1984

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

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19397
PHILLIP HOWELL & SHIRLEY HOWELL,	:	
Defendants-Appellants.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE INDETERMINATE 0-5 YEAR SENTENCE IMPOSED BY THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, UTAH, THE HONORABLE HOMER F. WILKINSON, PRESIDING, FOR VIOLATION OF U.C.A. § 76-5-109(2)(b) (Supp. 1983) CHILD ABUSE.

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PE/S	Psychological Evaluation re Shirley Howell
SS	Social Services "Social Summary"

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STATEMENT OF THE NATURE OF THE CASE

Appellants were each charged with one count of reckless physical child abuse in violation of Utah Code Ann. § 76-5-109(2)(b)(Supp. 1983),[1] a third-degree felony, for recklessly striking and injuring their minor children.

DISPOSITION IN THE LOWER COURT

Each pled guilty to one count of child abuse and was sentenced by the Honorable Homer F. Wilkinson, of the Third Judicial District Court, Salt Lake County, to the indeterminate term of 0-5 years in the Utah State Prison, as provided by law.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of appellants' sentences as imposed by the trial judge.

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[1] Appellants were charged with violating the provisions of Utah Code Ann. § 76-5-109(2)(b). This statute was mistakenly cited as § 76-5-109(b) in the court record.

STATEMENT OF THE FACTS

Appellants were originally charged, in a ten-count information, with the first-, second-, and third-degree felonies of forcible sodomy, attempted rape, and forcible sexual abuse of three of their small children. See information filed May 16, 1983, amended May 19, 1983 (R. 13-20).

The information was based on the following conversations that Detective Scott had with one of appellants' daughters and with the physician who examined appellants' children after they were removed from appellants' home, as summarized in the information's probable cause statement:

> 1) Upon his conversation with Pamela, a 4-year-old girl who stated that her Daddy, Phillip Howell, put his snake in her "pussy" and in her sister's, Annie's "pussy," and in her brother Phillip, Jr.'s "bum." And that Annie is 5 years old and Phillip is 2 years old; and that "Mommy," Shirley Howell, held her arms and Phillip's arms while Daddy did the above.
>
> 2) Upon [his] conversation with Dr. Martin Palmer, of the Primary Children's Hospital, who stated that his examination of the three above-named children on November 2, 1982 and December 15, 1982, showed that both little girls had extremely enlarged vaginal vaults consistent with penile and digital manipulation, and attempted intercourse and that Phillip Howell had been the victim of anal intercourse.

(R. 16, 20).

Prior to the filing of this information, the Howells (appellants) and Mrs. Howell's brother (Jack) had submitted to polygraph examinations concerning their involvement in the alleged sexual abuse. Each of them denied any knowledge of or participation in such abuse (R. 22-28). After testing them, Sergeant Bartlett expressed his opinion, in a series of letters directed to Ms. Leslie Lewis of the Salt Lake County Attorney's Office (R. 22-28), that appellants had been truthful in their responses (R. 24, 26) and that Jack had been "deceptive to all relevant issue questions" (R. 28).

Still unconvinced of appellants' innocence in the matter, the prosecution filed the ten-count information against them (R. 13-20). Following their arrest, appellants entered into plea negotiations with the prosecution. As a result of these negotiations, a second-amended information was filed, reducing the charges against them to one count each of reckless physical child abuse, a third-degree felony in violation of Utah Code Ann. § 76-5-109(2)(b) (Supp. 1983). See second-amended information (R. 21) and appellants' guilty plea affidavits (R. 31, 34).

The terms of the agreement were clear. By signing the affidavits, appellants acknowledged their guilt of the child abuse charge and understood that "the punishment for the crime may be not more than but up to a Five Year prison term, $5,000 fine, or both" (R. 31, 34). They understood that sentencing recommendations, if any, were not binding upon the

sentencing court and that, despite the entry of their guilty plea, the court was nonetheless free to fine them or to sentence them to prison (R. 32, 35). Respondent, in turn, agreed to dismiss the ten counts of sexual abuse (R. 32, 35). Appellants accepted the plea bargain and entered pleas of guilty to the child abuse charge in open court (T1. 2-5).

The sole remaining issue below was the determination by the court of appropriate sentences to impose upon appellants. A number of informative documents were provided to Judge Wilkinson by the parties and by the Adult Probation and Parole Department to aid him in this determination, inter alia, polygraph reports sent to the prosecution (R. 22-28); appellants' guilty plea affidavits (R. 31-32, 34-35); a progress report sent to appellants' counsel by appellants' therapist (R. 37); an allocution memorandum submitted by appellants' counsel (R. 40-48); a letter to the court from the prosecution (SI); and presentence reports, which included police reports, medical and psychological reports, a "social summary" prepared by the Division of Family Services (DFS), and letters of recommendation in behalf of appellants (SI). Two sentencing hearings were held where each side was allowed to refute, explain, or supplement the information contained in those documents prior to final sentencing (T2, T3). From these sources, the following factual scenario emerges:

Mr. Howell's prior criminal record was minimal. He was arrested once as a "fugitive from justice" (SI: PSR/P),

which, according to him, involved a "bad checks" charge that was dimissed when he made proper restitution (id.). Mrs. Howell had no prior criminal record (SI: PSR/S).

Appellants' prior contact with the DFS, however, had been significant. During the two years immediately preceding the commencement of this case, apellants had been referred to the DFS on four different occasions for alleged acts of child abuse or neglect (SI: SS). The DFS was alerted a fifth time when a doctor, who was treating one of appellants' children, observed bruises characteristic of child abuse (SI: SS; see also appellants' allocution memorandum, R. 41). Subsequent medical observation and treatment confirmed these observations of the first doctor (SI: Letter from Dr. Olson to DFS).

During the investigation that followed, appellants first denied any abusive conduct toward their children (SI: SS). After the children were removed from the home, which occurred because of the injuries suffered by the children and the inconsistent explanations offered by appellants (id.), appellants admitted to having disciplined their children with a wooden spoon and an electric cord (id.). Clarifying these admissions in a later polygraph examination, Mrs. Howell confessed that she "on several occasions used a wooden kitchen spoon to hit the children with in order to make it sting," adding that she had also hit Phillip, Jr. (hereafter "Junior"), on the head with a quart jar filled with cooking grease "because he scared her while she was in the kitchen

(R. 25; see further admission in SI: PSR/S). Likewise, Mr. Howell admitted to having used "an electric cord to hit the girls with in the past" (R. 22), noting that he had done so "on a couple of occasions" (SI: PSR/P). The children's claim that Mr. Howell would "drown" them when he became angry was denied (SI: SS).

Subsequent to their removal from the Howell home, appellants' children was examined by Dr. Palmer of the Primary Children's Hospital for evidences of possible sexual abuse, which was suspected in light of the foster mother's observation that the girls frequently masturbated themselves (SI: WVCPD), her discovery of Junior's rectal prolapse (SI: Letter from Dr. Palmer dated 12/8/82), and the children's vocabulary. For example, foster mother Darla Secassir overheard Shirley (Annie) threaten in an argument she was having with her sister, "I'm going to pull your pants down and suck your pussy" (SI: WVCPD). When questioned about her remark, Annie told Darla, "Daddy puts his finger in Pussy's mouth" (id.). The two girls were also overheard saying, "[M]y daddy takes downs my pants and kisses my pussy" (SI: Letter from Dr. Palmer dated 11/3/82).

Comments were also made concerning Mr. Howell's genitals. For example, when Annie was shown a picture of her family, her only response was to point at Mr. Howell's (clothed) genital area and say "my daddy has snake" (id.). Junior likewise spoke of daddy's "snake" when he was referring to Mr. Howell's genitals (SI: Letter from Dr. Palmer dated

12/8/82). He and the girls both told Dr. Palmer that "daddy" had put his "snake" in Junior's "bum" (id.). The girls added that he had also touched their genital areas with his "snake" and that when he had done so, it "became larger" (SI: Letter from Dr. Palmer dated 11/3/82).

The suspicions of sexual abuse were confirmed by Dr. Palmer's diagnoses. As appellants admit in their allocution memorandum, "overwhelming" evidence of prolonged and severe sexual abuse was found--including the girls' enlarged vaginal vaults and Junior's protruded anus (R. 16, 27), damage severe enough to warrant possible reparative surgery (R. 23). See extensive diagnoses in Dr. Palmer's letters to the DFS (SI).

Despite Pamela's testimony that "mommy" and "daddy" had sexually abused her and her siblings, appellants denied any such abuse of their children (R. 22, 41, 44-45; T3. 3). At first, they indicated that their daughter must have been referring to Jack (who had lived in appellants' home for a 1 1/2-year-period sometime before the children's removal) and his fiancee (who had lived with him in the Howell home during part of that period)(R. 22-23, 25-27, 42).[2]

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[2] Appellants later retracted their allegation and maintained that the sexual abuse may have been committed by someone outside of the Howell home, i.e., a neighbor (T3. 9-12; SI: Letter to court by prosecution.

In their discussions with the polygrapher, appellants alleged that Jack often babysat their children while he was living with them. They also claimed that he shared a room with the children and slept in the same bed as Junior (R. 22). In addition, they "recalled" suspicious activities that occurred while he was living with them (1) that whenever the children were in the bathroom, Jack would find some excuse to enter the room while they were in there; (2) that Mr. Howell had caught Jack masturbating in the Howell home on at least three occasions; (3) that Mrs. Howell had often found large stains (which she now believes were semen deposits) on the bed in which Jack and Junior slept; (4) that Annie had a serious masturbation problem; (5) that appellants, after tucking their children into bed, had occasionally found them naked later on in the evening; and (6) that when Jack moved out of their home, appellants had found medical books depicting the female anatomy, pornographic reading materials, and "sex" devices under his bed (R. 22-23, 25-26). During a previous psychological evaluation, Mrs. Howell had told the psychologist that she "believed her younger brother . . . had undoubtedly molested [the children] because while he was in the home, she discovered sexually oriented materials among his possessions" (SI: PE/S), admitting that she had "never confronted him about these things and [that] he remained in the children's bedroom for some time after her discoveries" (id.).

During his polygraph examination, Jack denied most of appellants' allegations and claimed that he had been unaware of any sexual abuse being perpetrated on the children (R. 27-28). He did admit to having shared a bed with Junior on two occasions and to having masturbated in bed (without being caught) a few times (R. 27).

As previously noted, charges were brought against appellants for the sexual abuse of their children. As a result of a subsequent plea bargain, the charges were reduced to one count each of reckless child abuse. Notably, when they signed their guilty plea affidavits, appellants conceded that Judge Wilkinson had the authority and the discretion to impose upon them the maximum penalty provided by law (R. 31, 34). Later, in appellants' allocution memorandum,[3] appellants' counsel admitted that it did

> not wish to suggest to the Court that the Court lacks the authority to impose even the maximum sentence in the Howell case. Sentencing, certainly, is a matter which is left to the sole discretion of the sentencing judge and each case to come before the Court merits individual consideration with the result that some defendants are properly given much harsher sentences than other defendants.

[3] Prior to the sentencing hearings, appellants' counsel prepared and submitted a memorandum of allocution to the court for consideration, wherein counsel purported to give a brief "history" of the case (R. 40-45); argued that this was a physical, not a sexual, abuse case (R. 45, 47-48); urged the court to not consider the sexual abuse matters (R. 47-48) which were summarized in the memorandum (R. 40-45); and attempted to persuade the judge to be lenient in his sentencing of appellants (R. 45-48).

(R. 46). And finally, at the second sentencing hearing, appellants conceded a third time that their sentences were a matter of judicial discretion, when their counsel remarked, "We realize Your Honor has latitude in that sentencing, and we would submit it on that basis" (T3. 6).

At the conclusion of the guilty plea hearing, appellants' counsel asked that presentence reports concerning appellants be prepared and submitted to Judge Wilkinson for consideration (T1. 5), which request was granted. After compiling and evaluating the data concerning this case, the Adult Probation and Parole Department recommended that appellants be imprisoned for the term prescribed by law. It made this recommendation despite the fact that, according to the "suggested disposition matrix" contained in the report, appellants would normally have qualified for a 6 to 9 month term in jail or on probation (SI: PSR/P, PSR/S; T2. 15-17). This recommendation echoed those of the prosecution (SI: Letter from prosecution to court, PSR/P, PSR/S), the DFS (SI: SS) and the evaluating psychologists (SI: PE/P, PE/S). Each of these persons or institutions characterized appellants, in the words of appellants' counsel, as threats to their children, as practically non-rehabilitative, and as meriting a prison sentence (T2. 7).

At the first sentencing hearing, appellants' counsel took issue with these findings and recommendations, pointing out that the letter he had received from David Brewer,

appellants' therapist (R. 37), indicated "that real progress has been made with the Howells in the area of physical abuse, and . . . feels that it . . . will be continued" (T2. 7),[4] and that appellants had been most cooperative with the authorities in this matter (T2. 8). Counsel argued that appellants had been physically abused as children and had learned improper methods of discipline from their own parents, adding that their progress in the therapy and parenting class sessions indicated that appellants were on their way to being rehabilitated (T2. 7-9). Although conceding that appellants' children had been sexually abused (T2. 6), appellants' counsel argued that appellants were not involved in that abuse and recommended that they be placed on probation (T2. 4, 11, 14). Counsel then suggested that the judge not pass sentence until after he had received the polygraph reports prepared by Sgt. Bartlett, indicating that he "would certainly find those enlightening . . ." (T2. 16). Counsel further suggested that the sentence proceedings be continued so that the judge could have the opportunity to hear personally from Ms. Lewis of the prosecution (who was out of town), Sgt. Bartlett, Mr. Brewer, and those persons who had prepared the presentence reports

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[4] The letter to which counsel refers does say that Mr. Brewer is "pleased with the recent efforts the Howell's [sic] have made in therapy" (R. 37). It also says that "[o]verall their progess has been slow. During the past year they have been resistive, defensive and reluctant to show deep emotion in therapy" (id.).

(T2. 18-19), if he desired.

Judge Wilkinson responded that he did not want appellants' counsel to feel that his clients were "being rushed through something" and indicated that he would not be opposed to giving appellants "additional time" to clarify the information already before the court and to secure additional mitigating information (T2. 19). With the exception of Ms. Lewis, however, the judge did not feel that it would be helpful for him to hear personally from the persons suggested by appellants' counsel. He did say that he would like those who had prepared the presentence reports to review them for errors and to submit new reports to him prior to sentencing if the information contained in the reports was incorrect (T2. 19-20). He also indicated that he did not feel that the polygraph reports "would make that much difference" (T2. 17) and took issue with some of Mr. Brewer's written statements regarding appellants' cooperativeness during this case, noting that "every report in this presentence report says that as they went in for investigation they were very hostile. They were not cooperative" (id.). The judge then continued the proceeding.[5]

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[5] The court indicated that, inasmuch as Ms. Lewis' presence was not necessary at the second sentencing hearing, it would proceed with the hearing whether or not she was in attendance (T2. 20). As it turned out, Ms. Lewis was away on vaction and did not attend (T3. 6).

At the second hearing, appellants' counsel reiterated appellants' position: that they did physically abuse the children, but that they did not sexually abuse them (T3. 2-3). Observing that the children were confused as to who their father was, counsel--despite the fact that appellants no longer contended that Jack was the person responsible for the sexual abuse (see n.2, supra)--implicated Jack as the perpetrator of the abuse, asserting that he had been a father-figure in the Howell home and that he had been referred to as "father" by the children (T2. 14; T3. 4-5), due to his prolonged stay with appellants and to Mr. Howell's frequent work-related absence from the home (T3. 4-5; R. 23).[6]

At the close of the hearing, and just prior to passing sentence, Judge Wilkinson expressed concern over the sexual aspects of appellants' case (T3. 8). Explaining that he did not want to completely discount the results of the polygraph examinations, he pointed out that he nonetheless did not regard them as foolproof or conclusive in this case (T3. 8).

Observing that children of tender years had been seriously abused sexually--to the point of likely requiring

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[6] Even if this allegation had been verified, there was nothing in the record to suggest that Jack's fiancee had been regarded as a mother-figure in the home. But Pamela told the police that "mommy" and "daddy" had committed the sexual abuse (R. 16, 20).

surgery--the judge expressed doubt as to appellants' claim that they neither knew of nor participated in the sexual abuse of their children (T3. 8-9, 12-13). Whether or not appellants had in fact sexually assaulted their children, he was convinced that "these parents did not fulfill the responsibility of parents as far as care for the children physically or sexually" (T3. 13). For example, he was surprised that parents would allow an uncle to sleep in the same bedroom, and sometimes in the same bed, as their small children (T3. 9, 12). He was also disturbed over the manner in which they dealt with their children's sexually-abnormal behavior (T3. 9-10).

Of particular concern was appellants' claim that they were unaware of the sexual abuse when the damage resulting therefrom was "noticeable visibly without any medical training to be able to detect that" (T3. 9, 12-13). Responding to their claim, he replied:

> I just can't understand how parents of the children can allow that to go on. The children would have to be bathed, hopefully every day, and the mother would be able to detect things of that sort and know what is going on.
> I don't know if they did this, but I certainly know they had to care for those children, and I am not convinced that they didn't know what was taking place.

(T3. 9). Later in the proceeding, he added that "either they knew or were putting their heads in the sand and would not

face reality . . ." (T3. 13).[7]

In view of the tragic nature of this case, Judge Wilkinson indicated that he was greatly concerned that "a ten or twelve page [sic] Information . . . [was] pled down to one count of child abuse" (T3. 7). He expressed the belief that the information, as amended, covered both the physical and the sexual abuse and pointed out that he would consider both aspects of the case (T3. 12).

He then commented that this case had "caused a great deal of emotion" in the community, noting that he had received a letter (SI: Citizen Letter re plea bargain) and various phone calls in relation to it. Emphasizing that he did not want to "base any sentence on any public opinion or public feelings or emotions that might be running if it is not justified," the judge reported that he had tried to take "a very unemotional approach to it" by reading over the case material twice and carefully "[c]onsidering all the facts" (T3. 13-14).

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[7] Statements by appellants counsel, in their allocution memorandum and during the latter sentencing hearing, confirm the judge's assessment of appellants as parents. In the memorandum, counsel depicted their manner of discipline as improper, inappropriate, and shocking (R. 44). At the hearing, counsel observed:

> Well certainly, Your Honor, there is no question that there was sexual abuse involved in this case. Certainly the fact that this occurred in the Howell home where the Howells were parents is indeed serious and shows certainly a lack of normal parental response.

(T3. 10). Counsel admitted this was a "tragic case" (T3. 11).

The judge then sentenced appellants to an indeterminate prison term of zero to five years, as provided by law; he did not, however, impose a fine (R. 49-50, 58, 61; T3. 14). As indicated in the judgment and commitment affidavit, imprisonment (rather than probation or time in jail) was ordered because of the "aggravating circumstances that remained unexplained by the defendants" (R. 59, 62). From their sentences of imprisonment, appellants bring this appeal.

ARGUMENT

POINT I

THE SENTENCING JUDGE'S CONSIDERATION OF INFORMATION CONCERNING THE SEXUAL ABUSE OF APPELLANTS' CHILDREN WAS PROPER AND DID NOT DENY APPELLANTS DUE PROCESS OF LAW, WHERE THEY WERE ADVISED OF THE INFORMATION AND ACCORDED THE OPPORTUNITY TO REFUTE IT.

The central issue in this case is whether the sentencing judge, after accepting a plea bargaining arrangement (whereby certain charges alleging sexual abuse of appellants' children were dropped in return for appellants' pleas of guilty to one count each of reckless child abuse), may nevertheless consider information regarding such sexual abuse in determining appropriate sentences for appellants. To do so, claim appellants, constitutes an abuse of the sentencing court's discretion and a denial of due process of

law.[8]

Respondent submits that unless the terms of the plea bargain somehow precluded the sentencing court's consideration of the above information (a condition which would be legally suspect), such that its consideration would violate the quid pro quo of the plea agreement and render void appellants' guilty pleas, it was wholly appropriate for the sentencing court to consider any matters relevant to a proper sentencing decision--matters relating not only to the nature and circumstances of the offense to which appellants pled guilty, but also to appellants' backgrounds, characters, etc. See State v. Miller, 120 Ariz. 224, 228, 585 P.2d 244, 248 (1978).

It is well-settled that a sentencing judge may consider evidence that is extraneous to the precise allegations or offenses set forth in the charging document. See Williams v. New York 337 U.S. 241, 246-51, rehearing denied, 337 U.S. 961 (1949) (information regarding defendant's life and characteristics is relevant in determining appropriate sentence); Williams v. Oklahoma, 358 U.S. 576, 585, rehearing denied, 359 U.S. 956 (1959) (sentencing judge is authorized, if not required, to consider all aggravating and mitigating circumstances pertaining to the

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[8] Notably, they do not challenge the validity of their convictions. Nor do they claim that the terms of their plea bargains were not fulfilled or that their guilty pleas should be set aside. They merely seek a review of their sentences and are presumably asking for a resentencing hearing.

crime committed). Such evidence could include past criminal activity, whether or not it resulted in an actual conviction.[9] See Annot., 96 A.L.R.2d 768, 787-93 (1964 & Supp. 1983), and cases cited therein. Recently, this court indicated that a judge may base his sentencing decision on several sources of information and that the decision ought not to be made "in total ignorance of the defendant's background," State v. Carson, Utah, 597 P.2d 862, 864 (1979), observing that "[a] sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." State v. McClendon, Utah, 611 P.2d 728, 729 (1980)(presentence report containing

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[9] The majority of courts which have discussed the propriety of considering prior criminal conduct not resulting in a conviction, in determining an appropriate sentence, have upheld the practice. See, e.g., United States v. Papajohn, 701 F.2d 760, 763 (8th Cir. 1983) (court may properly consider criminal activity for which defendant has not been prosecuted, as well as uncorroborated hearsay evidence that defendant has had an opportunity to explain or rebut); United States v. Williams, 668 F.2d 1064, 1072 (9th Cir. 1981) (information regarding criminal conduct not resulting in a conviction may be considered at sentencing); United States v. Benton, 637 F.2d 1052, 1060, rehearing denied, 645 F.2d 72 (11th Cir. 1981) (sentencing judge may consider evidence of other crimes not resulting in convictions when imposing sentence); United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982) (sentencing judge may take into account facts introduced at trial relating to other charges, even ones for which defendant has been acquitted); State v. Ethington, 121 Ariz. 572, 574, 592 P.2d 768, 770 (1979) (where all charges arose out of a single series of events, trial court could properly consider charges that were dismissed pursuant to plea agreement in sentencing). Contra Tommy v. State, 551 P.2d 179 n.1 (Alaska 1976); In re Lewallen, 23 Cal. 3d 346, 590 P.2d 383, 388, 152 Cal. Rptr. 528, 533 n.3 (1979).

record of defendant's juvenile delinquency was properly considered by judge in sentencing phase of trial).

In United States v. Tucker, 404 U.S. 443, 446 (1972), the Court observed that a "judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to kind of information he may consider, or the source from which it may come," when determining an appropriate sentence to impose. Utah law states:

> Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. . . . The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

Utah Code Ann. § 77-35-22(a)(1982)(emphasis added). This information may be presented in open court:

> At the time of sentence, the court shall hear any testimony or information the defendant or prosecuting attorney may wish to present concerning the appropriate sentence. Such testimony or information shall be presented in open court on record and in the presence of the defendant.

Utah Code Ann. § 77-18-1(2) (1982 & Supp. 1983). Or, so long as certain safeguards are observed, it may be submitted to the judge prior to the sentencing hearing (in the form of presentence reports, allocution memoranda, etc.). State v. Lipsky, Utah, 608 P.2d 1241, 1244, 1248 (1980) (statutory language requiring that information relevant to sentencing be

presented in open court did not apply to presentence reports, so long as the information contained in such reports was made available to the defendant prior to sentencing).[10] The "age-old practice" of obtaining out-of-court information is therefore left open to the sentencing judges to "guide their judgment to a more enlightened and just sentence." Williams v. New York, 337 U.S. 241, 246-47, rehearing denied, 337 U.S. 961 (1949). In fact, this Court has specifically pointed out that "[w]hen a judge undertakes to impose a sentence, he should be familiar with the pre-sentence report and whatever diagnostic evaluations have been conducted," State v. Carson, Utah, 597 P.2d 862, 865 (1979), thereby recognizing the importance of such out-of-court information.

Such information may only appropriately be considered at the sentencing phase of the trial. During the guilt phase, the court must observe strict evidentiary standards, considering only that information which pertains to the guilt or innocence of the defendant with regards to the particular offense of which he is charged. Once the guilt has been established, either by conviction or a plea of guilty,

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[10] This court, in Lipsky, was interpreting the "open court" requirement contained in former Utah Code Ann. § 77-35-13, which was repealed by the legislature's enactment of the new Utah Code of Criminal Procedure, which became effective July 1, 1980. Although there is no identical statute in the new Code, §§ 77-18-1(2) and 77-35-22(a) have been recognized by this Court as covering the same subject and as deserving of a similar interpretation. State v. Anderson, Utah, 632 P.2d 877, 878 n.1 (1981).

the court may properly consider all relevant data concerning the defendant so that an appropriate sentence may be imposed. See Williams v. New York, 337 U.S. 241, 246-47, rehearing denied, 337 U.S. 961 (1949); State v. McClendon, Utah, 611 P.2d 728, 729 (1980).

Furthermore, it is appropriately considered only when it is not shown to be " misinformation of a constitutional magnitude," United States v. Tucker, 404 U.S. 443, 447 (1972), which has been defined by the United States Supreme Court as (1) information regarding prior convictions which were constitutionally invalid, or (2) assumptions concerning appellants' criminal records which are "materially untrue." Id., Townsend v. Burke, 334 U.S. 736, 740-41 (1948).

The standard in Utah for the consideration of such information by the sentencing judge was set out in State v. Harris:

> [T]he basic protections afforded by our law to persons accused of crime do not exist in the same manner after he has been convicted. Nevertheless, he should be treated with the highest degree of fairness that can be achieved consistent with the proper and efficient administration of justice. This requires that caution be exercised to see that false or misleading information is not used to influence the court without the defendant's knowledge and without providing him an opportunity to refute or explain.

Utah, 585 P.2d 450 (1978)(emphasis added).

In accordance with these principles of law, Judge Wilkinson properly considered information regarding

appellants' activities, background, and characters in determining appropriate sentences to impose upon them. That visibly-noticeable sexual abuse of appellants' children had occurred during a prolonged period of time, while the children were in appellants' immediate care and custody, was relevant sentencing information (regardless of who the perpetrators actually were)--especially given the fact that the injuries suffered by the children were so severe that reparative surgery would likely be required (T3. 8-13). As observed by the Montana Supreme Court:

> If there is no clear consensus on these factors [which the sentencing judge "may consider in exercising a frequently enormous range of discretion"], it is certainly clear that they include, as aggravating circumstances, conduct that is not literally 'criminal,' or at least has not been duly adjudged criminal in the case in which sentence is being imposed . . . . The effort to appraise "character" is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet it is in our existing scheme of sentencing one clue to the rational exercise of discretion . . . . Impressions about the individual being sentenced . . . are, for better or worse, central factors to be appraised under our theory of "individualized" sentencing.

Matter of Jones, 176 Mont. 412, 418, 578 P.2d 1150, 1153 (1978), quoting passages from United States v. Hendrix, 505 F.2d 1233, 1235, 1236 (2d Cir.), cert. denied, 423 U.S. 897 (1975). So long as appellants were made aware of this sentencing information and were accorded the opportunity to challenge its accuracy, to refute it, and to offer evidence

and arguments in their own behalf, there would be no abuse of discretion in the court's considering the evidence regarding the sexual abuse, nor would appellants' due process rights be violated.[11] State v. Harris, Utah, 585 P.2d 450, 452 (1978). The facts of this case clearly show that appellants were accorded such an opportunity.

After appellants each pled guilty to violating the provisions of Utah Code Ann. § 76-5-109(2)(b)(Supp. 1983), a third-degree felony, their counsel asked that a presentence

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[11] Appellants contend that the judge's consideration of the sexual abuse matters and his comments regarding such matters at the sentencing hearing indicate that their sentences were based upon "a charge that was never tried" and that their due process rights were therefore violated. They cite, as support for their position, Cole v. Arkansas, 333 U.S. 196 (1948). That case, however, did not deal with the question of whether outside information, or information regarding past "bad" acts not resulting in a conviction, could be considered during the sentencing phase of a trial. That case dealt with an invalid conviction. The defendant was convicted for violating one section of an Arkansas statute. Id. at 199. On appeal, the Arkansas Supreme Court upheld his conviction because there was evidence that the defendant had violated another section of the same statute. Id. at 200. Overturning the conviction, the United States Supreme Court indicated that "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." Id. at 201. See also Jackson v. Virginia, 443 U.S. 307, rehearing denied, 444 U.S. 890 (1979); Gregory v. City of Chicago, 394 U.S. 111, 112 (1969). Appellants, however, were not convicted on the basis of the sexual-abuse information. Nor does respondent contend that appellants' convictions should be upheld because of the evidence relating to the sexual abuse. Appellants' convictions are not in issue. They convicted themselves with their guilty pleas. The only matter in issue here is whether or not the sentencing determination could be influenced by evidence relating to the charges which were dismissed. Cole and its progeny do not address this issue.

report be prepared regarding each of the appellants (Tl. 5). This request was granted and the reports were prepared. A copy was then made available to appellants' counsel (T2. 2, 7). These reports contained information regarding both the physical and the sexual abuse of appellants' children (SI: PSR/P, PSR/S, and attached materials). Judge Wilkinson allowed appellants various opportunities to refute or explain the evidence contained in these reports. One such opportunity was the allocution memorandum submitted to the court by appellants' counsel (R. 40-48) (see n.3, supra, regarding arguments made in memorandum). Appellants were also given the opportunity, personally and through counsel, to address the physical and sexual issues in court on two occasions prior to sentencing (T2. 2-11; T3. 2-12). In fact, even though the judge was persuaded that a prison sentence was in order at the conclusion of the August 11 hearing, he allowed appellants another opportunity to change his mind at a special hearing held the subsequent week (T2. 15-17, 19; T3).

Appellants understandably argued that the results of their own polygraph examinations proved that they were innocent and unaware of any sexual misconduct towards their children, and that the judge therefore erred in considering evidence relating to such misconduct when determining their sentences. The fallacy in their argument is that polygraph results do not prove someone innocent; they merely aid in casting doubt on one's guilt. Commonwealth v. Vitello, 376 Mass. 426, 450-53, 381 N.E.2d 582, 596-99 (1978). The test

results indicated that Jack (Mrs. Howell's brother) was deceptive in his responses and was likely the perpetrator of the sexual abuse (R. 28). Indeed, this was appellants' claim when the authorities were first made aware of the children's sexual abuse (R. 22-23, 25-27, 42). However, prior to and during the sentencing hearings, appellants (who have since retracted that allegation) maintained that the abuse may have been committed by someone else, i.e., a neighbor (T3. 9-12; SI: Letter from prosecution to court). According to appellants, then, polygraph results are conclusive with regards to some people but inconclusive with regards to others. In view of the inconsistency of appellants' position, as well as the statements made by judges in other jurisdictions as to the inconclusive nature of polygraph results [see State v. Miller, 120 Ariz. 224, 227-28, 585 P.2d 244, 247-48 (1978)], it was not error nor an abuse of discretion for Judge Wilkinson to recognize that such results were not conclusive in appellants' case and to observe that appellants may have either committed the sexual abuse of their children or at least knew that it was being committed (T3. 8).

As mentioned, appellants were given various opportunities to challenge the accuracy of the sexual-abuse information. Such information was never shown to be "materially false," United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 740-41 (1948); nor did it deal with prior convictions of appellants which were constitutionally invalid, United States v. Tucker, 404

U.S. 443, 447 (1972)--such that its consideration, under federal law, might constitute a violation of due process. Even if the information had been "false or misleading," State v. Harris, Utah, 585 P.2d 450, 452 (1978), it could still be considered by the sentencing judge in Utah so long as appellants were aware that he was considering the evidence and they were given an opportunity to "refute or explain" it. Id. The facts of this case clearly show that appellants were aware that the sexual-abuse information was being considered: they had received a copy of their presentence reports (T2. 2, 7) and were told by the judge that he was going to rely on the information contained in them (T2. 20). And, as mentioned, appellants were given at least three opportunities to challenge the accuracy of those reports and to satisfy the judge's concerns regarding the sexual-abuse matters (i.e., in their allocution memorandum and during the two sentencing hearings).

At the hearings, respondent relied heavily upon medical evidence and the accounts of appellants' children regarding the sexual abuse (T2. 11), whereas appellants relied on the polygraph test results (T2. 4-5). After weighing this evidence, Judge Wilkinson, inter alia, expressed serious doubt that appellants were unaware of the sexual abuse of their children (T3. 9). Whether or not appellants had in fact perpetrated the abuse was not the issue: it was that "these parents did not fulfill the responsibility of parents as far as care for the children physically or sexually" (T3. 13).

Here were parents who had permitted an uncle to sleep in the same bedroom, and sometimes the same bed, as their small children (T3. 9, 12)--even after at least one of them had discovered sexually-oriented materials among his possessions (SI: PE/S) and after both of them had observed his peculiar behavior while he was living in their home (entering the bathroom with the children, masturbating in the house, etc.) (R. 22-23, 25-26); and who had failed, inter alia, to discover physical damage resulting from the sexual abuse that was "noticeable visibly without any medical training to be able to detect that" (T3. 9, 12-13). They were parents who "either knew [that the abuse was occurring] or were putting their heads in the sand and would not face reality . . ." (T3. 13), as their children continued to suffer.

Certainly consideration of these sexual-abuse-related matters was appropriate when a full picture of appellants' relationship with and treatment of their children could help the court determine sentences which were appropriate for each of them, particularly when the information pertaining to these matters comprised only a part of the information considered and weighed by Judge Wilkinson. Other information, such as appellants' prior history with the DFS (four prior referrals); the information in the medical reports depicting the children's numerous bruises and neglected throat conditions; and the testimony of the children concerning their parents' disciplinary techniques (of striking them with an electric cord and wooden spoon, and of "drowning"

them), also figured in during the weighing process (see SI)--information which, with one exception (the "drowning" allegation), appellants do not dispute.

Lastly, whatever effect the judge's consideration of the sexual-abuse matters had on his sentencing decision, if any, it did not enhance the penalty above that expressly provided by law. Utah Code Ann. § 76-3-203(3) (1978 & Supp. 1983) authorizes the judge to sentence a person who has committed a third-degree felony to an indeterminate zero-to-five year prison term, which appellants received. Also, Utah Code Ann. § 76-3-301(2)(1978) authorizes the imposition of a fine, in an amount of up to $5000, in addition to the prison term. Appellants, however, were not even fined in this case. Certainly, such a sentence is not indicative of an abuse of discretion by the sentencing court. Appellants' punishment was not even the maximum provided for reckless child abuse.

POINT II

APPELLANTS' OBJECTION THAT THE SENTENCING JUDGE ERRED IN LISTENING TO AND BEING INFLUENCED BY ACCUSATIONS MADE AGAINST THEM OUTSIDE OF THE COURTROOM WAS NEITHER PROPERLY RESERVED FOR APPEAL, SUPPORTED BY THE RECORD, NOR SHOWN TO BE SUBSTANTIALLY PREJUDICIAL TO APPELLANTS' RIGHTS AT SENTENCING.

Appellants cite the following excerpt from the record as support for their claim that Judge Wilkinson heard and considered out-of-court accusations in determining their sentences:

> 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.

(T3. 13). Certainly, the above quote is subject to various interpretations. In any event, counsel for appellants never objected to the judge's possible consideration of any accusations that might have emerged from the phone conversations or letter. The issue now surfaces for the first time on appeal, thus preventing Judge Wilkinson from elaborating on or clarifying his intent behind the comment. This court held in State v. Steggell:

> In the absence of exceptional circumstances, this Court has long refused to review matters raised for the first time on appeal where no timely and proper objection was made in the trial court.

Utah, 660 P.2d 252, 254 (1983)(defendant had failed to make any objection to the court's comments at the time they were made or during the course of the trial, and then raised the issue for the first time on appeal). See Utah Code Ann. § 77-35-12(d) (1982); State v. John, Utah, 667 P.2d 32, 33 (1983); Jaramillo v. Turner, 24 Utah 2d 19, 21, 465 P.2d 343, 344 (1970); State v. Starlight Club, 17 Utah 2d 174, 176, 406 P.2d 912, 913, (1965). Appellants claim no exceptional circumstances in their brief to warrant appellate consideration of an issue which was not timely objected to and was therefore waived.

Even if appellants had preserved the issue for appeal, the record does not support their claim that the judge listened to and was influenced by the "accusations." Judge Wilkinson frankly and honestly alerted appellants to the existence of the letter and phone calls he had received (T3. 13). Recognizing their existence, however, is hardly the equivalent of saying that he "listened to and was influenced by" them. Omitted from appellants' citation from the record is the sentence which immediately follows those cited by appellants:

> Considering all of the facts, and I have read the material over twice now, all the materials going back and forth over it, and it has caused me a great deal of concern because I certainly do not want to base any sentence on any public opinion or public feeling or emotions that might be running if it is not justified.

(T3. 13-14). This statement hardly supports appellants' contention that Judge Wilkinson, like the judge condemned in the California capital-offense case of People v. Giles, 70 Cal. App. 2d 872, 161 P.2d 623 (1945), relied on "information in the sentencing process which has not been obtained in open court or in the presence of defendant or his council [sic]" (appellants' brief at 11). Judge Wilkinson never intimated that he had relied upon information brought out in the phone calls or letter.

Even if he had done so, the "[a]dministration of justice and purposes of sentencing are best served when the sentencing judge states openly the factors he considers in imposing judgment." United States v. Cruz, 523 F.2d 473, 476 (9th Cir. 1975), cert. denied, 423 U.S. 1060 (1976). Furthermore, this court recognized as early as 1917 the difficulty inherent in reviewing factors which may or may not influence the sentencing court, and may or may not be vocally expressed:

> Suppose the judge, with the matters referred to by him in mind, but without giving them expression, had merely imposed sentence upon the defendant. The effect, so far as he is concerned, would have been precisely the same as it now is; the only difference being that the judge would have remained silent with respect to the matters he had in mind. It would have been the same judge with the same mental attitude or condition that would have passed sentence. This merely shows that the mental attitude of the judge, whether expressed or not, in passing judgment, cannot be made a matter for review by this court.

State v. Martin, 49 Utah 346, 352, 164 P.500, 503 (1917), passage cited with approval in United States v. Sacher, 182 F.2d 416, 455-56 (2d Cir. 1950) (concurring opinion). The court went on to indicate that since the judge's remarks were made at the sentencing phase of the trial and that the sentence imposed was within the limits authorized by statute, the court was "powerless" to declare the sentence "illegal, or even erroneous." Id. It then concluded:

> The matter presented here does not even constitute such an irregularity as would authorize this court to set the sentence aside and remand the defendant to the trial court for resentence . . . .

No prejudicial error was committed. Id.

It is clear the Judge Wilkinson's remarks concerning the letter and telephone calls he had received were not such that they would constitute prejudicial error to a substantial right of appellants, id., i.e., error that is such that "it is reasonably probable that there would have been a result more favorable to the appellant in the absence of the error." State v. Kelbach, 23 Utah 2d 231, 238, 461 P.2d 297, 302 (1969). Here, the judge never specifically stated that he had been influenced by the accusations which emerged from the phone conversations and letter. Furthermore, the judge stated that he had read over the case material twice to make sure that he was making a proper sentencing decision, uninfluenced by undeserved public opinion. Inasmuch as that material

included much information of an aggravating nature [e.g., information pertaining to the physical and sexual abuse of appellants' children, appellants' prior history with the DFS, appellants' disturbed mental and emotional conditions (see SI: PE/P, PE/S), etc.], it is unlikely that much weight was given to the contents of the letter or phone conversations in Judge Wilkinson's determination of appellants' sentences or that the contents had much of an effect on the outcome of that determination. In addition, the judge's remarks concerning this "outside information" were made at the sentencing hearing, after appellants had pled guilty to the child abuse charges, and the sentences imposed were within the limits authorized by law. Therefore, even if appellants had not waived consideration of this issue on appeal, it would be clear, under Martin, that no prejudicial error was committed. See Utah Code Ann. § 77-35-30(a)(1982).

POINT III

APPELLANTS' STATUTORILY AUTHORIZED INDETERMINATE PRISON SENTENCES OF 0-5 YEARS FOR THEIR CRIMES OF CHILD ABUSE DO NO CONSTITUTE CRUEL, UNUSUAL, OR DISPROPORTIONATE PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants were sentenced to indeterminate prison terms of 0-5 years for the offense of child abuse. They do not dispute that their sentences are within the range of punishment established by the Legislature for that offense. Indeed, they could have received an additional fine of up to $5000, but did not. Nor do they challenge the penalty prescribed in the child abuse statute as violative of the cruel and unusual punishment provision of the Eighth Amendment to the United States Constitution. Rather, they claim that their sentencing judge's failure to place them on probation and his imposition of the indeterminate prison term provided by law is unconstitutionally disproportionate punishment for the offense under the Eighth Amendment, given their lack of prior criminal record, the claimed faulty foundation for the sentence, and the fact that this was their first conviction for child abuse. They assert (without any substantiation, either in the appellate record or in their brief) that a prison sentence for a first offense of child abuse is "highly unusual." Statistical data to support this claim is conspicuously absent

in this case.[12] Also, on at least three occasions in the proceedings below, the appellants conceded that they fully understood that they could receive the sentence they now claim is unconstitutionally disproportionate. The issue was never raised until this appeal (R. 31, 34, 46; T3. 6). Thus, it has not been preserved for appellate review and should be dismissed.

Should this Court chose to reach the issue, appellants have the burden of establishing that, under all of the facts and circumstances, "the sentence imposed in proportion to the offense committed is such as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances." State v. Nance, 20 Utah 2d 372, 375, 438 P.2d 542, 544 (1968).[13] Utah's standard is in

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[12] In State v. Starlight Club, 17 Utah 2d 174, 176, 406 P.2d 412, 913 (1965), this Court held that it could not consider matters outside the record. Also, the United State Supreme Court recently held in Pulley v. Harris, ___ U.S. ____, 52 U.S.L.W. 4141, 4143 (1984), that the Eighth Amendment does not always require an appellate court to compare penalties imposed an other criminals in similar cases. Cf. Solem v. Helm, __ U.S.___, 51 U.S.L.W. 5019 (1983).

[13] Under this standard, the Nance Court held that the trial judge's imposition of a 5-year prison sentence, under a statute authorizing such punishment for the crime of issuing a $13.32 check against insufficient funds, and where the defendant was not a first-time offender, was not cruel and unusual punishment.

Despite appellants' minimal criminal records, certainly the seriousness of their crime far exceeded that committed by Mr. Nance. If a maximum prison term of 5 years was not cruel and unusual in Nance's case, it is difficult to imagine that it would be in appellants' case.

line with those announced by the United State Supreme Court. Weems v. United States, 217 U.S. 349 (1910) (the punishment must be so grossly disproportionate as to shock the conscience); Rummel v. Estelle, 445 U.S. 263, 271 (1980)(the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime");[14] Solem v. Helm, ___U.S.___, 51 U.S.L.W. 5019 (1983) (sentence must be "signifcantly disproportionate" to the crime). That these standards are applicable to the states is not contested by respondent. Robinson v. California U.S. 660, 667, rehearing denied, 371 U.S. 905 (1962)

Appellants understandably fail to cite a single case to support the view that a sentencing court's failure to grant probation can constitute cruel and unusual punishment. Indeed, such a concept is totally foreign to the law of criminal procedure which views probation as a privilege, not a right, to be granted within the sound discretion of the sentencing judge and where it appears compatible with the public's interest. See Utah Code Ann. § 77-18-1(1) (1982 &

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[14] The Rummel Court observed that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." 445 U.S. at 272.

Also, the courts are most reluctant to uphold sentence challenges where the authorizing statute's validity is not attacked. Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1153 (1979); State v. Ethington, 121 Ariz. 572, 574, 592, P.2d 768, 770 (1969); and Pependrea v. United States, 275 F.2d 325, 329 (9th Cir. 1960).

Supp. 1983) Beal v. Turner, 22 Utah 2d 418, 421, 454 P.2d 624, 626 (1969); State v. Chambers, Utah, 533 P.2d 876, 878 (1975); State v. McClendon, Utah, 611 P.2d 728, 730 (1980). Failure to grant probation in favor of imposing the sentence provided by law, therefore, hardly rises to the level of "shocking the moral sense of all reasonable men." State v. Nance, 20 Utah 2d 372, 375, 438 P.2d 542, 544 (1968). Appellants' claim should therefore be summarily rejected.

Moreover, Respondent has already shown that Judge Wilkinson's sentence was not an abuse of discretion under all of the facts and circumstances of this case, and that the strengths and weaknesses of the aggravating and mitigating circumstances presented as sentencing information below were fully aired and addressed before the sentences were imposed. Appellants' crime was not trivial. They abused and injured their minor children who were between the ages of one and five. The children were recklessly struck with an electrical cord, a grease jar, and wooden spoons until they were badly bruised (R. 22, 25, 40-41). They were also sexually abused while in appellants' home (regardless of who abused them)[15] to such an extent that reparative surgery may be necessary. (R. 23, 41; T3. 9, 12). Appellants' actions

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[15] The statute under which they were convicted includes "[a]ny person who inflicts upon a child serious physical injury or, having the care and custody of such child, causes or permits another to inflict serious physical injury upon a child . . . ." Utah Code Ann. § 76-5-109(2)(Supp. 1983) (emphasis added).

..ere sufficiently grave to merit the sentences they received even as first time offenders. Surely, appellants' prison terms are not so long and harsh as to "be completely arbitrary and shocking to the sense of justice," State v. Pratt, 36 Wis. 2d 312, 322, 153 N.W. 2d 18, 22 (1967) (a case cited by appellants), where their children have been so victimized.

Inasmuch as appellants' sentences were within the statutorily-authorized limits; they did not challenge the constitutionality of the statute authorizing their sentences; and their sentences were neither cruel, unusual, excessive, nor disproportionate under state and federal standards, appellants' sentences should be upheld.

POINT IV

APPELLANTS' FAILURE TO CITE TO THE RECORD IN SUPPORT OF THEIR STATEMENT OF THE FACTS IS AN ADDITIONAL GROUND FOR DISMISSAL OF THIS APPEAL.

Rule 75(p)(2)(2)(d) requires that appellants' brief contain a concise statement of the material facts of the case, citing the pages of the record which support such statement. Appellants have not complied with this rule. They cite to no pages of the record in their statement of facts. Only a few citations to "attached" exhibits are to be found, and these were not attached to our copies of their brief. This Court, in the recent case of State v. Tucker, Utah, 657 P.2d 755, 757 (1982), stated:

> This Court will assume the correctness of the judgment below if counsel on appeal does not comply with the requirements of rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported.

See also State v. Vigil, Utah, 661 P.2d 947, 948 (1983); and State v. Steggell, Utah, 660 P.2d 252, 253 (1983). In accordance with the rule set forth in Tucker, this Court should assume the correctness of the district court's sentencing decision and dismiss this appeal.

CONCLUSION

Based upon the foregoing analysis, appellants' sentences should be affirmed.

RESPECTFULLY submitted this 16th day of May, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Kathleen McConkie Adams and Bradley H. Parker, attorneys for appellants, 455 East South Temple, Salt Lake City, Utah 84111, this 16th day of May, 1984.

Kathleen D. Williams