

1994

# John Fletcher Pendergrass v. Board of Pardons and H. L. Haun, Curtis L. Garner, and M. R. Sibbett, as members of the Utah Board of Pardons : Brief of Appellee

Utah Court of Appeals

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John Fletcher Pendergrass.

Jan Graham.

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**BRIEF**UTAH  
DOCUMENT

## IN THE UTAH COURT OF APPEALS

JOHN FLETCHER PENDERGRASS,

Petitioner/Appellant,

v.

UTAH BOARD OF PARDONS; and H. L.  
HAUN, CURTIS L. GARNER, and M. R.  
SIBBETT, as members of the Utah  
Board of Pardons,

Respondents/Appellees.

DOCKET NO. 940560

Case No. 940560-CA

ERRATA TO BRIEF  
OF APPELLEES

Priority No. 3

Respondents/appellees, through their attorney Nancy L. Kemp, Assistant Attorney General, hereby submit errata correcting the references in their principal brief to the uncertified transcript of petitioner/appellant's February 16, 1993 Board of Pardons hearing, by substituting citations to the certified transcript.

ERRATA

Addendum B, the noncertified transcript of the hearing audiotape, should be replaced by Attachment A to these errata, the certified transcript.

Page 11, lines 13-14: "Id. at R.—at 103-04. The tape recording of the Board hearing, as the certified transcript in Addendum B reveals, bears out the court's findings and uniformly refutes petitioner's claims."

Page 11, lines 16-17: ". . . hearing, 'Did you receive the Bboard's letter that notified you of the time and place of this hearing?', Addendum B at Tr. 12, petitioner . . ."

Page 12, line 4-6: "' . . . right?' Addendum B at Tr. 12-3. After receiving petitioner's assent, he continued, 'Otherwise, we'll assume that you-areyou're in agreement with everything that

we've shared with you.' Id. at Tr. 3."

Page 12, lines 8-9: ". . . history and asked, 'Is that correct?' Id. at Tr. 34. Petitioner replied, 'Yes, sir.' Id. at Tr. 5. In response to a discussion of the . . ."

Page 12, line 16: "'Does this all sound correct so far?' Id. at Tr. 46. Petitioner . . ."

Page 12, line 21 - page 13, line 3: "The ~~tapetranscript~~ then reflects the following exchange between respondent Garner and petitioner:

[Garner]: The information ~~enin~~ the presentence investigation report indicates that in the summer of 1987, you were with the victim in this case, Raymond Dale Jenkins, near Bear Lake—.

~~Pendergrass~~A. Willard Bay.

~~Garner~~Q. Pardon?

~~Pendergrass~~A. It's Willard Bay.

~~Garner~~Q. Excuse me, I'm sorry, Willard Bay.

Id. at Tr. 6-7. Similar exchanges covered the specifics of petitioner's adult criminal record (see id. at Tr. 68-9), prison disciplinary record (see id. at Tr. 811-912), and program participation (see id. at Tr. 912-103)."

Page 13, line 7: "' . . . respond,' id. at Tr. 238; a lengthy pause ensued while Garner waited . . ."

Page 13, line 9: ". . . asked, 'Do you have any comments or questions?', id. at Tr. 2631, to . . ."

Page 13, line 24: ". . . unspecified items or to have them read to him. The ~~tapetranscript~~ evidences . . ."

Page 14, lines 1-3: "' . . . indicates that your son was a sensitive and gentle type person. Aand you have also indicated

that you believe that his dog was also destroyed.' Addendum B at Tr. 1520. Ms. Avery testified at length about . . ."

Page 14, line 5: ". . . its ultimate fate at the hands of police. See id. at Tr. 135-179. The . . ."

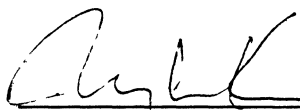
Page 14, line 7: ". . . written by the victim's sister (see id. at Tr. 1823-227. It is . . ."

Page 14, line 13: ". . . reaction to Ms. Avery's testimony (see id. at Tr. 238), did petitioner . . ."

Page 19, line lines 10-11: ". . . outside petitioner's presence (see Addendum B at Tr. 24), she ultimately chose to testify while he was in the room (see id. at Tr. 113-14). The . . ."

Respondents/appellees respectfully request that changes as noted above be made to their principal brief.


Dated this 15th day of December, 1994.

  
\_\_\_\_\_  
Nancy L. Kemp  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of December, 1994, a true and accurate copy of the foregoing Errata to Brief of Appellees was mailed, postage prepaid, to the following:

John Fletcher Pendergrass  
Central Utah Correctional Facility  
P. O. Box 550  
Gunnison, Utah 84634



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**ATTACHMENT A**

P A R O L E H E A R I N G

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IN RE:

JOHN F. PENDERGRASS

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)  
)  
)  
)

USP No. 19021

-o0o-

HELD: February 16, 1993

ORIGINAL

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P R O C E E D I N G S

MR. GARNER: Good afternoon. This is the time and place set for the original parole hearing of John F. Pendergrass, USP No. 19021.

Is that you, sir?

MR. PENDERGRASS: Yes.

MR. GARNER: Mr. Pendergrass, it's going to be necessary for me to take some testimony from you today, so could you raise your right hand and be sworn, please?

Do you solemnly affirm that the testimony you're about to give in this matter will be the truth, the whole truth and nothing but the truth?

MR. PENDERGRASS: I do.

EXAMINATION

BY MR. GARNER:

Q. Thank you. Did you receive the board's letter that notified you of the time and place of this hearing?

A. Yes, sir.

Q. Do you recall that in that letter we listed the various categories of documents which are in your file that we consider when we make a decision in your case?

A. Yes.

Q. All right. As we review the documents in your file and share them with you today, if you hear anything with which you disagree and you feel you would like an opportunity



1 to respond to, please say so when we give you that  
2 opportunity, all right?

3 A. Yes.

4 Q. Otherwise, we'll assume that you're in agreement  
5 with everything that we've shared with you.

6 I'd like to welcome here today several visitors,  
7 your mother and stepfather and also your father -- and I  
8 assume your stepmother?

9 A. No.

10 Q. Mother?

11 A. Just my father and mother.

12 Q. Okay, father and mother. Oh, excuse me, I  
13 apologize. We have the -- and we have your father and mother  
14 and also the victim's mother and stepfather.

15 Folks, we'd like to welcome you here to the  
16 hearing. As you may be aware, board rules don't allow you to  
17 participate in these hearings, although you may submit  
18 written documents, and I believe we've received written  
19 documents from at least some of you. However, we do welcome  
20 you here.

21 And, Mr. and Mrs. Pendergrass, I'm sure that  
22 Mr. Pendergrass appreciates your support.

23 (Statement made by Ms. Avery is not audible.)

24 MR. GARNER: A question, Ms. Hunt or Avery -- I  
25 don't know which you prefer to go by -- you have not

1 indicated a desire to testify here today. Do you wish to do  
2 that?

3 MS. AVERY: I wish very strongly to testify.

4 MR. GARNER: All right. The law entitles you to  
5 testify either in or out of Mr. Pendergrass' presence,  
6 whichever you prefer. That means that we can have him leave  
7 the room while you testify or he can remain here and listen  
8 to your testimony, whichever you wish.

9 MS. AVERY: I don't wish to have Mr.  
10 Pendergrass... (tape is inaudible.)

11 MR. GARNER: All right. You understand that if  
12 he -- if you testify out of his presence, we are required to  
13 record your testimony. He will then have an opportunity to  
14 listen to it and respond to it. Very good. Well, we'll get  
15 to that part of our hearing in a few minutes.

16 Mr. Pendergrass, you're here before us today on a  
17 commitment arising out of a conviction for murder 2, a first  
18 degree felony out of Judge Lowe's court in Box Elder County.

19 The latest judgment and commitment order from  
20 Judge Lowe was dated October 11th, 1989. There's some  
21 question in my mind about the amount of time you served prior  
22 to that. I know that you were originally arrested on this  
23 offense in August of '87, I believe, and it appears from the  
24 report that you've been in custody continually since that  
25 time. Is that correct?

1           A.     Yes, sir.

2           Q.     All right. We're going to have to work that out  
3 but it appears to me as we sit here today that you're  
4 entitled to credit for all the time that you did since August  
5 of eighty -- that you've been in custody on this event since  
6 August of '87.

7                     In addition to the first degree murder charge, or  
8 the first degree felony murder, you also received a  
9 conviction for firearm enhancement also out of the same  
10 court. That is a five-year enhancement that the judge  
11 imposed.

12                    Now, in the judge's commitment order, he ordered  
13 that to run concurrent rather than consecutive with the  
14 murder sentence. However, it is our understanding of the  
15 statute that that is not a legal order, that the statute only  
16 allows it to run consecutive and not concurrent, but that's  
17 something that we can research and you may wish to check on  
18 yourself if you want to be certain on it, but that is our  
19 current understanding is that we have to let that run  
20 consecutive.

21           A.     That's true.

22           Q.     You are also convicted of a second degree felony  
23 theft out of the same court. On the murder conviction, you  
24 were ordered to pay a fine of \$10,000 dollars. On the second  
25 degree theft conviction, you were ordered to pay restitution

1 of \$2,800 dollars and another \$10,000 dollar fine. Does this  
2 all sound correct so far?

3 A. No, sir, I never heard the fine part, but it may  
4 be true.

5 Q. All right. Let me review the judgment and  
6 commitment here briefly.

7 There is no fine here. That's correct, there is  
8 no fine. There are no fines reflected in the judgment  
9 commitment order.

10 Since your commitment on these offences that I've  
11 just reviewed, you also picked up a Class A misdemeanor  
12 conviction of assault by a prisoner. It's our understanding  
13 as we sit here today that the board probably does not have  
14 jurisdiction on that offense and we are not going to address  
15 that offense here today.

16 You did some' time that was ordered to run  
17 concurrently in San Juan County Jail and so we're not going  
18 to address that here today. If at some point in the future  
19 we decide to take that into account, you will be entitled to  
20 a hearing on that as well.

21 The information in the presentence investigation  
22 report indicates that in the summer of 1987, you were with  
23 the victim in this case, Raymond Dale Jenkins near Bear  
24 Lake.

25 A. Willard Bay.

1           Q.     Pardon?

2           A.     It's Willard Bay.

3           Q.     Excuse me, I'm sorry, Willard Bay. The evidence  
4 indicated that he was shot twice in the head while in his  
5 sleeping bag. And initially you had indicated to the  
6 authorities that he had shot himself playing Russian roulette  
7 and later said that he had shot himself but hadn't killed  
8 himself and you had fired the second shot to put him out of  
9 his misery. However, you were convicted of the murder.

10                   Do you, as we sit here today, admit firing both  
11 of those shots?

12          A.     I can't recall.

13          Q.     All right. Do you recall -- do you recall why --  
14 well, let me say this: The police officers indicated that  
15 shortly after the offense when you were being questioned, you  
16 indicated that you could remember many of the details, and it  
17 was only subsequently that you indicated you could not  
18 remember. Can you tell me what you do remember of that  
19 incident?

20          A.     I don't recall much of the previous day before  
21 the incident. As I went to court, I also went to two  
22 certified hypnotists, which tried to help me remember, which  
23 they thought I was unconscious at the time because they could  
24 not bring anything out. They said I was --

25          Q.     Do you remember disposing of the body?

1           A.     Yes, that was the next day.

2           Q.     All right.

3           A.     Is that --

4           Q.     And you remember going to California with the  
5 truck?

6           A.     Yes. I don't remember the previous day to it.

7           Q.     Do you remember speaking with the officers during  
8 the early stages of the investigation and do you recall that  
9 you remembered at that time some of the things that you don't  
10 remember now?

11          A.     No, I just -- when I was talking with the  
12 officers, at that time, I thought I did it and didn't know  
13 how to explain the situation, did not know what to say.

14          Q.     Okay. The second degree felony theft arises  
15 apparently out of the fact that you were found in California  
16 with the victim's truck and numerous items of his personal  
17 property. In reviewing your record, your criminal record,  
18 Mr. Pendergrass, I note that you have a fairly substantial  
19 juvenile record, a number of commitments, mostly thefts and  
20 forgery type of offenses -- or referrals, rather, not  
21 commitments. Then we get to your adult record and let me  
22 review that with you. I show a vehicle burglary in 1986,  
23 misdemeanor. Do you recall that you received probation,  
24 three months in jail?

25          A.     Oh --

1 Q. In Clearfield?

2 A. Yes, sir.

3 Q. Then I show an attempted vehicle theft, also a  
4 misdemeanor, out of Layton in '87.

5 A. I was convicted of it, yes.

6 Q. You received one year jail. Then in '87,  
7 misdemeanor theft out of Ogden in -- yeah, out of Ogden in  
8 which you received six months in jail.

9 A. I don't recall that one, no.

10 Q. Then I show an '87 misdemeanor for forgery out of  
11 Clearfield, one year in jail consecutive with other  
12 sentences. Do you recall that?

13 A. Yes, sir.

14 Q. All right. And then this offense. A number of  
15 the people who examined you back a few years, five or six  
16 years ago, indicated that you had an alcohol and substance  
17 abuse problem. Were you using alcohol or other drugs heavily  
18 at the time of this offense?

19 A. Yes, I was.

20 Q. What were you using?

21 A. I was using cocaine, crystal, marijuana. We were  
22 drinking beer also.

23 Q. Were you using that intravenously?

24 A. Yes, I was.

25 Q. One concern for me, Mr. Pendergrass, is that some

1 of those old reports that were done indicate that you're a  
2 person of high average intelligence. You've been through  
3 numerous programs as a youth to try and help you with your  
4 negative behaviors.

5           They indicate that you lie a lot, at least at  
6 that time, and that you tended to have an antisocial  
7 behavioral type personality. Those kinds of things are not  
8 inconsistent with somebody who denies memory of a crime,  
9 simply says "I can't remember." And, in any event, I guess  
10 what we're trying to do is just come to grips with what kind  
11 of person you were at the time the offense was committed,  
12 what kind of person you are, what kind of person you are  
13 likely to be in the decades ahead.

14           I will note for the record that we have read and  
15 reviewed -- received and reviewed your application to the  
16 board, the form that you filled out, received a couple of  
17 letters from the prosecutor in this case attempting to  
18 clarify the record. A part of what he was attempting to  
19 clarify was what he felt to be a misrepresentation from your  
20 attorney regarding the nature of the firearm enhancement.

21           We also received a letter from the judge and have  
22 received a letter from your parents in which they have urged  
23 us to have a rehearing on you sometime within fairly near  
24 future, I believe three years is what they requested.

25           At the time that we received the report from the



1 institution on you, they indicated that you were a level 1.  
2 I don't see you here in an orange jump suit today. What  
3 level are you?

4 A. Level 3.

5 Q. All right. You -- for a pretty substantial  
6 period, you were having a difficult time staying out of  
7 trouble.

8 A. Yes.

9 Q. Let me review what I show to be our disciplinary  
10 record on you. In 1990, being out of place, production of  
11 contraband, disorderly conduct or fighting, being out of  
12 place, production of contraband, forgery, embezzlement and  
13 theft -- it involved a forged officer's signature --  
14 possession of intoxicant and contraband, refusing a direct  
15 order, disorderly conduct in which you and another inmate  
16 were involved in an altercation at the hospital.

17 Then we get to '90 -- excuse me, one more in '91,  
18 was deliberate damage to state property in which you flooded  
19 the house and section and threw some food, refused to stop.

20 Then we get to '91. You have a disorderly, you  
21 spit a spit wad at an officer. We have another refusing a  
22 direct order. We have an assault by a prisoner. This was  
23 the incident where you received the Class A misdemeanor  
24 conviction for stabbing another inmate with a pencil.

25 And then in '92 we have another refusing to

1 submit to a direct order. Do you want to take a minute and  
2 tell me what the problem was that seemed to land you in all  
3 this trouble.

4 A. When I first came to prison, I thought, you know,  
5 you had to act hard, or whatever their word for it is, you  
6 know, and I realize now that the behavior that's appropriate  
7 in here isn't appropriate on the street. And since that  
8 Class A misdemeanor charge, I've tried to change and only  
9 received one write-up in the last year-and-a-half.

10 Q. Okay. And that was the one in August for --

11 A. Disobeying a direct order.

12 Q. They indicated threatening conduct or threats  
13 made verbally, physically or in writing. But it was remanded  
14 to a minor, from a major to a minor?

15 A. No, that was -- we were horseplaying and they  
16 thought we were fighting. That was remanded to a minor for  
17 horseplay because of numerous officers' statements.

18 Q. Are you still working as a recreation helper?

19 A. Because I moved to a level 3, I lost my job.

20 Q. All right. Are you working at all right now?

21 A. No, I have to wait at the end of the line.

22 Q. At the time of the board report, they indicated  
23 you were working on your high school diploma, you were doing  
24 some correspondence study.

25 A. Well, I already had my high school diploma. I

1 was working on college.

2 Q. Okay. You've been involved in anger management,  
3 substance abuse, self help, and AA. Any other programming  
4 that you've been involved in?

5 A. Not that I recall.

6 Q. All right. At this point in the hearing I'm  
7 going to allow Miss -- do you prefer to go by Avery or Hunt?

8 MS. AVERY: I would like to go by Avery.

9 MR. GARNER: All right. I will permit Ms. Avery  
10 to testify. I'm going to ask you to leave the room,  
11 Mr. Pendergrass, and you'll be allowed to return as soon as  
12 that testimony is through. You'll be able to listen to a  
13 tape recording of that testimony and respond to it.

14 MR. PENDERGRASS: Yes, sir.

15 MR. GARNER: All right.

16 UNIDENTIFIED SPEAKER: You can take us off the  
17 record for just a minute... (Tape is inaudible.)

18 MR. GARNER: Ms. Avery, we apparently  
19 misunderstood your desires and --

20 MS. AVERY: It doesn't really matter.

21 MR. GARNER: We certainly want to accommodate  
22 those. It is your right and we can simply bring him back in  
23 and have him sit and listen as you testify or we can have him  
24 remain out of the room, whichever you prefer.

25 MS. AVERY: It would be easier, I guess, for him

1 to be here again. If there's anything he would like to  
2 say --

3 MR. GARNER: Well, why don't we do that then.  
4 Let's bring him back in, and please step forward and take a  
5 seat right here where Mr. Pendergrass was sitting.

6 MS. AVERY: Right here?

7 MR. GARNER: Yes. We'll wait just a moment for  
8 him to return.

9 It's going to be necessary for me to place you  
10 under oath as well. So could you raise your right hand and  
11 be sworn, please.

12 Do you solemnly affirm that the testimony that  
13 you're about to give in this matter will be the truth, the  
14 whole truth, and nothing but the truth?

15 MS. AVERY: Absolutely, yes.

16 MR. GARNER: Could you please be seated and if  
17 you would, please state your full name and spell your last  
18 name.

19 MS. AVERY: Okay. My name is Linda Lorraine Hunt  
20 Avery. My last name, Avery, is A-v-e-r-y.

21 MR. GARNER: Thank you.

22 MS. AVERY: Can you hear me all right?

23 MR. GARNER: Fine.

24 MS. AVERY: Um, I'd like to ask you to be real  
25 patient with me. This is very difficult for me still. Um, I

1 may cry and I may need a little time to gather myself, so if  
2 you'll just be patient with me, I would greatly appreciate  
3 that.

4           Okay. First of all, I have no hate feelings or  
5 vengeance towards Mr. Pendergrass and I would like to see him  
6 have a family and have all the good things of life that I  
7 wanted for my son. I mean, like to be married and have a job  
8 and to have children.

9           Like my son, he was going to get married. He was  
10 just 22 years old. He was -- it was his very first vehicle.  
11 He was very proud of it. And he was my only son. And my  
12 sister is -- I mean my little -- my daughter, his sisters, we  
13 all miss him very much, and the pain is still very hard.

14           There's some things that I would like to point  
15 out. I don't feel that John has served his full time, simply  
16 because he didn't even -- my son was not even found until  
17 August. He killed my son in May and he was not even found  
18 until '87 -- I mean, until August -- and then there was the  
19 two years of the trial.

20           He was supposed to be serving time during this  
21 two years for forgery charges and the -- he'd even done  
22 against his own loving parents, which he has very loving  
23 parents, very fine parents. He was supposed to be serving  
24 this time. And then there was a trial time. I don't think  
25 that should be credited, all that time, for time that should

1 have been started serving when he was convicted for my son's  
2 death for -- all I want is justified restitution.

3 He took away -- I mean, he still has a whole life  
4 ahead of him. My son, he doesn't have a whole life ahead of  
5 him. He doesn't get to get married or drive his vehicle or  
6 have a job or give me grandchildren or be with us as a  
7 family. And he doesn't get to meet my new husband or go  
8 fishing and hunting.

9 And John will be able to do these things still in  
10 the future but my son -- so all I want is a justified time,  
11 you know, restitution for -- that's a lot to take away from a  
12 young person, you know, and my son was a good boy. He wasn't  
13 the smartest boy, but he loved to help people.

14 I have a few things I'd like to show you if you  
15 will take the time to look at them. Would you?

16 MR. GARNER: We can consider those, yes.

17 THE WITNESS: I have a paper -- 'cause, see, my  
18 son isn't here to say anything. He can't show you what kind  
19 of person he was. I'd like for him to just note -- this was  
20 from my son right there, just some of that there. If he  
21 would just look that over.

22 My son was a boy with, oh, learning  
23 disabilities. I mean, he wasn't dumb or anything like that,  
24 but he had learning disabilities and some emotional -- life  
25 was hard for him. Things hurt him. He cared so much about

1 people and animals and things that life was hard. He was so  
2 soft and gentle inside that he was easy to hurt, he was easy  
3 to set up and trick because he was such a simple minded  
4 little person, you know.

5               John is a very intelligent person. My son  
6 wasn't -- didn't have that ability, but yet he wasn't dumb  
7 and he cared very much about people and he -- and anyway,  
8 that -- and so he took Ritalin as a little boy and so  
9 sometimes -- he never got into anything hard because he  
10 couldn't even take a shot.

11              He had one tooth that was bad in his mouth and he  
12 wouldn't even go to the dentist and take a shot in his mouth  
13 for that because he didn't -- was afraid of needles. So he  
14 certainly wouldn't have never shot up anything into his  
15 veins. He never did anything like that, you know.

16              He wanted to be accepted by people. And he  
17 didn't choose always the right friends, and he did do a  
18 little bit with marijuana because it relaxed him and made the  
19 pain go away. And he would show people where he could get  
20 it. But he was never a drug user or, you know, things like  
21 that. He was just a typical -- he was human, you know, and  
22 he never got in -- he told me once that he'd tried cocaine  
23 but he said he hated that because it made him -- he didn't  
24 like it, you know, when you do it up your nose or something  
25 so...

1           But, I mean, he was in contact with people that,  
2 you know. And so -- but like -- and a -- but he was robbed  
3 of all the things that he could have had.

4           I just would like John to serve enough time to  
5 really realize what he did and to come to a maturity, you  
6 know. And I don't feel -- to me, it's only been like three  
7 years because the two years for the trial and the time that  
8 he was serving for forgery, those shouldn't be just thrown  
9 away. I mean, like, you know, and not be counted. It  
10 shouldn't be counted five years, and, you know.

11           And then I'd like to bring out something about  
12 the trial. Like when my son was found, the officer that went  
13 there and investigated when we were so frightened and we knew  
14 something -- I knew my son was dead, I knew it -- and I told  
15 the officer and he went and he looked real good. And he  
16 said, there's no sign of foul play anywhere.

17           Now, if John couldn't remember or didn't know  
18 what he was doing, how could he so -- cover my boy so good  
19 that the only way we could find him was John actually showed  
20 the people where he was. He -- there was no evidence of any  
21 foul play, nothing was left behind, everything was neat. All  
22 the litter, all the beer, all the things that they  
23 consumed -- because my son partied with him.

24           The people that saw him said that John and him  
25 was laughing. John made my boy think that he was a friend,



1 that he could trust him. And they left together, they fished  
2 together, they played music loud like boys do. And then he  
3 murdered my son in his sleep.

4           And then not only that, but he cleaned everything  
5 up so good at night in the dark before morning and had it all  
6 under my son where he buried him in the swamp, put it all  
7 under my son, put him there neat, wrapped him all up real  
8 good, put all this on top of him, broke off branches so that  
9 even when the plane went over to search, they could not find  
10 no -- how can someone who can't remember what they're doing  
11 do so well?

12           The only thing that was left behind was the  
13 cooler he forgot because it was dark and he didn't forget --  
14 he didn't remember to pick it up. And there was no sign, no  
15 nothing. So -- and anyways, like my son, he would have never  
16 shot up drugs like that. Sure, he -- my boy was not the most  
17 innocent boy, he was a typical teen-age boy who wanted to be  
18 accepted and have friends, but he also had a right to have  
19 children and a life too, a vehicle.

20           He'd only had that vehicle for less than three  
21 months. It was his first vehicle. He was real proud. And  
22 John wanted him to just give it to him. And he said no, so  
23 John just took it anyways. I mean, he could see my boy was a  
24 simple-minded boy, not a super intelligent -- did you read  
25 that little --

1                   MR. BLANCHARD: Yes, I'll just -- I could just  
2 summarize briefly. This document indicates that your son was  
3 a sensitive and gentle type person. And you also have  
4 indicated that you believe that his dog was also destroyed.

5                   MS. AVERY: His dog, him and his dog -- he loved  
6 animals and he grew up with this little puppy, a Labrador,  
7 Boy. And wherever Boy went, he went. And if Boy got a  
8 scratch, he took him to the vet and took care of him. They  
9 were buddies, you know. And, I don't know, John must have  
10 done something to the dog.

11                   I mean, I wasn't there, I don't know what John  
12 did, all I know is I know my boy, I knew his dog. The dog  
13 would have never let John do that and been alive. Somehow,  
14 when the -- the evidence was that when the police went --  
15 this man was at the site when my son was killed, and it was  
16 at the park, in the Cannell park, and this man wanted to go  
17 across this little lane up to the stairs to a dike and look  
18 out over the water.

19                   And my boy's dog, he held him at bay, wouldn't  
20 let them cross, because that's the area John had actually  
21 killed my boy and the scent was there, and my dog was -- his  
22 dog was protecting that scent, his master, because they had  
23 been together four years, inseparable.

24                   So the guy finally challenged the dog and he went  
25 across anyways. Coming back, the dog attacked him and he had

1 to have stitches, 12 stitches in his arm.

2 Well, so the police went out there totally  
3 unprepared, thinking they had a dog with rabies. But Boy was  
4 wearing tags, he was fully tagged. My son did everything  
5 that he was supposed to legally, and he was up on his shots.  
6 There was no chance of rabies. All he was doing was  
7 protecting my son, his master.

8 And then when this officer came, of course the  
9 dog had to have been through a traumatic -- John must have  
10 knocked the dog out. He had to, because Boy wouldn't have  
11 just let him take the truck, kill my son, dump him there, do  
12 all that, come back, clean everything up and then leave  
13 before dark.

14 So he had to have knocked the dog out, probably  
15 thinking he'd killed him. But the dog, I think came through  
16 and when he came through in the morning, he was confused.  
17 All he knew is he had that scent and his master was last  
18 there, so he stayed with that and protected it.

19 Well, when the police came, it was nine -- eight  
20 hours, I guess, it was towards five o'clock, and John had  
21 left long before the sun had come up. And when he came,  
22 he -- the policeman, he lunged at the policeman, so the  
23 policeman shot him dead. And then the police cut off his  
24 head and threw him away.

25 The police didn't even let us know -- we didn't

1 even know till his girlfriend -- see, my son was going to be  
2 married. He was engaged. And his girlfriend -- Dale didn't  
3 come home, and when he went to -- she went to pay the vet  
4 bill that they had, they said, well, we're sorry about your  
5 dog. And Gloria called me right away. She says, I think  
6 something terrible has happened because they said Boy is  
7 dead. And I knew -- we both knew Dale was too.

8               So when we started looking then -- and I didn't  
9 catch up with John until I went out to Hemet, California  
10 where they had found the pickup. And John had had his hair  
11 died like my son, bleached out. He was trying to kind of  
12 pass himself off as my boy. I guess he was trying to sell  
13 the vehicle and somehow the police got it then. And I had a  
14 lead so I went there and found out all the proof I could get  
15 to get John picked up.

16              But John was picked up on other charges. But he  
17 was brought here and then they interrogated him, and then he  
18 showed them where my son was. And he told them even before  
19 he found my son, he said, you'll find two bullets in his  
20 head. Even before they found him, he told them what they'd  
21 find.

22              But then when they found my son, he planted him  
23 in the swamp, and he'd been there for, oh, three months and  
24 all there was left of him was bones. I buried him in a  
25 little box like that because I had him crushed. But so I

1 don't -- and -- could I -- I don't really think -- I don't  
2 know what -- I hope I've remembered everything I thought was  
3 important. But could I read you something?

4 MR. GARNER: All right, very briefly. We're  
5 under some time constraints but --

6 MS. AVERY: Okay. I'd -- my -- this kind of  
7 gives you an idea of what his sisters felt for him and some  
8 type of a personality that my son had, kind of gives you -- I  
9 want you to know that I don't feel any vengeance towards  
10 John. I don't want to ruin his life and I know that  
11 eventually I want him to get out and have a family and  
12 everything. But I want him to have enough time to really  
13 realize the pain that he's caused some other people and --  
14 you know, it's a poem kind of wrote by my little daughter  
15 Lynnette. She was very close with her brother and she loves  
16 animals like he did and she has her dogs. And it goes like  
17 this. It goes:

18 "One Last Walk. My brother with your sandy hair  
19 and wide happy grin. Take my hand and let's walk along the  
20 rugged path of memories. Now. This last time for the  
21 memories to blossom into vivid colors. Remember the first  
22 moment you held my clumsy hands and body in your wobbly crib  
23 of your four year old arms. Remember, please remember the  
24 last hug I gave you, the last kind words I spoke. Yes, I  
25 know, you remember how in our early years, we explored the

1 collapsing houses and the old barns like curious puppies. I  
2 was just old enough to trail behind you on dusty roads of our  
3 ancient cow town.

4 "We clamored over debris and clamored up and  
5 through creaky fences. When you grew annoyed with my  
6 presence, you simply climbed into a room that my chubby hands  
7 could not yet master and disappeared. The memories are  
8 awakening and I see us roaming over countrysides like wild  
9 Indians complete with chicken feathers in our tangled hair.

10 "We shouted and we laughed with each other's  
11 discovery until the distant voice of our mother called us  
12 home for lunch. Images and feelings are surfacing while the  
13 actual events are blurred in a memory filled with too many  
14 moves and upheavals."

15 We had a hard life growing up, me and my  
16 children.

17 "Feeling of deep love driven to the very brink  
18 of extinction with crazed madness and displaced anguish.  
19 Images scarred by clenched fists and stinging voices. Years  
20 melded into timelessness and our innocent childhoods faded  
21 into oblivion.

22 "Pain mastered one on another, shaking our very  
23 roots of endurance until they splintered. The acts that  
24 followed were no one's fault. I thought at one time that I  
25 hated you but when my heart was stripped and there was only

1 steel base core of love standing naked in the biting cold I  
2 thought perhaps you hated us. But when I remembered very  
3 clearly the sincerity of your hugs once the insanity was  
4 ended, hindsight is so much clearer than foresight.

5 "If Gloria, your tiny wife..." -- Well, they was  
6 living together but they were going to get married -- "could  
7 have some way known what was happening, she could have never  
8 let you go. I know that Boy at your -- I know that boy" --  
9 this was his dog -- "...your black friend could have fought  
10 much more efficiently with his flashing white teeth to save  
11 his foolish master.

12 "He died so appropriately with a bullet through  
13 his skull. I realize I took for granted you would always be  
14 there. I had so many things left to say. I didn't dream  
15 that some day something as impersonal as a gun's bullet  
16 barrel would snatch you away from me. It never occurred  
17 anyone could pull the trigger.

18 "Now as they lay your tiny blue box beneath the  
19 lush grasses of the cemetery, salty tears sting my eyes and a  
20 place in my heart throbs with yearning for you. The rest of  
21 the journey I know you must take alone. I only wish that I  
22 could have seen your smile one last time and to tell you how  
23 much I cared.

24 "I will store your memory in a dark corner of my  
25 mind at least until the pain dims. There they will echo

1 faintly and dissolve into oblivion. I cannot fill the void  
2 that your absence leaves in my life but they seem to ease the  
3 burning in my heart just a little. Somewhere the memories  
4 will always bloom for me and you. Your loving sister."

5               She also wrote this. We -- his nickname was  
6 Rowdy. We called him Rowdy Ray because he was kind of always  
7 into little mischief stuff but never really anything that  
8 would hurt anyone, you know, because he was a very sensitive  
9 person.

10              "Ray was a trite short for a man his age. Built  
11 stout and square like his mother. Straw colored hair in  
12 unruly bunches on his head entangled carelessly down his  
13 eyes. My brother never saw the world exactly like you and  
14 me. He cared not if his Levis were torn at the knees nor if  
15 his shirt was slightly wrinkled, or if his cowboy boots were  
16 scuffed or worn. He was free and yet unchained.

17              "Ray was changed by life's expectations and free  
18 because he did not know how to obey them. His blue-gray eyes  
19 were frustrated, a little frightened by the harshness of the  
20 world that surrounded him. In covering his weaknesses, he  
21 often let it change to anger. Those who knew him, however,  
22 could see through his anger smokescreen and smile at the  
23 sensitivity that lay beyond.

24              "Of all the things I loved about Ray, I loved  
25 his smile the most. When Ray smiled, the sadness and despair



1 vanished from his eyes and they laughed. His smiles were  
2 generous, stood out of his oval face reminded me of a child's  
3 smile so innocent and uninhibited. For a moment his teeth  
4 flashed and the world was forgiven for all its heartless  
5 nature."

6                   Thank you very much for listening. There's one  
7 thing more I would like to say and I forgot what it was. Oh,  
8 Ray was so easy to be tricked and taken in by people because  
9 he was so gullible, you know, to believe that nobody -- he  
10 couldn't hurt anyone, you know, even though he would get  
11 angry at times, but it would just go, you know.

12                   Like he hawked his gun for \$50 dollars to feed  
13 these people off the street he didn't even know because they  
14 said they were hungry and needed food. And he hawked his  
15 rifle and he gave them the \$50 dollars and had them come over  
16 so they could buy food.

17                   So I just don't deserve -- don't feel he deserved  
18 what he did and I don't -- I think that's all, basically.  
19 I'm so nervous I probably forgot some things I would like to  
20 say. But thank you so much for listening to me.

21                   MR. GARNER: Thank you, Ms. Avery. We know this  
22 is difficult for you and we appreciate your willingness to  
23 come here and testify today.

24                   MS. AVERY: Oh, this is a picture of my son and  
25 the wife he was going to have. He was cracking a big grin

1 there because he was holding this animal. And you know how  
2 women are, they didn't want to -- she didn't fix her hair and  
3 she didn't want to be in front of the camera. So she'd -- it  
4 had taken him two hours to talk her into it and he'd kind of  
5 told a joke, and just as he told the joke, the guy flashed  
6 the picture. So -- and he wanted so bad to take a picture  
7 with this little cub. So, anyway, thank you very much.

8 MR. GARNER: Thank you.

9 Mr. Pendergrass, if you would come and take the  
10 seat again here in front of us, please. I'm going to give  
11 you a minute or two to respond to the testimony that you've  
12 just heard in any way you see fit.

13 A. I actually don't know how to respond.

14 Q. You've indicated that you don't remember too many  
15 of these events. Do you admit committing it?

16 A. I -- it's hard to admit committing it if I can't  
17 recall the events. It's --

18 Q. I'm going to ask Mr. Blanchard if he has any  
19 questions for you.

20 MR. BLANCHARD: Maybe just a follow-up on the  
21 same question that Mr. Garner has already asked.

22 EXAMINATION

23 BY MR. BLANCHARD:

24 Q. At one point you did acknowledge having fired a  
25 shot. Do you remember having shot one shot?

1           A.     No. I didn't know what happened. I thought I  
2 did the offense and I didn't know how to explain it.

3           Q.     Well, you thought that you did it, or, as you sit  
4 here today, do you know that you were responsible for this  
5 young man's death?

6           A.     I know not if I'm responsible.

7           Q.     Can you honestly sit here and tell us that? Is  
8 there any other plausible explanation for how he got two gun  
9 shot wounds to his head?

10          A.     I can honestly tell you I can't remember.

11          Q.     Was there anyone else nearby?

12          A.     Not that I recall. I don't remember anyone  
13 else.

14          Q.     Does hearing Mrs. Avery's testimony today impact  
15 you in any particular way at all?

16          A.     Yes, it makes -- I empathize for her in the  
17 situation and feel -- you know, I feel bad for what's  
18 happened. I realize the situation drugs got me into.

19          Q.     Sometimes it's easier -- it's convenient to not  
20 remember things. Sometimes it's difficult -- it's difficult  
21 for us to tell whether you're saying, I don't remember  
22 because it's so hard to remember and so hard to admit, or  
23 because you truly don't recall. And certainly there's a  
24 probability there that it's just convenient for you to not  
25 recognize or admit to the knowledge and the memories that are

1 there.

2 A. Yes, I understand.

3 FURTHER EXAMINATION

4 BY MR. GARNER:

5 Q. Mr. Pendergrass, just following up on that  
6 briefly, do you recall disposing of the body?

7 A. I recall everything after the next morning except  
8 for when I passed out again.

9 Q. Did you dispose of the body the next morning?  
10 I'm not clear on this.

11 A. Yes, sir, I did.

12 Q. Do you recall why you were so meticulous about  
13 making sure that it was under the water and covered up and  
14 things like that?

15 A. I wasn't meticulous, I just -- I was driving  
16 out -- I didn't know what I was going to do, and I missed the  
17 turnoff to leave. And I drove down to the dead-end place and  
18 got stuck in the mud. And I was going to get help but did  
19 not know how to explain the situation, so I thought it would  
20 be best if I disposed of it while I thought about it.

21 (Side 1 of the tape ends.)

22 MR. GARNER: All right. We'll go off the record  
23 for a minute while we deliberate.

24 Mr. Blanchard is not able to join me here when I  
25 announce this decision but, first, let me say,

1 Mr. Pendergrass, that this is an interim decision only. The  
2 the board has five members and it takes a majority of that  
3 five to make a binding decision. So what I announce to you  
4 here today is an interim decision only.

5 If you take it back and staff it with the rest of  
6 the board and there's some change, you would be notified of  
7 that change by mail, but if you hear nothing further by mail,  
8 probably within the next 30 days or so, you can assume that  
9 what we've announced here today is the final board decision.

10 It's going to be our decision today to grant you  
11 a rehearing ten years from today, grant you a rehearing in  
12 January of 2003. At that rehearing, we are ordering a  
13 psychological evaluation to address your propensity for  
14 violence and your coping skills. Do you have any comments or  
15 questions?

16 MR. PENDERGRASS: No.

17 MR. GARNER: All right. Then that will conclude  
18 the hearing.

19 (The taking of this tape-recorded proceeding was  
20 concluded.)

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C E R T I F I C A T E

STATE OF UTAH                    )  
  : ss  
COUNTY OF SALT LAKE        )

THIS IS TO CERTIFY that the tape-recorded proceedings in the foregoing transcript named, was taken before me, Rashell Garcia, Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing in Salt Lake City.

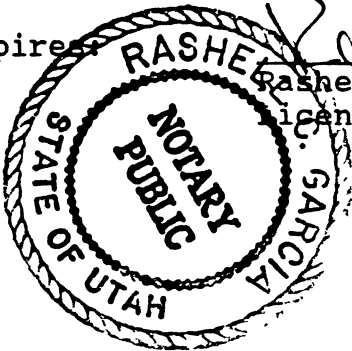
That the tape-recorded proceedings were by me reported in Stenotype, and thereafter caused to be transcribed into typewriting, and that a full, true, and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages, numbered from 2 to 31, inclusive, to the best of my ability to do so.

I further certify that the original transcript of the same was delivered to the Attorney General's Office for filing for any furture hearings in this matter.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 14th day of December, 1994.

My Commission Expires  
12-15-96



Rashell Garcia  
Rashell Garcia C.S.R.  
License No. 144