IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of A.H.F., a person under eighteen years of age.	)	OPINION
	)	Case No. 20091049-CA
A.H.F.,	)	
Appellant,	)	FILED (December 22, 2011)
v.	)	2011 UT App 437
State of Utah,	)	
Appellee.	)	

Third District Juvenile, Salt Lake Department, 525828
The Honorable Andrew A. Valdez

Attorneys: Rodney R. Parker and Richard A. Van Wagoner, Salt Lake City, for Appellant
Mark L. Shurtleff and Christine F. Soltis, Salt Lake City, for Appellee

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Before Judges McHugh, Thorne, and Christiansen.

THORNE, Judge:

¶1 A.H.F. appeals from the juvenile court's ruling certifying him to the district court for trial as an adult on murder, kidnapping, and robbery charges. *See generally* Utah Code Ann. § 78A-6-703 (Supp. 2011) (providing procedures for certifying juveniles accused of felony offenses to the district court for trial as an adult). A.H.F. argues that the juvenile court erred when it admitted a written report on A.H.F.'s social history and

background, prepared by the juvenile probation department, into evidence. The juvenile court admitted the report based on the court's conclusion that the Utah Rules of Evidence do not apply at certification hearings.

BACKGROUND

¶2 The charges against A.H.F. arise from events occurring in February 2009, when A.H.F. was fourteen years old. The State alleges that A.H.F. and three adult companions sought to rob alleged drug dealer Greg Brown of $1500 that they believed to be in Brown's possession. A.H.F. allegedly borrowed a pistol from his cousin and arranged to meet Brown by offering to trade the gun for marijuana. Upon meeting with Brown, the group kidnapped and robbed him. However, Brown had little money and the group told him that he needed to get them some more money if he wanted to live.

¶3 Brown made several phone calls attempting to find more money and eventually contacted his friend, JoJo Brandstatt. Brown and Brandstatt discussed robbing another drug dealer, and Brandstatt agreed to meet Brown and show him where the other dealer lived. A.H.F. and his companions then took Brown and picked up Brandstatt, robbed him, and forced him to show them where the other dealer lived. The group did not, however, attempt to rob the dealer.

¶4 At some point, A.H.F. and his companions felt that Brandstatt "knew too much." The group drove Brown and Brandstatt to an empty golf course, where A.H.F. is alleged to have fatally shot Brandstatt. Leaving Brandstatt at the golf course, A.H.F. and his companions then forced Brown to rob several convenience stores, after which Brown was able to escape. The police apprehended Brown, who named A.H.F. as his kidnapper and led the police to Brandstatt's body.

¶5 The State filed an information in juvenile court, charging A.H.F. with one count of aggravated murder, two counts of aggravated kidnapping, and five counts of aggravated robbery, all subject to group and firearm enhancements. The State then filed a motion asking that the juvenile court waive jurisdiction and certify A.H.F. for

trial as an adult.[1] The juvenile court held a preliminary hearing in July 2009, after which it found probable cause to believe that the crimes charged had been committed and that A.H.F. had committed those crimes. The juvenile court then scheduled a certification hearing.

¶6 Prior to the certification hearing, A.H.F. filed a motion seeking to exclude from evidence a written report (the Report) prepared by the juvenile probation department and addressing A.H.F.'s social history and background. *See generally* Utah R. Juv. P. 23(a)(1) (requiring the preparation of a background report for use in certification proceedings). A.H.F. alleged that the Report and its exhibits contained hundreds of pages of hearsay, including but not limited to the juvenile probation department's "recommendation" to certify him for adult trial. The juvenile court denied the motion and determined that the admission of hearsay evidence was appropriate because the certification hearing was dispositional rather than adjudicative and the rules of evidence are not applied as strictly in dispositional hearings as they are in adjudicative hearings.[2]

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[1]Certification refers to the process whereby the juvenile court waives jurisdiction over a juvenile charged with an offense that would be a felony if committed by an adult and transfers the juvenile to district court for trial as an adult. *See* Utah Code Ann. § 78A-6-703 (Supp. 2011). *See generally In re A.B.*, 936 P.2d 1091, 1094-95 (Utah Ct. App. 1997) (distinguishing certification from "direct file" and "serious youth offender" provisions). Certification is allowed only when the State establishes, "by a preponderance of the evidence, that it would be contrary to the best interests of the minor or of the public for the juvenile court to retain jurisdiction," Utah Code Ann. § 78A-6-703(2)(b), based on one or more of ten statutory factors, *see id.* § 78A-6-703(3).

[2]Generally, in the juvenile delinquency context, an adjudicative hearing is analogous to a criminal trial in adult court, and a dispositional hearing is often analogous to a sentencing hearing. *Compare* Utah R. Juv. P. 5(b) ("'Adjudication' means a finding by the court, incorporated in a judgment or decree, that the facts alleged in the petition have been proved."), *with id.* R. 5(f) ("'Disposition' means any order of the court, after adjudication, pursuant to [Utah Code] Section 78A-6-117."). Certification hearings have been described as dispositional in nature despite the lack of a prior adjudication. *See State v. D.M.Z.*, 830 P.2d 314, 316 (Utah Ct. App. 1992) (stating that "a

(continued...)

¶7 The juvenile court conducted the certification hearing over five days in December 2009. After the hearing, the juvenile court issued a Memorandum Decision, Findings and Order (the certification order) granting the State's motion to try A.H.F. as an adult. In the certification order, the juvenile court examined ten statutory factors to determine whether it was in either A.H.F.'s or the public's best interests to certify him as an adult. *See generally* Utah Code Ann. § 78A-6-703(3) (Supp. 2011). Among other factors, the court considered the seriousness of the offense, whether the protection and best interests of the community required that A.H.F. be isolated beyond the time and space afforded by the juvenile system, and A.H.F.'s level of maturity as determined by considerations of home, environment, emotional attitude, and patterns of living. The court found that nine of the ten statutory factors favored certification. Based on these findings, the juvenile court concluded,

> The life of an 18 year old boy was taken in a violent and terrifying manner. The public has a right to protection from those who rob, kidnap, assault and murder. The interests of the community would not be served to retain [A.H.F.] in a Juvenile system for the short period of time mandated by law. It would be contrary to the best interests of the public for the Juvenile court to retain jurisdiction.

In light of these conclusions, the juvenile court granted the State's motion and certified A.H.F. to the district court for trial as an adult. A.H.F. appeals.

ISSUE AND STANDARD OF REVIEW

¶8 A.H.F. contends that the juvenile court violated rule 23(a) of the Utah Rules of Juvenile Procedure when it considered hearsay and other inadmissible evidence contained in the Report. "'The proper interpretation of a rule of procedure is a question

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[2](...continued)
certification hearing is to select a forum, not to inquire into culpability," and thus, "the hearing is for dispositional purposes only").

of law, and we review the trial court's decision for correctness.'" *In re E.R.*, 2000 UT App 143, ¶ 6, 2 P.3d 948 (quoting *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073).[3]

ANALYSIS

¶9 A.H.F. argues that the district court erred in admitting the Report because it contained hearsay and other inadmissible evidence. The juvenile court concluded that the Utah Rules of Evidence did not strictly apply at A.H.F.'s certification hearing because it was dispositional rather than adjudicative. However, we agree with A.H.F. that rule 23 of the Utah Rules of Juvenile Procedure expressly governs the Report and subjects it to the requirements of Utah's evidentiary rules.

¶10 Rule 23 provides that, in certification cases, "the court shall order that a full investigation of the minor's social history and background be made by the court's probation department." Utah R. Juv. P. 23(a)(1). A report of the investigation is to be prepared and made available to parties and counsel no later that forty-eight hours prior to a certification hearing. *See id.* R. 23(a)(3). Most pertinent to A.H.F.'s argument, rule 23 then states, "Written reports and other materials relating to the minor's mental, physical, educational and social history and other relevant information *are governed by the Rules of Evidence*." *Id.* (emphasis added).

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[3]A.H.F. also attempts to raise various constitutional challenges to the certification process itself. However, A.H.F. concedes that these issues were not presented to the juvenile court and were thus not preserved for appeal. *See generally State v. Cruz*, 2005 UT 45, ¶ 33, 122 P.3d 543 ("As a general rule, claims not raised before the trial court may not be raised on appeal." (internal quotation marks omitted)). A.H.F argues that we should address these arguments under the "exceptional circumstances" exception to the preservation rule, but we see nothing in the record to suggest that this case presents a "rare procedural anomaly" justifying the application of that exception. *See generally State v. Alfatlawi*, 2006 UT App 511, ¶ 44, 153 P.3d 804 ("[E]xceptional circumstances is a concept that is used sparingly, properly reserved for truly exceptional situations, for cases . . . involving rare procedural anomalies." (alteration in original) (internal quotation marks omitted)).

¶11 The Report in this case clearly falls within the category of "[w]ritten reports and other materials relating to the minor's mental, physical, educational and social history and other relevant information." *See id.* As such, admissibility of the Report at the certification hearing was "governed by the Rules of Evidence," *id.*, without regard to whether the certification hearing is most properly characterized as dispositional or adjudicative in nature.[4] Thus, the juvenile court erred when it declined to apply the Utah Rules of Evidence to the Report upon A.H.F.'s objections.

¶12 A.H.F. argues on appeal that the Report was rife with hearsay and should have been excluded in its entirety.[5] A.H.F. identifies as hearsay the statements of accomplices who could not be compelled to testify due to their Fifth Amendment privilege; six pages of victim impact testimony, including testimony from Brandstatt's mother; statements from dozens of individuals including juvenile detention personnel, prior probation

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[4]The State relies on *State v. D.M.Z.*, 830 P.2d 314 (Utah Ct. App. 1992), for the proposition that any hearsay in the Report is nevertheless admissible because the certification hearing was dispositional in nature. Although *D.M.Z.* did allow for the consideration of a similar report at a certification hearing, *see id.* at 316-17, the Utah Rules of Juvenile Procedure have since been repealed and reenacted to include the present requirement that the Report be governed by the Utah Rules of Evidence. *Compare* Utah R. Juv. P. 23(a)(3) (2011), *with* Utah R. Juv. P. 21(c) (1995) (providing for certification hearing background reports with no requirement that such reports comply with the rules of evidence).

[5]A.H.F. also argues that the Report contained inadmissible opinion evidence in the form of the preparers' recommendations regarding A.H.F.'s rehabilitative potential. *See generally* Utah R. Evid. 702(a) (governing the admission of expert opinion evidence). A.H.F. alleges that the preparers' opinions were admitted without proper foundation as to the preparers' expertise. However, both preparers testified at the certification hearing, and the juvenile court overruled A.H.F.'s foundation objection, ruling that one officer's six years of preparing dispositional reports addressing juvenile rehabilitation gave him a "good pulse on what rehabilitation means." A.H.F. failed to object to the other officer's opinion testimony. In light of the juvenile court's unchallenged ruling that one officer was qualified as an expert and A.H.F.'s failure to object to the other's testimony, we decline to further address A.H.F.'s foundation argument.

officers, teachers, family members, acquaintances, and others; and statements from victims of A.H.F.'s prior violations. We agree with A.H.F. that the Report and its exhibits are largely comprised of hearsay which, absent some applicable exception, should not have been considered by the juvenile court. *See generally* Utah R. Evid. 801-807 (defining and governing the admissibility of hearsay).

¶13 The State argues that any error by the juvenile court in considering the Report is harmless in light of A.H.F.'s failure to challenge the court's findings on the ten statutory certification factors. *See generally* Utah Code Ann. § 78A-6-703(3) (Supp. 2011). The State also argues that much of the hearsay in the Report would have been admissible under one or more exceptions to the ban on hearsay evidence. *See generally* Utah R. Evid. 803-804 (identifying exceptions to the hearsay rule). Finally, the State alleges that much of the information contained in the Report was cumulative of other testimony that was presented to the juvenile court without objection.[6]

¶14 While the State's arguments might have merit, the juvenile court's erroneous assumption that the rules of evidence were inapplicable deprives us of the benefit of that court's assessment of the Report's admissibility under those rules and in the context of the certification proceeding. Thus, we acknowledge that the admissible evidence presented to the juvenile court might support certification of A.H.F. to the district court. However, we cannot say with reasonable certainty what evidence would have been properly admitted and whether the juvenile court, considering only the admissible evidence, would have exercised its discretion to certify A.H.F. The juvenile court's decision rested heavily on the seriousness of the alleged crimes, but it also focused on A.H.F.'s amenability to rehabilitation in the relatively short time that he would be subject to the juvenile justice system. The Report spoke extensively to A.H.F.'s amenability to rehabilitation, and thus it seems quite possible that the juvenile court's ultimate decision may have rested on inadmissible hearsay evidence.

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[6]Between the probable cause hearing and the certification hearing, the juvenile court heard approximately five days of testimony. The witnesses included one of A.H.F.'s co-defendants, Brown, and both probation officers who had prepared the Report.

¶15 It is the juvenile court, rather than this court, that is in the best position to determine in the first instance whether certification is appropriate based on the admissible evidence. Accordingly, we remand this matter to the juvenile court for the purpose of first identifying the admissible evidence, and then considering whether certification is appropriate based only on that evidence. If the juvenile court concludes that its ruling would not have changed had the Report been excluded in whole or in part, then the juvenile court may simply reaffirm its ruling with appropriate findings. Otherwise, the juvenile court is directed to conduct, in its discretion, such proceedings as will ensure that its ultimate certification decision complies with rule 23's requirement that the Report be subject to the Utah Rules of Evidence.

CONCLUSION

¶16 The juvenile court erred when it failed to apply the Utah Rules of Evidence to determine the admissibility of the Report. We remand this matter to the juvenile court for reconsideration of its certification order in light of rule 23(a)(3) of the Utah Rules of Juvenile Procedure and for such further proceedings as may be necessary to ensure that the ultimate certification decision regarding A.H.F. complies with that rule.

William A. Thorne Jr., Judge

¶17 WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

Michele M. Christiansen, Judge

proof and shall proceed first with its case. At the conclusion of the state's case, the minor may testify under oath, call witnesses, and present evidence. The minor may cross-examine adverse witnesses.

(h) If from the evidence the court finds probable cause to believe that the crime charged has been committed and that the minor has committed it, and if the information is filed under Section 78A-6-703, the court shall proceed in accordance with Rule 23 to hear evidence presented by the prosecutor regarding the factors of Section 78A-6-703 for waiver of jurisdiction and certification.

(i) If from the evidence the court finds probable cause to believe that the crime charged has been committed and that the minor has committed it, and if the information is filed under Section 78A-6-702, the court shall proceed in accordance with Rule 23A to hear evidence presented by the minor regarding the conditions of Section 78A-6-702.

(j) The finding of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

(k) If the court does not find probable cause to believe that the crime charged has been committed or that the minor committed it, the court shall dismiss the information and discharge the minor. The court may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

(l) At a preliminary examination, upon request of either party, and subject to Title 77, Chapter 38, Victim Rights, the court may:

(l)(1) exclude witnesses from the courtroom;

(l)(2) require witnesses not to converse with each other until the preliminary examination is concluded; and

(l)(3) exclude spectators from the courtroom.

(Repealed and reenacted effective April 1, 1996; amended effective April 1, 1997; November 1, 1999; January 1, 2009.)

Repeals and Reenactments. — Former Rule 22, providing for certification hearings, was repealed and the present rule enacted effective April 1, 1996.

Amendment Notes. — The 2009 amendment corrected statutory references throughout the rule.

Rule 23. Hearing to waive jurisdiction and certify under Section 78A-6-703; bind over to district court.

(a)(1) Upon the filing of a criminal indictment or information and motion to waive jurisdiction under Section 78A-6-703, the court shall order that a full investigation of the minor's social history and background be made by the court's probation department.

(a)(2) The investigation may include, but shall not be limited to: the minor's delinquency history, the minor's response to rehabilitative and correctional efforts; the minor's educational history, social history and status; a psychological evaluation and assessment, and any other matter ordered by the court.

(a)(3) A report of the investigation shall be prepared and made available to the parties or to counsel, if represented, and to the minor's parent, guardian or custodian, as early as feasible but in any case at least 48 hours prior to the hearing. Written reports and other materials relating to the minor's mental, physical, educational and social history and other relevant information are governed by the Rules of Evidence. The court may require, and shall require if requested by a party, that any person preparing the report or materials be present for direct and cross examination.

report contains hearsay

(b)(1) After a finding of probable cause in accordance with Rule 22, the court shall hear evidence and determine whether it would be contrary to the best interests of the minor or of the public for the court to retain jurisdiction. The

state has the burden to prove by a preponderance of the evidence the factors required in Section 78A-6-703 to be considered by the court.

(b)(2) At the conclusion of the state's case, the minor may testify under oath, call witnesses, and present evidence on the factors required by Section 78A-6-703 to be considered by the court. The minor may cross-examine adverse witnesses.

(c) The court shall make findings on each factor for which evidence is presented. If the motion to waive jurisdiction and certify is granted, the court shall indicate which factor or factors were relied upon as a basis for the decision. If the court finds by a preponderance of the evidence that it would be contrary to the best interests of the minor or of the public for the court to retain jurisdiction, the court shall enter an order directing the minor to answer the charges in district court.

(d)(1) Upon entry of an order directing the minor to answer the charges in district court, the court shall comply with the requirements of Title 77, Chapter 20, Bail. By issuance of a warrant of arrest or continuance of an existing warrant, the court may order the minor committed to jail in accordance with Section 62A-7-201. The court may order the minor held in a detention center or released in accordance with Rule 9. The court shall enter the appropriate written order.

(d)(2) The clerk of the juvenile court shall transmit to the clerk of the district court all pleadings in and records made of the proceedings in the juvenile court.

(d)(3) The jurisdiction of the court shall terminate as provided by statute.

(e) If the court finds probable cause to believe that a felony has been committed and that the minor committed it but does not find that it would be contrary to the best interests of the minor or of the public for the court to retain jurisdiction, the court shall proceed upon the information as if it were a petition.

(Repealed and reenacted effective April 1, 1996; amended effective April 1, 1997; January 1, 2009.)

Repeals and Reenactments. — Former Rule 23, providing for recall of jurisdiction by the juvenile court, was repealed and the present rule enacted effective April 1, 1996.

Amendment Notes. — The 2009 amendment corrected statutory references in the rule heading and in Subdivisions (a) and (b).

Rule 23A. Hearing on conditions of Section 78A-6-702; bind over to district court.

(a) If a criminal indictment under Section 78A-6-702 alleges the commission of a felony, the court shall, upon the request of the minor, hear evidence and determine whether the conditions of paragraph (c) exist.

(b) If a criminal information under Section 78A-6-702 alleges the commission of a felony, after a finding of probable cause in accordance with Rule 22, the court shall hear evidence and determine whether the conditions of paragraph (c) exist.

(c) The minor shall have the burden of going forward as to the existence of the following conditions as provided by Section 78A-6-702:

(c)(1) the minor has not been previously adjudicated delinquent for an offense involving the use of a dangerous weapon which would be a felony if committed by an adult;

(c)(2) that if the offense was committed with one or more other persons, the minor appears to have a lesser degree of culpability than the codefendants; and

(c)(3) that the minor's role in the offense was not committed in a violent, aggressive, or premeditated manner.

(d) At the conclusion of the minor's case, the state may call witnesses and present evidence on the conditions required by Section 78A-6-702. The minor may cross-examine adverse witnesses.

Katie Gregory - Juvenile Rules

From: Judge Elizabeth Lindsley

To: Commissioner Anthony Ferdon; Commissioner Joshua Faulkner; Judge Andrew Valdez; Judge Charles Behrens; Judge Christine Decker; Judge Dane Nolan; Judge Frederic Oddone; Judge Hans Chamberlain; Judge Janice Frost; Judge Jeffrey Noland; Judge Jeffrey 'R' Burbank; Judge Jim Michie; Judge Julie Lund; Judge Karla Staheli; Judge Kay A. Lindsay; Judge Kimberly K. Hornak; Judge Larry Jones; Judge Larry Steele; Judge Mark Andrus; Judge Mark May; Judge Mary Manley; Judge Mary Noonan; Judge Michelle Heward; Judge Paul Iwasaki; Judge Paul Lyman; Judge Scott Johansen; Judge Sherene Dillon; Judge Sterling Sainsbury; Judge Suchada Bazzelle; Judge Thomas Higbee

Date: 1/23/2012 2:33 PM

Subject: Juvenile Rules

CC: Katie Gregory

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The Rules Committee will be looking at the issue and whether Rule 23(a)(3) should be amended to take out the part that says the written reports and materials are governed by the Rules of Evidence. I would like some feedback from you on whether you think this should happen or not.

I have heard from some of you and there are two different positions. One is to amend the rule, striking the requirement of the Rules of Evidence applying and let the reports come in at the certification hearing. The other is to leave Rule 23 (a)(3) as is, which would make the certification hearings more time consuming. As one judge put it, we are dealing with a serious issue on whether the case should go to district court or not. The juvenile's rights need to be protected and if the prosecution has to call more witnesses than that's just what should happen.

Please let me know what you think about the issue, either by email or give me a call at 801-233-9693. I will report to the Rules Committee on what the judges comments are. I will not state to the committee which judge made the comments, just what the comments were.

Thank you for your input on this issue. Beth

Katie Gregory - Re: Juvenile Rules

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Date: 1/23/2012 3:03 PM

Subject: Re: Juvenile Rules

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The rule treats selecting a forum the same as an adjudication which it is not. I am in favor of the rule on fairness grounds but only for certification hearings not all disposition hearings. Out of court statements to prove a fact when the standard of proof is beyond a reasonable doubt to determine guilty or not guilty are unfair and the reason hearsay is inadmissable absent an exception.

Transfer hearings are serious hearings but the end result is a bind over not a finding of guilt. My thoughts are the prosecutor can call the witnesses needed---the certification report in the A.H.F. case was not substantial compared to 5 days of testimony but was replete with hearsay information. I think the Court of Appeals got it right.

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Date: 1/24/2012 10:03 AM

Subject: Re: Juvenile Rules

CC: Katie Gregory

Here are a few thoughts:

1. If we're going to require the report to be prepared, the court ought to see it. One advantage to requiring such a report from a P.O. going to the court is that it provides one more voice than just an individual prosecutor's decision to try to certify a juvenile. The way the current rule reads, requiring the report to comply with the rules of evidence, makes it virtually useless. So, if we decide to stick with the current rule, we ought to not require the report any more.

2. What seems to me to make the most sense is to treat this report similar to a pre-sentence report by AP&P in an adult criminal case. (Having said that, I'm not sure exactly what the rules are for those reports, having been out of that end of the business for a couple of decades, but it seems we could fashion similar rules.)

3. I think one of the good things about the reports has been that they help keep the focus on all ten statutory factors. If we take the P.O. report out of the mix, we may tend to push these cases towards more of a "focus on the sensational" kind of a hearing, driven largely by an individual prosecutor or police officer's vendetta. (To make my point a little clearer, when I was a prosecutor considering whether or not to certify a kid, my first question and my first visit was always to the kid's P.O. I felt like if they didn't think certification was appropriate, or their heart wasn't in it, maybe I ought to back off. And I did back off from three or four over the years, for that very reason.)

I don't have particularly strong feelings one way or the other, but those are some things to consider. Hope these ideas are helpful.

Mark A.

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Subject: Re: Juvenile Rules
CC: Katie Gregory

I haven't had many of these cases, so my experience is limited. I agree with everything Mark says, as usual. I do want to be able to see the report. As Mark notes it gives us another perspective and from my experience one that is usually more balanced, less sensational and more objective. So I recommend that we take the position that the rule should be amended to allow us to do so.

>>> Judge Mark Andrus 1/24/2012 10:03 AM >>>
Here are a few thoughts:

1. If we're going to require the report to be prepared, the court ought to see it. One advantage to requiring such a report from a P.O. going to the court is that it provides one more voice than just an individual prosecutor's decision to try to certify a juvenile. The way the current rule reads, requiring the report to comply with the rules of evidence, makes it virtually useless. So, if we decide to stick with the current rule, we ought to not require the report any more.

2. What seems to me to make the most sense is to treat this report similar to a pre-sentence report by AP&P in an adult criminal case. (Having said that, I'm not sure exactly what the rules are for those reports, having been out of that end of the business for a couple of decades, but it seems we could fashion similar rules.)

3. I think one of the good things about the reports has been that they help keep the focus on all ten statutory factors. If we take the P.O. report out of the mix, we may tend to push these cases towards more of a "focus on the sensational" kind of a hearing, driven largely by an individual prosecutor or police officer's vendetta. (To make my point a little clearer, when I was a prosecutor considering whether or not to certify a kid, my first question and my first visit was always to the kid's P.O. I felt like if they didn't think certification was appropriate, or their heart wasn't in it, maybe I ought to back off. And I did back off from three or four over the years, for that very reason.)

I don't have particularly strong feelings one way or the other, but those are some things to consider. Hope these ideas are helpful.

Mark A.

>>> Judge Andrew Valdez 1/23/2012 3:03 PM >>>
The rule treats selecting a forum the same as an adjudication which it is not. I am in favor of the rule on fairness grounds but only for certification hearings not all disposition hearings. Out of court statements to prove a fact when the standard of proof is beyond a reasonable doubt to determine guilty or not guilty are unfair and the reason hearsay is inadmissable absent an exception.

Transfer hearings are serious hearings but the end result is a bind over not a finding of guilt. My thoughts are the prosecutor can call the witnesses needed---the certification report in the A.H.F. case was not substantial compared to 5 days of testimony but was replete with hearsay information. I think the Court of Appeals got it right.

>>> Judge Elizabeth Lindsley 1/23/2012 2:33 PM >>>
The Juvenile Rules Committee is meeting this Friday, January 27th. The Court of Appeals issued its ruling in the A.H.F. case, 2011 UT App 437, in December. The case involves the certification of a juvenile and Rule 23 of the Utah Rules of Juvenile Procedure. In certification hearings the probation department files a lengthy certification report with the ultimate recommendation on whether the juvenile should be certified or not. Rule 23 and whether the Rules of Evidence apply to the report was the main issue of this case.

The Rules Committee will be looking at the issue and whether Rule 23(a)(3) should be amended to take out the part that says the written reports and materials are governed by the Rules of Evidence. I would like some feedback from you on whether you think this should happen or not.

I have heard from some of you and there are two different positions. One is to amend the rule, striking the requirement of the Rules of Evidence applying and let the reports come in at the certification hearing. The other is to leave Rule 23 (a)(3) as is, which would make the certification hearings more time consuming. As one judge put it, we are dealing with a serious issue on whether the case should go to district court or not. The juvenile's rights need to be protected and if the prosecution has to call more witnesses than that's just what should happen.

Please let me know what you think about the issue, either by email or give me a call at 801-233-9693. I will report to the Rules Committee on what the judges comments are. I will not state to the committee which judge made the comments, just what the comments were.

Thank you for your input on this issue. Beth

Katie Gregory - Re: Juvenile Rules

From: Judge Andrew Valdez

To: Commissioner Anthony Ferdon; Commissioner Joshua Faulkner; Judge Charles Behrens; Judge Christine Decker; Judge Dane Nolan; Judge Elizabeth Lindsley; Judge Frederic Oddone; Judge Hans Chamberlain; Judge Janice Frost; Judge Jeffrey Noland; Judge Jeffrey 'R' Burbank; Judge Jim Michie; Judge Julie Lund; Judge Karla Staheli; Judge Kay A. Lindsay; Judge Kimberly K. Hornak; Judge Larry Jones; Judge Larry Steele; Judge Mark Andrus; Judge Mark May; Judge Mary Manley; Judge Mary Noonan; Judge Michelle Heward; Judge Paul Iwasaki; Judge Paul Lyman; Judge Scott Johansen; Judge Sherene Dillon; Judge Sterling Sainsbury; Judge Suchada Bazzelle; Judge Thomas Higbee

Date: 1/24/2012 11:39 AM

Subject: Re: Juvenile Rules

CC: Katie Gregory

The rule does not preclude us from receiving the report. We just need to comply with the rules of evidence regarding hearsay. I agree the report is valuable and statutorily required. It is akin to a pre-sentence report in the adult system---used for disposition. But the Appellate Court decided certification hearings adhere to adjudication rules of evidence.

Katie Gregory - Re: Juvenile Rules

From: Judge Frederic Oddone
To: Commissioner Anthony Ferdon; Commissioner Joshua Faulkner; Judge Andrew Valdez; Judge Charles Behrens; Judge Christine Decker; Judge Dane Nolan; Judge Elizabeth Lindsley; Judge Hans Chamberlain; Judge Janice Frost; Judge Jeffrey Noland; Judge Jeffrey 'R' Burbank; Judge Jim Michie; Judge Julie Lund; Judge Karla Staheli; Judge Kay A. Lindsay; Judge Kimberly K. Hornak; Judge Larry Jones; Judge Larry Steele; Judge Mark Andrus; Judge Mark May; Judge Mary Manley; Judge Mary Noonan; Judge Michelle Heward; Judge Paul Iwasaki; Judge Paul Lyman; Judge Scott Johansen; Judge Sherene Dillon; Judge Sterling Sainsbury; Judge Suchada Bazzelle; Judge Thomas Higbee
Date: 1/24/2012 2:10 PM
Subject: Re: Juvenile Rules
CC: Katie Gregory
Attachments: Judge Frederic Oddone4.vcf

The ruling by the court of appeals in A.H.F. states that "the Rules of Evidence apply in certification hearings in juvenile court." That's an accurate statement since that is what the statute says. It isn't a policy statement so much as it is an observation that the language is there and was ignored. What is confusing is how that language ever got into the juvenile rule in the first place.
This language does not appear in former versions of the laws or Rules regarding certification hearings. Further, broadly applying the Rules of Evidence in certification hearings and treating the hearing like a trial is inconsistent with the purpose of holding a certification hearing.

Utah's first post *Kent* certification law as found in 78-3a-25, the Juvenile Court Act of 1986, required the court to order probation to prepare a report for the judges consideration and mandated that all parties have access to the report prior to the hearing. The earlier statute provided:

Written reports ... relating to the juvenile's mental, physical, educational, and social history shall be considered by the court, but the court, if requested,...shall require persons...to appear and be subject to both direct and cross-examination. The certification hearing shall be a dispositional hearing...

The earlier statue did not incorporate the Rules of Evidence primarily because the United States Supreme Court in the *Kent* stated:

We do not mean...to indicate that the [certification] hearings must conform with all of the requirement of a criminal trial or even the ususal administrative hearing;

The legal evidentiary standard was fundamental fairness.

Rule 23 has the same requirements as the prior statutes but somewhere in the process the phrase... *The reports are governed by the Rules of Evidence...* got inserted.

In a certification hearing a judge is directed to consider a wide number of social, psychological, and historical factors. There is nothing in the legislative history or earlier Supreme Court rulings which require certification hearings to conform to the Rules of Evidence.
Reliable hearsay and written reports are admissible in preliminary hearings, shelters and dispositional hearings and would still be competent evidence in a certification hearing were it not for the regrettable language which I doubt most judges knew had been inserted in the rule.

The rule provides protections for a minor from unreliable statements and opportunities for cross examination. Requiring a certification hearing to be governed by the Rules of Evidence, as if it were a trial is inconsistent with the purpose and nature of the hearing. I would urge you to delete the reference.

Katie Gregory - Re: Juvenile Rules

From: Judge Frederic Oddone

To: Commissioner Anthony Ferdon; Commissioner Joshua Faulkner; Judge Andrew Valdez; Judge Charles Behrens; Judge Christine Decker; Judge Dane Nolan; Judge Elizabeth Lindsley; Judge Hans Chamberlain; Judge Janice Frost; Judge Jeffrey Noland; Judge Jeffrey 'R' Burbank; Judge Jim Michie; Judge Julie Lund; Judge Karla Staheli; Judge Kay A. Lindsay; Judge Kimberly K. Hornak; Judge Larry Jones; Judge Larry Steele; Judge Mark Andrus; Judge Mark May; Judge Mary Manley; Judge Mary Noonan; Judge Michelle Heward; Judge Paul Iwasaki; Judge Paul Lyman; Judge Scott Johansen; Judge Sherene Dillon; Judge Sterling Sainsbury; Judge Suchada Bazzelle; Judge Thomas Higbee

Date: 1/24/2012 3:11 PM

Subject: Re: Juvenile Rules

CC: Katie Gregory

Attachments: Judge Frederic Oddone4.vcf

On the other hand.....
While the standard of proof in a preliminary hearing is probable cause, I just re-read the rule on certifications and the standard for a certification is preponderance of the evidence. Which unless there is an exception probably precludes hearsay. !@#$^&^n

Katie Gregory - Re: Juvenile Rules

From: Judge Larry Steele
To: Commissioner Anthony Ferdon; Commissioner Joshua Faulkner; Judge Andrew Valdez; Judge Charles Behrens; Judge Christine Decker; Judge Dane Nolan; Judge Elizabeth Lindsley; Judge Frederic Oddone; Judge Hans Chamberlain; Judge Janice Frost; Judge Jeffrey Noland; Judge Jeffrey 'R' Burbank; Judge Jim Michie; Judge Julie Lund; Judge Karla Staheli; Judge Kay A. Lindsay; Judge Kimberly K. Hornak; Judge Larry Jones; Judge Mark Andrus; Judge Mark May; Judge Mary Manley; Judge Mary Noonan; Judge Michelle Heward; Judge Paul Iwasaki; Judge Paul Lyman; Judge Scott Johansen; Judge Sherene Dillon; Judge Sterling Sainsbury; Judge Suchada Bazzelle; Judge Thomas Higbee
Date: 1/26/2012 10:39 AM
Subject: Re: Juvenile Rules
CC: Katie Gregory

Judge Oddone asks a good question - why was the language added to the rule to require the report to meet the rules of evidence? Does anyone remember? It appears this language was added in 2005. Why? Is there a problem for the same juvenile court judge to hear the actual trial if the judge denies certification? Having studied the certification report and received the hearsay, can the juvenile court judge now appropriately hear the trial or is the judge subject to challenge?

>>> Judge Frederic Oddone 01/24/2012 2:10 PM >>>
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