

1987

Utah v. David Lorrach : Brief of Appellant

Utah Supreme Court

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Andrew A. Valdez; Elizabeth A. Bowman; Salt Lake Legal Defenders Association; Attorney for Appellant.

David L. Wilkinson; Attorney General; Attorneys for Defendant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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DOCKET NO. **870255**

THE STATE OF UTAH,	:	<u>BRIEF OF APPELLANT</u>
Plaintiff/Respondent,	:	
v.	:	
DAVID LORRAH,	:	Case No. 870255
Defendant/Appellant.	:	Priority No. 2

The Appellant, David Lorrah, appeals from the judgment and sentence imposed for Rape of a Child, a felony of the first degree, in violation of Utah Code Ann. §76-5-402.1, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	<u>BRIEF OF APPELLANT</u>
Plaintiff/Respondent,	:	
v.	:	
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.	iii
JURISDICTIONAL STATEMENT.	iv
TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS	v
STATEMENT OF ISSUES	vi
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT:	
<u>POINT I. IMPOSITION OF THE SECOND SENTENCE, IN</u> <u>MR. LORRAH'S ABSENCE, DENIED HIM HIS DUE</u> <u>PROCESS RIGHT OF ALLOCUTION.</u>	2
<u>POINT II. THE TRIAL COURT ERRED BY NOT FOLLOWING</u> <u>THE SENTENCING GUIDELINES OF UTAH CODE ANN.</u> <u>\$76-3-201 (SUPP. 1983)</u>	4
A. THE INITIAL SENTENCE SHOULD STAND BECAUSE THE NEW SENTENCE IMPOSED BY THE COURT WAS GREATER THAN THE INITIAL SENTENCE.	5
B. THE INITIAL SENTENCE IMPOSED SHOULD STAND BECAUSE THE NEW SENTENCE WAS NOT IMPOSED WITHIN THE STATUTORY TIME FRAME	6
CONCLUSION.	7

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>CASES CITED</u>	
<u>Christiansen v. Harris</u> , 163 P.2d 314 (Utah 1945)	2, 3
<u>Gord v. Salt Lake City</u> , 434 P.2d 449 (Utah 1967)	5, 7
<u>Green v. United States</u> , 365 U.S.301, 81 S.Ct. 653, 5L.Ed.2d 670 (1961).	3, 4
<u>State v. Egbert</u> , 66 Utah Adv. Rep. 52 (1987)	5
<u>United States v. Mason</u> , 440 F.2d 1293 (10th Cir. 1971)	6

<u>STATUTES CITED</u>	
Utah Code Ann. §77-35-22 (1953 as amended)	3, 4, 5
Utah Code Ann. §76-3-201 (Supp. 1983).	4, 5, 6
Utah Code Ann. §76-3-203 (Supp. 1983)	4
Utah Code Ann. §76-5-402.1 (Supp. 1983).	1, 5
Utah Code Ann. §76-35-22(a)(1953 as amended)	3, 5

<u>OTHER AUTHORITIES</u>	
Article 1, §7, Utah Constitution	2

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §77-35-26(2)(a)(1953 as amended) and Utah Code Ann. §78-2-2(3)(h)(1953 as amended), whereby the defendant in a criminal action may take an appeal from a final judgment of conviction of a first degree felony. In this case final judgment and conviction of a first degree felony was rendered by the Honorable Michael R. Murphy, Judge of the Third District Court in and for Salt Lake County, State of Utah.

TEXTS OF STATUTES

Utah Code Ann. §77-35-22(a):

. . .

Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed.

Utah Code Ann. §76-3-203(1):

A person who has been convicted of a felony may be sentenced to imprisonment for a n indeterminate term as follows:

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law. . . .

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

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

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

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

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

TEXT OF CONSTITUTIONAL PROVISIONS

Article I, Section 7 of the Utah Constitution:

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

STATEMENT OF ISSUES

1. Was Mr. Lorrach denied his right of allocution when he was sentenced the second time in his absence?

2. Did the trial court err by not following sentencing statutory guidelines?

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	<u>BRIEF OF APPELLANT</u>
Plaintiff/Respondent,	:	
v.	:	
DAVID LORRAH,	:	Case No. 870255
Defendant/Appellant.	:	Priority No. 2

STATEMENT OF THE CASE

The Appellant, David Lorrah, appeals from the judgment and sentence imposed for Rape of a Child, a felony of the first degree, in violation of Utah Code Ann. §76-5-402.1, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, Judge, presiding.

STATEMENT OF FACTS

On July 31, 1986, Mr. Lorrah pleaded guilty to one count of Rape of a Child, a first degree felony, in violation of Utah Code Ann. §76-5-402.1 (Supp. 1983). On November 7, 1986, Judge Moffat sentenced Mr. Lorrah to "the indeterminate sentence as provided by statute with the minimum recommendation of ten years (T₁. 9)¹. The Court file indicates the original form documenting the sentence simply reads the defendant is sentenced to a term not to exceed ten years. (Addendum A). Another form documenting that sentence incorrectly read "defendant was sentenced to the maximum

¹ T₁ now and hereafter refers to the transcript of the sentencing hearing held November 7, 1986.

mandatory term of ten years, which may be for life." The form indicated it was for the sentence imposed November 7, 1986, but the Judge signed it November 13, 1986. (T₂. 2)². (Addendum B)

The court, upon discovering the error, filed an amended judgment and sentence in which the form was properly filled out. Without a hearing and without Mr. Lorrah being present, the court had the clerk issue an amended judgment (T₂. 6).

After the court received a letter expressing concern regarding the new sentence from Mr. Lorrah, Mr. Lorrah was brought before the court and represented by counsel at a hearing held June 26, 1987. At that time, the judge resentenced Mr. Lorrah to a minimum mandatory term of ten years and which may be for life (T₂. 5). (Addendum C). The Judge declared the prior sentences void. Id.

SUMMARY OF ARGUMENT

The trial court violated Mr. Lorrah's due process right by amending his sentence in his absence. Further, the trial court erred by attempting to amend his sentence by increasing it and by amending it outside the statutory time frame.

ARGUMENT

POINT I. IMPOSITION OF THE SECOND SENTENCE, IN MR. LORRAH'S ABSENCE, DENIED HIM HIS DUE PROCESS RIGHT OF ALLOCUTION.

"Due process" as set forth in Article I, §7 of the Utah Constitution embraces the concept that citizens shall have their day in court and all procedural safeguards shall be employed. In Christiansen v. Harris, 163 P.2d 316 (Utah 1945) this Court found

² T₂ now and hereafter refers to the transcript of "Defendant's Objections" held June 26, 1987.

due process concerns had been satisfied at a hearing which addressed whether the petitioner had been meeting the conditions of his probation. This Court noted:

The term "law of the land" embraces all legal and equitable rules which define human rights and duties, and provides for their protection and enforcement, both as between the state and its citizen, and between man and man. And the "due process" of law includes the steps essential under such rules to deprive a person of life, or liberty. It covers the means and methods that are prescribed or may be employed to accomplish the purposes of the law.

Id. at 316. Due process concerns therefore apply to procedural safeguards set forth in Utah's statutes. Id. at 316-17.

Our legislature has codified the common law right of allocution in Utah Code Ann. §77-35-22(a) (1953 as amended) which states in part:

. . .

Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed.

The same principle was announced in Green v. United States, 365 U.S.301, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961). In Green, the Court noted failure of a sentencing judge to specifically address the defendant asking him if he had anything to say before imposing sentence would violate the common law right of allocution.³ Such a failing renders a sentence illegal.

³ Although the issue of allocution came before the Court in Green in the context of Fed. R. Crim. P. 32 (a), the Court noted the common

Mr. Lorrah was present and given an opportunity to speak on his own behalf at the initial sentencing on November 7, 1986 (T₁. 7). The imposition of the sentence of ten years minimum and which may be for life in the case at bar took place off the record and in Mr. Lorrah's absence (T₂. 5-6). Mr. Lorrah challenges this subsequent sentence. Because the correction took place in Mr. Lorrah's absence, Mr. Lorrah's common law right of allocution as codified in Utah Code Ann. §77-35-22 (1953 as amended) and as recognized by the United States Supreme Court in Green was denied. His amended sentence is therefore illegal and the original sentence should stand.

POINT II. THE TRIAL COURT ERRED BY NOT FOLLOWING
THE SENTENCING GUIDELINES OF UTAH CODE ANN. §76-3-201
(SUPP. 1983).

At the initial sentencing on November 7, 1986, the Judge, rather than indicating the sentence was one of a ten year mandatory minimum, merely indicated it was an "indeterminate sentence as provided by statute with the recommendation of ten years." (T₁. 9) (emphasis added). The trial court attempted to correct the sentence first in Mr. Lorrah's absence, then at a hearing held June 26, 1987.

Utah's indeterminate sentencing scheme is set forth in Utah Code Ann. §76-3-203 (Supp. 1983) which provides for indeterminate sentencing "unless otherwise specifically provided by law." Utah Code Ann. §76-3-203(1) (Supp. 1983). Although the trial court called Mr. Lorrah's sentence indeterminate, it would seem the

3 cont. law right of allocution was recognized as early as 1689 and was merely codified in the Rule. Green at 304. The Court found the record did not substantiate the defendant's claim. Id.

exception in the above statute which is directed toward the minimum mandatory sentencing scheme in Utah Code Ann. §76-3-201 (Supp. 1983) controls.⁴ The minimum mandatory sentencing scheme has its own resentencing provision. Section 76-3-201(6)(a) allows for a trial judge to recall the original sentence and commitment and:

resentence the defendant in the same manner as if he had not previously been sentenced, so long as the new sentence is no greater than the initial sentence nor less than the mandatory time prescribed by statute . . . within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Board of Pardons. . . .⁵

A. THE INITIAL SENTENCE SHOULD STAND BECAUSE
THE NEW SENTENCE IMPOSED BY THE COURT
WAS GREATER THAN THE INITIAL SENTENCE.

At the initial sentencing hearing, the trial court merely indicated the sentence imposed carried with it the judge's recommendation for a ten year commitment (T₁. 9). The Court's form reflecting that sentence was in fact inconsistent with the oral pronouncement. That form indicated the ten year period was the

⁴ Although the minimum mandatory sentencing scheme is indeterminate at the outside limit because of the language "which may be for life", the inside limit varies from the usual indeterminate sentencing scheme because it is fixed by the judge and cannot be altered by the Board of Pardons. In that sense, the minimum mandatory sentencing scheme departs from the state's usual indeterminate sentencing philosophy. State v. Egbert, 66 Utah Adv. Rep. 52, 56 (1987) Zimmerman, J. dissenting.

⁵ Although Utah Code Ann. §77-35-22(e)(1953 as amended) provides for the correction of an illegal sentence at any time, the more specific statute, allowing only for a correction on the court's motion within 120 days of commitment applies to a conviction under Utah Code Ann. §76-5-402.1 (Supp. 1983). Gord v. Salt Lake City, 434 P.2d 449, 451 (Utah 1967).

"maximum mandatory" term and also contained the additionally confusing language "which may be for life" (T₂. 2). However, where a conflict between an oral pronouncement and a written sentence and commitment exists, the oral pronouncement controls. United States v. Mason, 440 F.2d 1293 (10th Cir. 1971) cert. denied (404 U.S. 883 (1971)). Therefore, the language recommending a ten year sentence controls.

Utah's legislature has stated any new sentence⁶ imposed cannot be greater than the original sentence. A minimum mandatory sentence of ten years and which may be for life minimally requires the serving of a ten year term. However, a sentence which merely carries with it the recommendation of a ten year term indicates there is a possibility of release before the completion of a ten year term. Thus the new sentence imposing the ten year minimum term, imposed at the hearing on June 26, 1986 violated the terms of Utah Code Ann. §76-3-201(6)(a) because it was greater than the initial sentence. Therefore, the original sentence, with the judge's recommendation of ten years imposed November 7, 1986 ought to control.

B. THE INITIAL SENTENCE IMPOSED SHOULD STAND
BECAUSE THE NEW SENTENCE WAS NOT IMPOSED WITHIN
THE STATUTORY TIME FRAME.

Utah Code Ann. §76-3-201(6)(a) allows the Court on its own motion to recall an original sentence and resentence a defendant within 120 days of the initial commitment. Mr. Lorrah was committed forthwith to the custody of the Utah State Prison following his

⁶ Utah Code Ann. §76-3-201(6)(a)(Supp. 1983).

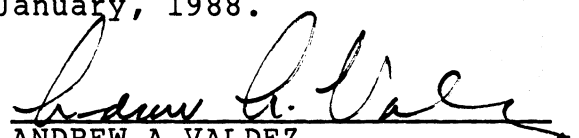
initial sentencing hearing on November 7, 1986. The trial court attempted to resentence him at a hearing held June 26, 1987.

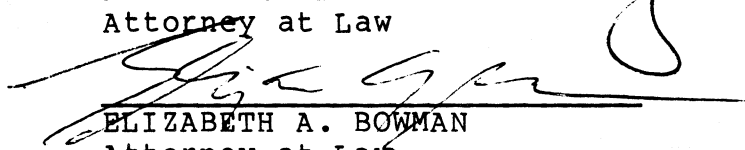
Where a statute is clear on its face, unless it violates constitutional principles, the plain language of the statute controls. Gord v. Salt Lake City, 434 P.2d 449, 451 (Utah 1967). In the case at bar, the resentencing took place outside the statutory 120 day limit and is therefore void. Therefore, Mr. Lorrach's original sentence, carrying the judicial recommendation he serve ten years ought to stand.

CONCLUSION

Mr. Lorrach, for the reasons set forth in his brief above, asks this Court to recall his amended sentence and remand his case for imposition of the original sentence.

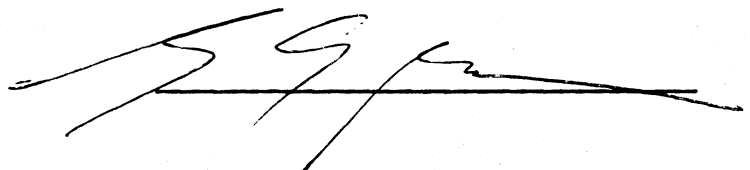
DATED this 29 day of January, 1988.


ANDREW A. VALDEZ
Attorney at Law


ELIZABETH A. BOWMAN
Attorney at Law

CERTIFICATE OF DELIVERY

I, ELIZABETH BOWMAN, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, State Capitol, Salt Lake City, Utah 84114, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 29 day of January, 1988.



DELIVERED by _____ this _____ day of
February, 1988.

ADDENDUM A

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

THE STATE OF UTAH,

Plaintiff,

vs.

Dave Lorrach

Defendant.

**JUDGMENT, SENTENCE
(COMMITMENT)**

Case No. CR 86-773
Count No. _____
Honorable Richard H. Moffat
Clerk C. Redding
Reporter Hal Walton
Bailiff Don Jensen
Date 11-7-86

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☒ the court; ☒ plea of guilty; ☐ plea of no contest; of the offense of Rape of a Child, a felony of the 1st degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by _____, and the State being represented by _____, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☐ to a maximum mandatory term of _____ years and which may be for life;
☐ not to exceed five years;
☐ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☒ not to exceed 10 years;
☐ and ordered to pay a fine in the amount of \$_____;
☐ and ordered to pay restitution in the amount of \$_____ to _____;
☐ such sentence is to run concurrently with _____;
☐ such sentence is to run consecutively with _____;
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.
☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
☒ Commitment shall issue forthwith

DATED this 7th day of November 19 86

APPROVED AS TO FORM:

Defense Counsel

Deputy County Attorney

DISTRICT COURT JUDGE.
ATTEST
H. DIXON HINDLEY
CLERK

By _____ Page 000001
Deputy Clerk

ADDENDUM B

NOV 14 1986

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

H. Dixon Hindley, Clerk 3rd Dist. Ct.
By [Signature] Deputy Clerk

THE STATE OF UTAH,

Plaintiff,

vs.

DAVE LORRAH

(USP)

Defendant.

AMENDED

**JUDGMENT, SENTENCE
(COMMITMENT)**

Case No. CR 86-773
Count No. 1
Honorable RICHARD H. MOFFAT
Clerk KATHY GROTEPAS
Reporter HAL WALTON
Bailiff DON JENSEN
Date NOVEMBER 7, 1986

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court; ☒ plea of guilty; ☐ plea of no contest; of the offense of rape of a child, a felony of the 1st degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by A. Valdez, and the State being represented by T. Vuyk, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☒ to a maximum mandatory term of 10 years and which may be for life;

- ☐ not to exceed five years;
- ☐ of not less than one year nor more than fifteen years;
- ☐ of not less than five years and which may be for life;
- ☐ not to exceed _____ years;
- ☐ and ordered to pay a fine in the amount of \$_____;
- ☐ and ordered to pay restitution in the amount of \$_____ to _____

- ☐ such sentence is to run concurrently with _____
- ☐ such sentence is to run consecutively with _____
- ☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
- ☐ _____

☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.

☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.

☒ Commitment shall issue Forthwith

DATED this 13 day of November, 1986

APPROVED AS TO FORM:

Defense Counsel

Deputy County Attorney

[Signature]
DISTRICT COURT JUDGE

ATTEST

H. DIXON HINDLEY

CLERK

By K. Grotepas

ADDENDUM C

JUN 30 1987

H Dixon Hindley, Clerk 3rd Dist Court

By [Signature] Deputy Clerk

THE STATE OF UTAH,

Plaintiff,

vs.

Dave Corrah

(U.S.P.)

Defendant.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Second Amended

JUDGMENT, SENTENCE of 11/7/86
(COMMITMENT)

Case No. CR 86-773
Count No. 1
Honorable Richard H. Moffat
Clerk Kathy Grotelbas
Reporter Hal Watson
Bailiff Al Demman
Date June 26, 1987

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court; ☒ plea of guilty; ☐ plea of no contest; of the offense of Rape of a child, a felony of the 1st degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by A Valdez, and the State being represented by P. Iwasaki, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☒ minimum to a ~~maximum~~ mandatory term of 10 years and which may be for life;
- ☐ not to exceed five years;
- ☐ of not less than one year nor more than fifteen years;
- ☐ of not less than five years and which may be for life;
- ☐ not to exceed _____ years;
- ☐ and ordered to pay a fine in the amount of \$_____;
- ☐ and ordered to pay restitution in the amount of \$_____ to _____

- ☐ such sentence is to run concurrently with _____
- ☐ such sentence is to run consecutively with _____
- ☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
- ☐ _____

☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.

☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.

☒ Commitment shall issue forthwith

DATED this 29 day of June, 1987

APPROVED AS TO FORM:

Defense Counsel

Deputy County Attorney

ATTEST
H. DIXON HINDLEY
CLERK

By K Grotelbas

[Signature]
DISTRICT COURT JUDGE