

No. _____

**In The
Supreme Court of the United States**

—————◆—————
MICHAEL L. GAILEY,

Petitioner,

v.

STATE OF UTAH,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari To
The Supreme Court Of The State Of Utah**

—————◆—————
PETITION FOR WRIT OF CERTIORARI

—————◆—————
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QUESTION PRESENTED

Whether the Utah Court of Appeals – by refusing to provide Petitioner any notice of how factual discrepancies were resolved prior to imposing consecutive sentences and thereby refusing him an opportunity to respond or mount a defense – decided an important question of federal law that conflicts with this Court’s well-settled precedent concerning due process of law.

LIST OF PARTIES

Petitioner, Michael L. Gailey

Respondent, the State of Utah

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OPINIONS BELOW

The Order of the Utah Supreme Court denying Petition for Writ of Certiorari in Case Number 20150997-SC, entered January 6, 2016, is contained in Appendix (hereinafter “App.”) 1. The Memorandum Decision of the Utah Court of Appeals in Case Number 20140396-CA, entered October 1, 2015, is contained in App. 2-12.



JURISDICTION

The judgment of the Utah Supreme Court was entered on January 6, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VI, which states, in relevant part:

In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, § 1, which states, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;



STATEMENT OF THE CASE

Petitioner, Michael L. Gailey, was convicted by a jury of three counts of aggravated sexual abuse of a child, all first-degree felonies pursuant to Utah Code Ann. § 76-5-404.1. The court ordered a presentence investigation report (PSI) and scheduled a sentencing hearing.

The lengthy PSI included conflicting statements from two groups of people – those adversely affected by Petitioner with a “very vindictive” perspective, and those commenting favorably on Petitioner’s character and hard work, both at work and in the community. The PSI also commented on Petitioner’s lack of criminal history, current living circumstances, education, strong employment and family relationships, amenability to supervision, and his continued denial of abusing the victim. The PSI recommended that Petitioner be sentenced to prison, but it did not make a recommendation whether Petitioner should serve concurrent or consecutive terms.

At sentencing – after asserting that Petitioner “maintains his innocence” – Petitioner’s counsel asked the court to carefully consider the “two opposing points of view” contained in the PSI. Counsel continued, “I don’t expect this Court to be merciful. I expect this Court to take a look at both sides of this case and render a just sentence. And with that, Your Honor, I have nothing further to say.”

The prosecutor requested that the court impose a mandatory fifteen to life sentence. According to the

prosecution, there were no mitigating factors that would mitigate the requested prison sentence. The prosecutor refrained from making a recommendation when asked by the court whether the sentences should run concurrently or consecutively.

Prior to imposing sentence, the court explained that it had reviewed the submitted letters and the PSI, and had heard the discussions and arguments of counsel, which included an analysis of the aggravating and mitigating circumstances. App. 3-4. The court expressed concern that Petitioner had violated a special position of trust, determining that numerous lives had been severely impacted as a result. App. 4. Consequently, the court concluded that a term of less than fifteen years was “not in the interest of justice.” App. 4. Even though neither the PSI nor the State recommended whether the sentences should run concurrently or consecutively, the trial court sentenced Petitioner to “three indeterminate terms at the Utah State Prison for 15 years to life” with “counts one and two . . . to run consecutive. Count three to run concurrent.” App. 4.

Petitioner appealed, arguing that “the trial court erred by imposing consecutive sentences without considering all of the relevant statutory factors [pursuant to Utah Code Ann. § 76-3-401(2)] and by failing to give adequate weight to various mitigating factors.” App. 4. In conjunction with this argument, Petitioner contended that the court failed to properly consider and resolve the ambiguity or discrepancy of facts as to Petitioner’s character. App. 8-9. Additionally, Petitioner

argued that if the court of appeals determined that trial counsel had failed to preserve the issue involving the imposition of consecutive sentences, trial counsel denied Petitioner of his Sixth Amendment right to the effective assistance of counsel by failing to object. App. 5.

In the course of considering Petitioner's sentence, the Utah Court of Appeals reiterated the standard by which the trial court's sentence is to be reviewed. App. 6-7. The court explained that "[i]n making sentencing determinations, judges have no obligation to make findings of fact, and we generally presume that the district court appropriately considered all the relevant evidence and statutory factors." App. 7.

Initially, the court determined that trial counsel had failed to preserve the issue as to the imposition of consecutive sentences. App. 4-5. The court then determined that Petitioner's alternative claim of plain error was unavailing "because there was no error, plain or otherwise." App. 5-6. As a result, the court affirmed Petitioner's sentence, determining that the trial court had properly considered all the requisite statutory factors before imposing the consecutive sentences because it had explicitly relied on the PSI. App. 8. According to the court, "the fact that [Petitioner] views his situation differently than did the trial court does not prove that the trial court neglected to consider the [requisite] factors. . . ." App. 9.

Petitioner petitioned the Utah Supreme Court for a writ of certiorari, which the court denied on January

6, 2016. App. 1. This Court granted Petitioner an extension of time until June 6, 2016, to file his Petition for Writ of Certiorari.



**REASONS FOR GRANTING THE
PETITION FOR WRIT OF CERTIORARI**

- I. BY REFUSING TO PROVIDE PETITIONER NOTICE OF HOW FACTUAL DISCREPANCIES WERE RESOLVED PRIOR TO IMPOSING SENTENCE AND THEREBY REFUSING HIM AN OPPORTUNITY TO RESPOND, THE UTAH COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT CONFLICTS WITH THIS COURT'S WELL-SETTLED PRECEDENT CONCERNING DUE PROCESS OF LAW.**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution is the source of three different kinds of constitutional protection, one of which “is a guarantee of fair procedure, sometimes referred to as ‘procedural due process’: the State may not execute, imprison, or fine a defendant without giving him a fair trial” or hearing. *Daniels v. Williams*, 474 U.S. 327, 337, 106 S.Ct. 677, 677-78 (1986) (citations omitted). While the meaning of “the cryptic and abstract words of the Due Process Clause” might be debated – “there can be no doubt that, at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity

for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657-58 (1950).

“This Court has often recognized that the requirements of due process cannot be ascertained through mechanical application of a formula.” *Groppi v. Leslie*, 404 U.S. 496, 500, 92 S.Ct. 582, 585 (1972) (citations omitted). Moreover, Justice Frankfurter appropriately recognized that due process “is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . .” *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162-63, 71 S.Ct. 624, 643-44 (1951) (concurring opinion). “Indeed, [this Court has] stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are ‘basic in our system of jurisprudence.’” *Groppi*, 404 U.S. at 502, 92 S.Ct. at 586 (quoting *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507 (1948)).

In cases involving a deprivation of procedural due process, it is not the deprivation of liberty that is unconstitutional; rather it is the deprivation of liberty *without due process of law* – without adequate procedures – that is unconstitutional. See *Daniels*, 474 U.S. at 339, 106 S.Ct. at 678. “A [defendant’s] right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic to our system of jurisprudence. . . .” *In re Oliver*, 333 U.S. at 273, 68 S.Ct. at 507. After all, “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *Mullane*, 339 U.S. at 314,

70 S.Ct. at 657 (citing *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914)).

In the course of considering Petitioner’s sentence, the Utah Court of Appeals utilized a standard that is fundamentally flawed. App. 6-7. The court explained that “[i]n making sentencing determinations, *judges have no obligation to make findings of fact, and we generally presume that the district court appropriately considered all the relevant evidence and statutory factors.*” App. 7 (emphasis added). This standard for summarily reviewing and resolving critical factual discrepancies at sentencing fails to provide the reasonable notice and opportunity to which a defendant is entitled when critical liberty interests are at stake.

By employing this standard, trial courts are allowed to resolve important factual ambiguities underlying a decision of whether or not to impose consecutive sentences without giving a defendant any notice or opportunity to answer or – more importantly – mount a defense. The process provided for by the Utah standard constitutes process that is a mere gesture, which is not due process. This lack of notice and opportunity to respond is particularly troubling inasmuch as the court of appeals determined that trial counsel’s failure to properly object to the imposition of consecutive sentences amounted to a futile objection, and therefore did not constitute ineffective assistance of counsel under the Sixth Amendment.

By refusing to provide Petitioner notice of how factual discrepancies were resolved prior to imposing the

consecutive sentences and thereby refusing him an opportunity to respond, the Utah Court of Appeals and the Utah Supreme Court – by denying writ – decided an important question of federal law that conflicts with this Court’s well-settled precedent concerning due process of law. *See* Supreme Court Rule 10(c).



CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari.

DATED this 6th day of June, 2016.

Respectfully submitted,
SCOTT L WIGGINS
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Attorney for Petitioner

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, Respondent,	ORDER
<i>v.</i>	Appellate Case No. 20150997-SC
MICHAEL L. GAILEY, Petitioner.	(Filed Jan. 6, 2016)

This matter is before the court upon a Petition for Writ of Certiorari, filed on December 2, 2015.

The Petition for Writ of Certiorari is denied.

FOR THE COURT:

Dated <u>Jan. 6, 2016</u>	/s/ <u>Thomas R. Lee</u> Thomas R. Lee Associate Chief Justice
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2015 UT App 249

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff and Appellee,

v.

MICHAEL L. GAILEY,
Defendant and Appellant.

Memorandum Decision
No. 20140396-CA
Filed October 1, 2015

Second District Court, Farmington Department
The Honorable David R. Hamilton
No. 121701553
(Filed Oct. 1, 2015)

Scott L. Wiggins, Attorney for Appellant
Sean D. Reyes and Daniel W. Boyer,
Attorneys for Appellee

JUDGE GREGORY K. ORME authored this Memorandum
Decision, in which JUDGES JAMES Z. DAVIS and
KATE A. TOOMEY concurred.

ORME, Judge:

¶1 A jury convicted Defendant, Michael L. Gailey, of three counts of aggravated sexual abuse of a child, all first degree felonies under section 76-5-404.1 of the Utah Code. He appeals, challenging the trial court's imposition of consecutive sentences with respect to two of the three sentences. Because the trial court did not abuse its discretion when it ordered consecutive sentences, we affirm.

¶2 In preparation for Defendant's sentencing hearing, the trial court ordered a presentence investigation report (PSI). The PSI included statements from two groups of people – those adversely affected by Defendant, who described how his conduct had taken a toll on them, and those commenting favorably on Defendant's character, principally family members and co-workers, who asked the judge to be lenient in imposing sentence. Also outlined in the PSI were Defendant's lack of a prior criminal history; his life history and current living circumstances; his education, employment, and financial information; his amenability to supervision; his strong employment and family relationships; and his continued denial of his abuse of the victim. The PSI recommended that Defendant be sentenced to prison, but it did not address whether Defendant should serve concurrent or consecutive terms. The prosecutor also refrained from making a recommendation when asked by the court whether the sentences should run concurrently or consecutively.

¶3 Before sentencing Defendant, the trial court specifically explained that it had "reviewed each and every letter that was provided." It also stated that it had

“carefully read through the pre-sentence investigation, heard the discussions and arguments [of counsel], and that included an analysis of the aggravating and mitigating circumstances that ha[d] been presented.” The court was especially concerned because Defendant had violated a “position of trust,” determining that “multiple lives have been severely impacted” as a result. Taking all of this into consideration, the trial court concluded that a term of less than fifteen years was “not in the interest of justice.” With neither the PSI nor the State articulating a position on whether the three sentences should run concurrently or consecutively, the trial court sentenced Defendant to “three indeterminate terms at the Utah State Prison of 15 years to life” with “counts one and two . . . to run consecutive. Count three to run concurrent.”

¶4 Defendant timely appealed, and he now argues that the “trial court erred by imposing consecutive sentences without considering all of the relevant statutory factors and by failing to give adequate weight to various mitigating factors.” “Generally, we will reverse a trial court’s sentencing decision only if it is an abuse of the judge’s discretion.” *State v. Helms*, 2002 UT 12, ¶ 8, 40 P.3d 626.

¶5 As an initial matter, we agree with the State that Defendant did not preserve this issue for appellate review because Defendant failed to present the issue to the trial court in such a way that the court had the opportunity to resolve it. *See State v. Moa*, 2012 UT 28, ¶ 23, 282 P.3d 985. The Utah Supreme Court has “set forth three factors that help determine whether the

trial court had such an opportunity.” *Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366. First, the issue must have been raised in a timely fashion; second, the issue must have been specifically raised; and third, the party seeking to preserve the issue must have introduced supporting evidence or relevant legal authority. *Id.* See *Hart v. Salt Lake County Comm’n*, 945 P.2d 125, 130 (Utah Ct. App. 1997). In the present case all three factors are absent. As the State points out, “Defendant never challenged the trial court’s imposition of consecutive sentences or claimed that the trial court had failed to consider the pertinent statutory factors and mitigating evidence.” The alleged error was therefore not preserved for our review.

¶6 Defendant nevertheless argues that “[t]his issue, alternatively, is reviewable for plain error.” Defendant also argues, as something of a fail-safe, that if “trial counsel failed to preserve the issue involving the imposition of consecutive sentences, counsel denied Defendant of his Sixth Amendment right to the effective assistance of counsel.”

¶7 Plain error is an exception to our preservation requirement. *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. Similarly, claims of ineffective assistance of counsel, when raised for the first time on appeal, are excepted from the preservation rule. *State v. Kozlov*, 2012 UT App 114, ¶ 35, 276 P.3d 1207. But whether we review the trial court’s decision for plain error or we reach the question of trial counsel’s effectiveness, the result is the same: Defendant’s claim of plain error is

unavailing because there was no error, plain or otherwise. He is likewise unsuccessful on his ineffective-assistance claim because trial counsel did not perform deficiently by failing to make a futile objection to the trial court's error-free imposition of consecutive sentences.

¶8 Plain-error review requires looking at a well-settled, three-part test:

[T]he appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993). In the instant case, the error alleged is that the trial court abused its discretion by disregarding statutory requirements before imposing consecutive sentences.

¶9 Our Legislature has mandated that sentencing courts consider certain factors before deciding whether a defendant's multiple sentences should run concurrently or consecutively to one another. *See* Utah Code Ann. § 76-3-401(2) (LexisNexis 2012). These factors are "the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant." *Id.* If a court fails to consider these factors before ordering that a defendant's sentences run consecutively, it abuses its discretion. *State v. Helms*, 2002 UT 12, ¶¶ 8-9, 40 P.3d 626.

But “[i]n making sentencing determinations, judges have no obligation to make findings of fact, and we generally presume that the district court appropriately considered all the relevant evidence and statutory factors.” *State v. Lingmann*, 2014 UT App 45, ¶ 35, 320 P.3d 1063. We next consider the trial court’s approach in sentencing Defendant in the present case.

¶10 The trial court affirmatively indicated that it had “carefully read through the pre-sentence investigation” report and “all of the correspondence.” These materials account for nearly one hundred pages of the record. They address the facts surrounding Defendant’s crimes, personal details about his life, observations about Defendant’s attitude, the impact of Defendant’s actions on his victim and her family, and contrasting views regarding Defendant’s character. In short, the PSI outlines the very factors that section 76-3-401(2) requires sentencing courts to consider. Because the trial court carefully read the PSI and considered the correspondence, it understood the details of Defendant’s case relating to each of the statutory factors. This satisfied the requirements of section 76-3-401(2). *See Helms*, 2002 UT 12, ¶ 13.

¶11 In *State v. Helms*, the Utah Supreme Court upheld a trial court’s imposition of consecutive prison sentences, rejecting a defendant’s argument that the court had not considered all of the required statutory factors. *See id.* ¶¶ 7, 18. As part of its analysis, the Utah Supreme Court considered the trial court’s own statement that it had “gone over th[e] presentence report rather carefully, and read it, and what ha[d] taken

place.” *Id.* ¶ 13 (internal quotation marks omitted). In that case, the presentence report contained “detailed information regarding not only the ‘gravity and circumstances of the offenses,’ but also the ‘history, character, and rehabilitative needs of the defendant.’” *Id.* The Supreme Court reasoned that “[a]ll this, the trial court stated, it had read ‘rather carefully,’ which evidences that the trial court did consider Helms’ history, character, and rehabilitative needs.” *Id.*

¶12 The trial court’s approach to considering the statutory factors in the case before us is nearly indistinguishable from that of the trial court in *Helms*, and the same conclusion therefore results. Because the PSI contained information relating to each of the factors outlined in section 76-3-401(2), and because the trial court carefully considered that information before ordering two of Defendant’s sentences to run consecutively, the trial court fulfilled the requirements of the statute. It is Defendant’s burden to show that the trial court failed to comply with the statute, *see id.* ¶ 16, and given the trial court’s explicit indication of its reliance on the PSI, which contained information corresponding to each of the statutory requirements, this is a burden he fails to carry.

¶13 The only particularized complaint Defendant seems to have regarding the trial court’s consideration of the statutory factors is that “the court failed to

properly consider and resolve the ambiguity or discrepancy of facts as to Defendant's character."¹ "However, the fact that [Defendant] views his situation differently than did the trial court does not prove that the trial court neglected to consider the factors listed in section 76-3-401[(2)]." *Helms*, 2002 UT 12, ¶ 14. The trial court stated that it had considered all of the information regarding Defendant's character, and we have no reason to doubt that it did so. It was not an abuse of discretion for the trial court to consider the conflicting statements and then decide to impose partially consecutive sentences. Because there was no abuse of discretion, there was no error. Because there was no error, we need not consider the other components of plain-error review. *See State v. Dunn*, 850 P.2d 1201, 1209 (Utah

¹ In what might be a separate argument, Defendant alleges that "not only did the trial court fail to properly consider all of the statutory factors in section 76-3-401(2) but it failed to give adequate weight to various mitigating factors prior to imposing consecutive sentences." But in support of this argument, Defendant merely reiterates portions of the PSI that cast him in a favorable light. This is not the sort of "reasoned analysis based upon relevant legal authority" that merits plenary consideration on appeal. *See Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14. Furthermore, Defendant's selective focus on factors that might have supported imposition of concurrent sentences does nothing to persuade us that the trial court failed to consider any of the required statutory factors. This is especially so given that "[t]he court is not required to give each factor equal weight." *State v. Scott*, 2008 UT App 68, ¶ 10, 180 P.3d 774. And because Defendant's argument concerning the trial court's weighing of mitigating factors is lumped in with his analysis of whether the court properly considered the requisite statutory factors, *see* Utah Code Ann. § 76-3-401(2) (LexisNexis 2012), we treat the arguments as one issue on appeal.

1993) (“If any one of these requirements is not met, plain error is not established.”).

¶14 The fact that there was no error is also determinative of Defendant’s ineffective-assistance claim, whereby he asserts that counsel was remiss for not objecting to the trial court’s imposition of consecutive sentences.

To show ineffective assistance of counsel . . . , a defendant must show (1) that counsel’s performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel’s deficient performance there is a reasonable probability that the outcome . . . would have been different.

State v. Smith, 909 P.2d 236, 243 (Utah 1995). “Because both deficient performance and resulting prejudice are requisite elements of an ineffective assistance of counsel claim, a failure to prove either element defeats the claim.” *State v. Hards*, 2015 UT App 42, ¶ 18, 345 P.3d 769.

¶15 Defendant argues that his trial counsel performed deficiently “[b]y failing to object to the imposition of consecutive sentences and/or by failing to alert the sentencing court to the factors that it failed to consider prior to imposing consecutive sentences.” We have already determined that the trial court properly considered the requisite statutory factors, so all that is left for us to consider is whether trial counsel’s failure to object to two of the three sentences running consecutively constitutes deficient performance.

¶16 As explained above, Defendant has failed to establish reversible error in the trial court's approach to sentencing Defendant to consecutive prison terms. *See supra* ¶ 12. Accordingly, any objection to the consecutive sentences would have been futile. And the "[f]ailure to raise futile objections does not constitute ineffective assistance of counsel." *State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546.

¶17 In conclusion, Defendant bears the burden of establishing that the trial court failed to consider the factors outlined in section 76-3-401(2) of the Utah Code. Because the record supports a determination that the trial court considered those factors, Defendant has failed to carry his burden. Thus, we cannot say that it was an abuse of discretion for the trial court to impose consecutive sentences in this case. Furthermore, because futile objections are unnecessary, Defendant's trial counsel did not perform deficiently when he chose not to object to the trial court's imposition of consecutive sentences.

¶18 Affirmed.

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of October, 2015, a true and correct copy of the attached DECISION was sent by standard or electronic mail to be delivered to:

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TRIAL COURT: SECOND DISTRICT,
FARMINGTON, 121701553
APPEALS CASE NO.: 20140396-CA
