

1953

State of Utah v. Edgar Ronald Penderville : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

v.

EDGAR RONALD PENDERVILLE,

Defendant and Appellant.

Case No.
8053

Brief of Appellant

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8053

Brief of Appellant

STATEMENT OF FACTS

The defendant was arraigned in the District Court before the Honorable A. H. Ellett on the 6th day of December, 1952, at which time he entered a plea of not guilty. The case was set for trial eleven days later, to-wit, on December 17, 1952, at 10:00 A.M. (R. 7). On

the 15th day of December, 1952, defendant notified his attorney, Joseph P. McCarthy, that he did not want him to proceed with the defense of his case and that he was discharged from any further legal service in connection therewith. That the reason for said action was because defendant was satisfied that said attorney had not properly prepared his defense, notwithstanding he had ample time to do so and defendant had paid his requested fee and expenses of \$1500.00. Thereupon defendant wrote a letter to the Honorable A. H. Ellett, judge of the Third Judicial District Court informing him of his action in discharging his attorney. Said letter was delivered to the judge of said court before 10:00 A.M. on the 16th day of December, 1952. That a copy of said letter is as follows: (R. 57-58)

“Honorable A. H. Ellett, Judge
of the Third District Court of
Utah, Salt Lake City, Utah

“Dear Sir:

This morning I considered it necessary to my welfare to summarily discharge my attorney Joseph P. McCarthy together with any assistants he has seen fit to record as associated with my case.

In my opinion Mr. McCarthy has been abysmally negligent and derelict in his obligations relative to my best interests and in the so-called preparation of my defense. He impresses me at this point as being completely devoid of professional know-how and completely lacking any sense of his deep legal and moral responsibilities. There are other factors involved, not monetary, which

have influenced my decision but which I do not feel free to discuss at this time.

In view of the foregoing I beg indulgence of the court and request a postponement of my trial until such time as I am able to engage competent legal counsel whom I feel will not only represent me but defend me.

Respectfully yours,
s/ E. R. Penderville"

On the 16th day of December, 1952, defendant was called before the Honorable A. H. Ellett in his chambers at approximately 9:50 A.M. and in the presence of Miriam E. Parker, the reporter of the above entitled court, he engaged in a conversation with the Honorable A. H. Ellett, which conversation has been duly reported in the official transcript of the case from page 242 to 252 inclusive (R. 316-325), as follows:

"THE COURT: Mr. Penderville, I had a letter from you this morning that gave me some little concern about your attorney. What is it that you have against him? I thought he was doing you an excellent job. I don't know anything about it.

MR. PENDERVILLE: The whole thing, he's been giving me a lot of concern for a long time. Primarily, I wanted this thing to go to trial a couple or three months ago. I didn't want to wait, but the situation as it exists now is approximately this: Mr. McCarthy has had in his hand information for a period of in excess of four months which he did nothing about. I felt that it was very definitely in my favor and something that should be prepared for the trial.

THE COURT: Are you having reference to the viewing of a chair in—

MR. PENDERVILLE: No sir.

THE COURT: He was in yesterday working on that matter.

MR. PENDERVILLE: No sir. No sir, it wasn't the chair, although that is one of the matters that was brought to Mr. McCarthy's attention at least two months ago, and apparently he didn't do anything about it until yesterday.

THE COURT: Well, the thing that irks me a little bit is I am all set to try this case. I think there has been a deliberate stall of trying to put it over, and I wasn't going to be a party to that and don't propose to be now. I propose to try this case.

MR. PENDERVILLE: Well, it is no stall on my part, Your Honor. As I stated at the beginning, as far as I was concerned, I wanted this thing over with. I don't enjoy being over in that county jail one moment. It's an entirely new experience to me, and as I have already stated, I don't like any part of it; but one thing and another, first the preliminary was postponed, and then this was postponed, and that was postponed, and Mr. McCarthy's wife was having a baby.

THE COURT: Now, Mr. McCarthy is ready to try this tomorrow, I am ready, the district attorney is ready, and the jurors are ready, and you come in with this monkey wrench to stop the machinery of court, and I'm not happy about that.

MR. PENDERVILLE: Your Honor, I know that Mr. McCarthy is not ready to try this case. In my opinion an attorney trying a case, particularly a case of this magnitude, should be prepared

for any eventuality, and I am thoroughly convinced that Mr. McCarthy is not.

THE COURT: How do you know what he is going to do, how he is going to direct this trial?

MR. PENDERVILLE: Because we have discussed it together last night.

THE COURT: You are not law trained, are you?

MR. PENDERVILLE: No sir.

THE COURT: Have you ever had a case in court, criminal case in court before involving yourself?

MR. PENDERVILLE: The only thing that I have ever been involved in is a military court-martial.

THE COURT: So you wouldn't be in a very good position to pass on his qualifications and on what he's planned for this thing.

MR. PENDERVILLE: No sir, but I know from certain witnesses that are to be present for the State that Mr. McCarthy does not have information at his hand. He has also been in a position to get the necessary information for the past four months. I have urged him repeatedly to get it. Some of it he attempted to get a week ago Sunday by long distance phone calls that he could have got four months ago for the use of a three-cent stamp, but he didn't check that until he found he was going to have to go to trial eleven days after I entered my first plea.

THE COURT: Of course, you took time enough entering that plea. You took about three weeks to do that.

MR. PENDERVILLE: Well, I didn't—that was his doings. I don't know. Last night I asked

him if he had checked three potential witnesses for me here in Salt Lake City. I have been begging him to check these people for months. Up until last night he hadn't contacted a single one of them, not a single one.

THE COURT: Well, I am going to try this case tomorrow. You fired your attorney at a mighty inopportune time.

MR. PENDERVILLE: Well, I don't know about that. The only thing I can do is plead not guilty, and that's that.

THE COURT: Your plea is in. You have a plea of not guilty, and you have a jury coming in to ascertain the facts, and you have had plenty of time to make this decision heretofore.

MR. PENDERVILLE: Well, I have given Mr. McCarthy this past week to whip this thing in order, and he has not whipped it in order.

THE COURT: That is your opinion that he hasn't.

MR. PENDERVILLE: Yes, as I stated in my letter, that is my opinion.

THE COURT: Of course, you are not in a very good position it seems to me from your training and experience to know whether he is giving you a good defense or not. You chose him. He wasn't appointed by the court for you.

MR. PENDERVILLE: That's right.

THE COURT: He was the attorney you chose in the beginning.

MR. PENDERVILLE: That's right, I did. I knew no attorneys. Mr. McCarthy is the first one that I talked to. I was emotionally upset at the time, completely distraught. I had had two

convulsions over in the county jail the day before. I was desperate enough that I would have hired anyone, and everybody over in the county jail knows how I have been trying to get Mr. McCarthy to do these things.

THE COURT: Have you talked to Mr. McCarthy about this letter?

MR. PENDERVILLE: No sir. I told him last night that I was very much afraid that we had come to the end of the line. He called Doctor Anderson last night and so stated that he was afraid that he was through.

THE COURT: Well, I will tell you what I think about you. I think you are just deliberately trying to get this case to go over.

MR. PENDERVILLE: No sir, I'm not. I have done just the opposite. I personally have been trying to get it tried, but I knew when this date was set a week ago Saturday that Mr. McCarthy wasn't by any means prepared.

(Court talked to Mr. McCarthy on the phone).

THE COURT: Well, I don't know. It's just—you may have a feeling on this thing here, but Mr. McCarthy tells me that the difficulties that you may feel that you have with him over the preparation of this trial involve matters which he thinks are remote and I am sure from what he tells me couldn't be brought into evidence, and it would just be your judgment of what a good trial would be as against his, and I think that you are making quite a mistake here.

MR. PENDERVILLE: I'm not the only one that has this opinion, Your Honor. The opinion is shared by outstanding professional people in the city of Salt Lake.

THE COURT: Whom do you have in mind?

MR. PENDERVILLE: I have in mind for one Doctor Camilla Anderson.

THE COURT: Well, you had better have some lawyer that will tell you because these doctors wouldn't know what they could get in evidence. Your background in the past isn't going to help you. This thing is going to come on what the facts surrounding this thing were. You could have been the best Sunday School boy in the world in the past, and it wouldn't help you.

MR. PENDERVILLE: That I appreciate, Your Honor.

THE COURT: Because you couldn't get it in. It might help you, but you couldn't get it in.

MR. PENDERVILLE: That I appreciate, and I am also cognizant of the fact that my life is at stake in this matter, and I don't believe that Mr. McCarthy is prepared.

THE COURT: Well, he tells me he is.

MR. PENDERVILLE: He did things, Your Honor, last Sunday by long distance telephone that he had every opportunity to do over the past four months. That I have proof of.

THE COURT: Well, I don't know—

MR. PENDERVILLE: I have begged him to do these things.

THE COURT: I don't know how much money he's had.

MR. PENDERVILLE: He's had over fifteen hundred dollars from me, every single penny that I have had coming in every month, 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.

THE COURT: You are going to be tried before the first of the month. I am going to try this case.

MR. PENDERVILLE: Then I will have to represent myself.

THE COURT: If that is what you want to do, I am not going to permit that. I am going to have you an attorney, and I am going to have Joe McCarthy to represent you because I think he is prepared on this case. He tells me he is, and there isn't any reason in the world—I think you are doing this to stall this case, and I'm not going to let you do it.

Mr. PENDERVILLE: No, I'm not doing it to stall anything.

THE COURT: This case is set for tomorrow, and you write me a letter today. You have had since August 1 to make your mind up on this.

MR. PENDERVILLE: And I have given Mr. McCarthy all this past week ever since December 6 to do the things that he should have done three and four months ago. He hasn't even done those, not up until last night, not even up until six thirty last night he hadn't done them.

THE COURT: Well, now, what is it you claim he hasn't done? He tells me he is ready.

MR. PENDERVILLE: He hasn't investigated to meet any possibility that might arise. He has admitted to me himself that he doesn't know, that he cannot say positively what will be entered in evidence and what will not.

THE COURT: Well, I suppose he wouldn't know that. He can't know what the district attorney is going to do.

MR. PENDERVILLE: No sir, but he is not prepared because he hasn't investigated angles of this case that even came out at the preliminary.

THE COURT: Well, you had better stay with your attorney that is prepared for you instead of trying to get one that the court would appoint for you because I am going to try this case tomorrow.

MR. PENDERVILLE: Well, I shall—

THE COURT: And if your evidence is not presented there and if you are found guilty, then, of course, you could file some affidavits for newly discovered evidence. I don't believe that Mr. McCarthy has sold you down the river. I think Mr. McCarthy has done you a good job in making this preparation.

MR. PENDERVILLE: I can't help but believe at this time Mr. McCarthy has done anything but speak to me of appeal. He is not going to come in here and tell the court the things about which he spoke to me. He's done nothing but speak of appeal since he first introduced himself into the case. At this point, he's been talking about appeal for the last week or ten days. I have informed him that I am not interested in appeal, that appeal is not the matter at this time. The trial is the matter.

(District Attorney Roberts comes into the Court's chambers).

THE COURT: Mr. Roberts, this gentleman feels that because Mr. McCarthy can't foresee all the evidence that is going to be presented here that he's let him down. I can't help but feel this

is a stall to keep from trying this case tomorrow. Mr. McCarthy tells me he is ready, that he's worked on the case, that he thinks he is in position to present it, that he is willing to represent the gentleman. He doesn't desire to represent a man who doesn't want him to work for him. Do you have any ideas or suggestions here?

MR. ROBERTS: Well, has Mr. Penderville in fact fired, discharged Mr. McCarthy?

THE COURT: Mr. McCarthy didn't know anything about it. He's written me a letter in which he says he has.

MR. PENDERVILLE: I told Mr. McCarthy last night that it was very probable that I would, and he called Doctor Anderson last night and conveyed that information to Doctor Anderson last night. It is particularly evident to support my statement that he has had notice that it probably was coming. I have been attempting to explain my position to Judge Ellett. In my opinion, Mr. McCarthy has had four months. I wanted to go to trial on this thing myself a couple of months ago and get it over with. Mr. McCarthy in the period of the last eight days did attempt by long distance phone calls what he could have done with a three-cent stamp three or four months ago.

THE COURT: Of course, I don't know that that matters to you—

MR. PENDERVILLE: He still doesn't have it.

THE COURT: —how he gets his preparation or whether he determines that a phone call might be better than a stamp. I don't see how that gives you any occasion for alarm.

MR. PENDERVILLE: My point, Your Honor, is that he was informed of these contingencies four months ago.

THE COURT: Informed nothing. He and you were the ones that have been asking for this thing. You stood up in open court and asked me each time that this thing go over. I have been trying to get this to trial for over a month.

MR. PENDERVILLE: I asked that at the behest of my attorney. I didn't know what his plans were, what he was attempting to do. I believe Mr. Roberts is aware of certain developments that came by long distance phone and which I believe the necessary papers have been sent for a deposition. That was information that Mr. McCarthy had four months ago.

THE COURT: The State can't use a deposition on you.

MR. PENDERVILLE: No sir. I am merely stating that I believe Mr. Roberts is aware of that.

MR. ROBERTS: Joe asked me the other day if I would agree to having some interrogatories sent down to a doctor in San Francisco, and I agreed that I would have no objection and that he could go ahead and do it, and I would not raise any question about it at the trial, and so those were sent down. That is the last I heard of them, and that has been about a week ago.

MR. PENDERVILLE: And he hasn't received them up until last night, but that is one of my points. He was in possession of that information four months ago. I have begged and implored him, cajoled him, everything to try to get this information.

THE COURT: You don't know whether he has those answers or not.

MR. PENDERVILLE: I know he sent them. At least he told me he sent them.

THE COURT: But you don't know whether he has them back or not. He says he is ready.

MR. PENDERVILLE: He told me last night he hadn't received them yet.

THE COURT: Well, do you want me to appoint a lawyer for you?

MR. PENDERVILLE: I think that 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.

MR. PENDERVILLE: No sir, I shan't go ahead with Mr. McCarthy because I know definitely he is not prepared.

THE COURT: Well, I am going to appoint him for you anyway, and this case is going to trial tomorrow. You will be prepared for it.

MR. PENDERVILLE: Yes sir."

That on the morning of the 17th of December, 1952, Joseph P. McCarthy contacted defendant in the courtroom before court convened and told him that Judge Ellett had appointed him to conduct the defense at the trial of said case, and that if defendant had any objections to proceeding with the trial with Joseph P. McCarthy as affiant's attorney, to make the objections to Judge Ellett in his chambers and not in open court before

the jury panel as the judge did not want the jury prejudiced by any statements made by any of the parties. Thereupon defendant told said attorney that he had made strenuous objections the day before to Judge Ellett against the appointing of said attorney to represent him; that he would prefer to try his own case if he would not let him employ other counsel, and the judge positively refused to let him do so, stating that he was going to appoint said Joseph P. McCarthy notwithstanding that defendant told the court that he would not go ahead with Mr. McCarthy because defendant definitely knew that said attorney was not prepared; that the court thereupon told defendant that he was going to appoint him anyway to defend him and that the case was going to trial the next morning; that said attorney thereupon told him that he could not do anything about it as the court had appointed him to represent him; defendant thereupon asked said attorney what he should do and said attorney told him he had done everything he could do in view of the judge's ruling that the case was going to be tried and that said attorney would have to represent him. That later in the morning and before the court convened, defendant was called into the chambers of Judge Ellett and, in the presence of Mr. Brigham E. Roberts, counsel for the State, Miriam E. Parker, reporter of the court, and the defendant, Edgar Ronald Penderville, and out of the presence of the jury, the following conversation took place:

“THE COURT: Let me ask you gentlemen in this case that is on trial, the State vs. Edgar

Ronald Penderville, is the State ready in that case, Mr. Roberts?

MR. ROBERTS: The State is ready.

THE COURT: And is the defendant ready, Mr. McCarthy?

MR. McCarthy: Yes sir.

THE COURT: Very well. I have your requested questions to be asked on voir dire, and I suppose there are no other preliminary matters here?

MR. McCARTHY: None that I know of."
(R. 64)

A careful analysis of the evidence in this case is necessary to give to the court the basis of many of the assignments of error stated in this brief. Defendant was charged by the information with the crime of murder in the first degree for killing his wife, June Weiler Penderville, on or about July 30, 1952. In the presentation of the facts, we will segregate the direct evidence surrounding the homicide from the maze of medical testimony introduced in the case.

At 5:15 P.M. on the 30th day of July, 1952, Dr. Lyman Condie came to defendant's apartment, No. 2 at 1012 Barbara Place, in answer to defendant's request that he see his wife, June Weiler Penderville, who was suffering from an alcoholic and barbiturate addiction (R. 118). Dr. Condie had previously been treating Mrs. Penderville for chronic alcoholism. He had indicated that Mrs. Penderville would have to be sent to the Salt Lake County Hospital for treatment, and if necessary,

committed to a mental institution (R. 119). The doctor advised Mr. Penderville that if he did not comply with his request, he did not wish to have anything more to do with the case. Mr. and Mrs. Penderville said they would let him know the following morning. Mrs. Penderville at that time was under the influence of intoxicating liquor and pleaded for something to help her sleep. The doctor gave her three one-and-a-half-grain seconal capsules and left one grain-and-a-half seconal capsule with Mr. Penderville to give his wife if further sedation was necessary (R. 119). The doctor explained that he gave this heavy dose of barbiturates for the reason that the excessive use of alcohol creates a high tolerance to barbiturates. At that time Dr. Condie observed that Mrs. Penderville had some old contusions about the eyes, which he called black eyes. They were of old origin. She had a few old contusions about the face, particularly on the cheeks and jaw. They were light purple to yellowish contusions. She was not bleeding from the nose or mouth. There were no marks on her neck that were visible. He left at 6:00 o'clock P.M. (R. 120). Later that evening at approximately 9:45 Dr. Condie received a call from William Christensen, an attorney, to come to the Penderville apartment. He arrived there at approximately 9:55 P.M. He was met at the door by Mr. Penderville who said, "Hurry, I think she has a pulse." Immediately he went to Mrs. Penderville and could obtain no pulse. He listened to her heart and could hear no heart beat and observed no effort at respiration. He thought she was dead at that time (R. 121). He made an examination of

her body and there was a difference in the condition which he found at that time compared with his observations earlier that same evening. She had some large contusions or black eyes about the orbit of the head. They were considerably larger than what he had observed in his first examination and the blood or skin in that area was dark purple. She also had contusions and abrasions about the face, neck and the chest. He had not observed these contusions in his earlier examination because she was fully clothed. The contusions about the neck and face were of recent origin. He stated that Exhibits B and C were a true and correct representation of the upper area of her body, neck and head as he observed it when he arrived at 9:55 P.M. (R. 122). He further stated there was blood in her nostrils and mouth and that when he examined her ears with an otoscope, he observed a very small punctate hemorrhage in both tympanic membranes or eardrums. The only people present at the time he returned were Mr. Penderville and Mr. Christensen.

On cross-examination by defendant's lawyer, Mr. Joseph P. McCarthy, Dr. Condie testified that he had examined Mrs. Penderville previously on July 27th, and on redirect examination by Mr. Roberts, after having been given leave to ask some questions on direct examination, the following testimony was given by Dr. Condie: (R. 130)

"THE COURT: Yes, you may reopen your direct.

Q. Was there any further conversation at your meeting on the 27th with them concerning her physical condition?

A. I was conversing with Mr. Penderville, and he was discussing the various contusions she had, and she said, 'He hit me,' and he immediately denied that. He said, 'Oh, you were drunk and were stumbling around the room.' ”

The doctor testified that he did not detect the odor of alcohol or paraldehyde on the breath of Mr. Penderville at his first visit on July 30th between 5:15 to 6:00 P.M.; that he paid no attention to Mr. Penderville on his second visit to the apartment at 9:55 as he was too busy with Mrs. Penderville (R. 138). He stated that when he arrived at the apartment on the 30th he detected paraldehyde on the breath of the deceased Mrs. Penderville. He further stated that paraldehyde is related to alcohol in its chemical structure and is a sedative and hypnotic and is characterized as a central nervous system depressant. He further stated that he had prescribed paraldehyde for the deceased Mrs. Penderville (R. 126).

SUSAN ELIASON — Witness — (R. 138)

Susan Eliason resides at 1012 Barbara Place, in apartment No. 3 right over apartment No. 2 occupied by Mr. and Mrs. Penderville. She was then 14 years of age and in the ninth grade in school. The bedroom and bathroom of the Eliason apartment are directly over the bedroom and bathroom of the Penderville apartment (R. 139). Miss Eliason testified that she was getting dressed at about the hour of 7:00 on July 30th. She was in the bedroom and bathroom directly over the corresponding rooms of the Penderville apartment. She heard a noise coming from below. She testified:

"I wasn't sure what it was. It sounded like it was stamping and a lot of racket and beating on the wall and things like that. * * * It sounded like something was thumping on the floor and against the wall. * * * It lasted until about seven twenty-five, around that time. * * * I didn't know what it was. 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. * * * It kept going on." (R. 140)

She left the apartment about 7:25 and the noise was still continuing when she left. She did not hear any cries, or outcries, or screams of any kind, or persons voices at all. The only thing she heard was the sound which she described as above. She said she was going out on a date and she started to get ready a little before 7:00 and she was running the bath water and she could still hear the sound below. She couldn't tell exactly where it was. She said, "I know it was in the vicinity of the Penderville apartment." When she returned later that evening she learned of the death of Mrs. Penderville at the Penderville apartment (R. 141).

On cross-examination Miss Eliason stated that the noise she heard "sounded like someone was stamping their feet or something hard on the floor, just pounding." She further stated she heard no voices, no outcry, no yells or screams of any kind; that she passed by the door of the Penderville apartment on her way out and, in answer to the question if she heard the noise as she went by, stated, "I wasn't exactly listening. I was kind of in a hurry and ran down the stairs and hurried out." She further stated in coming down she did not hear any out-

cry at all (R. 144). She stated that she did not make any comment at anytime between 7:00 and 7:25 to her mother or anyone else who may have been home. She said her mother did not hear it and proffered the explanation that her mother was on the other side of the house watching television (R. 145). She knew the Pendervilles had a 1947 Cadillac but she did not remember seeing it outside when she left.

WILLIAM J. CHRISTENSEN (R. 148)

William J. Christensen, a lawyer, was called by the State and testified as follows: That on the 30th of July he received a telephone call from the defendant at about fifteen minutes before 9:00 in the evening. That pursuant to this call he went down to the Penderville apartment at 1012 Barbara Place and he arrived there around 9:00 o'clock or maybe a few minutes before. Mr. Penderville was there and his wife, Mrs. June Penderville, was lying on the living room floor. A chenille bedspread was over her body. He could see the straps on a slip and there was an ice pack on her eye and head. He states Exhibit D does not show the approximate position she was in when he arrived. There was no pillow under her head and her neck was not stretched back as shown in the exhibit. She was lying on the floor and her head was a little to one side, with an ice pack covering most of her head. She was moved to the position shown in Exhibit D after the photographers and detectives arrived there. He left the apartment about 2:00 A.M. on the morning of July 31st (R. 149).

On cross-examination Mr. Christensen stated that he rang the door bell and the defendant appeared and when the witness started to tell the conversation, the State objected on the grounds it was hearsay. Defendant's attorney, Mr. McCarthy contended it was part of the res gestae and the court sustained the objection (R. 151). Mr. Christensen testified that his curiosity was naturally aroused when he observed Mrs. Penderville on the floor and in answer to the question, "Did you ask any question, what happened or something to that effect," the State objected to the conversation on the ground of hearsay and the court sustained the objection. Defendant's attorney contended that the conversation was part of the res gestae. The court then asked the question, "How long was it after you were called before you arrived?" Mr. Christensen answered, "Ten or fifteen minutes after I was called." The court again sustained the objection. The witness testified that the defendant did not appear to be upset; that he was perfectly rational; that he did not seem to be alarmed or fearful; that he appeared to be about normal as he had observed him on other occasions. The witness testified that Mrs. Penderville was alive and breathing rather heavily when he arrived. That about forty-five minutes later she discontinued breathing. Mr. Penderville first noted the change in his wife's condition and he said, "She's quit breathing," and the witness said, "Well, you had better get a doctor right away." Mr. Penderville requested him to call Dr. Condie and that he would have to use the office phone as the phone in the apartment was not

connected. He called Dr. Condie and the doctor told him he had an emergency call and did not know whether he could come or not. He told Mr. Penderville of the conversation with Dr. Condie and the defendant said, "My gosh, we have got to have somebody. We have got to get him or someone else." (R. 155). Mr. Penderville then went down to call a doctor. He was gone about five or six minutes. In about ten or fifteen minutes Dr. Condie arrived (R. 156). The witness was asked by the defendant's counsel if he noticed the conduct of the defendant at the time the doctor first arrived and his answer was, "Yes, sir." When he was asked what he observed the court sustained an objection on the ground it was not proper cross-examination. Mr. Penderville called the police and the resuscitator squad arrived about 10:00 o'clock P.M. Detectives Frank Gilbert and Del Duncombe arrived. The witness was not permitted to testify as to what he heard of the questioning of Mr. Penderville by these detectives as the court sustained the State's objection that it was immaterial, irrelevant and not proper cross-examination. After the detectives arrived there was a virtual parade of photographers and other persons that came to the apartment. The arrangement of the body was altered from time to time while he was there. It was altered in the preparation by the photographers by putting the pillow up under her shoulder and stretching her head back so her neck was exposed (R. 161). The following testimony and rulings of the court are pertinent:

"Q. Then I believe you testified that he did replace the ice pack?

A. That is correct. He went into the kitchen and then came back—

MR. ROBERTS: Now—

THE COURT: Don't give us—let's get this thing over and get out of the treadmill. Just answer the question without a dissertation. Go ahead Mr. McCarthy.

Q. What did the defendant do after that?

A. I believe it was shortly after that that the doorbell rang. Well, he continued his conversation with me right after that.

MR. McCARTHY: Your Honor, I know you have ruled that we can't repeat the subject matter of the conversation.

THE COURT: Yes.

MR. McCARTHY: Is it a proper question to ask what the conversation concerned without an attempt to repeat any of the language?

THE COURT: Well, you go ahead and ask the questions you want to. I will rule on the objections if they are made. I suppose counsel—

Q. What was the subject of the conversation?

MR. ROBERTS: We object to it as immaterial and irrelevant and hearsay.

THE COURT: That objection will be overruled.

MR. ROBERTS: And calling for a conclusion.

THE COURT: That objection is overruled.

Q. Would you answer?

MR. ROBERTS: Of course, we object to it also, Your Honor, on the ground it is not proper cross examination.

THE COURT: That objection will be sustained.

MR. ROBERTS: Thank you, Your Honor.

MR. McCARTHY: Apparently we are going to have to recall you as our own witness. I believe that will be all for now then." (R. 163-164)

G. J. MURPHY — (R. 166)

Mr. G. J. Murphy testified that he lived at 1012 Barbara Place and he was the caretaker of all of the thirty-nine apartments including the motel rooms. That he was acquainted with the defendant and his wife, June Weiler Penderville, having met them about the 1st of July, 1952, when they rented apartment No. 2 at 1012 Barbara Place. That during the month of July he heard the defendant arguing with his wife in the bedroom. Defendant said, "Get up, get up, get up off your dead ass and get me something to eat. You haven't cooked me ten meals in the last six months." (R. 169). He heard other conversations but could not recognize the words, except he heard the defendant say, "You know where it is, you get it." He never heard Mrs. Penderville say anything back to these statements. He said he was in and about and around the apartment throughout the 30th day of July. He knew the Pendervilles had a 1947 Cadillac; that it was constantly there, and on the 30th day of July he saw it there all day (R. 170). He first testified that he did not see the defendant at anytime during the day

of the 30th of July (R. 171). Later in answer to the question, "How many times did you see the defendant, the witness stated:

"A. Well, I saw him the first time about five o'clock when I came in. That's generally when I get through. Sometimes I have to go out after dinner and pick up my hose or something, but at five o'clock he was at the phone when I went through the office to go to our apartment; and then, of course, naturally when we hear somebody come in the door, we always go see who it is, see if somebody wants something, and at five thirty again he was in there again, and so on up to about six thirty he was in and out using the phone. Of course, we don't know who he is talking to. We don't want to know. It isn't our business.

Q. That's all right. Did you see him again after six thirty?

A. Yes, I did.

Q. What time was the next time you saw him?

A. It was, oh, perhaps seven thirty.

Q. And where was he at that time? Where did you see him at that time.

A. He came down to use the phone again.

Q. And when did you next see him?

A. I don't think I saw him after that until the officers took him out.

Q. And that was the last time that you saw him then before the officers—

A. Yes." (R. 172).

On cross-examination his attention was called to his testimony at the preliminary hearing in the transcript of that hearing on page 93, as follows :

“Q. Question, “Now, calling your attention to July 30, did he have occasion to use your phone numerous times that evening?” Answer, “Yes.”

Question, “Will you relate to the best of your recollection as to how many times and when he used your phone?” Answer, “Well, he used it about five o’clock, five thirty, five forty-five, and six thirty, and then again about nine thirty, nine or nine thirty.”

A. Yes, he did.

Q. There is no mention of the time there of seven thirty, at all?

A. Well, it was possible I didn’t think of it at the time.” (R. 174).

The witness further testified that he did not see where Mr. Penderville came from when he made the telephone call at 7:30. When the witness came in the office door, Mr. Penderville was inside using the phone (R. 175).

DELBERT F. DUNCOMBE — (R. 177)

Mr. Duncombe stated he was a police officer for Salt Lake City for some twenty-three years. That he received a call about 10:09 on the night of July 30th to go to the defendant’s apartment. He arrived there four or five minutes later. Two other police officers, Dr. Condie, Mr. Christensen and defendant were in the apartment. He made certain investigations for blood spots or marks. Those that he found in and around the place he directed

pictures to be taken of. He identified State's Exhibit J as a true and correct representation of the north part of the living room and the upper portion of the chair which is along the east wall. He discovered blood there on the chair and on the wall as shown in said exhibit. He indicated to the jury that the black marks or spots in the background on Exhibit J were the spots he had reference to. On the back of the chair were blood spots or smears. He identified Exhibit K as a true and correct representation of the box marked "books." The picture was taken from the north toward the south. The witness testified he had no experience in chemical analysis, but the spots appeared to be blood to him. He testified the spots on the box appeared to be very fresh. No tests or typing were made of the alleged blood spots to determine whether the blood came from the deceased or someone else. No laboratory tests were made. The witness pointed out on Exhibit K to the jury the spots in question. He testified as follows:

"A. This is a box that contained books. This is where the head of the body was lying, and the black spot was here on the bottom of the box, what appeared to be blood to me, also this little black spot here right on the edge of the carpet and the box, right here on the carpet was headed so in the picture the blood—what appeared to be blood had come back into the carpet, which doesn't show on the picture here." (R. 183).

He identified State's Exhibit L as a true and correct representation of one of the places where alleged blood spots appeared. He identified Exhibit M as another

place where there appeared to be blood spots. The picture shows a portion of the living room with two spots on the wall and the third spot on the door casing. The witness pointed out on Exhibits L and M the location of these alleged blood spots. He testified as follows:

"A. These spots there on what we call a door jamb, that would be the part where the door goes in this way. This is the corner part of the davenette which sits in the living room. This is an entrance which leads into a hall here, the door going back into the bathroom here. These black spots that you see here, here, and here, here and here, over here and this one here all appeared to be blood spatters. This is where what appeared blood had run down this jamb.

Q. And now on Exhibit M would you indicate, please, where those spots appear?

A. Yes. This would be the wall right above the arm of the davenette in the living room. This here spot, this spot here appeared to be blood spots, and this spot here appeared to be a blood spot which had been smeared. This is the facing of the door casing that you might call a four-inch piece there. That black spot there which is smeared down, these were very fine lines. They looked like smears down there, appeared to be blood." (R. 184-185).

He identified Exhibit O as the trousers that Penderville had on at that time. He attempted to point out some spots indicating that some of them may have been made by some kind of food. Two small spots appeared to be blood. He stated that no chemical tests had been made of the spots on the pants (R. 186). On cross-examination

he said he had taken the pants from the defendant the next day about noon in the City Jail. During the examination of the defendant's trousers (Exhibit O) a red capsule containing a red colored substance fell out of the watch pocket of the exhibit (R. 194). It was probably a seconal tablet which is usually packaged in that type of capsule. No chemical analysis was made of its substance. The witness testified he did not find any blood spots on any of the other clothing of the defendant. He did not find any blood spots on defendant's shoes. The witness did not testify to any alleged blood spots on any of the person or clothing of the defendant except two small spots which may or may not have been blood spots on his pants.

The State rested and out of the presence of the jury defendant's counsel first made a motion to dismiss the case, which was denied; he made a second motion to dismiss the charge of first degree murder, which was denied; he made a motion to reduce the charge to second degree murder, which was denied; he made another motion to reduce to voluntary manslaughter, which was denied (R. 200-202).

The first witness for the defense was Dr. E. LeVerl Barrett, a physician and surgeon. Dr. Barrett testified that he had Mrs. June Weiler Penderville under his treatment from February, 1946 to February, 1949. He treated the deceased primarily for the after effects of excessive alcohol use. He testified that she was a chronic alcoholic (R. 204).

Dr. Jack Tedrow, a physician and surgeon specializing as a psychiatrist, testified that he treated Mrs. Penderville for chronic alcoholism and barbiturate addiction from March 17, 1949, to the last of April the same year. In his opinion the deceased was a chronic alcoholic and barbiturate addict. He testified that alcohol and barbiturates have a cumulative effect to the extent that a person becomes very sensitive to the use of alcohol and requires more and more barbiturates. That both drugs affect the nervous system (R. 206).

Dr. William D. O'Gorman, a physician and surgeon specializing in neurology and psychiatry, stated that the deceased was his patient from April 24, 1949, until July 1, 1949. He treated her for psychosis in psychopathic personality and addiction to alcohol and barbiturates (R. 208). In his opinion the deceased was a chronic alcoholic and an addict to barbiturates. He testified that the effect of chronic alcohol and barbiturate, taking the two of them together, is a "vicious mixture, inasmuch as these people over a long period of time finally undergo a certain degree of degeneration of the brain. Prior to that, however, they lose considerable control of their own emotional reactions and, consequently, behavior becomes more and more primitive." The witness testified that a person addicted to alcohol and the use of barbiturates bleeds more easily than a person who is not. In his opinion such a person would require a less severe blow to cause death than a person who was not addicted to the use of alcohol and barbiturates (R. 208-209).

Sidney E. Gilchrist, the director of laboratories for the Salt Lake City Health Department, testified that he received samples of urine taken from the body of the deceased at the time of the autopsy. That he examined the urine samples for alcoholic content. The sample of urine showed .24 of 1 per cent of alcohol or .024 per cent. In cross-examination he testified that the percentage of alcohol in the urine translated into the concentration of alcohol in the blood would be equivalent to .171 per cent. He further testified that the point at which persons are under the influence of intoxication starts at .015 per cent; that the concentration of alcohol in the blood of the deceased indicated she was under the influence of alcoholic intoxication (R. 212-213).

Burton G. Clay, testified that he was the chief auditor of the Liquor Commission. At the outset of his testimony Mr. Clay apparently recognized one of the jurors and the court proceeded to chastize him in the following language:

“THE COURT: It’s highly improper for you to make any gestures or advances to a juror. You can’t possibly have these other people to think you are honest if you are going to play with a juror. You embarrass that juror no end, for he’s been instructed not to talk to you, and would you refrain from making any advances towards jurors.

A. I’m sorry, Your Honor. I will.” (R. 216).

Mr. Clay identified Exhibits 3 to 9 inclusive as the records of Store No. 3, being the time cards, machine tapes and individual purchase cards of the defendant,

Edgar Ronald Penderville, made on the 30th day of July, 1952 (R. 217-219).

Anna G. Robison testified that she was a cashier for the Utah Liquor Commission and was so employed on the 30th of July, 1952, at store No. 3 at 2nd South and 2nd East. She identified defense Exhibits 8 and 9 as liquor cards that had been signed by the purchaser in purchasing liquor at that store. She was not the regular cashier. She was relieving a Mrs. French on the 30th of July, 1952 (R. 221).

Cleo Porter testified that she was a cashier for the Utah State Liquor Commission on the 30th of July, 1952, at store No. 3. Exhibit No. 3 is her time card, which includes the day of July 30, 1952. Exhibit No. 10 is the tape from the machine she cashed with on that day. Exhibit No. 9 was the purchase order. This purchase order and the tape showed a serial number 87550. The starting serial number for that day on purchases made was 87322. The finishing number of sales made was 87907. That the number of sales made was 585. The witness testified that she punched in on her time slip at 3:41 P.M. That she punched out again at 6:03 P.M. for lunch. That she punched back in after lunch at 6:40 P.M. That she got off at 11:12 P.M. That the purchase card of the defendant bearing serial number 87550 was the 226th sale that she made that day. The witness testified that the sales on Wednesday, July 30, 1952, were considerably under the average. The witness could not place the time when this sale was made under the pur-

chase order 87550. It was definitely made after 4:00 o'clock in the afternoon and before 11:12 that night. The witness further testified there was no definite way she could peg the time when the actual purchase was made. The witness testified she did not know the defendant but she remembered seeing him in the store (R. 223-230).

EVA W. SHAW testified that she was employed by the Utah State Liquor Commission as a cashier on the 30th day of July, 1952, at store No. 3. She identified Exhibit No. 9 as a sales card for the purchase of a fifth of Davis County whiskey purchased on that date, July 30th, as shown by the purchase cards purported to be signed by the defendant (R. 232-4).

FRED M. NEWSON, testified he was the manager of the Davis Jewelry Company located at 161 South Main Street in Salt Lake City. That on the 30th of July, 1952, he saw the defendant and his wife, June Weiler Penderville, between 10:30 A.M. and noon that day. He had a conversation with them at that time. On cross examination he placed the time as the 30th of July, 1952, as the job repair envelope bore that date and that was the day on which they picked it up (R. 235-6).

DELBERT F. DUNCOMBE, who testified for the State, was called as a witness for the defendant. He testified that at the time he searched the premises of the Penderville apartment on the night of July 30th he found a bottle of Davis County whiskey. It was in a fifth of a quart bottle and it was about two-thirds or three-quarters full (R. 237).

WILLIAM J. CHRISTENSEN, a witness who testified for the State, was recalled as a defendant's witness. His attention was called to a conversation he had with Mr. Penderville at the Penderville apartment on the evening of July 30, 1952. Defendant's attorneys asked, "Would you state now the subject of that conversation?" Objection was made upon the grounds of "hearsay, calling for self-serving statements, and calling for his conclusion as to what the subject matter was. The conversation itself would disclose it if it were competent." The court ruled that the witness may answer as to the subject matter without giving the conversation. "You may tell what you talked about, what the subject was about." The witness answered, "The first subject matter was about my inquiry about what was the matter and about the lady on the floor." The next question propounded to the witness was, "Did you have any conversation relating to the subject matter of this case?" The State objected on the grounds it was immaterial, and irrelevant, calling for conclusion, hearsay, self-serving declarations. The witness answered, "I find that rather difficult, Your Honor. My answer would be 'no,' that the case didn't exist then. At that time there was no chance to talk about something that did not exist." (R. 238-239).

RICHARD A. CALL, testified he was a physician specializing in pathology and particularly legal medicine or forensic medicine. That he was then assistant clinical professor of pathology in the University of Utah College of Medicine. The doctor testified that a dose of alcohol plus another dose of barbiturates superimposed upon in-

jury would cause death sooner and that in his experience chronic alcoholics as well as addicts of any type may die of relative minor injuries (R. 248-249), and that the consumption of alcohol sufficient to produce a concentration of .024 per cent of alcohol in the urine, plus a sedation of three grain and one-half seconal capsules would definitely cause a loss of body function and control, and such a person would be more likely to fall (R. 250). The witness further testified that trauma was not the only cause of subdural hemorrhages. Hemorrhagic diseases may result in what we call spontaneous subarachnoid or spontaneous subdural hemorrhage. Also there is a condition which occurs congenitally. In other words, it's an alteration of certain vascular structures at birth. These may rupture spontaneously and result in subdural hematoma.

“Q. Can tests be made to determine whether or not there was such other causes other than blow or impact that you mentioned?

A. There are many tests which could rule them out.” (R. 250-251).

The witness further testified:

“Q. And if there is a concentration of alcohol and barbiturates, a small blow would be more likely to cause the condition we referred to, the massive subdural hematoma, than if it were absent?

A. Well, now, I can say yes to that question. That is correct. However, the readiness or the increased hemorrhagic tendency does not depend on the immediate level of alcohol or barbiturate. It depends on a long-term chronic condition like

chronic alcoholism or an addiction to some particular drug." (R. 251-252).

On cross-examination the witness testified that such a hemorrhage would not produce death; there would have to be some other superimposed condition (R. 254). The doctor testified it was impossible to tell what the two small spots were on Exhibit O, the defendant's pants that he wore the night of July 30th. That a chemical analysis would have to be made to determine if the spots were blood (R. 257). (Detective Duncombe testified they had the appearance of blood). They could be blood, shoe polish or many other substances. A laboratory analysis would have to be made to determine what the spots were (R. 257).

EDGAR RONALD PENDERVILLE, the defendant, is a retired officer of the U. S. Army Engineers. He testified that on the 30th day of July, 1952, at about 6:45 in the evening, he left his apartment and drove his Cadillac automobile down town to the liquor store at 2nd South and 2nd East; that he made a purchase of a fifth of Davis County whiskey. (This was the second purchase of whiskey he made that day, the first purchase being made around 2:00 in the afternoon when he was with his wife. They had been shopping prior to that time). From there he drove west on 2nd South and parked his car between Main and State. He then went across the street to the Pony Express Cafe where he ate his dinner. He then returned to the car and drove home. When he arrived home he found his wife lying on the floor along

the wall. He lifted her out from the wall as best he could as he only has full use of one arm. Her nose was bleeding. He went to the bathroom and rinsed 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. He then prepared an ice pack. Her right eye was swollen. He got the bedspread from the bed and put over her. About ten or fifteen minutes later he went downstairs and called Mr. Christensen. He could not state precisely the time of the call but in his best judgment it was between a quarter of eight and a quarter after eight (R. 271-274). Their first trip to town was primarily to have a watch band fixed and to leave two rings of June's to be sized. They went to the Davis Jewelry Store and talked to Mr. Newson, the manager of that store. Mr. Penderville identified Exhibits 8 and 9 as the purchase requisitions for liquor which he signed on that day (R. 287). (Exhibits 3 to 11 inclusive were admitted in evidence. R. 288). The witness testified that when he returned from town with his second liquor purchase, he found his wife on the floor. He was not particularly alarmed. He denied that he killed his wife (R. 288).

On cross-examination the witness testified as follows: That he left the apartment about 6:45 that night. He told the officers that in the best of his estimation he was gone about three-quarters of an hour. He could not place the exact time that he returned. That it could have been 7:30 or 7:45 P.M. He did not believe it could have been earlier than that (R. 289). When he left the apartment his wife was in bed asleep. When he

returned she was out of bed. She apparently had removed her dress and her shoes and stockings. She was in a different physical condition when he returned, in this, her right eye was considerably swollen, she was bleeding from the nose. He did not make any observation with reference to abrasions and contusions on her scalp. He did place the ice pack upon her head. After he returned, the first phone call he made was to Mr. Christensen, a lawyer. It was around between 8:00 and 8:15. He was not angry when he returned home that evening. When he returned home his wife was breathing audibly as she was lying on the floor on her back. He did not clean up anything in the room after he returned except to take the wash cloth and bathe his wife's face. He did not remove any blood from the bed or any place else. Certain spots were pointed out to him by the officer. He did not know how they got there. He did not examine the spots closely. On redirect examination the witness testified that they had consumed the first fifth of whiskey. That he had a drink or two out of the second fifth after the inquisition started. He did not recall what he may have told the officers as he was given a one ounce dose of paraldehyde after the interrogation started at the police station. He testified that his skull had been fractured March 1, 1951 (R. 289-296).

CAMILLA M. ANDERSON, called as a witness in behalf of the defendant, testified as follows: That she is a physician specializing in psychiatry. She graduated from the University of Oregon Medical School. She began her training in psychiatry in January, 1931, in the

State of New York, and has been training in psychiatry continuously in psychiatric hospitals, courses, lectures, up to the present time. That she is now teaching at the University of Utah Medical School. She testified that paraldehyde is primarily a sedative. In larger doses it has the capacity to produce amnesia or loss of memory for what is happening without causing sleep. In other words, a person can be up and about, or he can talk, or he can carry out directions and have no memory, and the loss of memory begins almost immediately following the taking of the drug, within just a matter of a minute or two. It is a drug that is used in obstetrics very frequently, so that women in labor will not remember any of the occurrences of the labor and still will be able to cooperate in the delivery of the baby (R. 299). In answer to the question, "Does paraldehyde have anything to do with whether a person tells the truth or whether he would tend to falsify, is there any relation at all in that?" The witness answered:

"A. That has not been worked out very carefully, Your Honor, but the over-all effects are comparable to sodium pentothal, which is used somewhat in psychiatry in the practice in an effort to determine truth and falsehood, and the patient apparently lacks voluntary directional activity while he is under this amnesic state." (R. 303-304).

The witness further testified that she had sufficient opportunity to examine the defendant and it was her opinion that an ounce of paraldehyde would produce amnesia or loss of memory to what was happening without being asleep. That paraldehyde affects the central ner-

vous system in the same way as alcohol and barbiturates (R. 301). A large dose of paraldehyde may cause a violent reaction to the person taking the same and cause such a person to have abnormal behavior incident to other forms of intoxication, such as repeated stumbling and falling resulting in traumatic injuries (R. 303).

DELBERT F. DUNCOME, called in rebuttal on behalf of the State of Utah, testified that on the 31st day of July, 1952, at about the hour of 11:00 A.M., he had a conversation with the defendant in which the defendant stated in substance and effect that he returned to the apartment the night of the 30th about three-quarters of an hour after he had left, and that would make it about 7:00 or 7:15. He further testified that at said time, in answer to the question, "Were you still angry at that time, the time he returned, and he replied, 'I wasn't particularly angry, but I was angry when I got in because I had left her in the bed.'" (R. 305). He admitted the defendant was given paraldehyde in the course of this examination. On cross-examination the witness stated that the defendant was simply giving his estimate of the time when the events took place on the night of the 30th. He further stated that after defendant had taken the paraldehyde he became very intoxicated. He staggered into the wall, bumped his head on the walls. When he got in the jail he batted his head into the iron bars and knocked himself flat (R. 307).

ELIZABETH ROSS, called out of order as a State's witness, testified that she was a medical record librarian

at the L.D.S. Hospital (R. 275). She produced and identified Exhibit P, the hospital records of June Penderville. The records were under the name of Mrs. June Coggle. The records are available for the doctors who are serving the particular patients involved (R. 276).

DR. MAURICE J. TAYLOR, a state's witness called out of order, testified as follows: That he is a medical physician and certified as an internist by the American Board of Medicine. That he knew the deceased, June Penderville, under the name of June Weiler Coggle. That he commenced treating her in August of 1949. That he saw her frequently over a period of time up until June 3, 1952. That she was hospitalized in August or September, 1949, and then two or three admissions in 1951, and the last admission in May of 1952. During these occasions blood tests were taken of the deceased. He made a complete liver function test on the patient on three occasions, including all the various coagulation prothrombin times, blood chemistry, blood figures, bleeding times, and protein metabolism and liver function. The tests were normal. "That alcoholism in and of itself, per se, is not the cause of increased bleeding, but alcoholism which has damaged the liver may give rise to increased bleeding by the fact that the liver in its damaged condition does not produce a substance we call prothrombin, and prothrombin is a vital element in the development of coagulation and bleeding and the control of hemorrhage in individuals, and in alcoholics who have a severe state of liver damage as a result of the alcohol effect, when there is some doubt about whether the alcohol itself

produces that or whether it's lack of food and other factors; but in some individuals where they get what we call cirrhosis of the liver, the liver does not produce prothrombin, and prothrombin then is not available for the rapid coagulation and clotting of the blood." (R. 280). At the time of the three tests made upon the deceased, the liver function tests were normal and there was no damage at that time to the liver which might lead to a bleeding tendency as a direct result of alcohol (R. 280). The witness testified that he saw the deceased at the Newhouse Hotel on May 13th, about eight or nine days later admitted her to the hospital, and subsequently saw her in his office on June 3rd. When he first saw the patient at the Newhouse Hotel, "she was in a very ragged physical condition. She was thin and very disturbed emotionally. She had lacerations of her scalp, back of her head, from which was oozing a purulent material. She was bruised around both eyes. Her face was battered and bruised. She had bruises on her body. She had evidences of fractured ribs on both the right and the left side in front, and she was bruised down over her private areas and on her legs. On taking her to the hospital, we x-rayed her chest, which showed evidences of fairly recent healing fractures on both sides of the chest and the ribs. She had a skull x-ray done in which there was unequivocal evidence of the possibility of a fissure fracture of the skull. As a result of her bruising and so on, we did liver function tests and blood studies to see if there was any relationship between that and a bleeding tendency. The studies did not prove any relationship, and there

were no other evidences of spontaneous bleeding during that period of time, and during all the period I knew her from '49 to '52 there were never any evidences of spontaneous bleeding or bleeding of any unusual nature." (R. 282-283).

Both the State and defendant rested. The following motions were made in chambers out of the presence of the jury: "Comes now the defendant and moves the court to dismiss the entire charge for failure of the State to prove the case." This motion was denied. "Comes now the defendant and moves the court for a directed verdict of not guilty." This motion was denied. "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." After argument by Mr. Roberts, counsel for the State, the court said, "I will deny your motion and let him argue it and see if they believe it." (R. 309).

STATEMENT OF POINTS

POINT I. THE ACTION OF THE TRIAL COURT IN FORCING DEFENDANT TO TRIAL WITH AN ATTORNEY WHICH HE HAD DISMISSED, AND REFUSING DEFENDANT A REASONABLE TIME TO PROCURE OTHER COUNSEL, OR TO CONDUCT HIS OWN TRIAL, RENDERED DEFENDANT'S SENTENCE AND CONVICTION VOID AS A VIOLATION OF ARTICLE I, SECTION 12, OF THE UTAH CONSTITUTION, AND SECTION 77-1-8 SUBPARAGRAPH 1, UTAH CODE ANNOTATED, 1953; AND FURTHER DENIED TO DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

POINT II. THE TRIAL COURT ERRED IN DENYING THE FOLLOWING MOTIONS MADE BY THE 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 ERRED 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 ACTION OF THE TRIAL COURT IN FORCING DEFENDANT TO TRIAL WITH AN ATTORNEY WHICH HE HAD DISMISSED, AND REFUSING DEFENDANT A REASONABLE TIME TO PROCURE OTHER COUNSEL, OR TO CONDUCT HIS OWN TRIAL, RENDERED DEFENDANT'S SENTENCE AND CONVICTION VOID AS A VIOLATION OF ARTICLE I, SECTION 12, OF THE UTAH CONSTITUTION, AND SECTION 77-1-8 SUBPARAGRAPH 1, UTAH CODE ANNOTATED, 1953; AND FURTHER DENIED TO DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The facts with respect to this argument are adequately, and in detail, set forth in Defendant's Statement of Facts and will not be repeated here. In summary, defendant on the 15th of December, 1952 wrote to the judge of the trial court, which letter was delivered to said judge before 10:00 A.M. on the morning of the 16th of December, 1952. That in said letter defendant asked for a postponement of his trial for the reason that he had felt it necessary to discharge his attorney. On the morning of the 16th the judge of the lower court summoned defendant to his chambers and there in the presence of defendant, the judge, and his certified court reporter a rather lengthy discussion was had with reference to the postponement and the securing of counsel for defendant. The following is pertinent:

"THE COURT: You are going to be tried before the first of the month. I am going to try this case.

MR. PENDERVILLE: Then I will have to represent myself.

THE COURT: If that is what you want to do, I am not going to permit that. I am going to have you an attorney, and I am going to have Joe McCarthy to represent you because I think he is prepared on this case. He tells me he is, and there isn't any reason in the world—I think you are doing this to stall this case, and I'm not going to let you do it.

MR. PENDERVILLE: No, I'm not doing it to stall anything."

It is defendant's contention that the lower court erred in refusing to grant defendant a postponement of

the trial in order to enable him to secure counsel to represent him. Further the court erred in failing to allow defendant to represent himself and in appointing counsel for defendant whom the defendant had already discharged. That based upon these two errors the defendant was not given a fair trial and was not accorded due process of law as required by the Fourteenth Amendment of the Constitution of the United States. The crime, as alleged in the information, was committed on July 30, 1952. The complaint and arrest of the defendant was had August 1, 1952. The information charging defendant was filed November 22, 1952. Defendant entered a plea of not guilty December 6, 1952, and a trial was had on December 17, 1952. Less than one month expired between the time the information charging the defendant with first degree murder was filed and the time the trial was held. The Utah Constitution provides:

“Rights of accused persons — In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, * * *.” (Art. 1, Section 12.)

Section 77-1-8, Utah Code Annotated, 1953, provides:

“Rights of Defendants — In criminal prosecutions, the defendant is entitled: (1) to appear and defend in person and by counsel.”

In 5 Am. Jur. par. 10 — Attorneys at Law, it states:

“Every person, sui juris, who is charged with crime has the constitutional right to try his own cause, and a trial court is not justified in imposing counsel on a defendant against his will, unless, in-

deed, it appears that he is mentally incompetent or not *sui juris* at the time of the trial. The constitutional provision relating to the right of a person to have the assistance of counsel was inserted for the purpose of abrogating the common law practice under which prisoners accused of felony were denied such right, and to restrain the legislature from denying it by statute. Such provision is merely permissive, and conditional upon the pleasure of the accused. Preferring the protection of the court or choosing to rely upon his own skill and ability, he may not desire the assistance of counsel. But he must elect by which method to proceed; he cannot insist upon examining one witness himself and then proceeding through his counsel."

In the case of *DIETZ V. STATE*, 149 Wis. 462, 136 NW 166, 173, the court states:

"Every person *sui juris*, who is charged with crime, has the right to try his own case, if he so desires. The constitution guarantees him the right to be heard "by himself" as well as by counsel. (Constitution, Art. 1, par. 7.)

"The trial court would not have been justified in imposing counsel upon the defendant against his will, unless indeed it appeared that he was mentally incompetent or not *sui juris* at the time of the trial."

Application of this principle of law is supported in the case of *BURGENDER V. STATE*, 103 P. 2d 256, 55 Ariz. 411, wherein the court stated:

"Defendant insists that the action of the court in first denying him the right to defend himself and thereafter granting him such right violates

Sec. 24, Art. 2, of the State Constitution which provides: In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel, * * *

"It does not seem to us defendant's contention is right either in fact or law. The court's action was induced by defendant's own equivocation. It appears he was able to employ an attorney and did so when first charged with the offense and Judge Speakman's order requiring such attorney to continue his services was for the protection of defendant, who, presumably, because of his youth and inexperience and the nature of his defense of insanity, was unable to defend himself intelligently. This order, although in the interests of defendant, was probably erroneous. If, however, he was entitled to defend himself without the assistance of counsel, the court offered to let him do so. He asked for counsel, actually he was permitted 'to appear and defend in person, and by counsel.' (Sec. 24, Art. 2, *supra*) He was given and he accepted full measure of the constitutional right.

"No complaint is made of the court's failure to postpone the trial.

"* * * It is only persons who are *sui juris* and mentally competent who are permitted to defend themselves without the aid of counsel. Note to *State of Minnesota v. Townley*, 17 ALR 266."

The case of *WILKINSON V. YUELL*, 22 SE 2d 356, 180 Va. 321, 359, is also interesting in this regard:

"The rule in this jurisdiction is that no one accused of crime is compelled to have counsel if he does not so choose. On a writ of error in the *Barnes* case (*Barnes v. Com.*, 92 Va. 794 at page

803, 23 SE 784) it was held that the record must show not only that the accused did not have counsel but that he was denied that right before the judgment would be reversed. Judge Buchanan, speaking for the court in that case, said: 'Every person accused of crime has a right to have counsel to aid him in making his defense, but no one is compelled to have counsel. * * * But we cannot presume that the trial court denied the prisoner the right to have counsel, or failed, if she were unable to employ counsel, to assign someone to aid her in her defense.'

"In *Watkins v. Commonwealth*, 174 Va. 518, 6 SE 2d 670, 671, this court speaking through Mr. Justice Eggleston, 'Cooley on Constitutional Limitations, 8th Ed., page 700, as follows: The right to counsel is permissive and conditional upon the pleasure of the accused. Preferring the protection of the court, or choosing to rely upon his own skill and ability, he may not desire the assistance of counsel.' See *State v. Yoes*, 67 W. Va. 546, 68 SE 181, 140 A. State Rep. 978."

Defendant was before the court personally. There is no question raised as to his sanity and yet the lower court absolutely refused to allow defendant to represent himself and discharge his attorney. The court's own statement is to the effect: "If that is what you want to do I am not going to permit that. I am going to have you an attorney and I'm going to have Joe McCarthy to represent you * * *" The very attorney which defendant had discharged the day before is now appointed by the court to forcibly defend the defendant in this action even though the defendant has stated to the court that he does not wish representation under these circumstances.

With reference to allowing defendant a reasonable time to secure other counsel and to grant a postponement of the trial this court stated in the case of *STATE V. FAIRCLOUGH*, 86 U. 326, 44 P. 2d 692, as follows:

“It is a general rule and justice requires, that a person charged with a crime should have a reasonable time to prepare his defense, otherwise a defendant’s right to a fair and impartial trial might be nullified. 8 RCL 67. To insure defendant the full enjoyment of his constitutional privilege, the time between the appointment of counsel by the court and the time of trial should be such as to afford a reasonable opportunity for preparation of the defense. 16 CJ 823, 84 ALR 545. The statute makes provision for the postponement of trial upon sufficient cause shown. RS Utah 1933, 105-30-1. Whether a postponement of the trial should or should not be granted on showing made is a matter within the discretion of the trial court and the matter of postponement will not be regarded as reversible error unless clearly prejudicial. *State v. Williams*, 49 U. 320, 163 P. 1104; *State v. Cano*, 64 U. 87, 228 P. 563. What is a reasonable time for preparation for trial depends on many things, such as whether the accused is confined in jail or is at liberty on bail, the nature and gravity of the charge, the complexity of the facts or circumstances involved in the crime, the number and availability of witnesses, the intricacy of any law points that may be involved. Such matters being within the discretion of the trial court, its decision is to be given great weight and ordinarily will not be disturbed *except for manifest abuse of discretion or a showing of want of consideration of the rights of the accused*. *Harris v. State*, 119 Ga. 114, 45 SE 973, 8 RCL 68.”

Apparently it was the lower court's opinion that defendant was taking too long to prepare his defense for the case. As previously stated less than a month expired between the time the information charging defendant with first degree murder was filed and the time the trial was held. This is a case of first degree murder in which the life of the accused is at stake. Certainly it cannot be held that such a period of time is unreasonable to allow defendant to properly secure the representation which he desires, and even in the event the court holds that defendant had sufficient time to secure his defense, the denial of the court to allow defendant to represent himself rather than have forced upon him an attorney whom he has discharged, certainly shows a want of consideration of the rights of the accused. Defendant was confined in jail, he was not at liberty on bail. 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? It is unquestionable that there was a difference of opinion as between defendant and his former counsel as to how the trial should be conducted and the investigations that should be made. Such is clearly set forth in the record that was taken down by the certified court reporter at the time defendant and the judge of the lower court discussed this problem. But in the end who must decide what representation he is entitled to? Certainly defendant being competent in all respects should be the one to decide what

he desires as far as representation is concerned and if he cannot secure it from his counsel in the way he so desires, then the constitution of the State of Utah and of the United States gives him the right to defend himself.

POINT II. THE TRIAL COURT ERRED IN DENYING THE FOLLOWING MOTIONS MADE BY THE 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).

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(d) THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE, AS RAISED IN DEFENDANT'S MOTION FOR NEW TRIAL. (R. 50-66).

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 admit that the deceased suffered traumatic injuries between the time that Dr. Condie left the Penderville apartment about 6:00 o'clock P.M. and the return of the defendant to his apartment later in the evening. We particularly call the court's attention to the fact that it is not incumbent upon the defendant to explain how and in what manner the de-

ceased suffered these traumatic injuries. It is incumbent upon the State to prove that the injuries were caused by defendant. Mere suspicion cannot be used to hurdle this very important link in the chain of evidence if a conviction for murder in the second degree is to be sustained. We have carefully analyzed the evidence in the above Statement of Facts. We again call the court's attention to the time element involved in this alleged crime. Dr. Condie arrived at the Penderville apartment at 5:15 P.M. on the 30th day of July, 1952. He found Mrs. Penderville suffering from alcoholic and barbiturate addiction. He had previously been treating her for chronic alcoholism. He definitely told the defendant that she would have to be sent to the Salt Lake County Hospital for treatment and, if necessary, committed to a mental institution (R. 119). The doctor advised Mr. Penderville if he did not comply with his request, he did not wish to have any more to do with the case. Mr. and Mrs. Penderville said they would let him know the following morning. Mrs. Penderville was under the influence of intoxicating liquor and pleaded for something to help her sleep. The doctor gave her three one and one-half grain seconal capsules and left another with Mr. Penderville to give his wife if further sedation was required. Dr. Condie observed Mrs. Penderville had some old contusions about the eyes, which he called black eyes. They were of old origin. She had a few contusions about the face, particularly on the cheeks and jaw. He left at 6:00 P.M. He did not return that evening until approximately 9:45 when he received a call from William Christensen, an at-

torney. These are undisputed facts in the case. The injuries which Mrs. Penderville received must have occurred after 6:00 o'clock.

The next important testimony is that of Susan Eliason, who testified that she resided in apartment No. 3 right over apartment No. 2 occupied by Mr. and Mrs. Penderville. The bedroom and bathroom of the Eliason apartment are directly over the bedroom and bathroom of the Penderville apartment (R. 139). Miss Eliason testified that she was getting dressed about the hour of 7:00 P.M. on July 30th. She was in the bedroom and bathroom directly over the corresponding rooms of the Penderville apartment. She heard a noise coming from below. It sounded like something was thumping on the wall or the floor and it lasted until about 7:25 P.M. Her testimony is fully quoted in the above statement of facts. She left the apartment about 7:25 and the noise was still continuing when she left. She did not hear any cries, or outcries, or screams of any kind, or persons voices at all (R. 40). She did not pay any attention to the noise when she went downstairs and knew nothing further about the case until she returned later in the evening and learned of the death of Mrs. Penderville. There is no reason to disbelieve this young lady, who was 14 years of age and rather young to be going on dates. She had no reason to be making any misstatements. She said her mother did not hear the noise because she was in another part of the apartment looking at television. We accept the statements of Susan Eliason to be true. Something occurred in the Penderville apartment between 7:00 and 7:25 P.M.

The defendant is a retired officer of the U. S. Army Engineers. He testified that on the 30th day of July, 1952, at about 6:45 in the evening, he left his apartment; drove his Cadillac automobile downtown to a liquor store at 2nd South and 2nd East; he made a purchase of a fifth of Davis County whiskey. (This was the second purchase of whiskey he made that day, the first being made around 2:00 in the afternoon when he was with his wife. They had been shopping prior to that time.) From there he drove west on 2nd South and parked his car between Main and State. He then went across the street to the Pony Express Cafe where he ate his dinner. He then returned to the car and drove home. When he arrived home he found his wife lying on the floor along the wall. He lifted her out from the wall as best he could as he had only full use of one arm. Her nose was bleeding. He went to the bathroom and rinsed 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. He then prepared an ice pack. Her right eye was swollen. He got the bedspread and put over her. About ten or fifteen minutes later he went downstairs and called Mr. Christensen. He could not state precisely the time of the call, but his best judgment was sometime between quarter of eight and quarter after eight (R. 271-274). The witness' testimony was not disturbed an iota on cross-examination. He told the officers to the best of his estimation he was gone about three-quarters of an hour. He could not place the exact time he returned. It could have been 7:30 or 7:45 P.M. He did not believe it could have been earlier than

that (R. 289). When he left the apartment his wife was in bed asleep. When he returned she was out of bed. Her dress, shoes and stockings had been removed. She was in a different physical condition when he returned than when he left her at 6:45 P.M. Her right eye was considerably swollen, she was bleeding from the nose. He did not make any observation with reference to abrasions and contusions of the scalp. He did place the ice pack upon her head. He was not angry when he returned home that evening and was not particularly alarmed because of his wife's condition. A more detailed account of his testimony is given in the foregoing Statement of Facts. The court's attention is called to the corroboration of the defendant's testimony. Burton G. Clay, chief auditor of the Utah State Liquor Commission, identified Exhibits 3 to 9 inclusive as records of Store No. 3, being the time cards, machine tapes, and individual purchase cards of the defendant, Edgar Ronald Penderville, made on the 30th day of July, 1952 (R. 217-219). Anna G. Robison, Cleo Porter and Eva W. Shaw, three cashiers at Store No. 3, further identified these records. Exhibit No. 9 was the purchase order signed by the defendant. It bore serial number 87550 and was the 226 purchase of the 585 sales made at store No. 3 between the hours of 3:41 P.M. and 11:12 P.M. that night. Witness Cleo Porter testified there was no definite way she could peg the time when the actual purchase was made. The testimony of these four witnesses clearly proved that two sales of liquor were made to defendant on the 30th day of July, 1952; that the second sale was subsequent to 3:41 P.M.

and being the 226 sale of 585 sales, a reasonable person would conclude that the sale occurred sometime in the evening of that day as testified to by the defendant.

Fred M. Newson, the manager of the Davis Jewelry Company located at 161 South Main Street, testified that he saw the defendant and his wife between 10:30 A.M. and noon of that day. He had a conversation with them at that time and on cross-examination referred to the job repair envelope that bore that date, and that was the day on which the Pendervilles were transacting business in his store (R. 235-236).

Delbert F. Duncombe, a state's witness who was later called by the defendant, testified that he searched the Penderville apartment on the night of the 30th of July and he found a bottle of Davis County whiskey. It was a fifth of a quart bottle and it was about two-thirds or three-quarters full (R. 237).

William J. Christensen testified for the state that he went to the Penderville apartment about 9:00 o'clock P.M. or a few minutes before on the 30th day of July in answer to a telephone call from Mr. Penderville. That Mrs. Penderville was lying on the living room floor with a chenille bedspread over her body. The witness testified that the defendant did not appear to be upset; that he was perfectly rational; that he did not seem to be alarmed or fearful; that he appeared to be about normal as he had observed him on other occasions.

These witnesses certainly corroborate the defendant's story. There is no question that he was up town

twice during the day of July 30th. He could not have signed the two liquor card purchases if he had not been uptown. The second purchase was certainly made hours after the girl went to work at 3:41 P.M. as it was the 226 liquor purchase of the 585 sales made between the hours of 3:41 P.M. and 11:12 P.M. that day. There was not anything in the conduct and demeanor of Penderville when State's witness William Christensen arrived which would indicate guilt in any way whatsoever. The unfortunate part of Mr. Christensen's testimony was the egregious error made by the court in refusing to permit Mr. Christensen to testify to the conversation that he had with the defendant when he arrived at the Penderville apartment. This assignment of error will be treated later in the brief.

Mr. G. J. Murphy, the caretaker of the apartments at 1012 Barbara Place, was called by the State and was permitted to testify that on or about a month before the alleged crime took place he heard the defendant arguing with his wife, in which the defendant said, "Get up, get up, get up off your dead ass and get me something to eat. You haven't cooked me ten meals in the last six months." This conversation was grossly immaterial and had no proper place in the case at all. The witness further testified he knew the Pendervilles had a 1947 Cadillac. He said it was constantly there and on the 30th of July he saw it there all day (R. 170). This testimony was definitely impeached by other State's witnesses. The evidence clearly establishes that defendant and the deceased were uptown at least once in the early afternoon and the de-

fendant alone was uptown in the early evening of July 30th. The witness first testified he did not see defendant at anytime during the day of the 30th of July (R. 171). Later, in answer to the question how many times did you see the defendant, the witness stated,

“Well I saw him the first time about 5:00 o’clock when I came in. That is generally when I get through. Sometimes I have to go out after dinner and pick up my hose or something, but at 5:00 o’clock he was at the phone when I went through the office to go to our apartment; and then, of course, naturally when we hear somebody come in the door, we always go see who it is, see if somebody wants something, and at five thirty he was in there again, and so on, up to about six thirty he was in and out using the phone. Of course, we don’t know who he was talking to. We don’t want to know. It isn’t our business.

Q. That’s all right. Did you see him again after six thirty?

A. Yes, I did.

Q. What time was the next time you saw him?

A. It was, oh, perhaps seven thirty.

Q. And where was he at that time? Where did you see him at that time?

A. He came down to use the phone again.

Q. And when did you next see him?

A. I don’t think I saw him after that until the officers took him out.

Q. And that was the last time that you saw him then before the officers—

A. Yes.” (R. 172).

His testimony was impeached by his own statements made at the preliminary examination many months before (P.T. 93) when he testified as follows:

“Q. Question, ‘Now, calling your attention to July 30, did he have occasion to use your phone numerous times that evening?’ Answer, ‘Yes.’

Question, ‘Will you relate to the best of your recollection as to how many times and when he used your phone?’ Answer, ‘Well, he used it about five o’clock, five thirty, five forty-five and six thirty, and then again about nine thirty, nine or nine thirty.’

A. Yes, he did.

Q. There is no mention of the time there of seven thirty, at all?

A. Well, it was possible I didn’t think of it at the time.” (R. 174).

The foregoing testimony is what the State relies upon to prove that the defendant killed his wife. There are no admissions or confessions of any kind whatsoever. The fact that she met with some traumatic injuries during a period from approximately seven o’clock until seven twenty-five certainly does not justify a finding that the defendant committed the alleged violence on his wife. There is not any question that Mrs. Penderville’s nose was bleeding when Mr. Penderville returned. There is not any question that there was a difference in her physical condition as far as injuries were concerned from the time that Dr. Condie left her at six o’clock and when he returned at nine forty five. There is not any question that there was a difference in her physical condition from

the time defendant left at about six forty five P.M. and when he returned about seven thirty or seven forty-five P.M. Defendant freely admitted that her condition was changed. He testified when he left the apartment his wife was in bed asleep. When he returned she was out of bed. Her dress, shoes and stockings had been removed. She was in a different physical condition when he returned in this, her right eye was considerably swollen, she was bleeding from the nose. When he returned home his wife was breathing audibly and she was lying on the floor on her back. When certain spots were pointed out to him by the officer, he did not deny what they were. He stated he did not examine the spots closely. His wife had a severe nose bleed and he 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.

At six o'clock Dr. Condie testified the deceased was in a state of intoxication from excessive use of alcohol; that he refused to treat her further unless they would agree that she be sent to the County Hospital and possibly to a mental institution (R. 119). She also at that time had been using paraldehyde as he detected it on her breath (R. 126). This vicious mixture of paraldehyde, seconal and alcohol would cause a violent reaction to the person taking the same and cause such a person to have abnormal behavior, such as repeated stumbling and falling resulting in traumatic injuries (R. 301-303). It is a common observation to see drunk people stumble and fall causing severe traumatic injuries without apparent

pain or outcry. The central nervous system being anesthetized by depressants such as paraldehyde, seconal or alcohol, or the combination of the same, readily explains the absence of cries, screams and outcries which certainly would have been present if a normal person was undergoing such punishment. It may be argued that during this thumping process Mrs. Penderville was choked off by some type of garrote and, therefore, was unable to make any outcry or scream. This theory is highly improbable if not impossible as a person could not be conscious for a half hour of such treatment. If she had been choked into insensibility the result would have been unconsciousness or death long before a half hour of such abuse. Furthermore, if there had been some sort of a noose about her neck, there is none the writer can think of which would produce two straight lines as Mrs. Penderville had in the pictures which are in evidence. (Exhibits B and C). If someone had choked her with some rope or tie and had bumped her head up and down on the floor the trauma would have been on the forehead and not on the vertex and back of the head. To have the bruises on her scalp where they were, the garrote would have had to extend all around her neck, and there was no evidence of any neck marks except on the front and one side of the neck. The marks on her neck might well have been produced by rubbing her neck from side to side over a moderately sharp piece of wood, such as the rung of a chair, and in fact, her head was resting on the rung of the chair when Penderville found her.

Dr. Richard Call, clinical professor of pathology at the University of Utah, testified that the consumption of alcohol sufficient to produce a concentration of .024 of alcohol in the urine, plus a sedation of three grain and one-half seconal capsules would definitely cause a loss of body function and control and such a person would be more likely to fall (R. 250).

Again we repeat, it is not incumbent upon the defendant to explain how she sustained these injuries. Where is there any evidence that the defendant committed any violence upon his wife? There has been an array of medical testimony introduced in this case largely concerning the tendency of an alcoholic or barbiturate addict to bleed more easily than a normal person. Practically all of the medical testimony given in the case answers that issue in the affirmative. The high medical reputation of the men so testifying for the defense lends a lot of credence to their testimony. The State in rebuttal called Dr. Maurice J. Taylor, who testified that sometime during the period from August, 1949, until June 3, 1952, on two or three occasions, blood tests were taken of the deceased. That he made a complete liver function test on the patient on three occasions, including all the various coagulation prothrombin times, the blood chemistry, blood figures, bleeding times, protein metabolism and liver function. He stated the tests were normal (R. 280). His testimony is set out in detail in the above Statement of Facts.

It is the consensus of opinion of the other doctors who testified in the case that the effect of alcohol in some

people is to alter not the bleeding time but the permeability of the vessels in such a way as to permit extravasation of blood into the tissues upon the most minor trauma. This tendency to bleed is thus not possible of determination by use of the common bleeding time test, or the clotting time test; that ecchymosis results in any minor appreciable trauma. Irrespective of the apparent medical disagreement between the array of doctors called by the defense and Dr. Taylor, it is not incumbent upon the defendant to explain medically, or otherwise, how the changed physical condition of the deceased occurred. Defendant's counsel are of the opinion that the injuries suffered by Mrs. Penderville were the result of the abnormal reaction of the deceased to the large dosage of paraldehyde, seconal and alcohol taken by the deceased or given to her by the attending physician. Loss of body function and control in extreme alcoholism is a common experience with alcohol addiction. Alcohol addicts fall and commit serious traumatic injuries upon themselves. In going over the evidence, may we submit that the location of the scalp bruise could best be accounted for by a fall—striking first on her knees (the court will note that the knee bruises were more recent than most of the others), then pitching forward striking her head on the edge of the arm chair and landing with her neck across the rung face down. The chair was against the wall and most of the blood spots were found on it. The deceased's head was resting on the rung when she was found but her face was up and she was lying supine rather than prone. That the banging heard by the girl upstairs was caused

by the deceased's efforts to free herself from the chair. She tried and tried to get free, banging the chair against the wall at each attempt and finally managed to get herself turned around face up, but in the process did two things: (1) She scratched her neck and one side of her face on the rung and leg of the chair; and (2) She used as strenuous effort as she was capable of using in her state and in so doing she elevated her blood pressure and thus encouraged increased hemorrhage from the injury which she had sustained to her brain and its coverings when she struck it in falling. The defendant's muscular disability in his left arm (R. 272) would have made it physically impossible for him to have lifted her weight with one arm and to have banged her head against the wall for the period of time the banging was alleged to have continued. No finger nail marks could possibly have made the even lines to be seen on her neck, and with her tendency to bleed, had the whole hand been used in knocking her head against the wall, hand marks would have shown up because of her tendency to bruise easily. There were numerous blood marks on the walls and doors but, according to the testimony and the exhibits, none were found above the elevation of the chair which would justify the finding that the trauma was caused by defendant's banging the deceased's head against the wall. Another interesting observation is the fact that no blood was found on the defendant's clothing or his person. Detective Duncombe testified there were two small spots which had the appearance of blood on the defendant's pants, Exhibit O. There is no competent evidence that would justify the

finding that these two small spots were blood. There were other spots which the detective admitted were food spots. The fact that his shoes and the rest of his clothing contained no blood spots of any kind, is the strongest evidence that the defendant did not and could not have banged his wife's head against the floor or the walls for a period of at least a half hour as indicated by the testimony of Susan Eliason. The numerous blood spots pointed out by Detective Delbert F. Duncombe on the chair, the wall, the books and the box that contained the books, the floor, the bed, as shown in Exhibits J, K, L and M, as more particularly set forth in the analysis of his testimony in the above Statement of Facts, are the strongest evidence that the injuries which caused the blood to spatter as indicated by these findings, could not have been caused by the defendant, whose clothes and person were free from such blood spots. How can this evidence justify a finding that the defendant could bang his wife's head against the floor and walls of this room for a period of more than twenty five minutes, causing the injuries which she suffered, without his clothes coming in contact with the blood that spurted out on the walls, the floor, the chair, and other furniture in the room? Defendant's counsel condemn most severely the inadequate and slothful investigation made by the detectives in this case. The F.B.I. were never called in to make a thorough investigation of the physical evidence in the room in which the deceased died. The F.B.I. laboratories were never used in the examination of alleged blood spots. The furniture, including the chair, was not

preserved. The failure to make a proper analysis of alleged blood spots, the total failure to type the blood spots with that of the deceased, the failure to make an observation as to the presence of incriminating evidence under the finger nails of the defendant, the grossly inadequate autopsy by an ordinary physician not qualified in the field of pathological research and the failure to make a vaginal examination to determine if there had been a criminal assault, are a sad commentary on the ability of the detection officials in this case. It appears to defendant's counsel that the detectives drew a conclusion that defendant killed his wife and then proceeded to rule out any and all other theories, even though they ignored the duty of a competent investigator to protect the innocent as well as convict the guilty. From the factual point of view, we ask in all sincerity, where is the evidence that will justify a finding that the defendant killed his wife?

We again repeat it is not the duty of the defendant to explain the injuries suffered by the deceased when there is no evidence to show any causal connection with such injuries and the actions of the defendant. By way of conjecture, sometime prior to this unfortunate death of Mrs. Penderville, the defendant suffered a fractured skull as a result of a beating administered by the deceased's former husband. Is it unreasonable to conjecture that such a person may have encountered Mrs. Penderville in her apartment and committed the alleged injuries? It is rather peculiar that when Mr. Penderville left his wife was in bed fully clothed except for her shoes;

that when he returned she was practically nude on the floor. No person in their right mind would have us believe that a husband would tear the clothes from his wife. What motive or reason did Mr. Penderville have to slaughter his wife in the manner which the State would have us believe? There was no evidence offered by the State to show a medical or other record of the defendant which may even suggest any form of violence or sexual perversion or aberration such as Psychomotor Epilepsy. The highly incompetent testimony of Dr. Maurice Taylor introduced over the objections of defendant's counsel concerning the condition in which he found the deceased at the Newhouse Hotel on the 13th of May, 1952, is pertinent in this, that not an iota of evidence can be found in the record to show any causal connection of the defendant with this episode. One thing is certain, if the defendant was implicated in any way, the State would have introduced the evidence to show criminal intent on the subsequent occasion now before the court. The only evidence in the entire record which has the slightest bearing upon the question of intent is the statement of the caretaker, G. J. Murphy, who testified that on or about the 1st of July, 1952, approximately thirty days before the death of Mrs. Penderville, he heard the defendant arguing with his wife in the bedroom. Defendant said, "Get up, get up, get up off your dead ass and get me something to eat. You haven't cooked me ten meals in the last six months." The deceased's experience at the Newhouse Hotel on May 13th, resulting in terrific traumatic injuries as testified to by Dr. Taylor, would have been invaluable evidence

in determining the question of criminal intent on the part of the defendant, provided the State had offered evidence proving the defendant committed the assault upon his wife at the Newhouse Hotel resulting in the injuries aforesaid. Without this causal connection the testimony is highly incompetent, immaterial, and the objection of defendant's counsel should have been sustained until the State produced the evidence that the defendant committed the assault in question. That no such evidence was produced is indicative of the fact that the defendant did not commit the assault. Dr. Taylor testified as follows:

“A. Well, I first saw the patient in the Newhouse Hotel. She was in a very ragged physical condition. She was thin and very disturbed emotionally. She had lacerations of her scalp, back of her head, from which was oozing a purulent material. She was bruised around both eyes. Her face was battered and bruised. She had bruises on her body. She had evidences of fractured ribs on both the right and the left side in front, and she was bruised down over her private areas and on her legs. On taking her to the hospital, we x-rayed her chest, which showed evidences of fairly recent healing fractures on both sides of the chest and the ribs. She had a skull x-ray done in which there was unequivocal evidence of the possibility of a fissure fracture of the skull. As a result of her bruising and so on, we did liver function tests and blood studies to see if there was any relationship between that and a bleeding tendency. The studies did not prove any relationship, and there were no other evidences of spontaneous bleeding during that period of time, and during all the period I knew her from '49 to '52 there were never

any evidences of spontaneous bleeding or bleeding of any unusual nature." (R. 282-283).

The admission of this evidence under the ruling of the court that it was competent in determining "whether or not she (the deceased) would have a tendency to bleed more so than ordinarily" on a subsequent occasion more than 2½ months later is beyond credence. The admission of this evidence with the court's approval would naturally inflame and prejudice laymen jurors who, under the circumstances, would not be capable of properly analyzing such evidence. The fine distinction advanced by the court for its admission would be lost in the inflamed and prejudiced minds of laymen.

Furthermore, the burden is upon the State to prove beyond a reasonable doubt the following elements in the crime of murder in the second degree :

"1. That on or about the 30th day of July, 1952, at Salt Lake County, State of Utah, defendant Edgar Ronald Penderville killed June Weiler Penderville.

2. That the killing was with malice aforethought.

3. That defendant intended to kill June Weiler Penderville but that he did not deliberate or premeditate upon the killing, or that the defendant did not intend to kill June Weiler Penderville but that he did intend to do great bodily harm to June Weiler Penderville.

4. That said killing was unlawful.

5. That the killing was felonious.

6. That the said June Weiler Penderville died within a year and a day after the cause of death was administered." (See Ins. No. 12, R. 28).

Where is there any evidence to support the element of "malice aforethought" as defined by Instruction No. 13 (R. 29). There is not a scintilla of evidence in the entire case with the widest possible implication that would justify a finding that the defendant killed his wife with malice aforethought. The criminal code of the State of Utah provides, "that in every crime or public offense there must be a union or joint operation of act and intent or criminal negligence." (76-1-20 Criminal Code, Utah Code Annotated, 1953). Criminal negligence only comes into the crime of involuntary manslaughter. All other degrees of homicide require the element of criminal intent. First and second degree murder require that the intent must be coupled with malice aforethought. The record is silent as to any evidence direct or otherwise that the defendant ever had a criminal intent to kill his wife with malice aforethought. The elements of the crime of which he was convicted are not sustained by the evidence and defendant contends that there is a total lack of evidence to justify a finding that defendant had anything to do with the death of his wife, June Weiler Penderville.

POINT III. THE TRIAL COURT ERRED 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.

William J. Christensen was called as a witness by the State and interrogated with reference to the conditions and circumstances that he found at the Penderville apartment when he arrived there and at the time Mrs. Penderville was on the floor of the apartment dying. The testimony of Mr. Christensen is fully set forth in the Statement of Facts, pages 20-24 and 34, and will not be repeated in detail here. The State, upon cross examination by counsel for defendant, objected to Mr. Christensen testifying as to any conversations he had with defendant during this period of time. It should be remembered that Mrs. Penderville was dying and was on the floor of the apartment. The State objected to the testimony on the ground that it was hearsay and improper cross-examination and the court sustained the objection, and refused to allow the witness to testify in any respect as to the conversations. Upon the witness William J. Christensen being called by the defense, the defense again attempted to secure the context of the conversations that were had during this period of time between Mr. Christensen and defendant. The State again objected, this time upon the ground it was hearsay, and calling for self-serving statements. Again this court sustained the objection of the State and refused to allow the witness to testify with regard to these conversations. It is defendant's contention that the lower court erred in refusing to allow this witness to testify with reference to the conversations at that time. The State fully interrogated the witness with respect to the conditions he found at the time he arrived at the Penderville apart-

ment. It is defendant's contention that these statements and conversations during this period of time were part of the *res gestae* and competent and admissible to be presented to the jury. The American Law Institute, Model Code of Evidence, par. 512, Contemporaneous or Spontaneous Statements, states:

"Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made (a) while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter; or (b) while the declarant was under the stress of a nervous excitement caused by his perception of the event or condition which the statement narrates or describes or explains."

"Comment: It is generally held that it is unnecessary that the declarant be qualified as a witness in this exception to the hearsay rule. Clauses (a) and (b) require that the declarant shall have perceived the event or condition, so that the requisites of Rule 104 are necessarily complied with. Clause (a) is in accord with the theory and result of a large number of cases. It expresses what Professor James Bradley Thayer believed to be the rule applied in the so called *res gestae* exceptions to the hearsay rule. * * * Clause (b) also is in accord with the theory and result of a large number of cases. It expresses what Dean Wigmore believes to be the rule applicable in the *res gestae* exceptions, and is accepted in a large majority of the modern opinions * * *."

In *DILLARD V. STATE*, 165 So. 783, 786, 27 Ala. App. 50, the court states:

“On the question as to what constitutes the *res gestae*, there can be no set rule. From the facts of each case the question of *res gestae* must be determined. The expression ‘*res gestae*’ as applied to crime, means the complete criminal transaction from its beginning or starting point in the act of the accused until the end is reached. As stated, what in any case constitutes the *res gestae* of the crime depends wholly on the character of the crime and the circumstances of the case. Generally, the rule appears to be, in homicide cases, that all the surroundings and circumstances attending the killing, the declarations of the accused at and after the killing, and his conduct at and after the killing, while at or near the scene, are admissible and form part of the *res gestae*.”

June Penderville was dying at the time William J. Christensen arrived at the apartment, and she passed away some forty-five minutes after he arrived. Certainly, based upon the rule of *res gestae*, the utterances, declarations and conduct of the accused during this forty-five minute period are relevant and should be allowed to be placed before the jury.

In the case of JACKSON V. UTAH RAPID TRANSIT CO., 77 U 21, 290 P. 970, 976, the court stated:

“The general limitations of the *res gestae* rule are ‘That the declaration or utterance must be spontaneous or instinctive; that it must relate to or be connected with the main or principal event or transaction itself material and admissible in evidence and that it must have been the result or product, the outgrowth, of the immediate and present influences of the main event, or preceding circumstances to which it relates, and must be

contemporaneous with it and tend to explain or elucidate it. * * * * That the word 'contemporaneous' is not taken literally, and that time is not the real governing factor in the determination, but is an important element in determining whether the statements are spontaneous and immediately connected with the main transaction and prompted or produced by its immediate and present influence."

The State in interrogating the witness Christensen opened up the case with respect to physical conditions found by witness Christensen, i.e., the position of the body, condition of the body, the fact that defendant was there present, the conduct of the photographers and detectives in arranging the body, etc., thereby raising inferences and suspicion in the minds of the jurors that the victim, June Penderville, had been murdered and that defendant was the murderer. Certainly defendant is entitled to bring out the entire transaction and circumstances, the utterances that were made, in order to present to the jury a complete picture of what occurred during this forty-five minute period of time in which June Penderville was dying. Certainly he should be given the right to rebut these inferences which the State has built up by going into the conditions and circumstances that existed. Refusal to allow defendant to rebut that testimony by bringing out the utterances and conversations that were had was prejudicial and erroneous.

It has been stated as a general rule that where the State's case rests largely upon circumstantial evidence greater latitude is allowed in admission of circumstances

which tend to throw light on any issues in the case. See *ETHRIDGE V. STATE*, 110 SW 2d 576, 133 Texas Crim. Rep. 287. Certainly such would be the case in the present prosecution as the State's entire case is rested upon circumstantial evidence.

In Wharton's Criminal Evidence, Vol. 1, par. 315, page 425, Explanation of Motive, Intent, etc. it is stated:

"It is clear that facts and circumstances in every transaction exhibit two phases: First, relevancy to establish an ultimate fact; second, an explanation of the facts and circumstances themselves that is relevant against the ultimate facts. In this view the entire transaction should go before the court, the accused's whole conduct—his utterances, his acts, and demeanor—should be received—and his explanation of his acts, conduct, and demeanor should go in to rebut or negative the case against him. Any exclusion of this renders the decisions of the various courts indefensively inconsistent and places an arbitrary limit upon the accused which is unjust in view of the freedom allowed the prosecution in adducing facts and circumstances against him."

CONCLUSION

In conclusion defendant submits that the judgment and conviction of the trial court should be declared null and void for the reasons stated herein.

Respectfully submitted,

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