

2003

Utah v. Michael Oliver : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 MICHAEL OLIVER, : Consolidated Case No. 20030286-CA
 :
 Defendant/Appellant. :

BRIEF OF APPELLEE

Appeal From a Conviction for Burglary of a Dwelling, a Second Degree Felony, in Violation of Utah Code Ann. § 76-6-202 (2003), Two Convictions of Burglary of a Building, Third Degree Felonies, in Violation of Utah Code Ann. § 76-6-202 (2003), and a Conviction of Possession of a Controlled Substance, a Third Degree Felony, in Violation of 58-37-8(2)(a)(i) (2002), in the Second Judicial District Court, Davis County, Utah, the Honorable Thomas L. Kay, Presiding

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FILED
UTAH APPELLATE COURT

MAR - 8 2004

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STATE OF UTAH, :

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff/Appellee, :

v. :

MICHAEL OLIVER, : Consolidated Case No. 20030286-CA

Defendant/Appellant. :

BRIEF OF APPELLEE

- - - - -

JURISDICTIONAL STATEMENT

Defendant appeals his sentences imposed pursuant to his guilty pleas to one count of burglary of a dwelling, a second degree felony, in violation of UTAH CODE ANN. § 76-6-202 (2003), two counts of burglary of a building, third degree felonies, in violation of section 76-6-202, and one count of possession of a controlled substance (methamphetamine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (2002). This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (2002).

STATEMENT OF ISSUE AND STANDARD OF APPELLATE REVIEW

1. Did the trial court correctly conclude that no constitutional violation occurred in sentencing where defendant's current crimes and past criminal history were disclosed in the

presentence report and formed the basis of the court's determination that concurrent terms of imprisonment were the most appropriate sentences for the multiple felony convictions?

A trial court's determination that a sentence was legally imposed is reviewed for correctness. *See State v. Brooks*, 908 P.2d 856, 858-59 (Utah 1995); *State v. Patience*, 944 P.2d 381, 384-85 (Utah App. 1997). Its underlying factual determinations are reviewed for clear error. *See State v. Wanosik*, 2001 UT App 241, ¶ 9, 31 P.3d 615, *affirmed*, *State v. Wanosik*, 2003 UT 46, 79 P.3d 937.

A trial court's determination of what sentence is appropriate is upheld unless “no reasonable person would take the view adopted by the trial court.” *State v. Corbitt*, 2003 UT App 417, ¶ 6, 82 P.3d 211 (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The language of no provision is determinative of the outcome of this appeal, which is fact-based. Any provisions cited in argument, however, are attached in *Addendum A*.

STATEMENT OF THE CASE

This is a consolidated appeal from three district court cases.¹ On June 17, 2002, defendant was charged in Second District Case No. 021701014 [hereafter #1014], with:

Count I: Burglary of a Dwelling, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (2003);

Count II: Theft by Receiving Stolen Property, a third degree felony, in violation of Utah Code Ann. § 76-6-408 (2003);

¹ Each case has a separate pleadings file, which the State designates by the last four digits of its district court number. There is only one set of hearing transcripts.

Count III: Possession of a Controlled Substance (Methamphetamine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (2002);

Count IV: Vehicle Burglary, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-204 (2003);

Count V: Possession of Drug Paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1) (2002); and,

Count VI: Unlawful Possession of Burglary Tools, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-205 (2003).

(R#1014: 1-3, 35-37). Two months later, on August 27, 2002, defendant was charged in Second District Case No. 02170147 [hereafter #1447] with:

Count I: Burglary of a Dwelling, a second degree felony, in violation of section 76-6-202;

Count II: Unlawful Acquisition, Possession, or Transfer of a Credit Card, a third degree felony, in violation of Utah Code Ann. § 76-6-506.3 (2003); and,

Count III: Theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (2003).

(R#1447: 1-3). On September 5, 2002, defendant was charged in Second District Case No. 021701498 [hereafter #1498], with:

Count I: Burglary of a Dwelling, a second degree felony, in violation of section 76-6-202; and,

Count II: Theft, a class B misdemeanor, in violation of section 76-6-404.

(R#1498: 1-2). Though the informations were filed at different times, the criminal conduct occurred between June 6-14, 2002. *See Addendum B (Informations)*.

On November 21, 2002, defendant pled guilty to four felonies pursuant to a plea bargain. In case #1014, defendant pled guilty to second-degree burglary (Count I) and felony possession of a controlled substance (Count II), and the remaining four charges were dismissed (R#1014: 40-50). In case #1447, defendant pled guilty to a reduced charge of third-degree burglary of a building (Count I reduced) and the remaining two counts were dismissed (R#1447: 12-18). In case #1498, defendant pled guilty to a reduced charge of third-degree burglary of a building (Count I reduced) and the theft charge was dismissed (R#1498: 10-17). *See Add. B (Defendant's Statement in Advance of Pleas).*

Pursuant to the parties' agreement, defendant's drug possession plea in case #1014 was entered nunc pro tunc to the date of the offense, which protected defendant's driver's license from further revocation (R#1014: 43; R89-Part 2: 6).² The prosecutor also agreed that if defendant were sentenced to and successfully completed probation, the State would not oppose a motion to further reduce the degree of the convictions pursuant to Utah Code Ann. § 76-3-402 (2003) (R#1014: 43; R#1447: 15; R#1498: 13).³ Defendant understood that any sentencing recommendations were not binding on the trial court and he could receive consecutive prison terms for each felony (*id.*). *See Add. B.*

² Record 89 contains a transcript of the morning sentencing hearing (Part I) and the afternoon discussion between defense counsel and the judge (Part 2). The State designates Part 1 as "R89" and Part 2 as "R89-Part 2."

³ Section 76-3-402, commonly referred to as a 402 reduction, permits a conviction to be reduced by one degree or, if the prosecutor agrees in writing, by two degrees upon a defendant's successful completion of probation (*Add. A*). The grant of any reduction is purely discretionary with the trial court.

The Department of Adult Probation and Parole [AP & P] prepared a presentence investigation report [PSI], which recommended probation, conditioned upon defendant serving jail time of either six months straight time or twelve months with work release (R89: 12; R89-Part 2: 11).⁴

On January 16, 2003, the court rejected AP & P's recommendation and sentenced defendant to the statutorily-authorized term of one-to-fifteen years imprisonment in case #1014, and to three statutorily-authorized terms of zero-to-five years imprisonment in cases #1014, #1447, and #1498, all sentences to run concurrently (R#1014: 53-54; R#1447: 22-23; R#1498: 20-21). Based on AP & P's assessment, the court imposed \$3883.92 in restitution plus other costs (*id.*). *See Addendum C (Sentencing Hearing)*.

On February 10, 2003, defendant filed a motion to “correct” what he claimed were his illegally-imposed sentences pursuant to rule 22(e), Utah Rules of Criminal Procedure, and a motion to withdraw his guilty pleas pursuant to Utah Code Ann. § 77-13-6(2)(a) (2002) (R#1014: 55-62; R#1447: 24-31; R#1498: 22-29). On March 27, 2003, the motions were denied (R#1014: 91-92; R#1447: 57-58; R#1498: 56-57).

⁴ Defendant's arguments are based on the contents of the PSI, even though he does not attack the report's validity. Consequently, he was obligated to include the PSI in the record on appeal, but has failed to do so. *See State v. Headley*, 2002 UT App 58 (a copy of the unpublished opinion is attached in *Addendum F* in compliance with rule 30(f), Utah Rules of Appellate Procedure). The record otherwise establishes the basic parameters of AP & P's recommendation. But other alleged facts—such as defendant's criminal history and personal characteristics—are incapable of verification without the PSI. Because the record on appeal is incomplete, this Court must assume the regularity of the trial proceedings and construe any “ambiguities or deficiencies resulting therefrom” in favor of the lower court's rulings. *See id.*

On April 1, 2003, defendant timely appealed (R#1014: 93, 101; R#1447: 59, 66; R#1498: 58, 66). Defendant does not attack the validity of his guilty pleas on appeal, but only challenges the legality and reasonableness of his sentences.⁵

STATEMENT OF FACTS⁶

Between June 6 and June 12, 2002, defendant burglarized the attached garages of three homes and stole cash, checkbooks, credit cards, cell telephones, keys, compact audio discs, jewelry, sunglasses, and other objects located in the garages and inside vehicles in the garages (R#1014: 2, 41, 100; R#1447: 2-3, 13, 70; R#1498: 2, 11, 62). Following the burglaries, some of the stolen checks were forged and some of the stolen credit cards used to obtain goods and money at various stores (*id.*). Defendant's wife, Briana Salgado Oliver, and two others, Bradon Larkin and Jereme Ogren, assisted defendant (*id.*). When Larkin was arrested by the police, he confessed and named defendant (*id.*).

⁵ Below, defendant characterized his challenge as a rule 22(e) motion (R#1014: 57-62; R108: 4). Rule 22(e) permits an illegal sentence to be corrected at any time and, consequently, is a narrow jurisdictional rule applicable only to untimely claims of patent or manifest sentencing error. *State v. Thorkelson*, 2004 UT App 9, ¶ 15, 84 P.3d 854. Here, defendant's motion to correct his sentences was filed with a timely motion to withdraw his guilty pleas, which tolled the time for appeal. *See* UTAH CODE ANN. 77-13-6 (2002) (subsequently amended) (*Add. A*); UTAH R. APP. P. 4(b). As a result, jurisdiction is not at issue and defendant may attack his sentences on any grounds preserved below. If, however, jurisdiction were at issue, defendant's allegations would not amount to cognizable rule 22(e) error. *See Thorkelson, id.* at ¶¶ 15 & 17.

⁶ The facts are stated in the light most favorable to the trial court's rulings. *See State v. Litherland*, 2000 UT 76, ¶ 2, 12 P.3d 92.

On June 14, 2002, a search warrant was executed on defendant's apartment (id.). Numerous stolen credit cards and stolen property, valued in the thousands of dollars, were found (id.).⁷ Methamphetamine and drug paraphernalia were also located (id.).

Defendant was charged with eleven offenses: three second-degree felonies, three third-degree felonies, one class-A misdemeanor, and four class-B misdemeanors. *See Statement of the Case, supra*. Pursuant to a plea bargain, he pled guilty to one second degree felony and three third degree felonies, two of which were reduced charges (id.). The remaining seven charges were dismissed (id.). *See Add. B*.

Defendant admitted he was a methamphetamine addict (R89: 2-3).⁸ Defense counsel, who was also defendant's father, claimed his son had reformed since his arrest, but conceded that defendant had a ten-year history of criminal offenses (R89: 11; R89-Part 2: 3-5, 16; R108: 5-6,13-14). Beginning when he was 16 years old, defendant had juvenile court adjudications for possession of tobacco, possession of marijuana, and possession of drug paraphernalia, and had received counseling in connection with two incidents of shoplifting (R89-Part 2: 3-4; R108: 5-6, 13-14). As an adult, defendant had five misdemeanor

⁷ The State alleged that \$5,000.00 of stolen property was located; defendant admitted "some" stolen property was found (R#1014: 2; R#1014: 41). Approximately, \$3884.00 in restitution was assessed (R#1014: 53-54).

⁸ Defendant spoke only through counsel at sentencing (R89: 8).

convictions: possession of drug paraphernalia, driving under the influence involving an accident, assault, and two separate incidents of disturbing the peace (id.).⁹

Nevertheless, because defendant did not have any previous felony convictions and had not been “formally” supervised by AP & P, defense counsel requested that defendant be placed on home confinement for 30 days and then on probation (R89: 8). AP & P agreed that probation should be considered, but only if defendant first served a term in jail of six months straight or twelve months with work release (R89: 12). The State submitted the matter on AP & P’s recommendation, but noted that a long jail term might delay drug treatment (R89: 8-9). The majority of the victims requested defendant be imprisoned (R#1014: 100; R#1447: 70; R#1498: 62).¹⁰

The trial court disagreed with defense counsel’s view of his son and with the recommendations for probation. The court explained:

Okay. I’ve had an opportunity to review the pre-sentence report and take into consideration everything that’s been said here today.

My observations are these, Mr. Oliver, it appears that since 1993 when you were about 16 years old, or 16 or 17 years old, you had quite an extensive juvenile court history and you’ve had quite an extensive adult history and it doesn’t seem like you’re going in the right direction and it doesn’t seem like you’ve learned anything from earlier times when you pled guilty or were found guilty of matters and sentenced. You have served some time but generally you’ve been on probation quite a bit and it doesn’t seem like anything has worked. There [sic] are not unserious crimes. You are here on a second

⁹ Without the PSI, the claim that this is the entire criminal history cannot be verified. *See n. 4, supra*.

¹⁰ Six victims submitted Victim Impact Statements. Three recommended prison, two believed community service or something less than prison would be adequate punishment, and one made no recommendation (R#1014: 100; R#1447: 70; R#1498: 62).

degree burglary; possession of a controlled substance, a third degree felony; a burglary, a third degree felony; another burglary. So we have three third degree felonies and a second degree felony and whether these are involved with drug [usage] or whatever, it's basically the past 10 years of your life have been spent in and out of various charges and very bad behavior.

(R89: 10-11). *See Add. C.* The court then sentenced defendant:

I'm going to depart from the recommendation, but I'm not going to depart in the way your attorney has asked for and I'm going to send you to prison and the reason I'm sending you to prison is to teach you that you cannot continue in this type of behavior, this type of behavior which says I can take drugs, I can steal, I can do this for the last - you're 26 years old and for 10 years you have done this and the time is going to stop now or you're going to spend the rest of your life in prison and if you want to continue to change - I think your change of the last month or so has been a change to make it look good basically for this. I don't believe, you know, I can't compare 10 years of bad behavior with one month of good saying everything is fine. This isn't fine and to come in here and basically ask for 30 days home confinement, you know, under these circumstances, you know, and depart from a 6-month or a one-year work release. I'm sentencing you to the Utah State Prison for an indeterminate term of 1 to 15 years on the Second [sic], zero to 5 on each of the thirds to run concurrently.

(R89: 11-12). *See Add. C.*

Later that afternoon, defense counsel, without defendant, approached the judge and told him that he was "shocked and personally devastated" by the court's decision, but that his son accepted it (R89-Part 2: 1, 24). Counsel recognized that the court's sentence was lawful and stated that he was not making a motion, but said he wanted to discuss his "loss of confidence" in the court (R89-Part 2: 2, 11). For the next hour, counsel chastised the judge for imprisoning his son (R89-Part 2: 1-30). He said the judge was "arbitrary" and the "harshest judge in the state" and characterized the sentences as "aberrant" (R89-Part 2: 8, 15, 17). He believed that "there was something more in play than [counsel] was aware of" and

alleged that the judge had heard the “rumors” that his son had committed other felonies because the judge signed a search warrant for defendant’s car a month before the sentencing (R89-Part 2: 8-10). The judge explained that he did not remember signing a new warrant, but possibly did because he signs all the search warrants for the Layton City Police (R89-Part 2: 8-9). Counsel next alleged that the judge harbored some hidden reason for rejecting AP & P’s recommendation (R89-Part 2: 13). These allegations and criticisms continued for over 40 minutes until the judge interjected:

I can tell you one other thing Mr. Oliver, when you talked about AP & P, AP & P because of the budget of the state [sic] of Utah never, hardly ever recommends prison. Very seldom do they recommend prison and the reason for that is because they’re under budget constraints. But I can tell you that we have a jail that is full and every time I put a person a year in jail, I get a call the next day from the jail to let three out and so what I’ve been doing and what I understand other judges are doing is the people who have a year commitment are usually going to prison now because we have too heavy of a load in the Davis County Jail.

(R89-Part 2: 15, 21). *See Addendum D (Afternoon Session)*. Defense counsel responded that sending people to prison because of jail overcrowding was wrong (*id.*). The court opined that overcrowding was part of the “system,” but stated that a sentencing judge does not “just point, you know, a thing at the wall and throw a dart and say, hum, prison; probation; jail” (R89-Part 2: 22). Instead, as in this case, the judge receives the presentence report and

I read those and I make the best determination and that’s what I did and I guess what bothers me just a little bit is the fact that you are both the attorney and as the father are coming into here and telling me that you have no confidence in the Court and all this other stuff that I don’t believe you would do if you had somebody else that was the defendant in this case.

(*id.*). The court continued:

I believe that Mr. Oliver, the defendant, should go to prison based upon his history and what's in the pre-sentence report and upon the discretion that I exercised. You do not and you believe that's improper. That is a difference of opinion and I don't do it for anything because of my feelings toward you, my feelings toward your son or anybody else. It's the basis of my opinion, what was in the report and the exercise of my discretion and as I did with the other five or six people that I sent to prison today, I don't do that lightly. I don't do it lightly [sic] people going to jail or prison.

(R89-Part 2: 23). *See Add. D.* Defense counsel continued to allege that the judge sentenced defendant to prison because the jail was overcrowded, the judge again clarified:

No, that's not the only reason I recommend that. . . . I just told you the fact is that AP & P doesn't recommend prison because of their budget constraints and they've been told by the higher ups about that and so I am saying that when I get a recommendation and they're saying one year jail, *which in reality should be prison*, I am sending people to prison.

(R89-Part 2: 27) (emphasis added). *See Add. D.* Finally, after more than an hour of counsel's complaints, the judge terminated the encounter (R89-Part 2: 30).

Defendant subsequently filed a timely motion to withdraw his guilty pleas (R#1014: 55-56; R#1477: 24-25; R#1498: 22-23). Defense counsel claimed that the plea bargain was based on defendant receiving probation and eventually being eligible for a 402 reduction, but admitted that defendant knew the court was not bound by the parties' recommendations (R108: 1-3). The court summarily denied the motion (R108: 3-4). Defendant does not challenge that ruling on appeal.

Defendant also filed a "petition for post-conviction relief" which sought correction of his "illegally imposed" sentences pursuant to rule 22(e) (R#1014: 57-62; R#1477: 26-31; R#1498: 24-29). Defendant alleged that the court had only sentenced him to prison because

the jail was overcrowded and had failed to reveal this fact until after sentencing (R108: 4-10). Defendant claimed that without “extreme aggravating circumstances,” his imprisonment was cruel and unusual because he had not been given “one chance, not even one chance to sit back and say, ‘Okay, you’re on probation, let’s watch you, let’s see how you’re going to conduct your life’” (R108: 18-22).

The court rejected defendant’s arguments and concluded that no illegality occurred in sentencing (R108: 23). *See Addendum E (Post-Judgment Ruling)*. The court found that the “record is absolutely clear” that during the afternoon encounter, the court only brought up prison and jail overcrowding in response to an “hour of basically, I don’t know what you could call what you did,” other than getting “something off your chest” (R108: 10-11). The court noted that only after counsel persisted in “asking things” about why the recommendation was not followed, the court offered its view that AP & P often did not recommend prison, even when warranted, because of overcrowding (R108: 10-13, 20). At the same time, the trial judge was equally aware of problems caused by long-term confinements in jail (*id.*). Overcrowding was not, however, the basis of the court’s sentencing determination; instead, the court

took into consideration the fact that [defendant] had a juvenile record, that he had had five misdemeanors as an adult from 1995 to 1999; that he’s been charged in a spree of felonies between June 6th and June 12th in these three cases; that he ultimately pled to four felonies that included burglaries and restitution. Taking all those things into consideration, I sentenced him to prison. I believe that is within due process. I believe that is not illegal and if it is illegal, then you have your appeal and the Appellate Court can make that decision.

(R108: 23 & 13). *See Add. E.*

SUMMARY OF ARGUMENT

Defendant, a drug addict, committed multiple felonies and misdemeanors in the course of burglarizing three homes. The crimes followed a ten-year history of criminal involvement. The court rejected recommendations for probation and imposed concurrent terms of imprisonment based on the crimes involved and defendant's history. The sentencing determination fully comported with constitutional requirements and reasonably reflected the legitimate personal judgment of the trial court. Consequently, defendant's challenges to his sentences fail.

ARGUMENT

THE TRIAL COURT RELIED ON INFORMATION CONTAINED IN THE PRESENTENCE REPORT IN REASONABLY EXERCISING ITS DISCRETION TO IMPOSE STATUTORILY-AUTHORIZED CONCURRENT TERMS OF IMPRISONMENT, DESPITE RECOMMENDATIONS FOR PROBATION

Defendant claims that his sentences are illegal because the court allegedly did not timely disclose the facts underlying its sentencing decision and because the sentences were "fixed and mechanical" and imposed without regard to defendant's individual circumstances (*Br.Aplt. at 9-13*). Defendant's argument lack merit.¹¹

¹¹ In defendant's brief, he states two issues, but presents a joint argument (*Br.Aplt. at 2 & 9-14*). The State responds to the joint argument. Additionally, while defendant nominally cites to the state constitution, no separate state analysis is presented. *See State v. Reyes*, 2004 UT App 8, ¶ 2, 84 P.3d 841 (refusing to interpret state constitutional provision differently than its federal counterpart when appellant failed to make a separate state constitutional argument).

(A) This Court Should Not Reach the Merits Because Defendant Failed to Include the PSI and Failed to Marshal the Evidence in Support of the Court's Rulings.

As noted, *supra at n.4*, even if defendant is not attacking the validity of the PSI, he is obligated to include the report where his arguments are necessarily connected with the report's contents. *See State v. Headley*, 2002 UT App 58 (*Add. F*). His failure to do so permits this Court to presume the regularity of the proceedings below and construe all ambiguities and record deficiencies in favor of the lower court's rulings. *See id.*

Additionally, because defendant's arguments—that the trial court relied on an undisclosed factor in sentencing and defendant's incarceration is cruel and unusual—are necessarily fact-specific, defendant is obligated to marshal the evidence in support of the trial court's rulings, before he may challenge the merits of those rulings. *See West Valley City v. Hoskins*, 2002 UT App 223, ¶ 13, 51 P.3d 52 (citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). Defendant has failed to do so here. Consequently, this Court may summarily affirm. *See id.*

For example, in challenging his sentences, defendant fails to acknowledge that even though AP & P recommended probation with jail time, the agency also found that defendant had mental health problems in addition to drug addiction, that he was likely still using drugs because he was not in drug therapy, and that he presented “a serious threat of violent behavior” (R89: 2-4).¹² These facts support the trial court's rejection of probation.

¹² Below, defendant disputed some of AP & P's findings, but did not establish their inaccuracy (R89: 1-5).

Similarly, though defendant attaches the transcript of his counsel's afternoon encounter with the judge to his addenda, he fails to fully acknowledge the judge's statements during that encounter and ignores the judge's clarifications of what he meant. *Compare State's Statement of the Facts, supra, with Br.Aplt. at 7.* Moreover, defendant ignores the court's findings and ruling in denying his post-judgment motion, other than to acknowledge such a hearing took place. *Compare State's Statement of the Facts, supra, with Br.Aplt. at 5 & 8. See also Add. E.* Defendant's omissions are egregious given his rejection of this Court's invitation to provide supplemental briefing. *See Utah Court of Appeals' Order, No. 20030286-CA, dated 10/30/03.*

On these grounds alone, defendant's arguments may be summarily rejected. If, however, the merits are considered, the arguments nevertheless fail.

(B) All Relevant Facts Were Disclosed to Defendant.

"The fair administration of justice at the least requires that the information upon which the judge relies in imposing punishment is accurate." *See State v. Lipsky*, 608 P.2d 1241, 1249 (Utah 1980). Consequently, the facts relied in sentencing must be disclosed to a defendant to permit him an opportunity to point out any inaccuracies. *Id.* at 1244. Usually, this is accomplished through disclosure of the presentence report. *Id.* at 1248-49.

Here, defendant does not claim that the PSI was not disclosed to him or that its contents were not accurate and reliable. Instead, defendant asserts that he was denied due process because the court failed to reveal "the determinative factor" for sentencing defendant

to prison, to wit, overcrowding in the Davis County Jail (*Br.Aplt. at 7, 11-13*). Defendant's argument lacks factual support.

While due process requires the disclosure of determinative facts underlying a court's sentencing determination, it does not require disclosure of the court's mental process or its reasons for crediting one fact or another. *Cf. Lipsky*, 608 P.2d at 1246-49. Nor, as claimed by defendant, does due process require a court to justify its rejection of a presentence recommendation or specifically address aggravating and mitigating factors justifying one sentencing option over another. *See* UTAH CODE ANN. § 76-3-406 (2003); UTAH R. CRIM. P. 22 (general sentencing procedures); *but see* UTAH CODE ANN. § 76-3-201 (2003) (requiring findings for imposition of a minimum mandatory term) (*Add. A*).

Here, in response to counsel's hour-long afternoon criticism of the sentences, the judge expressed his belief that AP & P "very seldom" recommended prison, even when warranted, because the prison was overcrowded (R89-Part 2: 21, 27). The judge stated that the Davis County Jail was also overcrowded and that when a defendant is sent to jail on a long-term commitment, the jail often calls the court and complains that it must release other inmates to accommodate the long-term inmate (R89-Part 2: 21). As the judge explained, these housing concerns did not drive his sentencing decision, but explained why the judge did not fully credit AP & P's recommendation (R89-Part 2: 22-23, 27). Additionally, the court was simply discussing the realities faced by any judge in imposing long-term jail commitments (R89-Part 2: 21-23). But as the judge repeatedly stated, it was the facts

contained in the presentence report which compelled him to sentence defendant to prison (R89-Part 2: 10-12, 22-23).

At sentencing, during the subsequent afternoon session, and in denying defendant's post-judgment motion, the court consistently stated the facts it relied upon in sentencing defendant. These included:

- (1) defendant had committed serious multiple felony and misdemeanor offenses in a one week period;
- (2) three of crimes involved burglary, a crime of violence;
- (3) the crimes resulted in substantial economic loss to the victims;
- (4) defendant had committed crimes for ten years, from the age of 16 until his present age of 26;
- (5) defendant had at least three juvenile adjudications; and
- (6) defendant had at least five adult convictions.

(R89: 10-12; R89-Part 2: 10-12, 22-23; R108: 13, 23). Additionally, the court believed that defendant's recent claims of reform were opportunistic for sentencing, but that even if the reform were genuine, it did not outweigh defendant's criminal history or the seriousness of his current crimes (R89: 11).¹³

¹³ During the afternoon session, defense counsel said he was "most upset" by these comments and that his son had reformed for six months, and not just the one month claimed by the court (R89-Part 2: 7-8). AP & P, however, noted that because defendant was not involved in drug treatment, he was probably still using drugs (R89: 2). Moreover, even by counsel's admission, defendant drove his wife to urine-analysis every week, yet did not participate in such a program himself or any other supervisory programs, except for a self-help group which he "generally" attended (R89: 2-3). Consequently, defendant's claim of reform was largely self-reported (id.).

In sum, as the trial court correctly found and concluded all relevant information was disclosed and no due process violation occurred (R108: 23). Moreover, even if the prison-jail overcrowding aspects should have been disclosed at sentencing, any error was harmless beyond a reasonable doubt. *See Jones v. United States*, 527 U.S. 373, 402-03 (1999) (holding that harmless error analysis may be applied even in death penalty cases where the jury considers an improper factor). Defendant learned of the court’s views in the afternoon session and, subsequently, had the opportunity to attack the relevancy and accuracies of those views in the post-judgment motion hearing (R89-2: 21-27; R108: 8-10). Nevertheless, the court stated that, in its opinion, the sentences were appropriate based on defendant’s past criminal history and current criminal involvement (R89-2: 22-23; R108: 23). *See discussion, infra*. Consequently, whether the information was disclosed or not, the sentences would be the same. *See Jones, id.*

(C) Rejection of AP & P’s Recommendation Was a Permissible Exercise of the Trial Court’s Discretion.

Defendant’s secondary argument—that his incarceration constitutes cruel and usual punishment—though clothed in a constitutional mantel, amounts to no more than a claim that the trial court abused its discretion in rejecting AP & P’s recommendation. *See Br.Aplt. at 2 & 10*. As defense counsel admitted below, a claim that a court abused its discretion by imposing a lawful sentence is a “waste of words” (R89-Part 2: 11). Given the wide variety of sentencing alternatives, “very wide discretion” is not only permitted the trial court, but “absolutely require[d]” in sentencing. *Lipsky*, 608 P.2d at 1244. The exercise of discretion

in sentencing “necessarily reflects the personal judgment of the court.” *State v. Corbitt*, 2003 UT App 417, ¶ 6, 82 P.3d 211. Abuse of that “vested” discretion occurs only if “it can be said that no reasonable person would take the view adopted by the court.” *Id.* (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)). *Accord State v. Valdovinos*, 2003 UT App 432, ¶ 14, 82 P.2d 1167.

Defendant implies that the needs of the criminal are paramount in sentencing (*Br.Aplt. at 10 & 13*). This is not incorrect. The sentencing court should consider “rehabilitation, deterrence, punishment, restitution, and incapacitation.” *State v. Sotolongo*, 2003 UT App 214, ¶ 5, 73 P.3d 991. “Many different ingredients factor into the sentencing process, and the discretionary imposition of probation rests in many cases upon subtleties not apparent on the face of a cold record.” *Id.* at ¶ 9 (quoting *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991), and upholding determination that prison, not probation, was the appropriate sentence). Moreover, contrary to defendant’s assertion (*Br.Aplt. At 5 & 13*), a “comparative review of other criminals and their crimes” is not required. *Id.* at ¶ 6 (citation and internal quotation marks omitted). Nor, as claimed by defendant (*Br.Aplt. At 10-11*), is the court’s discretion

to be surrendered to a mathematical formula by which numbers of circumstances rather than weight of circumstances are determinative. The overriding consideration is that the sentence be just. One factor in mitigation or aggravation may weigh more than several factors on the opposite scale.

State v. Russell, 791 P.2d 188, 192 (Utah 1990). In sum, a sentence will not be overturned simply because a defendant views “his situation differently than did the trial court.” *State v. Helms*, 2002 UT 12, ¶ 14, 40 P.3d 626.

Defendant claimed below that prison was inappropriate because he had not previously been convicted of a felony or formally supervised (R108: 4-10, 21-22). Defendant’s assertion that he deserved “one chance” rang hollow with the trial court in light of defendant’s 10-year criminal history and the seriousness of his current conduct. As the court recognized, the problem was not that defendant had not been given a chance, but that he had not learned from the chances he had been given (R89: 10-12). *See Add. C*.

In sum, while AP & P and the court differed in their opinions of where and for how long defendant should be incarcerated, they agreed that defendant’s conduct warranted some period of substantial incarceration. *See Statement of Facts, supra*. Defendant disagreed and urged no incarceration, but only 30 days of home confinement. *See id.* The court considered defendant’s current conduct (eleven felony and misdemeanor offenses reduced to four felonies through plea bargain), the nature of his most serious charges (burglary); the scope of the damage to the victims (almost \$4000.00 in restitution), his past criminal convictions (three formal juvenile adjudications and five adult misdemeanor convictions), defendant’s professed recent reform (which the court believed was opportunistic), and other information in the presentence report (including, even on this limited record, AP & P’s belief that defendant had mental health problems and a potential for violence). Based on these legitimate factors, the court determined that prison was the most appropriate sentence. While

others differed in their assessment of these facts, that difference does not render the court's ultimate determination fundamentally unfair or unduly harsh. *See cases, supra.*


Finally, even if this Court were to find prejudicial defect in defendant's sentences, his request for relief—to "remand the matter with instructions to follow the recommendation of AP & P—is impermissible. *See Br.Aplt. at 14.* An appellate court has no right to compel imposition of a particular sentence, but only the authority to vacate an invalid one.

CONCLUSION

Defendant's sentences should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of March, 2004.

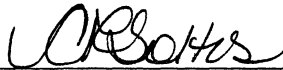
MARK L. SHURTLEFF
Attorney General

A handwritten signature in black ink, appearing to read "Christine F. Soltis", written over the printed name.

CHRISTINE F. SOLTIS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Plaintiff/Appellee were mailed to D. Bruce Oliver, D. BRUCE OLIVER P.C., attorney for defendant/appellant, 180 South 300 West, Suite 210, Salt Lake City, UT 84101, this 8 day of March, 2004.



Addenda

Addendum A

UNITED STATES CONSTITUTION

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

CONSTITUTION OF UTAH

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

1896

Sec. 9. [Excessive bail and fines — Cruel punishments.]

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

1896

UTAH RULES OF APPELLATE PROCEDURE

Rule 30. Decision of the court: dismissal; notice of decision.

(a) *Decision in civil cases.* The court may reverse, affirm, modify, or otherwise dispose of any order or judgment appealed from. If the findings of fact in a case are incomplete, the court may order the trial court or agency to supplement, modify, or complete the findings to make them conform to the issues presented and the facts as found from the evidence and may direct the trial court or agency to enter judgment in accordance with the findings as revised. The court may also order a new trial or further proceedings to be conducted. If a new trial is granted, the court may pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.

(b) *Decision in criminal cases.* If a judgment of conviction is reversed, a new trial shall be held unless otherwise specified by the court. If a judgment of conviction or other order is affirmed or modified, the judgment or order affirmed or modified shall be executed.

(c) *Decision and opinion in writing; entry of decision.* When a judgment, decree, or order is reversed, modified, or the reasons shall be stated concisely in writing and filed with the clerk. Any justice or judge concurring or dissenting may likewise give reasons in writing and file the same with the clerk. The entry by the clerk in the records of the court shall constitute the entry of the judgment of the court.

(d) *Decision without opinion.* If, after oral argument, the court concludes that a case satisfies the criteria set forth in Rule 31(b), it may dispose of the case by order without written opinion. The decision shall have only such effect as precedent as is provided for by Rule 31(f).

(e) *Notice of decision.* Immediately upon the entry of the decision, the clerk shall give notice to the respective parties and make the decision public in accordance with the direction of the court.

(f) *Citation of decisions.* Published decisions of the Supreme Court and the Court of Appeals may be cited as precedent in all courts of the State. Unpublished decisions may also be cited, so long as all parties and the court are supplied with accurate copies at the time all such decisions are first cited. (Amended effective October 1, 1992; November 1, 2003.)

UTAH RULES OF CRIMINAL PROCEDURE

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

76-3-201. Definitions — Sentences or combination of sentences allowed — Civil penalties — Hearing.

(1) As used in this section:

(a) "Conviction" includes a:

- (i) judgment of guilt; and
- (ii) plea of guilty.

(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(e) (i) "Victim" means any person who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

- (a) to pay a fine;
- (b) to removal or disqualification from public or private office;
- (c) to probation unless otherwise specifically provided by law;
- (d) to imprisonment;
- (e) on or after April 27, 1992, to life in prison without parole; or
- (f) to death.

(3) (a) This chapter does not deprive a court of authority conferred by law to:

- (i) forfeit property;
- (ii) dissolve a corporation;
- (iii) suspend or cancel a license;
- (iv) permit removal of a person from office;
- (v) cite for contempt; or
- (vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.

(4) (a) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement.

(b) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

(5) (a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:

- (i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;
- (ii) charged with a felony or a class A, B, or C misdemeanor; and
- (iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

(i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or

(ii) the defendant was not transported pursuant to a court order.

(c) (i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

(A) \$75 for up to 100 miles a defendant is transported;

(B) \$125 for 100 up to 200 miles a defendant is transported; and

(C) \$250 for 200 miles or more a defendant is transported.

* (ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

(d) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(6) (a) In addition to any other sentence the court may impose, the court shall order the defendant to pay court-ordered restitution to the county for the cost of incarceration in the county correctional facility before and after sentencing if:

(i) the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and

(ii) (A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or

(B) the reimbursement does not duplicate the reimbursement provided under Section 64-13c-301 if the defendant is a state prisoner housed in a county correctional facility as a condition of probation under Subsection 77-18-1(8).

(b) (i) The costs of incarceration under Subsection (6)(a) are:

(A) the daily core inmate incarceration costs and medical and transportation costs established under Section 64-13c-302; and

(B) the costs of transportation services and medical care that exceed the negotiated reimbursement rate established under Subsection 64-13c-302(2).

(ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate qualifying as an individual with a disability as defined and covered by the federal Americans with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining the monetary sum and other conditions for the court-ordered restitution under this Subsection (6), the court shall consider the criteria provided under Subsections 77-38a-302(5)(c)(i) through (iv).

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).

(7) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.

(b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.

(c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.

(8) If during the commission of a crime described as child kidnapping, rape of a child, object rape of a child, sodomy upon a child, or sexual abuse of a child, the defendant causes substantial bodily injury to the child, and if the charge is set forth in the information or indictment and admitted by the defendant, or found true by a judge or jury at trial, the defendant shall be sentenced to the highest minimum term in state prison. This Subsection (8) takes precedence over any conflicting provision of law.

76-3-401. Concurrent or consecutive sentences — Limitations — Definition.

(1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. The court shall state on the record and shall indicate in the order of judgment and commitment:

(a) if the sentences imposed are to run concurrently or consecutively to each other; and

(b) if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is already serving.

(2) In determining whether state offenses are to run concurrently or consecutively, the court shall consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant.

(3) The court shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole, unless the court finds and states on the record that consecutive sentencing would be inappropriate.

(4) If a written order of commitment does not clearly state whether the sentences are to run consecutively or concurrently, the Board of Pardons and Parole shall request clarification from the court. Upon receipt of the request, the court shall enter a clarified order of commitment stating whether the sentences are to run consecutively or concurrently.

(5) A court may impose consecutive sentences for offenses arising out of a single criminal episode as defined in Section 76-1-401.

(6) (a) If a court imposes consecutive sentences, the aggregate maximum of all sentences imposed may not exceed 30 years imprisonment, except as provided under Subsection (6)(b).

(b) The limitation under Subsection (6)(a) does not apply if:

(i) an offense for which the defendant is sentenced authorizes the death penalty or a maximum sentence of life imprisonment; or

(ii) the defendant is convicted of an additional offense based on conduct which occurs after his initial sentence or sentences are imposed.

(7) The limitation in Subsection (6)(a) applies if a defendant:

(a) is sentenced at the same time for more than one offense;

(b) is sentenced at different times for one or more offenses, all of which were committed prior to imposition of the defendant's initial sentence; or

(c) has already been sentenced by a court of this state other than the present sentencing court or by a court of another state or federal jurisdiction, and the conduct giving rise to the present offense did not occur after his initial sentencing by any other court.

(8) When the limitation of Subsection (6)(a) applies, determining the effect of consecutive sentences and the manner in which they shall be served, the Board of Pardons and Parole shall treat the defendant as though he has been committed for a single term that consists of the aggregate of the validly imposed prison terms as follows:

(a) if the aggregate maximum term exceeds the 30-year limitation, the maximum sentence is considered to be 30 years; and

(b) when indeterminate sentences run consecutively, the minimum term, if any, constitutes the aggregate of the validly imposed minimum terms.

(9) When a sentence is imposed or sentences are imposed to run concurrently with the other or with a sentence presently being served, the term that provides the longer remaining imprisonment constitutes the time to be served.

(10) This section may not be construed to restrict the number or length of individual consecutive sentences that may be imposed or to affect the validity of any sentence so imposed, but only to limit the length of sentences actually served under the commitments.

(11) This section may not be construed to limit the authority of a court to impose consecutive sentences in misdemeanor cases.

(12) As used in this section, "imprisoned" means sentenced and committed to a secure correctional facility as defined in Section 64-13-1, the sentence has not been terminated or voided, and the person is not on parole, regardless of

76-3-402. Conviction of lower degree of offense.

(1) If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court may unless otherwise specifically provided by law enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

(2) If a conviction is for a third degree felony the conviction is considered to be for a class A misdemeanor if:

(a) the judge designates the sentence to be for a class A misdemeanor and the sentence imposed is within the limits provided by law for a class A misdemeanor; or

(b) (i) the imposition of the sentence is stayed and the defendant is placed on probation, whether committed to jail as a condition of probation or not;

(ii) the defendant is subsequently discharged without violating his probation; and

(iii) the judge upon motion and notice to the prosecuting attorney, and a hearing if requested by either party or the court, finds it is in the interest of justice that the conviction be considered to be for a class A misdemeanor.

(3) An offense may be reduced only one degree under this section unless the prosecutor specifically agrees in writing or on the court record that the offense may be reduced two degrees. In no case may an offense be reduced under this section by more than two degrees.

(4) This section may not be construed to preclude any person from obtaining or being granted an expungement of his record as provided by law.

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77-13-6. Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(c) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

2003

Addendum B

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SEP 13 2002
Layton District Court
SECOND DISTRICT COURT
2002 SEP 12 A 9 11

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

THE STATE OF UTAH
Plaintiff,
vs.
MICHAEL WILLIAM OLIVER
DOB: 12/25/1976,
Defendant.

AMENDED
INFORMATION

Case No. 021701014

The undersigned prosecutor states on information and belief that the defendant, either directly or as a party, at County of Davis, State of Utah, committed the crimes of:

COUNT 1

BURGLARY, 76-6-202 UCA, second degree felony, as follows: That on or about June 6, 2002, at the place aforesaid the defendant entered or remained unlawfully in a dwelling or any portion of a dwelling with intent to commit: theft.

COUNT 2

THEFT BY RECEIVING STOLEN PROPERTY, 76-6-408 UCA, third degree felony, as follows: That at the time and place aforesaid the defendant received, retained or disposed of property of another, knowing that the property had been stolen or believing that it probably had been stolen, or concealed, sold or withheld or aided in concealing, selling or withholding the property, knowing the property had been stolen, intending to deprive the owner thereof, and the value of said property was or exceeded \$1,000, but was less than \$5,000.

COUNT 3

POSSESSION OR USE OF A CONTROLLED SUBSTANCE, 58-37-8(2)(a)(i) UCA, third degree felony, as follows: That on or about June 14, 2002, at the place aforesaid the defendant did knowingly and intentionally possess or use a controlled substance; to wit methamphetamine.

COUNT 4

VEHICLE BURGLARY, 76-6-204 UCA, class A misdemeanor, as follows: That on or about June 6, 2002, at the place aforesaid the defendant unlawfully entered any vehicle with intent to commit a felony or theft.

COUNT 5

POSSESSION OF DRUG PARAPHERNALIA, 58-37a-5(1) UCA, class B misdemeanor, as follows: That on or about June 14, 2002, at the place aforesaid the defendant did knowingly, intentionally or recklessly use, or possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

COUNT 6

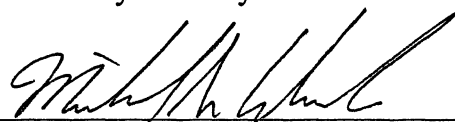
UNLAWFUL POSSESSION OF BURGLARY TOOLS, 76-6-205 UCA, class B misdemeanor, as follows: That on or about June 14, 2002, at the place aforesaid the defendant did have in his possession an instrument, tool, device, article, or other thing adapted, designed, or commonly used in advancing or facilitating the commission of any offense, under circumstances manifesting an intent to use or knowledge that some person intends to use the same in the commission of a burglary or theft.

This information is based on evidence obtained from witness Tadd Lowe.

Authorized September 11, 2002,
for presentment and filing:

MELVIN C. WILSON
Davis County Attorney

By


Deputy Davis County Attorney

MELVIN C. WILSON
Davis County Attorney
P. O. Box 618
800 West State Street
Farmington, Utah 84025
Telephone: (801) 451-4300
Fax: (801) 451-4328

SECOND DISTRICT COURT

2002 AUG 27 P 5:01

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

THE STATE OF UTAH
Plaintiff,

vs.

MICHAEL WILLIAM OLIVER
DOB: 12/25/1976
Defendant.

Bail

INFORMATION

Case No.

OTN No.

021701447 FS

RLK

The undersigned prosecutor states on information and belief that the defendant either directly or as a party, during June 10 through June 11, 2002, at County of Davis, State of Utah, committed the crimes of:

COUNT 1

BURGLARY, 76-6-202 UCA, a second degree felony, as follows: That at the time and place aforesaid the defendant entered or remained unlawfully in a dwelling or any portion of a dwelling with intent to commit theft.

COUNT 2

UNLAWFUL ACQUISITION, POSSESSION OR TRANSFER OF CARD, 76-6-506.3 UCA, a third degree felony, as follows: That at the time and place aforesaid the defendant acquired a financial transaction card from another without the consent of the card holder or the issuer, or, with the knowledge that it has been acquired without consent, and with intent to use it in violation of Utah Code §76-6-506.2.

COUNT 3

THEFT, 76-6-404 UCA, a class B misdemeanor, as follows: That at the time and place aforesaid the defendant obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and that the value of said property was less than \$300.

This information is based on evidence obtained from witness Shawn Lewis.

PROBABLE CAUSE STATEMENT: The undersigned prosecutor is a Deputy Davis County Attorney and has received information from the investigating officer, Shawn Lewis of the Layton Police Department, and the Information herein is based upon such personal observations and investigation of said officer.

1. Between the night of June 10, 2002 and the morning of June 11, 2002, an unknown person entered the garage of Bonnie and Layne Sackett, which is attached to their residence, and took a wallet and day planner that belonged to Mr. Sackett from a vehicle in the garage. Mr. Sackett's credit cards were in the wallet.

2. At approximately 9:00 A.M. on June 11, 2002, Mr. Sackett's credit card was used at the Layton K-Mart to purchase merchandise worth \$154.51.

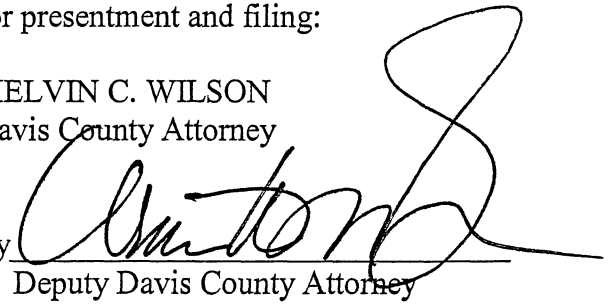
3. At approximately 10:14 A.M. on June 11, 2002, the defendant, Michael William Oliver, attempted to purchase merchandise with a value of \$284.30 from the Target store in Layton. The store's security video shows the defendant standing at the cash register with Briana Salgado. It also shows the defendant handing a credit card to the store cashier. Officer Shane Whitaker of the Farmington Police Department has viewed the store's security video, and identified the defendant and Briana Salgado.

4. On June 14, 2002, a search warrant was executed on the defendant's apartment. During the search officers found Layne Sackett's wallet.

Authorized August 20, 2002
for presentment and filing:

MELVIN C. WILSON
Davis County Attorney

By



Deputy Davis County Attorney

At the time of filing, issuance of a Summons rather than a Warrant of Arrest is requested.

MELVIN C. WILSON
Davis County Attorney
P. O. Box 618
Farmington, Utah 84025
Telephone: (801) 451-4300

SECOND DISTRICT COURT

2002 SEP -5 P 5:02

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

THE STATE OF UTAH
Plaintiff,
vs.
MICHAEL WILLIAM OLIVER
DOB: 12/25/1976
Defendant.

Bail

INFORMATION

Case No.
OTN No.

021701498 FS
72K

The undersigned prosecutor states on information and belief that the defendant either directly or as a party, on or about June 08, 2002, at County of Davis, State of Utah, committed the crimes of:

COUNT 1

BURGLARY, 76-6-202 UCA, a second degree felony, as follows: That at the time and place aforesaid the defendant entered or remained unlawfully in a dwelling or any portion of a dwelling with intent to commit theft.

COUNT 2

THEFT, 76-6-404 UCA, a class B misdemeanor, as follows: That at the time and place aforesaid the defendant obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and that the value of said property was less than \$300.

This information is based on evidence obtained from witness Eric Johnson.

PROBABLE CAUSE STATEMENT: The undersigned prosecutor is a Deputy Davis County Attorney and has received information from the investigating officer, Eric Johnson of the Farmington Police Department, and the Information herein is based upon such personal observations and investigation of said officer.

1. Between the evening of June 8, 2002 and the morning of June 9, 2002 in Davis County, Utah someone entered the garage that is attached to the home of Paulette Brimley. They stole Ms. Brimley's wallet out of one of the vehicles she had parked in the garage. Ms. Brimley told Farmington Detective Shane Whitaker that her credit card had been used at several locations on Sunday, June 9, 2002. One of the locations Ms. Brimley's card was used at was the Target store in Layton. Detective Whitaker eventually found out that one of the individuals who had used the card at Target was Jereme Ogren. When Jereme was interviewed about Ms. Brimley's credit card, he admitted that he had used it at several different locations, but that he had obtained the card from the defendant, Michael William Oliver.

2. Detective Whitaker eventually learned that an individual named Braden Larkin had admitted to being involved with the burglary of Ms. Brimley's garage. Detective Whitaker interviewed Braden, and Braden told him that he had taken the defendant to Ms. Brimley's residence, and the defendant entered the garage, taking a wallet and cash from a vehicle.

3. On June 14, 2002, a search warrant was executed on the defendant's home. Among other items found were a Pier One Import card and a Chevron gas card belonging to Paulette Brimley.

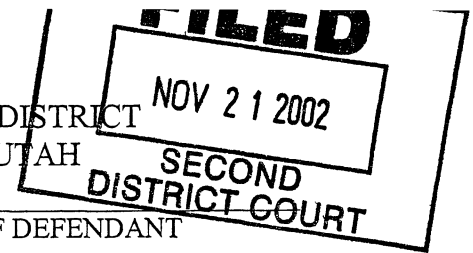
Authorized August 21, 2002
for presentment and filing:

MELVIN C. WILSON
Davis County Attorney

By 
Deputy Davis County Attorney

At the time of filing, issuance of a Summons rather than a Warrant of Arrest is requested.

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



THE STATE OF UTAH
Plaintiff,

vs.

MICHAEL WILLIAM OLIVER
Defendant.

STATEMENT OF DEFENDANT
IN SUPPORT OF GUILTY PLEA
AND CERTIFICATE OF COUNSEL

Case No. 021701014
021701447
021701498

I, MICHAEL WILLIAM OLIVER, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

Notification of Charges

I am pleading guilty to the following crime(s):

	Crime & Statutory Provision	Degree	Punishment Min/Max and/or Minimum Mandatory
A	Burglary of Dwelling Possession Controlled Substance (District Court Case 021701014)	Felony 2 Felony 3	1-15 years 0-5 years
B	Burglary of Building (District Court Case 021701447)	Felony 3	0-5 years
C	Burglary of Building (District Court Case 021701498)	Felony 3	0-5 years

I have received a copy of the (Amended) Informations against me. I have read them, or had them read to me, and I understand the nature and the elements of crime(s) to which I am pleading guilty.

The elements of the crime(s) to which I am pleading guilty are:

Burglary: unlawfully entered or remained in a dwelling or building with intent to commit theft.

Possession of Controlled Substance: knowingly and intentionally possessed a Schedule I or II substance.

I understand that by pleading guilty I will be admitting that I committed the crime(s) listed above. I stipulate and agree that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty plea and prove the elements of the crime(s) to which I am pleading guilty:

1. In Case 021701014, Dennis Gray reported that sometime during the early morning hours of June 6, 2002, his garage, which is attached to his home, was entered and several credit cards, checks, and other items were stolen out of this vehicle. Bradon Larkin was interviewed and stated that he was with defendant when they entered the Mr. Gray's home and stole checks, credit cards and other items from his vehicle.

2. On June 14, 2002, a search warrant was executed on the home of defendant as a result of that search, ~~over \$5,000.00 in~~ ^{SOME} stolen property was found, along with methamphetamine and drug paraphernalia. *DB2*

3. In Case 021701447, between the night of June 10, 2002 and the morning of June 11, 2002, an unknown person entered the garage of Bonnie and Layne Sackett, which is attached to their residence, and took a wallet and day planner that belonged to Mr. Sackett from a vehicle in the garage. Mr. Sackett's credit cards were in the wallet.

4. At approximately 9:00 A.M. on June 11, 2002, Mr. Sackett's credit card was used at the Layton K-Mart to purchase merchandise worth \$154.51.

5. At approximately 10:14 A.M. on June 11, 2002, the defendant, Michael William Oliver, attempted to purchase merchandise with a value of \$284.30 from the Target store in Layton. The store's security video shows the defendant standing at the cash register with Briana Salgado. It also shows the defendant handing a credit card to the store cashier. Officer Shane Whitaker of the Farmington Police Department has viewed the store's security video, and identified the defendant and Briana Salgado.

6. On June 14, 2002, a search warrant was executed on the defendant's apartment. During the search officers found Layne Sackett's wallet.

7. In Case 021701498, between the evening of June 8, 2002 and the morning of June 9, 2002 in Davis County, Utah someone entered the garage that is attached to the home of Paulette Brimley. They stole Ms. Brimley's wallet out of one of the vehicles she had parked in the garage. Ms. Brimley told Farmington Detective Shane Whitaker that her credit card had been used at several locations on Sunday, June 9, 2002. One of the locations Ms. Brimley's card was used at was the Target store in Layton. Detective Whitaker eventually found out that one of the individuals who had used the card at Target was Jereme Ogren. When Jereme was interviewed about Ms. Brimley's credit card, he admitted that he had used it at several different locations, but that he had obtained the card from the defendant, Michael William Oliver.

8. Detective Whitaker eventually learned that an individual named Braden Larkin had admitted

to being involved with the burglary of Ms. Brimley's garage. Detective Whitaker interviewed Braden, and Braden told him that he had taken the defendant to Ms. Brimley's residence, and the defendant entered the garage, taking a wallet and cash from a vehicle.

9. On June 14, 2002, a search warrant was executed on the defendant's home. Among other items found were a Pier One Import card and a Chevron gas card belonging to Paulette Brimley.

Waiver of Constitutional Rights

I am entering this plea voluntarily. I understand that I have the following rights under the constitutions of Utah and the United States. I also understand that if I plead guilty I will give up all the following rights:

Counsel. I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not) (have) waived my right to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crime(s) to which I am pleading guilty. I also understand my rights in this case and other cases and the consequences of my guilty plea.

If I have not waived my right to counsel, my attorney is Bruce Oliver. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty plea.

Jury Trial. I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty.

Confrontation and cross-examination of witnesses. I know that if I were to have a jury trial, (a) I would have the right to see and observe the witnesses who testified against me and (b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

Right to compel witnesses. I know that if I were to have a jury trial, I could call witnesses if I chose to and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

Right to testify and privilege against self-incrimination. I know that if I were to have a jury trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

Presumption of innocence and burden of proof. I know that if I do not plead guilty, I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of each charge beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty, I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

Appeal. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty.

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

Consequences of Entering a Guilty Plea

Potential penalties. I know the maximum sentence that may be imposed for each crime to which I am pleading guilty. I know that by pleading guilty to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crime(s), including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

Consecutive/concurrent prison terms. I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty, my guilty plea now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

Plea bargain. My guilty plea is not the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea bargain, if any, are fully contained in this statement, including those explained below:

Conviction date for Possession of Controlled Substance to be entered
nunc pro tunc to date of offense (June 14, 2002.) All pleas are
to State agrees that upon successful completion of probation
Defendant be granted treatment pursuant to 76-3-402 All convictions to be reduced

Trial judge not bound. I know that any charge or sentencing concession or recommendation of ^{to} ~~misdemeanor~~ probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

Defendant's Certification of Voluntariness

I am entering this plea of my own free will and choice. No force, threats, or unlawful influence of any kind have been made to get me to plead guilty. No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by an attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

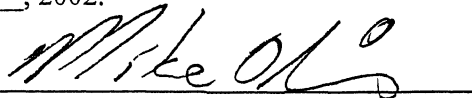
I am satisfied with the advice and assistance of my attorney.

I am 25 years of age. I have attended school through the 12 grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

I understand that if I want to withdraw my guilty plea, I must file a written motion to withdraw my plea within 30 days after I have been sentenced and final judgment has been entered. I will only be allowed to withdraw my plea if I show good cause. I will not be allowed to withdraw my plea after 30 days for any reason.

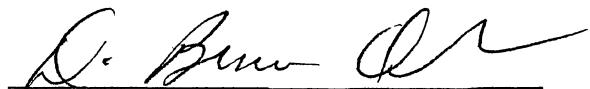
Dated this 21 day of November, 2002.



DEFENDANT

Certificate of Defense Attorney

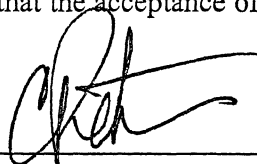
I certify that I am the attorney for MICHAEL WILLIAM OLIVER, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.



ATTORNEY FOR DEFENDANT

Certificate of Prosecuting Attorney

I certify that I am the attorney for the State of Utah in the case against MICHAEL WILLIAM OLIVER, defendant. I have reviewed this Statement of Defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea is entered and that the acceptance of the plea would serve the public interest.



PROSECUTION ATTORNEY

Order

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds that the defendant's guilty plea is freely, knowingly, and voluntarily made.

IT IS HEREBY ORDERED that the defendant's guilty plea to the crime(s) set forth in the Statement be accepted and entered.

Dated this 20th day of November, 2002.

DISTRICT COURT JUDGE

Addendum C

1 so based upon the simple fact that he did not have a prior
2 felony for drugs, is the reason why he was not accepted into
3 drug court. Otherwise, he was a candidate for that program and
4 they would have accepted him except for that and we discussed
5 that directly with Judge Memmott. And so that was a direction
6 that we were taking initially and had he had a prior felony
7 conviction that would count for drug court, he would have been
8 in drug court and this would have been handled substantially
9 different. It was just for the fact that he did not have that
10 prior felony is what puts us before this Court today,
11 recognizing Mr. Oliver's conduct, and I don't mean to minimize
12 that. I just wanted the Court to understand that there was
13 another alternative that we were looking at, agreed to by the
14 County and myself and just did not work out because he record
15 was not bad enough.

16 THE COURT: Well, his record wasn't bad enough for
17 drug charges.

18 MR. OLIVER: For the drug court. That's what I'm
19 talking about. I'm not talking about anything else, Your
20 Honor. We're not trying to minimize anything, I'm just saying
21 for the drug court.

22 THE COURT: Okay. I've had an opportunity to review
23 the pre-sentence report and take into consideration everything
24 that's been said here today.

25 My observations are these, Mr. Oliver, it appears

1 that since 1993 when you were about 16 years old, or 16 or 17
2 years old, you had quite an extensive juvenile court history
3 and you've had quite an extensive adult history and it doesn't
4 seem like you're going in the right direction and it doesn't
5 seem like you've learned anything from earlier times when you
6 pled guilty or were found guilty of matters and sentenced. You
7 have served some time but generally you've been on probation
8 quite a bit and it doesn't seem like anything has worked.
9 There are not unserious crimes. You are here on a second
10 degree burglary; possession of a controlled substance, a third
11 degree felony; a burglary, a third degree felony; another
12 burglary. So we have three third degree felonies and a second
13 degree felony and whether these are involved with drug or
14 whatever, it's basically the past 10 years of your life have
15 been spent in and out of various charges and very bad behavior.

16 I'm going to depart from the recommendation, but I'm
17 not going to depart in the way your attorney has asked for and
18 I'm going to send you to prison and the reason I'm sending you
19 to prison is to teach you that you cannot continue in this type
20 of behavior, this type of behavior that basically says I can
21 take drugs, I can steal, I can do this for the last - you're 26
22 years old and for 10 years you have done this and the time is
23 going to stop now or you're going to spend the rest of your
24 life in prison and if you want to continue to change - I think
25 your change of the last month or so has been a change to make

1 it look good basically for this. I don't believe, you know, I
2 can't compare 10 years of bad behavior with one month of good
3 saying everything is fine. This isn't fine and to come in here
4 and basically ask for 30 days home confinement, you know, under
5 these circumstances, you know, and depart from a 6-month or a
6 one-year work release. I'm sentencing you to the Utah State
7 Prison for an indeterminate term of 1 to 15 years on the
8 Second, zero to 5 on each of the thirds to run concurrently.
9 I'm ordering that restitution be paid in the amount of
10 \$3,883.92. That can be subject to your request to have a
11 hearing on the restitution, DNA testing, and payment of the \$75
12 fee. You will have 30 days to appeal this sentence. You'll
13 also have 30 days to file a motion to withdraw the guilty plea
14 and you're going to be committed forthwith.

15 MR. OLIVER: Your Honor, may be approach briefly?

16 THE COURT: Yes.

17 (Whereupon a sidebar discussion was held)

18 (Whereupon the hearing was concluded)

19

20

21

22

23

24

25

-C-

Addendum D

1 police report. I've read it. And the police report said, he's
2 been involved in numerous burglaries. They drove up and down
3 the streets looking for additional burglaries, in the police
4 report. He had not been involved in anything and he's not - he
5 was not charged with any burglaries. He was not charged with
6 anything of that nature from that offense or from that
7 situation and yet this comment of a month ago is very curious
8 to me because that's when this warrant was signed and you can
9 say, "Well, I didn't know anything about it." There was
10 nothing said that would lead this Court to believe that one
11 month -

12 THE COURT: Hold on just a minute. The month issue,
13 you brought up the month that you said that he has been living
14 with you for the past month. That's the only month that I
15 brought up.

16 MR. OLIVER: Excuse me, didn't say any such thing
17 Your Honor. I said he's been with me, and I started off and I
18 said he's been with me since July 3rd which was 22 days after
19 he was incarcerated. Go back and listen to the record because
20 I've never said a month, never.

21 THE COURT: Okay.

22 MR. OLIVER: Never. It didn't come from me.

23 THE COURT: Well, okay, well, first of all, if you
24 have your speech that you want to give about how you've lost
25 confidence in me as a judge because you feel like I am the

1 hardest judge that ever existed in the state of Utah, you are
2 entitled to that opinion but I got a pre-sentence report that
3 said that the recommendation was one year in jail and one year
4 in jail, and I can tell you, there were about six people that
5 went to prison today. Your son wasn't the only one. Your son
6 wasn't the only one that had one month or one year that was in
7 the Davis County Jail that was suggested to go to prison and
8 all I can say is on the basis of the background that I saw in
9 that pre-sentence report, his age, and the fact that we had the
10 number of felonies that we had, a second degree felony, three
11 third degree felonies and basically the past background and
12 history, that is what I based my opinion on. If you believe
13 that is abuse of discretion, you can appeal the sentence.

14 MR. OLIVER: You and I both know that that's a waste
15 of words to me, to everybody else. A lawful sentence -

16 THE COURT: If you say-

17 (Both talking)

18 MR. OLIVER: A lawful sentence is not an abuse of
19 discretion.

20 THE COURT: Let me finish, Mr. Oliver.

21 MR. OLIVER: Don't insult my intelligence either
22 because-

23 THE COURT: Don't insult mine then.

24 MR. OLIVER: I'm not.

25 THE COURT: Mr. Oliver-

1 MR. OLIVER: I'm speaking my piece.

2 THE COURT: Well, if you came in here to just want to
3 give me a speech that I'm a bad judge and no other judge in the
4 state of Utah would have done this, I didn't do this because
5 you represented your son. I didn't do this for anything other
6 than what I read and basically based upon my discretion and
7 that's what I did it on. I did not do it on any agenda that I
8 have against you, any agenda I have against your son, anything
9 about a search warrant that was signed by me about him. I
10 don't even recall that. Anything that I did was on the basis
11 of what I read and I believe that that was the appropriate
12 sentence. If you believe it is wrong, if you believe it is so
13 bad that no other judge would be able to do this in history,
14 then you might be able to say that that's abuse of discretion
15 if not another person but Judge Kay would have done that.

16 So, I'm happy to hear - you are entitled to your
17 opinion but I also have to say to you most of the things that
18 you have been saying to me right now, you said first of all I
19 want to express my displeasure and my loss of confidence in the
20 bench, I don't want to reargue this and then for the last half
21 hour, you've reargued this. You've reargued -

22 MR. OLIVER: No, I'm explaining my loss of confidence
23 and this Court is not going to call my son back in here and re-
24 sentence him. I know that. I haven't asked for it and I know
25 that. Okay-

1 that I was thought was existent. That's not what I've come
2 here to talk about now. I've come to talk about a criminal
3 history and facts surrounding this case. That's it. I've
4 explained - I've basically gone through everything I had to
5 say.

6 THE COURT: Okay.

7 MR. OLIVER: But the situation is, your comment about
8 a month didn't come from me, not at all.

9 THE COURT: Well -

10 MR. OLIVER: And it gives me great concern.

11 THE COURT: Well, you can believe what you want to
12 believe and probably nothing I say will change your belief. I
13 said a month because that had been somehow discussed. I didn't
14 bring that out of the air and I didn't bring that out of the
15 air saying but really what I've done is taken something else to
16 consider that I didn't raise with counsel-

17 MR. OLIVER: You didn't say that.

18 THE COURT: Well, I didn't.

19 MR. OLIVER: You didn't. That's one of my concerns.

20 THE COURT: I didn't and I haven't and whatever you
21 want to believe that you think that I've done something else in
22 making my decision, I did not and if you don't believe that,
23 then you can file your motions. If you have to file regarding
24 either the motion to withdraw the guilty plea or a motion to
25 say that the sentence is an abuse of discretion but otherwise,

1 I can tell you one other thing Mr. Oliver, when you talked
2 about AP&P, AP&P because of the budget of the state of Utah
3 never, hardly ever recommends prison. Very seldom do they
4 recommend prison and the reason for that is because they're
5 under budget constraints. But I can tell you that we have a
6 jail that is full and every time I put a person a year in jail,
7 I get a call the next day from the jail to let three out and so
8 what I've been doing and what I understand other judges are
9 doing is the people who have a year commitment are usually
10 going to prison now because we have too heavy of a load in the
11 Davis County Jail.

12 MR. OLIVER: That's wrong. No, no, no, Your Honor,
13 may I speak please?

14 THE COURT: Well, I'm just talking about -

15 MR. OLIVER: I understand that.

16 THE COURT: I'm just saying that today -

17 MR. OLIVER: I accept that.

18 THE COURT: - today, for example, and last week and
19 the weeks before, people who have been getting one year, have
20 been going to prison.

21 MR. OLIVER: But Your Honor, and I understand that
22 you're saying that, but I'm telling you that's wrong. These
23 are people's lives that we're dealing with and the-

24 THE COURT: Let me tell you something. This is
25 right. These are people's lives and we also have a system and

1 that system is based on this issue that a judge, given an AP&P
2 report, has to exercise their discretion and make the decision
3 that they think is proper in the appropriate circumstance,
4 which I try to do. I don't come out here and just point, you
5 know, a thing at a wall and throw a dart and say hum, prison
6 here; probation; jail. No, I read those and I make the best
7 determination and that's what I did and I guess what bothers me
8 just a little bit is the fact that you as both the attorney and
9 as the father are coming into here and telling me that you have
10 no confidence in the Court and all this other stuff that I
11 don't believe you would do if you had somebody else that was
12 the defendant in this case.

13 MR. OLIVER: In this case I certainly would.

14 THE COURT: Okay.

15 MR. OLIVER: In this case I certainly would.

16 THE COURT: We have a difference of opinion.

17 MR. OLIVER: No, no. That's right.

18 THE COURT: Yes, we do.

19 MR. OLIVER: I said that's right.

20 THE COURT: I believe that Mr. Oliver, the defendant,
21 should go to prison based upon his history and what's in the
22 pre-sentence report and upon the discretion that I exercised.
23 You do not and you believe that that's improper. That is a
24 difference of opinion and I don't do it for anything because of
25 my feelings toward you, my feelings toward your son or anybody

1 else. It's the basis of my opinion, what was in the report and
2 the exercise of my discretion and as I did with the other five
3 or six people that I sent to prison today, I don't do that
4 lightly. I don't do it lightly people going to jail or prison.

5 MR. OLIVER: You know, you've said this and -

6 THE COURT: And I will say one other thing. This job
7 is not the easiest job in the world and the two hardest things
8 when people ask you what are the hardest things to do, the
9 first one is sentencing people. That's the hardest thing to
10 do. Secondly, is giving custody of children in a divorce
11 action. Those are the two hardest things that I believe a
12 judge does and when anybody asks me that question like they did
13 at North Layton Jr. High yesterday in Reality Town that I
14 attended, those are the two questions that they were asking.
15 What is the hardest thing a judge does and that's exactly the
16 answer I give to everybody. This isn't an easy thing to do and
17 it isn't easier when I do my best and then told, you know,
18 that you have no respect for me as a judge because I made the
19 decision I made. I'm sorry. I'm sorry that I can't please you
20 but I can tell you one thing, there's not a single sole I've
21 pleased in this courtroom today because any time you sentence
22 them, no one is pleased. One side or the other is not pleased
23 in any lawsuit.

24 MR. OLIVER: It's interesting -

25 THE COURT: I simply try to do my best.

1 believe with all my heart and not just as a father but as a
2 defense attorney, that the system is intended to do two things,
3 rehabilitate and protect the public and if punishment is there,
4 okay, but that's not - as long as we can rehabilitate and
5 protect the public that's what we're after and the bottom line
6 is that when you get a recommendation for jail and because the
7 jail is full you put people into prison is wrong.

8 THE COURT: What I said -

9 MR. OLIVER: Because they don't deserve prison.

10 THE COURT: Let's just clarify something-

11 MR. OLIVER: They don't deserve prison if the jail
12 recommendation is there because right now, right now, what you
13 have done in this case alone, is taken away his opportunity to
14 sit on a jury. The 402 would have rehabilitated that but
15 you've taken that away from him because you sent him to prison.
16 402s are no longer eligible, never were, but he's no longer
17 eligible for 402 treatment because he's gone to prison,

18 THE COURT: I understand that.

19 MR. OLIVER: So he's going to remain a convicted
20 felon which the county and the State felt after their
21 evaluation of the case, that if he did well on probation he was
22 worthy of a lesser treatment. You've taken that away from him.
23 You've taken away from him the opportunity even on a drug
24 related basis to go into ARSAT and instead because AP&P
25 recommended a year in jail, you sent him to prison because the

1 jail is too full.

2 THE COURT: No, that's no the only reason I recommend
3 that.

4 MR. OLIVER: I understand.

5 THE COURT: I just told you the fact is that AP&P
6 doesn't recommend prison because of their budget constraints
7 and they've been told by the higher ups about that and so I am
8 saying that when I get a recommendation and they're saying one
9 year jail, which in reality should be prison, I am sending
10 people to prison.

11 MR. OLIVER: They actually said six months in jail.

12 THE COURT: They said six months--

13 MR. OLIVER: Straight time.

14 THE COURT: --or one year, yes. I don't know. If you
15 have anything else to say, please say it but I don't know - I
16 mean, I'm happy to hear what you wanted to say but I'm not
17 changing my opinion.

18 MR. OLIVER: I'm not asking you to. You haven't
19 heard me once say please change your mind.

20 THE COURT: Well, I'm not going to.

21 MR. OLIVER: I haven't asked you to.

22 THE COURT: Okay.

23 MR. OLIVER: That's not why I did this. I did this--

24 THE COURT: So where do we go from here then if you
25 say you have no respect for me? Do you not want to appear in

Addendum E

1 sentence, including a reduction of the charges for sentencing
2 made or sought by either defense counsel or the prosecuting
3 attorney are not binding on the judge. I also know that any
4 opinions they express to me as to what they believe the judge
5 may do, is not binding on the judge." And based upon the law
6 as I understand it, as to a motion to withdraw the guilty plea,
7 the fact that the State agreed that there would be a two step
8 reduction on 402A is not binding and that is made clear in this
9 form that's been approved by the Utah Supreme Court. So I'm
10 going to deny that motion.

11 So which one do you wish to do next? We have a
12 petition for post-conviction relief; a motion to correct the
13 sentence; and then a motion to stay the sentence.

14 MR. OLIVER: I think we'll do the motion to correct
15 the sentence at this time, Your Honor.

16 THE COURT: Okay, go ahead.

17 MR. OLIVER: This is pursuant to Rule 22 in the Utah
18 Rules of Criminal Procedure. This would be 22E. It says "the
19 court may correct an illegal sentence where a sentence imposed
20 in an illegal manner at any time." In this particular matter,
21 Your Honor, at the time of sentencing, the pre-sentence report
22 was prepared and I'd like to just go back through the PSI with
23 regard to the offenses that Mr. Oliver had faced in his history
24 and if the Court has the PSI in front of it, it's on page 6.

25 THE COURT: I don't have the PSI.

1 MR. OLIVER: I don't think I have an extra one but
2 I'd be happy to let the Court review mine as well if the Court
3 so desires.

4 THE COURT: I'm making notes. Go ahead.

5 MR. OLIVER: Okay. Mr. Oliver as a juvenile was
6 convicted of three offenses. One was a possession of tobacco
7 which is a status offense and an infraction. The next thing
8 that Mr. Oliver was convicted of stemmed out of one incident,
9 May 15th, 1994 incident, possession of marijuana and drug
10 paraphernalia. Both of them are Class B Misdemeanors. Those
11 are the only things in Mr. Oliver's juvenile history that he
12 was convicted of were those three offenses that I've indicated
13 stemming from two particular occasions. The tobacco was a 6-1-
14 93 and the possession of marijuana and paraphernalia were May
15 15th of '94.

16 There was there other juvenile history. Some status
17 offenses, none...there were motion hearings, review hearings,
18 things of that nature, some cases that were dismissed, things
19 of that nature that went on. There was no felonies or anything
20 of that nature.

21 Then as an adult, Mr. Olive has been charged with
22 five offenses. On April 4th of '95 he was charged with
23 possession of paraphernalia to which he pled guilty. It was a
24 Class B Misdemeanor. On March 2nd of 1996 he was charged with
25 DUI to which he pled guilty. On July 21, 1996 he was charged

1 with simple assault to which he pled guilty. On November 26th,
2 1998 he pled guilty to disturbing the peace and on February
3 12th, 1999 he pled guilty to disturbing the peace. Those are
4 his total offenses. He has five. They were all misdemeanors,
5 never were any of them charged as felonies and reduced to
6 misdemeanors. They were misdemeanors at the outset and he
7 virtually pled guilty straight up to all of them except it
8 looks like the disturbing the peace was an amended charge but
9 that was it. So he's only been charged with misdemeanors in
10 his past, never a felony. He has never been on supervised or
11 formal probation. That's contained within the pre-sentence
12 report. That's on page 7 of the pre-sentence report. It says
13 probation parole history, the defendant has never been
14 supervised on formal probation.

15 This Court at the time of sentencing indicated, it
16 says, "You have served some time but generally you've been on
17 probation quite a bit and it doesn't seem like anything has
18 worked." Then it goes on to say that he's been involved in
19 this type of conduct in and out of various charges and very bad
20 behavior for the last 10 years. Then you indicate that you're
21 going to send him to prison to teach him a lesson that he
22 cannot continue this type of behavior. It says, and then you
23 go on to say, "I think the change of the last month or so, has
24 been changed to make it look good basically for this. I don't
25 believe you, you know. I can't compare 10 years of bad

1 behavior with one month of good saying everything is fine."
2 But again, I went back through the transcript and in no place
3 did anyone mention a month. Mr. Oliver had been arrested on
4 June 14th and then released for an incarceration on July 3rd
5 and he had been out from July 3rd to January 16th and that's the
6 time period that I had addressed and he had changed his life
7 around totally and completely during that time period; had been
8 drug free; had had a full time job, was productive; had gotten
9 married; was doing numerous productive things with his life and
10 certainly it was not one month period of time. He had changed
11 his life around.

12 Also, the co-defendants in this matter and I went
13 through the co-defendants, one of the co-defendants, Breanna
14 SolDaro Oliver, was ordered to serve 35 days in jail and that
15 was suspended. She was a co-defendant. Braydon Larkin was
16 placed on probation to AP&P for the offense of attempted
17 distribution of a controlled substance, a Class A Misdemeanor
18 and it was noted that in the police report in Case #021701498
19 that Braydon Larkin was actually, admitted that he had entered
20 the garage and took the wallet and cash from the victim that
21 Mr. Oliver actually pled guilty to and Braydon Larkin in the
22 PSI on page 4, actually admitted to that particular offense.
23 David Reed, there was no information. I don't know his status
24 and Jeremy Olthron was on probation for child abuse, a third
25 degree felony, and property obtained by unlawful conduct, a

1 Class B Misdemeanor and Mr. Olthron had absconded and is a
2 fugitive from justice. I don't know his status today.

3 Each one of these co-defendants had received
4 considerably less of a sentence than Mr. Oliver had received,
5 and then when I spoke with the Court later, the Court indicated
6 that one of the reasons that Mr. Oliver had been sentenced to
7 prison was because the jail was full and the jail also does
8 contract housing with regards to the federal system. It also
9 does contract housing for INS and for the prison itself and as
10 a matter of fact I just recently received a brochure from the
11 prison indicating that Mr. Oliver could actually be housed in
12 Davis County under contract with the County as a state
13 prisoner. With all of this in mind, Your Honor, and referring
14 to State v. (inaudible). Has the Court had the opportunity to
15 review that case?

16 THE COURT: Why don't you tell me how that case
17 applies to this that this was imposed, sentence was imposed in
18 an illegal manner.

19 MR. OLIVER: Okay, I'm going to read directly from
20 (inaudible) a couple of provisions. In (inaudible) it's
21 quoting Howell, State v. Howell, 707 P Second, 115, it says, "A
22 sentence in a criminal case should be appropriate for the
23 defendant in light of his background and the crime committed
24 and also serve the interest of society which underlie the
25 criminal justice system." That's also quoted in State v.

1 McClendon which indicates that the sentencing judge has
2 discretion in determining what punishment fits both the crime
3 and the offender and then the court goes onto say, "We have
4 consistently sought to sure up the soundness and reliability of
5 the factual basis upon which the judge must rely in the
6 exercise of that sentencing discretion." Quoting State v.
7 Lipski, 608 P Second, 1241, requiring disclosure of pre-
8 sentence report. Then it says, "Although Rule 22A implements
9 sound procedures aimed at insuring that a trial court bases its
10 sentencing decision on such information, a criminal defendant's
11 right to be sentenced based on relevant and reliable
12 information regarding his crime, his background, and the
13 interests of society stands independent of the Utah Rule of
14 Criminal Procedure, 22A" and that's, they're referring to the
15 constitution provision, Article I, Section 7, the due process
16 provision.

17 What happened in (inaudible) was that at the time of
18 sentencing, the defendant failed to appear and his was in front
19 of Judge Frederick in the Third District. The defendant failed
20 to appear. It was on a Class A and Class B Misdemeanor. Judge
21 Frederick, based upon he failure to appear, sentenced the
22 defendant to the maximum that he could, one year in the county
23 jail and six months in the county jail. The sentence was
24 appealed and the Court of Appeals vacated the sentence saying
25 the defendant's failure to appear is not a factor, or it's one

1 factor that may be considered but it is not a basis upon which
2 to impose maximum jail time, and then they went on to indicate
3 that - and this is where the phrase comes that it should be
4 based on relevant, reliable information regarding his crime,
5 his background, and the interests of society and that the due
6 process requirement that the sentence be appropriate to the
7 person, the crime, the background of the person, that that's
8 what the Court should consider and the Court is expected to
9 follow the due process procedures, due process and allow the
10 defendant due process and sentence him accordingly. So they
11 vacated the sentence and sent it back down.

12 In this particular case, our position is that if the
13 jail is full, that that is not a basis to send Mr. Oliver to
14 prison for. The recommendation was, from the PSI was for six
15 months in the county jail, straight time. This Court indicated
16 that whenever you get a one year sentence recommendation, that
17 you automatically send them to prison because the jail is full
18 and that based thereupon, that's what you were going to do in
19 this case.

20 THE COURT: Well, first of all just so the record is
21 absolutely clear, the only thing that was said at the time of
22 the sentencing was at the beginning. When you came back at
23 4:21 p.m., you made the statement, "I recognize that once this
24 Court sentences people to prison that the Court loses
25 jurisdiction for the most part and this is not a motion." And

1 then after another hour of basically, I don't know what you
2 could call what you did. I've read this transcript today and
3 all I can say is that it reminded me of what happened on the
4 second hearing, or the second time you wanted to make your
5 statement which was not quote, "In the nature of a motion" or
6 anything else other than to get something off your chest and
7 then you used the basis of a statement made at that point as
8 the basis of the decision. That's what the record is.

9 MR. OLIVER: And that's fine, and I'll be happy to
10 read into the record what the statement was because that was a
11 statement that--

12 THE COURT: Maybe you can clarify for me, Mr. Oliver,
13 can you tell me then that I as a judge then, if I'm going to
14 put somebody in for a year and whether they serve a year in the
15 prison or if they serve a year in the jail, and one is crowded
16 and one isn't, that at no time can I ever have that as a
17 consideration? Is that what you're saying that that is
18 illegal?

19 MR. OLIVER: I'm not sure I understand your question
20 but that's not the sentence. If you sentence him to a year,
21 that's a year and that year should be in the jail. However, if
22 you're sentencing to prison, it's an indeterminate term for one
23 to 15. That is not one year. This Court does not sentence
24 people to prison for one year. It becomes then the purview of
25 the Board of Pardons to deal with that. So sentencing to jail

1 for one year is not the same thing as sentencing to prison for
2 one to 15.

3 THE COURT: Okay, anything further as to this motion?

4 MR. OLIVER: If I may just - I'm sorry I thought I
5 had it marked. I wasn't going to go that far into the
6 afternoon hearing, but... Okay. We were talking about the
7 month issue. This is - I don't have a page number on that
8 particular copy. We were talking about the month issue and
9 then we went on and I says, well, (inaudible) said, "Well, I
10 didn't." And I said, "You didn't, that's one of my concerns."
11 The Court says, "I didn't and I haven't and whatever you want
12 to believe that you think that I've done something else in
13 making my decision, I did not and if you don't believe that,
14 then you can file your motions. If you have to file regarding
15 either the motion to withdraw the guilty plea or a motion to
16 say that the sentence is abuse of discretion, otherwise I can
17 tell you one other thing, Mr. Oliver, when you talk about AP&P,
18 AP&P because of the budget of the State of Utah hardly ever
19 recommends prison, very seldom do they recommend prison and the
20 reason for that is because they're under budget constraints,
21 but I can tell you that we have a jail that is full and every
22 time that I put a person a year in jail, I get a call the next
23 day from the jail to let three out and so what I've been doing
24 and what I understand other judges are doing, is the people who
25 have a year commitment are usually going to prison now because

1 we have too heavy a load in the Davis County Jail." That was
2 the Court's own statement to me when we were talking about this
3 one month issue and then the Court made that statement to me.
4 That was at the 4:00 o'clock afternoon hearing.

5 But our position is that the sentence was imposed in
6 an illegal manner because due process considerations were not
7 there. The fact that the jail is full is not a factor for Mr.
8 Oliver to go to prison. I've had occasion to discuss this with
9 people from the prison and numerous other attorneys and I have
10 found no one that indicates that indeed a jail being full is a
11 basis to send someone to prison, especially someone who has
12 never been on formal probation, never been charged with a
13 felony. This was a non-violent felony.

14 THE COURT: Well, just so the record's clear and the
15 statement was made not in a motion, not at the time of
16 sentencing, but just so it's clear, that was never anywhere in
17 the transcript of the entire two hearings that we had until
18 almost 5:30 that was it ever said that that was the basis upon
19 which. You were asking things and I gave you that. That
20 wasn't the sole basis. I mean, in anywhere of this discussion
21 did we have that there were six felonies and five misdemeanors
22 in these cases and then he pled to four felonies, all that took
23 place in a week's period of time from June 6 to June 12, 2002
24 besides his five misdemeanors, besides his juvenile court
25 record beforehand? Was that the history?

1 MR. OLIVER: I'm sorry, I'm not sure I understand the
2 question.

3 THE COURT: In these cases—

4 MR. OLIVER: The current charges—

5 THE COURT: Let me—

6 MR. OLIVER: The current charges—

7 THE COURT: Don't ask a question and then not let me
8 answer the question. The question was that in the current
9 charges in the three files, there are as I count them six
10 felonies and four or five misdemeanors that took place in a
11 period of June 6th through June 12th of 2002, is that accurate
12 or not?

13 MR. OLIVER: That's what he was charged with.

14 THE COURT: And then he pled guilty to four felonies,
15 three third degree felonies and a second degree felony; is that
16 correct?

17 MR. OLIVER: That's correct.

18 THE COURT: And so that's what he pled to and you
19 talked about the five adult misdemeanors. Then he had also a
20 juvenile court record?

21 MR. OLIVER: Uh-huh (affirmative).

22 THE COURT: Okay, and that—

23 MR. OLIVER: An infraction and two misdemeanors.

24 THE COURT: Okay. All right, anything further on
25 this matter, on this motion?

1 MR. OLIVER: No, not at this time.

2 THE COURT: What is the position of the State?

3 MR. PETERSON: The position of the State is pretty
4 simple and straight forward that the Court did not abuse its
5 discretion in issuing the sentence, that the sentence that was
6 issued is the statutory guidelines for second and third degree
7 felonies, that at the time the plea was taken, the Court
8 advised Mr. Oliver, the defendant Mr. Oliver, that potential
9 penalties for these guilty pleas are as follows: one to 15 and
10 zero to five on the third degrees and the Court followed that
11 and the Court hasn't gone beyond anything and did not abuse its
12 discretion in issuing this sentence.

13 THE COURT: What is your understanding, Mr. Peterson,
14 as to what it means when it says an illegal manner under that
15 rule? What type of things are - what is the sentence when it's
16 an illegal manner?

17 MR. PETERSON: When a sentence is in an illegal
18 manner?

19 THE COURT: Yes. Is that something like where if
20 it's a third degree felony and you give them five to life
21 instead of zero to five?

22 MR. PETERSON: That is how I would interpret it or if
23 someone pled guilty to a Class A Misdemeanor and they were
24 sentenced to the prison instead of jail or a fine level is
25 \$10,000 instead of \$5,000 where it should be. An illegal

1 sentence in my mind is one that goes beyond the statutory
2 provisions for each count.

3 THE COURT: Okay, do you have anything further?

4 MR. PETERSON: I do not.

5 THE COURT: Okay. Is there any reply?

6 MR. OLIVER: Yes, as a matter of fact, the fact of
7 Lanosec which is 428 Utah Advanced Report 10 and it's a 2001
8 Utah Appeals, so it's a 2001 case is contained within the
9 annotations of the section talking about sentence imposed in an
10 illegal manner. That's where I found Lanosec is when I went
11 through and read the notations. So obviously it's not just
12 contemplated that it's a sentence that exceeds the statutory
13 requirements but also one that exceeds due process requirements
14 and the Court of Appeals has treated it that way and they
15 decided it in the court's therewith and so the circumstances
16 are that the court felt that imposing a maximum sentence
17 because of his failure to appear was imposed in an illegal
18 manner and it was an illegal sentence. They reversed it, they
19 vacated the sentence and reversed it and that's where we are.

20 MR. PETERSON: And if I may, Your Honor, I think Mr.
21 Oliver is accurate that the judge in that gave the maximum
22 because the defendant didn't appear. That is to differentiate
23 the facts. That is not what occurred here in this case. A
24 thorough PSI or pre-sentence report was conducted and the
25 defendant was present, the defendant was aware of the potential

1 penalties, the court in making its sentence actually reviewed
2 the record, advised at the time of the sentence that because of
3 the defendant's background this is the consideration the Court
4 was taking. Even if we count part of the consideration of the
5 prison as part of your statement that it's usual that they may
6 go to prison, if the sentence is for one year or more at the
7 jail, that all of those factor in an due process was given to
8 Mr. Oliver in this case, when in the Lanosec matter was simply
9 a matter of you failed to appear, you are getting the maximum
10 which didn't take into account any of his prior history, any of
11 his prior background. We don't know the final ending of that
12 case. Mr. Manosa could easily have gone back to the sentencing
13 judge and ended up with the maximum anyway after the judge
14 considered all of the factors in the case.

15 THE COURT: Anything further?

16 MR. OLIVER: Just briefly. With regards to this,
17 what Mr. Lanosec ended up in the long run has no relevancy to
18 this case whatsoever not does it change the outcome of the
19 case. The outcome of the Lanosec case was that you should go
20 through and you should evaluate the individual, you should look
21 and see about his rehabilitative ability, the ability to be
22 supervised, all of these things you need to take a look at and
23 then base there upon, enter a sentence that is appropriate to
24 the defendant. That's the theory behind the Lanosec. It's not
25 just a matter of whether he appeared or whether he didn't

1 appear. They're saying, as a matter of fact the Court of
2 Appeals states, "Although Rule 22A implements sound procedures
3 aimed at insuring that the trial court bases its sentencing
4 decision on such information, a criminal defendant's right to
5 be sentenced based on relevant and reliable information
6 regarding his crime, his background and the interest of society
7 stands independent of the Utah Rules of Criminal Procedure."
8 So it goes further and it says that "indeed that the discretion
9 is not absolute."

10 I recently read in the newspaper about a case wherein
11 an individual was given 800 hours of community service as a
12 result of two armed robberies wherein a gun was used and I find
13 that this particular situation with Mr. Oliver is far less
14 egregious than armed robbery on two different occasions with a
15 shotgun. Now, I don't know the other person's personal
16 background or history, don't know what the recommendations
17 were. Here the recommendation was six months straight time, 12
18 months with work release. The County at that time recommended
19 60 to 90 days with work release. So after those professionals
20 who have dealt with the case all along, AP&P, the county
21 attorney, they made the recommendations and there is no
22 compelling reason in this case to depart from the
23 recommendations that were received. There's not extreme
24 aggravating circumstances. And I also went through at the time
25 of sentencing and went through and talked about some of the

1 mitigating circumstances. For example, it says "offender
2 presents a serious threat of violent behavior" that's not true.
3 That's marked inaccurately in this circumstances. That is not
4 true. "Offender continued criminal activity subsequent to
5 arrest" that is not true. We pointed that out that indeed what
6 had happened was the charges came down after his arrest. He
7 was picked up and incarcerated. There was no further conduct.
8 Then in the mitigating, the AP&P put in there "Offender's
9 attitude suggests amenability to supervision" they included
10 that. That was #7. #8, "Offender has exceptionally good
11 employment and/or family relationships. #9, "Imprisonment
12 would entail excessive hardship on offender or dependents."
13 Those were checked off by AP&P as mitigating circumstances. I
14 then believe that there was two others, restitution would be
15 severely compromised by incarceration and that the offender had
16 extended period of arrest free street time which stemmed back
17 to his last incident in Colorado in 1999. So-

18 THE COURT: So let me ask a question. Are you saying
19 then that if the people at Adult Probation and Parole do a
20 recommendation and the county attorney concurs or does a
21 recommendation and the defendant concurs and does a
22 recommendation and the judge doesn't follow the recommendations
23 of those people, that that becomes an illegal sentence or an
24 abuse of discretion?

25 MR. OLIVER: I don't think I've said that.

1 THE COURT: Okay, then tell me then, there have been
2 many times when they have asked for jail and I have not given
3 jail. There has been times when they haven't asked for it and
4 I have given it or they've asked for jail and I've given
5 prison. If you were here today you would have seen three or
6 four more of the people go to prison and sometimes I follow the
7 recommendations and sometimes I do not but it's been my
8 understanding that what a judge is suppose to do is he's
9 suppose to take into consideration all the facts and give the
10 best sentence that they can do based upon all the circumstances
11 and that's what I did and so if it's illegal, if all we're
12 going to do from now on, part of your argument both here and in
13 the afternoon of the last hearing, and here today is that
14 you're not following what AP&P says, you're not following what
15 the county attorney says, we don't need judges for sentencing,
16 we can just have AP&P be the sentence. Judges would be
17 perfunctory because what we would have to do is give all of the
18 ability to sentence people to Adult Probation and Parole and
19 until and unless that is the system, I do not know what to do
20 otherwise than to do the best I can with the information that's
21 been given.

22 MR. OLIVER: You know, I went through prior to,
23 (inaudible) time over to the county attorney and actually
24 comment that you requested input on and-

25 THE COURT: Requested what?

1 MR. OLIVER: That you requested input on from the
2 attorney here today. I went through and I never once tried to
3 do anything other than just address a regular sentencing and
4 why I thought he should not be in prison.

5 Now, you've brought it down to where I think that we
6 should go with judges and just let AP&P and county attorney
7 determine. I haven't said that. I've not even tried to go
8 there.

9 THE COURT: Okay. How many times have you said
10 today, Mr. Oliver, and how many times have you said in this
11 transcript going over what AP&P recommended, what AP&P
12 recommended and what AP&P recommended and then just before I
13 made my comment you were talking about that AP&P have
14 recommended this, the county attorney had recommended this and
15 then you don't follow it? So what is your argument? And I
16 asked the question, if a judge departs from what AP&P does,
17 then is that either an illegal sentence or an abuse of
18 discretion? I just want to know what your position is. Why is
19 it in this circumstance and not when I do it in another case
20 when I don't follow their direction?

21 MR. OLIVER: There's never been supervised probation
22 for Mr. Oliver. There has never been a felony charge
23 previously with Mr. Oliver. Normally to end up at prison, you
24 work to get there. You go through the system several times and
25 you're placed on probation. You succeed, you fail or whatever

1 the case may be but you get a chance to show that once they
2 slap you up side the head and have your attention, are you
3 going to straighten up your life and fly straight and then not
4 go back there again? If you choose not to do that, you're
5 brought back again, the court then looks at it a little bit
6 different and gives maybe a harsher sentence but still - and it
7 depends upon the crime and it depends on the person, it depends
8 on a lot of things but the circumstances are you don't start
9 off a first felony, non-violent, as I indicated previously,
10 this is not a particularly aggravated crime. I recognize we
11 can throw the numbers out and Mr. Oliver did not deny the
12 numbers but we can throw the numbers out there but the
13 circumstances are that Mr. Oliver has not been through the
14 system and been given that one chance, not even one chance to
15 sit back and say, "Okay, you're on probation, let's watch you,
16 let's see how you're going to conduct your life. You're facing
17 real serious stuff here. Now go prove to us that you don't
18 deserve the break or that you do deserve the break." This says
19 I'm not going to give you the break.

20 So, you know, when the system and due process is of
21 such a nature that says you should consider the individual, the
22 nature of the crime and the needs of society, then sentences
23 should be commensurate one with another with other people. It
24 should not be disparate and in this particular case, that's
25 exactly where we are. This is a desperate sentence. This is

1 his first felony charge. He's never been on probation before
2 and he starts off in prison. Prison is a last resort on a
3 first resort.

4 THE COURT: Anything further?

5 MR. OLIVER: Nope.

6 THE COURT: Anything further from the State?

7 MR. PETERSON: Submit it.

8 THE COURT: Okay, as it relates to the second motion
9 which is petition for post-conviction relief and motion to
10 correct the sentence imposed in an illegal manner, I'm denying
11 that motion for the following grounds. First of all, I do not
12 believe that this sentencing violated due process; that under
13 the case law or statutes that it was illegal; that I took into
14 consideration the fact that he had had a juvenile record, that
15 he had had five misdemeanors that had gone as an adult from
16 1995 to 1999; that he'd been charged in a spree of felonies
17 between June 6th and June 12th in these three cases; that he
18 ultimately pled to four felonies that included burglaries and
19 restitution. Taking all those things into consideration, I
20 sentenced him to prison. I believe that is within due process.
21 I believe that is not illegal and if it is illegal, then you
22 have your appeal and the Appellate Court can make that
23 decision.

24 Okay, let's go to our third motion. It's the motion
25 to stay sentence pending defendant's post-judgment motions and

Addendum F

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Thomas C. HEADLEY, Defendant and Appellant.

No. 990462-CA.

Feb 28, 2002.

Edward R. Montgomery, Salt Lake City, for
appellant.

Mark L. Shurtleff and Thomas Bruner, Salt Lake
City, for appellee.

Before JACKSON, GREENWOOD, and THORNE,
JJ.

MEMORANDUM DECISION (Not For Official
Publication)

JACKSON, Presiding Judge.

*1 Thomas Headley appeals the district court's denial of his Motion to Correct Illegal Sentence submitted under Rule 22(e) of the Utah Rules of Criminal Procedure. He contends the district court erred in ruling that his motion did "not attack the legality of the sentence imposed nor the manner in which the sentence was imposed." Headley's contention is two-fold: (1) his counsel at sentencing provided ineffective assistance; and (2) the sentencing court relied on information in the presentence report that the court knew was false. We affirm.

A district court's Rule 22(e) decision is a legal question that we review for correctness, *see State v Brooks*, 908 P 2d 856, 858-59 (Utah 1995); *State v Patience*, 944 P.2d 381, 384-85 (Utah Ct App.1997), and we can affirm the decision "if it is sustainable on any legal ground or theory apparent on the record." *State v Finlayson*, 2000 UT 10, ¶ 31, 994 P 2d 1243. Rule 22(e) of the Utah Rules of Criminal Procedure provides for resentencing when a sentence is illegal or "imposed in an illegal manner." Utah R Crim. P. 22(e). The definition of an "illegal sentence" has been construed narrowly to include only sentences "where the sentence does not conform to the crime of which the defendant has been convicted." [FN1] *State v*

Parker, 872 P 2d 1041, 1043 n. 2 (Utah Ct.App.1994). Utah law has no comprehensive definition of sentences "imposed in an illegal manner"; however, the Utah Supreme Court has ruled that a sentence is imposed in an illegal manner when a defendant is deprived of his or her Sixth Amendment right to counsel during sentencing. [FN2] *See Kuehnert v Turner*, 28 Utah 2d 150, 499 P.2d 839, 841 (1975) (concluding that the sentence was illegal because the defendant did not have counsel at sentencing, was not informed of his Sixth Amendment rights during sentencing, and had not knowingly and intelligently waived his Sixth Amendment rights). [FN3] In *Kuehnert*, the Utah Supreme Court stated that the presence of counsel at sentencing is necessary

FN1. Nonconforming sentences include those where the sentence exceeds the statutory limits. *See, e.g., State v Higginbotham*, 917 P 2d 545, 551 (Utah 1996) (concluding that the sentence was illegal because statute only authorized one year enhancement and the court enhanced sentence by two years), *State v Patience*, 944 P 2d 381, 388 (Utah Ct App 1997) (noting that the sentence was illegal because it exceeded statutory term). Nonconforming sentences also occur when the court is without jurisdiction to impose a sentence. *See, e.g., State v Hurst*, 777 P 2d 1029, 1036 n. 6 (Utah 1989) (stating that sentences can be attacked when beyond the jurisdiction of the sentencing court). *State v Arviso*, 1999 UT App 381, ¶¶ 5-8, 993 P 2d 894 (stating that the sentence was illegal because Supremacy Clause deprived sentencing court of jurisdiction), *State v Grate*, 947 P 2d 1161, 1168 (Utah Ct App 1997) (stating that the sentence was illegal because court did not have jurisdiction to revoke probation).

FN2. Other jurisdictions have defined sentences imposed in an illegal manner as those that are within statutory and jurisdictional limits, but violate a defendant's rights, *see, e.g., Government of the VI v Martinez*, 239 F 3d 293, 299 n 3 (3rd Cir 2001), *State v McNellis*, 546 A 2d 292, 305-06 (Conn Ct App 1988) *State v Sieler*, 554 N W 2d 447, 479 (S D 1996) *cf State v Anderson*, 661 P 2d 716, 720-24 (Haw Ct App 1983) *State v Brooks*, 589 A 2d 444, 447 (Maine 1991), or that are based on erroneous information. *See, e.g., United States v Katzin*, 824 F 2d 234, 238

(3rd Cir.1987).

FN3. *Kuehnert*, which discusses illegal sentences under the rules in force prior to Rule 22(e), was not cited in the parties' briefs.

so that there is a real opportunity to present to the court facts in extenuation of the offense or in explanation of the defendant's conduct, as well as to correct any errors or mistakes in reports of the defendant's past record and to appeal to the equity of the court in its administration and enforcement of penal laws.

Id. at 840-41. [FN4]

FN4. *See also McConnell v. Rhay*, 393 U.S. 2, 4, 89 S.Ct. 32, 33- 34 (1968) ("As we said in *Mempa [v Rhay]*, 389 U.S. 128, 135, 88 S.Ct. 254, 257 (1967)], 'the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances[,] and in general aiding and assisting the defendant to present his case as to sentence is apparent.' The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of adjudication." (Citation omitted.)).

Headley first claims his counsel at sentencing provided ineffective assistance, thus depriving him of his Sixth Amendment right. To support his claim, Headley makes six assertions, four are as follows: (1) he asserts that his challenge to misinformation in the presentence investigation report was rejected by the sentencing court because it was poorly handled by sentencing counsel; (2) he challenges several factual statements contained in the presentence investigation report; (3) he asserts that "his own counsel accused him of being involved in incest when that information was not otherwise before the court"; and (4) he asserts that "his [sentencing] counsel convinced a witness with potentially exculpatory evidence not to cooperate with [Headley]." Each of these four assertions has some connection with the presentence investigation report, which is not in the record on appeal. Further, no other information in the record supports these assertions. Accordingly, as discussed below, we are unable to address them.

*2 Next, Headley claims the sentencing court imposed a \$10,000 fine without reason and without objection by his counsel. We find no mention of a \$10,000 fine in the record. The only fines mentioned in the sentencing context, a \$1,000 recoupment fee

and an unspecified amount to "pay for costs of extradition and for therapy of victim," are found in the sentencing transcript and the Judgment filed three days later. Finally, Headley alleges that "his counsel intentionally tried to prevent him from pursuing an appeal." However, the record reflects that Headley filed a notice of appeal on September 24, 1992, but voluntarily moved to dismiss his appeal to "file a motion to withdraw his plea of guilty." Headley's motion was granted on October 8, 1992, and the record contains no indication of subsequent attempts to appeal the case.

Without the presentence report or other information which may or may not be in the sentencing court record, the record submitted to us is inadequate for our review of Headley's ineffective assistance claim. All we have are Headley's unilateral, bald assertions of misconduct. As we have stated,

When a defendant predicates error to [an appellate court], he has the duty and responsibility of supporting such allegation by an adequate record. Absent that record, a defendant's assignment of error stands as a unilateral allegation which the reviewing court has no power to determine. [An appellate court] simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record. Consequently, in the face of an [in]adequate record on appeal, [we] must assume the regularity of the proceedings below.

State v. Penman, 964 P.2d 1157, 1162 (1998) (internal quotations and citations omitted) (alterations in original); *see also State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92 ("Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively."). Accordingly, we reject Headley's Sixth Amendment claim.

Next, Headley claims the sentencing court was biased because it relied on information in the presentence report that the court knew was false. Utah Code Ann. § 77-18-1(6) (Supp.2001) gives a sentencing judge discretion in evaluating information in a presentence report and requires the judge to "make a determination of relevance and accuracy on the record." Here, the sentencing judge made a determination of the relevance and accuracy of the presentence report, deciding the presentence report was "comprehensive in all the details," and stating that those working on elements of the presentence report "do a pretty good job." The sentencing court

Not Reported in P.2d

(Cite as: 2002 WL 287890, *2 (Utah App.))

has broad discretion to resolve factual disputes for or against a defendant, *see id.*, and we cannot say the court exceeded its discretion in making this determination. Further, without the presentence report, the record is inadequate and " '[we] must assume the regularity of the proceedings below.' " *Penman*, 964 P.2d at 1162 (citation omitted) (alteration in original).

*3 Accordingly, we affirm the district court's denial of Headley's Rule 22(e) motion for resentencing.

WILLIAM A. THORNE JR., J., concur.

GREENWOOD, Judge (concurring in the result).

I concur in the result reached by my colleagues, but would affirm on what I perceive to be a more straightforward basis. As stated by the majority, the trial court denied defendant's Rule 22(e) motion because the motion did "not attack the legality of the

sentence imposed nor the manner in which the sentence was imposed." The trial court was correct.

Defendant's claims of ineffective assistance of counsel and erroneous fact findings by the sentencing judge are simply not cognizable under Rule 22(e). Defendant has not cited any caselaw holding otherwise and has also not offered any reasoned analysis for why Rule 22(e) should apply to his case. *See State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (briefs must include "reasoned analysis based on [cited] authority"). The sentence imposed was permissible under applicable statutes, and the trial court properly resolved factual disputes presented to it. Defendant raises no claims legitimately related to whether the sentence was illegal or "imposed in an illegal manner." Utah R.Crim. P. 22(e). On that basis, I would affirm.

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