VS

CR 03414

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

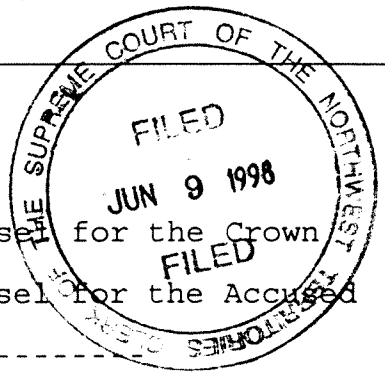
IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

THOMASIE HAINNU

Transcript of the Oral Reasons for Sentence by The Honourable Justice V.A. Schuler, at Clyde River in the Northwest Territories, on Tuesday, June 2nd A.D., 1998.



APPEARANCES:

Ms. D. Robinson: Counsel for the Crown

Mr. V. Foldats: Counsel for the Accused

Charge under s. 235(1) Criminal Code of Canada

THE COURT: Because I recognize that there is a great deal of community interest in this case, I am going to go into a little more detail about the background of the case than I would otherwise do. And since the trial did not take place here in Clyde River but instead in Iqaluit, I will also refer to what took place there.

Mr. Hainnu was originally charged with first degree murder in the death of Juda Natanine. Juda Natanine was killed when Thomasie Hainnu shot through the window of the house where Juda was listening to music with some friends.

Thomasie Hainnu, I am told, admitted early on that he shot the gun and that is what caused Juda Natanine's death and he wanted to plead guilty to manslaughter.

The Crown, which has the responsibility of prosecuting offences on behalf of the public, did not agree that Thomasie Hainnu should plead guilty to manslaughter. The Crown wanted a jury to hear the evidence and to decide whether Thomasie Hainnu was guilty of first degree murder or second degree murder or manslaughter.

I will explain what those different terms mean.

Simply put, first degree murder is where a person plans beforehand and carefully considers killing someone and then goes ahead and carries out the plan and kills the person.

Second degree murder is where a person causes another person's death in circumstances where he intends to cause death, intends to kill the person, or to cause him harm that he knows is likely to cause his death.

INTERPRETER QILLAQ: -- give the last.

THE COURT: Second degree murder is where the person intends to cause another person's death, intends to kill another person.

Manslaughter is where someone does something unlawful and in doing that act, he causes the death of another person. When a person commits manslaughter, he has killed someone without planning to do it beforehand and without intending to kill the person.

So in this case, the jury had to decide which of those three offences - first degree murder, second degree murder, or manslaughter had been proven on the evidence that they heard in court.

They heard evidence from the people who were in the house and who were there when Juda Natanine went to the window and was shot. They heard evidence from Mr. Hainnu's brother who was outside the house across the road. They heard evidence from Corporal Pinder and Amie Qaqasiq about how Thomasie Hainnu was acting after the shooting. And they also heard from a firearms expert who talked about the gun that Thomasie Hainnu used. The jury also heard evidence from Thomasie Hainnu

himself who told them that at the time that he fired the shot, nobody was in the window and that he fired the shot to scare the people in the house, not to kill or hurt anyone.

The jury decided that Thomasie Hainnu was not guilty of first or second degree murder but guilty of manslaughter only. That means that the jury decided that he was responsible for Juda Natanine's death but that did he not plan to kill or intend to kill Juda Natanine.

In deciding that he was guilty of manslaughter, they must have accepted Thomasie Hainnu's evidence that he went over to the adjoining house where Juda was staying because of the loud music coming from that house. He said that he had the gun with him to do some New Year's Eve shooting. He knocked on the house to get someone to come to the window to tell them to stop the music.

THE CLERK: There seems to be either a battery problem or something is wrong with the infoport, some people are not getting the Inuktitut.

THE COURT: We will just pause, perhaps you can have a look at it. Are you able to tell what the problem is? Are people able to hear now while the interpreter is speaking now? I see some people nodding their heads. Maybe for those who can't hear, maybe it is just a matter of getting a different headset. All

right, we will continue then.

A person came to the window whom Thomasie Hainnu did not recognize as being Juda. He said that he yelled at that person and another, whom he could see in the background, about the music. Then he shot through the window towards the ceiling. He said that when he did that, the person at the window, who we know from the evidence was Juda Natanine, was bending down and wasn't directly in the window. He said that he did not want to kill Juda Natanine or anyone else.

Obviously it is unlawful to shoot a gun to scare people. So Thomasie Hainnu did an unlawful act and that act caused the death of Juda Natanine.

In a trial by jury, the 12 people who are on the jury listen to the evidence and then they make their decision. We can not ask them how or why they made their decision.

Since the jury in this case decided that Thomasie Hainnu was guilty of manslaughter, I infer that they must have accepted his evidence about what he was thinking and doing on the night in question.

In a jury trial, it is the responsibility of the jury to decide whether the accused is guilty or not guilty of what he is charged with or some other charge. Once the jury decides, it is the responsibility of the Judge to sentence the accused for the offence of which the jury has found him guilty.

THE CLERK: Excuse me, My Lady, could you repeat that for the interpreter.

THE COURT: Once the jury decides, it is the responsibility of the Judge to sentence the accused for the offence of which the jury has found him guilty.

Now, as I indicated earlier, because of the legal arguments that the lawyers have made, some of what I am going to say will probably sound very technical and perhaps complicated. But I will just ask our interpreter to interpret -- to try to explain to everyone how I am dealing with the legal arguments.

Section 236 of the Criminal Code says what the punishment for manslaughter is.

It says that in this case, since Thomasie Hainnu has been found guilty of manslaughter and since a firearm was used by him in committing manslaughter, he is to be sentenced to no less than four years in jail and no more than life in jail. The minimum sentence has been in effect only since January of 1996. Prior to that, there was no minimum prescribed.

Mr. Hainnu's lawyer has filed a written argument, and he has referred to it here today, challenging the mandatory minimum four-year sentence.

Both the Crown and the defence lawyers provided a number of cases for me to read on this issue. I have read and considered all of them although I will not refer to all of them in giving my decision today. I

have also read the recent decision of Judge Browne in the Territorial Court in the cases of Kopalie and Kuksiak in which she had to consider this issue in the context of the minimum four-year sentence for robbery. I am not going to refer to case citations but I will provide them to the court reporter for when she prepares a transcript of this decision.

The arguments made by the defence counsel is that the minimum sentence for manslaughter with a firearm is unconstitutional because it contravenes Section 12 of the Canadian Charter of Rights and Freedoms which says that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The Supreme Court of Canada considered this issue in the case of R. v. Smith (1987), 34 C.C.C. (3d) 97 (S.C.C.). In that case, the Supreme Court was dealing with the mandatory minimum sentence of seven years in jail for importation of narcotics into Canada.

The Supreme Court said that the test in deciding whether the minimum amounts to cruel and unusual treatment or punishment is whether the effect of the punishment is grossly disproportionate to what would have been appropriate whether it is --

THE CLERK: -- excuse me, My Lady, could you slow down for the interpreter, please.

THE COURT: All right, I will slow down.

Whether it is so excessive as to outrage standards

of decency.

In R. v. Smith, the Supreme Court of Canada pointed out that the seven-year minimum sentence for importing narcotics would apply equally to the long-time drug trafficker, who imports many pounds of heroin, and to the young person with no record who comes back home from the United States after spring break and brings his first and only joint with him.

The Court held that in the latter circumstances, the mandatory minimum would clearly be grossly disproportionate.

Manslaughter is also an offence which can be committed in many different ways. The mandatory minimum is however applicable only to those offences of manslaughter where a firearm is used.

In the Smith case, Chief Justice Lamer said that a mandatory minimum term of imprisonment is not in and of itself cruel and unusual. But in the case of importing narcotics, the wide range of facts that could come within that minimum, as I have described, made the minimum grossly disproportionate.

It was also made clear in Smith that "grossly disproportionate" means something more than just excessive. A sentence which is excessive, although not grossly disproportionate, is to be dealt with in the regular appeal process but does not run afoul of Section 12 of the Charter.

In the latter case of R. v. Goltz (1991), 67 C.C.C. (3d) 481 (S.C.C.), the Supreme Court suggested a two-step test for deciding whether a minimum sentence is grossly disproportionate.

That test is, one, assess the sentence from the perspective of the accused by balancing the gravity of the offence, the particular circumstances of the case, the personal circumstances of the offender, and the effects of the sentence.

And two, if the minimum sentence is not found to be grossly disproportionate after making the assessment in step one, assess whether the minimum sentence would be grossly disproportionate in reasonable hypothetical circumstances.

Using this test, I will first assess the sentence under step one from the perspective of Thomasie Hainnu.

Is the four-year minimum grossly disproportionate in the circumstances of his case?

First of all, this is a very serious offence.

The Parliament of Canada, obviously seeking to address the problem of death and injury by firearms, has decided that a minimum sentence is warranted. Nobody contests that Parliament has a valid purpose in enacting the mandatory minimum sentence.

From a review of the cases, I think it is fair to say that sentences for manslaughter in the Northwest Territories before the enactment of the mandatory

minimum have ranged from a low of a suspended sentence with probation to a high of eight and a half years. Each case has to be considered on its own facts and in most of the cases I have reviewed, there was some pre-trial custody taken into account in coming to the final sentence.

As to this case specifically, I have to consider that Mr. Hainnu was under the influence of alcohol as is so often the case in cases of manslaughter.

From his evidence at the trial however, it is clear to me that he was not so affected by the alcohol as to have problems remembering what happened.

He shot through the open window of a house with a high powered rifle, knowing that there were people in the room and people near the window because he had seen two people from where he stood outside the window. He was an experienced hunter, who was familiar with firearms, and knew that this particular firearm was very powerful and capable of killing someone. He knew, he said in his evidence at trial, that if he did hit someone it would probably kill them.

The consequence of his action in shooting through the window, even though he did not intend it to happen, was that Juda Natanine died.

In the materials filed, I have read that Thomasie Hainnu is a 28-year-old man from this community. At the time of the shooting, he lived with his common-law

wife, they have three children. He has approximately a Grade 4 education with some Grade 7 level subjects. He obtained a building maintainer's certificate from Arctic College. His employment has been seasonal for the last three years but before that, he worked full-time for seven years as the maintainer for the Hamlet of Clyde River.

From the materials provided by his lawyer, I note that Mr. Hainnu was raised in the traditional Inuit way and hunts and fishes to provide for his family.

I have also noted that as a result of a childhood disease, he suffers from a hearing impairment.

Mr. Hainnu has a short but related and recent criminal record.

In 1991, he was convicted of a spousal assault and received a fine of $300. In 1996, he was convicted of two counts of making death threats - threats to shoot his wife and her family and an RCMP officer. He was sentenced to one day in jail and ten months probation. One of the conditions of his probation was that he was not to have possession of a firearm within the community. He was still on probation at the time that the shooting of Juda Natanine occurred and he knew that he was not to have a firearm in the community.

Mr. Hainnu has shown remorse for what happened and offered to plead guilty to manslaughter at an early opportunity and maintained that offer to trial,

offering the plea again in front of the jury.

He has also spent 17 months in custody to this point and that is usually taken into account on sentencing. It is often given more credit than its actual amount because it involves more restrictions than custody after sentence and also remission of sentence that would be available after sentencing is not available for the time spent in custody before the sentence is imposed.

There is no rigid rule for crediting pre-trial custody but it is often given credit for approximately twice the actual time spent. To do so in this case would result in it being credited as approximately three years and with that the effect of the minimum four-year sentence on Thomasie Hainnu would be a sentence of at least seven years.

So in assessing the mandatory minimum sentence from the perspective of the accused, I will take the approach that the mandatory minimum, with the time Mr. Hainnu has spent in custody to date, results in an effective sentence of approximately seven years.

In all of the circumstances, and considering that effect of the sentence, I am unable to say that the four-year minimum would result in a sentence that would be grossly disproportionate or that would be so excessive as to outrage standards of decency. It may be that the four-year minimum means that Mr. Hainnu will

end up with a sentence at the high end of the usual range of sentences for this type of offence. But that does not mean that such a sentence would be grossly disproportionate, that it would be cruel and unusual punishment.

THE CLERK: Excuse me, My Lady, the interpreter is missing some of what you are saying.

THE COURT: Perhaps you can simply indicate that I have decided that the fact that there is a minimum sentence in the law is not wrong in this case.

Nor do I think the fact, as submitted by defence counsel, that the sentence may be served in a penitentiary in southern Canada, something which is up to the correctional authorities and beyond the Court's control, is significant. While Mr. Hainnu may end up serving his sentence in an environment that is very foreign to him, that does not, in my view, render the sentence grossly disproportionate.

Now, I must go to the second branch of the test.

Are there reasonable hypothetical circumstances in which the four-year minimum sentence would be grossly disproportionate?

Counsel for Mr. Hainnu referred in his written material to a number of scenarios, some taken from actual court cases, which he argued are reasonable hypothetical circumstances in which the four-year minimum sentence would be grossly disproportionate, in

other words, would be clearly too much time.

I agree that the examples that he presented are reasonable ones, including the one that he described here today about the elder. They present a wide range of facts.

In at least two of the real life cases, Chivers, [1988] N.W.T.R. 134 (S.C.) and Shorty, [1993] Y.J. No. 101 (S.C.), the accused were given suspended sentences and probation because of factors peculiar to those accused.

Mrs. Chivers shot her husband while he was sleeping after years of being beaten by him. Mr. Shorty was a 90-year-old man who had been drinking and who shot his wife while she was sleeping. A suspended sentence and probation is at the very lowest end of the scale of sentences for manslaughter.

In my view, in the situations presented as hypotheticals, the mandatory minimum of four years could be said to result in a sentence at the high end of the scale or a sentence that might, in the particular circumstances of those cases, be described as severe or even harsh but not one which is grossly disproportionate.

Each of the examples that were referred to, it bears remembering, involves the use of a firearm and the causing of a person's death in unlawful circumstances.

The killing of another person is generally, in whatever circumstances, considered to be among the most serious crimes both by law in the Criminal Code and morally in the view of society.

I agree with the comments made by Madam Justice Bateman in R. v. Morrisey, March 23, 1998, N.S.C.A., No. CAC 141429 (unreported) wherein, although considering the minimum sentence for a different offence, she did refer to the offence of manslaughter. And I will just quote briefly from what she said. She was referring to manslaughter where a firearm is used.

She said,

> Although the actual discharge of the weapon may not be intended, the taking up of a loaded gun is an intentional act. To describe such conduct as benign or near accident is inappropriate.

She also said,

> The degree of moral fault for such a crime is high. While the minimum punishment might in occasional circumstances be severe, it would not commonly be grossly disproportionate.

So having considered both of the tests put forth by the Supreme Court of Canada for the reasons just given, I find that the minimum sentence prescribed by Section 236(a) of the Criminal Code is not grossly disproportionate and does not contravene Section 12 of the Charter.

Now, Mr. Foldats, on behalf of Mr. Hainnu, raised some other legal arguments in his materials that I will refer to just briefly.

He argued that even if I find that the four-year minimum sentence does not breach Section 12 of the Charter, I should still grant Mr. Hainnu what is called a constitutional exemption from the minimum sentence.

In support of this argument, he raised the same factors that he had argued on the issue I have just dealt with, urging particularly that the amount of pre-trial custody in this case is significant.

As I have already said, even with the pre-trial custody I do not view the minimum sentence in this case as grossly disproportionate. And having concluded that, I need not consider whether a constitutional exemption can be granted.

Mr. Foldats also argued that the pre-trial custody should be applied or can be applied in other ways so as to reduce the minimum sentence.

For the reasons set out in the decision of the British Columbia Court of Appeal in the case of R. v. Wust, R. v. Arthurs, R. v. Gatz, May 7, 1998, B.C.C.A. No. 23022/23198/23321 (unreported) and by Libman, Provincial Judge in R. v. MacDonald (1997), 43 C.R.R. (2d) 328 (Ont. Prov. Ct.), I am not persuaded that the discretion provided in Section 719(3) of the Criminal Code to take pre-trial custody into account

applies to mandatory minimum sentences except as may be expressly provided by Parliament which it has not done in this case.

Finally, Mr. Hainnu's lawyer also argued that Section 7 of the Charter should be applied as was done by Cole, Provincial Judge in R. v. Gill (1991), 8 C.R.R. (2d) 350 (Ont. Prov. Ct.) so as to allow for a sentence less than the mandatory minimum after credit for pre-trial custody.

Section 7 however imports considerations of proportionality which I have already dealt with in this judgment and I find no basis upon which to apply it in this case assuming that it were even possible to do so.

And I note of course the clear direction in Section 721(1) of the Criminal Code that a sentence commences when it is imposed except where a relevant enactment otherwise provides.

As the Quebec Court of Appeal said in R. v. Alain (1997), 119 C.C.C. (3d) 177 (Que. C.A.), this means that a minimum sentence runs from the date it is imposed.

Accordingly, and to summarize the way in which I have dealt with what are quite complicated legal arguments, I dismiss the challenge to Section 236(a) of the Criminal Code. I find that the four-year minimum sentence is constitutional and is not to be reduced by pre-trial custody and that the sentence imposed must

commence on the date that it is imposed.

All of this then brings me to what the sentence should be in this case.

Sentencing is never an easy task for a Judge and it is not easy in a tragic case like this one. One young man has died and another is now facing the prospect of leaving his community to spend some years in jail.

No sentence can change the tragic event that has happened and no sentence can change the grief and shock that I know that Mr. Natanine's family feels and that Mr. Hainnu's family feels. And also that this small community must feel at such a thing happening.

I know from similar situations that when things like this happen in a small community, people try hard to understand because of the close relationships between those who live in the community. It must be acknowledged however that it is very difficult to understand and to come to terms with such a terrible event.

The law is very clear about what the objectives of sentencing are.

The Criminal Code states that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. That is to be done by imposing just sanctions that have one or more of the following

objectives:

To denounce unlawful conduct; to deter, that is, to discourage the offender and other persons from committing offences; to separate offenders from society where necessary; to assist in rehabilitating offenders; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community.

Also, it is important that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

When deciding on a sentence, the Judge must consider both the aggravating and the mitigating factors of the case.

The aggravating factors in this case, the factors that make the offence more serious, are as follows:

Thomasie Hainnu knew that he was not allowed to have a gun. He was on probation with a condition that he not have a gun yet he went ahead and took up a gun for the purpose of scaring the people next door. I should say that he used the gun for the purpose of scaring the people next door. As I indicated earlier, he said that the reason that he initially took the gun was to do some shooting to celebrate New Year's Eve. The fact that he was on probation at the time of the offence is in itself an aggravating factor.

Thomasie Hainnu's criminal record, which I have already referred to, is related, in that it involves assault and threats of violence to other people.

For the reasons that I have already mentioned in dealing with the legal arguments, there is, in my view, a high degree of moral culpability in this case.

There are also some mitigating factors, factors which would justify the sentence being not as high as it might otherwise.

These are first that Thomasie Hainnu has shown remorse, has shown that he is sorry for what he has done.

We have heard that when Corporal Pinder told Thomasie Hainnu that Juda Natanine was dead, Thomasie Hainnu was upset and crying. We have also heard that he told Corporal Pinder that he was sorry and apologized to the Natanine family and recognized that they would be angry at him.

Here in Court today, he apologized to the Natanine family as well as to the community and his own family and the RCMP officer who had to deal with the aftermath of the shooting. I am satisfied that he is truly sorry for what happened and that he recognizes the trauma that his actions have caused.

Another indication that Thomasie Hainnu feels sorry for what he has done is that he did offer to plead guilty to manslaughter early on.

As I have already indicated, I also have to consider the length of time that Thomasie Hainnu has already been in jail. That, and for the reasons that I have already outlined, I will credit the 17 months of pre-trial custody as equivalent to approximately three years.

I also have to consider that with the verdict of manslaughter, the jury clearly accepted that Thomasie Hainnu did not plan or intend to kill Juda Natanine or anyone else.

As I have already said, this is a tragic case.

Juda Natanine, a young man, who has been described by his family as helpful, imaginative, and of course not replaceable, and who was also described by Thomasie Hainnu in his testimony at the trial as "everybody's friend", has had his life taken away all too soon. Mr. Hainnu must now face not only a prison sentence and being removed from his community but he will also have to live the rest of his life knowing that he is responsible for Juda Natanine's death.

I also want to mention that this case is tragic in the sense that Mr. Hainnu is a hunter and he knows firearms well and knows how to use them properly. But on this occasion, he used a firearm improperly and dangerously. The decision to use the firearm in that way had obviously devastating consequences.

I also note that alcohol played some part in this

incident notwithstanding that I am aware this community has made efforts to control alcohol. And I can only hope that the community will continue with those efforts.

Now, the lawyers have referred to a range of sentence and I take the range of sentence into account.

In some ways, the case that is most similar to this one is the case of Firth (1983), 52 A.R. 311 (N.W.T.S.C.) where a young man in Fort McPherson was drinking and shot into a house from outside, killing another man who was sitting there.

Mr. Firth was sentenced to three years in jail, and I understand that there was some pre-trial custody taken into account although the reported judgment does not indicate the length of it. I also note that the Firth case was decided before the mandatory minimum sentence was enacted.

At the high end of the range, as has already been mentioned, is the case of Ettagiak, [1986] N.W.T.J. No. 39 (S.C.) where a young man from Tuktoyaktuk killed a woman by shooting her seven times. And that case, I think, has to be distinguished in the sense that, as the Court noted, there clearly was some intention to kill but the manslaughter conviction was justified because of provocation.

Now, it is important that sentences for the same offence not be too different taking into account of

course the particular facts of each offence and each offender.

No two cases are ever exactly alike.

I have to consider in this case that the law has changed significantly by imposing a minimum sentence. I also have to consider the other factors that I have mentioned and, in particular, the pre-trial custody which I have indicated is approximately equivalent to three years.

Stand up, please, Mr. Hainnu.

Mr. Hainnu, taking into account all of the circumstances, including the time that you have already spent in custody, I sentence you to a term of imprisonment of five years.

You can sit down.

Now, counsel, there should be an order prohibiting possession of firearms and I meant to look at the Criminal Code. Is there a specified length in this case?

MS. ROBINSON: Thank you, My Lady. Section 100(1), I believe, would apply, and I believe that the proper term would be ten years. Crown did not file a notice seeking an increase beyond that.

THE COURT: All right, thank you. And I have heard no submissions with respect to imposing such an order so I will impose an order prohibiting you, Mr. Hainnu, from possessing firearms, explosives, and

ammunition for a period of time which commences, starts, today and expires ten years after you are released from imprisonment. And there will be a period of two weeks within which Mr. Hainnu is to surrender any such items to the RCMP if he has any such items to surrender.

The Victims of Crime surcharge will be waived.

Now, I believe exhibits were dealt with at the trial, counsel, is that the case?

MS. ROBINSON: Yes, My Lady, I recall you making an order that the exhibits be returned to the RCMP and I believe that there was also an order that the weapon in this case should be disposed of as well.

THE COURT: Madam Clerk, can you check the notes. I don't know if it was to be disposed of or be returned to the lawful owner.

THE CLERK: My Lady, the clerk's notes indicate that there was an order returning exhibits to RCMP pending appeal period, to be destroyed or returned to the owner at the end of the appeal period.

THE COURT: All right, thank you, that seems to take care of that then.

Mr. Hainnu, because of the time that you have spent in custody, the effect of the sentence is really an eight-year sentence and that is a lengthy time but I just want to say that -- to thank you for what you have said in court and acknowledging to your community your

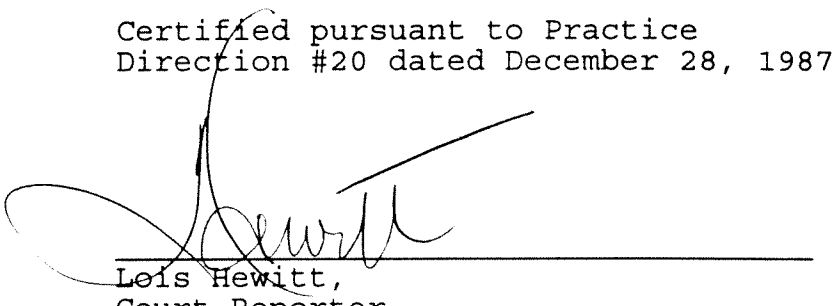
responsibility and how you feel about what happened in this case, and I hope that at some point in time that perhaps everyone will come to terms with this terrible thing that has happened and that you are responsible for.

We will close court then.

Thank you very much, counsel, I found the written materials very well done, I just want to let you know that.

(AT WHICH TIME THE ORAL REASONS FOR SENTENCE CONCLUDED)

Certified pursuant to Practice Direction #20 dated December 28, 1987.



Lois Hewitt,
Court Reporter