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State of Utah v. Phillip Howell And Shirley Howell : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and
Respondent,

vs.

Case No. 19397

PHILLIP HOWELL and SHIRLEY
HOWELL,

Defendants and
Appellants.

APPELLANTS' BRIEF

Appeal from the Third Judicial District
Court for Salt Lake County, State of Utah
Honorable Homer F. Wilkinson, Judge

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PAMPHLETS

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ABA Publications, Washington D.C., 1968.

STATEMENT OF KIND OF CASE

This is an appeal of maximum five year prison sentences imposed for one count of child abuse. The appeal arises out of the trial judge's consideration of the previously dropped charges of sexual abuse at time of sentencing.

DISPOSITION IN LOWER COURT

Defendants plead guilty to one count of physical abuse information as charged. Defendants were sentenced to the maximum penalty of five years imprisonment.

RELIEF SOUTH ON APPEAL

Appellants seek a review of the sentence by the Utah Supreme Court in that the District Court made errors in the process of sentencing by considering charges which had been previously dismissed in determining the length of defendants' sentences; this violated appellants United States Constitution Fourteenth Amendment due process rights as well as the United States Constitution Eighth Amendment right barring cruel and unusual punishment.

STATEMENT OF FACTS

This matter came to the attention of Utah State authorities early in 1982 when Phillip and Shirley Howell sought medical care for one of their four children. The doctor providing the medical care sought by the Howells noticed bruises on the body of the Howell child and contacted the Utah State Division of Family Services concerning an incident of possible child abuse. The Division of Family Services subsequently investigated the Howell matter and, upon speaking with Phillip and Shirley Howell, learned that Mrs. Howell has disciplined the children by spanking them with a wooden spoon and that her husband, on one occasion, had disciplined the children by spanking them with an electric cord. The Division of Family Services felt it appropriate under such circumstances to remove the children from the home and to initiate Juvenile Court proceedings sustaining the removal of the children and establishing a treatment plan for the Howells whereby they might improve their parenting skills and prepare for the return of the children to the Howell home.

Subsequent medical examinations made on the children revealed that the Howell children had been sexually abused. Though the Howells readily admitted their physical abuse of the children, they vehemently denied any involvement in sexual abuse.

The evidence was overwhelming, however, that sexual abuse had taken place and subsequently a ten count information was filed against both Phillips and Shirley Howell (a copy of said information is attached hereto as Exhibit "A" and herein incorporated by reference.)

When questioned about the sexual abuse and after denying their involvement, Defendants explained to the investigating authorities that Shirley Howell's brother, Michael Jack Dennis, and his fiancée, had lived in the Howell home for a period up through the time the physical abuse was first reported. They reported that Mr. Dennis shared the bedroom with the children and often babysat them when the parents were away. After Jack moved out of the home, Defendants found Playboy and Penthouse magazines under Mr. Dennis' bed, as well as medical books on female anatomy. Defendants later recalled that on many occasions they had tucked their children into bed at night only to find them denuded of their tee shirts, panties, and pajamas later in the night. Additionally, they recalled in hindsight, that Mr. Dennis often found excuses to follow the children into the bathroom as well.

The three children involved, Annie, 5 years of age, Pamela, 4 years of age and Phillip, Jr., age 2, explained to authorities that "Daddy" had been responsible for the sexual contact, but used the term "Daddy" interchangeably when shown pictures of Phillip Howell and Mr. Dennis.

Defendants requested that they be allowed to prove their

innocence through polygraph tests and such tests were subsequently administered by Steve Bartlett of the Salt Lake County Attorney's office. The test results indicated that neither parent had participated in any sexual abuse with the children. The results of a polygraph test administered to Jack Dennis by Steve Bartlett indicated, on the other hand, that Mr. Dennis was deceptive in denying sexual molestation of the Howell children (copies of Steve Bartlett's reports to Deputy County Attorney Leslie Lewis are attached hereto as Exhibits B, C, and D).

The Salt Lake County Attorney's office dropped the sexual charges against Defendants and amended the Information to one charging physical abuse only (a copy of said Information is attached hereto as Exhibit E). The Defendants, having previously openly admitted to the physical abuse, plead guilty to the one count physical abuse information as charged.

At sentencing, Judge Wilkinson stated that he had received many phone calls and letters from members of the community expressing concern about the case. Prior to sentencing, he also received extensive reports concerning the sexual abuse of the children. He stated that in meting out the sentence of imprisonment of 0-5 years, the maximum penalty for physical abuse, that he was considering not only the admission as charged of physical abuse, but also the pre-sentence evidence provided the Court on the sexual abuse as well. The Court confessed a distrust of polygraph tests, and a suspicion that the parents were the active perpetrators of the sexual abuse suffered by the children. Judge

Wilkinson went on to indicate that even though the sexual charges had been dropped, he was still considering the sexual abuse aspects of the case and based the severity of the sentence on these considerations. Realizing that Defendants might want to appeal his consideration of sexual abuse at the time of sentencing, Judge Wilkinson, on his own motion, refused a Certificate of Probable Cause but stayed imposition of the sentence for seven days for the express purpose of allowing Defendants time to appeal their sentences and seek a Certificate of Probable Cause from the Utah Supreme Court.

STATEMENT OF POINTS

POINT I

DEFENDANTS' FOURTEENTH AMENDMENT OF DUE PROCESS RIGHTS HAVE BEEN VIOLATED AS THE TRIAL COURT ERRED DURING SENTENCING BY CONSIDERING EVIDENCE AGAINST DEFENDANTS ON CHARGES WHICH HAD PREVIOUSLY BEEN DROPPED.

A. THESE APPELLANTS WERE SENTENCED ON THE BASIS OF ASSUMPTIONS NEVER HEARD OR TRIED IN COURT. THIS IS INCONSISTENT WITH DUE PROCESS OF LAW.

B. A FUNDAMENTAL ELEMENT OF DUE PROCESS IS THAT AN ACCUSED BE ADVISED OF CHARGES AGAINST HIM.

C. APPELLATE REVIEW OF THE SENTENCING PROCESS IS PROPER WHERE IT APPEARS THAT THE COURT RELIED ON INACCURACIES IN REACHING A SENTENCING DECISION.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE MAXIMUM SENTENCE IN THESE CIRCUMSTANCES. IT IS GENERALLY DISPROPORTIONATE TO A FIRST OFFENDER IN A CHILD ABUSE CASE TO AWARD THE MAXIMUM SENTENCE OF FIVE YEARS. EVEN WITHIN THE LIMITS OF THE STATUTE, THE SENTENCING SHOCKS THE CONSCIENCE AND AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT.

A. THE MERE FACT THAT THE SENTENCE IS WITHIN THE BOUNDS PRESCRIBED BY THE STATUTE DOES NOT PREVENT IT FROM BEING EXCESSIVE AND VIOLATING THE CONSTITUTIONAL BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT.

B. THE EIGHTH AMENDMENT HAS BEEN IMPLIEDLY MADE APPLICABLE TO THE STATES.

ARGUMENT

POINT I

DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS HAVE BEEN VIOLATED AS THE TRIAL COURT ERRED DURING SENTENCING BY CONSIDERING EVIDENCE AGAINST DEFENDANTS ON CHARGES WHICH HAD PREVIOUSLY BEEN DROPPED.

A. APPELLANTS WERE SENTENCED ON THE BASIS OF ASSUMPTIONS THAT WERE NEVER HEARD OR TRIED IN COURT. THIS IS INCONSISTENT WITH DUE PROCESS OF LAW AND SUCH A SENTENCE CANNOT STAND.

The United States Supreme Court, in the case of United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589(1972) found that questions of constitutional magnitude involving due process are reached when the defendant is sentenced on the basis of assumptions which are materially untrue. The defendant in that case, Forest Tucker, was brought to trial in a federal district court in California upon a charge of armed robbery. Tucker plead not guilty. He was identified, however, as the robber by four employees of the bank who were called as witnesses at trial. Tucker testified on his own behalf denying any participation in the robbery and offering an alibi. To impeach the credibility of his testimony the prosecution asked Tucker whether he had previously been convicted of any felony. After the Defendant admitted to three previous convictions, he was found guilty. During sentencing, the Judge inquired into the defendant's background. The record shows that the Judge gave explicit consideration to the previously found convictions. The Judge sentenced Tucker to 25 years-the maximum term authorized. Later,

two of the previous convictions were determined to be invalid. Thereafter, Tucker initiated litigation claiming that the introduction of the evidence of his prior invalid convictions had fatally tainted the outcome of the trial. In Tucker the question therefore presented for consideration was whether the sentence imposed by the Trial Court Judge might have been different if during the sentencing the Judge had known that at least two of the respondents previous convictions had been invalid. The court decided that had the Judge been aware of the invalidity of the two previous convictions, the respondent's background would have appeared in a dramatically different light at the sentencing proceeding. Obviously, this fact had a great effect on the severity of the sentence. The Supreme Court therefore, remanded the case to the trial court for reconsideration of the respondent's sentence.

There is an obvious parallel between the Tucker case and State v. Philip Howell and Shirley Howell. The assumption that the Howells' were involved in the sexual molestation of their children was never a proven fact. The Judge in the Howell case like the Judge in U.S. v. Tucker, supra assumed that these previous charges were true. The record indicates explicitly that the Judge relied on this previous evidence during sentencing. Judge Wilkinson stated:

The Court has taken into consideration in this case

the sexual as well as the physical abuse. The final information was on physical abuse. I think it covers both of them. The court is considering all these matters. (Record at 12.)

The severity of the sentence was dependent on information merely assumed; this evidence was never heard nor tried in court. The sentencing, therefore, is inconsistent with due process and such a sentence should not stand.

Another United States Supreme Court case, Cole v. Arkansas 333 U.S. 196, 201, 68S. CT. 514, 417(1978) presented the question of whether the United States Constitution Fourteenth Amendment rights were violated when convictions were confirmed under a criminal statute for a violation of which the petitioners had not been charged. In the Cole case, the Arkansas Supreme Court affirmed the defendants' convictions as though they had been tried for violating a section of a statute for which they were neither tried nor convicted. The facts of this case indicate that the defendants were tried in a state court under an information charging them with a specific violation of a specific section of an Arkansas State Statute making it an offense to promote an unlawful assemblage. Petitioners were convicted under this statute and appealed the judgment. The Arkansas State Supreme Court sustained their convictions on the ground that the evidence indicated that the petitioners had violated another section of the same statute.

In an appeal to the United States Supreme Court, the

Supreme Court held that petitioners were denied due process of law in that; (a) it is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made, and (68 S. Ct. 514 at 201) (b) to conform to due process of law petitioners were entitled to have the validity of their conviction appraised on consideration of the case as it was tried and as the issues were determined in the trial court. (68 S. Ct. 514 at 201).

In the Howell case, the Judge's remarks while sentencing evidenced the fact that the sentence was based upon a charge which had never been tried. Obviously, in order to conform to due process of law, the Howells' are entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in their particular trial. It is violative of the Howells' right to due process to have a sentence based upon facts not tried in court as well as based upon evidence which in all probability is untrue. Another United States Supreme Court case supports this contention. Townsend v. Burke, 58 S. Ct. 1252, (1948) involves a prisoner sentenced on the basis of untrue assumptions concerning his criminal record. In Townsend, The Supreme Court found that such a result to be inconsistent with due process of law. The court stated:

We would make it clear that we are not reaching this result because of petitioners allegation that his sentence was unduly severe, the sentence being within the limits set by the statute. It is not the duration or severity of this sentence that renders it constitutionally invalid, it is the careless or designed pronouncement of sentence on a foundation so extensively materially false... that renders the proceedings lacking in due process.

Although the Howell sentence is within the limits set by statute, it like that in the Townsend case, is based to a large degree on a speculative if not false foundation. Therefore, the Howell's constitutional right to procedural due process has been violated.

Following the lead of the previously cited United States Supreme Court cases, the California case of People v. Giles 70 Cal App 2d Supp. 872,161 P2d 623(1945) specifically condemns the practice of relying on information in the sentencing process which has not been obtained in open court or in the presence of defendant or his council. This practice denies the defendant his constitutional right of due process. Sentencing, then is based on assumptions instead of facts.

The defendant in Giles was convicted on a charge of having used force and violence upon the complaining witness. Defendant was sentenced to serve six months in the County Jail. In determining the severity of the sentence imposed, the trial Judge erred in listening to and being influenced by accusations made against the defendant outside of the court. The California

Appellate Court emphasized that this error is not a trivial one. In the Howell case, Judge Wilkinson also received outside information about the case and expressed his concern about this issue he stated:

I also want to state for the record that this case has caused a great deal of emotion. I want to state that the Court has received phone calls. The court has received well, I guess just one letter... The Court has tried to keep itself above it and to face this matter, take a very unemotional approach to it. (Record at 13)

It is important in terms of due process that the judge not listen to and be influenced by whisperings against the accused outside of court in determining the severity of sentence.

In another state case, State v. Ellefson, 287 NW 2d 493(S.D.1980) the defendant's due process rights were violated when the trial Judge based the sentence upon a misapprehension of prior criminality. In this case a jury found the defendant guilty of statutory rape and he was sentenced to a prison term of ten years. The defendant on appeal claimed that the court relied on inaccurate conclusions in passing sentence. The trial court states when addressing the defendant, "The fact is that you were convicted in 1975 of raping an 8 and 10 year old girl... four counts of lewd and lascivious acts. Now that is a fact". (Supra at 497).

The defendant however, was acquitted of all charges

relating to the 8 year old girl and the record indicates that there were never any rape convictions. The state supreme court held in this matter: "We believe it was violative of the defendant's right to due process to have his sentence based upon a misapprehension of the facts concerning his prior record" (Supra at 487).

The assumption of prior guilt that Judge Wilkinson made in the Howell case is particularly unfair as the evidence surrounding these earlier charges was speculative enough in nature as to allow their discontinuation. A polygraph test indicated that at the least, the charges lacked substance, and in all probability were untrue; Judge Willkinson, however, stated:

You have submitted polygraph tests, and examination by the expert indicates that these individuals in his opinion were truthful in passing that test. Now I do not wish to discount that test to the extent that it has no value, but I also wish to indicate to you that I know the polygraph tests are not foolproof, and that is not conclusive as far as this case is concerned. (Record at 8- 9).

Judge Wilkinson further states:

The court is convinced that these parents did not fulfill the responsibility of parents as far as care for the children physically or sexually. That either they knew or were putting their heads in the sand and would not face reality, because they would have certainly, could have known as to what was taking place as far as these children were concerned, and for the punishment that these children have received it is just unacceptable and unexplainable to this court. (Record at 9)

Obviously, Judge Wilkinsen based the sentences in the instant case, on an unacceptable foundation. A breach of parental duty such that parents should have known or been aware of circumstances surrounding their children is not a crime in Utah. Wilkinsen's criminal sentence in Howell is one based not on the standard of intent required by law for criminal conviction, but on negligence. Perhaps civil liability could attach, but certainly not criminal.

B. A FUNDAMENTAL ELEMENT OF DUE PROCESS IS THAT AN ACCUSED BE ADVISED OF THE CHARGES AGAINST HIM.

A defendant has a right to know the charges made against him. There is no principal of procedural due process which is more clearly established than that a defendant has the right to notice of a specific charge, and the right to be heard in a trial. These are among the constitutional rights of every accused in a criminal proceeding whether in state court or in federal court. This right is closely allied to the right of a defendant to confront his witnesses which right is also fundamental. In the California case of People v. Giles 70 Cal. App 2d., Sup. 872, 161 P2d 623(1945) The Appellate Court provided that there is no exception of fundamental right authorizing trial courts to listen out of court to witnesses whispering against defendants.

The Utah Supreme Court case of State v. Kelbach, 4661 P2d 297 (Utah, 1969), vacated 92 S. Ct. 2858 408 United States 935 (1972) found that the due process clause in the Fourteenth

Amendment does not require a judge to hold hearings and to give a convicted person an opportunity to participate prior to determination of the sentence to be imposed. This case can be distinguished from the previous authorities cited in this brief as well as from the facts of the Howell situation. The question of whether the judge used an appropriate and/or proper foundation for defendant's sentence was not at issue in the Kelbach case. The Kelbach case reflects the attitude that the failure of a trial court to ask the defendant represented by an attorney whether he has anything to say before sentence is imposed does not in itself constitute constitutional error. The due process clause does not require the judge to have hearings and give a convicted person an opportunity to participate at that point. The holding in the Kelbach case is narrow, and to enlarge it to encompass the circumstances of the Howell case would be unfair. On June 29, 1972 a petition for writ of certiorari to the U. S. Supreme Court occurred.

A defendant has the right to prove accusations against him false, and has the right as well to object to improper evidence. In order to facilitate this process, proper notice of the charges against a defendant and of the evidence proffered is of course required. This basic right for all practical purposes was denied the Howells. The foundation which was used to sentence petitioners was not obtained in open court or even in the presence of defendants. A defendant..."has a right that

everything appertaining to the case in the way of evidence affecting the case be open and above board and public". People v. Giles supra.

We do not contend that a judge need limit himself to that which appears in the record of a trial. The consideration of other facts could be of benefit to a defendant as well as to his detriment. However, sentencing a defendant upon facts which are highly speculative or for which the defendant had had no notice or opportunity to confront witnesses against him or offer evidence on his own behalf poses a serious constitutional due process problem.

C. APPELLATE REVIEW OF THE SENTENCING PROCESS IS PROPER WHERE IT APPEARS THAT THE COURT RELIED ON INACCURACIES IN REACHING THE SENTENCING DECISION.

In United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589(1972) the United States Supreme Court felt that an error in receiving evidence concerning a defective prior conviction led the trial court to impose a heavier prison sentence than it otherwise would have imposed. Because sentence founded at least in part upon misinformation carries with it problems of constitutional magnitude, the court found review of the case to be proper. Judge Wilkinson admitted the sentence he imposed in the Howell case was heavier because of prior evidence not heard at trial. Therefore, appellate review of the sentence is proper and called for.

The Supreme Court in Michigan expressed a similar opinion in People v. Sinclair 387 Mich. 91, 194 NW 2d 878, (1972). In Sinclair, the Michigan Supreme Court reversed a conviction for possession of marijuana and ordered that the defendant be discharged. Three individual justices expressed the view that an appellate court has the power to review a sentence for excessiveness. Representing this view, United States Supreme Court Justice Brennan reasoned that the courts constant reiteration that an appellate court is without authority to review a sentence had no basis in law or logic. Justice Brennan felt that it was unrealistic to conclude that the people intended to permit the legislature to give unbridled power to the trial court or that the Supreme Court was without power to support and observe the constitution. The court, he felt could review the actions of judges, even when such actions were literally within the discretion vested by the statute. (555 ALR 3rd 812 sec. 4).

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE MAXIMUM SENTENCE IN THESE CIRCUMSTANCES. IT IS GENERALLY DISPROPORTIONATE TO A FIRST OFFENDER IN A CHILD ABUSE CASE TO AWARD THE MAXIMUM SENTENCE OF 5 YEARS. EVEN WITHIN THE LIMITS OF THE STATUTE, THE SENTENCING SHOCKED THE CONSCIENCE AND AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT.

The landmark U.S. Supreme Court Case of Weems v. United States 217 U.S. 349, 30 S.C.T. 544 (1910) describes the Eighth Amendment to the United States Constitution as being progressive and not merely prohibiting the cruel and unusual punishment known

in 1787. The Eighth Amendment may acquire wider meaning as public opinions become enlightened by humane justice. The facts of the Weems case concern an accused public official of the United States Government of the Phillipine Island convicted of falsifying a public and official document. The opinion in Weem's states that it has no quarrel with the proposition that it is within the power of the legislature to determine what punishment may be addressed against those convicted of a crime.

But such a power is subject to constitutional limitations and it is this court's function to determine whether such limitations have been exceeded... The bare fact that a sentence is within a maximum prescribed by the legislature does not prevent it from violating the constitutional ban against cruel and unusual punishment. (Supra)

The state court in Barber v. Gladden 210 OR 55, 309 P2d 192, cert den 359 US 948, 79 CT. 732(1957) also stated that the fact that a sentence is within the maximum which the legislature had prescribed did not prevent it from violating the constitutional provision forbidding the imposition of cruel and unusual punishment. In the Barber case, however, the court held that it was not cruel and unusual punishment to sentence the defendant to imprisonment for an indeterminate period not to exceed 25 years for the offence of burglary with explosives which carried a maximum penalty of an indeterminate term not to exceed 40 years. The court said that because the defendant failed to offer any information other than the length of his sentence and

since the extreme danger to life and limb which may result from the use of explosives justified hard penalties for their unauthorized use, the sentence imposed upon the defendant was not cruel and unusual.

In the 1967 Wisconsin case the Wisconsin Supreme Court adopted a standard for determining whether a particular prison sentence constituted cruel and unusual punishment State v. Pratt 36 Wis 2d 312 153 NW 2d 18 (1967). The court stated that the sentence must be so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper. However, under the circumstances of the case the court held that an imposition of an indeterminate 18 month sentence for the offense of sexual intercourse with a child was in no sense cruel and unusual punishment under either federal or state constitutions. The court pointed out that under the applicable statute the defendant could have been sentenced to five years imprisonment and that he had a prior criminal record.

The above cases exemplify that the mere fact that a sentence is within the bounds prescribed by the statute does not prevent it from being excessive and violating the constitutional ban against cruel and unusual punishment. The circumstances surrounding each particular case must be examined. And in doing so, the court should be able to determine if a sentence is so

excessive and unusual as to be disproportionate to the offence committed and to shock the judgement of reasonable people concerning what is right and proper.

The Utah case of State v. Nance 20 Utah 2d 372, 438 P 2d 542(1968) uses the same standard used in State v. Pratt (Supra). The Utah Court found that a statutory penalty of imprisonment for not more than one year or in the state prison for not more than five years for the offense of issuing a check for insufficient funds was not so disproportionate to the offense that it exhibited an unrestrained exercise of power in clear disregard of the constitutional limitations against cruel and unusual punishment. Ray Nance was charged with issuing a check against insufficient funds for the sum of \$13.32. The defendant contended that the trial court erred in denying his motion to dismiss. He argued that Utah is the only state which makes the issuance of a check with insufficient funds a felony regardless of the amount of the check. He claimed that in most states insufficient fund checks of up to Twenty five dollars are misdemeanors and that a felony conviction for issuing an insufficient funds check regardless of amount constitutes a cruel and unusual punishment. The Utah court rejected defendant's argument stating that generally statutes fixing punishments are not unconstitutional and that sentences within the limits prescribed by such statutes generally would not be regarded as cruel and unusual punishment. The court also specified, interestingly

enough, that the constitutional prohibition against cruel and unusual punishment is not only directed against punishments which inflict torture but against all punishment which by their excessive length or severity are greatly disproportionate to the offenses charged. The Utah court did not however feel that imprisonment for writing a check for the amount of \$13.32 constituted cruel and unusual punishment.

In Nance, the court states that where it is claimed that the sentence within the limits of the statute constitutes cruel and unusual punishment, the Utah Supreme Court inquiry is limited to the question of whether the sentence imposed is so disproportionate to the offence committed as to shock the moral stance of all reasonable men as to what is right and proper under the circumstances. The Utah Court found concerning the statute in question that there was no basis of fact for it to interfere with the legitimate exercise of legislative power merely because the legislative body had deemed it inadvisable to classify the penalty for writing checks against insufficient funds on the basis of the monetary amount involved. The court felt that these particular circumstances, did not warrant a change of the sentence imposed. Therefore, the sentence imposed was not considered to be disproportionate to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.

However, in another state case Faulkner v. State, 445

p.2d 815(Alaska 1968), eight consecutive sentences totalling 36 years imprisonment imposed upon a defendant who in a single day passed eight bad checks totalling \$1,384.35 was held to be so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice and thus to amount to cruel and unusual punishment prohibited by the United States Constitution. While recognizing that ordinarily a sentence within statutory limits should not be disturbed, the court also pointed out that it was conceivable that in extraordinary circumstances a sentence, although within the limits of a statute may be so excessive in relationship to the crime committed that it represents cruel and unusual punishment. Noting that even the defendants history of criminal activity could not justify a sentence of such severity, the court concluded that the case should be remanded to the trial court with instructions to vacate the sentence imposed and to resentence the defendant.

In the case of Philip Howell and Shirley Howell, a maximum sentence for a first offense of child abuse is highly unusual. The circumstances surrounding the Howell case, combined with a faulty foundation upon which the sentence was based, can certainly qualify in shocking the moral sense of reasonable men as to what is right and proper.

B. THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION HAS BEEN MADE APPLICABLE TO THE STATE.

Until 1962, the United States Supreme Court consistently held that the Eighth Amendment's prohibition on cruel and unusual

punishment was only a limitation upon the federal government and was not applicable to the states through the due process clause of the Fourteenth Amendment. However, in Louisiana Xrel. Francis v. Resweber 329 U.S. 459, 67 S. CT. 374 reh. den. 330 U.S. 853 67, 67 S. CT. 673,(1947) the court, in ruling that the due process clause of the Fourteenth Amendment prohibited a state from executing the death sentence in a cruel manner, intimated but did not squarely hold, that the cruel punishment provision of the 8th amendment was applicable to the states through the due process law of the Fourteenth Amendment.

Later, in a separate opinion in NAACP v. Williams 359 U.S. 550 79 S. CT. 947 (1969), Mr. Justice Douglas expressed his view that the prohibition in the Eighth Amendment against cruel and unusual punishment was in turn made applicable to the States by the Fourteenth Amendment. Finally, the court held in Robinson v. California 370 U.S. 660, 82 S. CT. 1417 reh. den. 371 U.S. 905, 83 S. CT. 202 (1962), that a state statute which inflicts cruel and unusual punishment violates both the Eighth and Fourteenth Amendments of the United States Constitution and that the Eighth Amendments ban on cruel and unusual punishment is applicable to the states through the Fourteenth Amendment. In making the Constitution's Eighth Amendment applicable to the states, the United States Supreme Court relied on "principles of justice so rooted in the tradition and conscience of our people as to be ranked and fundamental, and thus, implicit in the concept of

ordered liberty or for those principles that were basic in our system of jurisprudence," (In Re Oliver 333 U.S. 257, 273 (1948)). Therefore the federal standard as to what constitutes cruel and unusual punishment is controlling in state cases.

CONCLUSION

The number of jurisdictions in which review of criminal sentences is available is steadily growing. (ABA Standards Relating to Appellate Review of Sentences, Sec. 1.2, Comment a) In some jurisdictions, the authority to review criminal sentences even where they are set within statutory limits has been specifically authorized by statute. (ABA standards relating to Appellate Review Sentences, appendix a.) In some jurisdictions the authority to review has been inferred from the general power of appellate courts to "reverse, affirm or modify" criminal judgments. (ABA Standards Relating to Appellate Review Sentences, Sec. 2.1, Comment a.) Therefore, it is proper and fair for the appellate court to review the maximum sentence for Philip Howell and Shirley Howell.

Trial court erred in the sentencing of Philip Howell and Shirley Howell. The sentence was based upon a faulty foundation of prior previously dropped charges instead of the issues which were heard and tried in court. This violates the United States Constitution's Fourteenth Amendment due process of law.

Because of the particular facts and circumstances surrounding the case, the excessive sentence is shocking to the moral sense of what is reasonable and right, making the unusually severe sentence cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

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