit precedent left unaddressed by party who did not ask for overruling), or carry the heavy burden to justify overruling this precedent, e.g., State v. Menzies, 889 P.2d 393,

398 (Utah 1994) (under *stare decisis*, this Court has authority to overrule its precedents if the Court is clearly convinced the precedent was erroneous when decided).

The State's concern is inapposite to both cases, as Cooper and Mr. Reichert were not aware of the disqualifying facts in time to move for disqualification or make a reckless and expensive tactical decision to proceed with an ostensibly partial judge to plant error for appeal. No party can take unfair advantage of an error they do not know about, particularly if judges do their duties to disclose disqualifying facts and/or recuse themselves. Reichert and Van Huizen correctly apply well-established Utah law requiring our judges, rather than unknowing litigants or their counsel, to scrupulously protect the appearance of our justice system by passing on the cases wherein their impartiality is reasonably subject to question. E.g., State v. Neeley, 748 P.2d 1091, 1094 (Utah 1988) ("a judge *should* recuse himself when his "impartiality" might reasonably be questioned. ... the integrity of the judicial system should be protected against any taint of suspicion."), cert. denied, 497 U.S. 1220 (1988).

The State seeks to distinguish Reichert, because it only remanded for re-argument before a different panel of the court of appeals, whereas Van Huizen purportedly undoes an entire criminal prosecution. State's brief at 37. Van Huizen ordered a new SYO preliminary hearing. If Cooper does not prevail, his pleas, convictions and sentence in adult court stand. Van Huizen at ¶ 65. Regardless of whether he prevails, he has served his entire prison sentence. Id. at ¶ 9.

The State observes that a court's violation of the Code of Judicial Conduct does not justify reversal of a criminal conviction, particularly when the record shows the defendant was not prejudiced. State's brief at 40-41.

Van Huizen recognizes that a judge's violation of disqualification law does not necessarily justify a new trial. Id. at ¶ 51. As the court first reasoned, the line of disqualification cases requiring proof of prejudice are appeals imposing this burden after Utah R. Crim. P. 29 procedures in the trial courts, wherein known causes for disqualification are presumably adjudicated properly by original judges and then further vetted by neutral reviewing district judges before appeal. See id. at ¶¶ 51-56, discussing Neeley; Alonzo; and State v. Gardner, 789 P.2d 273, 278 (Utah 1989). The court of appeals' reasoning is entirely consistent with Alonzo, 973 P.2d at 979, and Neeley, 948 P.2d at 1094-95, wherein this Court held that once rule 29 procedures have occurred, the burden shifts to the defendant to prove prejudice.

The Van Huizen court contrasted the Rule 29 cases with Reichert, wherein this Court reversed the decision of the court of appeals without a showing of prejudice, as a result of an undisclosed and disqualifying relationship between a court of appeals judge and two attorneys not involved in the appeal, who were working for the firm involved in the appeal and related to the judge by marriage. The Van Huizen court reasoned that in Reichert and Van Huizen, it was proper to abstain from requiring proof of prejudice, because the disqualifying facts came to light after rule 29 disqualification procedures were available, and thus, there was no layered district court consideration of the need for disqualification by the original and reviewing

judges prior to appeal, as is normally provided in Rule 29 proceedings. Van Huizen at ¶¶ 52-56, 58-59. The State does not address or dispute this reasoning.

The Van Huizen court next correctly reasoned that prejudice must be shown for failure to disqualify in cases such as Alonzo, Neeley and Gardner, wherein the rule 29 procedures occurred and the ultimate decision was made by jurors, who insulated the ultimate result from the apparent bias of the judges. See, id. at ¶¶ 57-58. In cases such as Reichert and Van Huizen, there was no independent decision-maker to insulate the ultimate result from the courts' apparent bias. Id. at ¶¶ 57-59. Similar to the judge in Reichert who participated in the ultimate decision of the court of appeals, Cooper's juvenile court judge made an independent factual and legal inquiry that resulted in the dispositive order sending Cooper from the protections of the juvenile court and into the adult system. Van Huizen at ¶ 58. As there was only one decision maker, and her husband was not screened from but was involved in this case at least following the bindover, the risk of effect from the disqualifying facts was greater than in Reichert, where only one judge on a three judge panel was related by marriage to attorneys who were not involved in the appeal but were part of a firm involved in the appeal.

The State contends incorrectly that Van Huizen reversed the bindover order despite finding the failure to recuse harmless, State's brief at 16. Van Huizen distinguished the cases such as Gardner finding judicial disqualification errors harmless. Van Huizen, ¶51. Van Huizen abstained from conducting a harmless error analysis, because there was no Rule 29 vetting process, given the highly

discretionary and fact intensive nature of the bindover decision made solely by the juvenile court judge, and in light of the absence of a jury to insulate the case from the effects of the apparent bias of the decision-maker. See *id.* ¶¶ 52-62.

Because Van Huizen squares with this Court's precedents on judicial disqualification and prejudice, the Court should affirm it.

C. THE COURT SHOULD NOT ADDRESS, OR SHOULD REJECT THE STATE'S CHALLENGES TO THE SUBSTANTIVE ISSUE OF THE NEED FOR THE JUDGE TO DISCLOSE THE MARRIAGE OR RECUSE HERSELF.

1. The State's Arguments Exceed the Grant of Certiorari and Misstate the Court of Appeals' Decision.

In addressing the preservation issue, the State argues as if Van Huizen justified its preservation analysis with its substantive ruling that Rule 2.11 of the Utah Code of Judicial Conduct required the judge to disclose her marriage or recuse herself, given her husband's involvement in the case. The State then argues that the judge was not plainly required to disclose the marriage or recuse, as the record does not truly show that the judge's husband was involved in Cooper's case. State's brief at 20, 22-30 citing ¶¶ 37, 48, 50 and n.15 of Van Huizen.

The Van Huizen court's preservation analysis appears in one footnote and does not encompass the substantive issue of whether the judge had a duty to recuse or disclose her marriage under Rule 2.11. Van Huizen, ¶ 50 n.15.

This Court's order granting certiorari does not allow for this issue to be raised by the State. See Court's Order granting certiorari dated 7/5/17, in the addendum.

This Court should protect its authority to select issues for certiorari review and disallow efforts to usurp it in violation of the rules of appellate procedure requiring parties to petition for permission to raise issues on certiorari, e.g., Utah R. App. P. 45-49. See DeBry v. Noble, 889 P.2d 428, 443 (Utah 1995)(rejecting petitioner's claim outside grant of certiorari).

While he maintains the Court should not address the State's unpermitted arguments, out of an abundance of caution, Cooper responds.

2. The State's Arguments Are Factually and Legally Incorrect.

The State repeatedly argues that the court of appeals acted contrarily to the record and on the unfounded the assumption that the juvenile judge's husband was involved in and in the chain of command in this case. State's brief at 2, 11, 12-13, 22, 24, 27, 29, 30, 36. The court actually recognized that the Chief Deputy gave at least some assistance to the juvenile court prosecutor. Id. at ¶¶ 9, 37, 40. As detailed above, the judge's husband did participate in Cooper's case at least in adult court (R. 523, R. 635, docket entries on 5/21/14).

The State argues that the Chief Deputy of the Criminal Division of the Weber County Attorney's Office was not "an officer, director, general partner, managing member, or trustee of a party" because he has no financial interest in the success of the Weber County Attorney's Office. State's brief at 27. Assuming the relevance of his financial interests, the Chief Deputy's position and employment were ostensibly contingent on the effectiveness of his work as the Chief Deputy.

Of greater importance, the focus of Rule 2.11 is not on the interests of the people to whom the judge is tied, it is on the appearance of our judicial system. The judge's husband, as the Chief Deputy of the Criminal Division, ostensibly to the public was an officer, manager or director in a powerful position over any criminal case prosecuted by the Weber County Attorney's Office, and the public court record shows his involvement in the case (R. 635, docket entries on 5/21/14). The judge presiding over a juvenile case wherein the Weber County Attorney's Office's goal was to move the juvenile to the adult system for adult prosecution and incarceration, who was married to the Chief Deputy of the Criminal Division, who was not screened from her cases, should have passed the case to another judge, to protect public confidence in the fairness of these important proceedings. See Rule 2.11 and commentary. The Chief Deputy's titled position falls within the plain language of (A)(2)(a).⁴ The judge's husband's position as the Chief Deputy of the Criminal Division is at least sufficiently analogous to the listed examples to require recusal under the non-exclusive language of 2.11, as the judge's impartiality might reasonably be questioned by virtue of her marriage to the Chief Deputy of the Criminal Division.

Contrary to page 29 of the State's brief, the record shows that the judge's

⁴ The Van Huizen court correctly noted that the term officer applies to government employees, but was uncertain as to its application because of uncertainty of whether the Chief Deputy was elected or appointed. Id. at ¶ 25-26. The code indicates that deputy attorneys are employed or deputized by county attorneys, Utah Code Ann. § 17-18a-602, and makes no mention of electing deputies. As the rule does not distinguish between elected and appointed officers, and the goal is to protect the appearance of our justice system, judges are properly encouraged to recuse if they have qualifying relationships to people in specified or similar positions.

husband had more than a *de minimis* interest in the case.⁵ He was one of the prosecuting party's lawyers and acting as a lawyer in this case at least after his wife issued the bindover order and after Cooper began challenging his convictions and sentences (R. 635, docket entries on 5/21/14, R. 523). This required recusal or disclosure under 2.11(A), (A)(1), (A)(2)(b) and (A)(2)(c). See Van Huizen at ¶ 27 (recognizing rule 2.11(A)(2)(b) and (c) seem applicable).

The State's argument that the judge's husband was not a party to the proceeding under (A)(2)(a) of Rule 2.11, State's brief at 27, is not explained. This Court should not address it. State v. Nelson, 355 P.3d 1031, ¶40, 2015 UT 62 (declining to address inadequately briefed issue).

This Court should leave undisturbed Van Huizen's holdings that reversal of the bindover order is required under Rules 1.2 and 2.11 as a result of the judge's marriage to the Chief Deputy of the Criminal Division, which gave rise to a reasonable question of partiality, and the court's unfulfilled duty to disclose the facts or self-recuse.

II. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SERIOUS YOUTH OFFENDER PRELIMINARY HEARING

⁵ The terminology definition in the Code of Judicial Conduct reflects:
"De minimis," in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality. See Rule 2.11.

The right to effective assistance of counsel applies when children are being prosecuted in SYO preliminary hearings, wherein they are at risk of being transferred to the adult system. E.g., Houskeeper v. State, 2008 UT 78, ¶¶ 38-40, 197 P.3d 636. To establish ineffective assistance, Cooper must specify acts or omissions that were objectively unreasonable. Strickland v. Washington, 466 U.S. 668, 687-88, 690 (1984). He must overcome the presumption that counsel's strategies were "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Thorough investigation of the facts and law are prerequisite to formulation of sound strategy, and essential to a constitutionally adequate defense. Strickland, 466 U.S. at 690; State v. J.A.L., 2011 UT 27, ¶ 27, 262 P.3d 1. Trial lawyers must properly preserve all issues. See, e.g., State v. Smedley, 2003 UT App 79 at ¶ 10, 67 P.3d 1005. When counsel fail to assert beneficial, current law, this objectively deficient performance will not be excused with hypothetical tactical reasons. See, State v. Moritzsky, 771 P.2d 688, 692 (Utah App. 1989). To show prejudice, Cooper must show with less than a preponderance of the evidence a reasonable probability of a more favorable result absent the objectively deficient performance. Strickland at 694.

A. COUNSEL WAS INEFFECTIVE IN FAILING TO
INFORM THE COURT ABOUT THE 2013
AMENDMENTS TO THE SERIOUS YOUTH OFFENDER
STATUTE.

Strickland puts the burden squarely on the shoulders of defense counsel to fully investigate and assert the law governing at the time of Cooper's SYO preliminary hearing. Id. at 690. During Cooper's SYO preliminary hearing on

December 20, 2013, no one mentioned the amendments to the Serious Youth Offender Act that went into effect on May 14, 2013. Prior to the amendments in May of 2013, our juvenile courts had very little discretion to retain minors under the SYO statute. Juveniles bore a “heavy burden” to overcome the presumption that they would transfer to the adult court, and had to show by clear and convincing evidence all of the retention factors: that they were less culpable than co-perpetrators, that their role in the offense was not violent, aggressive or premeditated, and that they had no prior delinquency involving a weapon that would have been a felony offense if an adult had committed it. E.g., Utah Code Ann. § 78A-6-702(3)(b) and (c) (2012); State v. F.L.R., 2006 UT App 294, ¶¶3 and 4, 141 P.3d 601. The rationale behind the pre-2013 version of the SYO statute was that public safety was served by sending young offenders into the adult system, despite the fact that juveniles might benefit from the rehabilitative services of the juvenile court. M.E.P. v. State, 2005 UT App 227, ¶ 14 n. 4, 114 P.3d 596; State ex rel. A.B., 936 P.2d 1091, 1098-99 (Utah App. 1997). Under the pre-2013 version of the SYO statute, courts were not to consider whether juveniles were amenable to rehabilitation. See A.B., *supra*, at 1098.

Under the 2013 amended statute, juvenile courts obtained discretion to retain juveniles based on an ultimate assessment of the juveniles’ and the public’s interest in the juveniles’ remaining in juvenile court. Under the 2013 statute, juveniles no longer bear the burden to prove by clear and convincing evidence all of the subsidiary considerations -- that they had no prior weapons-related adjudications, that their

relative culpability was lower than their co-perpetrators, and that their roles in the offenses were not violent, premeditated and aggressive. Rather, these factors are considered to the degree they may be present, along with the juveniles' prior history or lack thereof in the juvenile courts, and whether retaining them in juvenile court better serves the public safety interest than sending them into the adult system. See 78A-6-702(3) (2013). Considerations such as the juveniles' amenability to treatment, risk of re-offense, and availability of developmentally appropriate treatment in the juvenile system are now subject to consideration under the 2013 amended statute, which factors in whether the public's interest in safety and general interests and the minor's interests are best served by retaining the minors in juvenile court. See Utah Code Ann. § 78A-6-702(3)(b) and (c)(v) (2013).

The 2013 SYO statute added the requirement of ultimate weighing of whether sending the juvenile into the adult system would be contrary to the public interest in general the juvenile's interest in general, Utah Code Ann. § 78A-6-702(3)(b), and added in the list of subsidiary considerations the question of whether the public safety interest is better served by keeping juveniles in juvenile court or sending juveniles into the adult system, and the nature and number of the defendant's prior juvenile court adjudications. § 78A-6-702(3)(c)(iv) and (v).

Under standard rules of statutory construction, statutory amendments are presumed to alter existing legal rights or to clarify previous legislative intentions. E.g., Hercules Inc. v. State Tax Comm'n., 2000 UT App 372, ¶ 13, 21 P.3d 231. The 2013 statutory amendments, requiring retention analysis to weigh the public interest

and the juvenile's interest in retention and to consider the public safety interest, require a full inquiry into the juveniles' risk of re-offense and amenability to rehabilitation in the juvenile system. This is consistent with our constitutional law requiring the important decision of transferring a juvenile to the adult system to be premised on a thorough investigation, made in compliance with statutory directives, and sufficiently detailed to ensure thorough appellate review. E.g., State in re Clatterbuck, 700 P.2d 1076, 1078 (Utah 1985); Kent v. United States, 383 U.S. 541, 553 (1966).

Assuming the statutory amendments were less than clear, our law recognizes when the plain language of statutes does not clearly reflect what the legislature intended, it is appropriate to explore legislative history to clarify legislative intent. See, e.g., Sullivan v. Scouler Grain Company of Utah, 853 P.2d 877, 880 (Utah 1993), superseded by statute on other grounds, Bishop v. GenTec, Inc., 2002 UT 36, ¶ 12, 48 P.3d 218. The legislative history behind the 2013 amendments to the SYO Act confirms the amendments were designed to serve the interests of the public and juveniles in reducing recidivism by having juveniles who are amenable to reform, particularly first time offenders such as Cooper, utilize the resources in the juvenile system, rather than enter the adult system. Given the language of the statutory amendments and essential legislative history, e.g. Sullivan, full inquiry into Cooper's amenability to treatment and low risk of re-offense was essential under the 2013 amendments.

The rationale for the amendments is found in the legislative history for House Bill 105 from the 2013 general session that reflects the SYO statute was amended to increase the discretion of juvenile court judges to retain juveniles, and to decrease the burden of proof on juveniles in the retention phase of SYO preliminary hearings, and thereby reduce the number of juveniles who were being transferred into the adult system without first exhausting the resources of the juvenile system, in order to serve the best interests of both juveniles and the public. See http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=2796&meta_id=76536, (testimony of Jacey Skinner, Director of the Utah Sentencing Commission, before the House Standing Judiciary on February 22, 2013; http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=2864&meta_id=78203 (floor debate commentary by bill sponsor, Representative Lowry Snow); and http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=3146&meta_id=85441 (floor debate commentary by Senator Lyle Hillyard), transcribed in the addendum. The amendments were made to account for the fact that juveniles who are sent into the adult system are frequently released from adult confinement relatively quickly without rehabilitative intervention and resources, and tend to recidivate more frequently and more violently than those retained in the juvenile system. Thus, contrary to prior thought, public safety interests coincide with the juveniles' interests

in juveniles staying in juvenile courts, where they have the benefits of rehabilitative services. See id.⁶

As is detailed herein, counsel's failure to inform the court of the amended law was prejudicial for under the 2013 amendments, Cooper should have remained in juvenile court.

B. COUNSEL WAS INEFFECTIVE IN FAILING TO PREPARE AND PRESENT THE RETENTION CASE.

In Houskeeper, *supra*, the Court held that counsel was objectively deficient in failing to investigate and present expert testimony to the effect that the aggravated sexual assault bound over from the preliminary hearing was not violent or aggressive, id., and that Houskeeper was prejudiced by this, given that the jury who heard the appropriate expert testimony at trial convicted him only of attempted rape. Id. at ¶¶

⁶ Multiple studies document that transferring juveniles into the adult system disservices the interests of the public in safety and the interests of the minors, for in the adult system, minors do not receive the benefits of the age-appropriate rehabilitative services available in juvenile court, and are often released early without effective intervention. This phenomenon, coupled with the housing of impressionable and developing minors with adult offenders, and the stigmatizing effect of adult prosecution, results in increased recidivism, particularly violent recidivism, among juvenile offenders in the adult system, as compared to those who remain in the juvenile system. See, e.g., "Juvenile Transfer Laws: An Effective Deterrent to Delinquency" by Richard Redding in the OJJDP bulletin (2008) (<https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>); "Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Law, With Recommendations for Reform" by the National Center for Juvenile Justice (Nov 2008) (http://www.ncjj.org/PDF/MFC/MFC_Transfer_2008.pdf); "Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court" by Edward Mulvey and Carol Schubert, OJJDP Juvenile Justice Bulletin December 2012 (<http://www.ojjdp.gov/pubs/232932.pdf>); and "The Effectiveness of Declining Juvenile Court Jurisdiction," Washington State Institute for Public Policy, December 2013.

41-51. The Court found prejudice even though Houskeeper did not challenge the fairness of the trial he had in adult court, wherein he was convicted of a lesser offense for which he may have been found delinquent in juvenile court. In finding prejudice, the Court recognized that the juvenile court adjudications would have been subject to expungement, whereas the adult conviction was not, and that in the juvenile system, Houskeeper's best interests would have been the focus of the proceedings, and he would have been eligible for the rehabilitative services. Id.

Cooper's counsel similarly failed to prepare his retention case in the SYO proceedings, and prejudiced Cooper in the same manner with this objectively deficient performance. Under the 2013 amended statute, the retention inquiry was defined by § 78A-6-702(3)(b) and (c). The overarching considerations of the interest of the minor and the public were informed by consideration of

(i) whether the minor has 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) if the offense was committed with one or more other persons, whether the minor appears to have a greater or lesser degree of culpability than the codefendants;

(iii) the extent to which the minor's role in the offense was committed in a violent, aggressive, or premeditated manner;

(iv) the number and nature of the minor's prior adjudications in the juvenile court; and

(v) whether public safety is better served by adjudicating the minor in the juvenile court or in the district court.

Id.

1. Absence Of Qualifying Weapons Related History And Complete Absence of Prior History

Cooper had no prior weapons-related offenses. He no prior adjudications in

the juvenile court. Counsel failed to argue that these separate statutory factors weighed separately and heavily in favor of retention (PH 119).

2. Relative Culpability

Counsel did not assert the law in effect at the time recognizing that the court should compare the behavior of the crime participants, and should not attribute the misconduct of others to Cooper in the relative culpability analysis (PH 119-120).

Compare State v. Lara, 2003 UT App 318, ¶ 28, 79 P.3d 951;⁷ with M.E.P. v. State,

⁷ In Lara, the court reversed the juvenile court's application of the statute in finding that Lara had acted in a violent and aggressive way, because instead of focusing on Lara's actual individual role, the court "focused on the actions of the other participants." ¶ 28. The court recognized that all offenses eligible for prosecution under the SYO statute are by nature violent, and that if a transfer order could be premised on the violent nature of the offenses charged, rather than on the basis of a comparison of the juvenile's behavior vis-à-vis his co-perpetrators, all SYO defendants would be transferred to the adult court. Id. at ¶ 29. The court also reversed the juvenile court's reasoning that Lara was equally culpable with his co-perpetrators unless he could show no involvement in the crime. Id. at ¶ 29. The court explained that if the juvenile were not involved in the crime, he would not have been charged, and that "the relevant inquiry is whether the juvenile is less blameworthy than the codefendants because he was not the initiator or driving force behind the crime, did not use a weapon or threaten the victim, or otherwise played a less active role in the crime." Id. Because Lara had stayed in the back seat of the car while his co-perpetrators perpetrated the robbery and assault, and only drove the victim's car away, the court found that he had carried his burden to show that his role in the offense involved less culpability than that of his co-perpetrators. Id. The court noted that the State had presented no form of conspiracy or aiding such as encouragement. Id. at ¶ 30.

As to premeditation, the court found that Lara's participation was incidental, not premeditated, because the co-perpetrators approached the victim, robbed her of her keys at gunpoint, had her kneel outside her car, looked in the car and then went and talked to Lara and gave him the keys, before Lara walked from the car he was in and got in the victim's truck and drove away, stopping to pick up a co-perpetrator. Id. at ¶¶ 32-33. The court ruled that the facts showed that the other robbers decided that Lara would drive the stolen truck when they realized it had a standard transmission they could not drive, and that his role in the aggravated

2005 UT App 227, 114 P.3d 596;⁸ and State v. F.L.R., 2006 UT App 294, 141 P.3d 601.⁹ This was hugely prejudicial because Cooper's relative culpability was by far the least of the participants', and the court attributed their misconduct to Cooper. See Point III, *infra*.

Cooper was the youngest and second smallest of the defendants,¹⁰ the oldest

robbery was spontaneous, not premeditated. Id. The State petitioned for review of the reinstatement of the appeal on certiorari, and this Court affirmed the court of appeals' opinion. State v. Lara, 2005 UT 70, 124 P.3d 243.

⁸ M.E.P. affirmed the juvenile court's finding that regardless of the fact that the defendant's conduct occurred during horseplay, it was nonetheless violent or aggressive. The defendant was playing with friends who were hitting one another with a computer pad. He grabbed a gun, checked to see that it was not loaded, and then pointed it at and shot his friend, causing serious bodily injury. The Court found M.E.P.'s conduct more akin to that in State ex rel Z.R.S., 951 P.2d 1114 (Utah App. 1998), wherein a juvenile's bindover order was affirmed because the defendant forced his way into a home with a large knife in his possession, and put his hand on the thigh of the eleven year old girl who was home and who felt threatened by this. The court found that M.E.P.'s conduct less like that in State v. Lara, 2003 UT App 318, 79 P.3d 951, wherein the defendant's liability for an aggravated robbery arose when he drove a stolen car away from the victim after his two friends had removed the victim from the car at gunpoint, explaining, he "did not wield a gun or approach the victim." "His liability for the crime was purely as an accomplice. See id. Therefore, we determined that his role in the offense 'was neither violent nor aggressive.'" M.E.P. at ¶ 17. "In Lara, the juvenile was quite removed from the violence and aggression of the underlying offense to which he was an accomplice, and thus his role was not violent or aggressive." M.E.P. at ¶ 19.

⁹ F.L.R. affirmed juvenile court findings that the juvenile failed to show the requisite lack of violence and aggression, because the juvenile had a gun in his pocket and conducted a robbery by telling the victim he was armed, being in close proximity to her, blocking her from getting in her car, and taking her property. The court compared the facts of F.L.R. to those in Lara, wherein Lara sat in the car while his co-perpetrators committed the armed robbery, and only drove the stolen car away. F.L.R., ¶7.

¹⁰ Cooper was 16 years 4 months old, 5'11" tall and weighed 150 pounds (R. 160). Wesley Brown was 18 years 10 months old, 6'2" tall, and weighed 217 pounds (R.

of whom, Wesley Brown and Dexter Skinner, had multiple felony cases pending (e.g. R. 167-69; R. 170-72). Skinner had schemed by text messages with Joshua Dutson the day before the robbery to “grab them straps” (Cooper’s father’s guns) and rob some people, while, in a separate text message conversation wherein Joshua claimed to be “high” and appeared to be joking, Joshua invited Cooper to rob some people (R. 295-96, 450). The next day, after Cooper was driven to Skinner by Tomek Perkins and did not bring the guns, Skinner and the others took Cooper back to his father’s house to retrieve the guns and commit the robbery that Wesley had planned (R. 295-96, 450). Christian Davidson identified Skinner as the person who had his gun out by his side when the robbers forced their way into the home, and who threatened to pop a cap (shoot him) if Christian did not let them in (R. 247-49, 251 253, 260, 261). During the robbery that followed the amicable conversation in the basement about Dexter’s or Wesley’s gun supposedly having bodies on it (people who had been killed buy it), Christian said that Dexter was the first one to point his gun at Christian and demand his property, and also demanded the other bag of marijuana Skinner had seen Christian put in his pocket before the robbery began (R. 248, 251-52). Skinner demanded Christian’s money and directed one of his cohorts to take Davidson’s wallet and phone (R. 254). Inasmuch as Christian originally indicated during the photo array that it was the third gunman who took his wallet and phone (R. 310), and then was unsure that Cooper was this person (R. 257), it appears

165-66). Dexter Skinner was 18 years 4 months old, 6’ tall, and weighed 185 pounds (R. 163-64). Tomek Perkins was 18 years 9 months eighteen years old, 5’6” tall, and weighed 120 pounds R. 162). Joshua Dutson was 17 years 2 months old, 6’ tall, and weighed 160 pounds (R. 161).

that Joshua Dutson, who admitted to being the third gunman (R. 284, 289), was the person who took Christian's wallet and phone.

Wesley Brown had previously lived in the home where the robbery occurred, knew there would be drugs there, and planned the robbery (R. 248-49). He pulled a gun during the robbery and pointed it at Christian Davidson while discussing Brown's displeasure at Davidson's having awakened him with a pipe in a past incident (R. 255). Wesley went upstairs to pay an armed visit to Davidson's mother, who had previously taken Wesley in until he bragged of killing a man in Louisiana and she asked him to leave (R. 174, 282-83, 294).

Tomek Perkins provided the real-looking airsoft gun used by Joshua during the robbery (R. 301-02). He brought Cooper to Skinner's house the morning of the robbery, drove everyone to Cooper's to retrieve his father's guns, and was the getaway driver for the robbery (R. 283, 288).

Joshua Dutson was a juvenile whose phone records documented his dealing and using illegal drugs with multiple people (R. 267, 329-337). The day before the robbery, when Cooper texted him and asked him to "chill," Joshua suggested they go to Dexter's and smoke marijuana (R. 445-47). While claiming to be high, Joshua invited Cooper to participate in robbing people as if it were a joke, while simultaneously scheming with Dexter Skinner in a separate text message conversation about inviting Cooper to participate in robbing people, grabbing "them straps" (Cooper's father's guns), and robbing people the next day (R. 295-96, 450). Joshua pulled and held the real-looking airsoft gun pointed at the ground during the robbery

(R. 247).

Cooper was present and passive during the robbery; two of the three guns were retrieved from Cooper's father's house; none of the guns was loaded and one was broken (R. 284, 296). Cooper initially agreed to participate in robbing unspecified people during the text conversation the day before (R. 447-449), but the actual robbery was planned the next day by Wesley Brown, who knew Davidson would have drugs (R. 282-83, 306). Cooper did not know Wesley or Tomek or Davidson before the day of the robbery (R. 293). As is detailed herein, the juvenile court held Cooper accountable for the other participants' criminal conduct in what should have been the relative culpability analysis.

In closing argument, the prosecutor stated the ages of the codefendants and argued that they were all of similar age and experience, and were operating as a peer group, rather than as adults influencing the younger codefendants (R. 363). Counsel for Cooper presented no evidence and little argument that Cooper was the youngest defendant, smaller than all but one other defendant, and had no criminal history, in contrast to his codefendants, who were all older, all but one of whom were larger (R. 160-66), and the oldest two of whom, Wesley Brown and Dexter Skinner, had multiple felony cases pending (R. 161-73) (PH 120). When the detective testified about Cooper's interrogation and told the judge that Cooper initially omitted Wesley Brown from his description of the robbery but later agreed to tell the truth (R. 292-93), counsel failed to cross-examine the officer about the key missing fact: Cooper wanted police protection before he was willing to acknowledge Wesley Brown's

participation (R. 427). The unrefuted misimpressions left by the prosecutor's argument and evidence were that Cooper was operating with co-equal peers and was not influenced by anyone as they were all the same age (R. 363), and that Cooper was protecting Wesley Brown (R. 292-93).

Trial counsel performed objectively deficiently in failing to show that Cooper was relatively less culpable and susceptible to the older, larger and more sophisticated defendants, who were not present for the juvenile court to see. The evidence was important to show that Cooper qualified for retention in the juvenile court under Utah Code Ann. § 78A-6-702(3)(ii). The evidence also aids in understanding Cooper's role in the offense as a manipulated pawn of the older, larger, more sophisticated, codefendants, and that Cooper thus qualified for retention in the juvenile court under Utah Code Ann. § 78A-6-702(3)(iii). Cooper's relative vulnerability and lack of sophistication and criminality vis-à-vis his codefendants also informs the relatively lesser public safety risks Cooper poses, and his and the public's general interest in his remaining in juvenile court, see Utah Code Ann. § 78A-6-702(3)(b) and (c)(v).

Counsel presented no law or evidence that children are less culpable and deserve greater leniency, because their brains are biologically underdeveloped and do not function well when it comes to making decisions and gauging the impact of their actions.¹¹ Nor did counsel inform the court through expert testimony or other means

¹¹ Scientific and sociological studies demonstrate that the brains of adolescent children are not yet fully developed, particularly in the frontal lobes, which control decision-making. E.g. Roper v. Simmons, 543 U.S. 551 (2005). Children have an

as to the deleterious effects of marijuana on adolescent brains,¹² and as to how use of marijuana harms the portions of the brain are essential to decision-making.¹³

3. Violent, Aggressive or Premeditated Role

Counsel was ineffective in failing to inform the court that Cooper's role in the offense should focus on his behavior. See Lara, supra (requiring courts to distinguish and focus on role of the individual juvenile in assessing retention factors). As

underdeveloped sense of responsibility and lack maturity, and thus often take impetuous and reckless actions and make decisions without thorough consideration. Roper at 569. Adolescents are less likely to restrain their impulses, understand the perspectives of others, and consider alternative actions. Id. Children's poor choices and actions are influenced by their impressionable nature and their vulnerability to peer pressure and other negative influences. Id. They have less control over their environments, or less experience controlling their environments, than adults do, and their character traits are also less well formed than adults'. Id. Children are more vulnerable than adults to psychological damage. Id. at 569-70.

The biological and developmental differences in children lead to reasonable conclusions that children's misbehaviors are especially worthy of forgiveness, and that their characters are possible to redeem and reform. Roper at 569-70. The vast majority of children who engage in illegal and risky behaviors as adolescents grow out of them as they become adults. Id. Even for the most heinous of capital murders, we recognize that children do not weigh their actions prior to taking them as adults do, and thus their misbehavior is not as morally reprehensible. See id. See also, Thompson v. Oklahoma, 487 U.S. 815, 837-40 (1988) (plurality); Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 132 S.Ct. 2455, all to the same effect.

¹² See, e.g., National Institute on Drug Abuse, "DrugFacts: Marijuana," found at <http://www.drugabuse.gov/publications/drugfacts/marijuana> ("These effects include altered perceptions and mood, impaired coordination, difficulty with thinking and problem solving, and disrupted learning and memory. Marijuana also effects brain development, and when it is used heavily by young people, its effects on thinking and memory may last a long time or even be permanent."); Gottlieb, "Cannabis: A Danger to the Adolescent Brain – How Pediatricians Can Address Marijuana Use," found at <http://www.mcpap.com/pdf/Cannibis.pdf>.

¹³ E.g. <http://www.suntimes.com/news/metro/26886186-418/even-casual-marijuana-use-can-alter-the-brain-new-study-shows.html#.U5j8zo1dVU8>.

detailed herein, Cooper's behavior was not violent or aggressive, and was less premeditated than the other participants'. The court's assessment of this factor attributed the misconduct of others to Cooper, see Point III.

Counsel was objectively deficient in failing to assert ample evidence to challenge Christian Davidson's claim that the robbery was a home invasion robbery. Ryan Golding told the police that Davidson let the people in (R. 239), and swore that it was after one of them was showing Ryan his gun that someone else pulled a gun and began the robbery (R. 191). After the robbery, Golding counseled Davidson, "Stop bringing sketchy people over to your house," (R. 185), countering that this was a home invasion robbery. Davidson's mother made no claim of a forced entry or home invasion when she conveyed his allegations to the police (R. 174-78). Every defendant who confessed to the armed robbery described the entry into the home as consensual (e.g. R. 24, 27, 189, 237-38, 286).

Davidson was the only person who made claims to the effect that the robbery began with a forced entry, and his claims about the supposed forced entry were inconsistent.¹⁴ He testified that it was only after Skinner pulled out his gun in the

¹⁴ In his November 8, 2013, sworn typed "Roy City Police Department Statement of Witness," Davidson claimed that he heard the knocking, unlocked the door, and looked out the blind to see Dexter Skinner with his gun barrel visible, threatening to "bust a cap" if Christian did not let him in. But Christian also claimed the door was ajar and Dexter had his foot in it, blocking Christian from closing it. R. 183-85. If the door had been ajar, there would have been no need for the Dexter to knock or Christian to unlock the door.

In his separate handwritten sworn "Roy City Written Statement" from November 4, 2013, Christian claimed that he heard a knock, looked through the door, saw the barrel of a gun and heard a light skinned black man say, "Open the door or I'll pop this cap." Christian said he opened the door and was told to go

basement that he got very nervous and scared (R. 252). His sworn statement to the police describes him participating in an amicable conversation about the propriety of touching another man's gun that occurred in the basement before the robbery began, and acknowledges that Christian was laughing and incredulous when the robbery began (R. 184). Counsel should have cross-examined Christian about the inconsistencies and about how Christian's claims about the forced entry may well have arisen from his need to engender sympathy with the police to minimize his own criminal jeopardy for his drug dealing and running from them when they came to investigate the robbery (R. 180-82). He asked his mother not to report the robbery to the police for fear that he and his friends would be investigated for involvement in illegal drugs (R. 185). In addition to the false claim of a forced entry, Davidson told the police his wallet contained fifty dollars (R. 185), in contrast to originally telling his mother there was no cash in it (R. 174). He may have hoped to deflect blame from himself by exaggerating his claims of victimhood.¹⁵

On the premeditation factor, Ryan's Golding's version of someone pulling the gun and initiating the robbery when Skinner was showing his gun to Ryan (R. 264-65)

downstairs. But he made no claim of trying to close the door or the man sticking his foot in the door. R. 186-87.

In his testimony at the SYO preliminary hearing, Davidson claimed that he opened the door after hearing a loud knock at which point Dexter Skinner was holding a gun by his side and someone said they were coming in, and someone put their foot in the door (R. 247). Then he testified that he opened the door slightly, at which point someone put a foot in the door and threatened to pop [a cap] (R. 261).

¹⁵ People in trouble with the law often inculcate others to detract from their own liability. See Lilly v. Virginia, 527 U.S. 116, 130-31 (1999); Bruton v. United States, 391 U.S. 123, 126-28 (1968); and Lee v. Illinois, 476 U.S. 530, 545 (1986).

conflicted with Christian's version, which implied that Wesley and Joshua pulled their guns only after people did not immediately obey Dexter when he initiated the robbery (R. 252). Counsel should have called Ryan to testify as to this important detail, as it was apparently Christian's version of the pulling of guns that led the judge to believe that the use of the guns was "well planned." (R. 372-73).

These were highly prejudicial objective deficiencies, for the juvenile court characterized this robbery as a forced entry home invasion robbery, and found that the forced entry and home invasion aspects of the robbery were aggravating in her assessment of the public interest in having Cooper transferred to the adult court (R. 195-96). The court also focused on what the court believed was the "well planned" use of the guns (R. 372-73) in issuing the bindover order – when there was substantial evidence undermining the court's perceptions of a well-orchestrated home invasion robbery, as discussed above.

4. Public Safety

Counsel did not present any expert testimony or other information or specific argument to aid the juvenile court judge in assessing whether public safety was better served by retaining Cooper in the juvenile system.

The results of psychological testing conducted by Dr. Matt Davies after Cooper was sent to prison and then transferred to the Daggett County Jail reflect that Cooper scored as naïve and unsophisticated, a rule follower, rather than a rule breaker, lacking a history of impulsive or aggressive behavior, and appropriately empathetic and responsive to others' feelings (R. 410). His test scores show a low

risk for aggressive or violent behavior (R. 410). He had no elevated scores as are commonly seen with adolescents who have problems with violence, aggression, and non-compliance (R. 410). His testing shows no mental illness, although he may have been delayed in his ability to identify and express his feelings consistently (R. 410).

In discussing the crime during the evaluation, Cooper said he had no part in planning it, and when he found out what Wesley and Dexter planned to do, he knew it was wrong but did not know what to do (R. 411). He recognized the need to make amends for his criminal behavior, understood the impact of his and his co-perpetrators' conduct on the victims, and wished that the crimes had never happened (R. 411). The evaluation explained that because of Cooper's age and possible mild developmental immaturity, he did not have a completely developed capacity to think through and anticipate consequences of his own actions (R. 412). While Cooper recognized in hindsight that he could have derailed the crime, his test data suggested that at the time of the offense, he did not have the emotional wherewithal to intercede (R. 412-413). The evaluation noted studies showing that regions of the brain necessary to cognitive control are not yet developed in adolescents, and that social context heavily influences decision-making in adolescents, who are more prone to take risks to gain peer approval (R. 412 and n.21).

The evaluation addressed the public safety interest in his retention in the juvenile court, explaining that juveniles incarcerated with adults are more likely to be physically and sexually abused while incarcerated, a higher incidence of mental illness, and are 7.7 times more likely to commit suicide than juveniles held in juvenile

facilities. When released from adult facilities, such juveniles have significantly increased rate of recidivism (R. 412 and nn. 19-20). The evaluation concluded that if he were returned to the juvenile system, Cooper would benefit from the resources available there, and could grow intellectually, emotionally and physically in that less stressful environment (R. 413). As in Houskeeper, *supra*, Cooper was prejudiced by his counsel's failure to prepare with a necessary expert.

5. Cooper's and the Public's Interest in Retention

With regard to Cooper's and the public's interest in his remaining in the juvenile system, counsel presented no evidence or information to the court regarding the risks posed to minors in the adult system, and the effects of adult prosecution on their recidivism. He argued that Cooper would be a felon and under bad influences if he went into the adult system, although he might get a lighter sentence, and that counsel believed they could nip the serious crime in the bud by keeping him under the supervision of the juvenile system (PH 122-123).

Counsel's argument and failure to provide evidence were objectively deficient. People sentenced to our prisons may be injured and killed.¹⁶ Utah does not comply with the Prison Rape Elimination Act standards designed to protect minors housed in adult facilities from sexual assault (R. 224-225). See

http://ojp.gov/programs/pdfs/prea_final_rule.pdf, page 6. According findings

¹⁶ See, e.g. Salt Lake Tribune, "Investigators Identify Utah Prison Inmates Involved in Fatal Fight," (detailing homicide of one inmate by another); Salt Lake Tribune, June 25, 2014, "Inmate Stabbed in Gang Fight at Utah State Prison," (detailing stabbings of two inmates).

entered by Congress in conjunction with the enactment of PREA, juveniles housed in adult facilities are five times more likely to be sexually assaulted than those housed in juvenile facilities, often within the first forty-eight hours of being incarcerated.

“Public Law 108-79, September 4, 2003,” *Office of Juvenile and Delinquency Programs*, United States Department of Justice, September 4, 2003, found at <http://www.gpo.gov/fdsys/pkg/PLAW-108publ79/PLAY-108publ79.pdf>. Federal Prison Rape reporting law statistics show that the Utah State Prison has ranked among the least safe for inmates nationwide.¹⁷ As Dr. Davies indicated in his evaluation, juveniles who are housed with adults are 7.7 more likely than those housed with juveniles to commit suicide, and that juveniles housed with adults also have much higher rates of recidivism and physical and sexual abuse than juvenile offenders housed with juveniles. *E.g.* R. 412, nn. 2 and 4.

The warden’s well-intended temporary solution of placing Cooper in solitary confinement (R. 114-115) has well-known adverse side effects such as increased rates of suicide and psychosis, particularly given the developmental immaturity of juvenile offenders. *See, e.g.*, “Alone and Afraid: Children Housed in Solitary Confinement

¹⁷ In 2007, the Utah State Prison was listed among the eleven facilities wherein the highest percentages of inmates experienced nonconsensual sexual contact, see Table 5 in <http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfpri07.pdf>). Current statistics on the Prison Rape Elimination Act specific to each state are apparently unavailable, but general statistics are grim. *See generally* <https://www.bjs.gov/index.cfm?ty=tp&tid=20>. 2012 statistics show that 9.6 percent of incarcerated people were sexually assaulted in our country’s jails and prisons in 2012; 7.5 percent of prison inmates were molested; whereas 1.8 percent of jail inmates were, and that the rate of sexual assaults in prisons had increased from 4.8 percent to 7.5 percent. *See* <http://www.bjs.gov/content/pub/pdf/pdca12.pdf>. It appears that lack of funding has limited the availability of more recent studies. *See* <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=278>.

and Isolation in Juvenile Detention and Correctional Facilities,” (June 2014),
(<https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf>).

The foregoing information was key to the court’s accurate assessment of the public’s safety interests and general interests and Cooper’s interest in his remaining in the juvenile system, and Cooper’s lack of relative culpability and premeditation in his role in the offense. Counsel’s failure to investigate and present the key law and evidence was objectively deficient, not strategic. Strickland. Particularly in light of the evidence presented at the hearing and the court’s ruling, summarized herein, there is a reasonable likelihood of a more favorable result had counsel performed in an objectively reasonable fashion by investigating the facts and law and preparing the retention case.

6. Failure to Challenge Prejudicial Hearsay

Counsel was ineffective in failing to oppose prejudicial hearsay evidence. SYO preliminary hearings are unique and focus not only on probable cause, but also on retention in the juvenile court. They are presided over by juvenile court judges, not magistrates. See, e.g., M.C. v. State, supra, 916 P.2d at 917-918 (discussing why juvenile court judges presiding over SYO hearings are not considered magistrates under Utah R. Crim. P. 7). While hearsay is admissible as to probable cause, Utah R. Juv. P. 22(j), in the retention portion of the hearings, juveniles have the right to cross-examine adverse witnesses, Utah R. Juv. P. 23A(d). While the rules contemplate two separate phases of such hearings, in practice, the retention factors pertaining to the

minor's relative culpability, and the extent to which his role was violent, aggressive or premeditated, are often and naturally addressed in the probable cause portion of the hearing wherein the crimes are proved.

Much of the most damaging evidence was hearsay as to Cooper, whose SYO preliminary hearing was held jointly with Joshua Dutson's without objection by Cooper's counsel. Much of the hearsay came from co-defendants and others who were in deep trouble with the law themselves, and had the resultant need to curry favor with the police and prosecuting authorities by inculcating others. As a result of the bias that is engendered in such situations, their statements were unreliable as a matter of law. See, e.g., Lilly, Bruton and Lee, supra. Counsel should have objected to the joint preliminary hearings of Cooper and Joshua, and objected to the hearsay, particularly that from constitutionally unreliable witnesses, or subpoenaed them for cross-examination.

For instance, Detective Barker testified without objection that there were multiple robberies that day, wherein the five suspects had robbed multiple victims of cologne, a leather jacket, and marijuana, supposedly in Ogden, North Ogden, Harrisville, and Roy (R. 285-86). Trial counsel did not object to the hearsay embodied in this testimony or clarify that only Dexter Skinner and Wesley Brown were charged in other robberies (R. 167-73), and that Cooper was not.

The rules of evidence generally apply in juvenile court. See Utah R. Juv. P. 43. The assertions regarding the other robberies qualified as hearsay that was not admissible to show probable cause for the crimes at issue in this preliminary hearing,

and should have been excluded under Utah Rule of Juvenile Procedure 23A(d), *supra*, and Utah R. Evidence 801(c)(1) and (2) (defining hearsay as a statement made by the declarant outside of court and admitted by a party to prove the truth of the assertion in the statement); Rule 802 (excluding hearsay). Under Utah Rules of Evidence 401 through 404, before such evidence of extrinsic crimes was admitted, the Government should have shown a proper non-character purpose for the evidence, which should have been relevant to a material fact, and the probative value of the evidence should not have been exceeded by its potential for prejudice. *See, e.g., State v. Decorso*, 993 P.2d 837 (1999), *cert. denied*, 528 U.S. 1164 (2000). Evidence of the other crimes was not admitted for any proper non-character purpose, was not relevant to any material fact, and was hugely prejudicial to Cooper. The prejudice stemming from such evidence is recognized as a matter of law. *E.g., Huddleston v. United States*, 485 U.S. 681, 686 (1988).

The detective summarized Joshua's allegations about the charged robbery, wherein Joshua initially claimed that Cooper had a gun during the robbery, and then said Cooper had a switchblade (R. 284). He also read Joshua Dutson's 1102 statement into the record to the effect that they all agreed on Wesley's plan before going to Christian Davidson's, without any hearsay objection from Cooper's counsel (R. 282-89). Given Joshua's motive to exculpate himself by inculpating others, counsel should have objected to this unreliable hearsay. *E.g., Lilly, Lee and Bruton, supra*.

Counsel's failures to investigate, research and present Cooper's retention case are not properly characterized as strategy, as lawyers cannot make valid strategic decisions absent reasonably necessary and thorough investigation of the facts and the law. E.g., Strickland, 466 U.S. at 690.

Particularly when the evidence and law discussed above that were omitted or mishandled by counsel are compared to the information presented at the SYO hearing and the juvenile court's ruling, discussed herein, there is a reasonable likelihood of a more favorable result had counsel properly investigated and presented Cooper's case for retention. Cf. Houskeeper, *supra*.

III. THE JUVENILE COURT'S MISINTERPRETATIONS OF THE AMENDED SERIOUS YOUTH OFFENDER STATUTE REQUIRE REVERSAL.

A. COOPER'S RELATIVE CULPABILITY WAS THE LOWEST AMONG THE DEFENDANTS'.

SYO cases necessarily involve violent crimes.¹⁸ Courts must compare the relative culpability of the participants to determine whether a child should be retained in the protective confines of the juvenile court. See State v. Lara, 2003 UT App 318, ¶ 29, 79 P.3d 951, *supra*. Under 78A-6-702(c)(ii) (2013), because there were multiple perpetrators, the court should have assessed whether Cooper appeared "to have a greater or lesser degree of culpability than the codefendants."

¹⁸ The SYO act applies to aggravated arson, aggravated assault with serious bodily injury, aggravated kidnapping, aggravated burglary, aggravated robbery, aggravated sexual assault, felony discharge of a firearm, attempted aggravated murder, attempted murder, and felony-level weapons offenses committed by juveniles with prior convictions of that type.

The court found Cooper's culpability significant, but did not articulate the culpability of the defendants other than Cooper for purposes of comparison and did not actually find whether Cooper had a greater or lesser degree of culpability in comparison to all the others involved in the crime (R. 195).

Without carefully comparing Cooper's culpability to the co-defendants', the court was in no position to make a meaningful assessment of whether Cooper should remain in juvenile court. As explained in Point II B 2, above, the relative culpability factor should have weighed heavily in favor of Cooper's retention in juvenile court.

In the court's oral ruling, despite the fact that Joshua brandished a gun that came from Tomek Perkins during the robbery, the court found that Cooper's involvement was greater than Joshua's because the guns came from Cooper's home and the use of the guns was "well planned." (R. 372-73). The court found this in the marked absence of reliable evidence that Cooper had anything to do with any planned or spontaneous use of the guns by Joshua and the other two defendants who used them during the robbery.¹⁹ But see, e.g., Lara (requiring courts to distinguish and focus on role of the individual juvenile in assessing retention factors).

The court did not require an evaluation of Cooper prior to sending him to adult court, although Cooper's father complained at a detention hearing that no one

¹⁹ The evidence as to use of guns was Davidson's allegation that the two gunmen aside from Skinner pulled their guns out after Davidson laughed and asked if Skinner was kidding when Skinner pulled his gun and began the robbery (R. 252-53, 310) -- a series of events that appears unpredictable and unplanned. In contrast, Ryan Golding's 1102 statement, read into the record, indicated that a second person began the robbery by pulling his gun when Skinner was showing Golding Skinner's gun (R. 264-65).

had investigated Cooper's character or contacted his parents, family or friends to see who he is, and the court indicated that probation would be required to do so for the future detention hearings (T. 11/25/13). Had the court required a psychological evaluation, evidence was readily available that Cooper was developmentally susceptible to peer pressure, given his level of maturity and development. See Dr. Davies' evaluation (R. 406). An evaluation would have confirmed that Cooper's relative culpability was the lowest among the defendants involved in the robbery. Id. The court made no mention of the facts that Cooper was the youngest and second to the smallest defendant and the least developmentally equipped to be making good decisions, given his youth, who was further impaired by his marijuana use.²⁰

B. COOPER'S ROLE IN THE OFFENSE WAS NOT
VIOLENT OR AGGRESSIVE AND WAS NOT HIGHLY
PREMEDITATED.

All crimes in SYO cases are violent, aggressive and usually premeditated to a degree. Courts must focus on the role of the individual child and consider the extent to which the role was violent, aggressive or premeditated in determining whether to retain them in juvenile court. E.g. Lara, supra. In the court's ruling on the extent to which Cooper's role in the offense was committed in a violent, aggressive or

²⁰ See, e.g., R. 406 (Dr. Davies' evaluation) and National Institute on Drug Abuse, "DrugFacts: Marijuana," found at <http://www.drugabuse.gov/publications/drugfacts/marijuana> ("These effects include altered perceptions and mood, impaired coordination, difficulty with thinking and problem solving, and disrupted learning and memory. Marijuana also affects brain development, and when it is used heavily by young people, its effects on thinking and memory may last a long time or even be permanent.").

premeditated manner, the court repeatedly attributed the violent and aggressive actions of others to Cooper because he provided the guns they used (R. 195-96).

Had the court not misinterpreted but instead properly applied the statutory language, the result would have been different, as the evidence showed that Cooper's role in the offense was not violent or aggressive. There was no testimony that Cooper was one of the people who showed a gun prior to entering the house, put his foot in the door, or told Davidson he had to let them in and to go downstairs. Cooper's role was so minimal that Christian Davidson believed there were only three people involved in the robbery (T. 12/20/13: 8, 10), when there were actually four. While he ambivalently identified Cooper as the third gunman who collected the wallets (T. 12/20/13: 14, 72), Joshua Dutson admitted to being the third gunman (T. 12/20/13: 45). The court found insufficient evidence that Cooper brandished any weapon during the entire offense (R. 195).

There is no evidence that Cooper threatened anyone in any way. Cooper's liability for the offenses was accomplice liability, based on his presence and provision of two of the three guns used by others in the robbery. The court should have focused on Cooper's actual role during the offense in assessing his level of violence, aggression and premeditation, rather than holding him accountable for the violent and aggressive actions of his co-perpetrators. Compare Lara, M.E.P., and F.L.R., supra.

As for premeditation, the court ruled that there were several steps in this robbery, and that Cooper could have extricated himself from it before it occurred (R.

374). Rather than proceeding by assumption, the Court should have obtained a psychological evaluation, for Cooper's adolescent brain was biologically less able to anticipate the consequences of his actions, and he was developmentally not equipped to extricate himself from the robbery despite knowing it was wrong. E.g. R. 406. While Joshua Dutson told the police that everyone was aware of the plan that Wesley created, there was no evidence presented that Cooper was involved in the actual planning of the robbery of Christian Davidson and Ryan Golding. The text message conversation between Joshua and Skinner shows that they were scheming to get Cooper's father's guns the night before when Joshua invited Cooper to participate in a separate text message conversation (R. 295-96, 450), and Wesley Brown planned the robbery of Davidson, as he had previously lived in that home with him and knew he would have drugs (R. 282-83, 306). Thus, the premeditation was primarily done by the older, more sophisticated defendants and Cooper's role was less premeditated.

C. THE PUBLIC SAFETY INTEREST CALLED FOR
COOPER'S RETENTION IN THE JUVENILE COURT.

The juvenile court's public safety analysis (R. 196) echoed the outdated thinking of M.E.P. and A.B., *supra*, that public safety is best served by moving Serious Youth Offenders into the adult system, where potential sentences normally exceed the limited years of jurisdiction remaining in the juvenile court. The court may well have ruled differently had the court been aware of the purpose for the amendments to the Serious Youth Offender Act – to ensure that first time offenders such as Cooper are rehabilitated in juvenile court, rather than criminalized, stigmatized and

released quickly and without treatment in the adult system, to recidivate more violently in the future, *supra*.

The court's public safety analysis largely turned on the serious nature of the offenses charged, and the potential volatility and hypothetical threats they can pose to perpetrators, the police and the public, given that others may respond violently to such crimes (R. 196). This general and hypothetical approach would ostensibly lead to transfer in all SYO cases, which by nature involve violent crimes that can prompt violent responses and pose threats to law enforcement and members of the public. The court's belief that the crimes charged here are among the most serious in our community similarly did not take into account the range of offenses subject to retention under the SYO statute, which contemplates that retention in juvenile court may be appropriate for even more serious offenses involving intended and actual, rather than potential, serious injuries or intended death to the victims. In characterizing the crime as a dangerous breach of the sanctity of the home, the court did not recognize that aggravated burglaries and robberies are among the crimes that routinely result in SYO prosecutions under the statute, and that those minors who commit such offenses are nonetheless subject to retention in the juvenile court pursuant to the plain terms of § 78a-6-702 (2013). Nor did the court account for the facts that the guns were not loaded, and that the robbery began after an amicable conversation that Christian Davidson and Ryan Golding acknowledged occurred in the basement before the robbery (R. 184, 264-65), countering the notion of a home invasion robbery.

In assessing the public's safety interest in Cooper's being prosecuted in adult or juvenile court, the court did not require an evaluation of Cooper by a psychologist, and assumed from the facts of this case that there was a great likelihood of further injury and harm. With a professional evaluation, the court could have had a solid evidentiary basis for assessing the low risk of future harm posed by Cooper, his amenability to reform, and the public safety interest in keeping Cooper in the juvenile system (R. 406-12).

The court held it against Cooper that he came from a loving family and good home, because he chose to commit the crimes despite his fortunate upbringing (R. 196). The court did not consider that Cooper's upbringing and complete lack of juvenile history demonstrated that the robbery was a significant aberration from his law-abiding life which suggested that his caring parents would successfully aid him in reforming during the five years he could remain in the juvenile system if he were retained. The court concluded that Cooper needed a longer correctional period than the five years the juvenile system could provide, despite his complete absence of prior history and his good home, and his relatively minor and nonviolent role in the crime, and the change in the SYO law to counteract such thinking.

D. COOPER LACKED A QUALIFYING PRIOR WEAPON-RELATED OFFENSE AND HAD NO PRIOR OFFENSES.

The court ruled twice that Cooper had no prior record in the juvenile court, without separately recognizing one of the actual statutory criteria: that he had no prior weapons-related offense that would have been a felony had he committed one

(R. 194, 196), see Utah Code Ann. § 78A-6-702(c)(i), *supra*. This is important because it demonstrates the egregious type of juvenile history that might normally justify transferring a minor into the adult court, which Cooper did not have. His complete lack of a prior history in juvenile court should have weighed heavily and separately in favor of retention. See House Bill 105 and legislative history, in the addendum.

E. COOPER'S AND THE PUBLIC'S INTEREST IN
RETENTION IN JUVENILE COURT WERE HIGH.

The court perfunctorily found by clear and convincing evidence it was not in Cooper's best interest to be prosecuted in adult court, and it was in the public's best interest for him to be transferred to the adult court (R. 197). The court should have expressly considered the reformatory benefits available to Cooper in juvenile court, in contrast to the risks posed to and harms that befall minors such as Cooper when they go into the adult system, and how retaining Cooper in the juvenile system served the public interest, as discussed above.

F. THE COURT'S RULINGS PREJUDICED COOPER AND
ESTABLISH PREJUDICE FROM THE FAILURE TO
SELF-RECUSE.

Because all the retention factors should have weighed in favor of Cooper's retention in juvenile court, there is a reasonable probability of a more favorable result in the absence of the errors. As a result of the individual and cumulative prejudice from the errors, reversal is in order. See F.L., 2015 UT App 224, ¶ 32 (reversing SYO bindover ruling because in the absence of the juvenile court's misinterpretation and misapplication of multiple retention factors, there was a reasonable probability of

retention). As there is a reasonable likelihood of a more favorable result had the court been apprised of the relevant evidence and law, and had the court followed the law, Cooper has proved prejudice under the plain error and ineffective assistance of counsel doctrines. See Verde, supra.

The court's legal errors also prove prejudice from the failure to self-recuse, assuming this were necessary. The judge's legal errors in the bindover decision satisfy the abuse of discretion standard, which encompasses errors of law. See, e.g., State v. Barrett, 2005 UT 88, ¶¶ 15-17, 127 P.3d 692 (review for abuse of discretion includes review for errors of law). Under Alonzo, prejudice is shown because of the abuse of discretion, because Cooper's substantial rights were affected, and because there is a reasonable likelihood of a more favorable result had the judge recused herself. Id. 932 P.2d 606, 611-612 (Utah App. 1997).

CONCLUSION


This Court should affirm Van Huizen, and is urged to do so expeditiously. Cooper will turn twenty years old on July 29, 2017. While counsel for Cooper concedes nothing on this point, the juvenile court may well lose jurisdiction over him in the event the case remains tied up in the appellate courts until he turns twenty-one. See Utah Code Ann. § 78a-6-103(1)(A)²¹; State v. Schofield, 2002 UT 132, 63 P.3d

²¹ Utah Code Ann. § 78A-6-103 provides in relevant part:

78A-6-103. Jurisdiction of juvenile court -- Original -- Exclusive.

667 (affirming district court ruling that juvenile court lost jurisdiction over defendant's juvenile offenses when the defendant turned twenty-one).


Respectfully submitted this 15 of October, 2017.


ELIZABETH HUNT
Attorney for Cooper Van Huizen

CERTIFICATE OF COMPLIANCE

According to the wordcount function of the Word program I am using, the portions of this brief that count toward the word count contain 13,999 words.

Respectfully submitted this 15 of October, 2017.

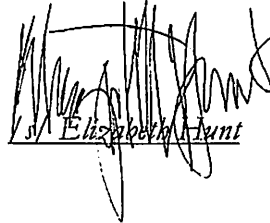

ELIZABETH HUNT
Attorney for Cooper Van Huizen

-
- (1) Except as otherwise provided by law, the juvenile court has exclusive original jurisdiction in proceedings concerning:
- (a) a child who has violated any federal, state, or local law or municipal ordinance or a person younger than 21 years of age who has violated any law or ordinance before becoming 18 years of age, regardless of where the violation occurred, excluding offenses in Subsection 78A-7-106(2)[.]

....

CERTIFICATE OF SERVICE

I hereby certify that on June 25th, 2017, I caused two true and correct copies of to be printed, bound and mailed, along with a compact disc containing a searchable PDF of this brief and the addenda, to the Criminal Appeals Division of the Utah Attorney General's Office, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854.


s/ Elizabeth Hunt

Tab 1

Tab 1 – Van Huizen Decision

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.

COOPER JOHN ANTHONY VAN HUIZEN,
Appellant.

Opinion
No. 20140602-CA
Filed February 16, 2017

Second District Court, Ogden Department
The Honorable Ernest W. Jones
No. 131902542

Elizabeth Hunt, Attorney for Appellant
Sean D. Reyes and Christopher D. Ballard, Attorneys
for Appellee
Monica Maio, Attorney for Amicus Curiae Utah
Juvenile Defender Attorneys

JUDGE STEPHEN L. ROTH authored this Opinion, in which JUDGE J.
FREDERIC VOROS JR. and SENIOR JUDGE RUSSELL W. BENCH
concurred.¹

ROTH, Judge:

¶1 Cooper John Anthony Van Huizen was involved in an aggravated robbery when he was sixteen years old. The State charged him in juvenile court under the Serious Youth Offender Act. After a hearing, the juvenile court bound Van Huizen over to stand trial as an adult in district court as provided by the Act, and he appeals. We vacate and remand for further proceedings.

1. Senior Judge Russell W. Bench sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6).

BACKGROUND²

¶2 In late 2013, Van Huizen committed a robbery with a friend and some acquaintances. At sixteen, Van Huizen was the youngest of the group; his friend was also a juvenile and their three acquaintances were adults. Although Van Huizen did not orchestrate the robbery, he agreed to it and facilitated the plan by providing guns from his family home.

¶3 In search of drugs, the group drove to the house of someone they knew would possess marijuana. They knocked on the back door, gained entry to the house and, brandishing the guns taken from Van Huizen's home, proceeded to rob the occupant of a cell phone, some cash, and a "little bit of weed." Though Van Huizen did not carry a firearm or other weapon, he was part of the group that entered the home and committed the robbery.

¶4 The State charged Van Huizen under the then-current Serious Youth Offender Act (the Act). *See generally* Utah Code Ann. § 78A-6-702 (LexisNexis Supp. 2013) (outlining the process by which a juvenile could be "bound over and held to answer in the district court in the same manner as an adult").³ The Act required that the State charge any minor accused of certain serious felony offenses by filing a criminal information in

2. Van Huizen has already been convicted as an adult in district court. After his conviction, he successfully moved to reinstate the time to appeal the juvenile court's bindover order. Thus, this appeal concerns juvenile court proceedings and, on appeal, we recite the facts in the light most favorable to the juvenile court's decision. *See In re J.C.*, 2016 UT App 10, n.3, 366 P.3d 867.

3. The Utah Legislature amended the Act after the State brought these charges. We address the Act as it existed at the time of Van Huizen's juvenile court proceedings in 2013.

juvenile court. *Id.* § 78A-6-702(1). Once filed, the Act directed the court to undertake a two-pronged analysis. First, the State had "to establish probable cause" that the defendant committed the crime. *Id.* § 78A-6-702(3)(a). If the State proved probable cause, the burden shifted to the defendant to establish by clear and convincing evidence that "it would be contrary to the best interest of the minor and the best interests of the public to bind the defendant over." *Id.* § 78A-6-702(3)(d), (e).

¶5 In making the ultimate determination on whether to bind the juvenile over to district court, the Act directed that "the judge shall consider only" five factors:

- (i) whether the minor has 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) if the offense was committed with one or more other persons, whether the minor appears to have a greater or lesser degree of culpability than the codefendants;
- (iii) the extent to which the minor's role in the offense was committed in a violent, aggressive, or premeditated manner;
- (iv) the number and nature of the minor's prior adjudications in the juvenile court; and
- (v) whether public safety is better served by adjudicating the minor in the juvenile court or in the district court.

Id. § 78A-6-702(3)(c).

¶6 Under that framework, the Weber County Attorney's Office, acting on behalf of the State, charged Van Huizen in juvenile court with two counts of aggravated robbery and one count of aggravated burglary, all first degree felonies. Unbeknown to Van Huizen and his parents, the juvenile court

judge assigned to his case was married to the then-Chief Criminal Deputy in the Weber County Attorney's Office.

¶7 The juvenile court determined that the State had met its initial burden of proof and that there was probable cause to bind Van Huizen over to the district court as an adult. In response, Van Huizen put on evidence that both his and the public's interests were both best served by remaining in the juvenile system. Van Huizen and the State stipulated to factors one and four, namely that he had no prior offenses and therefore no offenses involving a dangerous weapon. On the other factors, Van Huizen adduced testimony from his mother and father relating to the stability of his home life, his generally good nature, and his bright future.

¶8 The juvenile court considered the evidence and determined that Van Huizen had only carried half of his burden. While Van Huizen had shown that his best interest was served by remaining in juvenile court, he had not shown by clear and convincing evidence that the public interests also favored retention. The court bound Van Huizen over to district court. Van Huizen did not timely appeal the bindover decision.

¶9 In district court, the same deputy county attorney that had handled the juvenile proceedings continued to prosecute Van Huizen, and the attorney received at least some assistance from the juvenile judge's husband, the Chief Criminal Deputy in the prosecutor's office. Van Huizen eventually pleaded guilty to two reduced counts of robbery, both second degree felonies. The district court sentenced him to concurrent prison terms of one to fifteen years. He was paroled in November 2014.

¶10 While he was serving his prison sentence, Van Huizen retained new counsel and moved in district court to reinstate his time to appeal the juvenile court's bindover order under *Manning v. State*, 2005 UT 61, 122 P.3d 628. He supported the motion by alleging that he had been denied his right to appeal the bindover order through ineffective assistance of counsel,

asserting that trial counsel had “misinformed [him] that the time for appeal had run” when it in fact had not. The State stipulated to Van Huizen’s motion, and the district court reinstated his time to file an appeal. On that basis, Van Huizen now appeals the juvenile court’s bindover order that initially transferred him into district court.⁴

ISSUES AND STANDARD OF REVIEW

¶11 Van Huizen argues that the juvenile judge who bound him over was required to recuse herself under the Code of Judicial Conduct. “Determining whether a trial judge committed error by failing to recuse himself or herself under the Utah Code of Judicial Conduct . . . is a question of law, and we review such questions for correctness.” *State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998). Van Huizen also argues that the judge’s “risk of bias” in his case was so strong that it “violated due process” under the United States Constitution. “Constitutional issues, including questions regarding due process, are questions of law that we review for correctness.” *In re E.K.S.*, 2016 UT 56, ¶ 5 (citation and internal quotation marks omitted).

4. We note that, because Van Huizen’s time to appeal the juvenile court’s bindover decision was reinstated after it lapsed, he is taking this appeal on a more developed record than would normally be available. Specifically, we have before us a district court record that contains briefing, declarations, and other materials that were not part of the juvenile court proceedings and therefore would not have been available had this appeal been taken immediately following the bindover decision. This point is particularly salient as it applies to our resolution of this case, which turns on record information that—because of its introduction in district court after the bindover hearing—would have been unavailable to us had Van Huizen’s appeal arrived in this court under the usual timeline.

¶12 Additionally, Van Huizen asserts that ineffective assistance of counsel and the doctrine of plain error require that we reverse the bindover order. Because we resolve this case on the disqualification issue, we do not address Van Huizen's other arguments.

ANALYSIS

¶13 Van Huizen argues that the juvenile court judge (the Juvenile Judge) who bound him over into adult court should have disqualified herself from his case because she was married to the Chief Criminal Deputy in charge of the criminal division in the Weber County Attorney's Office, the office that prosecuted him. He argues first that the Code of Judicial Conduct required the Juvenile Judge to recuse herself. Second, Van Huizen argues that he was denied constitutional due process due to the acute "risk of bias" inherent in the Juvenile Judge's relationship with the prosecuting office. The "general rule [is] that courts should avoid reaching constitutional issues if the case can be decided on other grounds." *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994). We therefore address the Code of Judicial Conduct first, and because we resolve the appeal on that ground, we do not reach the constitutional question.

I. The Utah Code of Judicial Conduct

¶14 The Code of Judicial Conduct states that "[a]n independent, fair and impartial judiciary is indispensable to our system of justice." Utah Code Jud. Conduct, Preamble. As Justice Felix Frankfurter observed, courts possess "neither the purse nor the sword," so their authority "ultimately rests on sustained public confidence in [their] moral sanction." *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). That core principle is enshrined in our caselaw: "The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the

highest confidence in the integrity and fairness of the courts.” *Haslam v. Morrison*, 190 P.2d 520, 523 (Utah 1948).

¶15 The Code lists the conditions under which a judge must recuse or disqualify himself or herself.⁵ Generally, “[a] judge should act at all times in a manner that promotes—and shall not undermine—public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” Utah Code Jud. Conduct R. 1.2. Specifically, “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”⁶ *Id.* R. 2.11(A); accord *Dahl v. Dahl*, 2015 UT 79, ¶ 49 (“A judge should be disqualified when circumstances arise in which the judge’s ‘impartiality might reasonably be questioned.’” (quoting *State v. Gardner*, 789 P.2d 273, 278 (Utah 1989))).

¶16 Rule 2.11(A) contains an illustrative, but not exhaustive, list of disqualifying circumstances. In some circumstances, the judge’s duty to recuse is absolute. For instance, if “[t]he judge has a personal bias or prejudice concerning a party or a party’s lawyer,” he or she must disqualify. Utah Code Jud. Conduct R. 2.11(A)(1); see also *id.* R. 2.11(C) (establishing that the presence of actual bias or prejudice cannot be waived). In other

5. The terms “recuse” and “disqualify” are generally synonymous. See *In re School Asbestos Litigation*, 977 F.2d 764, 769 n.1 (3d Cir. 1992) (“Whether or not there was ever a distinction between disqualification and recusal, the courts now commonly use the two terms interchangeably.”).

6. The Code of Judicial Conduct defines “impartial” to mean the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as presence of an objective and open mind in considering matters that come before a judge.” Utah Code Jud. Conduct, Terminology.

circumstances, the judge must recuse unless he or she “disclose[s] on the record the basis of the judge’s disqualification” and “the parties and lawyers agree . . . that the judge should not be disqualified.” *Id.* R. 2.11(C). If the parties agree to such a waiver, it “shall be incorporated into the record of the proceeding.” *Id.*

¶17 Circumstances requiring disqualification absent waiver include:

The judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer in the proceeding;
- (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding

Id. R. 2.11(A)(2). Further, a judge “is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific [listed disqualifying circumstances] apply.” *Id.* R. 2.11 cmt. 1. And the judge bears ultimate responsibility for ensuring that the integrity of the process is protected: “A judge’s obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.” *Id.* R. 2.11 cmt 2; *accord Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 257 n.7 (Utah 1992) (holding that it “was [the judge’s] responsibility to identify her relationship . . . and take appropriate measures to recuse herself,” not the responsibility of counsel).

¶18 Thus, when a judge knows of circumstances that give rise to the reasonable appearance of bias, the judge is under an affirmative duty either to recuse or to disclose the facts that contribute to an appearance of partiality and allow the parties to

decide whether to waive disqualification. Indeed, “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” Utah Code Jud. Conduct R. 2.11 cmt. 5. Hence, even if the judge believes that recusal is not warranted under a given set of circumstances, it is better to disclose facts that might reasonably raise a question about impartiality and allow the parties to either waive the issue or file a motion for disqualification that will then be resolved by an independent judicial officer. *See* Utah R. Crim. P. 29(c)(2) (explaining that a motion to disqualify must either be granted or referred to a different judicial officer for disposition).

¶19 “The Utah Supreme Court has found the provisions of the Code of Judicial Conduct to have legal force.” *American Rural Cellular, Inc. v. Systems Commc’n Corp.*, 939 P.2d 185, 195 n.12 (Utah Ct. App. 1997); *see also* *Cheek v. Clay Bulloch Constr. Inc.*, 2016 UT App 227, ¶ 19, 387 P.3d 611 (collecting cases). For instance, in *Regional Sales Agency, Inc. v. Reichert*, the supreme court held that an appearance of impropriety under the Judicial Code of Conduct “[was] sufficient to dispose of the case.” 830 P.2d at 257–58.

¶20 In Utah law, as under federal law, the question of a judge’s impartiality is determined from the viewpoint of “a reasonable person, knowing all the circumstances.” *West Jordan City v. Goodman*, 2006 UT 27, ¶ 22, 135 P.3d 874 (quoting 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3549 (2d ed. 1984 & supp. 2005)).⁷

7. The federal analogue to the Code of Judicial Conduct is codified at 28 U.S.C. § 455 (2012). Although the Utah rules and the federal statute do not use identical language, “[s]ection 455(a),” like the Utah code, “is based upon the [ABA Model] Code of Judicial Conduct, which clearly imposes a ‘reasonable
(continued...)”

As the United States Court of Appeals for the Tenth Circuit explained, “The reasonable observer is not the judge or even someone familiar with the judicial system, but rather an average member of the public.” *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1310 (10th Cir. 2015). “In conducting this [reasonable person] review, we must ask how these facts would appear to a well-informed, thoughtful and objective observer, rather than [a] hypersensitive, cynical, and suspicious person.” *Id.* (citation and internal quotation marks omitted).

¶21 We now turn to the question in this case—whether there was a reasonable question as to the impartiality of the Juvenile Judge under the circumstances. If so, we must then determine whether the appearance of partiality requires vacatur of the bindover order and reconsideration by another judge.

A. Appearance of Partiality

¶22 We note at the outset that our thorough review of the record gives us no reason to think the Juvenile Judge was actually biased against Van Huizen. However, as we discussed above, the Code of Judicial Conduct requires a judge’s disqualification under many circumstances that fall short of actual bias, such as situations where a reasonable person would question the judge’s impartiality. In this case, it is uncontested that the Juvenile Judge that bound Van Huizen over for prosecution in district court was married to the Chief Criminal Deputy in the Weber County Attorney’s Office. It is also uncontested that the Juvenile Judge did not disclose that information to the parties on the record.

(...continued)

person’ test for recusal.” 13D Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3549 (3d ed. supp. 2016). Thus, we consider federal cases addressing the “reasonable person” standard helpful to our analysis.

¶23 Van Huizen argues that the spousal relationship required the Juvenile Judge to disqualify herself under rule 2.11. The rule requires recusal where, among other things, the judge's spouse is "a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party." Utah Code Jud. Conduct R. 2.11(A)(2)(a). Van Huizen asserts that the Chief Criminal Deputy was "properly considered an officer, director or managing member of a party"—in this case, the State. Van Huizen does not, however, explain that argument in detail. He apparently relies instead on the plain language, arguing that the Chief Criminal Deputy obviously was among the class of people denoted in rule 2.11 for which a spousal relationship with the judge created the appearance of partiality.

¶24 The State argues in response that the Chief Criminal Deputy was not covered under the plain language of the rule because he was not "an 'officer, director, general partner, managing member, or trustee' of the State of Utah in the sense that those terms are used in rule 2.11." The State does not explain precisely in what sense the rule uses those terms, but the point seems to be based on the distinction between government entities and corporate entities. That is, terms such as "general partner," "managing member," and "trustee" suggest positions within a private entity or corporate structure, not within a government body. Accordingly, the State's position appears to be the inverse of Van Huizen's—that the Chief Criminal Deputy's position is categorically outside the scope of rule 2.11(A)(2)(a).

¶25 We are not persuaded that the plain language of rule 2.11(A)(2)(a) answers the question presented. Taking just one term as an example, "officer" applies to both governments and private entities. For instance, "officer" is defined broadly as "anyone elected or appointed to an office or position of authority in a government, business, institution, society, etc." *Officer*, Webster's New World College Dictionary 1015 (5th ed. 2016). Similarly, Black's defines "officer" as "[s]omeone who holds an

office of trust, authority, or command.” *Officer*, Black’s Law Dictionary 1257 (10th ed. 2014) (explaining that, in public affairs, an officer is someone who holds a public government office and is “authorized by that government to exercise some specific function”). These definitions make clear the concept of an “officer” is broader than the State acknowledges and could apply to a position like the Chief Criminal Deputy’s.

¶26 But on the other hand, the plain language of rule 2.11(A)(2)(a) does not clearly apply to the Chief Criminal Deputy either. While the Chief Criminal Deputy is undoubtedly authorized by the government to “exercise a specific function,” it is unclear whether he was “elected or appointed” to his position of authority as understood by the term’s definition. For instance, it is likely that the Weber County Attorney—the Chief Criminal Deputy’s boss—would be properly considered an officer under the plain meaning of the term. Utah Code Ann. § 17-53-101(1) (LexisNexis 2013) (enumerating the county attorney as one of the “elected officers of a county”). However, it does not automatically follow that the Weber County Attorney’s Chief Criminal Deputy is likewise an officer of the State for purposes of the rule.

¶27 We are not persuaded that rule 2.11(A)(2)(a)’s language either plainly applies or plainly does not apply to the Chief Criminal Deputy. Rather, rules 2.11(A)(2)(b) and (c), which trigger recusal when a judge’s spouse is “acting as a lawyer in the proceeding” or “has more than a de minimis interest that could be substantially affected by the proceeding,” seem more applicable. Relevant cases have often employed these concepts in addressing similar conditions, and we accordingly now consider how disqualification rules have been addressed in like circumstances. In doing so, we keep in mind a consideration we discussed earlier—that the disqualification rule is meant to be applied broadly “whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the

specific [listed disqualifying circumstances] apply." Utah Code Jud. Conduct R. 2.11 cmt. 1.

1. Applicable Caselaw

¶28 We are aware of no published Utah decisions that analyze a relationship like the one at issue here, where the judge is closely related to an attorney who is not directly involved in the proceedings before the judge, but is nonetheless a supervisor in the public law office of the attorney handling the case in court. In the absence of Utah precedent, Van Huizen directs our attention to a Colorado case, *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984). In *Beckman*, a county court judge was married to a deputy district attorney who "handle[d] matters exclusively in the district court," a separate court from the judge's own. *Id.* at 1215. The criminal defendant in *Beckman*, originally scheduled for trial in county court before the county judge, requested a writ from the district court to prevent the county judge from presiding over his trial. He argued that the judge's spousal relationship to a prosecutor justified disqualification. *Id.* Even though the attorney spouse was not an active lawyer on the case, the district court found that "the powers of a deputy district attorney are akin to that of a partner in a private law firm," and thus the judge's recusal was necessary. *Id.*

¶29 On appeal, the Colorado Court of Appeals rejected that analysis and held that a deputy district attorney is not like a partner at a law firm "because his compensation and clientele are set, and the prestige of the office as a whole is not greatly affected by the outcome of a particular case." *Id.* at 1216. However, the court nevertheless held "that the husband-wife relationship" required recusal. *Id.* at 1215. The court reasoned that,

Generally, the public views married people as "a couple," as "a partnership," and as participants in a relationship more intimate than any other kind of relationship between individuals. In our view the

existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification, even though no other facts call into question the judge's impartiality.

Id. at 1216. The appellate court reached that conclusion even though the county judge and the district attorney "[had] drafted guidelines designed to further insulate [the attorney spouse] from all contact with any county court cases." *Id.* at 1215. Thus, the *Beckman* court determined that the spousal relationship is so close in nature that it outweighs other factors, including the screening procedure implemented by the county attorney's office and the manifest distinctions between private and public law firms.

¶30 The State counters with a more recent Minnesota Court of Appeals case, *In re Jacobs*, 791 N.W.2d 300 (Minn. Ct. App. 2010). In *Jacobs*, as in *Beckman*, Jacobs argued that "the assigned judge's impartiality can reasonably be questioned based on his spouse's employment with the [prosecuting] County Attorney's Office." *Id.* at 301. And like Van Huizen in this case, Jacobs based his claim on rule 2.11 of the Minnesota Code of Judicial Conduct, which is functionally identical to our own rule 2.11. Compare Utah Code of Jud. Conduct R. 2.11(A)(2), with Minnesota Code of Jud. Conduct R. 2.11(A)(2).

¶31 The appellate court rejected Jacobs' argument, concluding that "Jacobs has not shown that the judge's impartiality can reasonably be questioned." *Id.* at 302. "Assuming that a judge's spouse is not personally involved in a case, the personal interest, if any, of the judge's spouse in the prosecution of that case to conviction would be de minimis" and would not call for disqualification. *Id.* at 302. That reasoning was based, in part, on the fact that the "[Hennepin] County Attorney's Office is a large

office that prosecutes a large volume of cases.”⁸ *Id.* The court also noted “that prosecutors are not merely advocates but also ‘ministers of justice’ charged with protecting the rights of the accused as well as the rights of the public.” *Id.* (citation omitted). Finally, as the State notes, the *Jacobs* court specifically analyzed *Beckman* and determined that the “trend of the case law has been against the holding in *Beckman*.” *Id.* Specifically, the court’s analysis of other holdings led it to conclude the “closeness of the marital relationship, relied on in *Beckman*, is counter-balanced by the institutional aspects of employment in a public law firm such as a county attorney’s office.” *Id.*

¶32 We agree with the Minnesota Court of Appeals that *Beckman* is a relative outlier in the caselaw governing when a judge must disqualify based on a spousal relationship with an attorney in the relevant prosecuting office. For example, in *State v. Harrell* the Wisconsin Supreme Court held that a judge’s recusal from a case was not required simply because his wife was an assistant district attorney in same county. 546 N.W.2d 115, 118 (Wis. 1996). Likewise, in *Sensley v. Albritton* the United States Court of Appeals for the Fifth Circuit rejected an argument that a judge should have recused himself because his “spouse was an Assistant District Attorney in the office of [the] District Attorney . . . , whose office also represented the Defendants” in the case. 385 F.3d 591, 598 (5th Cir. 2004).

¶33 Although we agree that *Beckman* sets a relatively strict standard for disqualification compared to other cases dealing with similar facts, we note that none of the cases taking a more lenient approach, nor *Beckman* itself, involved an attorney spouse with supervisory authority within the government office in question. Indeed, the arguments for disqualification rejected by appellate courts have generally been based on the assertion that

8. Hennepin County includes within its boundaries the city of Minneapolis.

government agencies are akin to private firms for purposes of judicial disqualification; the arguments have not focused on the particular responsibilities of the spouse—such as a managerial role—that raise more specific concerns.⁹ For these reasons, we find the approach taken in *Beckman* to be of limited use in our resolution of this case.

¶34 However, the State's reliance on the facts and reasoning of *In re Jacobs* is likewise misplaced because the prosecutor spouse in *Jacobs* was not a supervisor within the county prosecutor's office like the Chief Criminal Deputy was in this case. In addition, the *Jacobs* court relied on the size of the district attorney's office as an insulating factor that diminishes a judge spouse's appearance of partiality, a factor that holds far less sway here. In *Jacobs*, the court noted that the Hennepin County Attorney's Office was "a large office that prosecutes a large volume of cases," 791 N.W.2d at 302, whereas here we are

9. We find no reason to disagree with the majority of decisions that have determined that, due to the differences in both institutional and economic incentives, a group of government attorneys is not necessarily similar to a group of private attorneys for the purposes of the judicial disqualification of a spouse. See *Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. App. 1984) (holding that, unlike a public attorney, "[a] partner in a law firm is said to be 'engaged' in every case in which a member of his firm represents a party, primarily because he has a financial interest in the outcome of the case"); *In re Jacobs*, 791 N.W.2d 300, 302 (Minn. Ct. App. 2010) (noting the institutional difference between prosecutorial offices and private firms); accord *Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 258 n.8 (Utah 1992) (citing favorably *Beckman*, 683 P.2d at 1216, for the proposition that public attorneys typically do not benefit from a judge's decision in the way that some private attorneys do).

addressing the substantially smaller Weber County Attorney's Office.¹⁰

¶35 Thus, while we are not inclined to follow the Colorado decision in *Smith v. Beckman*, as Van Huizen urges, we are not persuaded by the State that the Minnesota Court of Appeals approach from *In re Jacobs* is fully applicable here, either.

2. The Pertinent Facts

¶36 Having discovered no precedent to guide our resolution of these particular circumstances—where a judge is married to an attorney with a supervisory role within the office prosecuting the case—we consider the specific circumstances at issue here.

¶37 It is uncontested that the Juvenile Judge did not disclose her relationship to the Chief Criminal Deputy in the Weber County Attorney's Office during the juvenile phase of the case and Van Huizen learned of the relationship only after he was bound over as an adult.¹¹ As a consequence, no knowing and

10. "As the largest public law office in Minnesota, with more than 400 employees, [the Hennepin County Attorney's Office] handle[s] tens of thousands of adult felony, juvenile and civil cases each year." *2015 Highlights*, Hennepin County Attorney, <http://www.hennepinattorney.org/highlights2015> [<https://perma.cc/NV6H-6EEE>]. See also QuickFacts, Hennepin County, Minnesota, United States Census Bureau, <http://www.census.gov/quickfacts/table/PST045215/27053,49057> [<https://perma.cc/8VVM-E3CK>] (comparing the July 1, 2015 populations of Hennepin County (1,223,149) and Weber County (243,645)).

11. We acknowledge that the Juvenile Judge may have assumed that the litigants, or more probably their lawyers, were generally aware that her husband was the Chief Criminal Deputy and that the lawyers would raise a concern if one were warranted. We
(continued...)

voluntary waiver of any perceived partiality could have occurred here, nor did Van Huizen have the facts necessary to move to disqualify the Juvenile Judge.¹² Further, the record shows that the Chief Criminal Deputy had at least some involvement in Van Huizen's case once he was bound over to the district court. For instance, the Chief Criminal Deputy himself responded on behalf of the Weber County Attorney to communications from Van Huizen's current counsel when counsel substituted into the case. In addition, the district court's docket shows that the Chief Criminal Deputy requested digital copies of several proceedings, on behalf of either himself or a colleague, on the same day that his spouse signed the bindover order.

¶38 The record does not reveal the specific nature of the relationship between the Chief Criminal Deputy and the deputy county attorney who actually handled Van Huizen's case. The only information contained in the record on that point comes

(...continued)

agree with the Vermont Supreme Court, however, that "[i]t is not appropriate to make such an assumption." *Velardo v. Ovitt*, 2007 VT 69, ¶ 29 n.3, 933 A.2d 227 (addressing a situation where "the assistant judge [may have] thought that the litigants or their lawyers were generally aware of the sibling relationship" between the judge and a guardian ad litem). This is particularly the case given that it is the party's decision, in consultation with counsel, whether to waive a potential conflict, not the attorney's. See Utah Code Jud. Conduct R. 2.11(C) (allowing waiver only if the "parties and lawyers agree" to waive, and incorporate the agreement into the record).

12. In a sworn declaration, Van Huizen stated that, "If I had known" that the Juvenile Judge "[was] married to the Chief Deputy of the Criminal Division," "I would have requested a different judge who had no ties to the office prosecuting me."

from a brief filed in district court after the bindover in question. In that filing, the State represented that the Chief Criminal Deputy “does not supervise the attorneys in juvenile court; he does not screen cases in juvenile court and is not involved in juvenile court matters, those responsibilities are under the purview of other attorneys.”

¶39 We accept that characterization of the Chief Criminal Deputy’s role in the juvenile court proceeding. And while we accept the State’s general characterization of the workflow in the Weber County Attorney’s Office, we also note that on appeal the State does not contest Van Huizen’s basic premise, namely that his juvenile bindover hearing was criminal in nature. *See* Utah Code Ann. § 78A-6-702(1) (providing that actions against minors accused of crimes like the one at issue here “shall be [filed] by criminal information”). That premise suggests that the attorney handling the matter in juvenile court interacted with the Chief Criminal Deputy’s at some level, even if the chain of command had an additional supervisory layer while the case was in juvenile court.

¶40 The record before us seems to confirm that inference. For example, a single county prosecutor represented the State throughout this case, first in the juvenile court and then in the district court after bindover. Particularly given that the Chief Criminal Deputy had at least some involvement with the case once it reached district court and there is no evidence in the record of a screening procedure, it seems unlikely that the Chief Criminal Deputy was completely walled off from the juvenile court proceedings in Van Huizen’s case. Similarly, we cannot conclude that there was a separation of any substance between the juvenile and the adult proceedings—Van Huizen’s entire case appears to have occurred within the same organizational line at the county attorney’s office. Indeed, the case attorney and the Chief Criminal Deputy apparently worked together on the case once it arrived in district court. Therefore, because he was head of the criminal division of the Weber County Attorney’s

Office and the same attorney represented the State throughout Van Huizen's prosecution in juvenile and district court, it is reasonable to conclude that the Chief Criminal Deputy was in the chain of command over the attorney handling the juvenile side of the case, even if he did not supervise the juvenile portion directly.

¶41 In any event, the overall goal of the county attorney's office was to move Van Huizen from juvenile court to district court by means of the bindover proceeding—from a forum where the Chief Criminal Deputy may have had some attenuated role to one where it is clear the Chief Criminal Deputy exercised supervisory authority. With this backdrop in mind, we now consider the nature of various positions within the county attorney command hierarchy as they relate to the question before us.

3. Implications of the County Attorney's Chain of Command

¶42 We begin our analysis at one end of the chain of command, with the proposition that the Juvenile Judge would have been obligated to recuse had the Chief Criminal Deputy actually appeared in or worked on Van Huizen's juvenile case directly—that is, if he had been a counsel of record. Under rule 2.11(A)(2)(b), disqualification is required in any situation where the judge's spouse is "acting as a lawyer in the proceeding."

¶43 Similarly, at the other end of the chain of command, there is little question that the Juvenile Judge would have been obligated to recuse if her spouse was the Weber County Attorney himself—the Chief Criminal Deputy's boss—for at least three reasons. First, a county attorney appears to be within the class of officers of a party explicitly covered by the Code of Judicial Conduct. *Compare* Utah Code Ann. § 17-18a-301(1) (LexisNexis 2013) (stating that "[t]he county attorney is an elected officer"), *with* Utah Code Jud. Conduct R. 2.11(A)(2)(a) (requiring a judge to recuse when her spouse is "an officer . . . of a party").

¶44 Second, a county attorney seems to be among the class of persons who have “more than a de minimis interest that could be substantially affected by the proceeding.” Utah Code Jud. Conduct R. 2.11(A)(2)(c).¹³ This is because, as the elected official in charge of prosecutions for the county, the county attorney is ultimately responsible for individual case outcomes. *See* Utah Code Ann. § 17-53-106(1)(b) (LexisNexis 2013) (making “the management of deputies and other employees” one of the professional duties of a county attorney). Further, we note that a county attorney’s office is tied directly to the ballot box, and although individual votes may be subject to a wide variety of influences, a candidate’s perceived performance in office is certainly among the factors that are likely to inform electoral choice. And while we recognize that voters do not often choose to either support or disavow a given candidate based on the outcome of individual cases such as this, case outcomes as a whole certainly can affect voter choice. Thus, although not at the same level as a member of a private law firm with a direct economic interest in case outcomes, the county attorney’s interest in the results of his staff’s work is not simply de minimis.

¶45 Third, the county attorney typically makes an appearance in every case brought by his or her office. *Compare* Utah Code Ann. § 17-18a-202(1)(a) (LexisNexis 2013) (making the county attorney a “public prosecutor for the county”), *with id.* § 17-18a-401(1) (mandating that a public prosecutor “shall . . . conduct, on behalf of the state, all prosecutions for a public offense committed within a county”). The county attorney is therefore typically counsel of record in every criminal case because it is on his behalf that his attorney-staff charges defendants and prosecutes cases. *See* New York Adv. Comm. on Jud. Ethics Op.

13. “‘De minimis,’ in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.” Utah Code Jud. Conduct, Terminology.

07-216 (Dec. 4, 2008), <http://www.nycourts.gov/ip/judicialethics/opinions/07-216.htm> [<http://perma.cc/WFS5-GSFM>] (determining that a judge whose sibling was the district attorney “must disqualify him/herself” because “the District Attorney . . . is involved either directly or indirectly in all criminal cases prosecuted in the county where the judge presides”). As a consequence, the Juvenile Judge would have been obligated to recuse had she been married to the county attorney for the same reason that she would have been required to recuse if she were married to the case attorney—they are both “acting as a lawyer in the proceeding.” Utah Code Jud. Conduct R. 2.11(A)(2)(b).

¶46 Thus, the Juvenile Judge would have been obligated to recuse herself if her husband had been on either end of the chain of command—trial counsel or county attorney. But in this case, the Chief Criminal Deputy was somewhere in the space between, where the determination is less clear. Here, we turn again to the basic purpose of the Code of Judicial Conduct, which is meant to be read broadly to protect “[t]he purity and integrity of the judicial process . . . against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts.” *Haslam v. Morrison*, 190 P.2d 520, 523 (Utah 1948). The Chief Criminal Deputy, by the nature of his position, is responsible to the County Attorney for the performance of the attorneys below him in the supervisory line. And given that the Juvenile Judge would have been required to recuse if she had been married to either the Chief Criminal Deputy’s subordinate or the Chief Criminal Deputy’s superior, we believe that, in a public law office, the command hierarchy itself is material to the appearance of partiality. Thus, because we have determined that the Chief Criminal Deputy was within the chain of command for this case, we conclude that his marriage to the Juvenile Judge created an appearance of partiality.

¶47 While we are aware of no reported cases that are directly on point, several state ethics opinions have relied on a similar analysis.

There can be no debate over the inappropriateness of a judge hearing cases involving the office of a District Attorney when the elected District Attorney is a close relative of the judge Likewise, a disinterested person would reasonably conclude that the professional relationship between a District Attorney and his or her Chief Assistant is such that the same standard applies when the judge is a close relative of the District Attorney's Chief Assistant or another District Attorney with a supervisory role.

Georgia Jud. Ethics Op. No. 238, 2013 WL 9638986, at *3 (May 1, 2013); *see also, e.g.*, New York Jud. Adv. Op. 10-05, 2010 WL 8149118, at *1 (Mar. 2, 2010) (explaining that "the Committee previously has advised that a judge must disqualify him/herself when the judge's spouse holds a supervisory position in a public law office"). Indeed, there is support for the proposition that a chief criminal deputy may present a greater concern than the county attorney himself, because the chief criminal deputy is more directly responsible for prosecutorial functions. The New York Advisory Committee on Judicial Ethics explained that,

in this instance, the [judge's] spouse is in a position just below the attorney-in-chief, to whom he/she reports, and it is the spouse who bears the responsibility of overseeing all criminal practice operations including the very operations involved herein: State criminal trial proceedings. Thus the judge's spouse is more closely connected to the matters before the judge than the attorney-in-chief.

New York Adv. Comm. on Jud. Ethics Op. 05-87 (Dec. 8, 2005), <http://www.nycourts.gov/ip/judicialethics/opinions/05-87.htm> [<http://perma.cc/PL27-TSZ2>].

¶48 For these reasons, we conclude that, because he was in the direct chain of command between County Attorney and the attorney prosecuting this case, the Chief Criminal Deputy falls within the class of persons who can create an appearance of partiality that requires a judge spouse to, at a minimum, obtain informed consent from the parties to preside as provided by rule 2.11(C). In keeping with the majority of jurisdictions, our holding does not extend to a judge's relationship with attorneys who merely work in the same public office as the attorney appearing before the judge.¹⁴ Likewise, our holding does not exclude the possibility that thoughtful screening procedures in a public office could sufficiently protect a judge married to a

14. Our conclusion that there was an appearance of partiality here might be different if, for instance, the Juvenile Judge's spouse was the supervisor of the civil division of the Weber County Attorney's Office rather than the criminal division. In that situation, where the prosecuting attorney was part of a different command hierarchy than the attorney spouse, the separation between the divisions would likely be a significant distinction from the circumstances here with regard to questions concerning a judge's disqualification. Cf. Utah Jud. Ethics Informal Op. No. 94-6, 1995 WL 17935846, at *2 (advising that a judge's marriage to an assistant attorney general did not automatically require recusal from cases involving a different assistant attorney general "due to the...the divisional organization" of the office, among other reasons like the office's size and geographic dispersion). *But see* Utah Jud. Ethics Informal Op. No. 88-3, 1988 WL 1582480, at *3 (advising that a judge's marriage to a public defender working at the Legal Defender Association required recusal "in all cases where LDA is the attorney of record," regardless of whether the judge's spouse worked on the individual case, in part because of the relatively small size of the office which "functions like a private law office in that case information and strategies are shared among attorneys").

prosecutor from the appearance of partiality, but there is no indication that any were in place here. In any event, as we have discussed, it is important to err on the side of disclosure when considering relationships that could give rise to the reasonable appearance of partiality, and no such disclosure occurred on the record in this case.

B. Prejudice Requirement

¶49 We have concluded that the Juvenile Judge's marriage to the Chief Criminal Deputy created an appearance of partiality. But under the unusual circumstances of this case, which reaches us late in the proceedings after a successful *Manning* motion, Van Huizen has already been bound over for trial in the district court by the Juvenile Judge and convicted as an adult. We therefore must determine if any remedy is available to Van Huizen based on the Juvenile Judge's appearance of partiality.

¶50 Van Huizen argues that "the appearance of impropriety" in his case "requires reversal of the bindover order." The State counters that, even if the Juvenile Judge should have recused based on her marital relationship with the prosecutor's office, Van Huizen "has not shown prejudice, as he must."¹⁵ The key

15. The State asserts that we must conduct a plain error review on this issue. However, plain error is an exception to the preservation rule, which generally requires that claims be raised in the lower court before being raised on appeal. See *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346 (recognizing "plain error" as an exception to the preservation rule). It is true that the Juvenile Judge's appearance of partiality was not raised in the juvenile court. However, it is also true that the preservation rule assumes that the appealing party had the opportunity to object in the first instance. Here, the record indicates that Van Huizen did not have such an opportunity because he did not have knowledge of the relevant facts at the time of the bindover
(continued...)

difference between the two positions—and thus the key to whether Van Huizen is entitled to relief—turns on the question of whether a showing of prejudice is necessary for the remedy sought in this case.

¶51 Utah law is unsettled on the question of whether an appellant must show prejudice when a judge's relationship constituted an appearance of partiality, with two apparently diverging approaches. One line of cases imposes a prejudice requirement on appeal. For instance, our supreme court has held that "[f]ailure to observe [the recusal standard in the Code of Judicial Conduct] may subject the judge to disciplinary measures. However, that does not necessarily mean that the defendant is entitled to a new trial." *State v. Neeley*, 748 P.2d 1091, 1094 (Utah 1988). Building on that decision, the court concluded in *State v. Gardner* that a judge's failure to recuse, even

(...continued)

decision. Thus, we conclude that plain error is not the proper framework for our review. *See In re D.B.*, 2012 UT 65, ¶ 34, 289 P.3d 459 (noting parenthetically that the preservation rule "does not apply where the question did not exist or could not be raised below" (citation and internal quotation marks omitted)). Furthermore, the State's argument implies that a defendant has a duty to investigate and preserve appearance of partiality issues in the first instance. Certainly, a defendant must timely raise any questions of this sort that he is aware of from whatever source. *See* Utah R. Crim. P. 29(c)(1)(B)(iii) (requiring a disqualification motion to be filed not later than twenty-one days after "the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based"). But, as we have discussed, it is the judge's duty to disclose facts relevant to disqualification in the first instance. In any event, the State's larger point—that some Utah law supports the proposition that Van Huizen must show prejudice—is nonetheless accurate, and we address that below.

in circumstances where he should have done so, was subject to harmless error analysis. 789 P.2d 273, 278 (Utah 1989). Later, in *State v. Alonzo*, the supreme court reiterated that a judge's "failure to recuse himself or herself does not automatically entitle a defendant to a new trial." 973 P.2d 975, 979 (Utah 1998). Relying on *Gardner* for the proposition that "the appearance of bias may be grounds for reversal if actual prejudice is shown," the *Alonzo* court concluded that "[a]ctual prejudice can be shown when there exists a reasonable likelihood that the result would have been more favorable for the defendants absent the trial judge's appearance of bias." *Id.* (citing *Gardner*, 789 P.2d at 278).

¶52 Another case, however, indicates that a prejudice showing is not always required. In *Regional Sales Agency, Inc. v. Reichert*, the supreme court addressed an appearance of impropriety involving a member of this court. 830 P.2d 252 (Utah 1992). On certiorari, the *Reichert* court addressed a situation where one of the judges on a panel deciding the case was related through marriage to two partners at the firm that argued it. *Id.* at 254. As with the proceedings at the juvenile level in this case, the *Reichert* record contained no suggestion that the related attorneys "participated in [the] case at any time." *Id.* at 255. Also like this case, the petitioner did not "contend[] that [the judge's] failure to disqualify herself was intentional or malicious." *Id.* at 255. Instead, the petitioner simply argued that the "[judge's] participation create[d] an appearance of impropriety." *Id.* The supreme court agreed and, without conducting a prejudice analysis, "vacate[d] the court of appeals' decision and remand[ed] to the court of appeals for rehearing of the substantive issues." *Id.*

¶53 We believe that the apparent conflict between these precedents can be reconciled because there are several obvious differences between this case and the cases that required a showing of prejudice. First, the procedural posture is different. Unlike this case, the cases that required showing prejudice involved situations where the facts constituting the judge's

alleged appearance of bias where known and brought to the lower court's attention. *E.g.*, *Gardner*, 789 P.2d at 278 ("Defendant filed an affidavit of bias and prejudice against the trial judge because he worked in the [court building where the crime took place]."); *Neeley*, 748 P.2d at 1093 ("Defendants filed a pretrial motion to disqualify [the judge] from presiding at their trial."); *State v. Alonzo*, 932 P.2d 606, 610 (Utah Ct. App. 1997) ("After these alleged comments were made, defense counsel filed a motion for the trial judge to recuse himself and submitted affidavits detailing their versions of the trial judge's comments."), *aff'd*, 973 P.2d 975 (Utah 1998). Thus, in instances where the supreme court has required a showing of prejudice to grant a new trial, the complaining party had already tried—but failed—to disqualify the trial judge using appropriate procedural mechanisms, such as Utah Rule of Criminal Procedure 29.¹⁶

¶54 The supreme court acknowledged the importance of that point in *Neeley* when it stated, "absent a showing of actual bias or an abuse of discretion, failure to [disqualify] does not constitute reversible error as long as the requirements of [rule

16. Utah Rule of Criminal Procedure 29(c) outlines the process by which a party may move to disqualify a judge based on "bias or prejudice, or conflict of interest." The judge against whom the motion is directed must either grant the motion or certify it to a reviewing judge for decision. Utah R. Crim. P. 29(c)(2). "If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action" *Id.* R. 29(c)(3)(A). Rule 29 applies in juvenile court. Utah R. Juv. P. 57(e) (incorporating a party's rights under rule 29 of the Rules of Criminal Procedure into the rules of juvenile procedure).

29] are met." 748 P.2d at 1094–95.¹⁷ See also *State v. Ontiveros*, 835 P.2d 201, 204 (Utah Ct. App. 1992) ("Because the trial judge precisely followed the provisions of Rule 29, [the appellant] must show actual bias or an abuse of discretion in order to prevail on this point."). And in *Alonzo*, the supreme court explained that point further. "The trial judge in this case complied exactly with rule 29. After he had been approved to continue [with the case], the burden shifted to the petitioners to show actual bias or abuse of discretion." *Alonzo*, 973 P.2d at 979 (citing *Neeley*, 748 P.2d at 1094–95, and affirming this court's decision on that point).

¶55 Based on *Alonzo* and *Neeley*, it appears that a failed attempt to disqualify a trial judge may be a prerequisite to requiring a showing of prejudice on appeal. As we understand it, this burden shifting rationale makes sense. In the first instance, it is the judge's duty to either recuse sua sponte or disclose the facts that might give rise to an appearance of partiality. Once the facts have been disclosed, the defendant may either waive the appearance of partiality or move to disqualify the judge under Utah Rule of Criminal Procedure 29, which imposes a timeliness requirement on the movant.¹⁸ Assuming

17. In *Neeley*, the procedural mechanism in play was codified at Utah Code section 77-35-29. However, as this court noted in *State v. Ontiveros*, 835 P.2d 201, 204 (Utah Ct. App. 1992), rule 29 of the Utah Rules of Criminal Procedure is section 77-35-29's current analogue.

18. The rule requires the movant to file not later than twenty-one days after "the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based." Utah R. Crim. P. 29(c)(1)(B)(iii); see also Utah R. Civ. P. 63(b)(2) (imposing the same timeliness requirement in civil actions). Optimally, the
(continued...)

the defendant timely moves to disqualify the judge, the motion is either granted or referred to a neutral judge to decide the issue. *See supra* ¶ 53 note 16. Thus, rule 29 is the mechanism by which defendants may invoke the relevant requirements of the Code of Judicial Conduct. And hence, when reviewing a case in which the defendant moved to disqualify the judge, appellate courts assume that the issue was resolved properly through the rule 29 process in the first instance. The defendant therefore bears the extra burden on appeal of showing not just an appearance of bias, but actual bias.

¶56 However, that process presumes that the judge disclosed the facts necessary to support the rule 29 motion in the first place or that the party learned those facts through some other means. The case at bar, though, involves an appearance of partiality that was raised for the first time on appeal because the judge did not disclose the facts giving rise to the challenge. Van Huizen therefore had no basis to invoke rule 29,¹⁹ and the reasoning underlying the imposition of a burden of prejudice on appeal does not apply here.

¶57 The second difference between this case and those requiring a showing of prejudice is found in the judge's degree of involvement in the ultimate disposition of the case. In *State v. Alonzo*, the supreme court affirmed this court's reasoning that a judge's appearance of partiality was more likely to be harmless

(...continued)

time would begin at the point of the judge's disclosure to the parties of any relevant relationship.

19. Van Huizen's averment that he was not aware of the relationship until well after the bindover is uncontradicted in the record before us, and no one has suggested that his lack of knowledge was the result of any failure to "exercise . . . reasonable diligence." *See* Utah R. Crim. P. 29(c)(1)(B)(iii).

because the “[d]efendants’ guilt was determined by a jury and the judge’s [biased] statements were . . . not made in the jury’s presence.” 973 P.2d 975, 979–80 (Utah 1998) (original ellipses, citation, and internal quotation marks omitted). Thus, both this court and the supreme court seemed to consider the jury to be an important intermediary in the decision making process which shields a criminal defendant from the possible effects of a judge’s partiality. Utah is not alone in taking that position. *E.g.*, *Commonwealth v. Mercado*, 649 A.2d 946, 960 (Pa. Super. Ct. 1994) (“Moreover, when a defendant is tried by a jury, which exercised sole responsibility for evaluating the testimony and arriving at a verdict, the integrity of the fact-finding process is insulated from any predispositions held by the trial judge.”). *But see Parenteau v. Jacobson*, 586 N.E.2d 15, 19 (Mass. App. Ct. 1992) (holding that “a courtroom has no place for a judge whose impartiality in a matter may be reasonably questioned, even if he is not the fact-finder”).

¶58 In this case, Van Huizen never had the opportunity to invoke the procedural mechanism that the *Alonzo* court determined shifts the burden and requires the appellant “to show actual bias or abuse of discretion” to prevail on appeal. *Alonzo*, 973 P.2d at 979. Additionally, the Juvenile Judge acted alone in Van Huizen’s bindover hearing, making both factual and legal determinations in arriving at a decision that is both fact sensitive and highly discretionary; there was no jury to insulate the bindover decision from the appearance of partiality. *See id.* at 979–80.

¶59 For these reasons, we conclude that this case is dissimilar to the *Alonzo* line of cases that require a prejudice showing. This case is similar, however, to *Regional Sales Agency, Inc. v. Reichert*, which did not impose a prejudice requirement. In this case, as in *Reichert*, the facts constituting the appearance of partiality were not disclosed by the judge below and there was no jury to insulate the process from the potential effects emanating from the appearance of partiality. 830 P.2d 252, 257–58 (Utah 1992).

Thus, we conclude that Van Huizen is entitled to relief without showing prejudice on the basis that the Juvenile Judge's marriage to the Chief Criminal Deputy created an appearance of partiality that went undisclosed and thus unaddressed below.

¶60 Other courts have reached a similar conclusion. For example, the New Hampshire Supreme Court "decline[d] to implement a harmless error test when evaluating violations of the code [of judicial ethics] by the members of the New Hampshire bench" because "it would be inconsistent with the goals of our code to require certain standards of behavior from the judiciary in the interest of avoiding the appearance of partiality, but then to allow a judge's ruling to stand when those standards have been violated." *Blaisdell v. City of Rochester*, 609 A.2d 388, 391 (N.H. 1992); *see also Scott v. United States*, 559 A.2d 745, 751 (D.C. 1989) (en banc) ("Furthermore, a defendant is not required to show prejudice from a violation of the standard set by [the code of conduct] as would affect the outcome of the trial in order to be entitled to the extraordinary writ of mandamus."); *State v. Smith*, 635 So. 2d 512, 514 (La. Ct. App. 1994) ("Although in the instant case there was no motion to recuse [the judge], we believe that the interests of justice and the avoidance of impropriety require a reversal of sentence and a remand for resentencing.").

¶61 And in *Velardo v. Ovitt*, the Vermont Supreme Court addressed circumstances similar to those here. 2007 VT 69, 933 A.2d 227. In *Velardo*, a party claimed that the trial judge should have recused due to an appearance of partiality that was not identified until after trial in a child custody dispute. *Id.* ¶ 1. After determining that the complicated circumstances created the appearance of partiality, the court turned to the question of remedy and determined that a split of authority exists on whether vacatur is warranted absent a showing of prejudice. *Id.* ¶¶ 12, 23–28. The court stated:

We reject the North Dakota Supreme Court's holding that orders of a judge who creates an appearance of impropriety cannot be set aside unless there is a showing of actual bias or prejudice. On this point, we agree with the New Hampshire Supreme Court that such a rule would be inconsistent with the goals of our code to require certain standards of behavior from the judiciary in the interest of avoiding the appearance of partiality, but then to allow a judge's ruling to stand when those standards have been violated. On the other hand, we believe that [the New Hampshire Supreme Court's] holding that a judge's failure to disqualify can never be harmless goes too far.

Id. ¶ 28 (citations and internal quotation marks omitted). The *Velardo* court therefore took a middle ground and imported a federal balancing test to determine on a case by case basis whether vacatur is a proper remedy. While we do not adopt the Vermont balancing test, that approach confirms and reinforces the analytical approach that we have identified in our own precedent.

¶62 For instance, as in our case, the *Velardo* court noted that the judge "had actual knowledge of the source of the conflict" and "an independent duty to disclose the relationship that created the conflict." *Id.* ¶ 29. The court also noted that the decision below was a "very difficult . . . case," *id.* ¶ 31 (internal quotation marks omitted), a factor similar to the situation here, where the Juvenile Judge's decision was apparently a close call—she found by the high standard of clear and convincing evidence that one of the two statutory factors favored Van Huizen's retention in juvenile court. Thus, we agree with the *Velardo* court that, because "the result was not easily reached," "[t]he appearance of influence, therefore, [was] significant." *See id.* Finally, the court pointed out that, "because we afford such wide

discretion to the family court, we cannot determine with any precision the influence of partiality, if any.” *Id.* Without question, juvenile courts in Utah are similarly afforded “broad discretion regarding judgments, based on the juvenile court’s specialized experience and training,” *In re J.R.*, 2011 UT App 180, ¶ 2, 257 P.3d 1043 (per curiam), which serves to both obscure the effects of partiality and potentially amplify the consequences. For these reasons, the Vermont Supreme Court’s analysis supports our own conclusion that a showing of prejudice or actual bias on appeal is not required in this case.

C. Remedy

¶63 We conclude that Van Huizen is entitled to a new bindover hearing because the Juvenile Judge’s spousal relationship with the Chief Criminal Deputy created an appearance of partiality in the original bindover proceeding. Because the Juvenile Judge did not disclose her relationship, Van Huizen did not have the opportunity to move for disqualification under Rule of Criminal Procedure 29, which allows a party to challenge the impartiality of a judge in a juvenile case. *See supra* ¶ 53 note 16. Thus, Van Huizen never invoked the procedural mechanism that in other cases has been a factor in requiring a showing of prejudice to succeed on a claim of appearance of judicial partiality on appeal. *See State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998) (indicating that a failed attempt to disqualify a judge is a prerequisite for requiring a party “to show actual bias or abuse of discretion” on appeal). Further, the bindover decision here was solely within the realm of the Juvenile Judge’s discretion, with no independent decision maker such as a jury to attenuate the potential effects of any partiality. *See id.* at 979–80 (indicating that a jury helps insulate a judge from the effects of an appearance of partiality).

¶64 We therefore conclude that Van Huizen is not required to show prejudice to prevail on appeal under these circumstances. In a situation like this, where the relevant information was

neither disclosed by the judge nor known to Van Huizen at the time of his bindover hearing, the appearance of partiality is enough to require a new hearing. See *Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 254, 257–58 (Utah 1992) (remanding for new proceedings without conducting a prejudice analysis in circumstances where the facts giving rise to an appearance of partiality were not previously known).

CONCLUSION

¶65 Based on the analysis set forth above, we vacate the juvenile court's bindover order and remand the issue for a new hearing before a different judge. If Van Huizen is bound over to district court, the results of his district court proceeding will remain undisturbed. If Van Huizen is not bound over, his convictions in the district court shall be vacated.

Tab 2

Tab 2 – Juvenile Court's Written Bindover Decision

**IN THE SECOND DISTRICT JUVENILE COURT
FOR WEBER COUNTY, STATE OF UTAH**

STATE OF UTAH, Plaintiff, vs. COOPER VAN HUIZEN, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON BIND OVER Case Number: 1003447 Judge: Michelle E Heward
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This matter came before the court for a preliminary hearing/examination and a subsequent best interest hearing, on December 20, 2013. The State was present and represented by Brody E. Flint, Deputy Weber County Attorney. The Defendant was present and represented by his attorney, Rex Bray; co-defendant Josh Parley Dutson was present and represented by counsel, Mary Ann Ellis. The Court heard evidence from all parties and being fully apprised, now makes the following:

FINDINGS OF FACT

1. The State met its burden and the court finds probable cause to believe that the crimes listed in the Information, two aggravated robberies and one aggravated burglary, occurred as alleged.
2. Further, there is probable cause to believe that Cooper Van Huizen committed the offenses alleged in the Information.
3. The Defendant has no prior record in the juvenile court.

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JUVENILE COURT
SECOND JUDICIAL DISTRICT

4. These offenses were committed with other co-defendants. The Court therefore considers the Defendant's degree of culpability in comparison to the other co-defendants, and finds that his culpability was significant.

a. Mr. Van Huizen's involvement was less at the scene of the crime than others. There is insufficient evidence that he brandished a gun or switchblade knife during the commission of the burglary or robberies although he was present and assisted in the forced entrance into the home with co-defendants.

b. Mr. Van Huizen's involvement was to plan and facilitate the robberies. Specifically the guns used were guns from Mr. Van Huizen's home. Mr. Van Huizen provided the guns knowing they would be used in the burglary and robberies.

c. Mr. Van Huizen's assistance in the robbery ensured that the other co-defendants would have guns to use when breaking into the home and robbing the persons therein.

5. Mr. Van Huizen's role in the offense was committed in a violent, aggressive, or premeditated manner.

a. These offenses were committed with guns and threats of violence. The guns belonged to Mr. Van Huizen and were provided knowing they would be used in the burglary and robberies. This planning occurred over a period of time and was not a spur of the moment decision.

b. Mr. Van Huizen was with co-defendants who forced their way at gun point into one of the most protected and sacred areas in our society, the home.

c. The violence committed in the home was facilitated by Mr. Van Huizen's planning and preparation. Mr. Van Huizen knew that the guns were intended to be used in a burglary and robbery for drugs.

d. Mr. Van Huizen's presence in the home, by itself, was a threat to the victims and a danger to others who were in or could have come into the home.

6. This is Mr. Van Huizen's first offense in juvenile court.

7. Public safety is better served by adjudicating the minor in the district court.

a. Mr. Van Huizen is 16 years old and juvenile court jurisdiction is limited until the age of 21; the district court's jurisdiction is not limited.

b. The involvement of drugs, violence, firearms, and forcing entry into a home to commit robberies places these offenses among the most serious in our community.

c. The likelihood of harm to others was great given the facts of this case. People understandably react violently to such acts of aggression, particularly when they occur in the home. Acts of this nature are extremely volatile and can easily lead to even fatal harm to law enforcement and other members of the public.

d. Public safety requires a strong response and longer correctional period than is available in the juvenile court.

e. The defense provided evidence of a loving family and good home. The court finds that will help the Defendant in terms of his long term rehabilitation, but it also works against him in this case. Despite the benefits of that home he chose to engage in violent and irresponsible acts that put the safety of members of the public at grave risk.

8. The Court finds by clear and convincing evidence that it would be contrary to the best interest of the Defendant to bind him over to the jurisdiction of the district court.

9. The defense has not shown, however, by clear and convincing evidence, that it is in the best interest of the public for this case to be adjudicated in juvenile court. The court finds that it is contrary to the best interests of the public to allow the case to remain in juvenile court.


Based upon the foregoing Findings of Fact, the Court enters the following

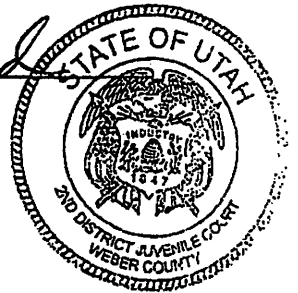
CONCLUSIONS OF LAW & ORDER

The Defendant should be and hereby is bound over to the district court for further proceedings on the Information. An arrest warrant has issued and bail has been set.

DATED this 21 day of January, 2014.

BY THE COURT:


MICHELLE E. HEWARD
JUVENILE COURT JUDGE



Tab 3

Tab 3 – Juvenile Court's Oral Bindover Decision

1 interest of the public to bind the defendants over to the
2 jurisdiction of the district court.

3 The Court wants to make sure that I'm making a record
4 that is clear for both of the defendants individually and not
5 placing them together. Counsel, I'll ask if there are any
6 questions with regard to the findings as I go through here that
7 you ask questions if I'm not clear with regard to each of your
8 clients and to the State's interest so that I can make sure that
9 that record is clear, and I'll attempt to do that.

10 The Court has considered the five statutory factors that
11 are set forth in 78A-6-702(3)(c). The first of those factors by
12 stipulation has been found to go in favor of each of the
13 defendants. Neither one of them have prior records here in the
14 juvenile court that are of any significance here.

15 The second factor is whether the offenses were committed
16 with one or more persons -- I'm sorry, these offenses were
17 committed with one or more persons, so the Court considers
18 whether each of the minor's involvement, whether each of them
19 had a greater or lesser degree of culpability than their co-
20 defendants.

21 With regard to Mr. JPD, the Court finds that his role
22 in carrying out the offenses was one of planning and pulling
23 people together. The evidence before the Court shows that the
24 culpability of Mr. JPD both before and during the actual offense
25 shows that he had culpability.

1 He was involved in acquiring guns prior to the robbery,
2 with the knowledge that they would be used in the robbery. He
3 was in a place to use those weapons to gain entry. I'm sorry,
4 he was in on the plan to use the weapons to gain entry into the
5 home, and to take what he and his co-defendants wanted from the
6 people within the home.

7 While the Court does not find that he pointed a gun at
8 either of the victims -- I'm just not sure what happened there --
9 but I do find that that was done by two of the -- the two adults
10 that were involved. Mr. JPD's involvement had a high degree of
11 culpability in insuring that that would happen, that the people
12 that he was with would pull guns and use them after breaking into
13 the home.

14 With regard to Mr. CVH, the Court finds that his
15 involvement was less in terms of his physical involvement at the
16 scene. I don't have evidence that he brandished a gun, and I
17 have insufficient evidence to determine whether he had a
18 switch -- the switchblade that had been referred to by others
19 that have testified here today.

20 His involvement was in planning and facilitating the
21 offenses. His involvement was actually greater than that of
22 Mr. JPD's. These were his guns from his home, and this was well
23 planned out in terms of how the guns would be used. So in terms
24 of the second factor, the Court finds that the involvement of
25 each of the -- each of these defendants was significant in terms

1 of the offenses.

2 Whether the role -- the third factor as the extent of
3 the minor's role in -- was it committed in a violent, aggressive
4 or premeditated manner. The premeditation in these offenses has
5 been -- already been referred to by the Court. This was not a
6 spur of the moment, a dumb or a childish decision, a quick
7 reaction. Both defendants were involved in planning the
8 robberies and the burglary.

9 There were multiple steps that were carried out prior to
10 actually going out to the home. This took place over a period of
11 time, giving both of the defendants ample opportunity to retract
12 themselves from the offenses, but they chose not to do so. These
13 were violent and aggressive offenses with the use of guns and
14 threats, going inside one of the most protected and sacred places
15 in our society, the home.

16 The violence that was employed, albeit by others in
17 terms of pulling the guns, was made possible by Mr. CVH and
18 facilitated by Mr. JPD. In addition to providing the guns by
19 Mr. CVH and the planning or pulling together of the parties and
20 facilitation by Mr. JPD, they both -- both of these defendants
21 forced their way into a home with the assistance of friends
22 that they were with who were using guns, and their physical
23 presence -- I'm talking about the defendant's physical presence
24 was a threat when the offense took place. The Court finds that
25 the roles of both JPD and CVH to have been involved involved

1 violence, aggression and were premeditated.

2 The number and nature -- the next factor is the number
3 and nature of prior adjudications in the juvenile court. The
4 Court finds that those again go in favor of the defendants here.
5 They do not have violent -- or they do not have records of any
6 significance here in the juvenile court.

7 The fifth factor is whether public safety is better
8 served by adjudicating the minors in the juvenile court or in the
9 district court. The Court believes that public safety would be
10 better served in both of these cases by adjudicating them in the
11 district court.

12 They are older juveniles, 16 and 17-years of age.
13 The extent of the juvenile court's involvement is limited until
14 the age -- is limited to the age of 21. The district court's
15 jurisdiction is not limited. While these were first offenses,
16 the involvement of drugs, violence, particularly the use of
17 firearms and forcibly entering into a home where people therein
18 were robbed places the offense amongst the most serious in our
19 community. The likelihood of further injury and harm is great
20 when given the facts of this case. Society deserves to be
21 strongly protected against this activity.

22 The Court does find that the defense has shown that it
23 is contrary to the best interest of the minors to bind them over
24 to the jurisdiction of the district court. There are more
25 rehabilitative services that are available in the juvenile system

1 than in the adult system. Both of the minors, both of the
2 defendants appear to have loving families and homes that they
3 have come from. They have had opportunities in the past to
4 succeed, and they have skill sets that show that they have many
5 capabilities. They chose not to use those. Either the support
6 nor the positive skill sets that I think both of them have, they
7 chose not to use those in this situation.

8 So the Court finds that the defense has not met its
9 burden of proving that it is contrary to the best interest of the
10 minor and the best interest of the public to bind the defendants
11 over to the jurisdiction of the juvenile court. Let me make sure
12 that I've said that right. While the defense has met the burden
13 of proving it is contrary to the minor's best interest, neither
14 defense has met its burden of showing that it's in the best
15 interest of the public in this inter -- in this instance, and the
16 matter is bound over to the district court.

17 On a personal note, this is not the way that I would
18 want any young man to start his majority with serious offenses
19 in the adult system. It's tough to be held accountable for
20 your actions, but I also think that it's necessary -- that
21 accountability is necessary. You still both have a lot of years
22 in front of you, and it is the Court's hope that you use this
23 experience to do -- make better decisions and choices in the
24 future as you move forward.

25 That being said, I need arrest warrants here. Does the

Tab 4

Tab 4 – District Court's Omnibus Ruling and Order Reinstating Appeal

**IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

COOPER JOHN ANTHONY VAN
HUIZEN.

Defendant.

**OMNIBUS RULING AND
ORDER ON DEFENDANT'S
POST-SENTENCE MOTIONS** AUG 29 2014

Case No. 131902542

Judge Ernie W. Jones

FILED

AUG 29 2014

SECOND
DISTRICT COURT

This matter is before the Court on Defendant's several post-sentence motions. In order, Defendant has presented the Court with the following motions: 1) the "Motion to Correct Sentence Imposed Illegally as a Result of Ineffective Assistance of Counsel"; 2) the "Motion to Reinstate Appeal of Right from Serious Youth Offender Bindover Order"; 3) the "Motion to Declare Misdemeanor or Nullify Pleas"; 4) the "Motion to Quash Bindover Order from Juvenile Court"; and 5) a "Motion for Stay of Sentence Pending Appeal" combined with an "Application for Certificate of Probable Cause." Counsel for both the State and Defendant have fully briefed these motions and the Court has carefully considered the arguments and law cited therein. In the interest of judicial efficiency, and as these motions touch on similar themes and legal questions, the Court will address these motions in this single omnibus ruling and order.

BACKGROUND

Defendant, following his participation in a violent home invasion, was charged with two counts of aggravated robbery and one count of aggravated burglary. Defendant, a 16-year-old minor, was then bound over from juvenile court to this Court to face the charges as an adult. The bind over process was conducted in accordance with the Juvenile Court Act, specifically its provisions relating to serious youth offenders *See* Utah Code Ann. §78A-6-702. In March of this year, Defendant entered guilty pleas to two reduced, second-degree felony robbery charges. On May 7, 2014, Defendant was sentenced to two concurrent 1- to 15-year terms in the Utah State Prison.

Defendant, by raising several alleged deficiencies, now seeks to challenge the process by which Defendant was bound over into district court from juvenile court, entered his plea of guilty, and a sentence was imposed. In deciding these motions, the Court will address each motion according to its chronological relation to Defendant's proceedings, rather than in the order that Defendant filed the motion with the Court. Following the Court's analysis and ruling, the Court will specify its respective orders.

ANALYSIS

I. Motion to Quash Bind Over Order from Juvenile Court

First, the Court addresses Defendant's motion to quash the bind over order from juvenile court. Defendant argues that he was prejudiced by several alleged

legal and structural errors that occurred during the process by which the juvenile court bound him over to this Court. The statutory mechanisms establishing this bind over process are outlined below.

The Juvenile Court Act, specifically in its provisions relating to transferring serious youth offenders to district court, provides that juveniles may be bound over and held to answer to as adults in district court if the criminal information filed against those juveniles charges them with certain types of violent offenses. *See* Utah Code Ann. §78A-6-702. This process is not automatic and is subject to the state meeting its burden to establish probable cause that that the violent offense has been committed and that the juvenile defendant committed said violent offense. Utah Code Ann. §78A-6-702(3). If the state met this burden, the juvenile court “shall order that the defendant be bound over [to the district court] . . . unless the juvenile court judge finds that it would be contrary to the best interest of the minor and to the public” *Id.*

The factors that a juvenile court judge may rely upon in making the determination to bind over the defendant are very specific, and the Juvenile Court Act provides that a juvenile defendant may appeal a bind over order. *See* Utah Code Ann. 78A-6-702(3)(c), 78A-6-704(a). On appeal, the Utah Court of Appeals then reviews the bind over order and the “underlying factual findings made by the juvenile judge” for “clear error” in order to determine whether to affirm or reverse the bind over order. State ex rel. M.E.P., 114 P.3d 596, 598 (Utah Ct. App. 2005).

This process illustrates that it is only the *appellate* court that is vested with the authority to consider and potentially quash juvenile bind over orders. Defendant has offered sundry arguments as to why this Court should quash the bind over order, but such arguments to *this* Court are unavailing, as it possesses no jurisdiction to issue the particular relief sought. Only the appellate court may consider these arguments and order the bind over order quashed if that court determines that such action is appropriate. For lack of jurisdiction, this Court cannot grant such a motion.

II. Motion to Reinstate Appeal of Right from Serious Youth Bindover Order

The Court now turns to Defendant's motion to reinstate the timeframe to appeal the bind over order. Defendant argues that he was prejudiced by the failure of then-serving counsel to timely file an appeal of the bind over order and the failure of same counsel to inform Defendant of the availability of such an appeal. Defendant cites the Utah Supreme Court case *State v. Manning* in support of the proposition that it is appropriate to reinstate appellate time when appeals of right are defaulted by counsel and through no fault of the defendant. *See State v. Manning*, 122 P.3d 628, 636 (Utah 2005). The State agreed in its opposing memorandum that under *Manning*, Defendant should have his time to appeal the bind over order reinstated.

Manning provides that it is appropriate to reinstate a Defendant's direct appeal right if it can be determined that the defendant "been prevented in some meaningful way from proceeding with a first appeal of right." *Id.* at 635. One of the outlined circumstances of *Manning* leading to reinstatement of the direct appeal right is that the defendant can demonstrate that "the court or the defendant's attorney failed to properly advise defendant of the right to appeal." *Id.* While the State points out that the juvenile court bind over order clearly specified the 30-day right to appeal that order, Defendant maintains that his counsel neither informed the Defendant of this fact nor provided the Defendant with a copy of the bind over order.

Normally a guilty plea, such as Defendant's here, would serve as a waiver of any alleged procedural defects with the bind over. *See State v. Rhinehart*, 167 P.3d 1046, 1049 (Utah 2007). However, our Supreme Court has specified that this waiver does apply to alleged errors of a jurisdictional nature. *Id.* Here, had Defendant timely appealed the bind over order, he would have been challenging the decision of the juvenile court to confer jurisdiction over the Defendant to this Court. This question, combined with the fact that Defendant has offered evidence supporting the application of the *Manning* circumstances (namely that counsel failed to advise Defendant of his right to appeal and failed to provide him with the juvenile court order specifying the available relief) leads the Court to conclude that reinstating Defendant's time to appeal the bind over order is appropriate.

The Court, however, must stress that granting Defendant's motion here does not affect Defendant's present incarceration, as the Court's decision cannot unwind all proceedings post-bind over order. When this Court heard the case, accepted the plea, and announced a sentence, it did so with the understanding that it held proper jurisdiction via bind over order. Barring an appellate court decision as to the validity of that bind over order and its effect on this Court's sentence, the Court lacks the authority to stay the sentence in conjunction with reinstating the time to appeal the bind over order. The appropriate procedural mechanism to stay a sentence pending appeal is found in Rule 27 of the Utah Rules of Criminal Procedure. As mentioned in the outset of this ruling, Defendant has made a motion invoking that rule, and the Court will address the merits of that motion later in this ruling.

III. Motion to Declare Mispleas or Nullify Pleas

Next the Court addresses Defendant's motion that this Court recognize Defendant's guilty pleas as mispleas or alternatively to nullify those guilty pleas. Defendant asserts that this Court retains the authority to declare a misplea here or to nullify his pleas because the guilty pleas were not knowing or voluntary. While it is true that a trial court may withdraw a plea of guilty upon a showing that the plea was not knowingly or voluntarily made, such motions *must* be made prior to the announcement of sentence. Utah Code Ann. §77-13-6(2)(a)-(b). Any

challenge to a guilty plea "not made within the [specified] time period" can only be pursued via request for post-conviction relief. Utah Code Ann. §77-13-6(2)(c).

Here, the Court has announced its sentence regarding the Defendant's conviction. Accordingly, the Court possesses neither the authority to hear such a motion nor the ability to grant the requested remedy. Defendant's arguments regarding knowledge, volition, and their relation to his guilty pleas may only be offered in a separate, civil petition for post-conviction relief. The Court therefore cannot grant this motion.

IV. Motion to Correct Sentence Imposed Illegally as a Result of Ineffective Assistance of Counsel

Defendant also moves this Court, pursuant to Utah Rule of Criminal Procedure 22(e), to correct Defendant's sentence on the basis that the sentence was illegal. In support of this motion, Defendant offers that the sentence was illegal due to trial counsel's ineffective assistance at the sentencing hearing. Specifically, Defendant argues that the assistance was ineffective because trial counsel failed at the sentencing hearing to distinguish Defendant's culpability from that of his co-defendants', and failed to provide the Court (for purposes of presentence reporting) with information that Defendant alleges was essential to consider. Despite Defendant's strenuous argument, ineffective assistance of counsel does not serve as grounds for declaring a sentence illegal.

Regarding illegal sentences, the Utah Supreme Court has adopted the definition promulgated by the 10th Circuit Court of Appeals. State v. Yazzie, 203 P.3d 984, 988 (Utah 2009). Under that definition, a sentence is illegal if it “is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.” United States v. Dougherty, 106 F.3d 1514, 1515 (10th Cir.1997) (internal quotation marks omitted). As the State points out, a sentence is also illegal if the imposing court lacks subject matter jurisdiction. State v. Thorkelson, 84 P.3d 854, 857 (Utah Ct. App. 2004).

As the Court cannot consider Defendant's arguments of ineffective assistance of counsel as a proper basis for declaring the sentence here illegal, it must determine whether the any of the aforementioned, recognized grounds apply. The Court determines that they do not. Defendant pled guilty to two counts of robbery. Robbery is classified under Utah Code Annotated §76-6-301 as a second-degree felony. Pursuant to Utah Code Annotated §76-3-203, the appropriate sentence that may be levied against a person convicted of a second degree felony is an indeterminate term of imprisonment “not less than one year nor more than 15 years.” Utah Code Ann. §76-3-203(2). Defendant's sentence here was not ambiguous with respect to time or manner. It was not internally contradictory. It did not omit a required term imposed by statute. It was not uncertain as to the

substance of the sentence. It was precisely the sort of sentence authorized by the conviction of a second-degree felony. As previously established, the Court had jurisdiction subsequent to the issuance of the bind over order from juvenile court. None of the established grounds that would render a sentence illegal and require correction under Rule 22(e) of the Utah Rules of Criminal Procedure exist here. Accordingly, the Court can find no basis to properly grant Defendant's motion.

V. Motion to Stay Sentence Pending Appeal and Issue a Certificate of Probable Cause

Finally, the Court addresses Defendant's petition for a certificate of probable cause motion to his Motion to stay his sentence pending appeal. In order to release a currently incarcerated defendant during the pendency of his appeal, Rule 27 of the Utah Rule of Criminal Procedure requires that that this Court first issue a certificate of probable cause and determine by clear and convincing evidence that the defendant is not likely to flee and does not pose a danger to the community. Utah R. Crim. P. 27(b)(1). In order to properly issue a certificate of probable cause, the Court must find that the Defendant's appeal is not taken for the purpose of delay and raises substantial issues of law or fact reasonably likely to result in reversal. *Id.* at (b)(3).

Out of the myriad arguments Defendant has made, the Court has recognized only one as cognizant: that the Defendant *may* appeal the juvenile Court bind over order due to the failure of trial counsel to apprise him of his right to appeal the

order. However, this Court is not convinced by Defendant's arguments that it is reasonably likely that the Court of Appeals will quash the bind over order.

Furthermore, on the basis of the clearly delineated jurisprudence that informs the Court's analysis of Defendant's other motions, the Court is not convinced that Defendant has raised any substantial issues of law and fact that make it reasonably likely that the Court of Appeals will overturn the Court's other determinations.

Specifically as to the bind over order, Defendant's argument challenges the juvenile court judge's qualifications to hear his case and only collaterally attacks the juvenile court's consideration of the five factors that must be analyzed when deciding to bind over a defendant to district court. As stated previously, the statutory provisions of Utah Code Annotated 78A-6-702(3)(c) require that juvenile court judges only consider five specific factors when making bind over determinations. Nothing in Defendant's arguments suggests that the juvenile court deviated from those factors and none of Defendant's proffered alternative conclusions to each of those factors is legally or factually significant enough to call the court's decision into question.

Furthermore, this Court is not convinced that Defendant's arguments regarding the juvenile court judge (specifically her personal and professional background) raise an issue of fact or law significant enough to make reversal of the bind over reasonably certain. As the Court can find no adequate ground on this issue, or as to the arguments supporting Defendant's other post-sentence motions,

that would warrant the issuance of a certificate of probable cause, the Court will refrain from issuing such a certificate.

Even if the Court were to find a basis to issue the certificate of probable cause, the circumstances forming the basis of Defendant's conviction demonstrate that it is not in the community's best interest to release him from incarceration.

The Defendant is serving his current sentence because he pled guilty to robbery—a robbery accomplished through home invasion and through Defendant's provision of firearms. These are actions and the sort of behavior that can only be characterized as absolutely contrary to the societal interests of peace and safety.


Defendant's age does not mitigate the gravity of these actions. Indeed, the severity of his behavior warranted charging him in district court as an adult. It would be antithetical to the interests—even safety—of the community to suspend the operation of his sentence. Absent grounds to issue a certificate of probable cause, and in light of the circumstances of the offense, the Court is not convinced that it is appropriate to release defendant from incarceration.

ORDER

On the basis of the foregoing rulings, Defendant's Motion to Reinstate Appeal of Right from Serious Youth Bindover Order is GRANTED. All other motions captioned and discussed herein are hereby DENIED. In accordance with granting Defendant's Motion to Reinstate Appeal of Right from Serious Youth Bindover Order, the 30-day period to appeal the bind over order is reinstated.

Pursuant to Rule 4(f) of the Utah Rules of Appellate Procedure, any such appeal of that bind over order must be filed within 30 days of the entry of this Order.

Dated this 29 day of August 2014.



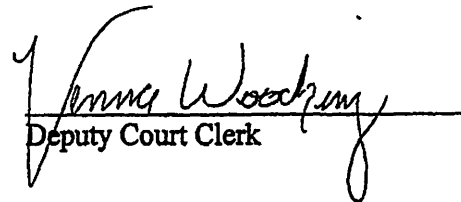
Judge Ernie W. Jones
Utah Second District Court

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of August 2014, I sent a true and correct copy of the foregoing ruling to the parties as follows:

Dee W. Smith
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Deputy Court Clerk

Tab 5

Tab 5 - House Bill 105

SERIOUS YOUTH OFFENDER AMENDMENTS

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Lyle W. Hillyard

LONG TITLE

General Description:

This bill amends the procedure to transfer jurisdiction for a serious youth offender from a juvenile court to a district court.

Highlighted Provisions:

This bill:

- provides for a juvenile court judge to consider a minor's prior adjudications in juvenile court, a minor's best interest, and the public's safety when determining a jurisdiction transfer from a juvenile court to a district court; and
- makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78A-6-702, as last amended by Laws of Utah 2012, Chapter 118

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78A-6-702** is amended to read:

78A-6-702. Serious youth offender -- Procedure.

(1) Any action filed by a county attorney, district attorney, or attorney general charging a minor 16 years of age or older with a felony shall be by criminal information and filed in the

30 juvenile court if the information charges any of the following offenses:

31 (a) any felony violation of:

32 (i) Section 76-6-103, aggravated arson;

33 (ii) Section 76-5-103, aggravated assault resulting in serious bodily injury to another;

34 (iii) Section 76-5-302, aggravated ~~[kidnaping]~~ kidnapping;

35 (iv) Section 76-6-203, aggravated burglary;

36 (v) Section 76-6-302, aggravated robbery;

37 (vi) Section 76-5-405, aggravated sexual assault;

38 (vii) Section 76-10-508.1, felony discharge of a firearm;

39 (viii) Section 76-5-202, attempted aggravated murder; or

40 (ix) Section 76-5-203, attempted murder; or

41 (b) an offense other than those listed in Subsection (1)(a) involving the use of a
42 dangerous weapon, which would be a felony if committed by an adult, and the minor has been
43 previously adjudicated or convicted of an offense involving the use of a dangerous weapon,
44 which also would have been a felony if committed by an adult.

45 (2) All proceedings before the juvenile court related to charges filed under Subsection
46 (1) shall be conducted in conformity with the rules established by the Utah Supreme Court.

47 (3) (a) If the information alleges the violation of a felony listed in Subsection (1), the
48 state shall have the burden of going forward with its case and the burden of proof to establish
49 probable cause to believe that one of the crimes listed in Subsection (1) has been committed
50 and that the defendant committed it. If proceeding under Subsection (1)(b), the state shall have
51 the additional burden of proving by a preponderance of the evidence that the defendant has
52 previously been adjudicated or convicted of an offense involving the use of a dangerous
53 weapon.

54 (b) If the juvenile court judge finds the state has met its burden under this Subsection
55 (3), the court shall order that the defendant be bound over and held to answer in the district
56 court in the same manner as an adult unless the juvenile court judge finds that ~~[all of the~~
57 ~~following conditions exist:]~~ it would be contrary to the best interest of the minor and to the

58 public to bind over the defendant to the jurisdiction of the district court.

59 (c) In making the bind over determination in Subsection (3)(b), the judge shall consider
60 only the following:

61 (i) whether the minor has [not] been previously adjudicated delinquent for an offense
62 involving the use of a dangerous weapon which would be a felony if committed by an adult;

63 (ii) [that] if the offense was committed with one or more other persons, whether the
64 minor appears to have a greater or lesser degree of culpability than the codefendants; [and]

65 (iii) [that] the extent to which the minor's role in the offense was [not] committed in a
66 violent, aggressive, or premeditated manner[-];

67 (iv) the number and nature of the minor's prior adjudications in the juvenile court; and

68 (v) whether public safety is better served by adjudicating the minor in the juvenile
69 court or in the district court.

70 [(c)] (d) Once the state has met its burden under [this] Subsection (3)(a) as to a
71 showing of probable cause, the defendant shall have the burden of going forward and
72 presenting evidence [as to the existence of the above conditions] that in light of the
73 considerations listed in Subsection (3)(c), it would be contrary to the best interest of the minor
74 and the best interests of the public to bind the defendant over to the jurisdiction of the district
75 court.

76 [(d)] (e) If the juvenile court judge finds by clear and convincing evidence that [all the
77 ~~above conditions are satisfied;~~] it would be contrary to the best interest of the minor and the
78 best interests of the public to bind the defendant over to the jurisdiction of the district court, the
79 court shall so state in its findings and order the minor held for trial as a minor and shall proceed
80 upon the information as though it were a juvenile petition.

81 (4) If the juvenile court judge finds that an offense has been committed, but that the
82 state has not met its burden of proving the other criteria needed to bind the defendant over
83 under Subsection (1), the juvenile court judge shall order the defendant held for trial as a minor
84 and shall proceed upon the information as though it were a juvenile petition.

85 (5) At the time of a bind over to district court a criminal warrant of arrest shall issue.

86 The defendant shall have the same right to bail as any other criminal defendant and shall be
87 advised of that right by the juvenile court judge. The juvenile court shall set initial bail in
88 accordance with Title 77, Chapter 20, Bail.

89 (6) If an indictment is returned by a grand jury charging a violation under this section,
90 the preliminary examination held by the juvenile court judge need not include a finding of
91 probable cause that the crime alleged in the indictment was committed and that the defendant
92 committed it, but the juvenile court shall proceed in accordance with this section regarding the
93 additional considerations listed in Subsection (3)(b).

94 (7) When a defendant is charged with multiple criminal offenses in the same
95 information or indictment and is bound over to answer in the district court for one or more
96 charges under this section, other offenses arising from the same criminal episode and any
97 subsequent misdemeanors or felonies charged against him shall be considered together with
98 those charges, and where the court finds probable cause to believe that those crimes have been
99 committed and that the defendant committed them, the defendant shall also be bound over to
100 the district court to answer for those charges.

101 (8) When a minor has been bound over to the district court under this section, the
102 jurisdiction of the Division of Juvenile Justice Services and the juvenile court over the minor is
103 terminated regarding that offense, any other offenses arising from the same criminal episode,
104 and any subsequent misdemeanors or felonies charged against the minor, except as provided in
105 Subsection (12).

106 (9) A minor who is bound over to answer as an adult in the district court under this
107 section or on whom an indictment has been returned by a grand jury is not entitled to a
108 preliminary examination in the district court.

109 (10) Allegations contained in the indictment or information that the defendant has
110 previously been adjudicated or convicted of an offense involving the use of a dangerous
111 weapon, or is 16 years of age or older, are not elements of the criminal offense and do not need
112 to be proven at trial in the district court.

113 (11) If a minor enters a plea to, or is found guilty of, any of the charges filed or any

114 other offense arising from the same criminal episode, the district court retains jurisdiction over
115 the minor for all purposes, including sentencing.

116 (12) The juvenile court under Section 78A-6-103 and the Division of Juvenile Justice
117 Services regain jurisdiction and any authority previously exercised over the minor when there
118 is an acquittal, a finding of not guilty, or dismissal of all charges in the district court.

Tab 6

Tab 6 – Legislative History of House Bill 105

UTAH LEGISLATIVE HEARINGS

Comments of Lowry Snow, Lyle Hillyard and Jacey Skinner

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P R O C E E D I N G S

(Electronically recorded on unspecified dates)

CHAIRMAN: With that, our first item on the agenda will be House Bill, Representative Snow. Representative Snow, the time is yours.

MR. SNOW: Thank you, Mr. Chairman and members of the committee. The bill before you, HB105 relates to the process in the State of Utah whereby we can or the court -- juvenile court can in certain cases involving a juvenile offender certify that juvenile to the district court to stand trial as an adult, and of course if found guilty, to be sentenced as an adult.

This amendment relates to that process. The current code provision is fairly restrictive into how -- as to how that process works. First of all, the process only applies to juvenile offenders that are 16 years of age or older. Secondly, the way that it proceeds is once criminal information is filed for one of the offenses that are listed that are subject to being certified as an adult, the Court holds a probable cause hearing, essentially to determine whether or not there's probable cause to believe that the offender has committed one of those offenses, and then also as part of that, to determine whether or not the juvenile offender was -- has previously been in the juvenile system and has committed an offense using a dangerous weapon.

If those burdens are met, then the Court under the current statutory scheme goes through a fairly narrow process in

1 determining whether or not this offender ought to be certified as
2 an adult. The standard of evidence in that determination is by
3 clear and convincing evidence, and the Court looks -- under the
4 current statute the Court looks at three elements: whether or not
5 this offender was previously adjudicated for an offense involving
6 a dangerous weapon, whether or not if it was that the activity
7 involved one or more co-defendants, whether or not this
8 particular minor's culpability was less than the others, and
9 whether or not there were elements of aggravated nature, a
10 violent element, aggressive or premeditated element.

11 Once those are met under our current code, the juvenile
12 court judge really has no discretion. Once those are met, then
13 the way the law is written, he or she sitting as the judge must
14 certify that offender to district court, and then the offender
15 goes through adult court to face those charges. Now clearly
16 there are some crimes that are so egregious and heinous in their
17 nature and by their facts that this was the reason this provision
18 exists in the code.

19 Now the purpose of the amendment is to keep that process
20 and that procedure in place, but to add an element of discretion
21 or a greater element of discretion in those cases where,
22 according to the amendment, it would be in the best interest
23 of the minor and the public to bind the defendant over to the
24 jurisdiction of the court -- of the district court, but must meet
25 in addition to the three elements that I've indicate.

1 The Court would also have a right to look at the nature
2 and number of the prior adjudicated offenses, and also an overall
3 determination analysis, is the public safety better served by
4 adjudicating the minor in the juvenile court or in the district
5 court.

6 Seated to my right, I should -- Mr. Chairman, members of
7 the committee, I think most of you know Director Jacey Skinner,
8 who is the director for the Utah Sentencing Commission. Before I
9 take questions on the amendment, if it's okay, Mr. Chairman, I'd
10 like to turn some time to Director Skinner to provide the
11 committee with a little more context and history as to how this
12 came about, this amendment, what the genesis was for it and why
13 the director and her board believes that this is a proper
14 amendment for the committee to consider and eventually be passed
15 into law. Is that acceptable?

16 CHAIRMAN: That would great. Ms. Skinner, if you'll
17 just introduce yourself.

18 MS. SKINNER: My name is Jacey Skinner. As mentioned,
19 I'm the director of the Utah Sentencing Commission. Before I get
20 started, I just wanted to thank you Representative Snow for his
21 help with this particular bill. He's been very dedicated and
22 helpful in helping us move those forward.

23 As was mentioned, this -- this bill deals with our
24 serious youth offender statute. To give you a little bit of
25 history, I've provided a chart there. You should all have one.

1 It's entitled Utah Juvenile Transfer and Custody Laws. It
2 explains the different methods by which we currently under our
3 current law transfer juveniles from the juvenile court to the
4 criminal system or the adult system. There are three methods.

5 There is one which we call just statutory jurisdiction
6 or where it's by -- by law, the crime is automatically filed in a
7 criminal court. These cases are fairly narrow, but they're when
8 the minor is 16 years of age or older and commits an offense that
9 would be murder, aggravated murder. Those offenses are filed
10 directly there, and there's no question there. Or if they've
11 previously been transferred to the adult court -- to criminal
12 court -- any case after that point is filed in that particular
13 area.

14 We also have a process called certification which is
15 more of a discretionary waiver where it doesn't fall into any
16 particular type of crime, but if the prosecutor feels like
17 transfer may be warranted, they can file an information and put
18 on a certification hearing for the judge where the judge has a
19 lot of discretion to determine whether or not it's in the
20 interest of the public or in the interest of the juvenile to
21 transfer them to juvenile court.

22 Then we have in the middle what we call a presumptive
23 waiver type of a situation where -- and this is the statute that
24 we're focusing on today which is called serious youth offender.
25 It's a presumptive waiver which means that for a violation of any

1 of the crimes that you see listed there, that it's presumed that
2 the juvenile will be transferred. Now as Mr. Representative Snow
3 mentioned, the factors that exist that the Court has to find are
4 quite narrow and very well defined. After preliminary hearing
5 the Court is asked to find -- to hold a retention factor hearing
6 in which they are asked to find some of the following
7 circumstances. It's a little awkward to follow because it's --
8 they must find that all of the circumstances exist, and they're
9 kind of negative findings, so I'll walk you through them.

10 So they -- the Court must find that the minor has not
11 been previously adjudicated delinquent for an offense involving a
12 dangerous weapon. They must also find that if the offense is
13 committed with one or more other persons, the minor appears to
14 have a lesser degree of culpability than the co-defendants, and
15 that the minor's role in the offense was not committed in a
16 violent, aggressive or premeditated manner.

17 Because the Court must find all of these to exist, it's
18 really difficult for them to ever retain a juvenile. So while we
19 give the appearance that the judges have some discretion here and
20 that they're making a decision, really, given the nature of these
21 offenses -- and these are serious offenses. I don't -- I don't
22 mean to lessen the degree of their seriousness at all.

23 For instance, an aggravated burglary, it's very
24 difficult to commit an aggravated burglary in a non-aggressive
25 manner. So by the very nature that the Court has found that the

1 probable cause exists, even if the minor has not been previously
2 adjudicated delinquent for a weapon, even if there -- the offense
3 was committed in concert with more than one person and their role
4 in the crime was very minor, the fact that the crime itself was
5 aggressive means that the Court has to bind them over.

6 I became the director of this commission about four
7 years ago, and one of the very first things that my commission
8 started saying that they wanted to look at was this particular
9 statute for that reason. All mem -- everyone involved felt
10 like their hands were kind of tied. The Court said that these
11 cases -- or the law says that these cases must be filed this
12 way, and the juvenile court judges have really no discretion in
13 deciding whether or not this juvenile should be transferred.

14 The reason that this is frustrating for them is that
15 they really may have a juvenile who has no previous history
16 whatsoever; this is their first interaction with the juvenile
17 court. Their role may have been a minor one. But again, because
18 of the nature of the crime, they are -- they're transferred to
19 the district court system.

20 The prosecutors don't always think that that should be
21 the case. The defense attorneys obviously don't think that that
22 should be the case, and the judges are often frustrated that they
23 are forced, because of the way the law is written, to transfer
24 them.

25 What happens when they are then transferred into the

1 district court is where we -- we're giving them these harsh adult
2 sentences, is given the fact that they are very young, that they
3 have no criminal history and that their role in the offense
4 was -- may have been rather minor, we often see them being placed
5 on probation, which is not really the purpose of sending someone
6 to district court.

7 If we think about why we would be transferring someone
8 to the adult court from the juvenile court, I think there are
9 two questions that we have to ask. First, is the harsher adult
10 sentence needed. I would characterize that is that a sentence of
11 a length and duration longer than we would have jurisdiction in
12 the juvenile court needed as retribution or for public safety
13 reasons in the adult system.

14 Now in the juvenile court we can maintain jurisdiction
15 until a juvenile is 21-years-old. The average age for these
16 offenders is that they are 16. When they are transferred to the
17 adult system, even if they are sanctioned, if they're sent to
18 prison, we find nationally that the length of stay for juvenile
19 offenders transferred to the adult system is a little over three
20 years. The reality is they will be returned to the community.
21 They will still be very young when they are returned to the
22 community, and the question is, how are we going to be returning
23 them to the community.

24 The next question that we have to ask is did the
25 transfer to adult court actually reduce the crime component or

1 future crime that will be committed. There have been a lot of
2 studies of transfer laws across the country. One of the reasons
3 for that is in the early '80's and the early '90's, which is --
4 or excuse me, the late '80's, early '90's, which is when our law
5 was passed as well in its current form, I should say, there was a
6 serious increase in concern about juvenile crime in the country,
7 particularly a lot of offenders who were repeat offenders and
8 very serious. They kind of coined the phrase super predator, and
9 they expected these juveniles to become just very serious
10 dangerous criminals, and so these laws were passed to remove them
11 from the juvenile court system, to deal with them in the adult
12 system, and to -- essentially the plan was to lock them up for a
13 very long period of time.

14 What we've seen since that time is that that forecast
15 hasn't really played out. In fact, the cases have diminished
16 significantly, and what we found is that the transfer to the
17 adult system hasn't really paid off the way that we anticipated
18 that it would.

19 For instance, soon after our law was passed, we started
20 having questions as to whether or not it was effective. In 2002
21 Commission on Criminal and Juvenile Justice's study of the
22 serious youth offender and transfer cases. In that year there
23 were 65 juveniles that were identified as serious youth
24 offenders. I can go through what happened there. In that case
25 about half of them were placed on probation in 2002.

1 Looking at the same cases for last year, we were able to
2 identify 11 total transfer cases -- now that included -- that
3 includes certification cases and serious youth offender cases.
4 There were five total serious youth offender cases last year.

5 So as we can see, these cases have dropped off
6 dramatically. Out of those, three of them were placed in prison,
7 two of them were placed on probation. The two that were placed
8 on probation were -- when we look at their offenses, we can
9 assume that the judge looked at the case and said, again, this is
10 not a serious enough of an offense -- or not offense, but doesn't
11 warrant a prison sentence in this particular instance. So there
12 are lots of things that a district court judge takes into play
13 when they're making that sentence.

14 What we are trying to do with this particular amendment
15 is to not change that system altogether. We recognize that there
16 are very serious crimes that are committed by young people in our
17 community. Some of those cannot be dealt with appropriately in
18 the juvenile court system. Some of them -- some of them warrant
19 for public safety reasons being transferred. The phrase that
20 you'll always hear with these laws is that they were created to
21 deal with the juveniles, the worst of the worst, and those who
22 had exhausted the resources of the juvenile court system.

23 As we can see through these factors that exist right
24 now, the juvenile's history doesn't really come into play. It
25 can be the juvenile's first offense, their first interaction with

1 the court system, and they could end up being transferred. So
2 that exhausting the resources of the juvenile court system
3 doesn't become a factor.

4 The worst of the worst does come into play with these
5 are the worst offenses that we do see, but it doesn't necessarily
6 mean that the minor's role was the worst in them. As you all
7 know, different facts come into each particular scenario, and we
8 need to be able to look at them.

9 My commission, as you know, is charged with maintaining
10 maximum discretion for and encouraging discretion for sentencing
11 judges. This is one of those areas where we feel like we really
12 need to make some improvement. So this amendment is trying to do
13 just that, is to provide that -- that discretion in making those
14 decisions.

15 As you can see, rather than a shall bind them over if
16 all of the following factors are found, the standard becomes --
17 and this is in line 57 -- they shall bind them over unless the
18 Court finds it will be contrary to the best interest of the minor
19 and the public not to bind the defendant over to the jurisdiction
20 of the district court. That is an and.

21 So we are looking at both of these -- both of these
22 factors coming into play, particularly when I asked the two
23 questions before one can ask, how is it in the best interest of
24 the public not to bind them over. We may find that the juvenile
25 will be much better served in the juvenile court system where we

1 can provide them services that do very well at reducing
2 recidivism rather than transferring them to a system that is not
3 equipped to deal with juveniles, particularly if they are placed
4 on probation, they're not going to receive those services that
5 may help reduce their criminogenic needs in the same way that
6 they would be able to receive in the juvenile court system.

7 In reviewing transfer laws, we do find that particular
8 for violent offenses, a juvenile who is maintained in the
9 juvenile court system versus a juvenile that's transferred to the
10 criminal system or the adult system, we find consistently that
11 those who are transferred to the adult system for violent
12 offenses reoffend more frequently and sooner than those who are
13 maintained in the juvenile court system.

14 So again, recognizing that we do have a need in some
15 instances to make these transfers, we want to make sure that that
16 can happen, but we want to give the judge the opportunity to look
17 at this particular minor, their interaction with the juvenile
18 court system before, the nature of the offense before them, and
19 to make an appropriate decision as to whether or not the public
20 and the minor would be best served in the juvenile court or in
21 the criminal court system. With that, I think I'd be open to any
22 questions.

23 CHAIRMAN: Thank you very much, Ms. Skinner. I do have
24 a question here. Representative Aaron?

25 MS. AARON: Thank you. Just first question, when you

1 talk about line 58, you -- both times you referred to that line
2 you said not to bindover. There's no not in that sentence. I
3 want to make sure we're clear on that.

4 MS. SKINNER: Yes. They will bindover if they find that
5 it -- or excuse me, unless -- there's an unless there on 56.

6 MS. AARON: Right.

7 MS. SKINNER: So unless they find it would be contrary
8 to the interest of the minor and to the public.

9 MS. AARON: Thank you. Could you tell me a little bit
10 about your studies in terms of -- I know some of these have an
11 age limit of 14, some of them have 16. Have you done any
12 analysis of that in terms of how often they've bound over?

13 MS. SKINNER: These are age limits for the statutes
14 themselves, so because of the different nature of the statutes,
15 it -- the presumption is a little bit different. So
16 certification cases aren't filed nearly as frequently. This is
17 14 years of age or older. They're not filed as frequently, but
18 are -- are filed.

19 When they are, cases that I looked at from last year,
20 they were all bound over, but I don't have -- I can't say with --
21 I can't say that there weren't others that were considered to be
22 filed that way that -- this isn't making any sense as I'm saying
23 this, but those numbers didn't show up because they didn't reach
24 the transfer level, and so they maintained themselves in the
25 juvenile court system.

1 So those that we looked over and in talking with
2 prosecutors and defense attorneys, I'm not aware of any from last
3 year -- I can say that -- that were not bound over. Those are
4 usually at -- done after giving a lot of thought and large
5 hearings that are placed on.

6 With the serious youth offender, again it does -- pardon
7 me. It does depend on their age. Now again, these are the cases
8 that are bound over that we're looking at. What we do know, and
9 this comes from both judges and from prosecutors is that when
10 they look at a child, one who may be younger or has lesser
11 culpability, that oftentimes because the statute is so
12 restrictive, they're finding other ways to make their way around
13 the statute. So they'll file one of the charges that is not on
14 the list, or they will come to some other kind of agreement in
15 order to avoid this, because the statute really does require that
16 transfer. Does that answer your question?

17 MS. AARON: Yes, it does. Thank you very much.

18 CHAIRMAN: Do we have any other questions?
19 Representative Hall?

20 MR. HALL: Could you just discuss the fiscal note that
21 we have related to this bill? I don't -- either Ms. Skinner or
22 Representative Snow.

23 MS. SKINNER: There is a fiscal note on the bill. This
24 is coming from juvenile justice services. They are estimating
25 that -- a couple of things. They're estimating that with the --

1 with the change to the statute that there will be more cases
2 filed. I can only assume that this would be because the statute
3 will give some discretion. Those cases that are now being filed
4 outside of the statute in an effort to avoid the requirements
5 will now be filed under the particular statute, so the cases may
6 increase.

7 What I can tell you, though, is that they are cases that
8 if they're trying to avoid the statute to begin with, I think
9 they're the cases that both the prosecutor and the judge feel
10 like may be retained under this particular statute given that
11 option. So I don't think that it would increase. Those are kids
12 that are already staying in the juvenile court system.

13 What JJS is estimating is that with this statute there
14 will be juveniles who are currently being sent to the district
15 court system who will be maintained in the juvenile court system,
16 and accordingly, they will need to provide services for those
17 juveniles. So that's what the fiscal note is based on. They're
18 estimating that most of those will go to secure care. That is
19 their estimate.

20 MR. HALL: Do you have any reason to disagree with the
21 amount?

22 MS. SKINNER: It's really hard to know. As I said
23 before, we don't know how many cases will -- each year the cases
24 differ, and we do expect that they will be changed a little bit.
25 In my -- in looking at the cases that have been filed over the

1 last few years, we do have a large number of those cases where
2 the juveniles really don't have any prior history at all.
3 When they are transferred to the adult system, their cases are
4 greatly -- in the course of a plea bargain greatly reduced.

5 Like I said, they're placed on probation in many
6 cases. Those juveniles are what I would classify as lower risk
7 offenders, and it's hard to know what would happen with them in
8 the juvenile court system, if the Court would them to secure
9 care, and if all of these juveniles are retained and are sent to
10 secure care, then that probably is an accurate estimate.

11 If they are not, if they are retained and placed on
12 probation or given some other services, to that -- I don't think
13 the fiscal note would arise to that amount.

14 It's also, as I said, difficult to know the numbers.
15 They're estimating -- I can't remember if it's four or six
16 juveniles that will be retained in addition to those that are
17 currently retained. As I said, last year we had a total of five
18 cases total, and so it's hard to know where those will coming
19 from -- will be coming from.

20 MR. HALL: Thank you.

21 MR. LOWRY: Can I weigh on that a little bit, too? I
22 certainly don't have the background that the director has, but I
23 think the feeling is anecdotally that for those whose -- when
24 jurisdiction is transferred to the district court and those
25 juveniles or those offenders are placed on probation, the

1 probation department for adults is really not equipped to deal
2 specifically or as well for juvenile offenders as juvenile
3 probation officers.

4 So while there may be some savings at that point,
5 ultimately there is a high risk that we're going to see those
6 folks back into the system, as Ms. Skinner as already alluded to.
7 So ultimately, and in the long run we think that there is a good
8 chance that the State is going to spend more money as those youth
9 offenders mature and they -- and their issues are not addressed,
10 we're going to see them again and it's going to cost more money
11 in the long run. Does that make sense?

12 MR. HALL: Sure. Thank you.

13 CHAIRMAN: Any other questions? I have one as the
14 chair. I'm just curious, I mean I know we've been talking a lot
15 about juvenile court -- or juvenile facilities being shut down.
16 Will -- on the fiscal note, are we going to be able to help the
17 juvenile facility folks be able to deal with some of the issues
18 that we're so concerned with in not shutting some of these
19 facilities down and giving them the resources to deal with the
20 problems that they don't have? Do you happen to know?

21 MS. SKINNER: I'm sure any resources that are allotted
22 to their system will be helpful in helping them maintain this.
23 These -- the estimates here are for juveniles that are placed in
24 secure care and in community based placements. Those are the
25 estimates that they maintain. I'm not sure if the money that

1 would be dedicated based on this particular offense would be
2 dedicated to those facilities or those programs, or if they could
3 be used for some of the other programs. I'm not sure how that
4 would -- how that would play out. I can find out for you.

5 CHAIRMAN: That would be great. The other concern I
6 would have is -- I mean there's been talk last year, we almost
7 had one of our facilities shut down, and obviously we're going
8 this direction, which I think is a worthy direction to go in, but
9 if you suddenly shut down a facility and then we'd have no place
10 to put these -- these youth, that creates a huge bind in our
11 system, so I'm just kind of -- wanted to make sure on that.

12 MS. SKINNER: It does, yes.

13 CHAIRMAN: Any other questions? Do we have anybody in
14 the audience that would like to address this issue? Please come
15 forward and state your name.

16 MR. GORDON: I'm Ron Gordon, the executive director of
17 the commission on criminal and juvenile justice. The original
18 serious youth offender law was passed in 1996. My office was
19 involved in the law at that time, and we've remained involved
20 with this while over the course of those intervening 17 years.

21 We've made a number of relatively minor changes to the
22 law over the -- that time, and I'm here today in support. My
23 commission, my office supports this bill as an important change
24 to ensure the integrity of the serious youth offender law.

25 The point of the law is to find appropriate ways to

1 address the most serious juveniles, and the current law does not
2 allow adequate flexibility. So the bill that Representative Snow
3 is bringing forth strikes a very delicate balance between
4 providing additional discretion to juvenile court judges in
5 certain circumstances, while also maintaining public safety. The
6 focus of the bill remains public safety.

7 A juvenile court judge is not permitted to retain a
8 juvenile if that harms public safety or is not in the best
9 interest of public safety. It does permit the juvenile court
10 some discretion to retain some juveniles when it is not a threat
11 to the public safety and will provide in better services being
12 delivered to that juvenile, which only increases the overall
13 public safety.

14 So my commission stands in full support of the bill.
15 We extend appreciation to Representative Snow for bringing this
16 forward to the sentencing commission for studying it over many
17 years, and as I said before, it strikes a delicate balance
18 between the discretion that's necessary to make these very
19 difficult decisions while also maintaining public safety.

20 CHAIRMAN: Thank you. Any questions for Mr. Gordon?
21 Seeing none, thank you. Anybody else? Oh, yes.

22 MR. BOYDEN: Thank you, Mr. Chairman. Paul Boyden,
23 executive director of Statewide Association of Prosecutors. We
24 have been involved in this issue, obviously, for a long time. We
25 helped draft the original 18 years ago, and these retention

1 factors have been a concern all along. I've been on the
2 sentencing commission, and of course involved with the prosecutor
3 for that length of time.

4 This is not a minor change. This is significant. We're
5 talking about changing these factors so that the Court -- so that
6 the discretion goes to the Court, because de facto the way it
7 operates right now is the prosecutors are kind of making the
8 decision on what to charge as to whether this is going to end up
9 in the adult court or the juvenile court.

10 Nobody likes to give up power, of course. That would
11 include prosecutors, but we do understand that this is the kind
12 of thing where really the judges need a little more discretion on
13 this kind of thing. We need to -- we need to adjust these
14 factors because they just are -- they have been a problem all
15 along, and so we really need to deal with those issues.

16 The big concern we have is we just -- we're trusting the
17 juvenile court judges at this time to make those decisions, and
18 particularly to take into account the needs of the public because
19 in criminal prosecution, it's very important for the public to
20 feel that justice is being done. In some cases they feel that
21 juveniles should be tried as adults, and that's an important
22 issue for justice to be done.

23 So we're probably never going to be entirely through
24 with tweaking these issues, but we certainly don't oppose this.
25 We've been involved in the process all along for a very long

1 time. Thank you.

2 CHAIRMAN: Thank you, Mr. Boyden. Do we have any
3 questions? No. Thank you. Anyone else from the audience? If
4 not, I'll bring it back to the committee for any other clarifying
5 questions. If not, we'll go back to Representative Snow for
6 summation.

7 MR. SNOW: Thank you, Mr. Chairman. I want to say that
8 I appreciate Director Skinner and for all of her work and the
9 work of the commission and all those who have helped coordinate
10 on drafting this bill. This has been a long process, and I think
11 they have indicated -- those that have spoke today -- this is
12 something that's been thought through for a long period of time.
13 It's supported by Statewide Association of Prosecutors, CCJJ,
14 Utah Sentencing Commission and the Council of Juvenile Court
15 Judges in this state, so it has -- it has broad support.

16 It's a good change. It allows in a very narrow
17 situation discretion on the part of the juvenile court judges --
18 and by the way, we have some great judges sitting on our juvenile
19 court benches. It offers in a very narrow situation discretion
20 in whether in making a proper decision on whether or not to
21 transfer jurisdiction to adult court in those situations where
22 the best interests of the public will be served, as well as the
23 best interests of the minor. So I believe that it's an
24 appropriate change. It's a good change in our judicial criminal
25 policy, and I would look for support from the committee. Thank

1 you, Mr. Chairman.

2 (Conclusion of Mr. Snow's comments)

3 SPEAKER PRO TEM: House Bill 105.

4 MADAME CLERK: House Bill 105, serious youth offender
5 amendments. Senator Hillyard?

6 SPEAKER PRO TEM: Senator Hillyard?

7 MR. HILLYARD: In juvenile court we have a provision for
8 serious youth offenders which requires them to be certified as
9 adults, and it's usually somebody 16, 17-years-old who have
10 committed a horrific crime. The problem has been the way the
11 statute has been drawn it's pretty well automatic. This
12 amendment makes it more discretionary with the Court, because
13 some of the kids are being certified over. When they get in
14 adult court are just released on probation and not given help
15 that the juvenile court can give and structure to do.

16 So this is brought to us by the CCJJ in a leveling
17 influence to allow a little bit more discretion in the juvenile
18 court to make sure that the people who should be punished are
19 punished, and those who may need some treatment (inaudible)
20 process have that opportunity. Be glad to respond to any
21 questions.

22 SPEAKER PRO TEM: Thank you, Senator. Questions for
23 Senator Hillyard?

24 MR. HILLYARD: I'll call for question on the bill.

25 SPEAKER PRO TEM: Seeing none -- and the question is

1 shall House Bill 105 pass? Roll call vote.

2 (Conclusion of Senator Hillyard's remarks)

3 SPEAKER PRO TEM: Madame reading clerk?

4 MADAME CLERK: House Bill 105, serious youth offender
5 amendments, Representative Snow. This bill was heard in
6 judiciary with a vote of 7-0-2.

7 SPEAKER PRO TEM: Representative Snow.

8 MR. SNOW: Thank you, Mr. Speaker pro tem. As this body
9 knows, our criminal justice system in the State of Utah is
10 divided into two parts, one that deals with adult offenders and
11 one that deals with juvenile offenders. This particular bill
12 deals with juvenile offenders whose crimes alleged are serious
13 enough that a prosecutor who is prosecuting those may feel
14 inclined to transfer them to adult court to stand trial as an
15 adult and ultimately be sentenced, and perhaps even incarcerated
16 as an adult.

17 Now currently in Utah there are three ways that can be
18 accomplished. House Bill 105 deals only with one particular
19 process, and let me tell you why I'm bringing the bill. Under
20 that process as it exists today, an offender -- a youth offender
21 who qualifies, over the age of 16, and who has committed one of
22 the offenses enumerated, fairly serious offenses at lines 31
23 through 44, his case or her case can be transferred to adult
24 court after a hearing is held in juvenile court before the
25 juvenile court judge, and as long as certain elements are met.

1 Now if those elements are met, the juvenile court judge
2 sitting and hearing the case has no discretion except to bind
3 that young person over to stand trial as an adult. It is that
4 rigidity in the bill that prompts me bringing -- or excuse me, it
5 is that rigidity in the existing law that prompts me bringing
6 this bill.

7 Now I will tell you that this bill that is before you
8 has been worked on at least for two years. It is supported by
9 the commission on criminal and juvenile justice, the Utah
10 sentencing commission, the Utah Juvenile Justice Service, and
11 also by the Statewide Association of Prosecutors.

12 What does the bill do? It keeps in place the procedure
13 where those who have been charged with serious offenses can still
14 be transferred to the jurisdiction of the juvenile court;
15 however, it broadens the discretion of the Court.

16 Now why is that necessary? Under the current rigid
17 structure, we actually have unintended consequences where a
18 juvenile under this scenario who meets those requirements, maybe
19 has very limited involvement with the juvenile court previously,
20 but meets those elements, could be transferred to the district
21 court, and either plead guilty or be found guilty and then stand
22 before that Court for sentencing.

23 The problem with the current system is the -- if the
24 offense is not of such a magnitude that the Court would be
25 inclined to impose a jail sentence or imprisonment on that

1 juvenile, the Court most likely is inclined to order probation.
2 The problem with that scenario is our adult probation in this
3 state is not really equipped to deal with a juvenile -- juvenile
4 supervision.

5 As a result, and as an unintended consequence,
6 those serious youth offenders who then are transferred to a
7 probation -- adult probation -- have very limited supervision.
8 Their supervision terminates after a period of time, and the
9 youth offender is not really -- and his or her issues are not
10 really addressed, at least to the same extent that they would be
11 under a juvenile court supervised probation.

12 Now the standard by which a juvenile court judge making
13 that determination is fairly significant. The juvenile court
14 judge before they would retain this offender in juvenile court
15 would have to make two findings, one that it's in the best
16 interest of the juvenile, that jurisdiction be retained in the
17 juvenile court, and the second, that it's in the best interest of
18 the safety and welfare of the citizens of this state. So it's a
19 fairly narrow band in which a juvenile offender would -- who had
20 committed some serious offense whose jurisdiction would be
21 retained.

22 The benefit would be on retention in the juvenile court
23 system whether it -- whether it required detention or whether it
24 required supervision is our system in this state is then able to
25 address the needs of that juvenile, and the likelihood of

1 reoffending is much less. In fact, the statistics show across
2 the country that in cases where a juvenile is tried as an adult
3 and then is put on probation as an adult -- under adult
4 supervision, the recidivism, the rate at which they reoffend is
5 higher than if that same juvenile were maintained under the
6 jurisdiction of the juvenile court.

7 Now that's a lot of talking to say that this bill
8 provides additional discretion to our juvenile court judges to
9 make the right decision in deciding whether or not to transfer a
10 juvenile offender for serious offenses to the district court to
11 stand trial or to be sentenced. I'm ready to take questions.
12 Thank you, Mr. Speaker pro tem.

13 SPEAKER PRO TEM: Thank you, Representative Snow.
14 Discussion to the bill? Representative King?

15 MR. KING: Thank you, Mr. Speaker pro tem. Will the
16 sponsor yield?

17 SPEAKER PRO TEM: Will the sponsor yield?

18 MR. LOWRY: Yes, sure.

19 MR. KING: If you could, Representative, could you
20 explain for us the fiscal note?

21 MR. LOWRY: There is a fiscal note that is appended to
22 this bill, and I think if you -- you each have a copy of that.
23 The fiscal bill current impact appears based on meetings that has
24 been held with the fiscal analyst as recently as this afternoon
25 is that that impact is probably going to be reduced, and I

1 don't -- you don't have it front of you in writing, but I believe
2 it's going to be reduced to about \$50,000.

3 Now it is true there is an impact, but if we -- we have
4 to decide, I suppose, from policy standpoint whether or not the
5 long term costs and risks associated with moving those juvenile
6 offenders who commit serious offenses to the adult system, their
7 chances of reoffending, and there's a saying among juvenile court
8 officers and those who supervise juveniles, and it goes something
9 like this. Once we take a juvenile and we put them in a certain
10 environment -- in jail or in prison with adults, criminals -- you
11 have almost certainly created another criminal and a serious
12 criminal once that juvenile is released.

13 So while it is true that, Representative, that there is
14 a fiscal note, my understanding is No. 1, it can be mitigated,
15 and No. 2, it's my position that this is a good policy, and we'll
16 have to deal with that, but it's good policy for the State in the
17 long run to assume that cost rather than creating long range
18 issues that we're going to have to deal with later.

19 MR. KING: Thank you, Mr. Speaker pro tem. I want to
20 address that point. One of the things that you'd look at if you
21 look carefully at the fiscal note is there is some savings to the
22 cost of administering the adult justice system because of this,
23 and there is some additional expenditure to the juvenile justice
24 system. I don't -- it's not troubling to me that we're spending
25 more money on the juvenile justice system with these kids. I

1 think this is a great bill.

2 I commend the bill sponsor for his work on this because
3 giving greater discretion to keep juveniles out of the adult
4 system who should in the minds of those working in the juvenile
5 system be kept in the juvenile system is -- increases the
6 likelihood that we're going to be able to have those kids given
7 the resources that they need to keep them from reoffender, to
8 keep them from recidivating. That's a positive thing. This is,
9 in my mind, an investment in the future of these kids. I'm glad
10 to hear that the fiscal note is lower than what the bill sponsor
11 originally obtained.

12 I think that's a good thing, but I don't want the body
13 to be deterred by the existence of a fiscal note at all, because
14 the resources that we're talking about are going in to helping
15 rehabilitate these kids before they become habitual offenders or
16 become -- or before they become adults. So I would encourage
17 your support of this bill. Thank you.

18 SPEAKER PRO TEM: Further discussion to the bill,
19 Representative McIff?

20 MR. MCIFF: Thank you, Mr. Speaker pro tem. I wish to
21 offer a simple analogy to make a point. If you want to be a good
22 horseman, you have to know when to pull back on the reins and
23 when to ease off, but you can never know that until you're in
24 the saddle and you see what the horse does. That same concept
25 applies to young people. It is impossible for us to statutorily

1 fix whether a youth should be tried as an adult or as a juvenile,
2 and that decision cannot be fairly and realistically made until
3 you're in the saddle, and the youth is before the Court, the
4 Court can evaluate all the considerations related to this young
5 person and the offense that's been committed. So I agree, this
6 is sound public policy, and we should support the bill.

7 SPEAKER PRO TEM: Representative McIff. Further
8 discussion to the bill? Seeing none, Representative Snow for
9 summation.

10 MR. SNOW: Thank you. In summary, No. 1, this does not
11 change or do away with the process that we have in our state
12 where some serious youth offenders ought to be tried as an adult,
13 and in some cases in very egregious cases ought to -- ought to be
14 incarcerated as an adult. That still remains in place.

15 The second thing, this bill, as has been mentioned,
16 provides some discretion -- addition discretion to juvenile court
17 judges to help make a decision that's in the best interest of the
18 person charged, but also in the best interests of the public.
19 The third thing that I'd mention with respect to the fiscal bill,
20 one way or another, whether that juvenile is going to supervised
21 or incarcerated as an adult or supervised as a juvenile, there is
22 going to be a cost.

23 There is a little more -- there is -- not a little more.
24 There is a greater cost in the structure that we build with
25 respect to supervising and rehabilitating juveniles, but in the

1 long run, I believe it's money well spent in the state, and I
2 urge your support. Thank you, Mr. Speaker pro tem.

3 SPEAKER PRO TEM: Thank you, Representative Snow.

4 Voting is open on House Bill 105.

5 (Conclusion of Mr. Lowry's statements)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF TOOELE)

I, Natalie Lake, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

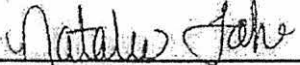
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

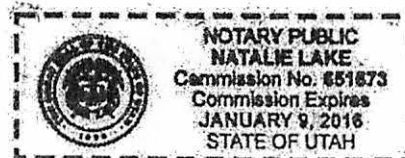
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 10th day of March 2015.

My commission expires:
January 9, 2016


Natalie Lake
NOTARY PUBLIC
Residing in Tooele County




Beverly Lowe, RSR, CCR

Tab 7

Tab 7 – Determinative Statute and Rules

Utah Session Laws of the 2013 Legislative Session

HB 105, Chapter 186

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 78A-6-702 is amended to read:

78A-6-702. Serious youth offender -- Procedure.

(1) Any action filed by a county attorney, district attorney, or attorney general charging a minor 16 years of age or older with a felony shall filed in the juvenile court if the information charges any of the following offenses:

(a) any felony violation of:

(i) Section 76-6-103, aggravated arson;

(ii) Section 76-5-103, aggravated assault resulting in serious bodily injury to another;

(iii) Section 76-5-302, aggravated ~~kidnaping~~ kidnapping;

(iv) Section 76-6-203, aggravated burglary;

(v) Section 76-6-302, aggravated robbery;

(vi) Section 76-5-405, aggravated sexual assault;

(vii) Section 76-10-508.1, felony discharge of a firearm;

(viii) Section 76-5-202, attempted aggravated murder; or

(ix) Section 76-5-203, attempted murder; or

(b) an offense other than those listed in Subsection (1)(a) involving the use of a dangerous weapon, which would be a felony if committed by an adult or been previously adjudicated or convicted of an offense involving the use of a dangerous weapon, which also would have been a felony if committed by an adult.

(2) All proceedings before the juvenile court related to charges filed under Subsection (1) shall be conducted in conformity with the rules of the juvenile court.

(3) (a) If the information alleges the violation of a felony listed in Subsection (1), the state shall have the burden of going forward with its case to establish probable cause to believe that one of the crimes listed in Subsection (1) has been committed and that the defendant committed it. (1)(b), the state shall have the additional burden of proving by a preponderance of the evidence that the defendant has previously been adjudicated an offense involving the use of a dangerous weapon.

(b) If the juvenile court judge finds the state has met its burden under this Subsection (3), the court shall order that the defendant be bound over to district court in the same manner as an adult unless the juvenile court judge finds that ~~all of the following conditions exist:~~ it would be contrary to the public interest to bind over the defendant to the jurisdiction of the district court.

(c) In making the bind over determination in Subsection (3)(b), the judge shall consider only the following:

(i) ~~whether~~ the minor has ~~[not]~~ been previously adjudicated delinquent for an offense involving the use of a dangerous weapon which would

(ii) ~~[that]~~ if the offense was committed with one or more other persons, ~~whether~~ the minor appears to have a greater or lesser degree of culpability

(iii) ~~[that]~~ the extent to which the minor's role in the offense was ~~[not]~~ committed in a violent, aggressive, or premeditated manner[-];

(iv) the number and nature of the minor's prior adjudications in the juvenile court; and

(v) whether public safety is better served by adjudicating the minor in the juvenile court or in the district court.

~~(e) (d)~~ Once the state has met its burden under ~~[this]~~ Subsection (3)(a) as to a showing of probable cause, the defendant shall have the burden of presenting evidence ~~[as to the existence of the above conditions]~~ that in light of the considerations listed in Subsection (3)(c), it would be a minor and the best interests of the public to bind the defendant over to the jurisdiction of the district court.

~~(e) (e)~~ If the juvenile court judge finds by clear and convincing evidence that ~~[all the above conditions are satisfied;]~~ it would be contrary to and the best interests of the public to bind the defendant over to the jurisdiction of the district court, the court shall so state in its findings as a minor and shall proceed upon the information as though it were a juvenile petition.

(4) If the juvenile court judge finds that an offense has been committed, but that the state has not met its burden of proving the other criteria over under Subsection (1), the juvenile court judge shall order the defendant held for trial as a minor and shall proceed upon the information as a juvenile petition.

(5) At the time of a bind over to district court a criminal warrant of arrest shall issue.

The defendant shall have the same right to bail as any other criminal defendant and shall be advised of that right by the juvenile court judge at initial bail in accordance with Title 77, Chapter 20, Bail.

(6) If an indictment is returned by a grand jury charging a violation under this section, the preliminary examination held by the juvenile court finding of probable cause that the crime alleged in the indictment was committed and that the defendant committed it, but the juvenile court with this section regarding the additional considerations listed in Subsection (3)(b).

(7) When a defendant is charged with multiple criminal offenses in the same information or indictment and is bound over to answer in the district court charges under this section, other offenses arising from the same criminal episode and any subsequent misdemeanors or felonies charged together with those charges, and where the court finds probable cause to believe that those crimes have been committed and that the defendant defendant shall also be bound over to the district court to answer for those charges.

(8) When a minor has been bound over to the district court under this section, the jurisdiction of the Division of Juvenile Justice Services and is terminated regarding that offense, any other offenses arising from the same criminal episode, and any subsequent misdemeanors or felonies except as provided in Subsection (12).

(9) A minor who is bound over to answer as an adult in the district court under this section or on whom an indictment has been returned by the preliminary examination in the district court.

(10) Allegations contained in the indictment or information that the defendant has previously been adjudicated or convicted of an offense involving a weapon, or is 16 years of age or older, are not elements of the criminal offense and do not need to be proven at trial in the district court.

(11) If a minor enters a plea to, or is found guilty of, any of the charges filed or any other offense arising from the same criminal episode, the jurisdiction over the minor for all purposes, including sentencing.

(12) The juvenile court under Section 78A-6-103 and the Division of Juvenile Justice Services regain jurisdiction and any authority previously there is an acquittal, a finding of not guilty, or dismissal of all charges in the district court.

RULE 1.2 - Promoting Confidence in the Judiciary

A judge should act at all times in a manner that promotes - and shall not undermine - public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Actual improprieties include violations of law or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge engaged in impropriety.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

RULE 2.11 - Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous three years made aggregate contributions to the judge's retention in an amount that is greater than \$50.

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court and is now acting as a judge who would hear the appeal or trial de novo.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] A judge is disqualified in proceedings involving a law firm that employs the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household as an equity holder in the law firm. A judge is not disqualified in other situations unless the judge's impartiality might reasonably be questioned under paragraph (A), or a relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(C).

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

Tab 8

Tab 8 – Order Granting Certiorari and Permitting Issues Raised as Alternate
Grounds for Affirmance

The Order of the Court is stated below:

Dated: July 05, 2017
10:24:03 AM

/s/ Thomas R. Lee
Associate Chief Justice

IN THE SUPREME COURT OF THE STATE OF UTAH

---00000---

State of Utah,
Petitioner,

v.

Cooper John Anthony Van Huizen,
Respondent.

ORDER

Appellate Case No. 20170304-SC

This matter is before the court upon a Petition for Writ of Certiorari, filed on April 19, 2017.

The Petition for Writ of Certiorari is granted as to the following issues:

1. Whether the Court of Appeals erred in concluding that Respondent was not required to demonstrate preservation of his appellate claim that the juvenile court judge should have disqualified herself.
2. Whether the Court of Appeals erred in concluding that a litigant is not required to show prejudice arising from an appearance of bias if a judge fails to disclose the facts generating the appearance of bias.

The cross-petition for writ of certiorari is denied but the Cross-Petitioner may raise the issues identified in the cross-petition as alternate grounds for affirmance.

A briefing schedule will be established hereafter. Pursuant to Rule 2 of the Rules of Appellate Procedure, the Court suspends the provision of Rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. The parties shall comply with the briefing schedule upon its issuance.