

1953

# State of Utah v. Edgar Ronald Penderville : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; Walter L. Budge;

---

## Recommended Citation

Brief of Respondent, *State v. Penderville*, No. 8053 (Utah Supreme Court, 1953).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2075](https://digitalcommons.law.byu.edu/uofu_sc1/2075)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

In the  
**Supreme Court of the State of Utah**

---

STATE OF UTAH,  
*Plaintiff and Respondent,*

vs.

EDGAR RONALD PENDERVILLE,  
*Defendant and Appellant.*

Case No.  
8053

**FILED**  
FEB 20 1964

Supreme Court, Utah

---

**BRIEF OF RESPONDENT**

---

E. R. CALLISTER,  
*Attorney General,*

WALTER L. BUDGE,  
*Assistant Attorney General.*

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	1
STATEMENT OF POINTS .....	22
ARGUMENT .....	23
POINT I THE RIGHTS OF APPELLANT AS GUARANTEED AND PROTECTED BY AR- TICLE I, SECTION 12, OF THE UTAH CON- STITUTION, AND SECTION 77-1-8, SUB- PARAGRAPH 1, UTAH CODE ANNOTATED 1953, WERE NEVER VIOLATED NOR WAS DUE PROCESS OF LAW DENIED APPEL- LANT IN CONTRAVENTION OF THE FOUR- TEENTH AMENDMENT OF THE CONSTI- TUTION OF THE UNITED STATES OF AMERICA .....	23
POINT II THE TRIAL COURT DID NOT ERR IN DENYING ANY ONE OR ALL OF THE FOLLOWING MOTIONS MADE BY DEFEN- DANT:	
(a) Motion to Dismiss the Action at the Close of the State's Case and Renewed at the Close of Defendant's Case (R. 200, 309).	
(b) Motion to Dismiss the Charge of First De- gree Murder at the Close of the State's Case and Renewed at the Close of Defen- dant's Case (R. 200, 309).	
(c) Motion to Reduce the Charge to Voluntary Manslaughter Made at the Close of the State's Case (R. 202).	
(d) The Verdict is Contrary to the Law and the Evidence, as Raised in Defendant's Motion for New Trial (R. 50-66) .....	28

# TABLE OF CONTENTS—Continued

	Page
POINT III THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE WITNESS WILLIAM J. CHRISTENSEN TO TESTIFY AS TO THE CONVERSATIONS HE HAD WITH DEFENDANT AT THE TIME JUNE PENDERVILLE WAS DYING ON THE FLOOR OF THE PENDERVILLE APART- MENT .....	44
CONCLUSION .....	45

## AUTHORITIES CITED

22 C. J. S., Criminal Law, Sec. 667, page 1054 .....	44
23 C. J. S., Criminal Law, Section 1145 (3), page 665, et seq. ....	33
Decennial Digest, Criminal Law, Key No. 586 and 1151 .....	28

## CASES CITED

Jackson v. Utah Rapid Transit Co., 77 Utah 21, 290 P. 970 .....	44
People v. Northcott (Cal. 1930) 289 P. 634 .....	27
State v. Aures, 102 Utah 113, 127 P. 2d 872 .....	43
State v. Anselmo, 46 Utah 137, 148 Pac. 1071 .....	27
State v. Cano, 64 Utah 87, 228 Pac. 563 .....	27, 28
State v. Fairclough, 86 Utah 326, 44 P. 2d 692 .....	27, 28
State v. Freshwater, 30 Utah 442, 85 Pac. 447 .....	27
State v. Gardner, 61 Utah 359, 213 P. 794 .....	45
State v. Green, 89 Utah 437, 57 P. 2d 750 .....	28
State v. Hartman, 101 Utah 298, 119 P. 2d 112 .....	27

## TABLE OF CONTENTS—Continued

	Page
State v. Haworth, 24 Utah 398, 68 Pac. 165 .....	28
State v. Lewellyn, 71 Utah 331, 266 P. 261 .....	39
State v. Peterson, (Utah 1952) 240 P. 2d 504 .....	39
State v. Riley, 41 Utah 225, 126 P. 294 .....	28
State v. Seboldt, 65 Utah 204, 236 P. 225 .....	45
State v. Thatcher, 108 Utah 63, 157 P. 2d 258 .....	39
State v. Vacos, 40 Utah 169, 120 P. 497 .....	27
State v. Williams, 49 Utah 320, 163 P. 1104 .....	27
United States v. Maurice Alvin Gutterman, 147 F. 2d 340, 157 A. L. R. 1221 (1945), Anno. 1225 ....	25
Van Cott et al. v. Wall, 53 Utah 282, 291, 178 P. 2d 42.	23

### STATUTES CITED

Fourteenth Amendment, Constitution of U. S. of America .....	22, 23
Article I, Sec. 12, Utah Constitution .....	22, 23
77-1-8(1), Utah Code Annotated 1953 .....	22, 23
77-24-18, Utah Code Annotated 1953 .....	28

In the  
Supreme Court of the State of Utah

---

STATE OF UTAH,  
*Plaintiff and Respondent,*

vs.

EDGAR RONALD PENDERVILLE,  
*Defendant and Appellant.*

Case No.  
8053

---

BRIEF OF RESPONDENT

---

STATEMENT OF FACTS

Responding to appellant's Statement of Facts, respondent says:

With exception to the reference to a sum of \$1,500.00 allegedly paid by appellant to counsel, said reference being, in our opinion, immaterial, we adopt what appellant has

said in his brief, pages 1 through 13, to the final reported answer to the court by Mr. Penderville, as being an accurate account of the happenings between court, counsel and appellant on December 15th, 16th, 1952. As to what appellant said to or told his counsel on December 17th, 1952, we are not informed from the record and, of course, we shall not attempt to interject allegation hors the record in rebuttal thereof. From the record of trial, it does appear that appellant did not again present his objection to the court on December 17th at a session in chambers immediately preceding the trial or at any time thereafter (R. 64).

The record shows from the "Transcript of Proceedings:"

Aug. 1, 1952—Filed Complaint of Del Duncombe charging defendant with the crime of Murder in the first degree

Aug. 1, 1952—Warrant of arrest issued

Aug. 2, 1952—Warrant filed on return

Aug. 2, 1952—Defendant present without counsel. Defendant answered that Edgar Ronald Penderville is his true and correct name. Complaint read. Defendant advised as to his right to counsel. On motion of defendant, court ordered arraignment continued to August 7 at 10:00 A. M. to enable defendant to employ counsel.

Aug. 7, 1952—Deft present with counsel Joe McCarthy. Deft answered that Edgar Ronald Penderville is his true and correct name. Complaint read. Court ordered hearing set for Sept. 18, 1952 at 10:00 A. M. Deft. to be held without bail.

Aug. 21, 1952—Filed Motion

Aug. 27, 1952—Defts. motion for State to furnish certain statements, documents, reports, photographs, and names of witnesses was argued by respective counsel and denied.

Sept. 15, 1952—Deft's motion for a continuance was argued by deft's counsel and granted and Court ordered hearing cont'd to Oct. 28, '52—10 A. M.

Oct. 28, 1952—Deft. present with counsel for hearing. Joyce Richardson was sworn as reporter. Complaint read. Wm. Y. Tipton, James D. Anderson and Reed M. Langford were sworn and examined behalf State. States exhibits "A"—drawing, "B"—7 photographs and "C"—11 photographs were marked. Dr. Maurice J. Taylor, Catherine Smith, Dr. Lyman W. Condie, Dr. Adolph M. Nielson, Tom Coggle, Vern Coggle, Susan Eliason, Wm. J. Christensen, B. F. Ramano, A. J. Murray and D. F. Duncombe were sworn and examined behalf State. States exhibit "D"—Bed spread, "E"—brassiere, "F"—pad, "G"—pillow and case, "H"—smock, "I"—slip and "J"—sheet were marked. States exhibits A, B, C, D, E, F, G, H, I, and J were offered and received in evidence. State rests

Oct. 28, 1952—Court informed deft. of his right to make a statement not under oath. Deft. waived his right. Deft's. motion to dismiss complaint was argued by respective counsel and denied. Deft. rests. Court ordered defendant bound over to the District Court for trial on the charge set forth in the complaint without bail (R. 2 and 3).

Appellant's arraignment in the District Court was on the 6th day of December, 1952 (R. 7).

To the witnesses: Adolph M. Neilsen, M. D.

Dr. Neilsen, Salt Lake City physician, testified that he arrived at the Penderville apartment at approximately

eleven o'clock p. m. on July 30th (R. 82) ; that at that time he found the body of June Weiler Penderville there at the apartment (R. 82) ; that he found her to be dead (R. 83). The doctor then described the position, condition, etc., of the cadaver, observing that there was blood in the nostrils and *mouth* (R. 83) ; that he formed an opinion from his examination as to the cause of death, that in his opinion death occurred from internal violence or trauma to the head and that *the injuries he observed on the neck, eyes, head and skull could not have been self-inflicted* (R. 93, 94) ; that the nose was broken (R. 83, 88) that it would take a fairly strong blow to cause such hemorrhaging as had occurred (R. 95) ; and, that the cause of death seemed evident (R. 113).

Lyman W. Condie, M. D. Witness—(R. 116)

Dr. Condie testified that he was called to the Penderville apartment on July 30th for the purpose of attending June Weiler Penderville in connection with the possibility of her commitment to the Salt Lake County Hospital; that he arrived at or about 5:15 p. m. and departed at 6 o'clock p. m. ; that he administered seconal, a drug sedative, to Mrs. Penderville; that *both* Mr. and Mrs. Penderville decided that they did not want her to go—to the Salt Lake County Hospital (R. 118, 119). He observed at that time that Mrs. Penderville had some old contusions about the eyes and cheeks and jaw (R. 120). The doctor thereafter testified that Attorney William Christensen called him at 9:35 p. m. in the evening of the same day and that he again went to the Penderville apartment in response to said call, arriving there at approximately 9:55 p. m. (R. 121) ; that,

as he entered the apartment Mr. Penderville said, "Hurry, I think she still has a pulse." Upon conducting an examination the doctor opined that, at that time, Mrs. Penderville was dead (R. 121). Further testifying as to his examination of the body, he stated that the body had a different look than when he had last seen Mrs. Penderville alive at 6 o'clock p. m. (R. 121), and that the contusions about the eyes were considerably larger and the " \* \* \* skin in that area was a dark purple" (R. 122); that there was blood in the nostrils and *mouth* (R. 123). On cross-examination, Dr. Condie testified generally as to treatment and medications afforded Mrs. Penderville while she was under his care with emphasis mainly to barbituates and the cumulative effect thereof when taken with alcohol (R. 123-128). Then, on re-opening for direct examination, the doctor testified that he attended Mrs. Penderville on July 27th at which time he noted various contusions, and that she, Mrs. Penderville, said, in the presence of the appellant, "He hit me," (R. 130). It was the opinion of this witness, as was that of Dr. Neilsen (R. 93, 94), that the injuries and contusions he observed on the body of Mrs. Penderville at and after 9:15 p. m. on July 30th, *were not self-inflicted* (R. 130).

Susan Eliason, Witness—(R. 138)

Miss Eliason testified that she heard a disturbance and noises coming from the vicinity of the Penderville apartment between the hours of 7 p. m. and 7:25 p. m. (the witness left the premises at that hour but the noise had not ceased) on the 30th day of July; and that "I thought they were making a lot of noise, and it made me mad, so

I stamped my foot on the floor to quiet it" (R. 140). The witness knew there were some cars in front of the apartment although she was not able to recall whether or not the Penderville car was one of them (R. 146).

William J. Christensen, Witness—(R. 148)

This witness testified that he received a call from the defendant at about fifteen minutes before 9 o'clock on the evening of July 30th (R. 149), and that responding to said call he went to the Penderville apartment arriving there at around 9 p. m. or shortly before that time (R. 148, 149). That he remained at the apartment until approximately 1:45 o'clock a. m. of the morning of the 31st of July (R. 150). In addition, on direct examination, the witness described what he then observed concerning Mrs. Penderville; he did not then state whether she was alive or dead.

On cross-examination, Mr. Christensen stated that upon seeing the lady lying on the floor, his curiosity was aroused (R. 151); that Mr. Penderville did not appear to be particularly upset at the time the witness arrived on the scene (R. 152); that he seemed perfectly rational, not alarmed or fearful (R. 153); that the lady was alive and breathing rather heavily (R. 153); that her condition changed while he was there, about forty-five minutes after other occurrences there, she discontinued breathing (R. 154). Mr. Penderville noted the change of condition first and only then was he advised by Mr. Christensen to get a doctor right away (R. 155). To this point in the examination of the witness, there had been nothing elicited from this witness other than that the lady was lying on the floor

and that no examination was made of her (R. 149), and nothing done pertaining to her with the sole exception of ministrations with an ice pack (R. 162) until after the arrival of Dr. Condie (R. 156, 164); the body was in the same condition at the time the doctor arrived as at the time the witness first arrived (R. 164). The objections by the State as to "hearsay" and as to "proper cross-examination" during the examination of the witness were sustained by the Court.

G. J. Murray—Witness (R. 166)

Mr. Murray testified that he was the caretaker for the apartments at 1012 Barbara Place (R. 166); that there were thirty-nine apartments together with from two to six motel rooms (R. 167). That he became acquainted with the defendant on or about the first day of July and that he rented Apartment No. 2 to the Pendervilles at that time (R. 167). He described the location of that apartment with relation to the office and the apartment which he occupied (R. 168). The witness testified as to voices or words he had heard emanating from the Penderville apartment during the month of July, that Mr. Penderville's voice always seemed to be that of a demand of some kind and that he heard it, after the first two or three days, every day while they were there (R. 169, 170). This witness then testified that he was either in his apartment or around the building on the 30th day of July, all day (R. 170). He then stated that he was familiar with the Penderville's Cadillac automobile, that it was at the apartment all that day, parked at a certain place and in a certain manner and that it was still in the same place when the officers arrived

(R. 170, 171). That during the day he did not see the defendant at any time and during the evening only when he saw the defendant at the phone (R. 171, 172). The witness testified that Mr. Penderville used the telephone numerous times from 5 p. m. on and fixed the time of five o'clock as being when he, the witness, went through the office to go to his apartment (R. 172); at five-thirty o'clock "Because I was eating my dinner" (R. 173); at seven-thirty because the witness was listening to the television (R. 173, 174, 176, 177). The record does show some discrepancy in this witness's testimony at the trial, as to the time of the telephone calls defendant made, with the witness's prior testimony at the preliminary hearing (R. 174); however, he had given the matter more thought and concentration and he had not talked to anyone about it (R. 175).

Delbert F. Duncombe—Witness

Officer Duncombe testified that he was called to investigate at 1012 Barbara Place on the night of July 30, 1952 (R. 177, 178); that he conducted the investigation and directed the taking of pictures (R. 179). The witness was fully examined as to his findings during the investigation and in the course thereof made reference to, and commented on, the pictures he had directed be taken. Chemical analysis was not made of the spots or stains found within the apartment nor of those on the appellant's clothing. On voir dire the witness was asked by counsel for the defendant:

"Q. How can you tell an old blood spot from a new blood spot.

"A. Well, they become dark and become hard, coagulated.

"Q. Would you repeat that?

"A. They become dark in color and kind of coagulate, kind of,—I can't explain it to you.

"Q. But when a blood spot has dried, assuming this is a blood spot, you can only tell the age of it by your experience?

"A. Well, I would say that was somewhat right. However, *in talking to Mr. Penderville, he also told me they were blood, \* \* \**" (R. 181).

Upon the completion of the further examination of this witness, the State rested (R. 200).

Motions were then presented for the defense (a) to dismiss the case, (b) to dismiss the charge of first degree murder, (c) to reduce the charge to murder in the second degree, (d) to reduce the charge to voluntary manslaughter, all of which were denied. The court reserved to the defense the right to renew the motion to reduce the charge to murder in the second degree upon the completion of the evidence (R. 201, 202).

The defense opened (R. 203).

E. Leverl Barrett, M. D., Witness—(R. 203).

The witness proffered testimony to the effect that the decedent was a chronic alcoholic in 1949 (R. 204, 205).

Jack Tedrow, M. D., Witness—(R. 205)

In the opinion of this witness, the decedent was a chronic alcoholic and addicted to the use of barbituates when he treated her in March and April of 1949 (R. 206). The doctor stated that alcohol and barbituates have a cumu-

lative effect and that both of them affect the central nervous system (R. 207).

William D. O'Gorman, M. D., Witness—(R. 207)

The decedent had been a patient of this doctor during the period from April to July, 1949 (R. 207). The doctor thought that a person addicted to the use of alcohol and the use of barbituates bleeds more easily than a person who is not; that one so addicted would be more apt to receive a fatal injury from a slighter blow than would a person not so addicted (R. 208, 209). The witness's remarks as to effect of combined use of alcohol and barbituates, quoted by appellant's counsel in their statement of facts, was stricken as being immaterial and irrelevant to the cause (R. 208). The witness had never formed an opinion as to whether the deceased would bleed more easily than other persons (R. 210); he had made no tests as to clotting time (R. 211).

Sidney E. Gilchrist, Witness—(R. 211)

This witness stated that he was director of laboratories for the Salt Lake City Health Department; that on or about July 31, he tested the urine of the deceased to determine alcoholic content.

Barton G. Clay, Witness—(R. 215)

Anna G. Robinson, Witness—(R. 220)

Cleo Porter, Witness—(R. 223)

Eva W. Shaw, Witness—(R. 232)

Clay, Robinson, Porter and Shaw were employees of the Utah Liquor Commission and were called to establish

the fact that defendant purchased two-fifths of Davis County whiskey at State Store No. 3, Second South and Second East, Salt Lake City, on July 30, 1952. Efforts to establish the exact or approximate time of the purchases failed. Miss Porter made one sale and Defense Exhibit 3 indicates that she was on duty July 30th from 3:41 p. m. to 6:03 p. m. and from 6:40 p. m. to 11:12 p. m.; Shaw made the other sale and Defense Exhibit 5 shows her as having worked on July 30th from 12:29 p. m. to 4:04 p. m. and from 4:32 p. m. to 7:33 p. m. The numbers on the cash register tapes corresponding with the numbers on the sales cards show only that in each instance the purchases were made during the above shift hours.

Fred M. Newson, Witness—(R. 234)

The witness testified that appellant in the company of the deceased was in his place of business on July 30th of this year (1952) “\* \* \* possibly between ten thirty and noon some time” (R. 235, 236).

Delbert F. Duncombe, Witness—(R. 237)

The officer, testifying as a witness for appellant, stated that during his investigation of the case he discovered a partially full bottle of Davis whiskey in the Penderville apartment.

William J. Christensen, Witness—(R. 238)

Called as a witness for defense, Christensen presumed that he was called to the Penderville apartment in a professional capacity as an attorney and he testified that the subject matters of which he talked with defendant were

(a) “\* \* \* my inquiry about what was the matter and about the lady on the floor” (R. 238); (b) “\* \* \* in connection with some advice he wanted as to marriage of the lady being bigamous or not” (R. 239); (c) that he had no conversation “relating to the subject matter of this case” since the case did not exist then and there was no chance to talk about something that did not exist (R. 239); (d) concerning the subject of homicide but not until after the plain clothes detectives had arrived and had questioned appellant (R. 239, 240).

Richard A. Call, M. D., Witness—(R. 240)

The doctor, a pathologist, testified at length as to autopsies; alcohol and seconal; Chemical analysis; hemorrhages; trauma, black eyes; locomotion and loss of control of bodily functions; hemorrhages, petechial and subdural; hemorrhagic diseases; blood tests; liver functions; blows—small, light and heavy; skull fractures; stains and spots; scratch marks and skin tests; blood types; age of blood stains; rigor mortis and body coloration after death; bruises, chronic alcoholics and bleeding; hemophiliacs; the thickness of the average scalp and the age of bruises. As to the deceased and as to the State’s photographic exhibits of the cadaver, the witness testified:

“Q. You didn’t know anything about June Weiler Penderville?

“A. I heard the testimony.

“Q. You didn’t know whether or not she would bleed more readily than other people, do you?

“A. As a specific case, no.

"Q. And that is because you haven't taken any tests or didn't treat her before she died. Isn't that true?

"A. I didn't take any test, no.

"Q. What is that?

"A. I did not take any tests.

"Q. And the reason you can't tell about her as a specific individual is because you didn't take any tests?

"A. If tests had been taken, it would have been able to determine that, though.

"Q. Now, it isn't your testimony that the condition of these eyes as you see it here is caused by some kind of make-up or something of that kind, is it?

"A. No, that isn't my testimony, but photography is notoriously deceiving.

"Q. And, of course, all we can do is take the appearance of these photographs, Doctor, and does it look to you like the condition reflected by these was caused by trauma?

"A. Well, given adequate photographs and an adequate examination, I could draw a much better conclusion.

"Q. I am asking you from the photographs we have at hand, sir. Does that appear to you to have been caused by trauma?

"A. I would again have to know if these were bruises or dried blood on the skin. The photograph in and of itself is not helpful in the determination of trauma.

"Q. Your testimony then is that from looking at those pictures that you are unable to express an opinion and tell us whether or not this body was subjected to any trauma. Is that your testimony?

"A. No.

"Q. Well, what is it then?

"A. I must qualify that a little bit and say if the photographs are a true representation, then I would agree that they do represent trauma.

"Q. And assuming that an individual—and assuming again that they truly represent the condition which existed, sir, and further assuming that the scalp showed bruises and contusions and was thickened up to 1.3 centimeters, it looks like, in a few areas due to the presence of edema and contusions, would you say that such trauma could cause a massive subdural hematoma?

"A. It is possible.

"Q. And from just taking the appearance of the body there and assuming again the condition of the scalp that I have indicated, that is the most likely thing which would cause a subdural or a massive subdural hematoma if it were present in the body which is indicated in the pictures?

"A. That is correct" (R. 266, 267, 268).

Edgar Ronald Penderville, Defendant—(R. 271-286)

Defendant, in response to questioning as to his whereabouts between approximately six thirty and seven thirty on the evening of July 30th, 1952, testified:

"A. I left the apartment I should judge approximately six forty-five. I drove downtown, went to the liquor store at Second South and Second East, made a purchase, and from there I drove west on Second South and parked between First and—between State and Second East, State and Second East—let's see—I'm not too familiar—Main and State is where I parked and went across the street and had something to eat.

"Q. Do you recall the name of the place where you ate?

"A. I'm not sure, but I believe that it's known as the Pony Express Cafe.

"Q. After you finished eating, what did you do?

"A. I returned to the car and drove home" (R. 272).

Further testifying, he said: that when he arrived home he found his wife lying on the floor along the wall; that he lifted her out as best he could and her nose was bleeding; that he went to the bathroom and rinsed out a wash cloth in cold water, bathed her face, went back and rinsed the wash cloth out again and folded it over her forehead (R. 272). Thereafter, he prepared an ice pack, noted her right eye was swollen and he got the bed spread from the bed and put it over her (R. 272, 273). Then he said, "I imagine ten or fifteen minutes after that I went down stairs and called Mr. Christensen" (R. 273).

"Q. Do you know what time you made the phone call for Mr. Christensen?

"A. No, I can't say precisely what time it was. It was some time I imagine between quarter of eight and quarter after eight. I have no way of knowing exactly what time it was" (R. 273).

*Mr. Christensen had testified that he received a call from appellant at about fifteen minutes before nine o'clock on the evening of July 30th (R. 149).*

From the testimony as supported by the exhibits, it appears that appellant did purchase two fifths of Davis

County whiskey at State Store No. 3 on July 30th, 1952; there remains a question as to the time of day for each purchase (R. 287). Appellant was "not particularly" alarmed to find the deceased on the floor of the apartment (R. 288).

Defendant and appellant here on cross-examination testified:

"Q. Doctor Condie left your place about six o'clock that night, didn't he?

"A. I believe it was shortly after six, yes sir.

"Q. And do you know what time you left?

"A. I know it was after six because Doctor Condie looked at his watch at one time while we were talking in the living room and said, 'it is after six o'clock. I have got to get home.'

"Q. Well, but in connection with your leaving the place, it could have been before six thirty that you left. Isn't that true?

"A. I don't believe it was before six thirty, no.

"Q. Could it have been six thirty?

"A. It could have been—I guess it could have been six thirty, but I don't believe it was.

"Q. As a matter of fact, you told the officers that you had been gone about three quarters of an hour. Is that how long you were gone?

"A. That would be my estimate" (R. 288, 289).

Testifying as to the deceased the witness said:

"Q. When you left, where was June?

"A. June was on the bed.

"Q. Asleep?

"A. Asleep.

"Q. And then when you returned, you say that she was out of bed?

"A. She was out of bed, yes" (R. 290).

And,

"Q. She was bleeding from the nose, wasn't she, when you got back?

"A. Yes, she was.

"Q. She was bleeding from the mouth when you got back?

"A. No, she wasn't.

"Q. Was there any blood in her mouth?

"A. Not that I noticed.

"Q. Did you ever at any time during that evening notice any blood in her mouth?

"A. No, I didn't" (R. 291).

Further,

"Q. And you say when you came back and you looked at this body or this—June there—that you were not particularly concerned. Is that right?

"A. Not at the time, no.

"Q. And you didn't call a doctor?

"A. Not right then, no.

"Q. The first person that you called was a lawyer?

"A. That's right" (R. 292).

Then,

"\* \* \* after you returned, what was the first phone call you made?

"A. I called Mr. Christensen.

"Q. And you estimate that time as being what?

"A. I should say it was probably around eight or eight fifteen.

"Q. And you called him in connection with the condition of June?

"A. Not particularly" (R. 292).

Also,

"Q. Now, you say that you—during this period that Mr. Christensen was there June was breathing very heavily, wasn't she?

"A. I wouldn't say very heavily. I would say she was breathing audibly.

"Q. And it didn't particularly attract your attention the way she was breathing during this period of time?

"A. No. I was conscious of it, but it didn't attract my attention.

"Q. And then all of a sudden she stopped breathing. Is that it?

"A. I don't know whether it was all of a sudden.

"Q. Were you paying any attention to her?

"A. No. At that particular time I believe my back was turned.

"Q. And she was there prone on the floor?

"A. She was lying on her back, yes.

"Q. Pillow under her at all?

"A. No" (R. 293, 294).

Finally,

"Q. And you knew that she had been given sedatives by the doctor?

"A. Yes, I did.

"Q. And that they had put her to sleep?

"A. Right" (R. 295).

Defendant on redirect examination testified:

"Q. Referring again to this liquor, I believe—was the first fifth that you bought drunk by the time you went downtown for the second fifth?

"A. It was gone.

"Q. How much liquor out of that bottle did you drink?

"A. I had two mixed drinks, whiskey sours.

"Q. Now, out of the second bottle, did you have any drinks out of that?

"A. I had some out of that after the inquisition started.

"Q. Did you have—were you the only one that had a drink—

"A. As far as I know.

"Q. —out of that bottle?

"A. As far as I know. It was open and there. I think it was opened about—well, it was after the officers came that it was opened. I couldn't say the time" (R. 295).

And,

"Q. Did you ever have a serious head injury?

"A. Yes. I have had a fractured skull.

"Q. When did you have this skull fracture?

"A. March 1, 1951.

"Q. Since that time have you noticed any difference in your capacity to hold liquor?

"A. Definitely.

"Q. In what respect?

"A. I can't take as much.

"Q. You can't take as much before you get drunk?

"A. In my opinion I don't get drunk" (R. 296).

The witness had taken some paraldehyde during an interview conducted by the officers on July 31st, 1952, and attributes to this his loss of memory as to what was then said.

Elizabeth Ross, Witness—(R. 274).

The witness, called by the State, produced and identified medical records from the files of the Latter-Day Saints Hospital, Salt Lake City, Utah, pertaining to the deceased.

Maurice J. Taylor, M. D., Witness—(R. 276).

The witness was called by the State, out of order of trial, and testified of intermittant treatment afforded the deceased by him from the month of August, 1949, through June 3, 1952. The doctor testified as to tests conducted as late as May and June of 1952 which did not indicate that the deceased had a tendency to bleed easily (R. 279); that alcoholism in and of itself is not a cause of increased bleeding in the absence of severe liver damage (R. 279, 280). The witness testified further as to an examination of the deceased at the Newhouse Hotel on May 13, 1952 and as to his findings thereon. On cross-examination the witness stated that the deceased was not drunk all the time (R. 285); that for a period of some eighteen months, during 1949 and 1951, she was gainfully employed, not malnourished, and the picture of health (R. 286), that as late as

June 3rd, 1952, the deceased was in quite good state of physical health (R. 286).

Camilla M. Anderson, Psychiatrist, Witness—  
(R. 298).

The witness testified she had examined the defendant and that she was of the opinion that he had a limited capacity for alcohol and as to the manner in which he might be affected by the taking of an ounce of paraldehyde. That a person in an amnesic state produced from the taking of paraldehyde would tend to tell the truth.

Delbert F. Duncombe, Witness—(R. 305).

Witness, a police officer, called by the State as a rebuttal witness, testified as to a conversation with defendant had on July 31st, 1952, during which defendant stated in substance and effect that he returned to the apartment about three quarters of an hour after having left there and that that would make it at about seven or seven fifteen o'clock; that, during the same conversation, defendant stated that he was angry upon entering the apartment and finding the deceased not in bed. The officer stated that defendant had been given some paraldehyde. On cross-examination, this witness stated that at the time of questioning the defendant was guessing at the time he left the apartment or judging it by the time the doctor departed; that "he stated that the doctor left, and he left immediately afterwards" (R. 306). Officer Duncombe further testified as to how the defendant reacted after taking the paraldehyde, he had previously testified that the paraldehyde was taken by defendant after the herein referred to statements of defendant at the interview (R. 306).

## STATEMENT OF POINTS

## POINT I.

THE RIGHTS OF APPELLANT AS GUARANTEED AND PROTECTED BY ARTICLE I, SECTION 12, OF THE UTAH CONSTITUTION, AND SECTION 77-1-8, SUBPARAGRAPH 1, UTAH CODE ANNOTATED 1953, WERE NEVER VIOLATED NOR WAS DUE PROCESS OF LAW DENIED APPELLANT IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

## POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING ANY ONE OR ALL OF THE FOLLOWING MOTIONS MADE BY DEFENDANT:

- (a) Motion to Dismiss the Action at the Close of the State's Case and Renewed at the Close of Defendant's Case (R. 200, 309).
- (b) Motion to Dismiss the Charge of First Degree Murder at the Close of the State's Case and Renewed at the Close of Defendant's Case (R. 200, 309).
- (c) Motion to Reduce the Charge to Voluntary Manslaughter Made at the Close of the State's Case (R. 202).
- (d) The Verdict is Contrary to the Law and the Evidence, as Raised in Defendant's Motion for New Trial (R. 50-66).

## POINT III.

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE WITNESS WILLIAM J. CHRISTENSEN TO TESTIFY AS TO THE CONVERSATIONS HE HAD WITH DEFENDANT AT THE TIME JUNE PENDERVILLE WAS DYING ON THE FLOOR OF THE PENDERVILLE APARTMENT.

## ARGUMENT

## POINT I.

THE RIGHTS OF APPELLANT AS GUARANTEED AND PROTECTED BY ARTICLE I, SECTION 12, OF THE UTAH CONSTITUTION, AND SECTION 77-1-8, SUBPARAGRAPH 1, UTAH CODE ANNOTATED 1953, WERE NEVER VIOLATED NOR WAS DUE PROCESS OF LAW DENIED APPELLANT IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

"Strategy may not be resorted to in courts of justice as is the case in war." Thus, this Court has spoken. *Van Cott et al., v. Wall*, 53 Utah 282, 291, 178 P. 2d 42.

The "Transcript of Proceedings" speaks for itself. Defendant was charged with the crime of murder in the first degree on August 1st, 1952, and was not finally arraigned in the District Court until the 6th day of December, 1952. Continuances were had on motion of defend-

ant and defendant was, in fact, continuously represented by counsel from and after August 2nd, 1952. It may not be said that defendant had insufficient time to prepare for trial; nor can it be successfully contended that he was denied the right to defend in person.

In the conduct of a criminal, the same as in a civil jury trial, much ought necessarily be left to the good sense and judgment of the judge. It is his duty to exercise a sound discretion in all matters appertaining to the orderly progress of the trial and during all stages of the proceeding as well, and his action should not be interfered with unless there is a clear abuse of discretion.

Defendant now contends that he was denied the right to represent himself. The primary question is, therefore, did he want to do just that. We think not. In the reported transcript of the discussion had between Judge Ellett and the defendant on the day preceding the trial, defendant said:

“\* \* \* and as of now, I don’t have one red penny with which to employ another attorney, and I won’t have until the first of the month. However I think I can get over that hurdle” (R. 321). \* \* \*

Then:

“The Court: Well, do you want me to appoint a lawyer for you?

“Mr. Penderville: I think I can make arrangements, or I should like after this incident—I should certainly like to see three or four attorneys.

“The Court: I’m not going to do that. I will tell you, because I think you are stalling on me, I

will appoint a lawyer if you want to, or you can go ahead with Mr. McCarthy, and it is immaterial to me which you do" (R. 325).

True, the record thereafter shows that defendant said he did not want Mr. McCarthy and it shows also that the court proceeded to appoint him regardless of that fact. However, the truth is that defendant did not seek to defend himself in person and it is apparent from all of the discussion had that the court understood correctly that what defendant actually desired was a further continuance. The court's ruling was correct; see *United States v. Maurice Alvin Gutterman*, 147 F. 2d 540, 157 A. L. R. 1221, (1945); Annotated 1225. That court, confronted with a similar if not identical problem, there said:

"As for the claim that the court unlawfully declined to dismiss the attorney who had been assigned to defend him and was not shown to be unfaithful or incompetent, it is in substance the same as the contention that we held to be unfounded in *United States v. Mitchell* (2 Cir.) 147 F. (2d) 1006, and *Id.* (2 Cir.) 138 F. (2d) 831.

"There we had to deal with a defendant's contention that he was seeking to discharge his attorney merely in order to exercise his right to conduct his own defense, just as we have to do here. In neither case did it appear that the defendant was really seeking to take over the personal conduct of his defense or that he was doing more than to claim the privilege of changing his counsel because he did not approve of the latter's judgment. To yield to such a request where the defendant has not made it clear that he really wished to conduct the defense in propria persona gives far too great a chance to delay trials and otherwise embarrass effective prosecution of crime."

In their brief, counsel for appellant say:

“As far as the record is concerned defendant had never been involved in a felony prosecution. This was an entirely new experience for him. Can there be any greater prejudice shown than forcing a defendant to trial with an attorney in whom he has no confidence?”

We wonder if forcing him to defend himself, he being so unskilled in such matters and totally unlearned in the law, would not have prejudiced his cause much more? We think that the court was acting within its sound discretion and that the record reveals a solicitude on the part of the court for the cause of appellant's defense.

Where a solicitous trial judge advised a defendant thusly:

“I think, as a matter of advice to the defendant and for the protection of his rights, that this case involves and will involve expert testimony; matters that require more or less technical knowledge; also technical knowledge on the part of counsel as to the character of evidence, propounding of questions put to expert witnesses; that requires a technical knowledge as to the manner of presenting such testimony in court; that no person who is not familiar and understands the propounding of those questions and examining the experts is fully competent to represent the defendant, unless it is handled by counsel who are familiar with that class of testimony to some extent at least. Another thing that I want to call to the defendant's attention is that if he has counsel he has the privilege to request his counsel to ask any question that he may desire him to ask of any witness in the case, by communicating that question to his counsel and his counsel putting the

question to the witness, and if the question is a proper one or one that is relevant to the issues in the case, I believe that his counsel would and should present the question to the witness and he would obtain all the results that he would obtain by putting the question directly to the witness himself in person."

Thereafter, and despite such advice, the defendant therein elected to personally conduct his own defense; on appeal it was contended that the court's attitude and ruling on the matter deprived the appellant of a constitutional right to appear and defend in person and with counsel. The appellate court found such contention to be without merit. *People v. Northcott*, (Cal. 1930) 289 P. 634. In that case the defendant intended to, elected to, and did conduct his own case and the matter as to the right to a continuance was not an issue.

The question of whether a continuance should be granted or not rests within the discretion of the trial court and will ordinarily not be reviewed:

*State v. Freshwater*, 30 Utah 442, 85 Pac. 447.

*State v. Anselmo*, 46 Utah 137, 148 Pac. 1071.

*State v. Cano*, 64 Utah 87, 228 Pac. 563.

*State v. Fairclough*, 86 Utah 326, 44 P. 2d 692.

*State v. Williams*, 49 Utah 320, 163 Pac. 1104.

*State v. Hartman*, 101 Utah 298, 119 P. 2d 112.

And, the refusal of a continuance will not be deemed error unless there has been a plain abuse of discretion:

*State v. Haworth*, 24 Utah 398, 68 Pac. 165.

*State v. Vacos*, 40 Utah 169, 120 Pac. 497.

*State v. Riley*, 41 Utah 225, 126 Pac. 294.

*State v. Cano*, *supra*.

*State v. Fairclough*, *supra*.

*State v. Green*, 89 Utah 437, 57 P. 2d 750.

See generally Decennial Digests, Criminal Law,  
Key No. 586 and Key No. 1151.

In the case of *State v. Cano*, *supra*, the time between the preliminary hearing and the trial was only a little more than thirty days; in the instant case, the offense charged was committed on the 30th day of July; the defendant was arraigned on August 2nd; thereafter successive continuances were upon defendant's motion granted to August 7th, September 18th, and finally October 28th, in the year 1952. Finally on the 17th day of December, 1952, the trial commenced. The court said, in the *Cano* case, *supra*, that it would be a travesty of justice to reverse a judgment merely because one charged with a grave offense was speedily tried, and upon such trial convicted. Defendant here complains of the "lower court's opinion" that defendant was taking too long to prepare his defense. Section 77-24-18, U. C. A. 1953, provides:

"After his plea, the defendant shall be entitled to at least two days to prepare for trial, but the time of the trial shall not be postponed for a longer time than the court may deem imperative."

## POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING ANY ONE OR ALL OF THE FOLLOWING MOTIONS MADE BY DEFENDANT:

- (a) Motion to Dismiss the Action at the Close of the State's Case and Renewed at the Close of Defendant's Case (R. 200, 309).

- (b) Motion to Dismiss the Charge of First Degree Murder at the Close of the State's Case and Renewed at the Close of Defendant's Case (R. 200, 309).
- (c) Motion to Reduce the Charge to Voluntary Manslaughter Made at the Close of the State's Case (R. 202).
- (d) The Verdict is Contrary to the Law and the Evidence, as Raised in Defendant's Motion for New Trial (R. 50-66).

Counsel for appellant says :

"We direct the following argument to all of the foregoing motions. There is not a scintilla of evidence which directly or indirectly justifies the conclusion that defendant was the perpetrator of the injuries sustained by the deceased on the 30th day of July, 1952."

We submit that there was much more than a "scintilla" of evidence both direct and indirect which fully justified the jury (*triers of the fact*) to unanimously find that the defendant inflicted the injuries causing death. We contend further that these injuries could not have been self inflicted; this contention is irrevocably sustained by the expert medical testimony adduced during the trial. We direct the Court to the testimony of Adolph M. Neilsen, M. D., "*the injuries he observed on the neck; eyes, head and skull could not have been self inflicted*" (R. 93-94) ; Lyman W. Condie, M. D., "*the injuries and contusions he observed on the body of Mrs. Penderville at and after 9:15 p. m. on July 30th,*

*were not self inflicted*" (R. 130) ; there is no evidence the injuries *were* self inflicted, *or could have been* self inflicted, nor do the exhibits so indicate. Counsel interposes, and contends, through some twenty pages of their brief, their own theories on *how* the injuries *could* have been inflicted and some of their theories are indeed not lacking in ingenuity. We think this argumentative approach would be proper for presentation to the jury but that it has little, if any, value or merit at this stage of the proceedings. It would not be material for the respondent here to advance a theory independent of the record. We are certain that this Court will draw its conclusions from the contents of the record.

To the motions and their merit. The motions complained of were made and disposed of as follows:

Record, page 200-202

"Mr. McCarthy: Comes now the defendant and moves the court to dismiss the charge of first degree murder for the reason that the prosecution has failed to establish a *prima facie* case, in that there is no showing of a criminal connection between the defendant and the charge, nor is there proof of the *corpus delicti*. The evidence is inadequate to fix the cause of death. There is no connection showing that the defendant did the act.

"The Court: Well, I think there is a jury question here. The defendant was with the deceased so far as the evidence goes—I think the jury now could say he was with her all the time, and the evidence of the doctors is that she died, received her death as a result of some trauma to the head, and I believe that the jury could find that this defendant was the cause of her death.

"Mr. McCarthy: Your Honor, I see nothing in the testimony that would rule out the possibility of an accidental death, nor is there anything to directly connect the defendant with the place in which the charged crime took place except negative testimony that no one saw him elsewhere, which does not place the defendant on the scene at the time the crime is charged to have been committed.

"The Court: He's with her at the last anyone saw her, and the first anyone saw her thereafter he was with her. I think there is a jury question involved. The motion will be denied.

"Mr. McCarthy: Now, Your Honor, I move to dismiss the allegation of first degree murder and ask that the charge on the present evidence be reduced to second degree murder because there is no showing of premeditation, plan, design, or anything else.

"The Court: Do you want to be heard on that?

"Mr. Roberts: Yes. I think there is, Your Honor, I think the testimony indicates that this woman was beaten and battered in the head. Numerous blows would have had to have caused the condition which appears on her scalp, on her eyes, and the rest of her head and on the neck, and certainly such a beating—evidence of such a beating would indicate that the person who did it was intending to cause the death.

"The Court: Let me ask, Mr. Roberts—you don't need to take this.

"(Discussion)

"The Court: The motion at this time will be denied. You may have the right to renew it upon the completion of the evidence if you desire.

"Mr. McCarthy: I would like to go one further and move that the charge be reduced to voluntary

manslaughter because there is a failure to show intent to kill.

"The Court: That motion, of course, would have been taken care of—

"Mr. McCarthy: On the denial.

"The Court: Of the first one, yes, and it is denied."

Record, page 309

"The Court: We are out of the presence of the jury and in the presence of the defendant and counsel. You may make such motions as you desire, Mr. McCarthy.

"Mr. McCarthy: Thank you, sir. Comes now the defendant and moves the court to dismiss the entire charge for failure of the State to prove the case.

"The Court: That motion will be denied.

"Mr. McCarthy: Comes now the defendant and moves the court to dismiss the charge of first degree murder for the reason that no premeditation has been proved.

"The Court: I want to hear you on that. How are you going to defend that?

"(Argument by Mr. Roberts)

"The Court: I will deny your motion and let him argue it and see if they believe it." \* \* \*

A motion to dismiss the charge "is properly denied as where, according to various statements of the rule, the evidence is sufficient to authorize conviction; where there is substantial evidence to support a conviction, even though

a conviction based thereon would be regarded as flagrantly against the evidence; where there is any legal evidence, however slight or weak and inconclusive, tending reasonably to show, or affording an inference of, guilt, or from which the jury can legitimately deduce either of two conclusions; where the evidence of a material nature is conflicting, or presents a case for the jury, or is such that reasonable minds might differ as to accused's guilt; where the evidence tends to show the commission of the offense charged and the connection of accused therewith, \* \* \* or is sufficient to overcome prima facie the presumption of innocence, and to require accused to produce evidence in his own behalf, or is such that, if believed by the jury, it would support an inference or finding of guilt." 23 C. J. S., Criminal Law, Section 1145 (3), page 665, et. seq., and cases there cited.

Commencing now with page 52 of Brief of Appellant, and with the above rules in mind, permit us to analyze (as we read them) the allegation, contention and conclusion of counsel for defendant as to what the record shows. Dr. Condie was with the defendant and the now deceased at their apartment between the approximate hours of 5:15 and 6:00 o'clock p. m. on the 30th day of July, 1952; he consulted with them both and examined (at least by observation) and administered to Mrs. Penderville (R. 118, 119, 120); the dose of seconal which he gave her would put an average individual to sleep without question (R. 120). When the doctor saw Mrs. Penderville next, at approximately 9:55 p. m. on the same date, she was dead (R. 121). He had been re-called to the apartment by an at-

torney, William Christensen, and upon entering he was told by defendant to "Hurry, I think she still has a pulse" (R. 121). The body of Mrs. Penderville now had a different look than it had had when he observed her when he last saw her alive at 6 o'clock p. m. and coupled with the abrasions and contusions thereon, there was blood in the nostrils and *mouth* (R. 123). The State's photo exhibits clearly show the extent of the abrasions, contusions and injuries inflicted upon the body of Mrs. Penderville. Something gruesome and most unpleasant certainly happened to her between the time of this physician's visits, i.e., 6 o'clock and 9:55 p. m. Since the defendant was with the deceased the last anyone saw her and the first anyone saw her thereafter, the evidence so far adduced was sufficient to overcome prima facie the presumption of innocence and to require defendant to produce evidence in his own behalf. The witness, Dr. Condie, on cross examination testified that he attended the deceased on July 27, 1952, (three days prior to her demise) (R. 123, 124); on redirect examination the witness testified as to a conversation with the deceased on said July 27th during which various contusions she had were being discussed, and she said "He hit me;" to which defendant replied, "Oh, you were drunk and stumbling about the room." Then while the doctor's examination continued and when defendant had left the room deceased again said to this witness, "He did too hit me" (R. 130). Is this evidence, such as, if believed by the jury, would support an inference of guilt?

Counsel for defendant accepts the statements of the witness, Susan Eliason, to be true and admits that something occurred in the Penderville apartment between 7:00 and 7:25 o'clock p. m. The witness did not know when

these noises or the disturbance ceased, it probably lasted after 7:25 o'clock but that is the time she left the building and as long as she heard it (R. 140, 141). From the evidence so far, we, at this point, know something happened to the deceased between the hours of 6:00 and 9:55 p. m. and we know that at least between 7:00 and 7:25 p. m., there was a discernable disturbance within the Penderville apartment. The jury could legitimately deduce from this testimony, coupled with the later testimony of defendant, either of two conclusions; the defendant was in the apartment or the defendant was not in the apartment at the time the sounds described by this witness emanated therefrom.

Abandoning now the sequence of witnesses at the trial, we go to the testimony of defendant as did appellant.

The defendant advances an alibi. He accounts for his time as follows:

"Q. Calling your attention to the 30th of July of this year, during the time interval between approximately six thirty and seven thirty of that evening, can you tell us where you were?

"A. I left the apartment I should judge approximately six forty-five. I drove downtown, went to the liquor store at Second South and Second East, made a purchase, and from there I drove west on Second South and parked between First and—between State and Second East, State and Second East—let's see—I'm not too familiar—Main and State is where I parked and went across the street and had something to eat.

"Q. Do you recall the name of the place where you ate?

"A. I am not sure, but I believe that it's known as the Pony Express Cafe.

“Q. After you finished eating, what did you do?

“A. I returned to the car and drove home” (R. 272).

On direct examination the defendant did not testify as to the hour of his return to the apartment. On cross examination, he believed that it was shortly after six that he had left the apartment (R. 288) ; he did not believe that it was before six-thirty (R. 289). It was his estimate that he was gone about three quarters of an hour (R. 289). Dr. Condie had testified that he had left the Penderville apartment at six o'clock (R. 120, 121). Defendant said he knew it was after six because the doctor looked at his watch and said, “it is after six o'clock, I have got to get home” (R. 288). Now, pinpointing time, if it be conceded that defendant left “shortly after six” and was gone about forty-five minutes, it must have been somewhere near the hour of seven when he returned. The disturbance was heard between seven and seven twenty-five and probably continued thereafter; we join with appellant's counsel and accept the testimony of Susan Eliason as being true. Conceding, for the sake of argument, but not admitting, we take the hour of six forty-five as the time of defendant's departure—the hour most favorable to defendant's cause and the one for which he himself claims—then, again taking his accounting of time—he would have returned to the apartment at seven-thirty. Only five minutes after Susan Eliason departed, and the disturbance not having then ended. Conceivable, but not probable, as we shall now see. Defendant has now been heard to say that he arrived home at seven-thirty o'clock; then he says that on his return he found his wife

lying on the floor along the wall and that he administered to her by bathing her face, preparing an ice pack and placing the bed spread over her. Then, "I imagine ten or fifteen minutes after that I went downstairs and called Mr. Christensen" (R. 273). That, says the defendant, was sometime between a quarter of eight and a quarter after eight! But, Mr. Christensen says he received the call about fifteen minutes before nine o'clock and that he arrived at the apartment at around nine p. m., or shortly before that time (R. 148, 149). Dr. Condie returned to the apartment at nine fifty-five. We know that something happened to the deceased between the hours of 6 o'clock and 9:55 p. m.; we know that it most probably happened between 7 o'clock and 7:25 o'clock and thereafter. It appears to have happened and was over with before Lawyer Christensen arrived on the scene at 9 o'clock or shortly thereafter. We are sure that it was over with before 9:55 when Dr. Condie returned. What we do not know is where was the defendant, accepting all of his testimony but again not conceding the truth thereof, between a quarter of eight or eight-fifteen when he said he called Christensen and eight forty-five when Christensen said he was called. Could the second bottle of whiskey have been purchased sometime then? Could the defendant, from all of the evidence, direct, indirect and circumstantial, have left the apartment *after* seven-thirty and returned sometime before *eight forty-five*? Is there evidence of a material nature conflicting, so as to present a case for the jury, and such upon which reasonable minds might differ as to accused's guilt? We do not hesitate to answer in the affirmative!

Possibly we need go on. The defendant says that when he left the apartment the deceased was on the bed and asleep (R. 290). Dr. Condie had testified that he had administered to the deceased seconal in an amount that would put an average individual to sleep without question (R. 290). The drug was administered during the doctor's first visit and when he departed the deceased was evidently yet awake, that was around six o'clock. Defendant says he left the apartment sometime between shortly after six o'clock and, again giving defendant the advantage, six forty-five o'clock. If deceased was drugged and asleep at six forty-five o'clock, what could have awakened her before the hour of seven o'clock? Nowhere has it been made to appear that anyone other than the defendant was seen at or near the apartment of the deceased at or about the time deceased sustained her injuries. Therefore, the jury was called upon to adopt one of two premises; either the defendant inflicted upon deceased her injuries, or they were self-inflicted. The medical evidence was conclusive that those injuries could not have been self-inflicted (R. 93, 94 and 130). There was legal evidence, however slight or weak or inconclusive, tending reasonably to show, or affording an inference of, guilt, from which the jury could legitimately have deduced either of these two conclusions. In such case the motion to dismiss was properly denied.

The defendant says that the deceased was bleeding from the nose when he returned and administered to her but that she was not bleeding from the mouth and that at no time during the evening did he notice any blood in her mouth (R. 291). The testimony of both Dr. Neilsen and

Dr. Condie was that there was blood in the nostrils and mouth (R. 83, 123). Here was evidence of a material nature which was conflicting! Officer Duncombe was interrogated as to his knowledge of the age of the blood spots and admitted that he could only tell from experience, however, the defendant knew the spots were blood and he told the officer so (R. 181). To have known so, defendant must have seen these spots made. Is that substantial evidence to support a conviction, even though a conviction based thereon would be regarded as flagrantly against the evidence? Is it evidence tending to show the commission of the offense charged and the connection of the accused therewith? Not one but every test as to the proper denial of a motion to dismiss has been, from the record in this case, squarely met. When such competent evidence appears in the record, there can be no error in failing to direct a verdict of acquittal. *State v. Peterson*, (Utah 1952) 240 P. 2d 504. If the court is dissatisfied with the weight and credibility of the evidence, he may afterwards, upon that ground, set aside the verdict and grant a new trial, but such is no grounds for directing an acquittal. *State v. Lewellyn*, 71 Utah 331, 266 P. 261. The rule applicable when a motion to dismiss challenges the legal sufficiency of the evidence was laid down by this Court in *State v. Thatcher*, 108 Utah 63, 157 P. 2d 258, as follows:

“The rule which must be applied upon a motion to dismiss a criminal case is that all reasonable inferences are to be taken in favor of the state, and only if the record itself reveals that no reasonable man could draw an inference of guilt therefrom is the trial court justified in taking the case from the jury.”

In applying the foregoing rule in this case, the trial court could properly have done only what it did do in denying the motion to dismiss.

Appellant points to the testimony of Burton G. Clay Anna G. Robinson, Cleo Porter and Eva W. Shaw and claims for this that it corroborates defendant's testimony. Nothing more was adduced from these witnesses other than the nature and scope of their employment, shift hours and the sale of two bottles of Davis County whiskey apparently to the defendant during the time the liquor store was open on July 30, 1952. The testimony of Anna G. Robinson went for naught (R. 222). The time of the purchases cannot be determined even speculatively.

The witness Fred M. Newson could have and possibly did see the defendant with the deceased at some time during the morning of July 30, 1952 in his store (R. 235, 236). It is not claimed that he saw defendant's Cadillac automobile.

Delbert F. Duncombe did find a partially full bottle of Davis whiskey in defendant's apartment (R. 237). Only by inference can it be said that this was one of the bottles supposedly purchased on July 30, 1952. We think that immaterial, it does nothing to establish the time of purchase.

William J. Christensen (R. 238, 239, 240). Called as a witness for defense, Christensen presumed that he was called to the Penderville apartment in a professional capacity as an attorney and he testified that the subject matters of which he talked with defendant were (a) " \* \* \* my inquiry about what was the matter and about the lady or the floor" (R. 238); (b) " \* \* \* in connection with some advice he wanted as to marriage of the lady being

bigamous or not" (R. 239); (c) that he had no conversation "relating to the subject matter of this case" since the case did not exist then and there was no chance to talk about something that did not exist, (R. 239); (d) concerning the subject of homicide but not until after the plainclothes detectives had arrived and had questioned defendant (R. 239, 240). This witness had previously been called as a witness for the State. He had testified as to when he was called on the phone by defendant; when he arrived at the apartment of defendant; what he then observed of the deceased and the defendant; what occurred while he was thereat. There was nothing in his testimony material or otherwise as to what occurred before the hour of eight forty-five p. m. on July 30, 1952, nor could there have been.

G. J. Murray, State's witness, testified that he was the caretaker for the apartments at 1012 Barbara Place (R. 166); that there were thirty-nine apartments together with from two to six motel rooms (R. 167). That he became acquainted with the defendant on or about the first day of July and that he rented Apartment No. 2 to the Pendervilles at that time (R. 167). He described the location of that apartment with relation to the office and the apartment which he occupied (R. 168). The witness testified as to voices or words he had heard emanating from the Penderville apartment during the month of July, that Mr. Penderville's voice always seemed to be that of a demand of some kind and that he heard it, after the first two or three days, every day while they were there (R. 169, 170). This witness then testified that he was either in his apart-

ment or around the building on the 30th day of July, all day (R. 170). He then stated that he was familiar with the Penderville's Cadillac automobile, that it was at the apartment all that day, parked at a certain place and in a certain manner and that it was still in the same place when the officers arrived (R. 170, 171). That during the day he did not see the defendant at any time and during the evening only when he saw the defendant at the phone (R. 171, 172). The witness testified that Mr. Penderville used the telephone numerous times from 5 p. m. on and fixed the time of five o'clock as being when he, the witness, went through the office to go to his apartment (R. 172); at five thirty o'clock "Because I was eating my dinner" (R. 173); at seven thirty because the witness was listening to the television (R. 173, 174, 176, 177). The record does show some discrepancy in this witness's testimony at the trial, as to the time of the telephone calls Mr. Penderville made, with the witness's prior testimony at the preliminary hearing (R. 174); however, he had given the matter more thought and concentration and he had not talked to anyone about it (R. 175).

The testimony of Mr. Murray as to what he heard or observed as to the demeanor and of the demagogic conversations between deceased and defendant was admissible to show motive and probable cause for the assault upon deceased by the defendant.

Counsel for appellant makes much ado about nothing through pages 60 to 71 of his brief. It is said that defendant "did the normal and logical thing in rinsing out a wash-cloth in cold water, bathed her face and went back and

rinsed the cloth out again and folded it over her forehead and then put an ice pack on her head." We submit that it would have also been the normal and logical thing for the defendant to summon aid, if he had nothing to hide, for the deceased. It certainly would have been the humane thing to have done. Can it be said that a lawyer was summoned for benefit of the deceased? Finally, we make this observation; that is, we cannot conceive that it could be in any way material whether the deceased was an alcoholic, a drug addict, a bleeder or in good health or in poor health insofar as the question of homicide is concerned. If any of these conditions existed, the defendant could not but have known and would ordinarily have been expected to respect the fact. He cannot blame his conduct upon a condition of intoxication, nor does he do so for he said, "In my opinion I don't get drunk" (R. 296). Normally, those unwell are able to command and to receive the greater attention because of that fact from all with whom they come in contact in every segment of an understanding society. The jurors brought in their verdict. It was, "We the Jurors impaneled in the above case, find the defendant guilty of second degree murder, \* \* \*."

We submit that there was substantial evidence from which the jury could and did reasonably conclude that Edgar Ronald Penderville fatally assaulted June Weiler Penderville and that being so, it is not the province of the appellate court to judge the sufficiency of the evidence; the verdict should not be disturbed. *State v. Aures*, 102 Utah 113, 127 P. 2d 872.

## POINT III.

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE WITNESS WILLIAM J. CHRISTENSEN TO TESTIFY AS TO THE CONVERSATIONS HE HAD WITH DEFENDANT AT THE TIME JUNE PENDERVILLE WAS DYING ON THE FLOOR OF THE PENDERVILLE APARTMENT.

Attorney Christensen arrived at the Penderville apartment approximately one and one-half hours after the witness Susan Eliason had heard the noises emanate therefrom. It was never contended that he perceived the infliction of the deceased's injuries; he, with the defendant, between the hour of approximately nine o'clock p. m. and nine fifty-five p. m., according to their own testimony, calmly and meditatively discussed the affairs of defendant. The Utah case, *Jackson v. Utah Rapid Transit Co.*, 77 Utah 21, 290 P. 970, is certainly not for application to the factual situation with which we are now concerned. The rule, as to *res gestae*, is:

"The *res gestae* may include statements, acts and conduct of accused after the commission of the crime, whether such statements, acts, and conduct of the accused are exculpating or incriminatory in character or effect, but the statements or acts must have been spontaneously made or performed while the mind was still under the influence that governed it at the time that the event took place, and at such a time and place and under such circumstances as to exclude the idea of design, fabrication, afterthought, or a mere retrospective narration of a past occurrence." 22 C. J. S., Criminal Law, Sec. 667, page 1054.

Adopted by our Court in *State v. Gardner*, 213 P. 794, 61 U. 359.

It was not erroneous to permit Christensen to testify to those facts which he knew of his own knowledge. But, the conversation he had with defendant sought to be elicited had all the earmarks of a self serving purpose and was therefore inadmissible. It was an attempt through hearsay evidence to show that defendant's story told at one time would corroborate his story told at the trial and thus strengthen his testimony before the jury. There was no error in sustaining the objections.

See, *State v. Seboldt*, 65 Utah 204, 236 P. 225.

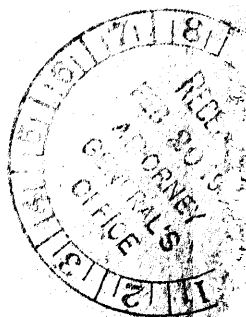
### CONCLUSION

We conclude that the judgment and conviction should be sustained.

Respectfully submitted,

E. R. CALLISTER,  
*Attorney General,*

WALTER L. BUDGE,  
*Assistant Attorney General.*



2005  
3