

1981

# State of Utah v. Howard D. Newmeyer : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH, STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

Vs.

Case No. 17512

HOWARD NEWMAYER,

Defendant-Appellant,

---

BRIEF OF APPELLANT

---

APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED  
IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
UTAH COUNTY

---

HONORABLE MAURICE HARDING, JUDGE

---

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE -----	1
DISPOSITION IN THE LOWER COURT -----	1
RELIEF SOUGHT ON APPEAL -----	2
BRIEF STATEMENT OF THE FACTS -----	2
ARGUMENT	
POINT I: THE TRIAL COURT IMPROPERLY QUESTIONED THE DEFENDANT'S TESTIMONY SO AS TO GIVE THE JURY THE CLEAR IMPRESSION THAT THE JUDGE DISBELIEVED THE DEFENDANT -----	3
POINT II: STATEMENTS BY THE PROSECUTOR TO THE JURY DURING CLOSING ARGUMENT THAT THEY HAD A DUTY TO CONSIDER THE FAIRNESS TO THE VICTIM IN COMING TO THEIR VERDICT INFRINGED ON THE DEFENDANT'S RIGHT TO A PRESUMPTION OF INNOCENCE. -----	9
POINT III: THE EVIDENCE PRESENTED AT TRIAL WAS INSUF- FICIENT TO SUPPORT THE CONVICTION OF THE DEFENDENT FOR RAPE. -----	12
A. The evidence presented at Trial below was so inherently improbable under the circumstances that reasonable persons, in the absence of the errors committed, could not have convicted the Defendant.-----	12
B. The errors committed at trial below substantially prejudiced the Defendant's right to a fair trial. -----	17
CONCLUSION -----	19
<u>Constitutional Provisions Cited</u>	
Constitution of the State of Utah, Article I, Section 11 -----	3

TABLE OF CONTENTS  
(cont'd)

Statutes Cited

Utah Code Annotated, 1953, Section 76-1-501	3
Utah Code Annotated, 1953, Section 77-17-10,	4
Utah Code Annotated, 1953, Section 77-35-30,	17

Cases Cited

State vs. Archuleta 501 P.2d 263 (Utah, 1972)	9
State vs. Eaton 569 P. 1114 (Utah, 1977)	18
State vs. Horne 364 P.2d 109 (Utah, 1961)	12, 11
State vs. Howard 544 P.2d 466 (Utah, 1975)	17
State vs. Lamb 131 P.2d 805 (Utah, 1942)	16
State vs. Mannion 57 P. 542 (Utah, 1899)	19
State vs. Mellen 583 P.2d 46 (Utah, 1978)	4
State vs. Rosenbaum 449 P.2d 999 (Utah, 1969)	4
State vs. St. Clair 301 P.2d 752 (Utah, 1959)	7
State vs. Strohm 456 P.2d 170 (Utah, 1969)	8
State vs. Studham 572 P.2d 700 (Utah, 1977)	15
State vs. Topham 123 P. 888 (Utah, 1912)	10
State vs. Williams 180 P.2d 551 (Utah, 1947)	15
State vs. Valdez 513 P.2d 422 (Utah, 1973)	10

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	Case No. 17512
Vs.	:	
	:	
HOWARD NEWMAYER,	:	
	:	
Defendant-Appellant.	:	

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BRIEF OF APPELLANT

---

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the crimes of rape and forcible sodomy, in violation of Sections 76-5-402 and 76-5-403, Utah Code Annotated, 1953, as amended, in that on or about August 29, 1980, at Utah County, Utah, the Defendant had sexual intercourse with a female not his wife, MARIE ELLEN MARTIN, without her consent, a felony of the second degree, and that the Defendant performed a sexual act upon the same female, by the use of his sexual organ in the mouth of said female without her consent.

DISPOSITION IN THE LOWER COURT

Appellant was tried in the Fourth Judicial District Court of Utah County, the Honorable Maurice Harding, Judge, on the 20th of

November, 1980, before a jury, which jury brought back a verdict finding the Defendant guilty as charged on both counts. Defendant was sentenced by the Court on December 12, 1980, to serve 1-15 years and 5 to life in the Utah State Prison. Notice of Appeal was timely filed by Appellant.

#### RELIEF SOUGHT ON APPEAL

Appellant respectfully requests that the Court vacate the Judgment entered in the District Court and remand the case with an Order granting the Defendant a new trial in this matter.

#### BRIEF STATEMENT OF THE FACTS

On the 29th of August, 1980, the Defendant, HOWARD NEWMAYER, made contact with MARIE ELLEN MARTIN, the Complaining witness in this case. She was a clerk at the 7-11 Store in Lindon, Utah. MRS. MARTIN, although married, agreed to accompany the Defendant to his house after she got off work sometime after 11:00 PM that night, (R., 30). Their association that night led to an act of sexual intercourse between them. Defendant asserts that the intercourse occurred as a result of mutual consent, although MRS. MARTIN says she was raped. MRS. MARTIN returned to her home later that night and failed to report or discuss this incident with her husband. She again failed to discuss the prior

night's occurrences with her husband the next morning when he left for work, (R.,49). That afternoon after discussions with friends they reported the incident to the police, and the Defendant was arrested, (R.,78).

#### ARGUMENT

##### POINT I.

#### THE TRIAL COURT IMPROPERLY QUESTIONED THE DEFENDANT'S TESTIMONY SO AS TO GIVE THE JURY THE CLEAR IMPRESSION THAT THE JUDGE DISBELIEVED THE DEFENDANT.

Article I, Section 11 of the Constitution of the State of Utah provides in part: "... No persons shall be barred from prosecuting or defending before any tribunal in this State ...". The Court has made the following statement in reference to the above cited section of the Constitution:

In addition to the important right to have access to the Courts, it is equally important that the Court be fair and impartial, committed to the purpose of seeking truth and doing justice, without bias or prejudice, fear or favor. In pursuing that objective, it is not to be questioned that, particularly in a jury trial, a Judge should maintain an attitude of neutrality and should not, either by his comments or demeanor indicate his opinions either as to the credibility of the evidence or on the disputed issues of fact. Consistent with the foregoing, the Judge should and normally does exercise restraint in examining witnesses, so that he does not unduly intrude into the trial or encroach

upon the functions of counsel, (Emphasis Added).  
State vs. Mellen, 583 P.2d 46, 48.

Although a Judge is not required to sit silently in maintaining the appropriate attitude of neutrality, he should also refrain from openly espousing the position of the Plaintiff or Defendant in the case before him. The Court's exclusive prerogative is to decide the law in each case, and not to argue factual matters on behalf of either Party before him. Utah Code Annotated, 1953, Section 77-17-10, as amended, provides:

(1) In a jury trial, questions of law are to be determined by the Court, questions of fact by the jury.

(2) The jury may find a general verdict which includes questions of law as well as fact but they are bound to follow the law as stated by the Court.

Judges are prohibited from deciding issues of fact in a jury trial, and it is inappropriate for a trial judge to give a jury even subtle indications as to whether evidence which has been presented is believable or not. In State vs. Rosenbaum 449 P.2d 999 (Utah, 1969), this Court reversed the Defendant's conviction of burglary holding that the trial court had committed prejudicial error by giving the jury an instruction disparaging the Defendant's alibi defense. The Court said:

In this State the trial Judge is not permitted to comment on evidence and he, therefore, may not indicate to a jury that evidence is either weak or convincing. It is the sole and exclusive province



of the jury to determine the facts in a criminal case, and this it must do regardless of the relative strength or weakness of the evidence in the case. 449 P.2d at 1000.

It is clear that a trial Judge may not in any way indicate to the members of a jury whether or not he personally believes or discredits whatever evidence is being presented. Certainly Judges have their personal opinions and beliefs, as does any person, but Judges have a special duty not to communicate their personal beliefs to the members of the jury in any possible way. If a trial Judge does project the attitude of belief or disbelief during a witnesses testimony, the jury may be improperly influenced by the Judge's opinion. If a jury is influenced by a Court's expression or communication of belief or disbelief, the Court has invaded the province of the jury to evaluate the evidence.

The record discloses that the Prosecution based part of its proof of "force" on behalf of the Defendant by introducing State's exhibit #4, a knife. (R.,105) The prosecution focused its questioning of the Defendant on this knife ( R.,141, 142) inferring that the Complaining witness would never have seen the knife had the Defendant not used it to threaten her. After the prosecution and defense had both questioned the Defendant at length, the Court began cross-examining the Defendant. (R.,154, 155) The trial court began following a line of questioning which

the Prosecutor had already completed, regarding the location of State's exhibit #4, the knife. At the very least the Court's questions were repetitive on a subject matter which had clearly already been covered by the Prosecution. However the Judge's demeanor became extremely skeptical and disbelieving, culminating in his question: "How do you account for the fact she told the Officers the next day what kind of a knife it was?" (R.,155) The attitude of the trial Judge, the edge on his voice, and his skeptical expression all communicated a clear disbelief and dissatisfaction with the Defendant's answer. It became so obviously prejudicial that the prosecution hurriedly interrupted the Court and again resumed his recross-examination on another topic. But by this time members of the jury, the Prosecutor and Defense counsel, and spectators in the court room were looking at one another and at the trial judge quizzically, wondering what had prompted such an open display of disbelief on his part.

The actions by the trial court gave those persons present, including members of the jury, every indication as to what the Judge thought of the testimony of the Defendant: he totally disbelieved it. This invades the province of the jury, whose

prerogative it is to evaluate the evidence presented. Such behavior on the part of the trial Judge was in effect a comment on his behalf to the jury that they need not believe the Defendant's testimony any more than he did. This is clearly impermissible and certainly prejudicial to the Defendant.

In State vs. St. Clair 301 P.2d 752 (Utah, 1956) the Supreme Court affirmed the trial court's conviction of the Defendant for murder. At trial evidence was presented by the Prosecution that the Defendant had cut a backdoor screen with his pocketknife to gain entry to the house where he allegedly killed a woman. In response to this testimony the trial Judge made a comment which questioned the Prosecution's interpretation of the markings or lack of markings on the screen door and on the pocketknife. However the Supreme Court was unable to see how this judicial comment of the evidence, although improper, was prejudicial to the Defendant, since the Court's statement questioned the Prosecution's evidence. Therefore the conviction was upheld. However in the case at bar the comments of the trial judge were directed to the testimony of the Defendant himself, and the incredulous demeanor adopted by the trial Judge was directed specifically at the Defendant's explanation.

In State vs. Strohm 456 P.2d 170 (Utah, 1969) this court reversed the Defendant's conviction on burglary and larceny and remanded for a new trial. After voir dire there was some question about the voluntariness of a confession, and the trial court announced in front of the jury that this was a question for the jury. The Supreme Court held this constituted error, because the question was in fact one for the Judge. The judgment was reversed and remanded for a new trial because the court had improperly instructed the jury to perform a function which was within the province of the trial Judge. The Judge had effectively abrogated his responsibility to decide the question. In the case at bar the guilty verdicts should be reversed because the trial Judge overstepped the bounds of his responsibilities, and invaded the province of the jury. By improperly indicating to the jury his strong disbelief of the Defendant's testimony, the trial court was improperly influencing the jury in it's duties as a finder of fact. Defense counsel moved for a mistrial on the basis of the Court's prejudicial behavior, which motion was denied. (R., 157, 158)

Even though the trial court's actions were improper, they constitute reversible error only when they are found to be prejudicial to the rights of the Defendant in obtaining a fair

trial. State vs. Archuleta 501 P.2d 263 (Utah, 1972). Defendant respectfully submits that the actions of the trial court below amounted to an abuse of discretion which substantially prejudiced the Defendant's right to a fair trial, and his conviction in that court should therefore be reversed, and the Defendant granted a new trial.

POINT II  
STATEMENTS BY THE PROSECUTOR TO THE JURY DURING  
CLOSING ARGUMENT THAT THE JURY HAD A DUTY REGARDING  
THE VICTIM IN RETURNING THEIR VERDICT TAINTED OR  
REMOVED THE PRESUMPTION OF INNOCENCE OF DEFENDANT.

Utah Code Annotated, 1953, Section 76-1-501, provides in part:

(1) A Defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In the absence of such proof, the Defendant shall be acquitted.

Since it is the Defendant on trial in a criminal proceeding it is his rights which are effected by the outcome of the trial. The State has the burden to present evidence and the burden of proof showing Defendant's guilt beyond a reasonable doubt. A criminal proceeding is not a balancing of interests between the victim of a crime and the alleged perpetrator thereof. The State

acts on behalf of all of its citizens in preserving their rights, including the rights of the citizen charged with the crime. The very essence of such rights is the presumption of innocence, and this presumption extends to every person until their guilt is proved beyond a reasonable doubt. State vs. Mannion 57 P. 542 (Utah, 1899) State vs. Topham 123 P. 888 (Utah, 1912). Any statement by the Prosecution which in any way alters the State's burden as regards the Defendant's presumption of innocence is improper. At the trial below the Prosecution made a statement during closing argument to the effect that the jury had a duty in coming to its verdict to consider the rights of the victim of this crime. This statement was not transcribed and therefore does not appear in the record of the trial. However counsel for the defense objected to the same and moved for a mistrial, which motion the court below denied. (R., 157, 158) The court below made no attempt to rehabilitate the jury or to discount the comments made by the Prosecutor.

Certainly both the prosecution and the defense are entitled to characterize the case in the light most favorable to themselves. But this does not include statements to the jury which could possibly shift the burden of proof from the State to the Defendant. In State vs. Valdez 513 P.2d 422 (Utah, 1973) the

Supreme Court affirmed the conviction of the Defendant for murder, in spite of some allegedly prejudicial remarks made by the prosecutor. The Court stated:

Counsel for both sides have considerable latitude in their arguments to the jury; they have the to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom. The test whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case probably influenced by those remarks. The determination of whether the improper remarks have influenced a verdict is within the sound discretion of the trial court on motion for a new trial. If there is no abuse of this discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment. (Emphasis added) 513 P.2d 426.

Defendant here contends that the statements of the Prosecutor during argument at trial below called the attention of the jury to matters which they were not justified in considering when coming to their verdict. And because of the delicate nature of a case such as this, where the entire issue is that of consent, the slightest tipping of the balance could have influenced the jury either way. Because of the conviction of the Defendant on both counts, it can be assumed that the jury was probably influenced by those remarks of the Prosecutor to the

sympathy of the jury. This combined with improper cross-examining of the Defendant by the trial court below, amounts to an abuse of discretion by the trial court. Where the facts are as tenuous as the ones established at trial below, and the trial judge and Prosecutor have both made improper statements, Defendant's conviction below resulted from prejudicial circumstances which denied him substantial justice.

#### POINT III

THE EVIDENCE UPON WHICH THE JURY RENDERED  
A GUILTY VERDICT WAS INSUFFICIENT TO SUPPORT  
THE CONVICTIONS FOR RAPE AND FORCIBLE SODOMY.

A. The evidence presented at trial below was  
so inherently improbable under the circum-  
stances that reasonable persons, in the ab-  
sence of the errors committed, could not have  
convicted the Defendant.

In State vs. Horne 364 P.2d 109 (Utah, 1961) this court reversed the Defendant's conviction of forcible rape. In that case as in the case at bar, the issue of intercourse was not disputed by either side, rather it was a question of consent. The court found it significant that the Complaining witness made no outcry over a three hour period when the Defendant was in her bedroom, despite the fact that she lived in a trailer



house within twenty or thirty feet of other trailers. Evidence also failed to established that the Complaining witness made any attempt to escape, although she apparently had opportunity to do so. Her clothing showed only limited evidence of a possible struggle, and instead of reporting the incident immediately to the Police, she waited all the next day and into the evening before calling for assistance. Noting that the old rule of "resistance to the utmost" was obsolete and no longer applicable, the court stated:

However, in determining the sufficiency of the evidence, there must be considered the ease of assertion of the forcible accomplishment of the sexual act, with the impossibility of defense except by direct denial, or of the proneness of the woman, when she finds the fact of her disgrace discovered or likely of discovery to minimize her fault by asserting force or violence, which had led courts to hold to a very strict rule of proof in such (rape) cases.... We have carefully evaluated the testimony of the prosecutrix and conclude it is so inherently improbable as to be unworthy of belief and that, upon objective analysis, it appears that reasonable minds could not believe beyond a reasonable doubt that the Defendant was guilty. The jury's verdict cannot stand. Reversed. (Emphasis Added) 364 P.2d at 112, 113.

The parallels between the facts established at the trial below and the ones in the Horne case, supra, are noteworthy.

The evidence presented by the Prosecution and Defense in this case shows that the Prosecutrix and the Defendant were acquainted socially, and that the Prosecutrix voluntarily accompanied the Defendant to his house (R., 30). This amicable beginning led to these two individuals spending a period of time together which resulted in intercourse. No evidence was presented that the Complaining witness attempted to escape, or attempted to alert any neighbors to her supposedly precarious situation. Evidence of any force was minimal and showed little, if any, marks of any struggle on the Complaining witness's part. (R., 115, 124) Upon leaving the residence of the Defendant she did not immediately report the incident to the police, instead she went home. There she was confronted by an irate husband who had been concerned over her delay. Yet again she failed to disclose to him anything about "the incident", (R., 49). The next morning she did not call the police and she did not tell her husband. Only later the next day, after confiding in friends, did she become impressed with the necessity of calling the police, (R., 82). Such a delay in reporting "the incident" to the Police gives rise to the obvious inference of an effort on the part of the Complaining witness to "minimize her fault by asserting force of violence". Such a story is unworthy of belief upon objective

analysis, and reasonable minds could not believe beyond a reasonable doubt that the Defendant herein was guilty of the crimes charged.

The Horne court quoted from the case of State vs. Williams 180 P.2d 551 (Utah, 1947). There the Supreme Court reversed a conviction of the Defendant at trial for rape. The Court stated:

Under such state of the record may the verdict of guilty be permitted to stand? We think not. Nevertheless we cannot escape the responsibility of passing judgment upon whether under the evidence a jury could, in reason, conclude that the Defendant's guilt was proved beyond a reasonable doubt. This is not to say that merely by reason of the fact that the circumstances surrounding an alleged assault of this nature created a reasonable doubt in the mind of this court that the offense was in fact committed, we will set aside a verdict. The total picture presented by the record here considered must be kept in mind in evaluating the result here reached. 180 P.2d at 555.

The same situation is applicable in the case at bar. Under the facts as presented at trial below reasonable minds simply could not conclude that Defendant was guilty beyond all reasonable doubt. This Court has held that if there is nothing so inherently incredible about a rape victim's story that reasonable minds would reject it, a conviction may rest upon the Complaining Witness's testimony alone. State v. Studham 572 P.2d 700 (Utah 1977). But under the facts established at trial

in the case below, the Complaining witness's explanation for behavior is inherently incredible. There is simply no explanation for her failure to report the incident until late the next day. If she was truly as outraged as she should have been had she in fact been forced to engage in the intercourse, she simply would not have waited that length of time before reporting the incident. Since there is no other conclusive evidence besides the Complaining witness's testimony that she did not consent to the act of intercourse, the question is essentially reduced to whether or not her story is believable or not. Defendant asserts that the same rule as regards circumstantial evidence should apply to this case, that is, a conviction may rest upon such evidence only when the facts are incompatible with the innocence of the accused by any reasonable hypothesis, and are incapable of explanation upon any other reasonable explanation other than the Defendant's guilt. State vs. Lamb 131 P.2d 805 (Utah, 1942) Since the facts of this case obviously establish another equally reasonable explanation besides the Defendant's guilt, that is the consent of the Complaining witness, the Defendant should not be found guilty upon such evidence alone.

B. The errors committed at trial below substantially prejudiced the Defendant's right to a fair trial.

Rule 30 of the Utah Rules of Criminal Procedure, Utah Code Annotated, 1953, Section 77-35-30, as amended, provides in part:

(a) Any error, defect, irregularity or variance which does not effect the substantial rights of a party shall be disregarded.

Defendant submits that the errors committed at the trial below had a substantial and prejudicial effect on the Defendant's right to a fair trial.

In State vs. Howard 544 P.2d 466 (Utah, 1975) this court vacated the Defendant's conviction of rape and remanded the case for a new trial. The evidence established that the association between the parties came about in a friendly and peaceful manner and the allegation by the Complaining witness of a transition into violence raised a genuine and critical issue as to her consent. Because the trial court excluded proffered evidence about the Complaining witness's reputation and moral character the Supreme Court found there may have been a different result had such evidence been allowed at trial. The Court stated the test for determining whether or not an error was prejudicial as follows:

... (1) If upon looking at the whole evidence it appears beyond a reasonable doubt that there is no substantial likelihood that the verdict would have been different in the absence of the error, it should be disregarded. But the reverse proposition is also true: that if there is a reasonable likelihood that in the absence of the error, there would have been a different result, the error should be regarded as prejudicial. (Emphasis added) 544 P.2d 468, 469.

Had the trial court in the case at bar maintained a proper neutral attitude towards the Defendant and had the Prosecutor refrained from commenting upon the duty the jury had to the victim in the alleged crime, there is a substantial likelihood that the jury would have reached a different result, and acquitted Defendant on both counts. Therefore Defendant is entitled to a new trial for these alleged crimes.

In State vs. Eaton 569 P.2d 114 (Utah, 1977) this court reversed the Defendant's conviction that trial for the distribution for value of a controlled substance. The Defendant had appealed his conviction on grounds that, among other things, the Prosecution had made oblique but impermissible references to the failure of the Defendant to testify in his own behalf. The Court stated:

Accepting the proposition that the remarks complained of were improper, the question of more grave concern is whether, in the light of the total picture as presented in this case,

that impropriety should be regarded as prejudicial error and justify reversal of the conviction. We note our awareness that there should be no such reversal merely to criticize a Prosecutor who, perhaps in the ardor of advocacy in the trial, oversteps the bounds of propriety, nor merely because error has been committed.

Consistent with the nature of criminal proceedings and the protections accorded those accused of crime under our law, including the presumption of innocence and the burden of the State to prove the Defendant's guilt beyond a reasonable doubt, we believe that, on appeal, when there is reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the Defendant. (Emphasis added) 569 P.2d at 116.

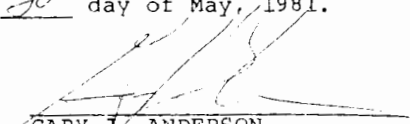
Because the error was sufficient to justify the reasonable belief that it had a substantial effect adverse to the Defendant's right to a fair trial, the error was not regarded as harmless. So too, in the instant case, there is a reasonable likelihood that in the absence of the prejudicial statements by the trial judge and the Prosecutor the jury would not have been able to come to a verdict of guilty.

#### CONCLUSION

Because the facts in this case lend themselves just as easily to a conclusion that the Complaining witness consented to sexual intercourse as they do to the conclusion that she did not consent, the improper statements made by the trial court and

the Prosecutor must be presumed prejudicial. The facts as established at trial are simply insufficient by themselves to support a conviction of the Defendant for rape and forcible sodomy. Therefore the errors at trial should be found by this court to be grounds for reversal of the Defendant's conviction on both counts, and the case remanded for a new trial.

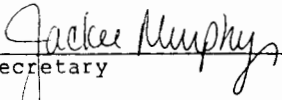
RESPECTIVELY SUBMITTED this 20<sup>th</sup> day of May, 1981.

  
GARY J. ANDERSON  
Attorney for Appellant



CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to the Utah Attorney General, DAVID WILKINSON, at 236 State Capitol, Salt Lake City, Utah 84114, this 20 day of May, 1981.

  
Secretary