

Preliminary Hearings



STATEWIDE ASSOCIATION OF
PROSECUTORS & PUBLIC ATTORNEYS

Utah Constitution

- **Article I, Section 12: Rights of accused persons:** “Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause . . . if appropriate discovery is allowed as defined by statute or rule.
- **Article I, Section 28. Declaration of the rights of crime victims:** (1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law: . . . (a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process.

Utah Rules of Criminal Procedure

- **Rule 7B. Preliminary Examinations:**

- (a) Burden of proof. At the preliminary examination, the state has the burden of proof . . . the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.
- (b) Probable cause determination. If from the evidence the magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate must order that the defendant be bound over for trial. The findings of probable cause may be based on hearsay, in whole or in part.

Utah Case Law

- The prosecution bears the burden of proof at a preliminary hearing. That burden protects our citizens from “groundless and improvident prosecutions,” *State v. Virgin*, 2006 UT 29, ¶ 20, 137 P.3d 787, or in other words, from “the substantial degradation and expense incident to a modern criminal trial when the charges . . . are unwarranted or the evidence insufficient,” *State v. Anderson*, 612 P.2d 778, 784 (Utah 1980).
- But, “[w]hen faced with conflicting evidence, the magistrate may not sift or weigh the evidence . . . but must leave those tasks ‘to the fact finder at trial.’ ” *State v. Hester*, 2000 UT App 159, ¶ 7 (quoting *State v. Wells*, 1999 UT 27, ¶ 2).
- “Properly construed and applied, the probable cause standard does not constitute a rubber stamp for the prosecution but, rather, provides a meaningful opportunity for magistrates to ferret out groundless and improvident prosecutions.” *State v. Virgin*, 2006 UT 29, ¶ 19.
- Prior to the ratification of the 1994 Victims’ Rights Amendment to the Utah Constitution (including both Article I, Sections 12 and 28), a preliminary hearing was also “a discovery device”—a means by which the defendant could “discover and preserve favorable evidence.” *State v. Anderson*, 612 P.2d 778, 784 (Utah 1980).
- The constitutional amendment eliminated this “ancillary” function of the preliminary hearing and limited the purpose of the preliminary hearing to the determination of probable cause. *State v. Lopez*, 2020 UT 61, ¶ 44.

Are Preliminary Hearings Fulfilling Their Constitutional Purpose?

- Weeding out “groundless and improvident prosecutions” occurs at least twice prior to an accused’s trial, at the prosecutor’s case screening and at preliminary hearing
- Prosecutor Case Screening:
 - Utah Code Section 77-2-2.1: “[N]o information may be filed charging the commission of any felony or class A misdemeanor unless authorized by a prosecuting attorney”
 - Utah Rule of Professional Conduct 3.8. Special Responsibilities of a Prosecutor: “**The prosecutor in a criminal case shall . . . [r]efrain from prosecuting a charge that the prosecutor knows is not supported by probable cause**”
 - Accordingly, if prosecutors are doing their job, most cases should result in a bindover after a preliminary hearing
 - Pending data from the courts
- Additionally, if judges are appropriately weeding out “groundless and improvident prosecutions” at preliminary hearings, few cases should result in a directed verdict at trial
 - Pending data from the courts

Should the Legislature Statutorily Broaden the Scope and Lengthen the Duration of Preliminary Hearings?

- Rights of Crime Victims
- Judicial Economy
- Supplanting the Role of the Fact-Finder (Jury)

Effects of Broadening the Scope of Preliminary Hearings

- Impairment to the Rights of Crime Victims
 - Prior to the 1994 Constitutional Amendments, crime victims were commonly subpoenaed to testify at preliminary hearings and were subject to vigorous cross-examination (and then cross-examined again at trial)
 - The Utah Constitution was explicitly amended to protect crime victims from this practice
 - Utah already has a problem with prosecuting sexual assault crimes
 - Only about 15% of victims report a rape
 - Only about 10% of reported rapes are prosecuted
 - Increasing victim reporting (and successful prosecution) is a primary factor in preventing sexual assault
 - A primary reason rapes are not reported is the trauma the criminal justice process inflicts on the rape victim

Effects of Broadening the Scope of Preliminary Hearings

- Impairment to the Rights of Crime Victims
 - Current court rules and case law permit a victim's testimony at preliminary hearing to be provided to the court in a form similar to an affidavit
 - Current law protects a victim's rights ("[t]o be treated with fairness, respect, and dignity, and to be free from harassment and abuse") while maintaining the defendant's constitutional right to confront and cross-examine his accusers at trial
 - We need to *improve* the process for victims, not make it more intimidating

Effects of Broadening the Scope of Preliminary Hearings

- Reductions to Judicial Economy

- Any broadening of the scope of preliminary hearings will increase:
 - (1) The number of cases that will be set for preliminary hearing
 - (2) The number and type of witnesses subpoenaed to testify
 - (3) The time needed for the court to conduct the hearings
 - (4) The time attorneys, victims and witnesses will remain in court
- Trial backlogs due to the pandemic currently exist throughout the state
 - Defendants are currently asserting (successfully) that their Sixth Amendment right to a speedy trial has been violated by court delays
 - Any broadening of the scope of preliminary hearings will increase the trial backlog and will result in the dismissal of more cases
 - Crime victims also have a right to a speedy trial (Utah Code Section 77-38-7)
- Respecting witness' time
 - Prior to the 1994 Constitutional Amendments, almost all witnesses needed for trial were also subpoenaed to testify at the preliminary hearing
 - Defendants used the preliminary hearing as a wide-ranging discovery tool, subpoenaing and cross-examining witnesses on issues unrelated to probable cause
 - "Secondary" witnesses (doctors, nurses, pharmacists, lab technicians, many law enforcement officers, etc.) were subpoenaed to court for the preliminary hearing and at extremely busy court dockets waited to testify on minor evidentiary matters

Effects of Broadening the Scope of Preliminary Hearings

- Supplanting the Role of the Fact-Finder (Jury)
 - Sixth Amendment to the US Constitution: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor”
 - The trial is the constitutional mechanism for fact-finding guilt or innocence
 - Weighing evidence is the role of the jury
 - Determining a witness’ credibility is the role of the jury
 - Drawing inferences from evidence is the role of the jury
 - Believing one witness over another is the role of the jury

What Can Be Improved?

- Allow both parties, with proper notice, to use live, recorded witness testimony from a preliminary hearing at trial if a witness is unavailable for trial (e.g., death, incapacity, etc.)
- Allow for the meaningful use of grand juries (authorized by Utah Constitution Article I, Section 13 but use severely limited by Utah Code Title 77, Chapter 10a)