

2003

# State of Utah v. Michael Oliver : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

D. Bruce Oliver; Attorney for Appellant.

J. Frederic Voros Jr.; Mark L. Shurtleff; Attorney General; Attorneys for Appellee.

---

## Recommended Citation

Brief of Appellant, *Utah v. Oliver*, No. 20030286 (Utah Court of Appeals, 2003).

[https://digitalcommons.law.byu.edu/byu\\_ca2/4281](https://digitalcommons.law.byu.edu/byu_ca2/4281)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

--- 00000 ---

STATE OF UTAH,	)	
	(	3
Plaintiff and Appellee,	)	Case Nos. 20020286-CA
	(	021701014
vs.	)	021701447
	(	021701498
MICHAEL OLIVER,	)	
	(	(Consolidated Appeal)
Defendant and Appellant.	)	
	(	Priority No. 15
	)	

---

**BRIEF OF APPELLANT**

---

Appeal from the Final Judgment and Conviction of the  
Second Judicial District Court, Davis County  
State of Utah, by the Honorable Thomas L. Kay

---

Attorney for Defendant and Appellant

D. Bruce Oliver #5120  
D. BRUCE OLIVER P.C.  
180 South 300 West, Suite 210  
Salt Lake City, Utah 84101-1490

Attorney for Plaintiff and Appellee

J. Frederic Voros, Jr.  
OFFICE OF THE ATTORNEY  
GENERAL  
160 East 300 South  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

\* Published Opinion Requested \*  
\*\* Oral Arguments Requested \*\*

**FILED**  
Utah Court of Appeals

SEP 18 2003

Paulette Stagg  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

--- oo0oo ---

STATE OF UTAH,	)	
	(	
Plaintiff and Appellee,	)	Case Nos. 20020286-CA
	(	021701014
	)	021701447
vs.	(	021701498
	)	
MICHAEL OLIVER,	(	(Consolidated Appeal)
	)	
Defendant and Appellant.	(	Priority No. 15
	)	

---

**BRIEF OF APPELLANT**

---

Appeal from the Final Judgment and Conviction of the  
Second Judicial District Court, Davis County  
State of Utah, by the Honorable Thomas L. Kay

---

Attorney for Defendant and Appellant

D. Bruce Oliver #5120  
D. BRUCE OLIVER P.C.  
180 South 300 West, Suite 210  
Salt Lake City, Utah 84101-1490

Attorney for Plaintiff and Appellee

J. Frederic Voros, Jr.  
OFFICE OF THE ATTORNEY  
GENERAL  
160 East 300 South  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

\* Published Opinion Requested \*

\*\* Oral Arguments Requested \*\*

---

**TABLE OF CONTENTS**

<b><u>CONTENT</u></b>	<b><u>PAGES</u></b>
<u>Table of Authorities</u> . . . . .	iii
<u>Preliminary Statement</u> . . . . .	1
<u>Statement of Jurisdiction</u> . . . . .	2
<u>Statement of Issues</u> . . . . .	2
<u>Standards of Review</u> . . . . .	2
<u>Statutes, Rules and Constitutional Provisions</u> . . . . .	3
<u>Statements of the Case</u> . . . . .	3
I. <u>Nature of the Case</u> . . . . .	3
II. <u>Course of the Proceedings</u> . . . . .	4
III. <u>Disposition in Trial Court</u> . . . . .	5
IV. <u>Statements of Fact</u> . . . . .	4
<u>Summary of the Arguments</u> . . . . .	8
<u>Arguments</u> . . . . .	9
<u>The Trial Court Failed To Follow Stare Decisis and Thereby     Violated Mr. Oliver's Right To Due Process</u> . . . . .	9

Conclusion ..... 14

Certificate of Mailing ..... 14

Addenda

- “A” - Minutes, Sentence, Judgment, Commitment
- “B” - Sentencing Transcript
- “C” - Second Hearing Transcript

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>Holm v. Smilowitz</u> , 840 P.2d 157(Utah App. 1992).	12
<u>In re B.V.</u> , 33 P.3d 1083 (Utah Ct. App. 2002).	2, 9
<u>Labrum v. Utah Bd. of Pardons</u> , 870 P.2d 902 (Utah 1993).	12
<u>Mempa v. Rhay</u> , 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967).	10
<u>Nelson v. Jacobsen</u> , 669 P.2d 1207 (Utah 1983).	3
<u>Rawlings v. Holden</u> , 869 P.2d 958 (Utah Ct. App. 1994).	9, 12
<u>Rupp v. Grantsville City</u> , 610 P.2d 338 (Utah 1980).	12
<u>State v. Babbel</u> , 813 P.2d 86 (Utah 1991).	11
<u>State v. Delmondo</u> , 67 Haw. 531, 696 P.2d 344 (1985).	11
<u>State v. Menzies</u> , 889 P.2d 393 (Utah 1994).	11
<u>State v. Robinson</u> , 860 P.2d 979 (Utah App. 1993).	12
<u>State v. Thurman</u> , 846 P.2d 1256, 1269 (Utah 1993).	11
<u>State v. Wanosik</u> , 31 P.3d 615 (Utah Ct. App. 2001).	7, 8, 10
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).	3
<u>United States v. Brown</u> , 479 F.2d 1170 (2d Cir. 1973).	12
<u>Wiscombe v. Wiscombe</u> , 744 P.2d 1024, 1025 (Utah App. 1987)	12
<u>Woolsey v. United States</u> , 478 F.2d 139 (8th Cir. 1973).	12

**STATUTES**

Utah Code Ann. § 76-3-201 (1953, as amended)

6, 9, 10

D. Bruce Oliver #5120  
Attorney for Defendant and Appellant  
180 South 300 West, Suite 210  
Salt Lake City, Utah 84101-1490  
Telephone: (801) 328-8888  
Fax: (801) 595-0300

IN THE UTAH COURT OF APPEALS

---

---

STATE OF UTAH,	)	
	)	<b>BRIEF OF APPELLANT</b>
Plaintiff and Appellee,	)	
	)	Case No. 20030286-CA
vs.	)	
	)	
MICHAEL WILLIAM OLIVER,	)	
	)	Priority No. 2
Defendant and Appellant.	)	
	)	
	)	

---

---

**PRELIMINARY STATEMENT.**

This is an appeal of the trial court's failure to disclose at the time of sentencing information the court intended to rely on for the purposes of sentencing. Judge Kay failed to disclose a wrongfully perceived aggravating factor he intended to rely on that substantially influenced his decision to commit the Michael Oliver to the Utah State Prison. The decision was a substantial upward departure from the recommendations of Adult Probation & Parole ("AP & P") in the pre-sentence report (the "PSR"). AP & P

---



recommended “six months in jail (straight time), or one year in jail with work release.” The State of Utah concurred with the recommendations. Instead following the recommendations, relying on his undisclosed information, the judge committed Michael Oliver to prison. It took a subsequent proceeding that afternoon to find out that (1) the judge didn’t read the PSR; and (2) the judge always send defendants to prison if the recommendations are for a year due to housing shortages at the Davis County Jail.

#### **STATEMENT OF JURISDICTION.**

Jurisdiction is conferred on this Court by *Utah Code Ann.* § 78-2a-3 (1953, as amended) (2)(e) (appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony). Michael Oliver appeals the final order and judgment of the Second Judicial District Court, in and for Davis County involving the inappropriately conducted sentencing hearing after the parties entered into a plea agreement. (R. at 49).

#### **STATEMENT OF ISSUES.**

- (1) Whether the trial court deprived Michael due process and equal protection?
- (2) Whether the upward departure is unduly rigorous and unusual punishment?

#### **STANDARDS OF REVIEW.**

The standard of review in this matter has long since been established and was reiterated by this Court:

“Constitutional issues . . . are questions of law which we [also] review for correctness.”

In re B.V., 33 P.3d 1083 (Utah Ct. App. 2002). (citations omitted).

**STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.**

Utah State Const. Art. I, § 12.

Utah State Const. Art. I, § 8.

Utah State Const. Art. I, § 7.

Utah State Const. Art. I, § 24.

Holm v. Smilowitz, 840 P.2d 157(Utah App. 1992).

Labrum v. Utah Bd. of Pardons, 870 P.2d 902 (Utah 1993).

Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983).

Rawlings v. Holden, 869 P.2d 958 (Utah Ct. App. 1994).

State v. Wanosik, 31 P.3d 615 (Utah Ct. App. 2001).

Strickland v. Washington, 466 U.S. 668 (1984).

United States v. Brown, 479 F.2d 1170 (2d Cir. 1973).

Woolsey v. United States, 478 F.2d 139 (8th Cir. 1973).

**STATEMENTS OF THE CASE.**

**I. Nature of the Case:**

This case arises from Michael Oliver's sentencing phase, where Judge Kay is alleged to have secreted information in which he relied on when he imposed a sentence on Michael Oliver in an upward departure. (R. at 53, 57-62, 66-67, 69-81, 83-85, 89; T.

at 11-12; T2 at 21, 25-27).<sup>1</sup> The *Minutes, Sentence, Judgment, Commitment* is attached. (Addendum "A")

## II. Course of the Proceedings:

Michael Oliver was sentenced on January 16, 2003. (R. at 53; T. at 11-12). At the time of sentencing, the judge secreted information that was not known to Mr. Oliver, or his counsel, at the time of sentencing. AP & P recommended "six months jail" straight time, or "one year with work release." (R. at 76; T. at 12). The County Attorney's Office, through Craig Peterson, concurred with the recommendation. (T. at 8-9). Mr. Peterson highlighting the need for treatment and rehabilitation. (T. at 9). Rather than following either recommendation, the judge upwardly departed; he sentenced Michael Oliver to 1 to 15 years in prison without justification. The only explanation provided was to "teach Mr. Oliver [a lesson]." (R. at 51; T. at 11-12; T2. at 15-16).

The sentence to prison was an unduly harsh sentence and constituted unnecessary rigor compared to others similarly situated in the light of no aggravating circumstances. Later that afternoon at 4:21 p.m., Bruce Oliver, counsel for the defendant, confronted the court on the record for an explanation demanding to know why the court departed upwardly in sentencing. (T2. at 1-3). The judge informed counsel that Michael Oliver was sent to prison rather than jail because the jail was full. (T2. at 20-21). This

---

<sup>1</sup> Due to this Court's consolidation order, any and all cites to the record are numerically taken from case no. 20030286-CA, record no. 021701014 only. "T" means the transcript from the January 16<sup>th</sup> sentencing hearing. (Addendum "B"). "T2" means the transcript from the January 16<sup>th</sup> afternoon hearing. (Addendum "C").

factor was not timely disclosed to counsel nor Michael Oliver so that he could reasonable prepare and defend against the claim. It was revealed during the afternoon hearing only. (T2. at 21, 25-27; see T. at 11-12).

On February 10, 2003, Michael Oliver then filed, timely, post-judgment motions seeking to have the sentence corrected. (R. at 55-62, 66-67, 69-81, 83-85). The said motions were heard at a hearing on March 27, 2003. (R. at 91). At that hearing, the court denied the motions. (R. at 92).

### **III. Disposition in Trial Court:**

In this matter, the history of the case preceding sentencing are not at issue; Mr. Oliver changed his plea to guilty. (R. at 63). The challenge on appeal is the trial court's unjustifiable upward departure in sentencing. (T. at 11-12; T2. at 20-21). Michael Oliver was wrongfully imprisoned for one year to five, when all of his co-defendants were not. (T. at 5-7). As of this date, Michael Oliver is still imprisoned. Had the judge followed the recommendations, Michael Oliver would have already returned home to his family. Instead, he is needlessly taking up a bed space regardless of either State or County budget problems. (T2. at 21). The judge explained his thinking was that the State does not recommend prison due to budget problems rather than thinking AP & P truly believed Mr. Oliver shouldn't go to prison. (T2. at 21, 25-27). Mr. Oliver contends that practice of the trial court is an abuse of discretion for not disclosing his disfavor for incarceration in the Davis County Jail timely. (T2. at 25-27).

#### IV. Statements of Fact:

In this matter, the trial court ordered Michael Oliver to serve one to fifteen years in the Utah State Prison solely upon factors not disclosed to him, or counsel prior to the hearing.<sup>2</sup> (R. at 51; T. at 11-12; T2. at 21, 25-27). In the subsequent March 27, 2003 hearing on post-conviction motions, Mr. Oliver argued that “Section 76-1-6(1)(a) specifically affords a defendant the right to appear and defend himself in person, and by counsel in a fair and meaningful manner.” (R. at 75-77). Unbeknownst to Mr. Oliver at the time of sentencing, the Judge claimed after the sentencing hearing that the reason Mr. Oliver was sent to prison was because of a bed space shortage experienced at the Davis County Jail. (T2. at 21, 25-27).

In this matter, the defendant underwent a Presentence Investigation with AP & P, and a report was prepared on January 13, 2003. The report was allegedly completed in accordance with *Utah Code Ann.* §§ 76-3-201 et al. The report was said to be thorough and detailed. (R. at 76). In the report, the investigator recommended probation to AP & P, with special conditions, which included “six months [incarceration] in jail.” “Recommendation no. 1” (R. at 76; T. at 12). As an alternative recommendation, the investigator offered “one year with work release.” (T. at 12).

In Mr. Oliver’s post-conviction motions, Mr. Oliver challenged the trial court for the undisclosed factor, the defendant claimed that the court could not harbor in

---

<sup>2</sup> Consequently, this factor is not relevant to either the crime nor the defendant. *Infra.*

secrecy any information from the defendant at the time of sentencing that it intended to rely on. (R. at 75-61). “Aggravating factors must be made in writing and on the record.”

The defendant claimed that the “Judge upwardly departed from matrix and AP & P’s recommendations without justification. The judge merely claimed he did so “to teach [Mr. Oliver] that you cannot continue in this type of behavior, this type of behavior that basically says I can take drugs, I can steal, I can do this . . . .” (T. at 11-12). The defendant demonstrated that his criminal history was minimal: It included merely status offenses as a juvenile, it included only misdemeanor offenses as an adult—no felony convictions, and it includes no periods of formal supervision/probation to AP & P. (T. at 1-8; T2. at 4-5). Contrary to the *in sentencing declaration*, (T. at 11), when the second hearing was conducted that afternoon, the judge disclosed—however, untimely—to Bruce Oliver the determinative factor which led the judge sending Michael Oliver to prison. (T2. at 21, 25-27). At that hearing, the judge informed Bruce Oliver that Michael was committed to prison because the Davis County Jail was full—meaning no apparent bed space was available. (T2. at 21, 25-27). The judge stated that every time he commits someone to a year in jail, the jail calls him to release three others. (T2. at 21). Mr. Oliver challenged the sentence, arguing that “housing is not a valid basis for an upward departure from the AP & P recommendations for sentencing—no more than absence was for the defendant in Wanosik.” (R. at 76-77; T2. at 25-27). The Court may only consider aggravating factors relating to the offense and the offender. The defense contended that

housing concerns, if any, would more likely be a mitigating factor limiting one's commitment to jail rather than the other way around as an aggravating factor requiring imprisonment. (R. at 77-78).

Nevertheless, Mr. Oliver argued that due to its own budget crisis, the prison is suffering its own housing problems. "Recently, the prison, through Michael R. Sibbett of the Utah Board of Pardons and Mike Chabries, Executive Director for the Department of Corrections, announced the possible early release of 400 inmates." (R. at 78; T2. at 21).

Regardless of what Mr. Oliver argued, the efforts were in vein. The judge denied each of the motions and the sentence's were not vacated, or corrected. The judge didn't even grant the defendants motion to stay sentence. (R. at 91-92).

#### **SUMMARY OF THE ARGUMENTS**

Pursuant to State v. Wanosik, 31 P.3d 615 (Utah Ct. App. 2001), the trial court is limited in what it can use as an aggravating factor in imposing a sentence. In this matter, the secreted housing concern of Judge Kay was not a proper basis for sending Mr. Oliver to prison rather than follow the recommendations of AP & P. As a result, the sentence was violative of due process and constituted treatment that was unnecessary rigor.

## ARGUMENTS

### THE TRIAL COURT FAILED TO FOLLOW STARE DECISIS AND THEREBY VIOLATED MR. OLIVER'S RIGHT TO DUE PROCESS.

In the trial court, post-conviction, Mr. Oliver challenged the trial court's sentence imposed in this case. In the petition, Mr. Oliver asked for the sentence to be corrected, which may include but was not limited to reconsider, review, or readdress the commitment to prison (an upward departure without reliance on relevant and reliable information regarding (1) the crime, (2) Mr. Oliver's minor criminal history, and (3) the interests of society). (R. at 57). The trial court denied the petition. (R. at 91-92).

The questions presented to the trial court were questions of law. Since no deference is considered on appeal, Mr. Oliver's appeal is de novo and the arguments are reraised in toto. "Constitutional issues . . . are questions of law which we [also] review for correctness." In re B.V., 33 P.3d 1083 (Utah Ct. App. 2002). (citations omitted).

At the time of sentencing, the first January 16, 2003 hearing, Mr. Oliver was sentenced to the Utah State Prison. (R. at 51; T. at 11-12). The said commitment disregarded AP & P's recommendation for supervised probation to AP & P with six month's jail time. (T. at 12). In the Utah sentencing scheme, the trial court may impose probation pursuant to Utah Code Ann. §§ 76-3-201 et al., or the trial court may impose an indeterminate term of incarceration to prison and then the Board of Pardons is supposed to determine the actual sentence to be served. Rawlings v. Holden, 869 P.2d 958 (Utah



Ct. App. 1994). In order for the scheme to be fundamentally fair, the sentencing court needs to address the mitigating and aggravating factors. Any aggravating factors must be in writing and on the record.

Meanwhile, as for a defendant, the purpose of the sentencing hearing is to allow a defendant an opportunity to provide the trial court judge with the mitigating factors he wishes the court to consider when determining an appropriate sentence (which needs to fit the crime and the offender). State v. Wanosik, 31 P.3d 615 (Utah Ct. App. 2001). The Supreme Court of the United States concluded that there is a Sixth Amendment right to have counsel participate fully at sentencing in Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). Counsel for a defendant is therefore entitled to know all relevant factors being considered so that they may be defended against, so that erroneous perceptions may be aired and dispelled.

In this matter, the trial court did not consider the relevant and reliable mitigating evidence presented to it by defense counsel and the presentence investigator of AP & P. The trial court didn't even follow the recommendations of the State. (T. at 8-9). The indeterminate term of punishment of one to fifteen years and zero to five years (concurrent) under *Utah Code Ann.* § 76-3-203 (1953, as amended) is unduly harsh and unnecessarily rigorous in this matter resulting in cruel and unusual punishment when the matrix (used by AP & P) is intended to be uniformly followed, but can be excepted in rare occasions when aggravating factors are brought to light at the sentencing hearing. (Cf.

T2. at 21, 25-27). However, the only aggravating factors that can be considered are those which are relevant to the crime or to the offender. In practice, the court is required to identify aggravating factors in findings. *Id.* In contrast, this court's consideration of housing concerns at the jail in secrecy was neither relevant or reliable evidence relating to either the crime or the offender in this matter, and severely departed from stare decisis making the sentence fundamentally unfair. (T2. at 21, 25-27). Predictability is key and essential in the administration of justice. State v. Menzies, 889 P.2d 393, 399 (Utah 1994) ("stare decisis is a cornerstone of American jurisprudence and necessary for the 'predictability of the law and the fairness of adjudication.'" (quoting State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993)). State v. Babbel, 813 P.2d 86, 88 (Utah 1991) (quoting, State v. Delmondo, 67 Haw. 531, 534, 696 P.2d 344, 346 (1985) "there may be circumstances under which even a corrected illegal sentence may be fundamentally unfair, thus violative of due process."

In this matter, it is clear that the defendant's sentence was fundamental unfairly imposed and in violation of due process. Rather than placing the defendant on probation to AP & P as the standardized matrix suggested, the Judge imposed an indeterminate sentence of one year to fifteen years without disclosing the true nature for the imprisonment, which consequently was not a relevant aggravating factor. (T. at 12; T2. at 21, 25-27). The court's exercise of discretion in this matter violated Mr. Oliver's substantive and procedural Due Process making it a sentence imposed in an illegal

manner because it was a “fixed and mechanical” sentencing policy irrelevant to the either the crime or the offender and it should otherwise “shock the appellant court” even though it was within the statutory maximum. *See, e.g., United States v. Brown*, 479 F.2d 1170 (2d Cir. 1973); *Woolsey v. United States*, 478 F.2d 139 (8th Cir. 1973).

Bear in mind “The demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved.” *Rawlings*, (quoting *Wiscombe v. Wiscombe*, 744 P.2d 1024, 1025 (Utah App. 1987) (quoting *Rupp v. Grantsville City*, 610 P.2d 338, 341 (Utah 1980)); accord *State v. Robinson*, 860 P.2d 979, 982 (Utah App. 1993); *Holm v. Smilowitz*, 840 P.2d 157, 164 (Utah App. 1992). It is clear that in this case, Mr. Oliver has been incidentally deprived of Due Process in his sentencing under Utah’s sentencing scheme because in Utah the duties in sentencing are shared by the trial court and the Board of Pardon if the judge desires to send an offender to prison. *Labrum v. Utah Bd. of Pardons*, 870 P.2d 902 (Utah 1993).<sup>3</sup> Under the scheme, the trial court is required to provide a defendant a meaningful opportunity to present the court with mitigating factors to consider for sentencing. The trial court is also required to enter any aggravating factors onto the record and in writing for the Board to consider when fixing a specific sentence. Moreover, if any aggravating factors have not been disclosed to the defendant in advance,

---

<sup>3</sup> “[T]he trial judge has no discretion in fixing the term of imprisonment. He or she simply imposes the statutorily prescribed range of years, and the Board of Pardons determines exactly how long the prisoner is to be confined.” *Id.*

the trial court must provide the defendant written notice of these factors in advance of the hearing to provide an opportunity to defend them. In this matter, the trial court admittedly failed to apprise Mr. Oliver, in advance of sentencing, of its decision to send Mr. Oliver to prison for the Judge's bed space concern at the jail. (T2. at 21, 25-27). After the sentencing hearing, the judge informed Bruce Oliver of his true concerns which was not a timely disclosure, thus violating Due Process. Moreover, a "fixed and mechanical" prison sentence for all those who receive a one year recommendation if true while ignoring mitigating factors **relevant** to the crime and the offender are overlooked is an unjust sentence, violative of due process.

This Court needs to correct the practices, if true, of the trial courts, because the violations are not limited to just Mr. Oliver. In this matter, Judge Kay said other judges are doing the same. (T2. at 21). Where defendants similarly situated not faced with bed space concerns would have been sentenced to probation and six months in jail as AP & P recommended, but not these defendants due to overcrowding at the jail, this act of judicial discretion should be shocking to an appellate court and is tantamount to cruel and unusual punishment. In this matter, Mr. Oliver entered guilty pleas on the condition that after successful probation, he would be entitled to a two-step 402 reduction of his sentence. Well, when Mr. Oliver was sentenced to prison, he now is no longer entitled to a 402 reduction at all. The sentence is unnecessarily rigorous for an irrelevant reason, unrelated to the crime or the offender. For these reasons, the trial court's sentence should

be vacated and this Court should remand the matter with instructions to follow the recommendations of AP & P.

**CONCLUSION**

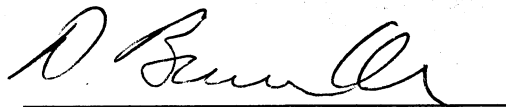
Mr. Oliver has been unjustly treated in this matter. The sentence imposing a prison term should be vacated. Due to the mitigating factors raised by Mr. Oliver, and the recommendations made by the State, the recommendations of AP & P should have been followed. The trial court failed to make findings of aggravating circumstances which entitles the court to upward depart in imposing a sentence.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of  
September, 2003.

  
D. BRUCE OLIVER

**CERTIFICATE OF MAILING**

I, D. Bruce Oliver, hereby certify that on this 17<sup>th</sup> day of September, 2003, I served a copy of the foregoing **BRIEF OF APPELLANT** upon the counsel for the Appellee in this matter, by mailing it to the State of Utah by first class mail with sufficient postage prepaid to the following address: J. Frederic Voros, Jr., Office of the Attorney General, P.O. Box 140854, Salt Lake City, Utah 84114-0854.

  
D. BRUCE OLIVER

**ADDENDUM A**  
**MINUTES, SENTENCE, JUDGMENT, COMMITMENT**

---

2nd District - Farmington Dept COURT  
DAVIS COUNTY, STATE OF UTAH

---

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
:  
vs. : Case No: 021701014 FS  
:  
MICHAEL WILLIAM OLIVER, : Judge: THOMAS L. KAY  
Defendant. : Date: January 16, 2003  
Custody: Bail:

---

PRESENT

Clerk: vickil  
Prosecutor: PETERSON, CRAIG T  
Defendant  
Defendant's Attorney(s): OLIVER, D BRUCE

DEFENDANT INFORMATION

Date of birth: December 25, 1976  
Video  
Tape Number: F 114 Tape Count: 108

CHARGES

1. BURGLARY - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 11/21/2002 Guilty
2. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 06/14/2002 Guilty

SENTENCE PRISON

Based on the defendant's conviction of BURGLARY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

Case No: 021701014  
Date: Jan 16, 2003

---

To the DAVIS County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

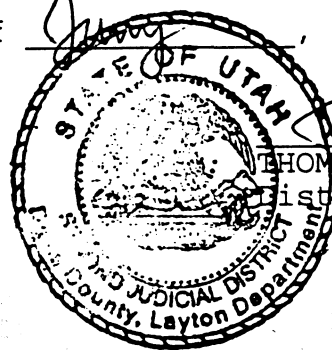
Concurrent service

SENTENCE RECOMMENDATION NOTE

Restitution in the amount of \$3883.92

DNA testing

Dated this 21st day of July, 2003.



*Thomas L. Kay*  
THOMAS L. KAY  
District Court Judge



**ADDENDUM B**  
**SENTENCING TRANSCRIPT**



APPEARANCES

For the Plaintiff:

CRAIG T. PETERSON  
Davis County Attorney  
800 West State Street  
Farmington, Utah 84025

For the Defendant:

D. BRUCE OLIVER  
Attorney at Law  
180 South 300 West  
Salt Lake City, Utah 84101

\* \* \*

1 FARMINGTON, UTAH - JANUARY 16, 2003

2 HONORABLE THOMAS L. KAY, JUDGE PRESIDING

3 P R O C E E D I N G S

4 THE COURT: Okay, 19, 20 and 21 is State of Utah v.  
5 Michael William Oliver and this is the time that's been set for  
6 sentencing.

7 Have you had an opportunity to review the pre-  
8 sentence report?

9 MR. OLIVER: I have, Your Honor.

10 THE COURT: Are there any corrections or changes to  
11 that report?

12 MR. OLIVER: No.

13 THE COURT: Is there anything you'd like to say  
14 before sentence is imposed?

15 MR. OLIVER: Yes, Your Honor. We'd ask the Court, at  
16 this time we'd ask the Court to depart from recommendation #1  
17 and there are several things that I would like to address with  
18 regards to that.

19 THE COURT: Okay.

20 MR. OLIVER: I have been intimately involved with Mr.  
21 Oliver, closely involved with Mr. Oliver since July 3<sup>rd</sup> of last  
22 year, that was his release date, 22 days after he was arrested  
23 and after the 22 days that he served in jail. Since that time  
24 I've had the opportunity to observe him on a day to day basis  
25 almost continuously, not totally but almost and I've seen a

1 tremendous improvement in Mr. Oliver's life and lifestyle; his  
2 responsiveness, his acceptance of responsibility from what it  
3 was previous to June 14.

4           On June 14<sup>th</sup> I was made aware of the circumstances  
5 that were going on quite by accident and I didn't go down there  
6 to participate in any way, shape, or form but the week before  
7 that I'd been down there and had a conversation with Mr. Oliver  
8 about certain things and that I had seen him just the week  
9 before and observed what he was going through and what he  
10 looked like and what his attitude was, so a month later I have  
11 an extreme contrast to that to start comparing things with.

12           With regards to some of the comments that were made  
13 in the pre-sentence report, I wish to address those directly.  
14 One, is that there's a suggestion that Mr. Oliver has not  
15 stopped the use of controlled substance based upon the fact  
16 that he's not been in therapy. Mr. Oliver has been attending  
17 the LDS 12-Step Workshop program. It's a 6-night a week  
18 program and he's been attending that. He started attending  
19 that immediately upon his release from incarceration and has  
20 been generally participating in that including up until last  
21 evening. His wife, who was a co-defendant, listed as a co-  
22 defendant in this, was participating in a UA program through  
23 the Work Center here in the county. She was taking UAs three  
24 times a week. He was participating. He never took UAs. He  
25 went down with her, transported her, was there every time that

1 she took a UA and together they have remained clean.

2           It's suggested that he has some other problems  
3 because he's taking anti-depressant medication. That's Celexa  
4 and that was actually at the recommendation of his mother's  
5 doctor that he went into see after he stopped using meth and  
6 the reason for that was because the doctor indicated that  
7 that's a typical treatment for people who stop using meth, that  
8 when they stop using meth that it's not at all unusual to go on  
9 anti-depressants for anywhere from a year to whatever is  
10 appropriate thereafter to get them through the period of time  
11 of coming off the meth. He's remained on Celexa and as I've  
12 indicated, I've seen a tremendous change in his attitude. I  
13 don't think that he has the mental health problems as indicated  
14 by the PSI but rather that that is actually something that is  
15 used for his benefit.

16           The statement Mr. Oliver makes in the PSI I think  
17 indeed indicates his acceptance of responsibility. I think  
18 that that is indeed the case, that he has accepted the  
19 responsibility. He takes this matter very seriously and I  
20 regret that it took this type of an encounter with the law to  
21 get him to do that but he does take it seriously.

22           He does apologize to the people for any problems at  
23 all, minor or major, that they experienced as a result of his  
24 conduct and he requests that very sincerely.

25           With regards to the aggravating and mitigating

1 circumstances as contained on the final page of the PSI, Your  
2 Honor, I'd like to address a couple of those. On the  
3 aggravating, #3 it says, "Offender presents a serious threat of  
4 violent behavior" and I don't see that. I've never seen that  
5 in Michael and I've known him long enough to understand that.  
6 I've never seen violent behavior from Michael at all. And then  
7 he has not engaged in continued criminal activity, #9, since  
8 the arrest. That is not a factor. There have been additional  
9 charges that came down but they came down from the incident  
10 wherein the search warrant was executed on his residence and  
11 nothing subsequent thereto. So, as crimes were solved from  
12 that, additional charges have been filed but, no additional  
13 conduct has precipitated that. That was all known or not  
14 known, but all came about as a result of the search warrant  
15 that was executed.

16 THE COURT: Are those charges still pending?

17 MR. OLIVER: No, that's in this case, Your Honor.  
18 That's everything here.

19 THE COURT: All right.

20 MR. OLIVER: And then with regards to the mitigating  
21 circumstances, I'd agree with the three that are checked there.  
22 However, I do believe also that #6, restitution was severely  
23 compromised by incarceration, especially the recommendation  
24 that they're making and that is that six months straight time  
25 and that comes - when Mr. Oliver came out of his interview, he

1 came and contacted me and he said, "You know, the first thing  
2 that they said when I went in for my interview was you can't  
3 live there and you can't work there." And I thought that's  
4 kind of strange and then I stopped and I thought, well, they  
5 don't want him living with an attorney. They don't want him  
6 working with an attorney and then along comes this  
7 recommendation the way it is and I think that that's reflective  
8 of that because that's what they're precipitating as I see it.  
9 Maybe I'm wrong on that. Maybe that's unfair to AP&P. I don't  
10 want to be too unfair in that respect but - and then #10, it  
11 says the offender has extended period of arrest free. Extreme  
12 time. This incident was there prior to that. It was an  
13 extended period of time. Since then, there has been nothing so  
14 we would ask the Court to also include that as a mitigating  
15 circumstance.

16           Mr. Oliver has a strong family support group. He has  
17 brothers and sisters and his mother present today and they all  
18 support him. His wife supports him and we have all seen a  
19 tremendous change in his life which we appreciate tremendously.  
20 We think that it's a very positive thing.

21           The final thing that I wish to address to the Court,  
22 two things, is looking at the sentences that were handed down  
23 in the other cases, co-defendant's cases, Breanna was sentenced  
24 to 35 days in jail which was suspended. There were other  
25 things but that was the incarceration aspect of it and that's



1 all I'm going to be addressing as I talk to the Court now.

2 THE COURT: What was she sentenced on?

3 MR. OLIVER: She was sentenced on the theft. She  
4 also had - see there was as - I can't remember. Let me look.  
5 I think there was a felony that was also dismissed but she was  
6 sentenced on the theft and the recommendation there, by the  
7 way, was I believe 60 days in jail but she was sentenced on two  
8 theft charges, theft by receiving and attempting to obtain  
9 property by use of financial transaction card.

10 Then, Braydon Larkin and it says that he pled to an  
11 attempted distribution of a controlled substance, a Class A  
12 Misdemeanor and that he's on probation right now and I would  
13 draw the Court's attention back to Page 4 of Mr. Oliver's PSI  
14 and towards the bottom, just above where it says defendant's  
15 statement, that very short paragraph there? It says on June  
16 14, 2002 - no, the paragraph just above that, last sentence and  
17 that paragraph above - or last sentence. It says, "Braydon  
18 Larkin was located and indicated he had entered the garage  
19 taking a wallet and cash from the vehicle" and that's with  
20 regards to Ms. Brimley's residence so Mr. Larkin admitted to  
21 participating in that and yet he's only on probation for  
22 attempted distribution of a controlled substance, a Class A  
23 Misdemeanor. David Rigg does not appear as though he's ever  
24 been charged and then Jeremy Ohgren, he was on probation. He's  
25 absconded and my client has had no contact with Jeremy Ohgren

1 but he was on probation for his charges and so these people who  
2 were co-defendants, it seems as though they got far less than a  
3 year, far less than six months and we would ask the Court to  
4 take that into consideration.

5           What we're asking the Court to do today - and the  
6 other thing is, the last thing is that if you look at the  
7 victim impact statement I thought that there was two of them  
8 that were very thoughtful. It's easy for a victim to say  
9 maximum sentence and maximum fine and I appreciate the victim's  
10 prospective on that and I'm not trying to minimize that but I  
11 do notice that there were two victim impact statements that  
12 said, you know, if there's a substance abuse problem or if  
13 there's another problem, he needs to get in, he needs to  
14 develop self-esteem, self-respect and he needs to move forward,  
15 they support that and there were two of them that actually  
16 addressed that. I thought that was very thoughtful,  
17 insightful, because indeed those are the issues that I've been  
18 working on with Mr. Oliver and I think that those are the  
19 issues that need to be addressed. And if the Court wishes,  
20 that was the victim impact statement from Jack and Linda White  
21 and also from (inaudible)?

22           With regards to that, Your Honor, we have no  
23 objection to the balance of the recommendations from AP&P.  
24 We'd ask to leave restitution open because I think there's some  
25 questions that we have with regard to restitution. We're not

1 challenging substantively a lot of the restitution but I think  
2 that myself and the County can work some of that out and we'd  
3 just ask the Court to leave that open but other than that we  
4 have no objection to any of the other recommendations. We're  
5 just asking the Court to depart from the one and what we'd ask  
6 the Court to do is to - we'd actually ask for 30 days home  
7 confinement for Mr. Oliver with electronic monitoring and that  
8 would be in addition to the time that he's already served and  
9 that he be allowed to participate in counseling work and  
10 nothing else.

11 THE COURT: Okay. Mr. Oliver, the defendant, do you  
12 have anything you wish to add?

13 THE DEFENDANT: No, Your Honor.

14 THE COURT: Are there any victims or anything on  
15 behalf of the County Attorney's Office?

16 MR. PETERSON: I don't believe there's any victims  
17 present.

18 Are there any victims on the Wycliff/Oliver case that  
19 wish to address the Court?

20 I didn't think there was, Your Honor.

21 As for the State, when this agreement was reached by  
22 Mr. Edwards, my predecessor, he agreed to submit it on the  
23 recommendations of AP&P but part of his focus is a need for  
24 drug rehabilitation, really pre-habilitation and treatment and  
25 I think Mr. Oliver makes a valid point that all of these are

1 related to the fact that the defendant was addicted to  
2 methamphetamine and that's really kind of the underlying issue  
3 that kind of drives everything that happens and if he's in a  
4 treatment program, the only concern that I would have as a  
5 prosecutor is to put him into the jail might disrupt that and  
6 that would be kind of contra-beneficial to what we're trying to  
7 do in this matter. It might indeed be more appropriate to put  
8 the defendant in jail for 30 to 60 days on a work release with  
9 less time to make him more available for treatment than it  
10 would be to put him in for a year outright or even put it six  
11 months without any work release. It's kind of circular way to  
12 say I agree in part with what Mr. Oliver had to say and it does  
13 have some merit and the Court should take it under  
14 consideration. With that, we'll submit it on the  
15 recommendations.

16 MR. OLIVER: Your Honor, there's one thing that I  
17 forgot to mention, may I very briefly?

18 THE COURT: Sure.

19 MR. OLIVER: In this particular (inaudible) Mr.  
20 Oliver was actually a candidate for drug court and this matter  
21 was referred to drug court. We went through a screening over  
22 there and all of the cases would have been referred and dealt  
23 with through the drug court process and Mr. Oliver was amenable  
24 to that as was the County at the outset. The problem came  
25 though, he didn't have a prior felony conviction for drugs and

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

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

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

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

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

1 that since 1993 when you were about 16 years old, or 16 or 17  
2 years old, you had quite an extensive juvenile court history  
3 and you've had quite an extensive adult history and it doesn't  
4 seem like you're going in the right direction and it doesn't  
5 seem like you've learned anything from earlier times when you  
6 pled guilty or were found guilty of matters and sentenced. You  
7 have served some time but generally you've been on probation  
8 quite a bit and it doesn't seem like anything has worked.  
9 There are not unserious crimes. You are here on a second  
10 degree burglary; possession of a controlled substance, a third  
11 degree felony; a burglary, a third degree felony; another  
12 burglary. So we have three third degree felonies and a second  
13 degree felony and whether these are involved with drug or  
14 whatever, it's basically the past 10 years of your life have  
15 been spent in and out of various charges and very bad behavior.  
16 I'm going to depart from the recommendation, but I'm  
17 not going to depart in the way your attorney has asked for and  
18 I'm going to send you to prison and the reason I'm sending you  
19 to prison is to teach you that you cannot continue in this type  
20 of behavior, this type of behavior that basically says I can  
21 take drugs, I can steal, I can do this for the last - you're 26  
22 years old and for 10 years you have done this and the time is  
23 going to stop now or you're going to spend the rest of your  
24 life in prison and if you want to continue to change - I think  
25 your change of the last month or so has been a change to make

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

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

16 THE COURT: Yes.

17 (Whereupon a sidebar discussion was held)

18 (Whereupon the hearing was concluded)

19

20

21

22

23

24

25

-c-

**ADDENDUM C**  
**SECOND HEARING TRANSCRIPT**

---



1 FARMINGTON, UTAH - JANUARY 16, 2003 4:21 P.M.

2 HONORABLE THOMAS L. KAY, JUDGE PRESIDING

3 P R O C E E D I N G S

4 THE COURT: Do we have the file?

5 MR. OLIVER: Your Honor, it's not so much the file.  
6 I'm going to be talking in a very general context, this is more  
7 - I would appreciate the opportunity to address the Court.

8 THE COURT: Okay. And what is this on?

9 MR. OLIVER: This is on the matter that we just dealt  
10 with earlier today, the Michael Oliver case.

11 THE COURT: Okay. Let's just get the number of the  
12 case again.

13 MR. OLIVER: There's three of them, 0217, 01014,  
14 0217, 01447, 021701489 -or 98, excuse me.

15 THE COURT: 98?

16 MR. OLIVER: I believe so. Those are the numbers that  
17 I've taken off the PSI and that's where I'm getting those  
18 numbers. I'm relying on the accuracy of that for those  
19 numbers. If they're incorrect, I apologize but that's where I  
20 got the numbers, off the cover sheet of the PSI.

21 THE COURT: Okay.

22 MR. OLIVER: Your Honor, I must admit, that the  
23 Court's ruling previously today left me shocked and somewhat  
24 personally devastated. When I left the courtroom after the  
25 Court had pronounced a sentence, I have been doing a great deal

1 of soul searching since that time. I recognize that once the  
2 Court sentences people to prison that the Court loses  
3 jurisdiction for the most part and this is not a motion. I  
4 have relived in my mind this entire case from the first day  
5 that I became aware of the existence of this case -

6 THE COURT: These cases?

7 MR. OLIVER: It started with a search, a search  
8 warrant being executed and as a matter of fact, it was  
9 coincidental that my daughter happened to have gone over to  
10 visit her brother that day. When she arrived there, there was  
11 a bunch of police officers there searching his apartment. Tad  
12 Lowe, the detective on the case, contacted my daughter and said  
13 to her, "We would really appreciate it if you dad did not come  
14 down here, it would just complicate things." I respected that  
15 desire of the police officers and did not go down there but my  
16 daughter called me and explained everything to me. The warrant  
17 was being executed and I didn't respond down because Tad Lowe  
18 had asked me not to and as much as I was conflicted with the  
19 circumstances, I respected his wishes and did not go.

20 But today, I think for really the first time, I've  
21 lost confidence in the bench and that's what I want to address  
22 this minute. I'm not here to talk about the case. I'm here to  
23 talk about me and my relationship with this Court. I have  
24 reviewed this case for a long time. I've talked with  
25 prosecutors from Judith West to Mike Edwards to Craig Peterson

1 and informally talked to others. I've talked to numerous  
2 defense attorneys in the course of conversations trying to  
3 decide whether it would be best if I removed myself from the  
4 case because he was my son or whether I should remain on the  
5 case. I've looked at it from every angle possible. This case  
6 could have been resolved long ago but Mike Edwards couldn't  
7 come to a decision as to what a plea bargain would be and as  
8 soon as we arrived at an agreement, we did. I did not do  
9 anything inappropriate because he was my son and because I was  
10 personally or emotionally involved in his welfare. I didn't do  
11 anything that was untoward and I think Mr. Peterson will tell  
12 you the same thing. I've been professional in the case in  
13 every respect. My goal was to resolve the case.

14 My son has never had a felony conviction of any sort  
15 previously. My son has never been charged with a felony at any  
16 time previously. This long history that you referred to as far  
17 as criminal conduct stemming back to 1993, and I was so shocked  
18 and certainly was not going to argue with the Court in front of  
19 a courtroom full of spectators, not going to bring disrepute to  
20 the Court. I want to talk about the juvenile record. That was  
21 a long juvenile history since 1993. Two shoplifting - which  
22 didn't even result in a conviction. They were dismissed or  
23 resulted in counseling and non-judicial extended counseling.  
24 Counseled, warned, and released; possession of tobacco, status  
25 offense, a fine; possession of tobacco, non-judicial finding;

1 alcohol possession or consumption, dismissed.

2 I had nothing to do with that by the way. I was not  
3 involved with that as an attorney and that was not dismissed on  
4 anything other than what the State did. To tell you the truth,  
5 I didn't even know about that offense. Some of these when I  
6 read this for the first time, I was quite surprised at some of  
7 these offenses and knowing the juvenile court system, as a  
8 father I was surprised because I have been notified of one,  
9 two, maybe three offenses against him as a juvenile, one of  
10 which I represented him on as an attorney, the others I did  
11 not. The rest of these came as a surprise to me when I read  
12 his PSI so I'm quite surprised that they're there. That's  
13 neither here nor there, bottom line is, possession of marijuana  
14 I did represent him on and that's in connection with the  
15 possession of drug paraphernalia. Then there's two motions.  
16 There's possession of tobacco. By the way they were  
17 misdemeanors. Then there's a possession of tobacco, status  
18 offense and then a contempt three years ago that was dismissed.  
19 I don't even know what that was. I've never even heard of it  
20 before, neither had Michael. That was in 1999, four years  
21 after he was an adult. And so we have dismissed cases or cases  
22 disposed of non-judicially, no convictions; status offenses;  
23 one possession of marijuana and one possession of paraphernalia  
24 as a juvenile. That's it. Certainly not a criminal record  
25 which poses a threat to society or shows lack of amenability to

1 supervision or rehabilitation.

2 Then let's talk about his offenses as an adult.

3 Possession of paraphernalia, Class B Misdemeanor. He pled  
4 guilty. DUI as the result of an accident, Class A. He pled  
5 guilty. Simple assault. He pled guilty. Didn't represent him  
6 in that at all. He pled guilty to disturbing the peace in  
7 Colorado and disturbing the peace again in Colorado. None of  
8 those are heinous crimes which show a career of criminal  
9 conduct. None of those are crimes which would create fear and  
10 trembling in society if this boy were allowed to walk the  
11 streets. None of those are crimes which show disrespect for  
12 society or the system. None of them. Nor is his history of  
13 such a nature that would warrant prison on these offenses. The  
14 county attorney, the investigators, all have eaten and breathed  
15 this case for a period of time, not for a long period of time,  
16 but while they're sorting through it, while they're screening,  
17 while they're reviewing the evidence, while they're talking to  
18 the investigator, while they're getting a warrant, while  
19 they're reviewing the return on the warrant, they knew all of  
20 this and in spite of all that they knew, the darkest side of  
21 the case, they were still recommending drug court. He didn't  
22 have a serious enough record, he didn't have a serious enough  
23 record to get his cases dismissed through drug court. He  
24 wasn't acceptable to drug court, he didn't have the  
25 qualifications. He didn't have a prior felony conviction for

1 drugs to get him into drug court and he has no other felony  
2 convictions and yet the county, the State, the people were  
3 willing to dismiss all the cases if he'd go through drug court.  
4 Judge Memmott said, no, we can't make an exception in this case  
5 because he doesn't have the prerequisite prior felony  
6 conviction, not because he failed anything. He just didn't  
7 have the prerequisite and he didn't meet the requirements for  
8 drug court, so they wouldn't let him in. And so the State at  
9 that point in time was saying, "We're willing to wipe your  
10 record clean if you will complete rehabilitation through the  
11 drug court system," and he had accepted that. So the State  
12 certainly did not believe that this offense warranted prison.

13           Six weeks ago, we stood before this Court and he pled  
14 guilty. As part of that guilty plea this Court, yourself,  
15 authorized the entry of the conviction for the possession of a  
16 controlled substance nunc pro tunc, back to the date of the  
17 offense, June 14. That's what this Court did on that day. At  
18 that time, this Court, yourself, felt that there was enough  
19 either through the recommendation of the State or the nature of  
20 the case or whatever it was, that he should be given a break on  
21 his driver's license and instead of losing his license for six  
22 months from the date of the plea on, it went back to the  
23 beginning of June 14 and he was entitled to get his license  
24 back on December 14 which he did.

25           And as I explained to this Court, all the things that

1 he had done for the past and I'm going to count them out, I  
2 said July 3 was the date that he entered my home, so July,  
3 August, September, October, November, December, through January  
4 16 he has clearly shown that he is capable of being in society  
5 without violating the laws.

6 Now, there is and there was - well, at any rate, but  
7 an interesting comment that this Court made and it's probably  
8 this comment which has devastated me most of all and I found it  
9 totally out of place and that was that he had behaved himself  
10 for the last month and probably just for purposes of  
11 sentencing, just to impress us. That's not true and there was  
12 absolutely nothing presented to this Court to suggest that Mr.  
13 Oliver's life had changed in the past 30 days. As a matter of  
14 fact, everything I said went from July 3<sup>rd</sup> to the present which  
15 is seven months, six months. And he's taken for six months and  
16 if it's to impress this Court then so be it, he earned his  
17 reward but some of us are far wiser than that and we sit back  
18 and we say no, you behaved for six months, you had a very short  
19 period wherein you really did these things and they're wrong,  
20 okay, he admitted that, he pled to it. He didn't deny it in  
21 his statement and then for you to go from a nunc pro tunc six  
22 weeks ago to prison today on this long history that shows that  
23 he's incapable and that he's on his way towards doing something  
24 terrible and not to be trusted in society. The worst he's ever  
25 dealt with is a Class A DUI and other than that they were

1    misdemeanors and even really mostly status offenses. I've  
2    looked at this pre-sentence report six ways from breakfast and  
3    on what I consider to be the harshest judge in the state of  
4    Utah and I appear in front of most judges throughout the state  
5    in all districts, I travel around the state quite a bit, I  
6    would never have predicted prison in this case. Forget my son,  
7    from the history, from the nature of the offenses, from the  
8    recommendation, from the recommendation of the prosecution,  
9    from his history for the past six months, for the sentences  
10   given to his fellow conspirators in this situation, I could not  
11   have in my wildest imagination believed that prison would be  
12   the sentence. That's why I've lost confidence is because of  
13   the comment of one month ago.

14            Now, since that time, it's come to my attention that  
15   you signed a search warrant for his car about that time, when  
16   you're talking one month ago and if this Court relied on any  
17   information that it obtained at that time, or that was  
18   discussed with the Court, that was this Court's duty to  
19   disclose that to me that that was going to be a factor in the  
20   sentencing so I could address it.

21            THE COURT: Well, I can tell you, Mr. Oliver, that I  
22   sign so many search warrants and so many warrants for Layton  
23   City Police that I don't even remember how many -

24            MR. OLIVER: This said it was Layton City Police Your  
25   Honor? I have no respect for -



1 THE COURT: Those are the ones that I - I sit in  
2 Layton and most of the warrants I sign are Layton City Police.

3 MR. OLIVER: I didn't say it was Layton City Police,  
4 thank you.

5 THE COURT: I'm just saying those are the ones. I  
6 don't know. I did not take that into consideration. I didn't  
7 even know that I had signed a search warrant.

8 MR. OLIVER: There was a lot of rumor out there and I  
9 believe that this Court's comment about his continuing criminal  
10 conduct, that he's shown where he's going, there's a lot of  
11 rumors out there. I've heard them twice from different people  
12 that he was involved in the OxyContin robberies at various  
13 pharmacies and I know for a fact that the police believe that.  
14 He's not the guy and my son was not involved in that. My son  
15 was not involved in that but I know, I know they were talking  
16 about it. My son has not been involved in further criminal  
17 conduct and by the way, the burglary that was alleged at the  
18 church for which this warrant was obtained, there was no  
19 burglary at the church. There was a screw missing out of a  
20 screen that my son didn't do. But there was a screw missing  
21 out of a screen and there was a window that was approximately  
22 one inch open and from that, they construed that my son had  
23 committed a burglary at the church and got a warrant to search  
24 his car. They detained him for eight hours and I know what  
25 they were thinking about him at that time because it's in the

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

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

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

21 THE COURT: Okay.

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

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

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

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

16 THE COURT: If you say-

17 (Both talking)

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

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

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

23 THE COURT: Don't insult mine then.

24 MR. OLIVER: I'm not.

25 THE COURT: Mr. Oliver-

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

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

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

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

1 THE COURT: Okay. So what is the purpose of what  
2 we're doing then?

3 MR. OLIVER: What is the purpose? Because I feel  
4 very strong, I feel very strong that there was more in play  
5 than I'm aware of and I don't know what that is.

6 THE COURT: Well, there wasn't anything-

7 MR. OLIVER: Because a month ago, six weeks ago-

8 THE COURT: You've recused that. There's nothing  
9 more (coughing in audience) said.

10 MR. OLIVER: Six weeks ago, you were willing to enter  
11 the conviction nunc pro tunc.

12 THE COURT: The nunc pro tunc was something that he  
13 wasn't sentenced on today; is that correct.

14 MR. OLIVER: It was. As a matter of fact it was.

15 THE COURT: Okay. Which one was that?

16 MR. OLIVER: The possession of a controlled  
17 substance.

18 THE COURT: One of the three third degree felonies?

19 MR. OLIVER: Yes.

20 MR. PETERSON: It was entered nunc pro tunc because  
21 of the statutory provision that it effects the driver's license  
22 for six months and so the State had made a motion to enter that  
23 one nunc pro tunc -

24 THE COURT: But that was done then. He was sentenced  
25 on that today was he?

1 MR. PETERSON: He was. That was part of the  
2 sentencing today.

3 THE COURT: Okay. We still have a second degree  
4 felony and the three thirds.

5 MR. OLIVER: His very first felonies and no  
6 supervision in the past. He's a prime candidate for probation  
7 and I understand this Court has the discretion to send him to  
8 prison. You've exercised it and I understand that. I am no  
9 fool but the bottom line is that I also have given a lot of  
10 thought to this since then because you say you're the hardest  
11 judge, I disagree with that. That's not what I said. What I  
12 said was I appear in front of a lot of judges and I don't know  
13 any who would have sent to prison under these circumstances.  
14 That's what I said. I didn't say anything about you being hard  
15 or anything else. Tough judges or hard judges don't bother me.  
16 We live with that and we get who we get and we deal with it.  
17 That doesn't bother me and I didn't say you were a hard judge  
18 and I didn't say you were the hardest in the state of Utah.

19 THE COURT: So if I would have just done though what  
20 you requested, then I would have been a great judge.

21 MR. OLIVER: And if you think I'm that shallow, if  
22 you think I'm that shallow, you're wrong because quite  
23 candidly, I don't see-

24 THE COURT: I didn't come in here asking for a fight  
25 with you, Mr. Oliver. You came and asked-

1 MR. OLIVER: Then please don't make allegations  
2 against me-

3 THE COURT: It is now at five o'clock - no, I'm just  
4 trying to understand what you're saying.

5 MR. OLIVER: Okay.

6 THE COURT: I'm saying I don't believe we would have  
7 this if I would have followed what your recommendation was for  
8 your son's sentencing. We wouldn't have had this discussion.

9 MR. OLIVER: You know, I think that's extremely  
10 shallow because judges, I don't expect them to follow my  
11 recommendations. I never have and I never will. I do the best  
12 that I can for my client but at the same time, there is an  
13 amount of predictability when you take into consideration the  
14 nature of the offense, the nature of the charges, the nature of  
15 the plea deals, the nature of the history, you take that into  
16 consideration, there is a degree of predictability. We can sit  
17 down, Mr. Peterson could sit down, I could sit down, any good  
18 defense attorney in the state, any good prosecutor in the state  
19 could sit down and predict what an average, usual sentence  
20 would be in this case. This sentence is so aberrant from that,  
21 that's the problem that I have. It has nothing to - if you'd  
22 given him a year, I'd have sat back and said okay, I  
23 understand, he followed the recommendation. You didn't even  
24 follow the recommendation. You didn't follow the  
25 recommendation of AP&P who did a thorough investigation of him.

1 You didn't follow the recommendation of the prosecutor who  
2 worked the case. You didn't follow the recommendation of me as  
3 either his defense attorney or his father and you tell him that  
4 he has a terrible criminal history from 1993 up to the present  
5 and quite candidly, he's never had a felony offense, never been  
6 supervised-

7 THE COURT: After I made that statement, I didn't  
8 have any rebuttal from either you or him about that.

9 MR. OLIVER: You'd sentenced him. I mean, what did  
10 you want me to do, jump in and argue with you at that point in  
11 time? No, that's not the way you do it and that's not the way  
12 I-

13 THE COURT: I believe the argument that you're making  
14 now would have been better at that time than it is now.

15 MR. OLIVER: Maybe it would have but it's my  
16 understanding - and I'll be honest with you - my understanding  
17 is once a judge starts into his approach on the sentence, I'm  
18 not going to stand here and argue with you. That is not my  
19 nature nor what I do in the courtroom. Quite candidly, I have  
20 more respect for the bench than just to stand here and  
21 especially when I have a courtroom of people. One of the  
22 ethical considerations I have is not to bring the Court into  
23 disrepute, fine, I didn't expect prison. I figure, "Okay he's  
24 headed there and he's going to go and he's going to talk and  
25 he's going to go ahead and give the year." Okay. But the



1 bottom line was, then all of a sudden he's in prison, first  
2 felony ever, never supervised and he's done damn good, pardon  
3 my French, for the past six months supervised constantly,  
4 working for me. And I don't interrupt judges in the middle of  
5 their sentence, Your Honor. I never have and I never will and  
6 that's courtroom etiquette as I understand it. That's  
7 courtroom etiquette as far as I understand it. So I was not  
8 being wimpish. I was being polite and maybe in this case I  
9 shouldn't have been polite.

10           And the reason that I am upset, it's not because (a)  
11 you sent him to prison or (b) you would have given his a year  
12 or this or that, it's because I believe the sentence was  
13 arbitrary. That's my problem because I stood before you with  
14 a gentleman by the name of Cody Kais. Cody Kais when we stood  
15 before you had been charged with crimes very similar to what  
16 were present in this particular offense. It was burglary of a  
17 garage and possession of stolen property and there may have  
18 only been one or two counts here but he had had prior felonies.  
19 He was facing other felonies in Murray. He had felonies in St.  
20 George. We went through all of this and you - far worse record  
21 than my son and including the current charges that he was faced  
22 with - gave him a concurrent time with a sentence in St. George  
23 which is six months approximately. I don't remember all the  
24 details. I haven't gone back and pulled the file to make sure.  
25 So I've watched a case that characteristically I would say was

1 worse than this and that that particular case, as a matter of  
2 fact Mr. Kais was charged with I think probably 12 or 13 or 14  
3 - and I don't know the exact number because I did not look at  
4 the file prior to coming back this afternoon - burglaries  
5 throughout Salt Lake County. That was part of - it wasn't the  
6 case here but that was part of the case here because the  
7 burglary that occurred in Davis County, recovery of the stolen  
8 property in Salt Lake, were all tied into all the burglaries in  
9 Salt Lake. You didn't send him to prison and his was a more  
10 egregious case than this.

11           When I sit down and I do a case, I don't live in la-  
12 la land and I don't live in a make believe world. I evaluate  
13 the case from a legitimate prospective. Well, do I think that  
14 innocent people have been convicted? Sure. Do I think that  
15 guilty people have been acquitted? Sure. Can I predict that?  
16 No. But when we do a plea and we work through a plea, I'm not  
17 so stupid as to think that I can't at least reasonably predict  
18 the range - not what's going to happen - but the range of  
19 what's going to happen, the severity of the punishment.

20           THE COURT: Well, you represented at the bench that  
21 you could withdraw this guilty plea if I didn't comply with the  
22 understanding of you and the prosecutor about the double step  
23 from a second degree felony to a class A misdemeanor, the  
24 double reduction if he goes to prison and that somehow that was  
25 the basis of the plea and I guess I didn't understand that at

1 all.

2 MR. OLIVER: Actually what I represented to the  
3 bench, I approached the bench and what I said was as a part of  
4 this deal, a 402 was included, including a two-step 402 down  
5 from a second to an A.

6 THE COURT: If probation is successfully completed?

7 MR. OLIVER: Uh-huh (affirmative), that's correct and  
8 I did say that and what I said to this Court at the bench, and  
9 Mr. Peterson was present, what I said to this Court was that  
10 that was substantially a basis for him entering into this deal  
11 was that. I then said to the Court that that would be a basis  
12 under which we would be filing a motion to withdraw the guilty  
13 plea.

14 Now, having said all of that, that's what I said at  
15 the bench. I was asking the Court as that point in time to  
16 reconsider and quite candidly, I mean I hate to say it, but  
17 from a legal argument, I was begging the Court for a second  
18 breath. Now I didn't say that. I didn't say that. Now, did I  
19 say Judge, please give me another chance? No. I walked up and  
20 I discussed a legal principle hoping, hoping, to rectify what  
21 was devastating me at the moment, devastating me personally.  
22 I'm not even mincing words on that.

23 I walked up with fingers crossed so damn tight they  
24 were damn near breaking off and at that point in time, to tell  
25 you the truth, Your Honor, I would have grabbed at any straw

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

6 THE COURT: Okay.

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

9 THE COURT: Well -

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

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

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

18 THE COURT: Well, I didn't.

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

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

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

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

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

15 MR. OLIVER: I understand that.

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

17 MR. OLIVER: I accept that.

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

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

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

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

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

14 THE COURT: Okay.

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

16 THE COURT: We have a difference of opinion.

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

18 THE COURT: Yes, we do.

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

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

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

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

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

24 MR. OLIVER: It's interesting -

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

1                   MR. OLIVER: It's interesting and I want to share  
2 this with you. I haven't even shared it with Michael's mother  
3 yet because at the time it happened to me, I was pretty  
4 emotional and I just kind of broke up again. Since this  
5 happened, so you don't misunderstand about who appreciates what  
6 and whether you please people or whether you don't please  
7 people, I haven't been over to see Michael. I tried to come  
8 back into see him for a minute but they'd already taken him  
9 over to the jail so I haven't seen Michael since sentencing. I  
10 haven't spoken with him and I haven't seen him and I could have  
11 gone over as an attorney and seen him but I haven't. But the  
12 circumstances are this, he called my office and he left a  
13 message with my secretary and said to my secretary, "Dad, don't  
14 worry, I know that you did the best that you could and I'm  
15 still proud of you." So do not sit and tell me that my son is  
16 what you have accused him of this day because that's what he  
17 said to me as I am broken hearted. He didn't rile on you and  
18 he didn't attack you, he called and he said "Don't worry, dad.  
19 I love you and I know you did your best."

20                   THE COURT: I think you did your best.

21                   MR. OLIVER: But the bottom line is, that you said  
22 you didn't make anybody happy and everybody went out of here  
23 dissatisfied and I'm telling you that that boy walked out of  
24 here saying I accept what the judge said because he is the  
25 judge.



1           My position here today and what I'm saying this  
2 minute is because I have got enough experience under my belt to  
3 know that an injustice was done. That's why I'm here. That's  
4 where my lack of confidence comes, not because you did  
5 something to my son because my son has already called me and  
6 said "Dad, everything is okay. I love you and I know you did  
7 your best."

8           THE COURT: And if you believe an injustice has been  
9 done, then you're appropriate -

10          MR. OLIVER: I know my appropriate remedy, Your Honor  
11 but unfortunately, I also understand that appeals on sentences  
12 are flushed aside provided that it's in the lawful range. This  
13 just flush them out. You do no good on that. It's hollow.  
14 It's hollow. It means nothing. It's a wasted appeal and I  
15 know that and you want to read the cases? That's what they  
16 say. There's no abuse of discretion as long as it's a lawful  
17 sentence.

18          I'm almost finished but I do want to say one thing  
19 and then if you wish to comment I'll listen, but otherwise, I'm  
20 finished. What you just said to me about when you get a  
21 recommendation for prison - or for jail and you send them to  
22 prison instead because the jail is too full, that is a terrible  
23 decision because the people who go through here, including my  
24 son, people in general, because I represent lots of people,  
25 have already had a rough time in their life and I believe, I

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

8 THE COURT: What I said -

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

10 THE COURT: Let's just clarify something-

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

18 THE COURT: I understand that.

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

1 jail is too full.

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

4 MR. OLIVER: I understand.

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

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

12 THE COURT: They said six months-

13 MR. OLIVER: Straight time.

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

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

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

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

22 THE COURT: Okay.

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

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

1 front of me again?

2 MR. OLIVER: I don't. I do not.

3 THE COURT: Well, that's up to you then if you - I'm  
4 not holding anything, even what you've said here today, I'm not  
5 going to feel one way or the other.

6 MR. OLIVER: I do.

7 THE COURT: Well, I can appreciate what you're saying  
8 here and I can appreciate as a father how you feel as well as an  
9 attorney and I can appreciate that but I'm not going to say  
10 tomorrow, if you come in here on a case with another person or  
11 try another case, I'm going to think anything differently of  
12 you than I thought before today, Mr. Oliver.

13 MR. OLIVER: I hope, I hope that the next judge I  
14 appear in front of and the next one and the next one and next  
15 one, is not so arbitrary because that's one thing that I don't  
16 believe that the judiciary is entitled to is arbitrariness.

17 THE COURT: Well, and arbitrariness is the other  
18 thing, that's another word for abuse of discretion and if I am  
19 arbitrary -

20 MR. OLIVER: No, you can have discretion, you can  
21 have that discretion but there's predictability too and while-

22 THE COURT: You cannot, you know, the predictability  
23 is the same when you ask a criminal defendant, do you  
24 understand, even though this is the recommendation of the  
25 prosecutor or this is the recommendation of the defense that I

1 am not bound by that. Why is that in the affidavit? Why is  
2 that in Rule 11? Why is that thing even considered when people  
3 come up because everybody who goes to jail or goes to prison,  
4 they say, "Well, I didn't expect that."

5 MR. OLIVER: Well, you know, this is not everybody  
6 and I'm not talking about me going to prison or to jail and  
7 saying I didn't expect it. What I'm saying is I've had 15  
8 years of experience. I've had 15 years of evaluating cases and  
9 we've gone through the juvenile history. We've gone through  
10 the adult history. He's never been on probation before, never  
11 been on formal probation before and he's never committed a  
12 felony.

13 THE COURT: We've -

14 MR. OLIVER: Now, stopping at that - I understand  
15 that. You just brought something up and I'm addressing what  
16 you just brought up. I'm not just going back and rehashing.  
17 There are things, nobody ties your hands but the bottom line is  
18 there is a level of predictability. We can say, based upon  
19 what goes on in all of these cases, we can see the range of  
20 where we're looking at. Now, I didn't give him a range. I  
21 don't do that. I didn't do that with him and I don't do it  
22 with any of my clients. I'm not a fool and I didn't start  
23 today so I didn't give him a range but the bottom line is,  
24 there is predictability. We can look at a case and we can say,  
25 what this case requires is - and we can talk about it and I

1 might ask for a little bit less than what the case requires and  
2 when I do so I'm standing there with fingers crossed saying  
3 maybe I'll get it and Mr. Peterson can stand up and say what he  
4 thinks that State would want, AP&P can say - but there is  
5 predictability. There is predictability, not guarantees and  
6 that predictability, we are entitled to. When we assess cases  
7 and when we enter into pleas, we are entitled to that  
8 predictability. That doesn't bind your hands. It doesn't tie  
9 you to the deal. I understand that but we are entitled to that  
10 predictability because it's everywhere and-

11 THE COURT: I don't understand, and I'm not going to  
12 prolong this. My clerk has been here and it's after five and  
13 I'm not going to go into this. You know, the predictability is  
14 within whatever range there is, you know, with a second degree  
15 felony is can be all the way from probation to 1 to 15 years in  
16 prison plus a fine. That is the range and that's the  
17 predictable range and if you say because you have 15 years of  
18 practice, this one, you know, ought to be 30 days home  
19 confinement that you suggested, or should be-

20 MR. OLIVER: No, no that's not what I said.

21 THE COURT: Unless you have something more or  
22 different than you've already said, is there anything more that  
23 you want to say or Mr. Peterson, you want to say?

24 MR. PETERSON: I have nothing, Your Honor.

25 MR. OLIVER: And I have nothing more to say and I

1 think that as I conclude, I think that the very issue that I've  
2 addressed is manifest because I (inaudible) answer your  
3 questions, I was addressing my points as I was going through  
4 them and I have a very firm feeling about what I've said.

5 THE COURT: I don't doubt you believe what you said.

6 MR. OLIVER: And it has nothing to do with my son.  
7 It has to do with my practice and I would tell you that if we  
8 take out, and, of course, we don't tie your hands as a judge,  
9 but if we take out that level of predictability, if we take  
10 that out, and we say, No, it's totally unpredictable, we're  
11 just going to let the judge do whatever he does, plea  
12 negotiations will drop off considerably because it's that level  
13 of predictability that permits plea negotiations because-

14 THE COURT: Well, if people don't make pleas, we'll  
15 try more cases.

16 MR. OLIVER: And that in response to me, is exactly  
17 what I'm talking about because I was in the middle of a  
18 sentence and "we can try more cases."

19 THE COURT: When I was talking, you cut me off too  
20 and Mr. Oliver, you know, with all due respect, I've been to  
21 work since seven this morning, it's now after five. We've all  
22 had a long day. I don't think either one of us ought to say  
23 something that we're not going to be happy with later.

24 MR. OLIVER: But I haven't at this point. I've been  
25 very controlled and I've not gone outside the bounds of

1 anything.

2 THE COURT: Thank you. Is there anything further you  
3 want to say?

4 MR. OLIVER: No, I think that you summarized it in  
5 the cold statement that you made because I thought that there  
6 was a dialogue at least on that particular point.

7 THE COURT: Okay, then we'll be in recess.

8 (Whereupon the hearing was concluded)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

-C-



CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Thomas L. Kay was transcribed by me from a videotape and is a full, true, and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 10<sup>th</sup> day of March, 2003 in Sandy, Utah.



Carolyn Erickson  
Certified Shorthand Reporter  
Certified Court Transcriber

My Commission expires May 4, 2006

