



## Committee for Public Counsel Services Youth Advocacy Division

### QUICK REFERENCE GUIDE TO TRANSFER HEARINGS G.L. c. 119, § 72A

*c. 119, § 72A applies to cases where an individual is alleged to have committed an offense prior to his 18<sup>th</sup> birthday but is not apprehended until after his 19<sup>th</sup> birthday.<sup>1</sup> The statute addresses “whether an individual who is alleged to have committed a crime while a juvenile, but who has aged out of the Juvenile Court’s jurisdiction . . . will be subject to any prosecution at all.” Commonwealth v. Davis, 56 Mass. App. Ct. 410 (2002). This guide outlines the procedure that must be followed and common issues that arise.*

#### Court Procedure

A delinquency complaint originates in juvenile court where a **two-part** hearing is held to determine whether:

- 1) There is **probable cause** to believe the individual committed the crime and, if so;
- 2) Determine, in the court’s discretion, whether the individual will be tried as an adult or discharged and not face any charges.
  - The juvenile court can **discharge** if “satisfied that such discharge is consistent with the protection of the public” **or**
  - The juvenile court can **dismiss** the juvenile complaint **and transfer** the individual to the **adult court** “if the court is of the opinion that the interests of the public require that such person be tried for such offense or violation instead of being discharged. “
- If transferred, the juvenile court complaint is dismissed, a criminal complaint issues, and the case proceeds in the usual course of criminal proceedings in accordance with c. 218, § 30 (binding over to superior court) and c. 278, § 18 (district court).
- If transferred, and then indicted, the superior court has jurisdiction to try a defendant for an offense that comes within its jurisdiction even though, had the juvenile been apprehended prior to his 19<sup>th</sup> birthday, he could not have been indicted as a youthful offender. *Commonwealth v. Porges*, 460 Mass. 525 (2011) (§72A applied to rape charge where defendant was 13 when he was alleged to have committed rape and would not have been subject to being indicted as a youthful offender if apprehended when he was a juvenile).

#### Apprehension

*Whether the juvenile court will hold a transfer hearing (c. 119, § 72A) or whether the court will retain jurisdiction (c. 119, §72)<sup>2</sup> rests on a critical point in time - when the juvenile was “apprehended.” The following are cases that define what “apprehension” means in the context of §§ 72 and 72A:*

- “**Apprehension**” occurs upon commencement of process (the issuance of a summons) provided the juvenile is available to the court. *Commonwealth v. Mogelinski*, 466 Mass. 627 (2013).
- A person is “**available to the court**” where there is no “reason to believe that he will not appear upon a summons.” *Id.* at 634.

**Apprehension** *(Continued)*

- “If an **arrest warrant** is issued pursuant to c. 119, § 54,<sup>3</sup> apprehension occurs when the juvenile is taken into custody and available for disposition. *Id.* Likewise, if a **juvenile is arrested**, without a warrant, the point of “apprehension” is when he is taken into custody. *Mogelinski*, 466 Mass at n.6. See also *Commonwealth v. A. Juvenile*, 16 Mass. App. Ct. 251, 257 (1983). In *A Juvenile*, the juvenile was apprehended and defaulted prior to his 17<sup>th</sup> birthday and was later apprehended on a default warrant after his 18<sup>th</sup> birthday. Due to the default, the juvenile was not in custody and available to the court for disposition until after the second arrest, therefore § 72A was applicable. *Id.*
- The commencement of process after a **youthful offender indictment** marks a new point of apprehension separate and distinct from the commencement of process relative to a delinquency complaint based on the same facts. In *Mogelinski*, 466 Mass. at 634-648 the juvenile was “apprehended” (process had commenced) on a delinquency charge prior to his 18<sup>th</sup> birthday and was later indicted for the same charge after his 18<sup>th</sup> birthday. The court held that the “apprehension” date of the YO indictment did not relate back to the apprehension date of the delinquency complaint because the YO indictment did not implicate the continuing jurisdiction statute (§ 72) as it was not a “proceeding arising out of” the delinquency case. Accordingly, a transfer hearing pursuant to § 72A was the proper procedure.<sup>4</sup>

Other considerations:

- When apprehension occurs does not depend on **whether the defendant is responsible for the delay** in charging. *Commonwealth v. Sullivan*, 78 Mass. App. Ct. 631, 633 (2011)(§ 72A applied even though police knew about allegations and completed the follow up investigation well before defendant’s 18<sup>th</sup> birthday and the delay in charging was due to no fault of the defendant because he made no attempts to evade prosecution).
- If the delay in charging was in done in **bad faith**, the defendant’s due process rights are implicated. See *Porges*, at 532 n.4; *Mogelinski*, 466 Mass. at n.11 (court noted that if the Commonwealth knows about a charge against a juvenile prior to his 19<sup>th</sup> birthday and, rather than seeking a youthful offender indictment, waits until after the defendant turns 19 to seek a delinquency complaint and start the § 72A process “it bears the burden of demonstrating the absence of bad faith or inexcusable neglect in failing to obtain timely a youthful offender indictment. . . it would be incumbent upon the Commonwealth to show the unfeasibility of timely seeking and obtaining such an indictment”); See also *Commonwealth v. Imbruglia*, 377 Mass. 682, 691 (1979)(regarding delays in charging).
- The decision to transfer, in certain cases, may violate a defendant’s due process rights because the delay limits a judge’s sentencing options. See *Sullivan*, 78 Mass. App. at 633 (court declined to address this issue because it was not raised below). See also, *Commonwealth v. Washington W.*, 462 Mass. 204 (2012)(not a § 72A case but the court found that dismissal with prejudice was warranted for discovery violations where prosecutorial delay would have limited judge’s sentencing options).

**Hearing: Part I - Probable Cause**

*In the first part of the hearing, the juvenile court must determine whether there is probable cause to sustain the charges against the defendant.*

- The first part of the § 72A hearing is akin to a probable cause hearing in district court. *Commonwealth v. Nanny*, 462 Mass. 798, 806 (2012).
- A probable cause hearing is to be treated just like a trial in district court - the same rules of evidence apply. *Myers v. Commonwealth*, 363 Mass. 843, 849 n.6 (1973).
- Probable cause has been defined as “sufficient evidence to send the case to the jury if proceedings were a trial.” *Commonwealth v. Davis*, 56 Mass. App. 410, 416 (2002).

“The minimum quantum of evidence required to find probable cause ’is somewhat analogous in function to [a judge’s] ruling on a motion for a directed verdict at trial as to whether there is sufficient evidence to warrant submission of the case to the jury.” *Commonwealth v. Matthews*, 406 Mass. 380, 388 (1990) citing *Myers*, 363 Mass. at 850.

- The defendant is entitled to discovery prior to the hearing. See *Commonwealth v. Silva*, 10 Mass. App Ct. 784, 790 (1980). In *Silva*, the Appeals Court noted that the probable cause hearing is a “critical stage of the criminal process” and found that the district court’s dismissal with prejudice of an armed robbery case for failure of Commonwealth to provide discovery prior to the probable cause hearing was warranted. This failure to provide discovery also barred Commonwealth from prosecuting the case by indictment in superior court. *Id.*
- The defendant may present a defense and cross examine witnesses. *Nanny*, 462 Mass. at 806.

**Hearing: Part II– Discharge or Dismiss and Transfer**

*If the court finds probable cause, the court must then determine whether to discharge if “satisfied that such discharge is consistent with the protection of the public” or dismiss and transfer if the court “is of the opinion that the interests of the public require that such person be tried for such offense or violation instead of being discharged.”*

During this second part of the hearing:

- The judge’s decision whether or not to transfer is discretionary “without the need for proof by clear and convincing evidence and without specific evidentiary considerations to guide the ultimate decision.” *Davis*, 56 Mass. App. Ct. at 415 (the judge should consider the “protection of the public” and “the interests of the public”).
- There is no enunciated standard of proof – i.e. no clear and convincing evidence required. *Id.* citing *Commonwealth v. Bousquet*, 407 Mass. 854 (1990).

**Hearing: Part II– Discharge or Dismiss and Transfer** (*Continued*)

- The judge can base the decision to transfer solely on the nature of crime. *Bousquet*, 407 Mass. at 860 (court noted that the defense did not put on any evidence); *Davis*, 56 Mass. App. Ct. at 417 (the manner in which the victim was murdered was enough to find that prosecution in adult court was consistent with the protection of the public).
- Judges are not required to make written findings but to do them is a “prudent and desirable practice.” *Id.*

**Appeal**

- An appeal from a court’s decision to transfer is taken after the trial on the merits not by filing a c. 211, § 3 petition. *Fitzpatrick v. Commonwealth*, 453 Mass. 1014 (2009); *A Juvenile v. Commonwealth*, 466 Mass. 1035 (2013).
- For a transfer decision to be upheld, there only needs to be record support for probable cause and that hearing judge exercised her discretion when assessing the “two cognate considerations, the ‘protection of the public’” and “the interests of the public,” prior to making the decision to discharge or dismiss and transfer. *Davis*, 56 Mass. App. Ct. at 415, citing *Commonwealth v. A Juvenile*, 16 Mass. App. Ct. 251, 257 (1983).

**Endnotes:**

<sup>1</sup> Effective September 18, 2013, 17 year olds were included in the jurisdiction of the Juvenile Court by Chapter 84 of the Acts of 2013 “An Act Expanding Juvenile Jurisdiction.”

<sup>2</sup> c. 119 § 72 addresses the continuing jurisdiction of the juvenile court. Prior to the enactment of Chapter 84 of the Acts of 2013 the juvenile court retained jurisdiction over individuals who allegedly committed a crime prior to age 17 but who were not apprehended until between 17 and 18. § 72(a) now states if a child commits an offense before 18 “and is **not** apprehended before his 19 birthday, the court shall deal with such child in the same manner as if he has not attained his 18<sup>th</sup> birthday.” It appears that the new language in § 72(a) should have omitted the word “not.” Additionally, our reading of the new § 72(a) is not consistent with the language in the new § 72A.

<sup>3</sup> The preferred practice in juvenile court is to summons a child to court rather than issue an arrest warrant.

<sup>4</sup> The Commonwealth may not indict a defendant who is over the age of 18 [now 19 after the “raise the age legislation”] as a Youthful Offender. *Commonwealth v. Nanny*, 462 Mass. 798 (2012). The Commonwealth must file a delinquency complaint and follow the procedures set forth in c. 119, § 72A.

*This guide is meant as an overview of the law surrounding G.L. c. 119, § 72A transfer hearings and should not take the place of legal research. This guide can be used in conjunction with the JDN Guide to Juvenile Court Jurisdiction and Dispositions <http://www.youthadvocacydepartment.org/jdn/resourcedocs/Juvenile-Court-Jurisdiction.pdf>.*

If you have any questions that are not addressed by this guide please contact us:

Wendy Wolf, Director of Training, [wwolf@publiccounsel.net](mailto:wwolf@publiccounsel.net)

Holly Smith, Training Attorney, [hsmith@publiccounsel.net](mailto:hsmith@publiccounsel.net)

March 2014

Edited by: Elizabeth LaFrance, Esq. and Nancy McLean, Esq.