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Motion to Dismiss Appeals as of Right and Brief in Support of Motion to Dismiss and Opposing Motions for Leave to Appeal

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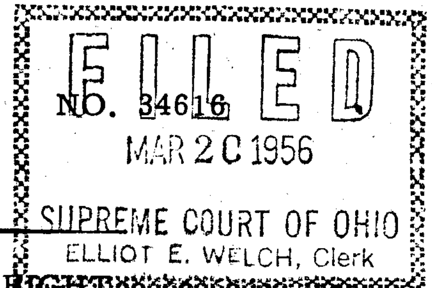
In the

Supreme Court of Ohio

Appeal From
The Court of Appeals of Cuyahoga County

STATE OF OHIO, Plaintiff-Appellee,
VS
SAM H. SHEPPARD, Defendant-Appellant. NO. 34615

STATE OF OHIO, Plaintiff-Appellee,
VS
SAM H. SHEPPARD, Defendant-Appellant. NO. 34616



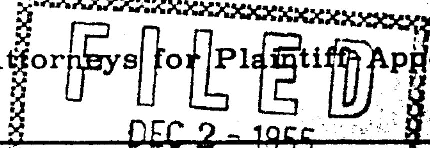
MOTION TO DISMISS APPEALS AS OF RIGHT
and
BRIEF IN SUPPORT OF MOTION TO DISMISS
AND OPPOSING MOTIONS FOR LEAVE TO APPEAL.

FRANK T. CULLITAN,
Prosecuting Attorney of Cuyahoga County,

SAUL S. DANACEAU,
THOMAS J. PARRINO,
GERTRUDE BAUER MAHON,
Assistant Prosecuting Attorneys.

Criminal Courts Building,
Cleveland, Ohio.

Attorneys for Plaintiff-Appellee.



Opposing Counsel on inside of cover.

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Cleveland - MAin 1-3919

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No. 34615
No. 34616

- - -

IN THE SUPREME COURT OF OHIO

- - -

APPEALS FROM
THE COURT OF APPEALS OF CUYAHOGA COUNTY

- - -

STATE OF OHIO,

Plaintiff-Appellee

vs.

SAM H. SHEPPARD,

Defendant-Appellant

- - -

MOTION TO DISMISS APPEALS FILED AS OF RIGHT

- - -

Now comes the Appellee, the State of Ohio, and respectfully moves this Court for an order dismissing the appeals filed as of right by the Appellant for the reason that no debatable constitutional question is involved in said causes; and for the further reason that no question arising under the Constitution of the United States or the Constitution of Ohio is involved; and for the further reason that said causes did not originate in the Court of Appeals; and finally, for the reasons set forth in the brief filed in the above entitled causes opposing the motions for leave to appeal.

FRANK T. CULLITAN,
Prosecuting Attorney of
Cuyahoga County

By SAUL S. DANACEAU,
THOMAS J. PARRINO,
GERTRUDE BAUER MAHON,
Assistant Prosecuting Attorneys,
Attorneys for Appellee

- - -

NOTICE

MESSRS. WILLIAM J. CORRIGAN,
ARTHUR E. PETERSILGE,
FRED W. GARMONE,
PAUL M. HERBERT,
RUSSELL E. LEASURE,
Attorneys for Defendant-Appellant.

You are hereby notified that the appellee, the State of Ohio, is filing in the Supreme Court of Ohio a motion to dismiss the appeals filed as of right by the appellant, a copy of which motion to dismiss is hereto attached, and you are further notified that said motion to dismiss will be heard by the Supreme Court at the time the motions for leave to appeal are on for hearing.

FRANK T. CULLITAN,
Prosecuting Attorney of Cuyahoga County

By SAUL S. DANACEAU,
THOMAS J. PARRINO,
GERTRUDE BAUER MAHON,
Assistant Prosecuting Attorneys,
Attorneys for Appellee

- - -

PROOF OF SERVICE

Receipt of a copy of the foregoing motion to dismiss and notice that the same will be heard with the motions for leave to appeal, together with copy of brief, is hereby acknowledged

1 this ____________ day of December, 1955.

2 WILLIAM J. CORRIGAN,
ARTHUR E. PETERSILGE,
3 FRED W. GARMONE,
PAUL M. HERBERT,
4 RUSSELL E. LEASURE,
Attorneys for Defendant-Appellant.

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IN THE SUPREME COURT OF OHIO

- - -

APPEALS FROM
THE COURT OF APPEALS OF CUYAHOGA COUNTY.
No. 23,400
No. 23,551

- - -

STATE OF OHIO,

Plaintiff-Appellee

vs.

SAM H. SHEPPARD,

Defendant-Appellant

- - -

BRIEF OF PLAINTIFF-APPELLEE

- - -

HISTORY OF THE CASE

On August 17, 1954, the Defendant-Appellant Sam H. Sheppard was indicted by the Grand Jury of Cuyahoga County on a charge of Murder in the First Degree for the killing of his wife, Marilyn Sheppard, on July 4, 1954.

The Case was tried to a jury before the Honorable Judge Edward Blythin, commencing on October 18, 1954. The trial lasted nine weeks and on December 21, 1954, the jury returned a verdict against the defendant of guilty of Murder in the Second Degree.

A Motion for New Trial was filed on December 23, 1954,

and a supplement thereto was filed on December 24, 1954, and the Trial Court overruled both motions on January 3, 1955.

A Motion for New Trial on the ground of newly discovered evidence was also filed, and overruled on May 9, 1955. The proceedings with reference to the motion for a new trial on the ground of newly discovered evidence are set out in the Memorandum and findings of the trial court, attached to and made a part of the Bill of Exceptions.

The Memorandum of the Trial Court ruling upon the motion for new trial was ordered filed and made a part of the record.

The judgment of conviction was affirmed by the Court of Appeals of Cuyahoga County on July 20, 1955, with a written opinion dated July 13, 1955 (App. Appendices to Brief, pp. 5a-75a), in Court of Appeals case No. 23,400.

The decision of the trial court overruling the motion for new trial on the ground of newly discovered evidence was upheld by the Court of Appeals of Cuyahoga County on July 25, 1955, with a written opinion (App. Appendices to Brief, pp. 76a-109a), in Court of Appeals case No. 23,551.

The defense have violated Rule VIII, Section 3, Sub-section (f) by failing to set forth in their brief copies of the Opinions rendered in this case by the trial court and we are, accordingly, attaching them to our brief in the Appendix.

STATEMENT OF FACTS

The extraordinary excursions in appellant's brief to newspaper stories as though they were before the jury as evidence in the

case on trial, the numerous distortions and misrepresentations of the evidence, the substantial omissions of pertinent evidence and the substitution of the opinions and interpretations of defense counsel for such evidence, necessitates a restatement of the facts.

The defendant, Dr. Sam. H. Sheppard, thirty years of age, resided at 28924 Lake Road, Bay Village, Ohio, with his wife, Marilyn Sheppard, age thirty-one, and their son, Samuel Reese Sheppard, Jr., age seven, known as "Chip." Living at the home also was the family dog named Koko.

The defendant worked at Bay View Hospital, located in Bay Village, Ohio, which, to a great degree, was established through the efforts of Dr. Richard Sheppard, Sr., the father of the defendant. Working at the hospital also were the defendant's brothers, Dr. Stephen Sheppard and Dr. Richard Sheppard, Jr., all osteopathic physicians and surgeons.

The home of the defendant is located on the north side of Lake Road, which extends in an easterly and westerly direction. A door leads to a screened-in porch on the so-called front of the home, which faces Lake Erie on the north. Beyond this porch to the north is a lawn of some 20 or 30 feet, ending in a sharp descent, at the base of which is a beach on Lake Erie. There is a series of 52 steps from the top of the hill leading down to a bath house and in turn to the beach. The area from the top of the hill to the beach is covered with thick, high grass, brush, weeds and stones. North of the house is a small building used as a storage room. To the east of the house is a two-car

1 garage.

2 A wide lawn extends to Lake Road from the back, or south
3 side, of the home. There are trees on the lawn. There is a door on the
4 south side of the house, leading to a vestibule to the west of which is
5 the kitchen. In the northwest corner of the kitchen there is a door lead-
6 ing to a series of eight steps descending into the basement. To the
7 east of the vestibule is a room that was used as a combination den and
8 doctor's office.

9 The vestibule then leads into an L-shaped living room in
10 which there is an assortment of furniture and a television set against
11 the north wall. From both the kitchen and the living room, on the
12 south side, three steps lead to a small landing, and from there 12
13 steps ascend to the second floor. Both on the wall at the point of the
14 small landing leading to the second floor, and at the top of the stairs in
15 the second-floor hallway are electric light switches for lights that
16 illuminate both the stairway and the upper hallway, which extends
17 east and west and is approximately four feet in width.

18 Directly at the top of the stairs and across this hallway is
19 the room that was occupied by the murdered Marilyn. To the west off
20 this hallway there is a guest bedroom. Chip's room was next to and
21 east of Marilyn's room. Across the hallway and south of Chip's room
22 is a reading room in which was the only light burning at the time of
23 the arrival of the Houks and the police. Another guest bedroom is
24 located to the east of this room, occupied the night before the murder
25 by Dr. Lester Hoversten. Also across from Chip's room is a bathroom.

On Thursday afternoon, July 1, 1954, Dr. Lester Hoversten, a former schoolmate of the defendant, arrived at the defendant's home as a guest. He came there from the Grandview Hospital in Dayton, Ohio, where he had been working. He stayed at the Sheppard home until the morning of July 3, 1954, when he left to visit another friend, Dr. Richard Stevenson, at Kent, Ohio, intending to spend the evening with him and to play golf with him the next day. He left most of his clothing and luggage behind at the Sheppard home.

On Saturday, July 3, 1954, arrangements were made between Marilyn and Nancy Ahern for the Sheppards and the Aherns to spend that evening together. Don and Nancy Ahern reside at 29146 Lake Road, Bay Village, had known the Sheppards for approximately one year prior to July 4, 1954, and were their close personal friends. Mr. and Mrs. Ahern and the defendant and his wife assembled at the Ahern home at about 6:00 p.m. At 7:00 p.m. the defendant left to go to Bay View Hospital, returning to the Ahern home about 7:30 p.m. Cocktails were served at the Ahern home, where they each had approximately two drinks. After a short time they all went to the defendant's home, following Marilyn, who had gone there shortly before to make preparations for dinner.

Before dinner, the defendant and Don Ahern took the children down to the basement, where the defendant instructed them in the use of a punching bag that was suspended there. At about 9:00 p.m. they all commenced eating a substantial dinner, which was completed at about 10:00 p.m. Mr. Ahern then took his children home and returned. Chip was put to bed. At one point Mr. Ahern, who operates a deodorant

business, with the defendant went both upstairs and down to the basement of the Sheppard home, part of which had burned some time previously, to see if they could detect any peculiar odors.

They all later watched television. Since the night was quite brisk, the defendant put on a brown corduroy jacket over the white T-shirt he had been wearing. He was reclining on a couch in the L of the living room, lying on his stomach with his head to the north. This couch was located adjacent to the first landing of the stairway leading to the second floor, and it could be seen from the landing and lower part of the stairway.

The Aherns left at approximately 12:15 a.m., before which time Mrs. Ahern had locked the door on the north side of the living room and latched the night chain into the closed position. Marilyn accompanied them to the south door and as they left, the defendant remained asleep on the couch previously described, still wearing the corduroy jacket and T-shirt.

On the morning of July 4, 1954, at approximately 5:50 a.m. J. Spencer Houk, the Mayor of Bay Village, received a phone call from the defendant, in which the defendant said:

> "Sam said, 'My God, Spen, get over here quick. I think they've killed Marilyn.'
>
> "And I said, 'What?'
>
> "And he said, 'Oh, my God, get over here quick.'" (R. 2264)*

The Houks were personal friends of the Sheppards and reside at 29014 Lake Road, Bay Village. Immediately after this call, Mr. and Mrs. Houk

* Indicates record pages of typewritten transcript.

went to the Sheppard home, where, at the time of their arrival, there was one light burning upstairs. They entered the Sheppard house from the south, or Lake Road, door, which was closed but not locked. In the vestibule, outside the door to the den, there was a doctor's medical bag lying open on the floor, with some of its contents spilled on the floor (State's Exhibit 11). It was later discovered that the compartments in this bag had remained unopened (R. 2521). The Houks then went into the den and there found the defendant. At this time the defendant was wearing shoes, socks and trousers which were wet, but he was bare from the waist up and had a bruise on his face in the area of the right eye.

Houk testified:

> "Well, we went immediately into the den, which is to the right -- the right door off the hallway, and Dr. Sam was half sitting -- I would say more slumped down in his easy chair, and I immediately went up to him and asked what happened, words to that effect, and he said, 'I don't know exactly, but somebody ought to try to do something for Marilyn,' and with that, my wife immediately went upstairs, and I remained with Dr. Sam, and I said something to the effect of 'Get ahold of yourself,' or something like that; 'Can you tell me what happened?'
>
> "And he said, 'I don't know. I just remember waking up on the couch, and I heard Marilyn screaming, and I started up the stairs, and somebody or something clobbered me, and the next thing I remember was coming to down on the beach.'
>
> "And that he remembered coming upstairs, and that he thought he tried to do something for Marilyn, and he says, 'That's all I remember.'" (R. 2273)

In the den was a desk, the drawers from which had been removed and some of them placed on top of one another in various parts of the room. The record discloses that later when Dr. Stephen Sheppard

2 **tents onto the floor. On the floor behind this desk, Marilyn's bloodstain-**
3 ed wrist watch was found by the police.

4 The north door in the living room was open at the time the
5 Houks arrived. Mrs. Houk went upstairs and found Marilyn in bed, dead.
6 Chip was asleep in his room.

7 The next person on the scene after the Houks was Officer
8 Fred Drenkhan of the Bay Village Police Department. Drenkhan received
9 the call at about 5:57 a.m. and arrived at the scene at 6:02 a.m. The Bay
10 Village Police Department, for which the defendant was police surgeon,
11 consists of some seven full time policemen and four part time police
12 officers, most of whom were personally well acquainted with the defendant
13 and other members of the Sheppard family.

14 Officer Drenkhan testified that he was on duty on the night
15 of the murder, patrolling Lake Road, and that he drove past the Sheppard
16 home approximately five or six times during the night, and observed no
17 hitchhikers or suspicious persons along theroad.

18 Upon going into the house, Drenkhan first looked into the den
19 and then immediately went upstairs by way of the kitchen. Going up-
20 stairs he noticed the couch on which Dr. Sam had been asleep and on it he
21 saw, neatly folded, the defendant's brown corduroy jacket (State's Exhi-
22 bit 8) (R. 2491-93).

23 In the bedroom Drenkhan saw Marilyn lying on a four-poster
24 bed, her head about three-fourths the way down on the bed, with both her
25 legs hanging over the north end and under a cross-bar, one leg exposed

and the other covered with a white sheet. **She was wearing** [illegible] blouse on the upper part of her body, pulled up so that **her breasts re-** mained exposed. Her head was severely beaten and was facing the door to the east. There was a great quantity of blood on the bed and many blood spots on the south and east walls. There were spots of blood in other parts of the room also, and on the furniture (State's Exhibits 9 and 10).

There was a second twin bed in this room to the west, and these beds were separated by a night stand on which there was a tele-phone, a clock, and a writing pad. The second bed had not been slept in and the sheets had been partially folded back. There was a chest of drawers against the west wall. There was a chair in the northeast cor-ner of the room, with certain of Marilyn's clothing on it, and near it, on the floor, there were a pair of panties and two pairs of Marilyn's shoes. The distance between the east wall and Marilyn's bed is approximately four feet.

Later on, after the arrival of the Coroner, when the sheet covering part of Marilyn's body was lifted, it was discovered that she was wearing one pajama pant leg but the other leg was completely bare.

Officer Drenkhan testified that there were three windows in this bedroom. One was partially open but the screen on it was locked from the inside. The other two windows were locked from the inside, and none of them showed any marks or signs of forcible entry. An in-spection of the entire home disclosed that nowhere on the doors or win-dows was there any sign of forcible entry, and in her bedroom, except

1 for her appearance and that of the bed on which she was lying, nothing
2 appeared to have been disturbed.

3 In the living room against the north wall was a drop-front
4 desk with four drawers. The lower three drawers were partially pulled
5 out, the top one being closed (State's Exhibit 13). The contents of these
6 drawers did not appear to have been disturbed. On the floor, in front
7 of this desk, there was found a small quantity of writing paper, tax stamps,
8 and other miscellaneous papers, not in great disarray. In the garage,
9 later that morning, Drenkhan saw the defendant's Lincoln Continental,
10 his Jaguar, and a jeep used in Civil Defense work.

11 Drenkhan was followed to the scene by Fireman Richard
12 Sommers, who had been directed to bring the ambulance, which he did,
13 and by Patrolman Roger Cavanaugh.

14 At 6:10 a.m. Dr. Richard Sheppard arrived at the scene,
15 and Mayor Houk heard the following conversation between Dr. Richard
16 and the defendant:

17 "Dr. Richard bent over Dr. Sam, and I heard him
say that, 'She's gone, Sam,' or words to that effect,
18 and Sam slumped farther down in his chair and said,
'Oh, my God, no,' or words to that effect.

19

"And then I heard Dr. Richard say either, 'Did you
20 do this?' or 'Did you have anything to do with it?'

21 "And Sam replied, 'Hell, no.'" (R. 2279)

22 Dr. Stephen Sheppard arrived at the defendant's home at approxi-
23 mately 6:15 a.m. With the assistance of Dr. Carver from Bay View
24 Hospital, he half carried and dragged the defendant to his station wagon,
25 according to his testimony, and along with Mrs. Betty Sheppard, Dr.

1 Steve's wife, they took the defendant to Bay View Hospital. All this
2 took place within a very few minutes after Dr. Steve's arrival, and at a
3 time when there was a stretcher in the house and an ambulance in the
4 yard. At or about the same time, Dr. Richard Sheppard removed Chip
5 from the home. All of this was done without asking permission of the
6 police officers.

7 In daylight, shortly before 6:30 a.m., Officer Drenkhan
8 went down to the lake, and while standing on the platform of the Sheppard
9 bath house, he observed that there was approximately five feet of beach
10 in the area immediately in front of the bath house; that the beach at the
11 foot of the stairs and in the surrounding area was smooth, and that there
12 was no indication of anyone having been on the beach (R. 2536).

13 Some time between 6:30 and 7:30 a.m., Drenkhan called
14 the Detective Bureau of the Cleveland Police Department and asked for
15 assistance.

16 Drenkhan had the following brief conversation with the
17 defendant on the morning of July 4th:

18 "Q And what did you say to the defendant, and what did the defendant say to you?

19

A I asked the defendant what had happened. He said that he heard Marilyn scream, that he remembered fighting on the stairs, that he was in the water, and then that he came upstairs.
20
21

22 Q Yes.

23 A That was all. That was the conversation.

24 Q Did you have any further conversation with him at any time that morning?
25

A No, I didn't." (R. 2557)

Drenkhan made no further attempt to question the defendant on July 4th, 5th, 6th or 7th concerning Marilyn's death. It was on July 7th that the defendant left Bay View Hospital to go to Marilyn's funeral.

Chief John Eaton of the Bay Village police stated that he arrived at the scene some time between 6:25 and 6:30 that morning, and while going upstairs to the murder room, he also noticed the defendant's brown corduroy jacket, neatly folded, lying on the couch, as previously described. He stated that a quantity of money was found in the house in various places, including $4 in change in a dressing table in the east bedroom, $100 in a desk drawer in the den, $20 in a bedroom on the second floor, and some $30 in a copper stein in the den.

Deputy Coroner Lester Adelson, a specialist in pathology, testified on behalf of the State as to the cause of Marilyn's death. She was found to be four months pregnant. There were 35 separate injuries on her head, face and hands. Of these, approximately 15 were to the head, causing many gaping lacerations of the skull and resulting in numerous comminuted fractures in this area. No physical injury in or about the vagina of Mrs. Sheppard was observed, (R 1981). Dr. Adelson took a smear from the vagina to examine microscopically and discovered no spermatazoa present (R 1886). He testified that she came to her death as the result of the following injuries:

"Q And will you tell the jury what caused her death ?

A Marilyn Sheppard came to her death as a result of multiple impacts to the head and face which resulted in comminuted fractures of the skull and separation

of the frontal suture, the seam I described, bilateral subdural hemorrhages, which means collections of blood immediately above the brain, diffuse bilateral subarachnoid hemorrhages, which are hemorrhages immediately on the brain, and contusion of the brain or bruising of the brain." (R. 1720)

Coroner Samuel R. Gerber arrived at the Sheppard home on the morning of July 4th at about 7:50 a.m. Later that morning, around 9:00 a.m., he saw the defendant at Bay View Hospital and had a conversation with him in which the defendant related that he was "clobbered" on the back of the head or neck by some unknown form when he rushed up to the head of the stairs after hearing Marilyn scream (R. 1380-1384).

Mr. Corrigan would not permit the coroner, when he arrived at the hospital at 11:00 o'clock on the morning of July 8th to talk to the defendant (R. 3064-3065). The defendant himself stipulated certain conditions to the Coroner before he would talk (R. 3068).

Dr. Gerber held an inquest, beginning on July 22nd, at Normandy School in Bay Village, where the defendant appeared as a witness. The defendant stated under oath at the inquest that he had never had an affair with Susan Hayes.

Dr. Gerber testified that at the inquest he asked the defendant the following questions and received the following answers relative to the defendant's encounter with his alleged assailant.

"Q Did you see the form on any of the stairways going down?

A I can't say that.

Q You did not catch up with it?

1 A Not on the way down.

2 ***

3 Q Did you see him on any landings?

4 A I cannot say specifically that I did.

5 Q Where is the first time that you saw him?

6 A Again?

7 Q Yes.

8 A It was on my way down from the landing down
9 to the beach.

10 Q Which landing are you talking about now?

11 A The landing of the beach house.

12 Q And where was he at that time?

13 A I cannot say specifically.

14 Q Was he on the beach?

15 A I am not sure.

16 Q Or was he at the foot of the stairway?

17 A Doctor, under such circumstances, I just couldn't
be sure exactly where it was.

18 Q What was the condition of the light at that time?

19 A I told you the light was not pitch black. It was--

20 Q At that time could you see the form, see how it
21 was dressed?

22 A That is the time as I progressed down the stair-
way -- that is the time I thought that I could see
23 the form.

24 Q Did the form that you saw have trousers on at
that time?

25 A I am not sure what he had on.

1 Q Did he have a coat on?

2 A I don't know what he had on.

3 Q Did he have a hat on?

4 A As I told you, I couldn't say.

5 Q Was this a white person or a colored person?

6 A I can't say for sure. I somehow after encountering him have the feeling that it was not a colored
7 person, but that is merely a feeling. It is not --
8 a fact that I can say specifically.

9 Q Did the color of the hair register?

10 A I can't say that I could see the color of the hair.

11 Q Did he have any hair?

12 A I felt that he had a large head, and it seemed to me like there was, as I mentioned earlier, a
13 sort of a bushy appearance.

14 Q You say you encountered him on the beach?

15 A Yes.

16 Q Did he grab you or did you grab him?

17 A Well, I felt as though I grabbed him.

18 Q In other words, you caught up to him?

19 A That was my feeling, but it seemed as though I had caught up with a steam roller.

20 ***

21 Q In other words, you caught up to him?

22 A That was my feeling, but it seemed as though I
23 had caught up with a steam roller, some immovable object that just turned and made very short
24 work of me.

25 Q When you grabbed him, what kind of clothes did he have? What did you feel?

1 A I can't say that I felt anything specific.

2 Q Did you feel any clothes?

3 A I can't say for sure.

4 Q You don't know whether he was naked or not? Did he have any clothes on?

5 A I felt that I grasped something solid.

6 Q Was it a human being?

7 A I felt that it was.

8 Q Did you have the T-shirt on at this time?

9 A I don't have any recollection of the T-shirt.

10 Q Did you have a corduroy jacket on at this time?

11 A I don't know.

12 Q After you grappled with him, or he grappled with you, what happened?

13

14 A I became -- I was -- I had a twisting, choking sensation, and that was about all I remember.

15 ***

16 Q Where was the twisting, choking sensation? Other than the choking sensation, where was the other sensation? That is the question.

17

18 A Other than what I told you, I don't believe I can give you any other specific information.

19

20 Q What did you realize next?

21 A I realized being -- I had a feeling of moving back and forth or being moved back and forth by water.

22

23 ***

24 I realized-- I had a feeling of moving back and forth or being moved back and forth by water. I felt -- I think that I may have coughed

25

or choked a time or two. I slowly came to some sort of consciousness. I got to my feet and went up the stairs. The time element --

Q Did you swallow any water?

A I don't know. Very likely I did.

Q When you first came to, where was your head and where was your feet? Where were your feet?

A My head was toward the south and my feet were into the lake.

Q How high were the waves at that time?

A The waves were -- well, I didn't notice the waves specifically, but it seemed as though they were moderately high. They were not very high, but it was not extremely calm.

Q Was it daylight then or was it still dark?

A I won't say that it was daylight, but it was much lighter. It was definitely light enough so you might call it daylight, but it was not bright day like it is now." (R. 3508-3513)

Dr. Gerber described further that when examining Marilyn's body on the morning of July 4th, he observed the impression of the band of her wrist watch in the dried blood on her left wrist at the base of the thumb. (State's Exhibits 9 and 45, Appendix C and E). He testified in that connection:

"Q Now, Dr. Gerber, when you examined the body of Marilyn Sheppard on July 4th, did you observe anything on her left hand in the vicinity of her wrist?

A Yes, sir.

Q What did you observe?

A I observed some dried blood that had the impressions of the bracelet of a watch on the left wrist.

1 Q And where on the wrist was that impression?

2 A Down towards the back of the hand.

3 Q Will you show on that wrist where that was?

4 A Right across this way (indicating).

5 Q I hand you what has been marked State's Exhibit 9, and ask you to point out --

6

7 THE COURT: Let's get the record clear on that. Show indicating over the base of the thumb. Is that right?

8

9 THE WITNESS: Beginning back at the wrist, at the bone.

10 THE COURT: Beginning back of the wrist bone and extending over --

11

12 THE WITNESS: Coming across the back of the hand.

13 THE COURT: --diagonally across the base of the thumb.

14

15 Q Handing you what has been marked State's Exhibit 9, and facing the jury, will you point out where you observed this impression?

16

17 A This is the left hand, and if you look closely right at the base of the thumb, and extending backward, extending up across and up towards the other side, you can see dried blood and you can see the imprint of the bracelet, of a stretch bracelet, over this particular area.

18

19

20 Q And was that on the left hand, sir?

21 A Yes, on the left wrist extending down to the hand.

22 Q I will hand you what has been marked State's Exhibit 45 and ask you whether or not that is a fair representation of what you saw on the hand, the left hand and wrist of Marilyn Sheppard?

23

24

25 A Yes, sir." (R. 3080-3081)

The coroner further [illegible]
indicate that the bracelet was in position when the blood stains were wet and remained in position until the blood was dry (R. 3131).

The pillow found by Dr. Gerber on Marilyn's deathbed was offered as an exhibit. A large, dry blood spot was evident on one side of the pillow, into which there was imprinted the outline of a surgical instrument or something similar to this type of instrument. (R. 3132-33) (State's Exhibit 34, Appendix D).

Dr. Gerber testified further that on the basis of the contents of Marilyn's stomach, the time when she had eaten her last meal, and the amount of food consumed by her, the appearance of her body at the time he first saw it, on the autopsy report and other information available, in his opinion she came to her death between three and four o'clock a.m. on July 4th.

When her body was brought to the morgue she had three rings on her left hand, ring finger. (R. 3924)

Among the personal effects of the defendant turned over to Dr. Gerber at Bay View Hospital by Dr. Richard Sheppard, Sr., on July 4th were the defendant's wallet and three one-dollar bills. In a secret compartment of the wallet $60 was found.

Robert T. Schottke, a member of the Homicide Unit of the Cleveland Police Department, who was assigned to assist the Bay Village police, testified that he and his partner, Patrick Gareau, arrived at the Sheppard home about 9:00 a.m. on July 4th. At about 11 that morning, Schottke went to Bay View Hospital and spoke to the defendant for about

1 **20 minutes, and had the following conversation with him:**

2 "Q Tell us what you said to him and what he said to you.

3 A We introduced ourselves, told him we were members of the Cleveland Homicide Squad, and that we had been
4 requested by the Bay Village Police Department to assist them in this homicide. We asked him to tell us
5 everything that he knew in regard to this matter.

6 Q And what did he say?

7 A At that time he told us that the evening before there was company over, the Aherns, and that later in
8 the evening he had fallen asleep on the couch, and while the Aherns were still there, and that while he
9 was sleeping on the couch he heard his wife scream, he ran upstairs --
10
Q Did he say where this couch was located?
11
A In the downstairs, in the living room.
12
Q Yes. Continue.
13
A He heard his wife scream, and he ran upstairs,
14 and when he got into the room he thought he seen a form. At the same time he heard someone working
15 over his wife. He was then struck on his head --side of the head and knocked unconscious, and when he woke
16 up he heard a noise downstairs. He ran downstairs and he thought he seen a form going out the front
17 door. He pursued this form down the steps, and when he got to the landing at the boat house, he does not
18 know if he jumped over the railing or if he ran down the steps, but he half-tackled this form on the beach.
19 There was a struggle and he was again knocked out.

20 When he regained consciousness, he was on the beach
21 on his stomach being wallowed back and forth by the waves.

22 He then went up the stairs into the home, wandered
23 around in a dazed condition. He went upstairs and looked at his wife, attempted to administer to her.
24 He felt that she was gone.

25 He then went downstairs again, was wandering around

trying to think of a phone number. He called a number and it turned out to be Mayor Houk. Mayor Houk came over.

Later on his brother Richard came over, and he was taken to Bay View Hospital.

Q Do you recall any further conversation?

A We asked him questions after he told us his story.

Q I see. In other words, first he made a recitation to you of what happened, is that correct?

A Yes, sir.

Q And then you and Gareau asked certain questions, is that correct?

A Yes, sir.

Q And did he answer those questions?

A Yes, sir, he did.

Q Now, will you please tell this jury what questions you asked and what answers he made?

A We asked him how the screams sounded to him when he woke up. He said they were loud screams. We asked him how long the screams lasted, and he stated all the while he was running up the steps. We asked him if he was assaulted by the one he heard working over his wife, and he says, no, that he had the impression that he was assaulted by someone else because he was assaulted just about the time he heard someone working over his wife. We asked him how many times he had been assaulted. He said two or three times, at the most. We asked him with what. He said with fists.

Q He said what?

A He said with fists. We then asked him if this was in both assaults, the one in the bedroom and on the beach, and he said yes.

We asked him if he could give us a description of the form that he seen running out the front door, and he stated that he was a big man, and we asked him if the man was white or colored. He said he must have been a white man because the dog always barked at colored people.

1 We asked him if he knew how tall the man was. He said he was bigger than what he was. He was about six foot three. He was dressed in dark clothing, and he was a dark complected white man.

We asked him if he had turned on any lights in the house. He stated no. We asked him if there were any lights on in the house, and he said he doesn't know, he doesn't recall.

We asked him about the beach, and he said that he was being wallowed back and forth by the waves, when he regained consciousness on the beach, that he was stomach down.

We asked him about Dr. Hoversten. We had heard he was a house guest, and he says, yes, he was staying at the house for a few days, and he said he had left yesterday afternoon to keep a golf engagement in Kent, Ohio.

We then asked him that we had heard rumors to the effect that Dr. Hoversten was infatuated with his wife. He said that he had heard those rumors, that they might be true, but he didn't pay any attention to them because he knew his wife was faithful to him.

We asked him if his wife had any men callers during the day while he was out.

Q Just a moment.

MR. PARRINO: Do you want that read back, Mr. Corrigan?

MR. CORRIGAN: Yes, the noise outside muffles his voice.

MR. PARRINO: Read that back, just the end of it, please.

(Answer read by the reporter as follows:

'We asked him if his wife had any men callers during the day while he was out.')

A He stated that there were several men who called during the day while he was out, but he didn't think anything

of it, and we asked him if he knew the names of these men. He stated that he could not recall them at this time. We asked him if his wife was having any affairs with men, and he stated no.

At that time that was just about the extent of our conversation with him.

Q And how long did that conversation last, approximately?

A Approximately 20 minutes.

Q Would you describe the defendant's appearance during that conversation?

A He was lying there on the bed and he answered all our questions in a normal tone. He did not ask us to repeat any questions. He answered all of the questions and spoke in a loud enough voice that we could hear. We was able to understand him." (R. 3571-3577)

The Bay Village police had asked a group of boys to assist them in searching the area north of the home extending to the lake. At approximately 1:30 p.m. on July 4th, Lawrence Houk, the son of Mayor Houk, found a green cloth bag (State's Exhibit 26) belonging to Dr. Sam, in the thick brush slightly to the east of the stairway leading to the beach. He turned this over to Schottke and Gareau, and upon examining it they found a ring, key chain with keys attached, and a watch, all belonging to Dr. Sam (State's Exhibits 26-A, -B, -C), and which defendant admitted he was wearing while he was asleep on the couch. The watch was an automatic, self-winding one, had water and moisture under the crystal, and there was blood on the face, blood on the band, blood on the rim and blood on the fastener of the watch (R. 3031). The watch was stopped at 4:15 (R. 3026).

On July 4th at 3:00 p.m., Schottke and Gareau, in company

1 **with Chief John Eaton of the Bay Village Police, had the following further**

2 conversation with the defendant at Bay View Hospital (R. 3586-3591):

3 Q All right. Now, would you tell this jury what you, Gareau and Chief Eaton stated to the defendant at
4 that point and what the defendant stated to you?

5 A At that time we told Dr. Sheppard that we would like to ask a few more questions. He said all right, and
6 we asked him at that time when he lay down on the couch to go to sleep, what clothing he had on at that
7 time.

8 He stated that he was dressed in a corduroy jacket, a T-shirt, trousers and loafers.

9

10 We asked him if -- what jewelry he had on at that time. He stated his wrist watch, a ring and a key chain with keys on it.

11

12 We asked him if he knew where his jewelry was at now. He stated no.

13 And we then showed him the green bag which we had brought along from the house and asked him if he
14 had ever seen that bag before. He stated it looks just like the bag in which he keeps motorboat tools.

15

16 And we asked him where this bag was kept. He stated in the drawer in the desk of his study.

17 We then showed him the wrist watch and asked him to identify the wrist watch, and he stated that it
18 looks just like his wrist watch, if it is not his wrist watch.

19

20 He was then shown the ring and asked if he could identify the ring; he stated that it was his class ring.

21 We showed him the key chain and the keys and asked him if he could identify them, and he stated that they
22 were his keys and his key chain.

23 We then asked him how the moisture and the water got into the wrist watch. He stated that a few days
24 before, that he had been playing golf with Otto Graham, that they were caught in a heavy downpour, and at
25 that time the water got into the crystal of the wrist

watch, that it was not running properly, his wife was going to take it back to Halle's where she purchased it.

We then told him that there was blood on the band and on the crystal of the wrist watch, asked him if he could tell us how the blood got on there. He stated that he remembered that at the time that he regained consciousness in the upstairs bedroom, that he had felt his wife's pulse at the neck, felt that she was gone, and at that time he must have gotten the blood on the wrist watch, and then he heard a noise downstairs and ran downstairs.

We told him that the jewelry had been found in a green bag about halfway down the hill near the lake, asked him if he could account how the jewelry got in this bag that was found on the side of the hill.

He says he didn't know how it got there, but someone must have taken the jewelry from him at the time when he was unconscious.

We then told him that we had examined his billfold and clothing at the Bay Village police station, and that his billfold was still in the hip pocket.

We asked, "If a burglar or someone had taken your jewelry, why didn't they take your billfold?"

He said he remembered at the time when he woke up upstairs he seen the billfold lying on the floor, and that he put it in his pocket and ran downstairs.

We then stated to him that he told us before that he had been on the beach and when he regained consciousness he was being wallowed back and forth by the waves on his stomach, since he was on his stomach, his face would be down, and that he knew as well as we did that an unconscious person can drown in as little as two inches of water.

We asked him how could he account for the fact that he did not drown. He stated that he knew an unconscious person could drown in as little as two inches of water, but that sometimes an unconscious person can help themselves, just like a football player who could play a half a game of football and after the game was over not realize that he was playing football.

We then stated to him that [illegible]
that he had been assaulted two or [illegible]
most with fists, but that he was wandering around
the home in a dazed condition, and if he can account
why he was wandering around in a dazed condition.

He said that he was just like a football player that could be injured in a game and play a half a game of football and not know that he was playing the game.

We then asked him when he had taken off his jacket. He stated that some time during the night he very faintly remembers waking up and being too warm and taking the jacket off and either placing it on the floor or placing it on the couch and then going back to sleep.

We told him that the jacket was found on the couch folded neatly, that if he had placed the jacket on the floor, it would still be on the floor, and that if it had been on the couch and he went back to sleep, he would have laid on the jacket and wrinkled it up.

We asked him if he had turned on any lights at any time when he was in the house. He stated no.

We then told him that we had heard that he had been keeping company with a nurse from Bay View Hospital, that this nurse had quit Bay View Hospital, and that she was now in Los Angeles, California, and that while he was in Los Angeles several months ago and while his wife was staying some place else he was seeing this nurse.

He stated, "That is not true."

We told him we heard that he had also given this nurse a wrist watch, and he stated that it was not true.

At that time I said, "The evidence points very strongly towards you and that in my opinion you are the one that killed your wife."

And he said, "Don't be ridiculous."

He says, "I have devoted my life to saving other lives and I love my wife."

He was then asked if he would take a lie detector test and he said yes. He asked how a lie detector worked

and we told him it takes the reaction of the respiratory system --

Q Just a minute, Bob.

MR. CORRIGAN: I can't hear you.

THE COURT: Now go ahead.

A The respiratory system and the blood pressure and the activity of the sweat pores on the palm of the hand, and that's recorded on a graph and the operator interprets the graph.

He said that due to his present condition that he didn't feel as though this would be a fair test and that he would not want to take the test at this particular time.

We told him that he would be able to take the test, if he wanted to, at the time when he felt better. (R. 3586-3591).

During this conversation with the defendant, Dr. Stephen Sheppard was in and out of the room several times. In addition to the foregoing, the defendant was asked if there were any narcotics in the house, and he stated, "No, but there may have been a few samples in my desk." Chip was not mentioned by the defendant either in his first or second conversation. On later occasions and in other conversations the defendant said he went to the door of Chip's room and peered into it before going downstairs and onto the beach to struggle with the unknown assailant.

On July 5th, Schottke and Gareau and Deputy Sheriff Carl Rossbach went to the hospital again to question the defendant, but they were not permitted to do so. There they saw Mr. William Corrigan, Sr., and Mr. Arthur Petersilge, attorneys for the defendant, as well as members of the Sheppard family.

1 On July 8th Schottke and Gareau were present at Bay View
2 Hospital to assist in the interrogation of the defendant but were not
3 permitted to question him, although Officer Drenkhan, who was present at
4 the request of the defendant, together with Deputy Sheriffs Rossbach and
5 Yettra did question him at that time. On July 21, 1954, at the request of
6 the Bay Village authorities, the Cleveland Police Department took over
7 the investigation.

8 Carl Rossbach, Deputy Sheriff, testified that he began
9 assisting the Bay Village police on July 5th. On July 5th, 6th and 7th
10 he attempted to question the defendant but was not permitted to do so.
11 On July 8th, with Officer Drenkhan and Deputy Sheriff Yettra, he did
12 question the defendant, and the defendant stated that he was attacked by
13 a tall, bushy-haired form (R. 3841-3846).

14 On the morning of July 4th, Michael S. Grabowski, a member
15 of the Cleveland Police Department, attached to the Scientific Identifica-
16 tion Unit, went to the Sheppard home at about 8:30 a.m. for the purpose of
17 assisting the Bay Village police in the taking of photographs and searching
18 for fingerprints. On the drop-front desk in the living room and in other
19 places he discovered peculiar straight lines as though the surfaces had
20 been wiped with some rough cloth. On the drop-front desk he found only
21 a partial palm print, later identified as Chip's. On the doorknob of the
22 door on the north side of the living room he found some smudged marks,
23 none of which were even partially clear as fingerprints. He examined
24 various other places and objects but no other finger or palm prints were
25 found in the living room or in the den.

1 Henry E. Dombroski testified that he is a chemist and a
2 member of the Department of Scientific Identification of the Cleveland
3 Police Department, and that commencing on July 23rd he together with
4 other members of his unit made a scientific investigation of the Sheppard
5 home.
6 Mary E. Cowan also testified on behalf of the State. She
7 stated that she had been employed by the County Coroner's office for 15
8 years as a medical technologist. Dombroski and Miss Cowan testified that
9 they found numerous spots that were determined scientifically to be blood
10 spots at various places in the Sheppard home, including the upper hallway,
11 the steps leading to the second floor, the living room, the garage, and the
12 room over the garage. In addition to those, additional tests were made as
13 to some of these spots. In several places on the basement steps and
14 the steps leading to the second floor, spots of human blood were found.
15 Miss Cowan examined the green bag heretofore described that had con-
16 tained the defendant's ring, key chain and watch, and stated that there
17 were no blood stains anywhere, either on the inner or the outer surfaces
18 of the bag.
19 Cyril M. Lipaj, a Bay Village police officer, testified that
20 on July 14th an old, battered and torn T-shirt was found near the pier
21 of the home adjacent to the Sheppard residence, but later testimony showed
22 that this was neither the size nor make of other T-shirts found in the
23 Sheppard home.
24 Mrs. Doris Bender testified that she lived at 294 Ruth Street,
25 Bay Village, Ohio, and that on the morning of July 4th at approximately

2:15 or 2:30 a.m., she along with her husband and child, were driving past the defendant's home. She noticed that at that time there was one light on upstairs and one on downstairs on the east side of the house (R. 4174-77).

Thomas R. Weigle, the record discloses, was Marilyn's cousin. He related that while he was visitng at the defendant's home in March, 1952, Dr. Sam flew into a rage and administered a severe beating to Chip (R. 4821).

Elnora Helms, who worked from time to time as a maid at the Sheppard home, testified that when she examined the murder bedroom some two weeks after July 4th, she could not find anything missing therefrom (R. 3984). She also testified that after Dr. Sam Sheppard and Marilyn Sheppard returned from their spring visit to California they occupied separate beds in the north room, and that prior to such visit they occupied a double bed in the eastern room. Elnora Helms also testified that Koko, the dog, would not bark at persons with whom she had become familiar, but would bark at strangers.

Miss Susan Hayes, age 23, appeared as a witness on behalf of the State, and related that for a period of time she was employed at Bay View Hospital as a laboratory technician. She worked with the defendant on many emergency cases. She worked at Bay View from early in 1949 to December 1952, and again from August 1953 to February 3, 1954, after which she went to California. During that time the defendant expressed his love for her and had sexual relations with her, in the defendant's automobile, at her apartment, and at the Fairview Park Clinic

1 **operated by the Sheppards. She testified that on a number of occasions**

2 the defendant discussed divorcing his wife with her (R. 4853-4856).

3 Susan Hayes testified:

4 "Q And what did he say? Tell us what the conversation was, please?

5

6 A Well, I remember him saying that he loved his wife very much, but not so much as a wife. He was thinking of getting a divorce, but that he wasn't sure that

7 his father would approve.

8 Q He said he loved his wife very much?

9 A Yes.

10 Q He was thinking of a divorce?

11 A Yes.

12 Q That he did not love her as a wife?

13 A Yes.

14 ***

15 Q But he wasn't sure?

16 A He didn't say that.

17 Q What did he say then?

18 A He said he loved his wife very much, but he was thinking of getting adivorce.

19

20 Q And did he say as to how he loved his wife?

21 A No.

22 Q Do you recall his words on that subject?

23 A Yes. He said he loved his wife very much but that he was thinking of getting a divorce.

24 Q I see. And what else did he say?

25 A That he wasn't sure that his father would approve." (R. 4853-4854).

Before she quit her job at Bay View the defendant gave her a ring as a gift; and before she left for California she gave the defendant her California address.

In March 1954 the defendant and Marilyn went to California and when they reached Los Angeles Marilyn went on to Monterey, California, to stay at the ranch of Dr. Randall Chapman and remained there with Mrs. Chapman. The Chapmans and the Sheppards had been well acquainted for several years. The Chapman ranch is located some 300 miles north of Los Angeles, where the defendant had remained.

Shortly after Marilyn's departure for Monterey, the defendant called Miss Hayes, who was living in a suburb of Los Angeles, and saw her. The same evening they attended a party together at the home of Dr. Arthur Miller, with whom both the defendant and Marilyn had been acquainted for many years. Attending the party were Dr. Randall Chapman and other doctor friends who knew both Marilyn and the defendant. The defendant and Miss Hayes remained at the Miller home that night, sharing the same bed. The following day the defendant drove Miss Hayes to her residence, where she picked up some clothing and returned with him to the Miller home, where she and the defendant lived together for approximately a week, occupying the same room. They had sexual relations there, on numerous occasions. During that week, the defendant, Miss Hayes, the Millers and some others all went to San Diego to attend a wedding. Miss Hayes lost her wrist watch on the trip and the defendant bought her another one.

After staying with Miss Hayes, the defendant drove up to the

Monterey ranch with Dr. Randall Chapman, and from there he and Marilyn returned to Ohio.

The evidence established that Dr. Lester Hoversten visited the defendant at Bay View Hospital on July 5th, at which time Dr. Steve came into the room, was irritated and stated that he had left strict orders that no one was to see Sam unless he, Dr. Steve, was first notified (R. 3803). Dr. Hoversten testified relative to that incident as follows:

"Q Did Steve leave at any time after he came in?

A Yes. After speaking sharply to me, he turned on his heel and walked quickly out of the room, and then he came back in just a few minutes.

Q And when he came back in, did he say anything?

A Yes. I remember I was sitting on the left hand side of the bed, and Steve sat near the foot of the bed, and he advised Dr. Sam to go over in his mind several times a day --

As I recall, Dr. Steve addressed Dr. Sam, and said in words to this effect, 'You should review in your mind several times a day the sequence of events as they happened so that you will have your story straight when questioned,' and then he gave as an example, 'You were upstairs, you went downstairs, and from here to there,' and so forth." (R. 3812-13)

Dr. Hoversten testified further that the defendant had written Marilyn a letter concerning a divorce while he was in California. The defendant had permitted Dr. Hoversten to read this letter, at which Dr. Hoversten advised him against sending it (R. 3771-3777).

Dr. Hoversten further testified that the defendant again discussed divorcing Marilyn with him in the spring of 1953. At this time Dr. Hoversten advised the defendant to speak to his parents about

this and to go slowly when considering divorce since "he might be actually jumping from the frying pan into the fire." (R. 3779-3781).

The defendant is six feet tall, weighs around 180 pounds, and in past years had been active in many sports including football, tennis, track, and up to July had played basketball with some regularity and was an expert water skier.

Shortly after his arrival at Bay View Hospital on July 4th, X-rays of the defendant were taken, in which there was allegedly found to be a chip fracture in the infra-posterior margin of the second cervical vertebral spinous process. Dr. Stephen Sheppard announced that the defendant had a broken neck. Additional X-rays of this area of the spine were taken on July 7th and this supposed fracture did not appear in them. On July 8th the defendant was discharged as a patient from Bay View Hospital, wearing an orthopedic collar, which he continued to wear until after his arrest on July 30th.

Dr. C. W. Elkins, M. D., was called as a witness by the defense. He was personally acquainted with the Sheppards for some time and on July 4th was called in as a consultant specialist. He testified that at no time did he have the opinion or advise that Dr. Sam could not be extensively questioned by the police.

Leo Stawicki and Richard Knitter testified on behalf of the defense. Stawicki testified that he was driving an automobile on Lake Road on the morning of July 4th, around 2:30 a.m. and noticed a man standing in a driveway next to a tree which he described as six feet tall, with a long face and bushy hair standing up, crew hair cut (R. 6049, 6050,

6097). Stawicki's report to the police came after the Sheppard family had offered a $10,000 reward for the arrest and conviction of Marilyn's killer. Knitter testified that he saw a stranger on the roadway near the Sheppard home on the morning of July 4th, as he was driving along around 2:50 a.m., but did not report it to the police until July 12th, after the reward had been made.

The defendant took the stand and claimed that on the night in question he was sleeping on the couch downstairs, heard his wife scream and ran upstairs and was knocked out when he entered the bedroom; that he saw a light garment that had the appearance of having someone inside of it (R. 6559) at his wife's bed and that something hit him from behind; that he came to, heard a noise downstairs, went down the stairs and out the door of the house leading to the lake, chasing a dark form down the stairway to the water where again the defendant was rendered unconscious by this form. As to this, the defendant testified:

"Q Well, will you describe it in more detail, then?

A My recollection is that it was a good sized man. I felt that it was a man.

***

Q And I mean by that, Doctor, not what you felt but what you actually know.

A It was a form that seemed to me to be relatively good sized, evidence of a large head with a bushy appearance on the top.

Q And when did you determine that it had a head, Doctor?

A At that time, I would say, was the first time I could be absolutely sure that --

Q At what time?

A At the time that I saw the form going from the landing down to the beach." (R. 6581-82)

The defendant testified further on cross examination:

"Q Did you have the feeling that this form was the thing that was responsible for your wife's death?

A Yes, sir, I did.

Q And you don't know whether you struck at it or not?

A I don't know for sure. My feeling was to tackle it or get ahold of it and bring it down, and then do what I could.

Q Well, now, after you came through -- or came to, rather, and you found yourself down on the beach, with water washing up on you, what did you do then?

A Well, I very gradually came to some sort of sensation, staggered to my feet and started to eventually ascend the stairway to the yard and to my home.

Q And when you came to on the beach, did you see anything of this form?

A No, sir, I didn't." (R. 6585)

The defendant further testified that he came up from the beach into the house and went upstairs, turned on no lights in the bedroom, examined his wife and determined that she was gone. He then went downstairs and later called Mayor Houk.

The Sheppard home, the surrounding area, and the lake itself out some distance were searched, on July 4th and at other times, but neither the murder weapon nor the defendant's T-shirt were ever found.

Other pertinent parts of the evidence will be referred to in the argument which follows:

ASSIGNMENT OF ERROR NO. 1

THERE WAS NO ERROR IN DENYING THE MOTIONS FOR A DIRECTED VERDICT OR FOR DISMISSAL OF THE INDICTMENT.

THE VERDICT WAS SUSTAINED BY SUFFICIENT EVIDENCE.

Under their first assignment of error the defense attempt to state in condensed form what they choose to call the findings of the Court of Appeals. They quote portions of the opinion of the appellate court and charge that court with faulty interpretations and with an unjustified analysis of the evidence. They offer their own interpretation and analysis of the evidence and insist that the court should have adopted such interpretation and analysis as its own.

We suggest that this court go directly to the opinion and consider it in its entirety, rather than accept the construction given thereto by the defense.

It is claimed that all of the evidence given by the appellant, except his statements, his injuries, and the two defense witnesses who claim they saw a man in the vicinity of the appellant's home, was brushed aside by the Court of Appeals, (App. Br., pp.10-22). The Court of Appeals did not sit as a jury in this case. Counsel for the appellant seem to take the position that the Court of Appeals was duty bound to accept the appellant's version of what occurred at the time of this murder, to believe the appellant and his witnesses and give weight to their testimony; and, on the other hand, to disbelieve the State's witnesses or to give little weight

to their testimony. This, we submit, was not the function of the Court of Appeals at all. These were questions for the jury to decide. It was for the jury to determine whom to believe and whom not to believe, and what to believe and what not to believe, and what weight was to be given to the testimony of any particular witness.

As stated by Judge Turner in State v. Petro, 148 O.S. 473, 501:

> "It is the minds of the jurors and not the minds of the judges of an appellate court that are to be convinced. The jurors see the witnesses and observe their demeanor. The credibility to be given to each and all of these witnesses and to part or all of their respective testimony is for the jury. The question to be determined by the appellate court is: Does the record contain evidence from which a jury would be justified in concluding that the accused was guilty beyond a reasonable doubt?"***

Counsel for the defendant attempt to maintain that the evidence in this case was not sufficient to exclude every other reasonable hypothesis than that of the guilt of this defendant of the murder of his wife, by suggesting that this murder might be the result of a sex attack and/or a burglarious intruder.

If this victim had been murdered by an intruder whose only motive was a sex attack, why would such an intruder take the defendant's watch, ring and key chain which he had on his person that night?

Under the evidence in this case, this Court is asked to assume by such a claim of the defense that this woman was killed in her home by a sex maniac who entered that home in the dead of night, while Koko, the dog, was there and did not bark, with a formidable weapon, knowing in advance that the back door was unlocked, passed up the defendant who

was lying on a couch adjacent to the stairway and who could be seen by anyone coming in that door and going up the stairway, entered the bedroom of the victim without having turned on any lights on the stairway or in the bedroom, attempted to attack the woman and proceeded to beat her skull and body with some 35 blows of this weapon before the defendant could come to her aid; and when the defendant did come to her aid without having turned on any lights, the intruder felled this 180-pound athlete with only a blow of the fist, did not use the same formidable weapon on the defendant to erase him as an eye-witness to this deed; left him lying in the bedroom and went downstairs in the dark, started to make some noise and waited around downstairs to be chased by the defendant out the lake door of the house, which the evidence shows had been locked by Mrs. Ahern and closed with a night chain; ran down the stairway to the beach, the only place where the intruder could not get away from the defendant other than going into the water, struggled with the defendant on the beach and again did not attempt to eliminate him as an eye-witness to this deed; removed the T-shirt from the defendant's body, removed his wrist watch, key chain and ring from his person, placed the defendant's watch which had blood on it and water under the crystal, the key chain and ring into the green bag which had been in a desk drawer in the defendant's den, took the bag and its contents outside the house and threw it away; set the home up to make it look as though a burglar had entered the place, removed any fingerprints, and then departed with the weapon and the T-shirt, having thrown the rest of the loot away. And now defense counsel urge that the motive of the intruder, under all of these circumstances, <u>was a sex attack.</u>

That someone murdered Marilyn Sheppard on July 4, 1954, in that home is clear beyond all doubt and the evidence is clear beyond a reasonable doubt that no human being other than the defendant had the exclusive opportunity to do the deed. There was evidence of a burglary set up in that home but even this idea of a burglar, though urged by the defendant's counsel during the trial, was finally abandoned by counsel in their argument to the jury when they said:

> "Well, of course, we don't claim there was a burglary. I mean I don't know why the intruder was there. We claim there was a man there, but whether he was there for a burglary or not, I don't know. We never claimed that he was." (R. 62 Supp.)

If there wasn't a burglar in that home that night, and the defense finally conceded that they weren't claiming there was a burglar in there, who put the watch, ring and key chain in that green bag? The defendant had been wearing these items. Someone set it up to make it look as though a burglar entered that home and committed this murder, and who other than the defendant would simulate a burglary; who, other than the defendant would have reason so to do; who, other than the defendant had the time and the exclusive opportunity to set up this evidence of a burglary?

The defendant's watch had stopped at 4:15 (R. 3026, 3581). The Coroner testified that Marilyn was killed between 3:00 and 4:00 a.m. What was the defendant doing in the hour and a half that elapsed between the time his watch stopped, his wife was killed, and 5:50 a.m. when he called Mayor Houk, who was the first one he informed as to what happened to Marilyn? For some time prior to 4:15 a.m. and before 5:50 a.m.

this defendant had the place all to himself.

Let us see whether the evidence excludes the hypothesis that a burglar did the killing, because if it does, then the only person left in that home to commit this crime was the defendant. There was no evidence of a forcible entry into this home and if a burglar entered the back door which the defense claim may have been unlocked, the defendant's own statement that he was lying sleeping on the couch until he heard his wife scream makes it absolutely clear that the burglar could have burglarized the place (all of the evidence of the ransacking was downstairs), gotten what he wanted and gone away without having to go upstairs to kill the defendant's wife to accomplish the burglary. The evidence shows that all that the "burglar" got was a green bag with the defendant's wrist watch, key chain and ring in it, and then the "burglar" threw those items away. There was no evidence in this case that it was necessary to go upstairs to murder thiswoman to secure the defendant's wrist watch, key chain and ring. He had those on his person.

From the evidence in this case, the jury were justified in concluding as a matter of fact that it was too unreasonable to believe that a burglar would have spared this powerful man lying downstairs in full view of anyone who may have entered that door, and go upstairs and kill the wife in order to ransack the downstairs portion of the home. This strange burglar, contrary to what is the custom of burglars, chose to kill rather than to get away with the defendant's valuables. And a strange way this "burglar" had of ransacking. He pulled out some drawers in a desk and then neatly stacked those drawers aside the desk. He pulled out

the drawers of another desk in the living room but did not disturb the contents of those drawers. There was money in the defendant's wallet and money in various places in the house which this burglar did not take. He searched for this green bag which was in a drawer in the defendant's desk in his study in order to carry out of that house three small items, namely, the defendant's watch, key chain and ring, all of which the burglar could have put in his pocket and made a quick getaway, if he really wanted those items. And this peculiar burglar evidently did not want these items because he threw them away. They were found in the weeds on the hill leading to the beach.

Then again, this burglar did another strange thing -- his unnatural doings as a burglar involved in the story the defendant tells -- here is a burglar up in that bedroom bludgeoning this defenseless woman to death, the defendant appears on the scene and appears so late that the burglar has had an opportunity to get in some 35 blows on this woman's skull and body with a deadly weapon. The burglar then becomes highly considerate of the defendant who surprises him in the commission of this crime, and only "clobbers" the defendant -- not with the same deadly weapon -- the blow to the defendant was a fist blow. The supposition that this burglar could not inflict one single mortal or serious wound on this defendant (the defendant was discharged from the hospital four days after the murder and attended his wife's funeral the day prior to his discharge) while he was able at the same time to inflict mortal wounds on this defenseless woman, is exceedingly unreasonable and fallacious. The jury were justified in finding from that part of the evidence offered by the

defendant in his story as to what happened in the bedroom that any wounds the defendant claimed he had were either self-inflicted or inflicted by Marilyn.

Nor is there any explanation offered by the defendant as to how it could be that this burglar or intruder would beat this woman to death with a formidable weapon to secure the defendant's wrist watch, key chain and ring which were on his person that night. Marilyn's rings were still on her fingers when she was found, so this burglar was not murdering her to secure any of her valuables. Marilyn's wrist watch was found in the defendant's study so this burglar did not take that watch. And, obviously, no burglar would have had to murder her in order to take any valuables such as found in the green bag. The evidence conclusively established that they came from the person of the defendant.

Wasn't it reasonable for the jury to conclude that no intruder entered this home that night, and that since there was evidence of a fake burglary, that the defendant set up this fake burglary to divert suspicion from himself as his wife's murderer? There is no other reasonable hypothesis left under all of this evidence, as to who did this deed except that it was done by the defendant. Every other reasonable hypothesis is excluded by the evidence.

Beyond a reasonable doubt, no one but the defendant, her husband, had the exclusive opportunity and the time to kill this woman in the manner that she was murdered. There could be no motive for fabricating evidence such as the burglary set up other than the defendan'ts own guilt of the homicide, and no outsider had the opportunity and

the time, nor the motive, to fabricate a burglary in that home.

The evidence in this case is undisputed that on the night of July 3rd after the departure of the Aherns from the Sheppard home, there were three living persons remaining there, Marilyn, Chip, and the defendant. At the time of the arrival of Mr. and Mrs. Houk, the first persons to appear on the scene that morning, two of the persons, Chip and the defendant, were still alive, and Marilyn was dead. Chip was sound asleep. It is significant to note that when the Houks arrived, the defendant was offered and refused a drink of whiskey because he "wanted to keep his senses." For what? So that he would not get confused on the story that he had concocted before the Houks arrived as to how he would explain this murder?

Thereafter, upon being asked what had happened, the defendant told a fantastic and wholly incredible story. The jury heard the defendant's stories which he told at the inquest, which he told to the police officers, which he told in his written statement and which he told on the trial, and being judges of the facts and of the credibility of the witnesses, and it being their province to weigh all of the evidence, they evidently concluded that they were too unreasonable for belief and justifiably so. We have heretofore quoted portions of his testimony at the inquest, what he told Coroner Gerber and what he told the police officers and his story in his written statement (State's Exhibit 48) was in substance as follows:

The defendant said he was lying on the couch in the living room watching television and fell asleep; that he heard his wife cry out

or scream, at which time he ran upstairs and charged into their bedroom and saw a form with a light garment (R. 3621). At that time he grappled with something or someone and was struck down. He said, "It seems like I was hit from behind somehow but had grappled this individual from in front or generally in front of me." The next thing he knew he was gathering his senses while coming to in a sitting position next to the bed and recognized a slight reflection on a badge that he had on his wallet. He picked up the wallet and "came to the realization" that he had been struck.

He said he looked at his wife and believed that he took her pulse and "felt that she was gonè"; that he instinctively "ran" into his youngster's room and determined that he was all right. After that, he thought he heard a noise downstairs and went down the stairs as rapidly as he could, rounded the L of the living room and saw a "form" progressing rapidly. He pursued this form through the front door, over the porch, out the screen door and down the steps to the beach house landing and then on down the steps to the beach. The defendant said he then lunged or jumped and grasped this form in some manner from the back, "either body or leg, it was something solid" (R. 3623) and he "had a feeling of twisting or choking and this terminated my consciousness."

The defendant said that the next thing he knew he came to a very groggy recollection of being at the water's edge on his face, being wallowed back and forth by the waves; that he didn't know how long it took but he staggered up the stairs toward the house and at some time came to the realization that something was wrong and that his wife had been injured. He went back upstairs and looked at his wife, felt her, checked her

pulse on her neck and determined that she was gone.

After determining that his wife "was gone," he said he believes he paced in and out of the room and "may have re-examined her"; that he went downstairs, "searching for a name, a number or what to do." He said, "A number came to me and I called, believing that this number was Mr. Houk's." (R. 3624)

He said that the Houks arrived shortly thereafter and during the period between the time that he called them and their arrival, he paced back and forth somewhere in the house. He went into the den either before or shortly after the Houks arrived. At this point in his story, the defendant volunteered: "I didn't touch the back door on the road side to my recollection." Shortly after the Houks arrived, the defendant said one of them poured half a glass of whiskey and told him to drink it and he refused to drink because he was trying to recover his senses. He said then, "I soon lay down on the floor," and Mr. and Mrs. Houk went upstairs.

So glaring in its absurdity, improbability and unreasonableness was that tale of the defendant in view of the evidence in this case, that the jurors' minds must have recoiled when it was offered to them as the truth of what occurred in that home that night. His story defies common sense, and from the evidence, the jury were justified in concluding that it was too unreasonable to be worthy of belief.

The evidence established that when the Aherns left that home, the defendant was lying on the couch with a jacket on, a T-shirt, and his wrist watch and the jury were justified in inferring that the defendant,

before going up to that bedroom that night, was fully awake and knew what he was doing. His jacket that he had been wearing while lying on that couch was found neatly folded on the couch. He offered no explanation on the trial as to when he removed that jacket, other than a vague recollection (as all of his recollections were vague and misty) that he may have taken it off while sleeping there. The evidence established that he could not have had this jacket on when he started upstairs and later pursued this phantom out of the house and down to the water, because the defendant claims that he lay in the water for an unknown period of time and, as we say, the jacket was found dry and neatly folded on the couch where he had been sleeping, and had no blood on it.

The jury were justified in concluding that there was no one up in that bedroom murdering this woman but the defendant. Other than the appearance of the victim as she lay on that bed, there was no sign of any struggle having taken place in that room with any intruder.

The victim's rings were still on her finger so no burglar had been in that room murdering her for her valuables. There was no evidence that she had been sexually attacked. Further, the evidence established that no one but the defendant had the opportunity and the time to remove the victim's wrist watch from her wrist, and that this watch was not removed from her wrist until some time after the murder. The evidence clearly established that the victim's wrist watch had remained on her wrist for some time after the murder because the blood had dried and left an imprint of her wrist watch band (a bracelet band) on her wrist. This was the watch found in the defendant's den in the same location as was the green

bag originally.

No one but the defendant had the time and the exclusive opportunity to remove the object from the pillow on the victim's bed which the evidence clearly established had lain there for some time after the murder because the blood on it had dried and left an outline of some kind of instrument on that pillow. The jury were justified in concluding from this evidence that the defendant was the only one in that house who had the time and opportunity to remove that instrument from that pillow.

The defendant's wrist watch was found with blood on it, in a green bag that had no blood on it. The blood was on the crystal and on the upper band of the watch. The jury were justified in concluding that it was the defendant and no burglar who placed that watch in this bag in an attempt to deceive and divert suspicion from himself. The defendant attempted to explain the blood on the watch by claiming that he must have gotten it on the watch at the time he took his wife's pulse at the neck. He told Coroner Gerber that when he came up to the bedroom the last time, he took her pulse at the neck (R. 2983, 3102, 3123). The watch, according to his own story, should have been gone by that time, if taken by the "form." He offered no explanation as to how the watch could have gotten into the green bag other than that it must have been taken off him when he was unconscious.

According to the defendant's own story, before he could touch his wife in that bedroom, he got clobbered. If, after he came to, he touched her and got the blood on the watch then, no burglar could have taken the watch from him while he was knocked out the first time. The

1 only other opportunity for a burglar to take the watch off his person was
2 when he was down on the beach, knocked out the second time. If a bur-
3 glar took the watch off the defendant down at the beach, the burglar would
4 have had to go back to the house, search for the green bag, put the watch
5 in the green bag, take it outside and throw it down the hill. No burglar
6 or phantom had that green bag in his possession while he was being pursued
7 down to the beach by the defendant and threw it away at that time, since the
8 watch could not have been in the green bag at that time because the only
9 opportunity the burglar had to remove it from the defendant's person was
10 down on the beach. And why would a burglar throw a bag among the weeds
11 with these valuables in it, after knocking the defendant unconscious on
12 the beach? He had every opportunity at that time to get away with these
13 items.
14 Further, as stated, there was no blood on the green bag and
15 the blood on the watch would have had to dry in order not to leave a stain
16 on the bag. The jury could reasonably infer, therefore, that the watch of
17 the defendant was placed in that bag some time after the murder, after the
18 blood had dried on the watch, and no one but the defendant had that oppor-
19 tunity.
20 And strange it was that the defendant took his wife's pulse
21 with his left hand, which necessarily follows as a fact if he got the blood
22 on the watch by taking her pulse. And strange it was that the blood on
23 the watch was on the upper surface of the watch where it could not
24 reasonably be expected to be if gotten on there as a result of taking the
25 victim's pulse. There was no "form" around, according to the defendant's

1 own story, after he came up from the beach and felt his wife's pulse.

2 When the defendant was pursuing this phantom down to the

3 water, he told Officer Schottke that when he got to the landing at the boat

4 house he does not know "if he jumped over the railing or if he ran down

5 the steps." Could not his actual injury have resulted from a jump and

6 fall?

7 And why was the defendant going down to that water with his

8 wife lying brutally murdered, instead of summoning help? The deed was

9 done by that time, he knew that "she was gone" or at least needed help,

10 and he knew he was only chasing a phantom, because according to his own

11 story, he was pursuing only a "form." He went down to that water for

12 some other purpose than to catch this form. There was evidence on his

13 trousers of a bloodstain. His T-shirt that he had been wearing while he

14 was lying on that couch has never been found and the jury were justified

15 in inferring that that T-shirt was splashed with blood and that the defendant

16 had a reason therefore for disposing of it. He offered no explanation as

17 to what may have happened to his T-shirt. He claimed that he had not at

18 any time that night washed his hands, but if he took his wife's pulse and as

19 a result got blood on his watch, some blood would have gotten on his hand

20 also. And if he got the blood on the watch after he came up from the

21 water, no burglar, not even a "form" was around at that time.

22 There were bloodstains around the house. There was evi-

23 dence of an attempt to remove fingerprints in that home. Who but the

24 defendant had the opportunity after the murder to accomplish the removal

25 of fingerprints?

The evidence shows that the defendant made no effort to summon help while he was up in that bedroom, which he could readily have done because there was a telephone on the night stand in that room. He made no effort to do anything to help his wife at that time. During the entire period of time when the defendant claims he heard his wife scream, to and including the time he returned to the house from the beach and again went upstairs to examine his wife, he turned on no lights in the house, according to his own testimony. Why? The evidence shows that there was a light switch at the bottom of the stairway as well as at the top of the stairway. If, as he says, he heard Marilyn scream, why did he not immediately turn on the lights by flipping the switch at the bottom of the stairway? He went into that bedroom again to examine his wife after he returned from the lake, but turned on no light in that room at that time, according to his testimony. Why? And the defendant, according to his own story, although twice ascertaining that his wife "was gone," told the Houks and his brother, Dr. Richard, that something ought to be done for Marilyn. Why? He knew that she was dead when these persons arrived.

And who would have waited around that home until after the blood had dried and then removed that instrument from the pillow on the victim's bed, and the watch from her wrist, on which the blood had also dried and left an imprint of the bracelet? Who could possibly have done that except the defendant?

With all of this evidence before them, the jury were fully justified in concluding that this defendant wasn't chasing any phantom down

to the water but was being pursued by his own conscience, and ran down to the water for purposes other than to catch his wife's murderer - to wash the blood off his body and his clothing. And the jury were justified in concluding that this defendant then came back into the house, realized the seriousness of what was confronting him and that is when this fake burglary was set up to deceive anybody who might investigate. The jury could reasonably conclude also that that is when whatever instrument he had used to bludgeon his wife was taken from that house, and the T-shirt that he had been wearing was disposed of.

In this Court the defense urge that:

> "Except the absence of the T-shirt and the fact that the appellant was in his home at the time his wife was murdered, every other item of evidence introduced by the State could be connected with someone other than the appellant. No weapon has been identified and no motive is shown." (App. Br., pp. 462-463)

In the Court below, the defense stated that:

> "With two minor exceptions there is no circumstantial evidence of any value whatsoever: (1) the water under the appellant's wrist watch crystal; (2) the loss of the shirt." (App. Br., C. of A., p. 348).

What about the blood on defendant's wrist watch?

What about the blood on Marilyn's wrist watch, the place where it was found (the den), and the fact that it was removed from her wrist after the blood had dried?

How about the impression of an instrument on the pillow and the removal of the instrument after the blood had dried?

What of the fact that there was no bloodstain on the green cloth bag in which the defendant's blood-stained wrist watch was found,

indicating that the watch was put in the bag after the blood had dried?

What about the blood on the stairways and in the basement?

And how about his neatly folded corduroy jacket found on the couch, dry and without bloodstains?

And why was the defendant whisked away by his brother Stephen without consulting the police or the Mayor, and without using the stretcher and the ambulance available, in the light of the claimed serious injuries?

And if Marilyn screamed as the defendant claims she did, why was not Chip awakened; and if there was some intruder in the house, why did not the dog Koko bark?

Consider also the spontaneous utterance of Dr. Richard Sheppard to his brother, the defendant, when he stated, "Did you do this?" or "Did you have anything to do with it?"

Consider also the exaggeration of the injuries to the defendant: The claim of a broken neck, the final X-rays showing no fracture whatever, and the activities of the appellant in the pursuit of his practice as a doctor within a few days thereafter. Consider also the evidence that the defendant was not averse as a doctor in suggesting to Mrs. Houk in a conversation at his home pertaining to insurance in case of an accident, that where there was no obvious injury a head injury could be easily claimed as far as insurance was concerned (R. 2414-2417).

Consider also the fake burglary:

The billfold of the defendant not taken.

Marilyn's rings not taken.

Marilyn's wrist watch not taken, but found in the den of the defendant, in the very same room in which the green bag was kept.

Compartments in defendant's upturned medical kit undisturbed.

The drawers of drop-leaf desk in living room pulled out but contents undisturbed.

The drawers in a desk in the defendant's den neatly stacked beside the desk.

The absence of fingerprints due to wiping by rough cloth.

Relatively inconsequential items placed in green bag and bag then thrown away.

No evidence of a forcible entry.

Consider also the fact that the defendant's watch, when found was stopped at 4:15 and, according to the Coroner, the time of death was between 3:00 and 4:00 a.m

And why did the defendant fail to call for help immediately, with a telephone available in that bedroom? Why did he wait until 5:50 a. m. and then call his friend Mayor Houk?

What about his incredible and fantastic story of encounters with "forms"?

Why should this "form" use a deadly weapon to kill defenseless Marilyn and not use the same instrument on the defendant, who could be a witness if there was in fact such a form present?

What of the fact that Mrs. Doris Bender drove past the Sheppard home between 2:15 and 2:30 a.m. and saw the lights on, both up and down stairs?

Consider also that the instrument used to murder Marilyn, as well as the defendant's T-shirt have disappeared and neither have ever been found.

And what of the fact that Elnora Helms, the maid, found nothing missing in the bedroom, and defense conceded in their brief in the Court of Appeals (p. 357) that the weapon was brought into the bedroom?

Nor can the physical attainments of the defendant be ignored -- his various athletic pursuits and his skill as a surgeon. He was physically able to strike the blows that killed Marilyn in the manner described in the evidence, and he could do it with either or both hands.

Consider the fact that the defendant's thumb print was found on the north side or front side of the backboard of Marilyn's bed, and the complete absence of any other thumb or fingerprints in that bedroom.

Consider also the absence of any footprints or other evidences of a struggle on the beach when Officer Drenkhan went down at 6:30 a.m. and took a look at the beach.

And what about the defendant's affairs with Susan Hayes and other women, affairs that became known to Marilyn Sheppard, the consequent marital troubles -- fertile soil for precisely what happened in this case.

Consider also the behavior and conduct of the defendant since the murder of Marilyn Sheppard, and the protective shield thrown about him.

In the supplementary brief there is an attempt to infer that the evidence supporting the guilt of this defendant required the jury to base

inferences upon inferences.

1. The folded jacket on the couch (App. Supp. Br., p. 2).

The facts shown concerning this jacket negatives the defendant's story that upon hearing Marilyn scream, he immediately rushed upstairs and had this encounter with this alleged form. It was a fact established in the evidence that the defendant had this jacket on when he was sleeping on the couch at the time the Aherns left. The jacket was on him at 12:15 a.m. and it was not on him at 5:50 a.m. when the Houks arrived, and it was seen about 6:05 a.m. by Drenkhan neatly folded on the couch. These were facts, not inferences. And in view of the fact that there is no evidence as to how it was taken off, it could reasonably be inferred by the jury that he took it off. It is a fact that the defendant removed the jacket between 12:15 and 5:50. The defendant testified that he went up to his wife's room. According to the defendant's own statement he was conscious of the fact that he went up there and that somebody hit him with a fist. We are not drawing an inference that he was conscious and alert because of the fact that his jacket was folded on the couch. He himself testified that he went upstairs. How conscious the defendant was at the time was an inference to be drawn based upon the facts to which he himself testified. Further, a jury is not precluded from drawing more than one inference from the same fact or facts.

If the defendant's story that upon hearing his wife scream he immediately rushed upstairs, was knocked out, etc., was true, his jacket could not possibly have been neatly folded on the couch. The fact that it was neatly folded, shows that his story was not true.

2. The missing T-shirt (App. Supp. Br., p. 2).

It was a fact established in the evidence that the defendant had this T-shirt on at 12:15 a.m. and it was a fact that it was not on him at 5:50 a.m. when the Mayor arrived. Certainly, it was removed within those hours. These are facts - not inferences.

The defendant himself gave no explanation whatsoever of the removal of this T-shirt. The evidence discloses that when Marilyn Sheppard was beaten to death, there were spurts of blood outward and upward, some of which landed high on the walls. Such spurts of blood would have necessarily landed all over a T-shirt on the assailant standing or leaning over the victim. From all of the facts the jury had the right to conclude that the defendant got rid of the T-shirt because it was covered with blood.

The defense now claim that the defendant could have substituted a wet T-shirt if he wanted to deceive, but the fact is that he had no T-shirt at all on him upon the arrival of the Houks and he has never explained what happened to this T-shirt.

3. No struggle in room? (App. Supp. Br., p. 3)

Under this heading it is stated that the State's witness Dr. Adelson testified that the teeth of the victim were broken in such a way that "such was not caused by any blow from the outside but by something getting inside her mouth and doing the damage (R. 1806)." Dr. Adelson gave no such testimony. He was questioned as follows by the defense:

"Q And the way that these teeth were broken off and the wound inside the mouth, without any exterior wound, indicated that something had got into the mouth; hadn't it?

A Certainly.

Q It might have been a finger that Marilyn Sheppard bit?

A The abrasion might be accounted for by such an event, certainly not the fractured teeth.

Q Well, you could fracture the teeth if in a struggle Marilyn Sheppard had bitten hard upon the bone of a finger; you can fracture a tooth with a piece of candy, can't you?

A It is possible." (R. 1806)

The foregoing falls far short of supporting the defense assertion that Dr. Adelson testified either that Marilyn Sheppard bit a finger or that her teeth were chipped by something getting inside her mouth.

In their summary of this item on page 16 of the Supplemental Brief, counsel states that there were wool fibers imbedded under the nails of the deceased, as well as bits of leather. There is no such evidence. There were found in the scrapings under the fingernails certain wool fibers concerning which the witness Mary Cowan testified were insignificant. However, there was absolutely no evidence that any bits of leather were found imbedded under the nails of the deceased.

Both sides seem to be in agreement that apart from the bed and the victim on the bed, there was no sign of a struggle having taken place in that room with any intruder. It may well be, as the defense suggest, that the victim fought and struggled with her assailant, and it may well be that some of the injuries to her hand resulted from that struggle; and it may also be that this line of reasoning advanced by the defense could very well explain how the defendant sustained the injuries to his face and the abrasion in his mouth; and the tear in the defendant's

trousers might well have occurred in such a struggle. This theory, like other theories advanced by the defense, DOES NOT EXLUDE THE DEFENDANT AS HER ASSAILANT.

4. Victim's rings still on her fingers (App. Supp. Br., p. 4).

It is argued that no valid inference can be drawn from the fact that the victim's rings were still on her fingers after she was murdered -- that some types of intruders would have been interested in the rings and some not.

It was not the contention of the State that any intruder came in that home and murdered this woman for her valuables on her person -- that was the contention of the defense. The fact that the victim's wrist watch was taken off and found in the den of the defendant, while her rings including a diamond ring, remained on her fingers was a circumstance to be considered by the jury.

The fact that the attendant at the morgue manipulated the victim's hand (R. 1746) to take off the rings is no reason why the jury could not draw an appropriate inference or inferences from the fact that her rings were not removed by any "burglar". Certainly, a burglar intent upon getting valuables would not have overlooked the diamond ring.

5. No evidence of sexual attack (App. Supp. Br., p. 5)

There were no injuries whatever in the lower part of the body of the victim, particularly about her private parts. Dr. Adelson did testify that an examination was made to determine whether there was spermatozoa present and that he found none. There is not the slightest evidence in the record that there was a sexual attack. At the trial, the

defense labored to show that there was a burglary until the time for argument, when they apparently abandoned that theory. The defense later substituted, by way of opinion and argument, the sex attack theory, which does not in any way EXCLUDE THE DEFENDANT.

6. Victim's wrist watch (App. Supp. br. p. 5).

The defense claim that "the bare fact in evidence is that some kind of an imprint, presumably of the watch band, was observed in the blood on her wrist." This evidence was not a presumption at all. It was definitely testified to by the Coroner. It was a fact that the blood had dried on her wrist and left the imprint. It was seen by the Coroner and it may be seen in the photograph (Appendix E), which was introduced and received in evidence. The time for blood to dry depends upon the amount of blood there is, as well as a number of other factors. There is no evidence in the record that a substantial amount of blood will congeal within seconds if it is exposed to air, as claimed by the defense. That is a volunteered opinion of the defense with no basis in the evidence. The evidence established as a fact that this woman was beaten. She had blood all over her head, face and neck. This bloody imprint was on her wrist and matched the bracelet of her wrist watch. Those were facts -- not inferences. These facts were before the jury and they had the right to draw all appropriate inferences therefrom.

7. Bloody splotch on pillow (App. Supp. Br., p. 6)

The blood splotch on the pillow was not an inference. It was seen and testified to by the Coroner. It is also shown on Exhibit 34 (Appendix D) which was received in evidence. The Coroner further testified that the imprint of dry blood outlined an instrument which he described as a surgical instrument or an instrument similar to a surgical instrument.

1 Defense counsel state that the only inference arising directly from
2 the bloody splotch is that it "could" have been caused by a bloody object.
3 This bloody imprint was not an inference, but a fact, and the jury had a
4 perfect right to infer that it was the imprint of the weapon, which had
5 lain there long enough for the blood to dry and had been thereafter removed.

6 8. Blood on defendant's wrist watch (App. Supp. Br., pp. 6-7)

7 Counsel for the defendant claim that the defendant being a doctor
8 dealing with injured patients could get blood on his watch at any time.
9 There is no evidence that he did get this blood on his watch at any other
10 time. We do know that Marilyn Sheppard was murdered the morning of
11 July 4th and that there was plenty of blood around. We do know that the
12 defendant was there and that the watch he was wearing at that night had
13 blood on the face of it, and on the upper part of the band leading to the
14 face of the watch. The defendant himself never claimed that he got the
15 blood on the watch as a result of treating a patient. As a matter of fact
16 he sought to explain it by saying that he took his wife's pulse.

17 9. The green bag (App. Supp. Br., p. 7).

18 This bag was examined for blood by Mary Cowan. Contrary to the
19 claim of defense counsel that only a small portion of the bag was examined,
20 the evidence will disclose that it was examined both inside and outside by
21 this witness who used a stereomicroscope (R. 4657-8) and that no blood
22 was found, and she made a further chemical test of a portion cut from
23 the bag and no blood was found. This was the bag in which was found the
24 defendant's watch, the crystal and the upper band of which was smeared
25 with blood. The jury would be justified in inferring from these facts that

this watch was placed in the bag after the blood had dried, otherwise there would have been some blood stain, at least on the inside of the bag.

10. <u>One bloody smudge on defendant's trousers, but no other blood</u> (App. Supp. Br., p. 8).

Defense counsel suggest that the bloody spot on the defendant's trousers could have come "from an injured patient at some time." This is extremely far fetched. Any such large blood spot would have been most certainly noticed by Don and Nancy Ahern during their visits the evening of July 3rd at their respective homes. There is no evidence in the record to support counsel's assertion and it is directly contrary to what the defendant himself claims. Certainly, there is no dispute but that there was this blood spot on his trousers. This is a fact and not a mere inference.

11. <u>Absence of finger prints</u> (App. Supp. Br., p. 8).

Defense counsel concede that there is evidence of the absence of fingerprints and concede that there is evidence to the effect that there was a wiping over certain surfaces by sand paper, or a rough cloth, but then urge that to attribute this conduct to the defendant is placing an inference upon an inference. These were observations of fact testified to by the State's witnesses and the jury could draw all proper inferences therefrom.

12. <u>Blood stains around the house</u> (App. Supp. Br., p. 9)

There is a wealth of evidence showing the numerous blood spots in various places in the Sheppard home, and the witness Mary Cowan identified a number of them as being human blood. The jury was not obliged to accept defense counsel's version of how the blood may have gotten there during the years gone by. We do know of the spilling of human blood during

the early morning of July 4, 1954, and the jury would have been fully justified in concluding from all the other facts before it and the fact that some of it was human blood and from the location where it was found, the stairways to the kitchen and to the basement, that it was the victim's blood, and that the person dropping it was the defendant.

13. Water under defendant's wrist watch crystal (App. Supp. Br., p. 10).

The presence of water under the crystal of the defendant's wrist watch is a fact - not an inference. It is asserted in the supplementary brief (p. 10) that "The only justifiable inference might be that some kind of water got under there some time while he was wearing it." The defendant himself testified that he was wallowing in the lake after he was allegedly knocked out. That, too, is a fact - not an inference. The jury could draw all proper inferences from these facts.

14. The dog, Koko, was not heard to bark (App. Suppl. Br.p. 10).

Under this heading it is urged that the dog, Koko, did not bark when people approached. That the dog did at times bark is supported by the testimony of Nancy Ahern (R.2146), and Elnora Helms (R.4001). It is also supported by the statement of the defendant himself, who said that it could not have been a colored man because the dog always barks at colored people.

One does not have to argue that a dog is more likely to bark at a stranger than a member of the household. Elnora Helms testified that after the dog got to know her she stopped barking at her (R.4001).

The defendant himself placed significance upon the fact that he did not hear the dog bark.

Counsel concludes his argument on this point by stating that "a dog is under no statutory duty to bark," Sort of silly, isn't it? Defense counsel know that, but did Koko know it?

15. <u>Burglary picture confused</u> (App. Supp., Br., p. 11)

It is stated that the prosecution gratuitously assumes that the burglary was a fake. The evidence was so overwhelming that the burglary set-up was a fake that even counsel for the defense was obliged to say to the jury:

> "Well, of course, we don't claim there was a burglary. I mean I don't know why the intruder was there. We claim there was a man there, but whether he was there for a burglary or not, I don't know. We never claimed that he was." (R. 62, Supp.)

The jury was fully justified in concluding that the only one who was in a position to and had the time, and who actually did, set up this fake burglary was the defendant.

The argument advanced that some other type of intruder, and not the defendant, would have set up a burglary after committing the murder, to avert suspicion from himself as the murderer, is so far fetched and so highly improbable as to fully justify the jury in rejecting it. The evidence is conclusive that there was a fake burglary set up and the jury had ample justification for concluding that it was set up by the defendant to avert suspicion from himself.

After discussing the foregoing 15 points, defense counsel in the supplemental brief attempt to give by way of summary what they deem to

1 be the "fair inferences arising directly from the State's own evidence."
2 In the first place, the interpretation of the State's evidence by defense
3 counsel cannot be accepted, nor are we willing to limit the facts on the
4 matters discussed to what is asserted in their brief. Furthermore, the
5 jury was not required to accept the version of counsel for the defense of
6 what inferences may be drawn from the evidence, nor is the jury limited
7 by law to one inference from any fact or facts received in the evidence.
8 See House v. Stark Iron & Metal Company, 33 O.L. Abs., 345, 350, 34
9 N. E. (2d) 592; Hartenstein v. New York Life Insurance Co., 93 O. App.
10 413; City of Cleveland v. McNea, 158 O.S. 138.
11 Finally, defense counsel treat each part of the evidence as
12 though it was an isolated fragment to be considered by itself and
13 wholly apart from all of the other evidence. These evidentiary facts and
14 the many others received in evidence are not to be considered as isolated
15 fragments and separate and apart from each other. Considered together,
16 and in their entirety, they present a mass of evidence which proves the
17 defendant guilty beyond a reasonable doubt of the crime charged.
18 Under the principles of the law of circumstantial evidence, a case
19 in point and which closely parallels the instant case is Hinshaw v. State,
20 47 N.E. 157 (Sup. Ct. of Indiana) (1897), wherein a husband was con-
21 victed of second-degree murder of his wife.
22 Counsel for the defendant in the instant case argue negative
23 evidence and select certain pieces of evidence to show that the defendant
24 was not guilty. In the Hinshaw case, the Court stated (at page 172):
25 "***Must the jury be directed to take the evidence of

the State, piece by piece, and reject every part in which a flaw may be found? It is good military strategy to divide and conquer. It is not a sound or just rule which requires the prosecution in a state case to make voluntary division of its forces, so that they may be beaten in detail. And so we say it is not the law that the jury in a criminal case must take the evidentiary facts piece by piece, and consider each item separate and apart from the other items or the whole evidence."

***

"Evidence is not to be considered in fragmentary parts, and as though each fact or circumstance stood apart from the others, but the entire evidence is to be considered, and the weight of the testimony to be determined from the whole body of the evidence. ***"

On the subject of the legal force of exclusive opportunity the defendant in the instant case had, to commit this crime as a circumstance tending to prove his guilt, the Court in the Hinshaw case says at page 164:

"Where the relation between the parties is of a still more intimate character, as between members of the same family, and particularly between husband and wife, opportunities for the commission of crimes of the highest grade become indefinitely multiplied. They are, in fact, of hourly occurrence. There exist in the relation last mentioned all the elements to constitute the most perfect opportunity that can be desired, unlimited access to the person, and complete seclusion during the hours when that person is in its most defenseless state." ***

The authorities cited by defense counsel on page 13 of their supplemental brief support the proposition that all circumstances must be taken together, <u>and when taken together</u>, must then point surely and unerringly to the guilt of the defendant, and must be inconsistent with any other rational supposition than that the defendant is guilty of the offense charged.

In the supplemental brief (pp. 15 etc.) it is stated that certain

"established facts *** point almost unerringly to the innocence of the appellant."

These alleged facts, although in several instances quite incorrect, do not exlude the defendant as the perpetrator of this murder. If there was a violent struggle immediately preceding her death, it could have been with the defendant and under this theory advanced by the defense, the defendant might have sustained the injuries to his face.

One fingernail from the left hand of Marilyn Sheppard was practically torn off and this may well have resulted from such a struggle.

As heretofore stated, there is no evidence that the deceased bit anyone. Nor is there any evidence whatsoever that bits of leather were found under her nails. Mary Cowan testified that the colored fiber found under the nails of the deceased was insignificant.

The chip of tooth found under the bed of Mrs. Sheppard was not found until weeks later although the area had been previously searched, and the piece of leather or leatherette was likewise found after there had been scores of persons in and out of the bedroom.

A cigarette butt was allegedly found that morning in the toilet upstairs. The evidence showed that Marilyn Sheppard smoked (R. 2049). In fact, the defendant claimed that he attempted to dissuade her from smoking. And there was a large number of other persons in and out of those rooms.

Reference is also made to the testimony of the two defense witnesses who allegedly saw some person or persons in the vicinity of the Sheppard home during the night in question. It is clear from the evidence that

they did not come forward with their testimony until after there had been printed in the newspapers a description of the bushy haired form given by the defendant and an offer of a reward of $10,000. As the Court of Appeals stated:

> "Defendant produced two witnesses, one of whom reported that while driving east on West Lake Road at about 2:15 a.m. on July 4th he saw a big man over six feet tall and weighing 190 pounds standing in the Sheppard driveway wearing a light T-shirt but was unable to describe the rest of the dress. He testified that the stranger had a crew hair cut and was a bit tanned and that all this was observed in the dead of night while returning from a fishing party at Sandusky, Ohio. The witness had a boat attached to his automobile and testified he was driving 35 miles per hour when he observed the stranger in the drive near three maple trees.
>
> "The other witness claims to have been driving west at about 4:00 a.m. when he observed a stranger near the cemetery which is just west of the Sheppard home. He described the stranger as having a crew haircut, was 5'9" tall and had bulging eyes and was wearing a white shirt.
>
> "Neither of these witnesses came forward until a reward was offered publicly six or seven days after July 4th although the story of Marilyn Sheppard's death had received great publicity, including the story that defendant had met with a form with bushy hair in the Sheppard home after he heard his wife scream for help." (Def., App. 49a-50a).

It was for the jury to believe or disbelieve this testimony and it was for the jury to determine what, if any, weight should be given to it. Certainly, the jury was not obliged either to believe these witnesses or to give their testimony the weight that would satisfy the defense. Nor was the jury obliged to believe that a "sex maniac" and/or a "burglar" after doing this deed would stand out in front of the house so he could be observed.

Coming back to the main brief of the defense, we wish to point out certain errors, omissions and distortions of fact.

At page 55 it is stated: "There was no search made to determine whether there might be a prowler secreted somewhere inside." Of course, before the murder took place there was no occasion to make a search for secreted prowlers. But counsel failed to mention certain facts, which are in evidence, namely, that Don Ahern and the defendant, before dinner at the Sheppard home, went upstairs and also downstairs and in the boiler room in connection with the odor of smoke; that Nancy Ahern went upstairs and had Chip bring out a mirror to be used to fix the television set; that the defendant, Don Ahern and the children went in the basement where the children were shown how to use a punching bag; and that Chip went into the room that had been occupied by Dr. Hoversten, to get the mirror.

At page 59 of the main brief, the defense lists the articles of clothing worn by the defendant when he went to sleep on the couch, but omit mentioning the corduroy jacket that was later found neatly folded on the couch.

At page 63 of the main brief, counsel would imply that the defendant was subjected to continuous questioning from 8:30 in the morning until close to 5:00 in the afternoon, without any stop for lunch. This, of course, is wholly untrue. As a matter of fact the defendant was not being questioned continuously between those hours and he was asked several times whether he wanted anything to eat. Much of the time was consumed in transcribing the questions and answers and the statement it-

self (Exhibit 48) indicates the length of the questioning and the time it took for the defendant to tell the story he tells. The defendant was accompanied by his counsel who examined the statement and made certain suggestions for correction before it was signed, and the rights of the defendant were at all times fully protected. Any implication of mistreatment is wholly unwarranted.

At page 126 of the main brief, the defense refer to certain headlines in the newspapers which were later submitted as Exhibit No. 1 on the motion for new trial. Neither the newspapers nor the headlines were evidence in the trial of the case and counsel's assertion that the jury were reading these headlines and these newspapers is nowhere supported in the record. In various places in their brief in support of argument on the evidence, reference is made to newspaper articles and headlines, none of which were received in evidence on the trial of this cause. The fact that they were offered and received in evidence before and after trial on the various motions made by counsel for the defense does not make them evidence considered by the jury in the trial.

At pages 128 to 132 of the main brief, it is claimed that the back door (the Lake Road door) of the Sheppard home was unlocked "as usual" and it is inferred that the defendant may have gone out the front door facing the lake, to get some glue to fix a toy airplane for Chip, after Mrs. Ahern had locked the front door and put the night chain on. It is claimed further that the findings of the Court of Appeals on this item of evidence are erroneous.

The maid, Elnora Helms, testified on direct examination:

"A Well, I went to the lake front -- I mean the street door and knocked and banged and tried the knob, and the door was locked, I couldn't get in, so I went around to the den door and knocked and banged and no answer, so I went around to the French doors on the other side of the house, and that is when Dr. Sam heard me." (R. 3980)

She testified on cross examination:

"Q And didn't she on many occasions or on occasions leave that door that faces the road open?

A That was left open once, I think, to my knowledge.

Q And didn't she on occasions leave the door that leads onto the front porch and into the living room open?

A No, that was never open." (R. 3986)

There is no evidence in the record showing that the Lake road door was unlocked at the time of the murder, and Mrs. Ahern testified that while they were still at the table, before they stood up, Mr. Ahern started out to take the children home; that Dr. Sam went out to the garage and got some glue just as Mr. Ahern left (R. 2203, 2207). Mrs. Ahern further testified that it was after she came off the porch with the last of the dishes that she closed the front door facing the lake, locked it and put the night chain on (R. 2137, 2138).

At page 145 of the main brief, it is stated with reference to the two chips of teeth found on the bed after the body of Marilyn Sheppard had been removed that Coroner Gerber "could not fit them to the teeth of Mrs. Sheppard" so it was assumed that they were parts of teeth of her slayer. Counsel neglect to point out that because of the physical condition of the mouth of the deceased, the coroner could not then and there determine

whether they fitted her teeth or not. The implication that the coroner then and there found that they did not fit Mrs. Sheppard's teeth is wholly unwarranted. During the autopsy it was determined that the fragments of teeth did come from Marilyn's mouth (R. 3220).

At page 152 of the main brief, it is asserted that the only examination of the bag made by Mary Cowan, a technician and witness for the State, was to cut a piece out of the bag of the size 1/2" by 1/2" and that she examined that small piece and determined there was no evidence of blood. The fact is that she examined the entire bag both inside and outside by the use of a stereomicroscope and that no blood was found, and she made a further chemical test of a portion cut from the bag and no blood was found.

At page 154 of the main brief, the defense blandly state that the officers questioning Dr. Sheppard on July 4th told him they knew of his association with a woman in California, that he was seeing this nurse and that "it was known around Bay Village on the morning of July 4th." Counsel neglects to say that for several weeks, both the defendant and Susan Hayes denied any intimate relationship; that Dr. Sam Sheppard, at the inquest as late as July 22nd, under oath, denied any intimate relationship with Susan Hayes. Of course these denials by the defendant were all in keeping with the attempt to portray Dr. Sam Sheppard as a loving and faithful husband enjoying a happy married life and to divert any suspicion from him as a possible suspect.

At page 154 of the main brief, it is stated that on the morning of July 4th all of the authorities, police and otherwise, had completed their investigation of the murder of Mrs. Sheppard upon their visit to the defen-

dant at the Bay View Hospital and that "from that time nothing was done by the authorities except to endeavor to support this statement and secure a confession from the appellant."

There is absolutely no evidence in the trial of this case to support so baseless a charge. As a matter of fact, the investigation by the Coroner and the Bay Village authorities continued and several weeks later, the Cleveland Police Department was called in at the request of the Mayor and the Council of Bay Village, and the Homicide Department of the City of Cleveland proceeded to assist in the investigation. In the meantime, on July 9th, the defendant appeared at the house where he was accompanied by his counsel and by Drs. Stephen and Richard Sheppard. By arrangements made between the Coroner and Mr. Corrigan, the defendant went through the house, upstairs and downstairs and around the grounds. One of the purposes of this visit and the examination of the interior of the house was to determine whether or not anything was missing, and the defendant did not point out anything that was missing (R. 3072). Counsel for the defense in their brief try to make it appear that the sole purpose of this visit was to reenact the scene of the night of July 3rd. This is contrary to the testimony of the Coroner. He testified:

"Q And you were to meet there for what purpose?

A To have Dr. Sam Sheppard go over the house with the police and the Sheriff officers to point out anything that may be missing, anything that may be out of the ordinary or anything else that he might observe.

Q I see. And did he go through the house?

A He went with the -- through the house and about the

1 house with the police and the Sheriff officers.

2 Q And with his attorney?

3 A Yes.

4 Q And he was not under arrest at that time, was he?

5 A No, sir.

6 Q And did he also go down to the beach?

7 A Yes. I went as far as the landing. I don't know whether they went on the beach or not.

8

9 Q They went through the various rooms of the house?

10 A Yes, sir.

11 Q And did Dr. Sam Sheppard examine these bags?

12 A Yes, sir.

13 Q And he was in the various rooms?

14 A I wasn't with him constantly, but --

15 Q But he went from room to room?

16 A Yes, sir.

17 Q Were you with him in the bedroom?

18 A No, sir.

19 Q Were you with him in the den?

20 A Yes, sir.

21 Q Did he point out anything to you that was missing from the den?

22

23 A No, sir.

24 Q Did he point out to you anything that was missing anywhere in the house?

25 A No, sir.

Q Did he tell you of anything that was missing?

A No, sir.

Q After he had concluded the entire going through the premises, both in the house and on the lot?

A Didn't point out --

Q He didn't point out anything at all?

A He did not tell me of anything that was missing."

(R. 3071-3072)

In view of the foregoing charge in the brief of the defense, unsupported in fact and contrary to the evidence in the case, may we also point out that the public authorities and particularly the members of the Homicide Bureau of the City of Cleveland were kept quite busy checking out the numberless leads to other suspects, many of them suggested by the defendant, his relatives and friends, his attorneys, directly and otherwise. For instance, at the bail hearing Dr. Stephen Sheppard, a brother of the defendant, testified to an alleged confession to the crime made by a "phony" in Baltimore. And near the close of the trial a character by the name of Henry W. Fuehrer came up here from Cincinnati and claimed that he had participated in a burglary of the Sheppard home on the night in question. Defense counsel questioned Officer Drenkhan about this character (R. 4227-4233) and the Court placed Fuehrer under bond as a witness for the Sheppard case. He was in the County Jail from November 27, 1954, and released on December 7, 1954. He was never called as a witness by the defense for the simple reason that he actually was in prison in Tennessee on the night of July 3rd.

At page 157 of the main brief, it is asserted that "no one knows what was missing from the Sheppard home." Counsel concede visits to the home for the purpose of removing articles of personal property but ignore entirely the examination of the interior and exterior of the home by the defendant when he was accompanied by his attorneys, Messrs. Corrigan and Petersilge, for the purpose of determining whether or not anything was missing and the defendant could not point to anything missing. (R. 3072). Also ignored is the testimony of Elnora Helms, the maid, who examined the bedroom in which Marilyn Sheppard was murdered, and found nothing missing (R. 3984 and 3994).

At page 157 of the main brief, counsel criticize the investigation by the Coroner and the Cleveland police officers for "permitting all sorts of people to trample the house and grounds." Before either the Coroner or the Cleveland police officers got there, Dr. Stephen Sheppard, Dr. Richard Sheppard and Betty Sheppard, brothers and sister-in-law of the defendant, had been in and about the house, and another doctor from the Bay View Hospital had been in and about the house. Mayor Houk, a close personal friend of the family and called by the defendant, Mrs. Houk, Chief of Police Eaton, Officer Drenkhan and all of the other officers of Bay Village, all personal friends of the defendant, who was their police surgeon, firemen and ambulance drivers were all in and about the house. The defendant himself had the run of the house for several hours from the time Marilyn Sheppard was killed to the time he was removed before the Coroner and Officers Schottke and Gareau arrived. To criticize these officers because all sorts of people trampled the house and the grounds, and to blame them

for the destruction of clews, particularly for the destruction of clews between 4 a.m. and 8 a.m. is without justification.

At page 159 of the main brief, it is stated in bold type that "the appellant was subjected to long, continued indignities by the authorities." An examination of the entire record will disclose no such indignities. On the contary, he was treated most gently, particulary by his close friends, the Mayor and police officers of Bay Village for whom he was a police surgeon, and in view of the protective shield that was thrown about him by his relatives, associates, friends and attorneys, the Coroner and the other public authorities were at all times more than patient and considerate in the treatment of this defendant.

It is urged by defense counsel that inasmuch as the defendant was a suspect, that the Coroner had no right to question him. We, of course, recognize the constitutional right of the defendant to refuse to testify on the ground of self-incrimination, but if he wishes to use this privilege he must assert it and base his refusal to testify on that ground. This, the defendant chose not to do. The questioning of the defendant, therefore, by the Coroner and by the police authorities was not only proper but under the circumstances was necessary in the performance of their duties.

It is also asserted at page 162 of the main brief that when one of the attorneys interjected an objection and insisted upon entering his objection in the record, he was summarily thrown out of the hearing by the Coroner. This is a most inadequate statement of what occurred. The inquest lasted three days and the defendant and all but one of the witnesses had completed their testimony. On the last day and within 10 minutes of the

conclusion of the inquiry, Mr. Corrigan proceeded to instruct the reporter not only to enter his objections in the record, but to place certain statements in the record. He was told to desist therefrom by the Coroner. Instead of desisting, he continued to disrupt the inquest hearing and was again told to desist and to sit down, all of which he refused to do. The Coroner was then obliged to order that he be removed from the hearing room. It appears to counsel for the State that Mr. Corrigan deliberately provoked the Coroner for the very purpose of having himself thrown out of the inquest hearing, to make capital of it later.

On pages 169 and 197 of the main brief, the opinion of the Court of Appeals is criticized because of the reference that the weapon used in the assault was a "blunt" instrument. From the nature of the wounds and the testimony of Dr. Lester Adelson, Deputy County Coroner, the Court of Appeals was justified in concluding that the weapon used was a blunt instrument. Dr. Adelson testified on cross examination:

"Q And that would be a matter that you would be required to study and to know something about when you see a wound to determine what is the type of a weapon that caused this wound?

A We would try to draw a reasonable inference from our observation.

Q And if you have a cut, a sharp cut with sharp edges, no lacerations and no contusions, you can come to the conclusion, a reasonable conclusion that that cut was made by a knife or by a sharp instrument?

A Yes. A sharply edged instrument of some kind.

Q A sharp edged instrument. And if you have, for instance, say skull fracture, where the plate of the skull is driven into the brain, and you have a tearing of the brain surface, then you can come

to the conclusion that was done with a hammer or an instrument of that kind?

A A heavier weapon of some kind." (R. 1738-1739)

"Q A laceration is a tear. So you could readily conclude that that was not done by any sharp instrument?

A Yes, sir, that is correct." (R. 1811)

At page 181 of the main brief, it is stated that the contents of the stomach (Marilyn's) were not examined. This is contrary to the evidence. Dr. Adelson testified that he did examine the stomach contents (R. 1978). The doctor testified that he opened the body and examined all of the organs and that if there was any poison in her system it would have appeared in the blood; that there was no reason to make an analysis of the stomach to determine whether or not there was poison in the stomach (R. 1881-1883, 1975-1977).

At page 191 of the main brief, it is stated that on July 4th, Officer Drenkhan searching the room found a piece of paint and a small piece of leather and that on July 5th another piece of leather was found and a small piece of nail polish, and that Mrs. Sheppard had no nail polish on her fingernails. There was testimony of the finding of a small piece of leatherette and of a piece of nail polish on July 5th, after numberless people had been in and out of the bedroom. Defense counsel fail to mention the fact that Mrs. Sheppard had nail polish on her toenails and such a fragment of nail polish could just as well have come from the toenails as from the fingernails.

There is only one piece of leatherette in the evidence which is

identified as Exhibit 43 and any reference to any other piece of leatherette or piece of paint is sheer speculation on the part of counsel.

At page 195 of the main brief, it is said: "There was no examination of these bed clothes, except of the sheet under the body of Mrs. Sheppard." And in the same paragraph they say the bed clothes consist of a pad, pillow, bed sheets, a comforter and bed spread. While all of these articles may not have been tested chemically as suggested by counsel, it is not correct to state that there was no examination made. We need but recall the detailed examination of the pillow and the bloody print thereon, photographs of which are in the evidence.

An instance of misrepresentation and omission occurs on pages 199-200 of defendant's main brief beginning with the statement:

"In answer to the Court's question (R. 3132), he stated:

"'It could have been made by any other instrument.'"

The fact is that this was not the answer of the witness. It was the question of the Court. The answer of the witness is omitted in their brief. The answer to this question of the Court was:

"Similar to this type of a surgical instrument."

Not only do defense counsel convert the question of the Court to the answer of the witness and make the omission indicated, but they do not quote the questions and answers in proper sequence. In order that this Court may have this testimony correctly presented, we quote from the record:

"THE COURT: Just one moment, please. I would like to have a question to the doctor.

"Doctor, on yesterday when you were testifying as to this pillow and the stains upon it, and so forth, you

testified that you found an impression on the pillow, and I understood you to say that it was the impression of a surgical instrument.

"Is that what you said?

"THE WITNESS: Yes, sir.

"THE COURT: All right.

"Do I understand you to say, then, that it could not have been made by anything other than a surgical instrument?

"THE WITNESS: No, sir.

"THE COURT: You didn't mean that?

"THE WITNESS: No, sir, I did not mean that.

"THE COURT: It could have been made by any other instrument?

"THE WITNESS: Similar to this type of a surgical instrument.

"THE COURT: So that you didn't mean to confine your testimony to a surgical instrument?

"THE WITNESS: No, sir." (R. 3132-3133)

At page 208 of the main brief, the defense state that the Court of Appeals finds that "The manner of killing suggests a person of violence and ungovernable passion." We do not find this language nor these words in the Court of Appeals opinion.

On page 210 of the main brief, it is insisted that the word "clobbered" appears nowhere in the testimony or statements given by the appellant and that the only person who uses that word is Dr. Gerber. Defense counsel fail to state that in using this word Dr. Gerber was quoting the defendant (R. 3101).

1 On page 227 of the main brief, it is stated: "The prosecutor
2 had publicly announced that when he got the appellant on the stand he would
3 'tear him apart.'" We do not know upon what defense counsel base this
4 assertion. Certainly it is not in the evidence in this case. If, as claimed,
5 the cross examination of the defendant was extensive, that was no excuse
6 for the evasiveness and vagueness in the answers of the defendant.
7 On page 231 of the main brief, referring to the witness Susan
8 Hayes, defense counsel gratuitously state: "She is a woman who apparent-
9 ly has no inhibitions about sex and exhibited no shame or reluctance in dis-
10 cussing with others her activities with the appellant. She gave out inter-
11 views, posed for pictures, and indicated that she was enjoying the publicity
12 attached to her appearance in the case. She claimed no constitutional
13 privilege and did not break down on the stand." Counsel fails to state
14 that for several weeks after the murder, Susan Hayes, like the defendant,
15 denied any illicit relationship (R. 4873) and that it was only after their con-
16 duct, particularly their living together at the Miller home in California and
17 the lost watch episode had become known to the police, that the true story
18 was unfolded. The defendant, in order to avoid suspicion toward himself
19 and to present an appearance of a faithful and loving husband and a happily
20 married life, lied under oath and sought to conceal his conduct. When
21 Susan Hayes appeared as a witness for the State and took the stand, defense
22 counsel Corrigan arose and demanded that the Court instruct the witness
23 that she had a constitutional right not to testify (R. 4830). Why did he do
24 this? Was he concerned about the constitutional rights of this witness or
25 was he concerned about her testimony and its damaging effect on the

defense portrayal of Dr. Sam Sheppard as a faithful and loving husband who had a happy married life and could not possibly have committed the murder of his wife?

Counsel's gratuitous assertion that she enjoyed the publicity and exhibited no shame or reluctance is so false that we are compelled to note that the young lady was extremely pale and on the verge of collapse when required to take the witness stand and while testifying. And we do not see why the fact that after she heard Mr. Corrigan's remarks she claimed no constitutional privilege gives any support whatever to these gratuitous and false statements of counsel. It was for the jury to observe this witness, believe or disbelieve her testimony, and weigh her testimony. Obviously, the jury did not agree with counsel for the defense.

In the main brief, at pages 243 to 246, the following items are relied upon by the defense as being inconsistent with the appellant's guilt:

1. "The absence of numerous fine drops of blood on appellant's trousers, belt, shoes, socks and shorts." The evidence shows that the blood splattered upward and it may well be that the defendant's T-shirt sufficiently covered the upper part of his trousers. The State, of course, contends that the defendant disposed of his T-shirt because it was spattered with blood. The evidence also shows that the defendant went down to the lake and into the water with the trousers and other articles of clothing on.

2. "The appellant was not bitten." This is pure speculation and we have heretofore quoted the testimony of Dr. Adelson on this subject.

3. "The tooth chip that was found under the bed did not belong to Marilyn." As heretofore pointed out, this was not found until July 23rd, after many people had been in and out of that room, and after the victim had been buried.

4. "The two pieces of leather or leatherette which were found on the floor of the room were never identified as having come from anything of appellant." The evidence shows that only one piece of leatherette was found on July 5th, after many persons such as Dr. Richard Sheppard, Dr. Steve Sheppard, numerous Bay Village policemen, numerous Cleveland policemen, the Houks, numerous newspaper reporters and photographers and others had been in and out of that room.

5. "The source of the chip of paint found on the bedroom floor was never investigated." Counsel must be referring to the fleck of fingernail polish. This is mere speculation and the subject has heretofore been treated in this brief.

6. "The flake of fingernail polish which was found on the floor of the bedroom did not come from the appellant and it did not come from Marilyn." The fleck of nail polish was not found until July 5th, after numerous people had been in and out of that room. Furthermore, the victim wore this polish on her toenails.

7. "The strands of fibers under the victim's fingernails were not identified." The evidence shows that the wool fibers found under her fingernails were insignificant, as testified to by Mary Cowan.

8. "The cigarette butt in the upstairs toilet." The victim smoked cigarettes. Further, the evidence shows that there were numerous

people in and out of the house and upstairs.

9. "Two disinterested third persons testified that they saw a bushy-haired man answering the general description of the person with whom the appellant twice grappled." This has heretofore been answered in our brief.

The State agrees that it has the burden to prove the essential elements of the charge against this defendant and by evidence that convinces a jury of his guilt beyond a reasonable doubt. We submit that the evidence in this case presents an unbroken chain of circumstances all pointing to this defendant as the murderer of his wife and by evidence beyond a reasonable doubt.

ASSIGNMENT OF ERROR NO. 2

THERE WAS NO ERROR IN DENYING THE MOTION FOR CHANGE OF VENUE AND A CONTINUANCE.

THERE WAS NO DENIAL OF DUE PROCESS TO THE APPELLANT.

Under this assignment of error, defense counsel have made a most extraordinary excursion into newspaper stories, articles and headlines before, during and after the trial of this case. It is not within our province to explain or defend anything that appears in any newspaper, favorable or unfavorable. That there was a tremendous amount of interest in this case, not only throughout our own community, but throughout the state and nation, and in other parts of the world, is not in dispute. It does not follow, however, from the mere fact that this murder mystery fascinated so many people, that the defendant was prevented from having a fair trial

1 or that any of the defendant's constitutional rights were violated.

2 The defense have seen fit to set forth what purport to be news-
3 paper headlines. They selected certain headlines, which, by and large,
4 merely reflected the great interest of the public in the murder mystery and,
5 of course, deliberately omitted particular headlines that tend to contradict
6 their contention. Defendant's counsel do not set forth the headline on the
7 front page story in the Cleveland News of July 9, 1954, by Severino P.
8 Severino, News Staff Writer, who, as he states, was granted permission to
9 question Dr. Sam in the presence of his father, Dr. Richard A. Sheppard,
10 and his attorneys, William J. Corrigan and Arthur Petersilge. The head-
11 line in large type reads: "EXCLUSIVE! 'I LOVED MY WIFE -- SHE
12 LOVED ME', SHEPPARD TELLS NEWS REPORTER."

13 Nor do they list the headline in the Cleveland Press of August
14 18, 1954, reading: "DR. SAM WRITES HIS OWN STORY." Under the head-
15 line appeared the text of a statement by Dr. Samuel H. Sheppard, furnished
16 the Press by a member of his family, and above the headline is an enlarged
17 photograph of the last paragraph of the statement, followed by the signature
18 of the defendant, and reading:

19 "I AM NOT GUILTY OF THE MURDER OF MY WIFE, MARILYN.
20 HOW COULD I, WHO HAVE BEEN TRAINED TO HELP
PEOPLE AND DEVOTED MY LIFE TO SAVING LIFE, COMMIT
21 SUCH A TERRIBLE AND REVOLTING CRIME?"

22 Nor does the defense list the headlines of the statements issued
23 by Attorneys William J. Corrigan and Fred W. Garmone, such as the one
24 appearing in the Cleveland Press of August 27, 1954, reading:

25 "SHEPPARD LAWYERS HIT STORIES ON MURDER."

followed by the text of the long statement so issued.

The defense also might have included other headlines as follows:

July 8, 1954, The Cleveland Press:

"DR. SHEPPARD'S STATEMENT ISSUED TO ANSWER GOSSIP"

July 8, 1954, The Cleveland Plain Dealer:

"BAY DOCTOR TALKS TO REPORTER"

July 8, 1954, The Cleveland Press;

"HUSBAND PUTS $10,000 UP FOR SLAYER"

July 9, 1954, The Cleveland Plain Dealer:

"TEXT OF DOCTOR'S STATEMENT ON HIS OFFER OF REWARD"

July 9, 1954, The Cleveland Plain Dealer:

"DOCTOR WILL HELP IN HUNT FOR DEATH WEAPON TODAY"

July 10, 1954, The Cleveland News:

"HONORED ATHLETE AT HEIGHTS HIGH"

July 12, 1954, The Cleveland Press:

"DR. SHEPPARD RETURNS TO BAY VIEW HOSPITAL TO TREAT HIS PATIENTS"

July 15, 1954, The Cleveland News:

"DRUNK 'CONFESSES' BUT STORY FIZZLES"

July 17, 1954, The Cleveland Press:

"DR. SHEPPARD TELLS PRESS 'KILLER WILL BE CAUGHT'"
(Then follows responses to 11 questions.)

July 31, 1954, The Cleveland Press:

"TEXT OF STATEMENT BY CORRIGAN AFTER ARREST OF CLIENT, DR. SAM"

1 July 31, 1954, The Cleveland News:

2 "POLICE CORDIAL, POLITE AS THEY TAKE SHEPPARD"

3 August 13, 1954, The Cleveland Plain Dealer:

4 "FAMILY POINTS TO BAY MAN AS NEW SUSPECT AS HOVERSTEN TALKS"

5 August 19, 1954, The Cleveland Press:

6

"DR. SAM IS ANXIOUS TO TAKE STAND, HIS BROTHER SAYS"

7 September 14, 1954, The Cleveland News:

8

"BATTLES PROWLER IN BAY. CORRIGAN LINKS BOY'S

9 STORY WITH SHEPPARD CASE"

10 September 17, 1954, The Cleveland News:

11 "DR. STEVE HITS 'RED HERRING' ACCUSATION"

12 October 19, 1954, The Cleveland Press:

13 "WRITER FINDS DR. SAM'S LOOKS BIG ASSET FOR ACTOR CORRIGAN"

14 October 21, 1954, The Cleveland Press:

15

"DR. SAM JUST LIKE A BROTHER, 2 SISTERS-IN-LAW

16 SAY AT TRIAL"

17 October 22, 1954, The Cleveland Plain Dealer:

18 "CORRIGAN RATED SECOND DARROW"

19 October 25, 1954, The Cleveland Plain Dealer:

20 "'OTHER SIDE' OF CORRIGAN LIES IN POETRY"
(With picture of W. J. Corrigan and his writer daugher)

21 October 26, 1954, The Cleveland Plain Dealer:

22

23 "COURT PSYCHOLOGISTS SEE TRIAL CROWD AS NORMALLY CURIOUS"

24 October 26, 1954, The Cleveland Press:

25 "SAM, WOMAN JUROR SOB IN COURT"

1 October 27, 1954, The Cleveland Press:

2 "CITY CHEMIST AIDS DEFENSE OF DR. SAM"

3 October 28, 1954, The Cleveland Press:

4 "JUROR OUT, ADMITS SHE WAS FOR SAM"

5 November 4, 1954, The Cleveland News:

6 "LETTERS WRITTEN IN JAIL BARE SHEPPARD FEELINGS"

7 November 5, 1954, The Cleveland Press:

8 "DR. SAM SAYS AUTOPSY BUNGLED"

9 November 9, 1954, The Cleveland Plain Dealer:

10 "CORRIGAN MUSES ON TRIAL'S DRAMA"

11 November 10, 1954, The Cleveland Press:

12 "GARMONE QUIZZING WILTS MAYOR HOUK"

13 November 11, 1954, The Cleveland News:

14 "HOUKS HELP DR. SAM AS MUCH AS THEY HURT"

15 November 11, 1954, The Cleveland News:

16 "DEATH HOME OPENED TO DR. SAM'S KIN"

17 November 13, 1954, The Cleveland News:

18 "CORRIGAN'S STRATEGY SCORES"

19 November 15, 1954, The Cleveland News:

20 "CORRIGAN HAMMERS AT DRENKHAN"

21 November 16, 1954, The Cleveland News:

22 "CORONER IS VILLAIN OF CORRIGAN PIECE"

23 November 17, 1954, The Cleveland News:

24 "DR. STEVE HITS PRINT THEORY; SAYS BLOOD FLOWED INTO FOLD"

25

November 17, 1954, The Cleveland Press:

"DR. SAM WRITES TO HIS SON"
(Photo of Letter)

November 18, 1954, The Cleveland News:

"DR. SAM DISPLAYS NO-WEAPON THEORY"
(With picture demonstration)

November 19, 1954, The Cleveland Plain Dealer:

"DR. STEVE'S TIP IS EX-PATIENT"

November 19, 1954, The Cleveland News:

"ORDERED HOVERSTEN OUT, DR. STEVE SAYS"

November 19, 1954, The Cleveland Press:

"SEEK STEVE'S 'SUSPECT' IN DETROIT:

November 20, 1954, The Cleveland Press:

"SCHOTTKE AIDED SAM: DR. STEVE"

November 22, 1954, The Cleveland Plain Dealer:

"PROBE NEW BAY TIP; DETROIT MAN CLEAR"

November 22, 1954, The Cleveland News:

"SLAYING 'SUSPECT' IS WRITTEN OFF"

December 2, 1954, The Cleveland News:

"EVIDENCE CHANGED: DR. STEVE"

December 4, 1954, The Cleveland News:

"CHIP PAYS CALL ON STORE SANTA"

December 7, 1954, The Cleveland News:

"DR. SAM THANKS REPORTER"

Newspapers are, of course, interested in stories and whether they are favorable to the State or to the defense is to them wholly immater-

ial. As a former newspaper man and not without considerable skill in the art of publicity, Mr. Corrigan knew very well how to get favorable stories and his efforts produced noteworthy results. Mr. Corrigan's skill in the art of publicity is demonstrated by the innumerable stories that appeared, emanating from the defendant, his counsel, his relatives and his friends. The bales of newspapers offered by the defense in support of their motions show these favorable personal stories and the innumerable photographs for which the defendant and his counsel posed.

Mr. Corrigan also demonstrates his accomplishments as an actor by pretending to object to the pictures and reading his objection into the record. The photographs themselves, and the stories which accompanied them, show complete acquiescence and pleasure. That the objection made for the record was without justification and mere pretense is proved by the testimony of Julian Wilson during the hearing on the motion for new trial. Mr. Wilson was a photographer for the Associated Press, assigned to this trial, and testified that he made many pictures of Dr. Sam Sheppard and considerably over a hundred of Mr. Corrigan (R. 7088). His testimony speaks for itself:

"Q Now, did you take any pictures in this court room while the court was in session?

A No, sir, I did not.

Q Now, while the court was not in session, during recess or after adjournment, did you take pictures in this court room and around this building?

A Many times.

Q Did you take pictures of Mr. Corrigan?

1 A Yes, sir.

2 Q About how many times?

3 A Roughly -- it would run considerably over a hundred negatives.

4

5 Q About a hundred negatives. And of Dr. Sam Sheppard?

6 A I made many pictures of him.

7 Q And Mr. Garmone?

8 A He, too, I have made many pictures of.

9 Q Now, did Mr. Corrigan ever object to your taking of any of these pictures?

10

11 A A few times he has objected.

12 Q When was that?

13 A About the middle of the trial or towards the end of it, Mr. Corrigan -- we were instructed that Mr. Corrigan didn't want any pictures made of himself, the defense, or the defendant.

14

15

16 Q How many pictures had you taken without his objection before you received those instructions?

17 A Oh, many.

18 Q More than 50?

19 A I'd think so.

20 Q And after you received the instructions, did you stop taking pictures?

21 A Yes, sir.

22 Q And how long did that continue?

23 A About a week and a half, two weeks.

24 Q Then what occurred?

25 A We asked Mr. Corrigan's permission.

1 Q And did you get it?

2 A Yes, sir.

3 Q And then resumed taking pictures?

4 A Yes.

5 Q How many pictures did you resume taking -- did you take after you resumed taking those pictures?

6

A I'd say not as many as before because we didn't

7 need as many pictures.

8 Q More than 20 or 25?

9 A About that.

10 Q Now, with respect to the defendant, Dr. Sam Sheppard, is the number of pictures that you took before

11 the objection by Mr. Corrigan about the same as what you took of Mr. Corrigan?

12

A About, yes.

13

Q You took about 50 before. Then there was this

14 period when you didn't take any pictures because of the objection, is that correct?

15

A That's true, sir.

16

Q And then did you later resume?

17

A Yes, sir.

18

Q With whose permission?

19

A Well, when we got Mr. Corrigan's permission, we

20 resumed taking pictures.

21 Q And about how many did you take after you got permission?

22

A Somewhere around 15, 20, 25.

23

* * *

24

Q Did you ever take a picture of either Dr. Sam Shep-

25 pard or any of his counsel over their objection?

A No, sir.

* * *

"THE COURT: May I have just one question? Were you present at the conference which the Court had with photographers prior to the opening of the case?

"THE WITNESS: Yes, sir, I was.

"THE COURT: And at which the Court stated what the rule would be as to taking pictures during the trial?

"THE WITNESS: I was.

"THE COURT: Do you recall what that was as to taking pictures within the court room and of the defendant and his counsel?

"THE WITNESS: Yes, I do recall.

"THE COURT: All right. State it.

"THE WITNESS: Your ruling, sir, was that no pictures would be made at any time when the court was in session, and you also requested that we make no pictures of the defendant or the defense or anyone without their permission. I believe that is the gist of the thing.

"THE COURT: That's correct." (R. 7087-7091)

It is obvious from the record that Mr. Corrigan's objections, if any, were quite pro forma and mere pretense. The publicity was welcomed and, good actor that he was, he pretended to object.

The Trial Judge, in ruling upon the motion for new trial on the question of denial of change of venue, stated:

"The request, when made, was based upon the claim that the extraordinary public attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury in this county impossible.

It is a matter of common knowledge that the case

commanded that same attention throughout Ohio and the United States of America. It commanded very much attention throughout the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.

> Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communication, the same precise stories were simultaneously published in every city and county in the state and it certainly will not be denied that Cuyahoga County is the most liberal county in the state, and, as a result, the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature.
>
> It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like was involved -- what actually was involved was a mere mystery, a 'whodunit.' The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The Court reserved ruling on the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon that being accomplished, the Court overruled the motion and believes such action was not error." (Jr. 85, pages 6-7)

Counsel for the defendant applied for a continuance of the trial to "permit the extraordinary publicity to quiet down." The trial started on October 18th and counsel for the defendant had been engaged in the case within hours following the crime. It was not claimed that they were not prepared for trial and, as the Trial Court stated: "nor was any suggestion made as to who was going to quiet down the publicity, nor when,

nor how." (Jr. 85, page 7) This application was therefore properly overruled.

There is no question but that there was a great deal of public interest in this case and that there has been a great deal of publicity throughout the country and, for that matter, throughout the world. It should not be necessary to point out that newspapers have a constitutional right to report events in the community and to criticize what appears to them to be laxity on the part of public officials. Defense counsel have seen fit to devote a considerable portion of their brief to criticism of public officials; surely, the newspapers have an equal right. The Trial Court put it very succinctly when he stated in ruling upon the motion for new trial:

> "It is to be noted that not a single person or agency connected with the investigation of, or prosecution, for the crime involved escapes the anathema of the defense. These include the police, the Coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the Grand Jury, its foreman, the trial jury, the public, the bailiffs and the Court. The sense of search for truth and the declaration of justice seems to have vanished from a whole community as if by magic and overnight.
>
> The news agencies of every kind and character are thrown in for good measure. In spite of all the charges made, not a single specific item is cited in support of the claims made. Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did."
> (Jr. 85, page 14.)

The only question with respect to the motion for change of venue was, could a fair and impartial jury be impaneled in this community, where the offense occurred? The question was answered by the impaneling of the jury. Such a fair and impartial jury was impaneled, even though the defense did not exhaust their peremptory challenges, either as to the first 12 jurors or as to the alternate jurors.

There isn't a scintilla of evidence in the record to support the contention that the jury or any single member thereof, was biased or prejudiced by the newspaper stories or anything else, or that the jury was in any way influenced by the reporting of this case in the newspapers, over the radio and on television. A distorted picture is presented to this Court as to the conduct of the trial and the arrangements made for the reporters and others. Regardless of what action was taken by the Trial Court, it was certain that all of these newspaper reporters were to be present and that demands would inevitably be made upon the Trial Court by all types of news media. The Trial Judge stated, in ruling upon the motion for new trial:

> "Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully 'cover' the trial, and having requests for space from many of them, the Court decided to make proper arrangements before trial and to control the situation so as to minimize and, if possible, eliminate confusion during the trial. The court room is small.
>
> The Court assigned specific seats to individual correspondents in the rear of the court room and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the court room; that there was to be no passing back and forth

through the trial area and that all entries to and movings out of the court room be via the public doorway in the rear of the court room. Members of the defendant's family were accommodated with seats at all times during the trial. The same was accorded members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the court room and a scheme of rotation was established so that many persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.

Rules were prescribed for photographers and representatives of radio and television stations. They were cautioned that no cameras were to be permitted in the court room excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken in the court room at any time excepting with his consent or that of his counsel.

The Court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to overenthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the Court. A very large number of pictures of the defendant, his family, counsel and friends were taken in the court room (outside of court session periods) with their permission and without complaint. Counsel for the defense held press conferences in the court room with cameras clicking; all to the apparent delight of counsel for the defense, and, naturally, without protest.

Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service.

> Not a single complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or the defendant, but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest.
>
> Some space outside of the court room which could be spared for the moment without interference with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:
>
> > 'The Assignment Room, where cases are assigned for other causes to court rooms, was assigned by the Court to reporters and telegraphers.'
>
> Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate court room area. They were out of the corridors leading to the court room and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity." (Jr. 84, p. 9-11.)

It should be noted that following the request for separation of witnesses, which the Court granted, the Court allowed Dr. Stephen Sheppard to remain in the court room throughout the trial, even though it was stated he was to appear as a witness for the defense. (R. 1673)

Complaint is made relative to the part taken by the Trial Court in a Fabian television program on the steps of the Court House.

1 The Trial Judge on one morning walked toward the Court House steps, as
2 usual, and there saw Robert Fabian (a retired Superintendent of Scotland
3 Yard) with a very small contraption in his hand. Mr. Fabian said, "Good
4 morning, Judge Blythin, nice morning." The judge said, "Good morning,
5 Mr. Fabian." (Jr. p. 13, Item 38.) There was no conversation of any
6 kind about the case on trial or any other subject.

7 The right to grant a change of venue lies in the sound dis-
8 cretion of the Trial Court, State v. Richards, 43 O. App. 212; and there
9 is no showing that the Trial Court abused its discretion in overruling the
10 motion for a change of venue and for a continuance.

11 As stated in the opinion of the Court of Appeals, in the
12 Richards case the Court held:

13 "2. That trial court denied change of venue without
prejudice until it could be determined whether
14 fair and impartial jury could be impaneled,
held not abuse of discretion. (Sec. 13427-1
15 G.C.; 113 O. L. 132, Art I, Sec. 10, Constitu-
tion."

16

Other Ohio authorities cited by the Court of Appeals are:

17

12 Ohio Juris. Sec 97, p. 128;
18 12 Ohio Juris. Sec. 853, p. 844;
State v. Stemen, 90 O. App. 309;
19 Dorger v. State, 40 O. App. 415;
Johnson v. State, 6 O. L. Abs. 707;
20 State v. Deem, 154 O. S. 576.

21 The Court of Appeals states further:

22 "From the foregoing authorities, the law of Ohio is clear
that the best test of whether a defendant can have a con-
23 stitutional trial in the county in which the indictment is
returned is to be determined upon the impaneling of the
24 jury. Citizens summoned for jury service represent a
cross section of the community. Their answers to ques-
25 tions directed to them in the process of impaneling a

jury gives a clear-cut picture of their state of mind; their answers indicating whether or not they will be guided by the evidence alone in reaching conclusions of fact, must be given great weight in considering the question presented by a motion for change of venue. When the great majority of the prospective jurors called or summoned as provided by law to be impaneled in a criminal case state they are not and will not be subject to outside influence if accepted on the jury, a trial judge who overrules a motion for change of venue under such circumstances is not guilty of an abuse of discretion. The very foundation of the jury system is founded upon the inherent honesty of our citizens in performing courageously such public service without fear or favor." (App. Appendices to Brief, pp. 19a-20a)

The same rules are as applicable in considering a motion for continuance as are applicable in considering a motion for a change of venue. Snook v. State, 34 O. App. 60.

The process of impaneling the jury demonstrated the wisdom of the foregoing rules and there was no unusual difficulty in securing a fair and impartial jury. The analysis of this process is briefly stated in the opinion of the Court of Appeals as follows:

"The record in this case discloses that a special venire was called for the trial of this defendant as provided by Sec. 2945.18 R.C. Seventy-five names were drawn from the jury box. Of this number, 11 were immediately excused for justifiable reasons or were not found, and could not be summoned (three in number) by the sheriff. Of the remaining 64, 13 were excused because they had formed a firm opinion as to the guilt or innocence of the accused and 10 were likewise excused because they were opposed to capital punishment. Sixteen others were excused for cause.

The State used four peremptory challenges and the defendant five. As is provided in Sec. 2945.21 the State in a homicide case where there is but one defendant, is entitled to six such peremptory challenges and the defendant a like number so that when the jury was sworn, the defendant left the right to one peremptory challenge unused.

From the foregoing analysis of the venire of 75 electors called in this case, four of those called were not needed in impaneling a jury of 12. Such jury was selected as provided by law and sworn and accepted by the defendant to well and truly try and true deliverance make between the State and the defendant.

The parties agreed to select two alternate jurors as provided by Sec. 2313. 37 R. C. The four remaining jurors of the original list, together with an addition-venire of 24 summoned as provided by law, were used for this purpose. Of the 24 summoned, eight were called and questioned together with the four from the original venire, in impaneling the two alternate jurors. Of those examined, three were excused for holding a firm opinion of the guilt or innoeence of the accused, four were excused as being against capital punishment, one was excused on challenge for cause and each side used one peremptory challenge. (Each side had the right to excuse two prospective alternate jurors peremptorily under the provisions of Sec. 2313. 37 R. C)

The analysis of the impaneling of the jury in this case where but 16 prospective jurors out of 72 examined could not sit because they had prejudged the guilt or innocence of the accused, clearly shows that there was no difficulty whatever in impaneling a fair and impartial jury.

The jury having been impaneled as provided by law and sworn to afford the defendant a fair and impartial trial, and to come to its verdict by a consideration of the evidence submitted in open court without any outside influence or consideration, and where there is no claim of misconduct on the part of any member of such jury during the trial, there can be no ground to claim a mistrial because of continued publicity, publicizing the events of the trial, and other related matters." (App. Appendices to Brief, pp. 23a-24a)

We wish to note that the defense did not exhaust their peremptory challenges in the selection of the jury.

The defense try to make capital out of the many rumors and efforts to solve this murder, especially in the weeks following July 4th. Naturally, the public authorities would check out every tip, good or bad.

The same may be said for the newspapers, and if the defendant and his lawyers pursued a course of conduct that was not in accord with protestations of innocence, comment by newspapers and others was inevitable. The mere suggestion that the defendant, who was protesting his innocence, submit himself to certain tests deprived him of no constitutional right nor prevented him from having a fair trial. He was not forced to take any test and he did not submit to any test.

The police and other public authorities are severely criticized for trying to obtain a "confession" from the defendant. What is unconstitutional about the police endeavoring to secure a confession? No one laid a hand on the defendant and the most that can be claimed is that some officer used some bad words.

Much is made of the use of the words "third degree" in a newspaper editorial, but it should be remembered that that expression is frequently applied to a thorough interrogation and does not at all necessarily mean the use of force or violence. In any event, there was no force or violence used. Defense counsel must have been fearful that a confession might have been obtained. How else can they explain the extraordinary effort they made to prevent the defendant from being interrogated except by friendly officers under stipulated conditions? How else can they explain their "sit down strike" in the county jail on Sunday, August 1st, 1954, when counsel appeared at approximately 8:15 o'clock in the morning and, by alternating one with the other, remained with the defendant until afternoon, to prevent the interrogation of their client by the officers who were obliged to cool their heels downstairs during the entire period of time? And when

1 the sheriff, noting that counsel was merely reading a newspaper, requested
2 the attorneys to leave, the defense bitterly assailed him, charging him with
3 violations of law and of the constitution. They even saw fit to make charges
4 against the sheriff to the Bar Association and at a subsequent hearing there-
5 on before the bar committee, counsel who made the charge did not even ex-
6 tend to them the courtesy of appearing.

7 We should also note that later that same Sunday, after some
8 police officers had futilely interrogated the defendant, they were asked to
9 leave by the sheriff in order that he be revisited by Messrs. Corrigan and
10 Petersilge. The officers got nowhere in trying to question the defendant
11 and no confession was obtained. So what point is there in dwelling upon
12 the subject matter of "confession"?

13 The defense also dwell on newspaper editorials critical of
14 the progress that was being made in the solution of this horrible crime.
15 It must be remembered that the Mayor of Bay Village was a close personal
16 friend of the defendant, as were the police officers in Bay Village for whom
17 he was the police surgeon; that he was whisked off to Bay View Hospital
18 by his brothers without permission before the Coroner or any of the Cleve-
19 land police officers arrived; that a protective shield was thrown around
20 him and that the defendant and his counsel would permit no interrogation
21 except under their own terms and by designated friendly officers; and
22 that the defendant and his counsel were obstructing the public authorities
23 in what should be the normal investigation of a murder. It seemed, at
24 least to the newspaper editors, that certain public officials were "sitting
25 on their hands" and were fearful, for one reason or another, of proceeding

vigorously in the investigation as they would in any other case. Certainly, these newspapers have a right to criticize what they deem to be laxity on the part of public officials. It is a right given them by the same constitution which assures the defendant a fair trial by jury. Whether we or defense counsel agree or disagree with the opinions expressed by the newspaper editors is entirely beside the point.

The defense again refer to the inquest held in the school auditorium in Bay Village and again proceed to distort the nature of the proceedings and what occurred (App. Br., pp. 271-280). Ignored entirely is the testimony of Dr. Gerber that he had made arrangements for the inquest and had actually issued subpoenas before the Press editorial appeared, and that the reason it was held in Bay Village was that most of the witnesses lived there and it would be convenient for them. Also untold is the fact that the hearing was in perfect order during the testimony of the defendant, his parents, his brothers, the doctors, Don Ahern and Nancy Ahern, Mayor and Mrs. Houk and the Bay Village officers. There was no disorder until the last few minutes of the last day of the public hearing when Dorothy Sheppard was recalled to testify further. It was brought about by Mr. Corrigan, who sought to direct the reporter to insert certain matter into the record. Mr. Corrigan was told not to do so and was cautioned that if he persisted, he would be asked to leave. He not only persisted, but ordered the reporter to make the insertions in the record, refusing to desist when so requested, refused to sit down when so requested and challenged the authority of the Coroner to put him out. The Coroner had no alternative and was obliged to have Mr. Corrigan removed from

the hearing room. This occurred within a few minutes before the close of the hearing. Furthermore, the inquest was held on July 22nd, 23rd and 26th and there was no indictment of the defendant at that time. The indictment was later, and the trial started on October 18th. The disturbance at the inquest which Mr Corrigan projected has no possible bearing on the trial of this case, nor did it prevent the defendant from having a fair trial.

The defense, on pages 297-298 of their main brief, stated that the "appellant was taken from the jail and subjected to personal indignities." This is completely without foundation in fact. The defendant had complained of injuries and he was taken to the Cleveland City Hospital where he was given a complete and thorough physical examination. Nowhere in the testimony of the defendant himself does he assert that he was abused by the doctors. This procedure of "pricking a patient with a pin" is merely to test the patient's reflexes and there is nothing abusive in this practice, so commonly used.

The defense dwell considerably on various matters preliminary to this trial, including their own applications for writs of prohibition, habeas corpus, etc., all of which have no bearing whatever on the trial of this cause.

On page 310 of the main brief, it is asserted that the indictment was the result of pressure on the Grand Jury. This statement is based solely on the assertion of the foreman, Mr. Winston, to the effect that "pressure on us has been enormous." The complete answer of the foreman appears on the same page of their brief (p. 310) where Mr. Winston

explains in response to the question:

"Q What was the pressure that was placed on you?

A <u>Only curious people who wanted to know what we knew on the Grand Jury.</u>" (Emphasis ours)

The pressure was for information and not, as suggested by defense counsel, to indict the defendant.

At pages 332-333 of the main brief, the defense recount the incident of a newspaper reporter visiting the home of Lois Mancini, an interview with Mrs. Mancini's mother, husband and children, and of the pictures taken of the members of the family, together with a story of the difficulties of the family while the mother was serving on the jury. There may be some question as to the good taste of such a story, but in any event it did not favor one side or the other and was entirely without prejudice to the defendant. Furthermore, Lois Mancini was not present during the visit of the reporter and did not participate in the interview. We wish to also note that she was merely an alternate juror and did not participate in the deliberations or the verdict.

Reference is made to a broadcast by Walter Winchell, at page 333 of the main brief. The reference, Record 5428, is incorrect and should be Record 5429. The two jurors who heard the broadcast were asked by the Court: "Would that have any effect on your judgment?" Both answered, "No." The Court stated:

"I do hope, ladies -- I would like to ask if any of you know if any members of your families heard the broadcast?

"Have any of you, other than these two ladies, heard anything about that broadcast last night? And I wish

to ask you two ladies in particular, and all of you in general, to pay no attention whatever to that kind of scavenging. It has no place, in my judgment, on the air at all, but that is not for me to determine, but surely it has no place whatever in our thinking or considerations or thoughts in any way, shape or manner in this case. Let's confine ourselves to this court room, if you please." (R. 5429-30)

Much is made at page 362 of the main brief of "Disorder During the Trial." Counsel complains that there were instances of disorder, noise and laughter in the court room. It should be remembered that this trial continued for some nine weeks and that necessarily there are times when people are required, for one reason or another, to leave the court room. A few of these occurrences caused the Court to admonish the spectators to the end that there be no interruption of the trial proceedings. There are, of course, the inevitable traffic noises on East 21st Street which result in short delays or repetition of the questioning.

As to the incident of the laughter to which Mr. Corrigan refers, it resulted from Mr. Corrigan's remark, "Well, I don't care what the conversation was," after he had asked the witness what the substance of a conversation was, and the witness had given his answer.

Counsel complains of the presence and conduct of unnamed persons in and about the court room and corridors during the five days in which the jury was deliberating in their jury room. If the unnamed persons interested in the outcome of the trial, whether they be newspaper men, counsel for the defendant, the defendant's brothers, Dr. Steve Sheppard and Dr. Richard Sheppard, their respective wives and friends or other spectators, milled around during the five days, or if some of them played

during the long wait, we fail to see how that in any way influenced the jury in its deliberations or had any bearing on the verdict. There is not a scintilla of evidence in the record that the jury was disturbed or influenced by any of the activities in the court room or in the corridors while they were in their jury room during their deliberations.

ASSIGNMENT OF ERROR NO. 3

THE APPELLANT WAS NOT DENIED DUE PROCESS OF LAW.

It is claimed that the appellant was denied due process of law, but apart from quotations from "Annals of the American Academy of Political and Social Science" and several cases, nothing specific is shown wherein the appellant was denied due process of law.

ASSIGNMENT OF ERROR NO. 4

THERE WAS NO MISCONDUCT BY THE PROSECUTING ATTORNEY.

The sole basis of this assignment of error is the defense allegation that the Sheppard home was guarded by the Bay Village police officers under John Eaton, Chief of Police of Bay Village, and that upon instructions of the prosecutor, he would not turn the keys and the control of the house over to the attorneys for the defendant.

The record of this case shows the extreme importance of numerous articles of property within the home and a number of such articles appear as exhibits in the evidence. It was also necessary to continue the examination and search in and about the house for possible clews and particularly for the still missing T-shirt and weapon. The record will disclose the continuous examination of the premises for blood spots,

fingerprints, etc., by the scientific unit of the Cleveland Police Department and by members of the staff of the county coroner. As stated by the trial court (Appendix B, p. 26a), the prosecutor "could very well have been subject to just criticism" had he directed Chief Eaton to act otherwise.

Further complaint is made that the Court erred in not ordering the keys to the house turned over to Mr. Corrigan during the testimony of Chief Eaton. This episode occurred during the closing days of the trial when a subpoena was issued to Chief Eaton, requesting the Chief to bring with him the keys to the house. As a matter of fact, the defendant, counsel for the defense, and the members of the defendant's family had never been denied an opportunity to enter the premises or any part thereof, or to make an examination or investigation therein. Also, as a matter of fact, the defendant, counsel, and defendant's family had visited the premises and at no time had they been denied access thereto.

The cross examination of Chief Eaton at that time, by Mr. Mahon, was as follows:

"Q Chief, since you have had that key -- you got it some time in November, the key to the house; is that right?

A Yes, sir.

Q From that time down to date has the house been accessible to the Sheppard family?

A Yes, it has.

Q And have they been in the house during that period of time?

A Once, on one occasion, at least.

Q To take care of the heat, and so forth, and water,

and all of those things?

A Yes.

Q Is that right?

A Yes.

Q Have they ever been denied at any time the right to go into that house since you have had possession of the keys?

A They have not." (R. 6076)

"By Mr. Corrigan:

Q And the order that Sam Sheppard could not go into his home, where did that come from?

A Pardon me. Will you repeat that?

MR. DANACEAU: We object to that. We know of no such order.

Q Did you make that order?

MR. DANACEAU: Just a minute.

MR. MAHON: Was there such an order?

THE COURT: Let him tell what the situation was.

MR. MAHON: There is no evidence there ever was such an order.

THE COURT: No, there isn't any evidence about an order, but he is the Chief of Police. Let him answer if there was.

A I didn't understand the question, I'm sorry.

THE COURT: Will you restate your question, Mr. Corrigan? The Chief doesn't understand it. Or let the reporter repeat it.

(Question read by the reporter.)

A There was no order he could not go in his home.

Q The order that Sam Sheppard could not go into his home except in the custody of a policeman or with a policeman, how did that originate?

A That was suggested, I believe, by the prosecutor's office." (R. 6077-6078)

Obviously, the whole episode in the closing days of the trial, and the demand for the keys in the presence of the jury was a grandstand play and show, and nothing else.

It is also intimated that the defense were prevented from making an inspection or examination of the premises. This is simply not true. Defense counsel were specifically told that they could inspect or make an examination of the premises at any time. (See State's Affidavit N.D.E.-A on Motion for New Trial on Newly Discovered Evidence)

In the meantime, the defendant and his counsel had, on more than one occasion, visited the home and, as previously pointed out, went through all the rooms and examined the house, both inside and outside. The defendant was permitted to remove his medical bags and the contents. He and the members of his family were also permitted to remove his clothing, Chip's clothing, and various other articles. Also removed were his automobiles, consisting of a Jaguar, a Lincoln Continental and a jeep. Except for the Lincoln Continental, all of these articles of property were removed within a week or two following the murder of Marilyn Sheppard and became unavailable for further examination by the scientific unit of the Cleveland Police Department when, at a later date, the case was turned over to them for further investigation. Also made available to the

defense for their inspection were all of the articles in the possession of the county coroner and such articles were examined by Fred Garmone, counsel for the defense, and by Dr. Anthony J. Kazlauckas, a former deputy coroner of the county, on behalf of the defense. (See State's Affidavit N.D.E. - B and N.D.E. - C on Motion for New Trial on Newly Discovered Evidence).

In the words of Judge Blythin:

> "Seldom indeed does the entire interior of a home become as important as the interior of this home seemed to be in the period in question and while complete exclusion of the representatives of the defense would not be justified, it is only rational to believe that the Prosecuting Attorney was fully justified in preserving the scene in status quo pending trial and its outcome. The two affidavits last mentioned and the statements of all counsel in open court clearly indicate that the prosecution had no desire to conceal anything and must lead the Court to the conclusion that there existed neither concealment nor hindrance and that the condition imposed, already mentioned, was merely precautionary. It is not unlikely that failure to take possession of the property and failure to take the precaution taken could very well have been subject to just criticism." (Appendix B, pp. 26a)

ASSIGNMENT OF ERROR NO. 5

THERE WERE NO IRREGULARITIES IN THE PROCEEDINGS OF THE COURT BY WHICH THE APPELLANT WAS PREVENTED FROM HAVING A FAIR TRIAL.

This was a case in which the defendant was charged with First Degree Murder and it was wholly proper to question the jurors with respect to their views on capital punishment. Whether the questions were put by counsel or the Court is wholly immaterial. The statement that when there was a negative reply "or hesitancy" (App. Br., p. 389) the juror was excused by the Court is simply not correct. Where the juror expressed views

[illegible] prevent him from joining in a verdict that carried with it the death penalty, upon challenge by the State, the juror was excused and properly so.

Also discussed under this assignment of error are some of the statements of the Court designed to proceed with the progress of the trial, after defense counsel had extended interminably, by constant repetition, the examination of Dr. Adelson, Deputy County Coroner, on matters pertaining to the cause of death. The record will disclose, from pages 1727 to 1969, some 240 pages of cross examination of this doctor, and from pages 1985 to 2016, some 30 pages of recross examination, or a total of some 270 pages.

Dr. Adelson appeared as a witness for the State to establish the cause of death. He appeared for direct examination on the afternoon of November 4th. The direct examination was concluded a few minutes after the Friday morning session, November 5th (R.1723-1727). The cross examination of Dr. Adelson then ensued. After a whole day of cross examination, the Court suggested that a whole day of cross examination appeared to him to be enough to determine the cause of death. However, an adjournment was taken to Monday, November 8th, and the cross examination of this witness continued for most of the morning (R.1893 to 1969). After a short redirect (R. 1969-1985), there was recross examination of this witness for the remainder of the morning session (R. 1985-2015).

The record will disclose that the cross examination and recross examination was extremely repetitious and the widest possible latitude was given to counsel, notwithstanding the excursions of counsel

into wholly unrelated fields.

Similarly, as to the testimony of Officer Dombrowski and the comments of the Court complained of (App. Br. p. 391) (R. 4582). This officer had previously produced, at the request of counsel, all of the pictures that were taken and in open court counsel examined them all and selected the pictures they wished to use and returned the remainder to the officer, who returned them to the files of the Police Department. Later, counsel questioned this witness with respect to the pictures he had so returned to the files. He asked him to again 1- k them up and again bring them back into court (R. 4582).

It should b- examination of Officer Dombrowski began n November 26th at 10:15 a. m. and procee the day. It was resumed (R. 4545) on Monday, Novem through the entire morning. It continued during the episode complained of took place late that afternoon (R. 4 s examination of this officer consumes some 322 pages c d (R 4291-4613). Delay in requiring the officer to go back and p hotographs previously produced in court and examined by counsel a turned to the officer was caused by counsel and in view of the unnecessary time consumed with repetitious matters and questions, the remark of the Court that "We can't go on with this witness forever. We will have to somehow or other get through with this witness" was not only pertinent, but necessary, if we were to ever conclude with the trial of this case.

As to the query of the Court (App. Br. p. 392) pertaining to

[illegible] the witness Elnora Helms, the maid in the Sheppard home, referred to in her testimony pertaining to the washing of blood, and the subsequent remark of the Court that the washing of blood during the month of April "had nothing to do with the 4th of July or anywhere near it," (R. 4003) counsel objected to the form of the question, whereupon the Court withdrew it and rephrased the question as follows: "It was not anything that happened near the 4th of July, one way or another?" The witness answered, "No, because I hadn't been there." (R. 4004) There was no objection to this last question.

ASSIGNMENT OF ERRORS NOS. 6 AND 7

THERE WAS NO PREJUDICIAL ERROR IN THE IMPANELING OF THE JURY.

The defense claim that there was some error in impaneling the jury because certain jurors had read newspapers or had otherwise heard something about this murder before they had been summoned.

We know of no principle of law which excludes such jurors from service merely because they had previously read or heard something about the case. The persons who could hear the evidence without bias or prejudice and could decide the issues fairly and impartially were seated. Those who could not, were excused.

It is contended that the Trial Court erred in refusing to allow the appellant to question prospective jurors on whether evidence of extra-marital affairs would prejudice them against him.

The record will disclose innumerable questions asked various jurors as to whether extra-marital relations would bias or prejudice them

[illegible] and impartial jurors. The only objections that were sustained were those to questions which were asked in such a form as to call for the reaction of the jurors in advance, the evident purpose of which was to have the jurors indicate in advance what their reaction would be under a certain state of the evidence. Such questions were inadmissible. In State v. Huffman, 86 O. S. 229, it was held:

> "1. The examination of persons called to act as jurors is limited to such matters as tend to disclose their qualifications in that regard, under the established provisions and rules of law, and hypothetical questions are not competent when their evident purpose is to have the jurors indicate in advance what their decision will be under a certain state of the evidence or upon a certain state of facts."

The claim is made that the challenge for cause should have been sustained in connection with Juror Barrish because it is claimed he said he would give more weight to a police officer's testimony than he would to a layman. The record will show that upon further examination of Juror Barrish, he stated in this connection:

> "Q Mr. Barrish, you understand it is the function of the jury to weigh the testimony of all of the witnesses who testify?
>
> A Yes, sir; I do, sir.
>
> Q And in weighing the testimony of any witness, you have a right to believe or disbelieve all or any part of any of the testimony of a witness. You understand that?
>
> A Yes, sir.
>
> Q Now, if a police officer testified or any law-enforcing officer testified, would you weigh and measure his testimony with the same yardstick that you use on the testimony of any lay witness?

A I would --

Q Would you -- go ahead.

A I understand what you mean. I would have to hear the other side. I couldn't give a policeman preference over the layman, but he should -- he would know more information about any information whatsoever in a case like this.

Q Well, if a policeman testified and you felt that you believed him, you would believe him?

A Yes, sir.

Q If you felt that he wasn't telling the truth, you wouldn't believe him?

A That's right, sir.

Q And wouldn't you apply that same test to any layman?

A That's right.

Q So you would apply the same test to the testimony --

A That's right.

Q -- of a policeman as you would to a layman?

A Yes, sir." (R. 93-95)

As to the matter of presumption of innocence, Juror Barrish was also questioned and stated as follows: (This juror was passed for cause by the defense at Record 115.)

"Q You could. One of the rules of law that I am sure his Honor, Judge Blythin, will instruct you on is that at the outset of this trial, right at this moment, that the law provides that this defendant is innocent, and that that presumption of innocence is to carry on through to him throughout the trial until such time, if such time ever comes in the trial of this case, that his guilt is proven beyond a reasonable doubt, that he is guilty.

Now, if the Judge should charge you that that is the

law, could you follow that instruction?

A I could, sir.

Q And can you at this time give this defendant the benefit of that presumption of innocence?

A I could, sir. (R. 67.)

As to Prospective Alternate Juror Mrs. Betty Richter, who was excused for cause, she had acknowledged that she knew Dr. Sam and Marilyn Sheppard, had met them socially, and was a golf companion of Marilyn Sheppard. Ultimately Lois M. Mancini was seated as such alternate juror in place of Mrs. Richter, but she was excused at the conclusion of the trial and did not participate in the deliberations or the verdict.

As to Juror Manning, after he was seated and sworn as a juror, a young man came to the Criminal Courts Building, talked to counsel for the defendant first and later to the Prosecutor, and informed them that Juror Manning had been arrested and convicted of a morals offense relating to a young man. The matter was also brought to the attention of the Court and counsel for the defense. Manning neglected to make this conviction known when he was asked on the voir dire examination whether or not he had ever appeared as a witness in any case. The matter became known generally and received considerable publicity. A meeting was held in chambers and by common consent the matter was continued to over the weekend. Counsel for the defense thereafter proposed that he would consent to the discharge of Juror Manning if the entire panel was discharged and we would proceed to re-impanel the jury. This proposal was declined by the State.

After the alternate jurors were impaneled, Juror Manning addressed himself to the Court, in open court, and stated:

> "JUROR MANNING: Right now, I mean from what is going on, when I came down here for jury duty I thought I was doing what a public spirited citizen of this country would do. That's the only idea I had when I came down. It interfered with my work, my earning a living. I didn't give a second thought to that. I came down here, and if I was chosen, I would serve and serve in the way I spoke, absolutely unbiasedly. And I was -- I tried to run myself from the heart and mind together and be absolutely unbiased and unprejudiced in thinking and talking with other people, even speaking outside this jury. But after what has happened, I would not be able to sit in that box with the other jurors, be able to listen to the case and be unbiased, unprejudiced or -- unemotional is what I am trying to drive at mostly; that if this keeps up, if I am kept on the jury, I think I will be a sub-headline as long as the trial goes on. I will definitely have a nervous breakdown in a very short time and, in fact, I feel I am just about ready for one right now." (R. 1600-1601)

The Trial Court excused Juror Manning on the ground that he was both disabled and disqualified.

Revised Code Section 2945.29 (13443-13) provides:

> "Jurors becoming unable to perform duties. If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the Court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the Court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

Revised Code Section 2313.37 (11419-47) provides in part:

* * *

"If before the final submission of the case to the jury

[illegible] incapacitated or disqualified, he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror."

The defense contend that they had one challenge left when Juror Manning was excused and his place taken by alternate Juror Hanson (App. Br., p. 411). As the Court of Appeals stated:

> "The defendant entered his exception to the procedure used by the Court in discharging Juror Manning and demanded the right to exercise his remaining peremptory challenge when the first alternate juror was seated in the panel after Manning was discharged, which request was refused.
>
> "After a jury is sworn and charged with the delivery of the defendant, the trial is commenced and unused peremptory challenges cannot thereafter be used and where an alternate juror has been selected and sworn as provided by law, he must be seated in the place of the discharged juror by order of the Court." (App. to Appellant's Br., p. 27a)

In each instance where the defense asked that a juror be discharged for cause and were overruled, it had developed upon further questioning that the juror was unbiased and unprejudiced and would follow the instructions of the Court, and was a qualified juror. There was, therefore, no basis for discharge for cause.

The prospective jurors were questioned at very great length by both counsel for the State and the defense, and the Court. In fact, there are three volumes of the Bill of Exceptions, totaling hundreds of pages, setting forth such detailed examination. Except for Juror Manning who was discharged, the 13 jurors who sat and heard this case, and the 12 jurors who decided this case, were all competent and qualified jurors,

[illegible] jury, and the record discloses that they gave most careful and adequate consideration to the case.

ASSIGNMENTS OF ERROR NOS. 8, 9, 10, 11, 12 and 13

THERE WAS NO ERROR IN THE ADMISSION OF CERTAIN TESTIMONY.

(8) Complaint is made because color slides were used by Deputy Coroner Adelson in connection with his testimony. The color slides which, except for the color, are the same as the black and white photographs, which are in evidence, by their very nature of presenting the color, gave a better view of the objects portrayed. For example, the color slides would clearly distinguish blood or blood spots, not so readily distinguishable on black and white photographs. On the other hand, they would also show that the liquid under the crystal of the defendant's watch was not blood, but water.

The color slides included not only pictures of the deceased's body but also of various objects such as the defendant's watch, the victim's watch and the trousers of the defendant, as well as the tooth chips found on the bed.

(9) It is contended that some hearsay testimony by Nancy Ahern prejudiced the defendant.

This testimony followed the cross examination of Don Ahern by the defense wherein he was questioned as to the attitude of Marilyn and Dr. Sam Sheppard toward one another. There is also an assertion in the opening statement of the defense that their married life was happy. On cross examination of Nancy Ahern the defense proceeded to question her on her

testimony on the very same subject matter at the inquest and thus got substantially the same testimony to the jury. Many other witnesses were also questioned by the defense as to the attitude of Marilyn and Dr. Sam Sheppard, one to the other, and the defense introduced into evidence a letter from Marilyn Sheppard to Mrs. Brown, her aunt, and had the letter read to the jury.

There was an abundance of testimony from other witnesses, Dr. Hoversten, Susan Hayes, Dr. Stephen Sheppard, that at various times there was trouble and talk of divorce, notwithstanding that up to and at the inquest such trouble and divorce talk was denied by the defendant. There was for example the testimony of Dr. Hoversten who dissuaded the defendant from sending to Marilyn, his wife, a letter pertaining to divorce after Dr. Sam Sheppard had shown him the letter and discussed its contents with him.

The substance of the testimony of Mrs. Ahern was merely that Dr. Sam and Dr. Chapman had a conversation and that following the conversation, the defendant had determined to continue his married life. Such a conversation, in view of all of the other evidence on the same subject, could hardly be considered as having prejudiced the defendant.

It did not involve any particular element of the crime itself. At most it would have had some bearing on the possible motive, which is not an essential element of the crime itself.

As the Court of Appeals stated:

> * * * "Statements such as were given in evidence or testified to by Mrs. Ahern as a statement made by the decedent, are always admissible to show that the statement

[illegible] made or to establish the state of mind of the parties where their relationship is material to the issues in the case.

* * *

"Even if it be argued that there is no sound legal basis for the inquiry of what the deceased said of statements of defendant to Dr. Chapman about divorce, yet, because of the state of the record on that subject, the defendant's admitted relationships with other women which came to the knowledge of the decedent, the watch incident which was a part of the same conversation between the decedent and Mrs. Ahern (the watch given to Susan Hayes having been previously the subject of some slightly animated discussion between defendant and his wife) we do not find that the defendant was prejudicially affected by the admission of this evidence about which he complains." (Appendices to App. Br., pp. 59a-61a)

(10) It is claimed that the testimony of Esther Houk relative to the defendant's statement to her sister in her presence that a head injury could be faked, was remote and unrelated. The defendant was claiming rather severe injuries in this case. It was the contention of the State that although the defendant was injured, the extent of his injuries were not nearly as serious as he and his family stated them to be. If he thought no more of faking a head injury for someone else, how much more would he be inclined to fake injuries for himself? This testimony was pertinent.

(11) The defense claim that the Court erred in permitting the defendant to be cross examined about Margaret Kauzor and Julie Lossman.

The defendant had mentioned Julie Lossman in his written statement and there was no objection to the introduction of the statement. Cross examination of the defendant on the same subject certainly would be pertinent for him to explain the contents of his written statement.

[illegible] convey was that the defendant

and Marilyn were perfectly happy in California. Cross examination of the defendant relative to his conduct with Kauzor was for the purpose of throwing some light on his true conduct in California.

The defense persistently attempted to portray an exceedingly happy and lovable married life for the defendant to support their contention that under no possible circumstances could the defendant have committed this crime. From the very beginning of his interrogation by police officers, the defendant maintained that he had had no affairs whatever with other women and it is admitted that he denied under oath during his testimony at the inquest that he had any affair with Susan Hayes. The record discloses that his affair with Mrs. Lossman, as well as his affair with Susan Hayes, was known to Marilyn. The affairs themselves, as well as the subsequent knowledge of the wife, are certainly pertinent to show the troubled status of their married life and negatives the lovable and happy picture presented by the defense.

The evidence shows with respect to Margaret Kauzor, like that with Susan Hayes and Lossman, his affairs with other women, all conducive to a troubled rather than a happy married life, and conducive to quarrels and incriminations which are very likely to result in a crime such as charged in this case. The evidence shows by the testimony of Dr. Hoversten that this defendant, while married, had on an occasion been with Margaret Kauzor in California, when he was a student there, and subsequent to the Kauzor affair, the defendant prepared a letter directed to Marilyn, suggesting a divorce, which he was dissuaded from sending by

(12) **The defense claim that the Court erred in permitting unfair cross examination of the appellant concerning Susan Hayes and as to how he sustained his injuries.**

At the inquest the defendant was specifically asked whether he had had an affair with Susan Hayes, which he under oath unqualifiedly denied. This, of course, was to sustain the picture they were trying to portray of a lovable, happy, married life. At the trial the defendant admitted intimacies with Susan Hayes. Cross examination along this line was not only not error but the prosecutor would have been lax if he had not questioned the defendant as to his previous testimony under oath, which contradicts his testimony at this trial concerning Susan Hayes.

Incidentally, the claim now made that he deliberately lied because he was a "gentleman" in order to protect the reputation of Susan Hayes was not followed by the same sort of solicitation by the defendant for Mrs. Lossman. In that instance, the defendant was careful to portray Mrs. Lossman as the aggressor. The simple fact of the matter is that, in both instances, the defendant was concerned solely with his own interest and in concealing his affairs with other women in order to continue the pretense of a lovable, happy, married life.

Cross examination of the defendant with the following question was likewise competent:

> "Q And that after you had killed her you had rushed down to that lake and either fell on those stairs or jumped off the platform down there and out to the beach, and there obtained your injuries?"

himself told Officer Schottke in describing the events surrounding the murder that "He pursued this form down the steps, and when he got to the landing at the boat house, he does not know if he jumped over the railing or if he ran down the steps." (R. 3572) The question was, therefore, perfectly proper and it was a reasonable inference to be drawn from the defendant's own account of how he pursued the phantom down the stairway to the beach, that that is how he sustained any injuries that he had.

(13) The defense argue that it was error to permit Mayor Houk to testify that he took a lie detector test. Houk was merely a witness in this case, not the defendant, and his willingness to take the lie detector test was simply one item of fact to show both his attitude and conduct. The Trial Court instructed the jury that a person is not compelled to take a lie detector test. His instruction to the jury on the subject of a lie detector test was as follows:

> "THE COURT: Mr. Parrino, the Court would like to say a word to the jury now.
>
> Ladies and gentlemen of the jury, you are not to understand by these questions that any person is obligated to take any lie detector test.
>
> A person has his own choice. He is under no obligation whatever to take it." (R. 3852)

When the subject of the lie detector was first presented in the questioning of Officer Schottke and he related the conversation he had had with the defendant pertaining to the lie detector, no objection was made to the admission of those conversations at that time (R. 3590).

The defendant himself on direct examination in response to questions asked by his counsel, Mr. Corrigan, related his conversations

with Officers Schottke and Gareau pertaining to the lie detector test (R. 6298-6299).

It is argued that the testimony of the Coroner was unfair and biased relative to the defendant's description of the "form" and that the Coroner at one point stated that the defendant didn't know whether it was a human being. The record shows that upon further questioning, the Coroner testified that he asked the defendant, "Was it a human being," and that his answer was, "I felt it was." We invite the Court to examine all of the questions and answers with respect to this "form" (R. 3508-3513).

ASSIGNMENTS OF ERROR NOS. 14, 15, 16, 17, 18, 19, 20 and 21

THERE WAS NO ERROR IN THE EXCLUSION OF CERTAIN TESTIMONY.

(14) It is contended that the Court erred in withholding a record of the Coroner's office from the appellant. Coroner Gerber testified that during the week of the 4th he had obtained a copy of a partial report of Detective Schottke's police report as to what he had done (R. 3248). Mr. Corrigan requested that Dr. Gerber bring into court all of his records in this case. The judge instructed that the Coroner was only obliged to bring into court public records. This was not a public record. It was a part of the police records. Coroner Gerber brought into court pursuant to the Court's instructions all of the public records relating to this case. During the course of the work of the technicians in the Coroner's office, certain work sheets were prepared for their own use. These work sheets were not a part of the permanent public records and certainly there would

to bring them into court.

(15) The claim is made that the defense were restricted in their cross examination of Dr. Hexter. The defense were cross examining Dr. Hexter along the lines of "what makes a person tired." The cross examination was so extended as to tire everyone. Also, the record will disclose that Dr. Hexter was cross examined quite extensively by counsel for the defendant on the subject of "shock." Objection was made to the substance of the question set forth on page 433 of the appellant's brief, which was properly sustained by the Court. Thereafter, counsel proceeded to cross examine Dr. Hexter on the subject of "shock" ad infinitum. (R. 4534 et seq.)

(16) The claim is made that the defense were restricted in their cross examination of Officer Schottke. Objections were properly sustained to certain questions put to Officer Schottke quoted in the brief of the defense. Counsel was injecting into the questions conclusions and argumentative material. The record will disclose that those questions by counsel which were direct and called for answers which related to the facts were not objected to and were fully answered.

(17) It is contended that the Trial Court erred in sustaining objections to certain questions omitted from appellant's brief (See Court of Appeals Br. pp. 320-321) asked of Officer Schottke regarding a police report published in the Cleveland News. Counsel endeavored to examine Schottke about a newspaper article with which Schottke had no connection and the Court properly sustained objections thereto. Schottke brought into court the report that he had made and it was made available to the defense

[illegible] (R. [illegible]). After repeated reference of counsel for the defense to the police report of Detective Schottke, the report was marked as State's Exhibit 49 and turned over to counsel for defense (R. 3759) and without objection was offered and received in evidence (R. 3759). The record shows that Exhibit 49 is the complete report of the conversations Schottke had with the defendant on the first and second occasions on July 4th and that Officer Schottke knows of no other report (R. 3762). Officer Schottke testified that he had no connection whatever with the story in the Cleveland News.

(18) The next claim is that the Court erred in refusing to allow evidence of similar acts in Bay Village. As to the testimony of Miles Davis with reference to an encounter with a person in his home on 375 Kenilworth Road, Bay Village, the evening of September 13, 1954, there was no basis whatever upon which such testimony could be received and the particular questions objected to were properly sustained. (R. 5984-5986)

Similarly, with respect to the witness Lawrence Carman, who testified that he resided at 31013 West Lake Road and further stated that his home was burglarized on July 7, 1954. There was no basis upon which the testimony could be received and the particular questions objected to were properly sustained (R. 6083-6085).

(19) The defense claim that the Court erred in preventing a juror during the trial from asking a question of the appellant. The Court was fully justified in declining to permit a question to be put. Had the Court acted otherwise and each juror been permitted to question witnesses,

[illegible] one would have protested more [illegible] and longer than counsel for the defense.

(20) It is claimed that the Court refused to allow Witness Don Ahern to testify that the appellant was a deep sleeper. This is not true. The Witness Don Ahern had testified that it did not strike him as strange that his host should go to sleep in his presence; that he had seen Sam Sheppard go to sleep on many occasions at the Ahern and Sheppard homes; and that there was nothing strange about that situation or that incident that night (R. 2056-2057).

The only question objected to was the one question counsel inquired as to the reason for the defendant sleeping at various times in the presence of guests. This was the question to which an objection was properly sustained. Thereafter, counsel proceeded to question the witness further and asked, "Was it characteristic of Sam Sheppard to go to sleep in the middle of a party" and without objection, the witness was permitted to answer, "It wasn't unusual." (R. 2057) When counsel for the defense again asked, "Is it not a fact that Sam's going to sleep in the middle of a party was not unusual?" (R. 2061) (App. Br. p. 439) the question being repetitious was objected to and the objection properly sustained. Counsel thereupon continued by asking, "But the fact is that his going to sleep on the night of July 4th (July 3rd) caused no question in your mind?" The witness was permitted to answer without objection, "That's right."

As to the question, "Isn't it a fact he worked hard and slept hard," an objection was properly sustained. When the defense went beyond

[illegible] beyond the knowledge of this witness and called for his opinion or conclusion, or when the questions were repetitious, the objections were properly sustained.

(21) The next complaint is that the Court erred in refusing to permit Dr. Adelson to express an opinion as to how the wounds got on the hands of the victim. It is apparent on its face that the question put to Dr. Adelson (App. Br. p. 439) as to whether or not the wounds on her right hand would indicate a struggle, was objectionable.

ASSIGNMENT OF ERROR NO. 22

THERE WAS NO FAILURE TO PROPERLY INSTRUCT THE JURY AT THE TIME THEY SEPARATED.

It is claimed that the Court erred in failing to properly admonish the jury at the time they separated. In support thereof, counsel do not claim that such admonition was not given but objects that the instruction was not sufficiently extended in detail upon every occasion. The Court did instruct and admonish the jury in great detail at the outset and repeated such detailed instructions on many occasions. On other occasions, having given such detailed instructions and admonition, the Court simply reminded them of their duties not to discuss the case, "not even among themselves."

ASSIGNMENT OF ERROR NO. 23

THERE WAS NO COERCION OF THE VERDICT.

Counsel complain of coercion of the verdict but cite no evidence whatever to support this unfounded assertion. The fact that the jury deliberated a period of five days merely shows the carefulness and considera-

case, and the written instruction given by the Court to this jury which they had with them in their jury room.

ASSIGNMENTS OF ERROR NOS. 24, 25, 26 and 27

THERE WAS NO ERROR IN THE CHARGE OF THE COURT.

(24) It is claimed that the Court erred in failing to give the entire charge in writing, in giving part of the charge one day and part the next, and in failing to give the full charge immediately after argument.

The record discloses that at the close of the arguments the Court, after admonishing the jury, adjourned at 4:15 p. m. to 9:00 a. m. the following morning. The only thing that occurred between the adjournment and the charge was the request of defense counsel in the judge's chambers for special instructions, which the Court refused (R. 6988-6991). Thereupon, the parties proceeded to the court room and the Court immediately gave the written charge, a copy of which counsel for the defendant already had, to the jury verbatim and in its entirety (R. 6992-7012). The charge was given the morning of December 17th without interruption.

(25) The Court did not err in failing to charge on assault and battery and assault. The evidence in this case did not warrant a charge on assault and battery or assault. Whether in an indictment for murder in the first degree, a charge is warranted as to a lesser offense depends, not merely upon whether the lesser offense is included in the formal charge, but upon whether or not there is any evidence tending to support the lesser offense. Bandy v. State, 102 O.S. 384.

charge on character and reputation (R. 7006) (App. Br. p. 448), in that the Court did not appreciate the weight that is to be given to evidence of character and reputation and the jury was not required to consider this evidence if it followed the Court's instruction.

The Court did not, by this charge, take from the jury the right to consider the character evidence with all of the other evidence in determining the question of defendant's guilt or innocence. In fact, the Court left it to the jury to give full consideration to all of the evidence including character evidence, in coming to their verdict.

In Harrington v. State, 19 O.S. 264, the Court said, at page 269:

> "The true rule is said to be, 'that the testimony (character evidence) is to go to the jury and be considered by them in connection with all the other facts and circumstances, and if they believe the accused to be guilty they must so find, notwithstanding his good character.'"
>
> Stewart v. State, 22 O.S. 477

The Trial Court correctly instructed the jury further that good character and good reputation will not avail any person charged with a crime against proof of guilt beyond a reasonable doubt. This is the same as saying, as the Court of Appeals stated in State v. Wayne Neal, "If you have no doubt whatever of the defendant's guilt, after considering all of the evidence, character evidence should not set him free from such criminal conduct clearly established." (97 O.A. 339, 351)

(27) Counsel complains about the charge on circumstantial

evidence (R. 7004-7006) (App. Br. 451-456) but do not point out wherein it is wrong in any respect. The fact that the Court did not use the language of the charge submitted by counsel on the same subject matter does not make the charge as given erroneous.

ASSIGNMENT OF ERROR NO. 28

THERE WAS NO ERROR IN OVERRULING THE MOTION FOR NEW TRIAL.

The defense claim that the defendant was entitled to a new trial because the Trial Court erred in allowing the jurors to separate and to communicate with outsiders during their deliberations. (App. Br. pp. 458-462).

The Trial Court appropriately stated on the hearing on the motion for new trial:

> "While this Court would not for the world minimize the importance of guarding this jury -- or the jury in any other case -- from annoyance or influence, he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.
>
> The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note -- and indeed decisive in this Court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them, it is now pertinent to halt and ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.
>
> It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed.

> [illegible] and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a 'separation' is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.
>
> The Court had complete confidence in the jury in this case; it was protected at all times from any possible approach, and its every movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it." (Jr. 85, p. 12-13)

It is stated at pages 458 to 460 of the appellant's brief that telephone communications were made by members of the jury with outside parties during their deliberations which prejudiced the defendant.

Bailiff Edgar Francis testified on the motion for new trial hearing:

> "Q Do you know, of your own knowledge, whether there was any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?
>
> A Their phones were cut out, Mr. Garmone.
>
> Q By whose request?
>
> A Mr. Steenstra arranged that.
>
> Q And were there any telephone calls made from the room that you occupied?
>
> A Yes, sir.
>
> Q Did you make the calls, or did the jury make the

A No. The jury made the calls, and I sat in the chair right alongside the telephone.

* * *

Q Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * *

A Well, they were made to their husbands and wives, and those that had children, they talked to the children.

Q Was there any conversation whatsoever about this case or their deliberations?

A Not one word, Mr. Parrino." (R. 7084-7085)

It is also alleged by the defense that the "finding of the Court of Appeals that the separation of the jurors was only sufficiently far apart to enable a separate picture of the men and women to be taken is not found in the evidence" (App. Br. p. 459). That statement of the defense is not correct. The record shows in the testimony of Bailiff Edgar Francis:

"THE COURT: Wait a minute. Do you know when or about when and where that picture was taken -- those pictures were taken?

'THE WITNESS: Well, it was taken in the coffee room of the Carter Hotel. I think the five ladies' picture was taken first, and then the gentlemen of the jury. The ladies stepped aside and the gentlemen of the jury -- their picture was taken.

THE COURT: To what extent was the jury separated at that time?

THE WITNESS: Well, about 10 feet.

THE COURT: Sir?

THE WITNESS: Ten feet. About 10 feet

THE COURT: You mean the men from the women?

THE WITNESS: That's right. After the first picture was taken, they stepped aside, and then the others went over and got in line and had their pictures taken.

THE COURT: Was there any conversation by anyone, other than the two bailiffs, with the jury?

THE WITNESS: No, sir." (R. 7071-7072)

There is absolutely no evidence that this jury was influenced in any way in their verdict by any communications from outsiders.

It was asserted by the defense in a supplemental motion for new trial that a female bailiff should have been placed in charge of the female jurors, and is commented upon in the appellant's brief (App. Br. p. 458). The Trial Court stated in that connection:

> "Again we are left with nothing beyond a definite distrust of jurors. No law is cited in support of the contention made nor is there one word of suggestion that any men or women jurors were approached or communicated with by anyone; nor that any of them misconducted themselves in any manner." (Jr. 85, p. 14)

At pages 32 to 39 of the supplementary brief, it is urged that the defendant was denied his constitutional rights because, upon instructions of the Court, the bailiff, at about 10 p. m. on the fourth day of the jury's deliberations, knocked at the door of the jury room and propounded questions to the jurors as follows:

> "Have you arrived at a verdict? If not, is there a probability that you can arrive at one if you deliberate a while longer either this evening or tomorrow? If so, which would you prefer?"

This request was made at the suggestion of counsel for the defense following

of defense counsel. The juror closed the door and in a few moments returned and stated to the bailiff "that the jury had not arrived at a verdict, but that the jury was very close to agreement and would prefer to retire for the night and return the next morning for deliberation." This was communicated to all counsel in chambers and a few minutes thereafter, at 10:15 p. m., the jury took their places in the jury box in the court room and, in the presence of defendant and defense counsel, were instructed as follows:

> "MONDAY, DECEMBER 20, 1954, 10:15 p. m.
>
> "THE COURT: We are assuming, ladies and gentlemen of the jury, that you have not arrived at a verdict, and you will repair to the hotel for the night, with the bailiffs, and reconvene here at 9:15 tomorrow morning. Then you will return to your jury room and resume your deliberations.
>
> "Will you please be very careful to observe the caution which the Court has expressed to you: Do not discuss this case with anyone in any manner." (R. 7025)

The inquiry made by the bailiff at the order of the Court following the request made by counsel for the defense and acquiesced in by the State was perfectly proper and in accord with the provisions of 2945.33 of the Revised Code, which provides in part as follows:

> * * * "Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the Court. * * *"

The jury was not receiving any instructions of the Court nor was the Court giving the jury any instructions by this inquiry of the bailiff. There was no need to summon the jury to the court room for this inquiry and the presence

There is no claim that the bailiff as an officer of the Court was guilty of mis conduct. He merely performed his duty in accordance with the statute and the order of the Court. The mere inquiry as to the probability of the jurors reaching a verdict if they deliberated a while longer that evening or the next day could not possibly be prejudicial to the defendant; nor did it in any manner deprive the defendant of any constitutional right.

Although this matter is discussed in the supplementary brief, it is not placed in any particular assignment of error; nor was this presented as an assignment of error in the Court of Appeals.

MOTIVE

Complaint is made in the main brief at page 463, and in the supplementary brief at page 20, of the trial court's charge on the subject of "motive."

The charge of the Court on this subject is substantially word for word the same as that approved by this Court in Fabian v. State of Ohio, 97 O. S. 184, Syllabus 2 of which reads:

> "2. The proof of motive is not essential to a conviction of the crime of homicide, and where the commission of the crime by the accused is clearly established by direct evidence, a judgment of conviction will not be reversed because of the following instruction: 'The law does not require the State to prove motive in this case. The presence or absence of motive shown by the evidence may be considered by you in determining intent, or its presence or absence in the mind of the accused, so that if you find beyond a reasonable doubt that the defendant is guilty under the instructions which the Court gives you, then you shall find him guilty whether or not a motive has been established.'"

THE MOTION FOR NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE WAS PROPERLY OVERRULED.

The proceedings with reference to the motion for new trial on the ground of newly discovered evidence are set out in the Memorandum and Findings of the Trial Court (Appendix B, p. 19a).

The Trial Court not only makes his findings but discusses the law applicable thereto, and we invite the Court's attention thereto.

As stated by the Trial Court, applications for a new trial on the ground of newly discovered evidence are not favored by the courts and should always be subjected to the closest scrutiny. State ex rel. Robinson v. Hightower, 153 O.S. 93, 90 N.E. (2d) 849; Taylor v. Ross, 150 O.S. 448, 83 N.E. (2d) 222.

Newly discovered evidence which will warrant granting of new trial "is evidence other than that which might have been known before termination of a trial had due diligence been used." State ex rel. Robinson v. Hightower, supra; Domanski v. Woda, 132 O.S. 208, 6 N.E. (2d) 601. And it must be shown that the "new evidence" discloses a strong probability that it will change the result if a new trial is granted.

The rule is stated in 20 R. C. L., 289, Section 72:

> "While newly discovered evidence, material to the party applying, which he could not with reasonable diligence have discovered and produced at the trial, is ground for a new trial, applications on this ground are not favored by the courts, and in order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequence of an adverse verdict, such applications should always be subjected to the

closest scrutiny by the Court, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. The matter is largely discretionary with the Trial Court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse. This is also true in criminal cases, where new trials may be granted on this ground, which is not the case in some jurisdictions."

The defense cite Koenig v. State, 121 O. S. 147, in which a new trial was granted because of newly discovered evidence. In the Koenig case the defendant was charged with issuing a check upon a bank in which he had not sufficient funds to meet the check. The State had in its possession documentary evidence forming part of the assets and files of the bank which had been closed and taken possession of by the State, which evidence tended to establish the entire good faith of the accused and the want of intent on the part of the accused when issuing the check on the bank in which he did not then have to his credit sufficient funds to meet the check, and the State was unable to find and produce such evidence for use at the trial, but such documentary evidence was found and made available after trial and conviction, and was offered by the defendant in support of his motion for a new trial on the ground of newly discovered evidence. All of the requirements of newly discovered evidence were clearly met by the defendant. There was due diligence, the evidence was material and significant and undoubtedly would have changed the result.

In State v. Petro, 148 O. S. 505, the syllabus reads:

"To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has

not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (State v. Lopa, 96 O.S. 410, approved and followed.)"

In the opinion, per Turner, J., the pronouncement of this court in State v. Lopa, 96 O. S. 410, is quoted with approval as follows: (R. 507-508):

> "The law on this subject is set forth in the per curiam opinion in the case of State v. Lopa, 96 O. S. 410, 117 N.E. 319, where at page 411 it is said:
>
> "The granting of a motion for a new trial upon the ground named (newly discovered evidence) is necessarily committed to the wise discretion of the Court, and a court of error cannot reverse unless there has been a gross abuse of that discretion. And whether that discretion has been abused must be disclosed from the entire record. The rule of procedure in this regard has been frequently announced by this court. The new testimony proffered must neither be impeaching nor cumulative in character. Were the rule otherwise, the defendant could often easily avail himself of a new trial upon the ground claimed. Unless the Trial Court or court of error, in view of the testimony presented to the Court and jury, finds that there is a strong probability that the newly discovered evidence will result in a different verdict, a new trial should be refused."

Judge Turner also distinguished the case of Koenig v. State, 121 O. S. 147, 167 N. E. 385, saying (R. 509):

> "The case of Koenig v. State, 121 Ohio St. 147, 167 N.E. 385, is inapplicable here and is in no wise a limitation of the doctrine announced in the Lopa case."

It is also the rule that the decision of a Trial Court on a motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the Trial Court, and that such decision

is not reviewable except upon a showing of a gross or manifest abuse of discretion. State v. Lopa, 96 O. S. 410, 411.

I

THE "AFFIDAVIT" OF DR. KIRK
(Defendant's Ex. N. D. E. 7.)

In the instant case, reliance is had on the so-called affidavit of one Dr. Paul L. Kirk of Berkeley, California, who has arrogated to himself the authority of a reviewing court in the analysis and weighing of the evidence received on the trial, and who acts as a sort of thirteenth juror in the consideration and treatment of such evidence. His self-assumed pose of objectivity is so utterly absurd from a mere examination of the affidavit, its self-serving declarations, theories, speculations, arguments, conclusions, and misstatements and misrepresentations of the facts, as we shall hereinafter set forth.

Judge Blythin quoted from the so-called affidavit in his Memorandum, to illustrate the nature of this instrument. We direct the attention of this Court also to the many items of evidence contained in the record and brief but totally disregarded by Dr. Kirk; and to the many other instances in which items of evidence have been distorted or misinterpreted in order to reach his predilections or set conclusions.

For example, at page 6 Dr. Kirk says:

> "Detailed analysis of the blood pattern in the bedroom in which Marilyn Sheppard was murdered constituted the bulk of the analysis of physical evidence. It is in this room and only here that the story of the actual murder is written." (Emphasis ours)

It may well be that Marilyn was murdered in this room, but to state that

it is only here that the story of the actual murder is written is preposterous. The evidence submitted on what occurred and what was found downstairs, on the stairways to the second floor and to the basement, and on the defendant's journey to and in the lake is significant. Also significant is the green bag found on the slope of the bank.

At page 7, Dr. Kirk states:

> "Only the autopsy and pathology findings are really pertinent to the case. With two minor exceptions, it shows no circumstantial value whatever. These are
> (a) Water under defendant's wrist watch crystal
> (b) Loss of T-shirt."

To limit the proof to the autopsy and pathology findings is absurd on its face. His assertion that the technical evidence presented by the prosecution shows no circumstantial value whatever with two minor exceptions simply parrots the opinions of defense counsel urged in their brief and answered by the State.

At page 10, Dr. Kirk states:

> "Clearly, the presence of blood on the green bag is not indicative in any way of the guilt or innocence of any accused person, ***"

The fact of the matter is that the significant evidence was the absence of blood rather than the presence of blood on the green bag. The record discloses that the entire bag, both inside and outside, was examined by Mary Cowan of the Coroner's office, by the use of a stereomicroscope and that no blood was found, and she made a further chemical test of a portion cut from the bag and no blood was found.

This evidence is valuable in that it shows that the blood on the

defendant's wrist watch had dried before the watch was put into the bag, otherwise there would have been a blood smear.

Dr. Kirk's assertion at page 10 that "it must be accepted that the murderer stripped from both the victim and the defendant the items in the bag" is wholly unwarranted since none of the items found in the bag belonged to Marilyn.

As to Dr. Kirk's statement at page 10 that "it may be presumed to have been put there by the murderer regardless of who he may have been," he ignores entirely the absurdity of any claim that a real burglar or intruder would have taken these few small objects, gotten the green bag out of a desk in the defendant's den, placed these objects, and only these objects, in the green bag, and then threw the bag with its contents away.

At page 22 of his "affidavit," Dr. Kirk says:

> "The only reasonable article would be the attacker's hand, possibly placed over the mouth to prevent an outcry -- which is consistent with defendant's story, and the fact that nobody heard such an outcry, including Chip in the next room." (Emphasis ours)

He ignores entirely the defendant's story, repeated on many occasions, that he heard Marilyn scream and that her screams awakened him.

Dr. Kirk ignores entirely the marital difficulties of Marilyn and the defendant; his affairs with other women and Marilyn's knowledge of such affairs; the defendant's own testimony that Marilyn was sexually non-aggressive. He ignores entirely the recriminations that may result from this background of marital difficulty. Dr. Kirk, at page 33, states:

"10. The type of crime is completely out of character

> for a husband bent on murdering his wife. In such instances, the murder does not start out as a sex attack with the single exception of an unfulfilled and frustrated husband, which is completely contrary to the indications of this event."

and his statement that this "is completely contrary to the indications of this event" is not consistent with the evidence presented by the State on this subject matter.

As to his various theories, conclusions and interpretations of the evidence, there is no point in our discussing these matters in this brief as they are fully covered in the brief of the State and have no place whatever on a hearing on a motion for new trial on the ground of newly discovered evidence.

The record is replete with testimony of witnesses and exhibits showing all of the blood spots to which reference is made in the brief of appellant; to the various places about the room where these blood spots landed; to the places where there was an absence of blood; to the size, shape and appearance of the blood spots, and to their direction and velocity. The record will also disclose that counsel for the defense used a blackboard to emphasize the points he wished to make with reference to these blood spots. All of the pertinent blood spots were in the evidence.

Dr. Kirk's assertions (Appellant's Br., p. 470):

> "1. That during the beating the attacker stood close to the bottom of the bed on the east side and balanced himself with one knee on the bed.
>
> 2. That Mrs. Sheppard was struck with low angular blows.
>
> 3. That the weapon swung to one and one-half feet from the wardrobe door during the striking of

the blows.

4. That Marilyn's head was on the sheet during most if not all of the beating.

* * *

6. That the blows were struck by a left-handed person.

7. That the largest spot of blood on the wardrobe door could not have come from impact spatter or back throw of the weapon."

are merely his theories and speculations. They do not constitute newly discovered evidence. His assertion that "Marilyn's slacks had been partially removed from her before the murder" (App. Br. p. 471) is also mere speculation except for the fact that when found, the slacks were off the left leg only. This fact was in the evidence and is certainly not newly discovered.

As to the kind of weapon which was used, whatever it was, the defendant is not excluded. Sam Sheppard used whatever weapon was used and speculation as to the kind of weapon is no proof that he did not wield the murder weapon.

In his speculations on the large blood spot found on the wardrobe door, Dr. Kirk sloughs over the likelihood that the weapon used may have had jagged or other irregular surfaces where blood would collect and would land as a large spot on the door. He also ignores the likelihood that a substantial quantity of blood might have collected on the hands of the murderer and might have been similarly thrown onto the door.

Dr. Kirk concedes that some of the wounds on the victim's head are consistent with right-handed blows only if her head were turned

sharply to her left. He follows this with the statement that this latter idea is inconsistent with her final position and with some of the injuries, notably those on the right of her head; but by what possible reasoning process does he conclude that her head, throughout the struggle and throughout the period of time in which some 35 blows were rained upon her head and body, was in the precise position in which it was finally found? The injuries on her hands surely indicate that she tried to protect herself, and there is every reason to believe that she did move her head in an attempt to avert these savage blows.

We invite the Court's attention to the exhibits which clearly show the deep lacerations on both the left and right side of her head and face and on the top of her head. But, whether wielded by the right hand or left hand, or by both hands, certainly Sam Sheppard, the defendant, is not excluded.

This defendant, Dr. Sam Sheppard, was physically strong. He had played football. He was a good swimmer and water skier. He drove cars in races. He played basketball and tennis. He practiced bowling and had a punching bag in the basement of his home. Such athletic activities develop skill in both right and left hands and arms. He was also a practicing surgeon and must have been necessarily adept with either hand. A man of his physical strength and attainments could very readily rain blows on the head and face of Marilyn Sheppard with downward strokes, strokes from the right to the left or left to right, and backhand strokes as well, tennis style.

There were lacerations on both sides of Marilyn's head and on

the top of her head. There were blows on her face and on her hands. This defendant was physically able to rain these savage blows on his victim with either the right hand or the left, or from time to time with both hands. The evidence discloses that the defendant did on occasions actually use his left hand. He stated that when he was in the bedroom he took his wifes pulse at the neck, and that is his explanation for the blood on his wrist watch, which he wore on his left wrist.

Much ado is made of a large blood spot on the wardrobe door. More than a month after the conclusion of the trial, after the Sheppard residence had been turned over, keys and all, to the Sheppard family, Dr. Kirk arrived from California and proceeded to make what he and counsel for the defense termed a strictly impersonal investigation, examination and research. He was here during the period from January 22nd to January 26, 1955, and, according to his own report, made a thorough study of the blood spots on the walls, doors, etc. He did not at that time remove this or any other blood spot. About three weeks later, Dr. Stephen Sheppard and Dr. Richard Sheppard, buttressed by the presence of Rev. Scully and Dr. Haws, entered the Sheppard home. These gentlemen proceeded to remove the blood spots in question, had the material placed in vials and mailed to Dr. Kirk, who received them in California on February 18, 1955. Materials from these vials were, according to Dr. Kirk, subjected to certain tests and he found that the blood spot in question was Type O, the same as Marilyn. If anything at all about the tests thus made is significant, this is it. The type is the same.

As the Trial Court stated:

"It is not claimed by anyone that any of the blood mentioned came from the defendant." (Memo. p. 11) (Appendix B p. 30a)

Whether or not the blood type is the same as that of Marilyn (Type O) may be of some significance. On this matter, Dr. Kirk found that it was Type O. However, Dr. Kirk states that he proceeded to make further tests as to solubility and agglutination and reported that the blood from the very large spot was less soluble than that from the smaller spot, or from controls from the mattress; and that similarly, the agglutination was much slower and less certain than the controls. He concedes that there was agglutination of the blood from the very large spot but says that it was slower and less certain. From that he concludes that the "blood of the large spot had a different individual origin from most of the blood in the bedroom." (P. 21, N.D.E. Ex. 7)

We must bear in mind that the Sheppard home was in the exclusive possession of the Sheppard family for almost two months before the blood spots were removed and we cannot concede that no one was in that house and in that bedroom during that long interval of time. Bear also in mind that between July 4th and December 23, 1954, scores of people were in and out of that bedroom and that the walls and doors were subjected to fingerprint dusting powders, ultra-violet light, dust and the elements. Bear in mind also that a possible admixture of soap, detergent, paint from the painted door where the stain was removed, luminal reagent, hand or body oils and perspiration or other substances of human origin could easily influence the reactions even qualitatively. (See affidavit of Dr. Roger W. Marsters, State's Exhibit N.D.E. - D).

Bear in mind also that the interior of a large drop of blood would undoubtedly dry less rapidly than would the interior of a smaller drop, and that Dr. Kirk apparently excluded the possibility that there may have been differences in bacterial, biological or chemical contamination of the various blood drops after they were shed. One of the most important of the factors that may affect the solubility of a dry blood smear is the rate at which the blood dried. Other things being equal, a large mass of blood tends to dry less rapidly than a small mass. Because of this fact, a large mass of contaminated blood is more likely to support bacterial growth during the period of its drying than does a small mass. Bacterial growth of shed blood may alter its characteristics in many ways, including its solubility and the activity of its agglutinins and agglutinogens. Exposure to ultra-violet light or differences in chemical contamination may likewise alter the solubility and immune properties of blood. Certainly, no person experienced in the performance of tests on blood that has dried under uncontrolled conditions would be justified in assuming that two blood samples having the same basic group characteristics must have come from two different individuals because of differences in solubility or rate of agglutination activity. This statement is fully supported by the affidavit of the most competent specialist on blood grouping in this part of the country, Dr. Roger W. Marsters. (State's Exhibit N.D.E. - D).

Dr. Marsters has been in charge of the Maternity Rh Laboratory, which is a clinical laboratory at the University Hospitals of Cleveland, for the last eight years. During that time over 50,000 blood specimens have

1 been blood grouped under his supervision and over 10,000 antibody titra-
2 tion tests have been either performed by him or under his supervision;
3 and for the past two and one-half years he has been in charge of the main
4 blood bank of University Hospitals, where over 15,000 cross matches for
5 blood compatibility have been performed under his supervision; and for
6 the past five years he has been blood group referee for the Cuyahoga County
7 Juvenile and Common Pleas Courts, during which time he has personally
8 performed over 200 blood grouping studies in cases of putative paternity.
9 His wide experience, training and numerous scientific papers are set forth
10 in his affidavit.

11 He has examined those portions of Dr. Kirk's affidavit dealing
12 with the grouping of two large blood stains on the wardrobe door and in
13 his affidavit Dr. Marsters states:

14 "Apparently, Dr. Kirk has observed a difference in solubility and also a 'much slower and less certain'
15 reaction with one of these two particular stains. On this basis he concluded that although both stains were
16 Type O, the larger stain had a different individual origin and was therefore from someone other than
17 the victim.

18 "Under ideal conditions, from time to time variability occurs in the routine performance of blood grouping
19 and antibody titration tests. These individual variations in a particular reaction are often impossible
20 to reproduce on re-running the same reaction under apparently the same conditions. These variables are
21 almost always quantitative differences rather than qualitative ones, however.

22

23 "The grouping of dried blood by the inhibition technique is complicated by the fact that intact red cells
24 are no longer present for conventional agglutination procedures. Antiserum must first be exposed to the
25 stain and finally residual activity determined by means of a secondary system employing fresh intact cells

added later. Under such conditions reaction speeds may not be uniform due to the many variables introduced. In the first place, the antiserum used is deliberately diluted so that even slight inhibition will not be missed due to remaining residual activity.

"The exact quantity of blood stain introduced into such a test is difficult to control, and the 'lowered solubility' observed by Dr. Kirk may be simply a reflection of the increased time necessary to dissolve a larger stain than a smaller one. For that matter, the presumption of individual differences of blood origin on the basis of a difference in solubility is certainly unwarranted.

"Furthermore, since Dr. Kirk dissolved the stains in distilled water, the final concentration of protein and salts would depend directly on the exact weight of stain employed for each test. These variables could also influence the speed of reaction.

"A further very important variable which could easily influence the reactions even qualitatively is the possible admixture of soap, detergent, paint from the painted door where the stain was removed, luminal reagent, fingerprint dusting powder, hand or body oils and perspiration or other substances of human origin. In addition, such blood spots may have been altered by exposure to ultra-violet light so as to interfere with the subsequent reactions and solubility. In all tests of this type it is absolutely essential that controls in addition to the antiserum-cells control be taken in an identical manner from the same general area as the stain so that the particular effect of the background material on the stain can be properly evaluated. This type of background control was apparently not performed and represents a serious oversight.

"Dr. Kirk is postulating different qualities of Type O blood characteristic. Even under ideal conditions of fresh blood reactions, subgroups of Type O are unknown. Therefore, to assume the existence of another quality of Type O and especially another individual source on the basis of some quantitative difference in reaction and solubility employing an admittedly complex technique cannot be justified."

(State's Ex. N.D.E. - D, pp. 2-3.)

Dr. Kirk cannot ignore the effect of contaminants but he very blithely states that the blood drops were "free of contaminating substances, fingerprint powder, physiological matter other than blood, and any visible contaminants whatever." (Defendant's Exhibit N.D.E.-8, p. 3) This certainly does not exclude the possibility that one of the drops was superimposed on, or contaminated by, a film of perspiration or saliva, a fleck of detergent, a residue of soap or any one of a dozen other invisible but potentially important substances. Certainly there may be differences in Group O blood but no expert would accept the differences described by Dr. Kirk as being indicative of blood samples of different origin.

At the hearing before the Court of Appeals, defense counsel submitted to the Court Dr. Kirk's book on "Crime Investigation" in which it is said on pages 198 and 199: (App. Appendices to Brief, pp. 105a-106a)

> "O blood which contains neither A or B agglutinogen contains both agglutinins, * * *"
>
> and on pages 199 and 200, he says:
>
> "It is also clear that variations of considerable magnitude in the strength of reaction exists between persons classed in the same group. For this reason, there are various subclassifications such as A1 and A2 in use among serologists. The distinction between these rests chiefly on the strength of reaction and can be obtained satisfactorily only when fresh blood is available. With dried blood stains, the form in which most blood appears in evidence, it is not simple to determine the subgroups with certainty."
>
> and on page 201:
>
> "It should be noted further that, on standing, the agglutinins are slowly lost in many bloods. For this reason, a test which depends only on testing for agglutinin is to be trusted completely only when the blood is comparatively fresh, or when the results are checked also by

methods testing for the presence of agglutinogen as well."

Dr. Kirk also has referred to a book by Leone Lattes titled "Individuality of the Blood" and we invite this Court's attention to the quotations therefrom set forth in the opinion of the Court of Appeals, pages 102 to 104a in the Appellant's Appendices to their Brief.

The Court of Appeals, after a careful consideration of the affidavits and the authorities referred to, found:

> "From a careful consideration of the affidavits on this subject, as well as the authorities referred to above, we find:
>
> "(1) that Dr. Kirk's contention rests on the difference in time in the appearance of agglutination of the large spot when compared to the same reaction of known blood of Marilyn and the smaller spot used as a control;
>
> "(2) that Dr. Kirk believes that this difference confirms the presence of a person at the murder scene other than the victim and the defendant;
>
> "(3) that experts contra say that such differences are not unusual even with known samples of the same blood and at most is a quantitative and not a qualitative difference;
>
> "(4) that all three blood samples were of the same blood group, known as O;
>
> "(5) that the samples tested, being dried blood exposed for some eight months in a room subjected to much activities by many persons, who examined and tested various parts of the room, were exposed to contamination of many sorts: bacteria, fingerprint dusting powder, hand or body oils and perspiration, dust and other substances;
>
> "(6) that in the removal of the stain from the wardrobe door, paint, soap and detergents may have been scraped off;

> "(7) that experts agree that tests conducted on dried blood are not as reliable as those made on fresh blood;
>
> "(8) and that no court, to our knowledge, has accepted such findings as proof of blood from different persons.
>
> "We conclude from all the foregoing that the opinion of Dr. Kirk that 'These differences are considered to constitute confirming evidence that the blood of the large spot had a different individual origin from most of the blood in the bedroom,' even though such blood had the same blood grouping as that of Marilyn Sheppard's, is based on claims so theoretical and speculative in view of Dr. Marsters' affidavit, the statements of authority referred to by Dr. Kirk and his own writings on the subject as to have no probative value in support of defendant's claim of newly discovered evidence." (App. Append. to Brief, pp. 106a-107a)

The so-called additional facts developed by Dr. Kirk are merely his theories, speculations, conjectures, interpretations and arguments and certainly do not constitute newly discovered evidence. Many of these arguments were made to the jury.

In the main, Dr. Kirk simply parrots the theories and opinions of counsel for the defense and his affidavit is designed to justify their position. One would indeed have to be naive to accept his affidavit as being the result of a strictly impersonal investigation or having any of the attributes of objectivity.

II

THE APPELLANT COULD WITH REASONABLE DILIGENCE HAVE DISCOVERED AND PRODUCED THE "NEWLY DISCOVERED EVIDENCE" AT THE TRIAL.

Because the prosecutor refused to order the keys to the Sheppard home turned over to counsel for the defendant, it is suggested that

1 the defense did not have adequate means to inspect or examine the home
2 or the blood spots in the bedroom.

3 Neither the defendant nor his counsel were ever denied a
4 request to make any such inspection or examination. On the contrary,
5 they were expressly told that they could do so at any time, and that the
6 premises would be made available to them for such purposes. (See
7 affidavit of Saul S. Danaceau, State's Exhibit N.D.E. - A.) Of course,
8 as a precautionary measure, an officer would have had to be in attendance.
9 Had there ever been such a request and the defense denied an opportunity
10 to enter the premises for such purposes, recourse could have been had
11 to the Trial Court or the presiding judge.

12 The attitude of the State is illustrated by the readiness with
13 which the physical evidence in the office of the Coroner was made avail-
14 able to counsel for the defense and to Dr. Anthony J. Kazlauckas, a
15 former Deputy County Coroner, who was engaged to investigate and other-
16 wise assist the defense. (See State's Exhibits N.D.E. - B and C.)

17 The statement of Mr. Danaceau to defense counsel that the
18 premises would be available to them at "any and all times for purposes
19 of inspection and examination" was made in the presence of newspaper men,
20 as is shown by the published stories they wrote. Jim Flanagan of the
21 Cleveland News was present and on November 9, 1954, the News wrote:

22 "At the afternoon recess today Assistant County Prosecu-
23 tor Saul Danaceau told Dr. Stephen A. Sheppard that he
could remove clothing, books and Dr. Sam Sheppard's
24 car from the West Lake Road home of Dr. Sam Sheppard
any time he desired. He said he could also inspect the
25 premises any time he desired." (State's Ex. N.D.E. -A.)

The following morning the Cleveland Plain Dealer published a story by Sanford Watzman, which read in part as follows:

> "Dr. Stephen A. Sheppard, brother of the murder defendant, requested the keys yesterday from the prosecutor's office. He was told he could carry clothing out and otherwise have freedom of the home, but under the stipulated conditions.
>
> "Arthur E. Petersilge, attorney for the Sheppard family, said access to the premises 'doesn't mean anything in defending this case because the clews are cold by now.'" (State's Ex. N.D.E - A)

As stated by the Trial Court:

> "There is no evidence whatever of denial of access to the premises provided such access was had in the presence of a police officer. It borders on the ridiculous to say that the examination and investigation made by Dr. Kirk within the dwelling could not have been made with precisely the same ease and effect in the presence of a police officer as was the case without him. Had the prosecutor at any time during the pendency of the case assumed an unreasonable attitude on the matter of the right of defendant to examine house, clothing or other property or material likely to produce, or which might produce, valuable evidence in the case, the presiding judge in the criminal division of this court would certainly have solved that problem upon being requested to do so.
>
> "On the matter of diligence, the Court must hold that, as a matter of fact, the defense was not denied access to the Sheppard home during the pendency of this cause and that under the circumstances disclosed by the record, the condition of entry imposed -- that a police officer be present -- was normal, natural and reasonable, and that no showing has been made as to how or why any such presence would in the slightest degree prevent, impede or affect the investigator in his search for facts which, in his judgment, could or might aid the defense.
>
> "The Court finds that the tendered matter is not matter or evidence that could not, with reasonable and most ordinary diligence, have been found long prior to the trial and, therefore, fails to come within the clear requirement of the law in that regard." (Memo, p. 10)

[illegible] did on several occasions, and particularly on July 9th,

3 examine the premises, including the house and that thereafter they were

4 permitted to remove not only articles of clothing, books, etc., but also

5 the defendant's medical bag and the three motor vehicles from the garage.

6 Neither the record of the trial nor the affidavits in support of

7 this motion disclose a single instance of a denial of access to the premises

8 for purposes of examination or inspection by the defense.

9 It is also to be noted that the premises were available for

10 such inspection or examination from July 4th until the middle of December

11 when the cause was finally submitted to the jury; that Dr. Kirk did not

12 make his investigation until January 22nd to January 26th, 1955, a month

13 after the Sheppard family had not only the keys but complete possession

14 of the premises; that Dr. Kirk did not himself make the scrapings of the

15 blood spots at that time, and that some three weeks later, Drs. Stephen

16 Sheppard and Richard Sheppard, accompanied by Rev. Scully and Dr. Haws,

17 went to the Sheppard home where the scrapings were made, placed into

18 small bottles and mailed to Dr. Kirk of Berkeley, California, on February

19 14, 1955. Before these blood spots were scraped off the door, they had

20 been there for more than seven months, and there is no reasonable ex-

21 planation of why the presence of a police officer would have prevented the

22 testing of any particular blood spots from July to December, 1954. Of a

23 certainty, no request by the defense to have such a blood spot tested was

24 ever made.

25

III

THEORY OF SEX ATTACK IS JUST A THEORY AND IS NOT "NEWLY DISCOVERED" EVIDENCE

The sex attack theory is pure speculation and whatever may be said to support such a theory does not exclude the defendant.

There is neither a strong probability nor a probability that the so-called newly discovered evidence would have changed the verdict.

As stated in State v. Petro, 148 O. S. 505, one of the essential requisites for the granting of a motion for a new trial in a criminal case based on the ground of newly discovered evidence is that "it must be shown that the new evidence discloses a strong probability that it will change the result if a new trial is granted." The Trial Court is best able to make this judgment and determination. Judge Blythin has discussed the purported newly discovered evidence in his Memorandum and he said, in part:

> "It is not reasonable to believe that production of the testimony of Dr. Kirk at the trial, and the counter-testimony of Dr. Marsters, would have made the slightest difference in the total evidence, and certainly not resulted in a different conclusion by the jury." (Memo, p. 12)

The final findings of the Trial Court are also set forth in this Memorandum and follow:

> "After careful review of the authorities, a thorough examination of the proffered evidence and consideration of presentations of counsel, the Court is forced to the conclusion that what is offered has been available from the time of the murder and could easily have been secured in ample time for presentation at the trial; that it is neither of the type nor quality of evidence required to justify the granting of a new trial and that it is definitely not of such a character

upon trial would produce a different result."
(Memo, p. 16)

The allowance of a motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the Trial Court and its rulings thereon cannot be assigned as error unless there has been a gross or manifest abuse of discretion.

As stated by the Court of Appeals:

> "A motion for a new trial on the ground of newly discovered evidence is directed to the sound discretion of the trial court.
>
> "The Supreme Court in Taylor v. Ross, 150 O.S. 448, in paragraph 2 of the syllabus, states:
>
>> "'2. The granting or refusing of a new trial on the ground of newly discovered evidence rests largely within the sound discretion of the trial court; and when such discretion has not been abused, reviewing courts should not interfere. (Paragraph 2 of the syllabus in the case of Domanski v. Woda, 132 O.S. 208, approved and followed.)'
>
> "See:
>
>> 26 O.S. 1, Smith & Wallace v. Bailey;
>> 96 O.S. 410, State v. Lopa;
>> 124 O.S. 29, 32, Canton Stamping v. Eles;
>> 132 O.S. 208, Domanski v. Woda;
>> 148 O.S. 505, State v. Petro;
>> 51 O.L. Abs. 185, State v. Tarrant;
>> 13 O.L. Abs. 244, Pannell v. State;
>> 28 O.L. Abs. 166, Cebulek v. Tisone.
>
> "The trial court did not abuse its discretion in this regard.
>
> "Paragraph 3 of the syllabus of The People v. Fice, 97 Cal. 459, reads as follows:
>
>> "'It is not an abuse of discretion for the trial court to deny a motion for a new trial in a criminal prosecution, made upon the ground of newly

discovered evidence, where the affidavits offered in support thereof are fully contradicted by counter-affidavits on the part of the prosecution.'

"It is the law with respect to a motion of this kind that a new trial will not be granted on the ground of newly discovered evidence unless the affidavits in support thereof contain statements which, if it had been offered in evidence at the trial, would have required the jury to return a different verdict.

"The Supreme Court in Cleveland, Columbus, Cincinnati & Indianapolis R. R. Co. v. Long, 24 O S. 133, says:

"'A new trial should not be granted on the ground of newly discovered evidence, unless the legitimate effect of such evidence, when considered in connection with that produced on the trial, ought to have resulted in a different verdict or finding. The rule of practice, on this subject, was not substantially changed by Section 297 of the Code of Civil Procedure.'

* * *

"We believe the trial court was in the best position to determine that question.

"Having read the voluminous evidence of the murder trial, studied in detail the affidavits filed in support of and contra to the motion, and the briefs of counsel, and having come to the several conclusions stated above, we unanimously hold that the trial court did not commit prejudicial error nor abuse its discretion in overruling the motion for a new trial on the ground of newly discovered evidence." (App. Appendices to Brief, pp. 107a-109a)

On this motion the defense fall far short of showing any error whatever, much less a gross or manifest abuse of discretion.

CONCLUSION

Appellants would have this Court rely and base its action on selected newspaper editorials and headlines. This seems rather strange coming from counsel who have pretended that they object to newspaper

headlines, stories and editorials in reference to a criminal case. They devote a considerable portion of their brief to protesting against such newspaper activity. The same sort of attitude prevailed throughout the trial when, on numerous occasions, defense counsel sought to inject newspaper articles into the case and it was always the State that insisted that the newspaper be kept out. And so here, too, the State urges that this case be considered on the basis of the law and the facts, and not on newspaper editorials.

In support of their claim that this is a case of public and great general interest, the defense cite numerous newspaper headlines, most of which merely note the fact that an appeal has been filed. There is here no important question of law to be resolved by this Court. Such issues of law as have been urged are, by and large, artificial and the facts are misrepresented and distorted in order to raise fictitious issues.

Defense counsel would have this Court believe the witnesses and the testimony as viewed by the defense and disbelieve the witnesses and the evidence presented by the State. It is respectfully submitted that this is the function of the jury and not of a reviewing court. The evidence submitted by the State, if believed by the jury, and they had every right to do so, proves the defendant guilty beyond a reasonable doubt as found in the verdict and a fair analysis of the record will disclose no substantial error prejudicial to the defendant.

This defendant was given a fair trial by an impartial jury and every constitutional right of the defendant was safeguarded. The claims of denial of his constitutional rights are groundless and rest entirely upon

this trial. There is involved in this case no real constitutional question and the appeal as of right should be dismissed for the reason that there is herein involved no debatable constitutional question.

Section 2945.83 of the Revised Code in so far as material, provides:

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> * * *
>
> "(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;
>
> "(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby,
>
> "(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

Accordingly, it is submitted that the motion for leave to appeal should be denied and the appeal as of right, dismissed.

Respectfully submitted,

FRANK T. CULLITAN,
Prosecuting Attorney of Cuyahoga County

SAUL S. DANACEAU,
THOMAS J. PARRINO,
GERTRUDE BAUER MAHON,
Assistant Prosecuting Attorneys,
Attorneys for Plaintiff-Appellee

No. 34616

IN THE SUPREME COURT OF OHIO

APPEALS FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

VS.

SAM H. SHEPPARD,

Defendant-Appellant.

APPENDIX A

---

*OPINION OF THE COURT OF COMMON
PLEAS ON MOTION FOR NEW TRIAL

STATE OF OHIO,

Plaintiff,

VS.

SAM H. SHEPPARD,

Defendant.

---

*The opinion of the Court of Common Pleas are herewith set forth for the reason that the Appellant neglected to include them in their Appendices.

Date: January 3, 1955
BLYTHIN, J:

This cause is before the Court on the motion filed December 23, and supplement thereto filed December 24, 1954, of defendant for a new trial following a verdict of Guilty of Murder in the Second Degree rendered by a jury and followed by sentence thereon as provided by law.

Still another motion for new trial has been filed on the ground of claimed newly-discovered evidence but this memorandum is not directed in any particular to it. Hearing will be had on it in due course and ruling will be made thereon after such hearing.

The Court has deemed this memorandum necessary due to some statements made by counsel for the defense during trial and repeated or enlarged in said motion. Some are not factually true and some others create or tend to create impressions not representative of the true situation.

Forty (40) reasons are advanced in support of the motion and one (1) by the supplement thereto and the Court will, as briefly as possible, state the facts or his views as to each.

(1) Error in overruling application for a writ of habeas corpus. This is the first that the Court has heard of any such application in this cause, and, certainly, none was denied by him.

(2) Error in denying the release of defendant on bail. The guilt or innocence of the defendant was not involved in his application for bail. His guilt or innocence is the only issue in the trial that brought the verdict complained of. This claim is, therefore, clearly without merit.

(3) Denial of change of venue requested by defendant. The request, when made, was based upon the claim that the extraordinary public

attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury in this county impossible. It is a matter of common knowledge that the case commanded that same attention throughout Ohio and the United States of America. It commanded very much attention throughout the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.

Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communication the same precise stories were simultaneously published in every city and county in the State and it certainly will not be denied that Cuyahoga County is the most liberal county in the State and, as a result, the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature. It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like, was involved--what actually was involved was a mere mystery -- a "whodunit." The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The Court reserved ruling on the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon

...considered the Court overruled the motion and believes such action was not error. Section 2945.06 Revised Code of Ohio provides that a person charged in a case such as this may waive trial by jury and elect to be tried by a panel of three judges. While not challenging the right of a defendant, in a proper case, to a change of venue it does seem that the lack of confidence in any jury anywhere, coupled with the failure to elect to be tried by a panel of three judges, smacks of objection to any trial at all.

(4) Error in denying application for continuance. The crime charged in the indictment occurred on July 4. Trial started October 18. Defendant's counsel had been engaged and active from a time within hours following the crime and long before defendant's arrest. Seventy-five prospective jurors had been summoned with full knowledge of all counsel long before any application for continuance was filed. The only ground stated for a continuance was "to permit the extraordinary publicity to quiet down." It was not claimed that counsel were not prepared for trial nor was any suggestion made as to who was going to "quiet down" the publicity, nor when nor how.

(5) and (6) Are claims of error in disallowing challenges for cause and refusing to withdraw a juror and continuing the cause.

The Court believes the rulings were correct.

(7) Refers to irregularities without detail or specifications of any kind. Too indefinite to justify comment.

(8) Dismissal of Juror Manning and substitution of Alternate Jack Hanson. This, fortunately, took place before viewing of the premises, before opening statements of counsel and before a word of evidence. This

is not stated as an admission that it would have constituted error if the problem had developed later in the proceedings. The Court believes that the substitution was made in strict conformity with the provisions of law and was not erroneous in any sense or particular.

(9) Error in not permitting defendant to exercise a peremptory challenge upon such substitution. The law makes no provision for challenging an alternate juror except upon his impaneling as such alternate juror. If such a right existed it could, and undoubtedly would in many cases, defeat the entire purpose of having an alternate juror. On its face, this claim is without merit.

(10) Irregularity in the proceedings of the Court.

(11) Irregularity in the proceedings of the jury.

(12) Irregularity on the part of the Prosecuting Attorney.

(13) Irregularity on the part of the State's witnesses.

The four items last mentioned are mere conclusions and the facts, if any, on which they are based are not set forth in the motion, nor even referred to. They will, therefore, be disregarded.

(14) Claim that defendant was denied rights to which he is entitled under the Constitution of the United States and the Constitution of the State of Ohio.

Again no details or specifications whatever. Claim is a mere conclusion.

(15) Claim of abuse of discretion. No details or specifications.

(16) Claim of misconduct on the part of the Prosecuting

Attorney. Repetition of No. 12 but still no facts.

(17) Claim of misconduct on the part of witnesses for the State of Ohio. Repetition of No. 13 but still no facts nor even information as to which of the witnesses are referred to. All?

(18) Claim that verdict is not sustained by sufficient evidence.

(19) Claim that verdict is contrary to law.

The two claims last above mentioned are, of course, proper claims to make on the entire record but the Court cannot agree that either claim has merit in this cause.

(20) Errors of law upon trial. No specifications.

(21) Evidence admitted which should not have been admitted. No specifications.

(22) Evidence excluded which should have been admitted. No specifications.

(23) Errors in the charge of the Court.

Counsel for defendant requested two minor changes in the charge before its presentation to the jury. The Court considered them and denied them on the ground that he then believed the charge to be correct in the respects then under notice and that it was even expressive of the law as claimed by the defense. That belief is still entertained.

(24) Refusal to give special instructions prior to argument and failure to include them in the general charge. The Court believes that the general charge includes in substance and detail every proper principle of law embodied in the requests and applicable to the issues in this cause.

(25) Claimed error in refusing to direct a verdict for defendant

(26) Claimed error in refusing to direct verdict for defendant at close of all the evidence.

(27) Is a combination of Nos. 25 and 26.

The Court then believed, and still believes, that the record, at both stages referred to in Nos. 25, 26 and 27, presented issues of fact for the consideration of the jury.

(28) Claimed error in not removing from the jury the charge of Murder in the First Degree.

(29) Same as No. 28 excepting in reference to charge of Murder in the Second Degree.

(30) Same as Nos. 28 and 29 excepting in reference to Manslaughter.

Nos. 28, 29 and 30 were overruled because it was the Court's judgment that the record contained evidence within which a jury might find all the elements of Murder in the First Degree to be present, and the Court still firmly believes that judgment was correct. If correct, it naturally follows that his ruling was correct on Nos. 29 and 30 for the reason that they are included offenses.

(31) Other errors. None specified.

(32) Is an attack on the Grand Jury and the Indictment. Not involved here at all. It is also claimed that the jury (presumably the trial jury) substituted the presumption of guilt for that of innocence. The Court is wholly unable to even imagine what can furnish the basis for such a claim. It is not worthy of serious comment.

(53) This is in the nature of an omnibus complaint, and in view of the statements made and the fact that they were voiced periodically throughout the trial, presumably in the hope that they would impress the jury and inoculate them with the persecution complex of the defense, the Court deems it necessary to make clear for the record what the actual situation was.

Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully "cover" the trial, and having requests for space from many of them, the Court decided to make proper arrangements before trial and to control the situation so as to minimize and, if possible, eliminate confusion during the trial. The courtroom is small. The Court assigned specific seats to individual correspondents in the rear of the courtroom and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the courtroom; that there was to be no passing back and forth through trial area and that all entries to and movings out of the courtroom be via the public doorway in the rear of the courtroom. Members of the defendant's family were accommodated with seats at all times during the trial. The same was accorded members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the courtoom and a scheme of rotation was established so that many persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.

Rules were prescribed for photographers and representatives

of radio and television stations.

They were cautioned that no cameras were to be permitted in the courtroom excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken in the courtroom at any time excepting with his consent or that of his counsel.

The Court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to overenthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the Court.

A very large number of pictures of defendant, his family, counsel and friends were taken in the courtroom (outside of court session periods) with their permission and without complaint. Counsel for the defense held press conferences in the courtroom with cameras clicking; all to the apparent delight of counsel for the defense and, naturally, without protest.

Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service. Not a single complaint was registered by any juror in this connection and it is worthy of note that the

defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or defendant but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest.

Some space outside of the courtroom which could be spared for the moment without interference with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:

> "The Assignment Room, where cases are assigned for other causes to courtrooms, was assigned by the Court to reporters and telegraphers."

Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate courtroom area. They were out of the corridors leading to the courtroom and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity.

Complaint is made of the appearance of a man on or about the courthouse steps, on one occasion, with a banner, and the Court's failure to inquire of the jury concerning what effect, if any, the banner or

[illegible] citizen of

Mount Pleasant, Pa. did so appear one day with a perfectly meaningless and crude home-made sign. He is, unfortunately, a religious fanatic who has been, at least once, an inmate of an institution for mentally disturbed persons. On knowledge of him and in open court without jury or defendant or his family being present the Court ordered him confined in the hospital section of the County jail. His family was reached by telephone and his wife and Pastor came for him and took him back home. The Court does not know that any juror actually saw him or his sign; the entire matter was so wholly meaningless as to make any mention of it at this point border on the ridiculous. Under this item the following is also included:

> "During the trial newspaper pictures were taken inside the home of one juror, showing how the family fared while the juror was at court. This was called to the attention of the Court, but no action taken."

The Court believes the entire statement true and, while not expressing any opinion as to the legal propriety or impropriety of such action of a newspaper publisher during the progress of the trial, he does, nevertheless seriously wonder what has happened to its sense of the ethics of such a situation and its own responsibility to the public it serves and its respect for the processes involved in the administration of justice.

Whatever the legal or ethical considerations, the incident proved to be a nullity in this case. The juror (Mrs. Mancini) was an alternate juror; her services were not finally needed; she was discharged at the close of the presentation of the Court's charge to the jury and took no part whatever in the jury's deliberations or the redition of the verdict. This is

not a suggestion that Mrs. Mancini was influenced in any manner, nor that she even knew of the matter at that time. It certainly cannot be claimed that the other jurors cared anything about it, nor is it even claimed that they even knew of it.

(34) Complaint is made of the procedure in connection with having defendant brought into the courtroom several minutes before opening of the trial session. The Court insisted on starting the sessions of the trial on time. It is the custom to bring a defendant to the courtroom before calling the jury down. The rule was followed normally in this case except that on more than one occasion counsel sought delay in calling the jury in order that they might have a brief conference with the defendant before the opening of the formal session. The Court cannot say whether "his (defendant's) picture was taken several hundred times" but the Court must say that there was no such picture-taking within the courtroom except upon consent of defendant or his counsel, or both. Only once, toward the closing date of the trial, was the matter of timing mentioned to the Court and the Court endeavored to have the timing as close as humanly possible in such a situation.

It is difficult to understand how, in any event, this item could have influenced the jury. The jury would not be present at the taking of such pictures.

(35) Complaint re. newspaper articles prior to arrest and prior to trial.

These surely had no connection with the trial and the trial court had nothing to do with them. The Court had one function to perform --

that of securing to the defendant a fair and impartial trial on an indictment by the grand jury for murder.

(36) Complaint is made of statements, adverse to defendant, supposedly made by various public officials prior to trial. These, again, had no connection with the trial. In this connection it is not to be overlooked that the defendant, members of his family and his counsel were fairly prolific in their statements to the newspapers for publication and public consumption prior to the trial and the defendant's "Own Story" was head-lined in unusually bold type on the front page of one Cleveland daily prior to trial. Time and again statements were made by the defendant, or on his behalf declaring him innocent in the clearest and most positive terms. The Court intends now no criticism of these actions as he has not deemed them subject to his control when made, or since. He mentions them only to avoid any impression that defendant's instant complaint is a one way thoroughfare.

This conduct, on the part of at least one member of defendant's family, bid fair to continue during the trial period and to become critical, during trial, of the actions of the Court itself and those charged with the prosecution or adjudication of the issues. It is fair to say that this conduct ceased promptly upon the attention of one of counsel for the defense being directed to it, and its impropriety, by the Court. The Court was then careful to confine the matter entirely between said counsel and himself.

(37) Complaint re. care of jurors during deliberations.

While this Court would not for the world minimize the impor-

tance of guarding this jury -- or the jury in any other case -- from annoyance or influence he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.

The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note -- and indeed decisive in this Court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them it is now pertinent to halt and ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.

It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed. Foreman Bird and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a "separation" is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.

The Court had complete confidence in the jury in this case; it was protected at all times from any possible approach, and its every

movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it.

(38) Complaint re. part taken by the Court in a Fabian television program on the steps of the courthouse. The Court, in view of a mere general claim, must beg leave to state the facts. The Court, on one morning, walked toward the courthouse steps, as usual, and there saw Robert Fabian (a retired Superintendent of Scotland Yard) with a very small contraption in his hand. Mr. Fabian said, "Good morning, Judge Blythin, nice morning." The Court said, "Good morning, Mr. Fabian." These are the very words, as near as the Court can remember them, that passed. There was no conversation of any kind about the case on trial or any other subject.

If this incident is claimed to be prejudicial error it must be overruled.

(39) Complaint re. Court's denying Juror Borke the privilege of asking the defendant a question while the defendant was in the midst of testifying.

This, of course, is a legal matter and will be passed upon on appeal in the event that appeal is prosecuted. Indicative of the regard of chief counsel for the defense for the proprieties of trial and his desire for a fair trial is the remark then made by him to the perfectly honest and sincere juror: "Go ahead and ask it."

(40) Complaint of a general failure to secure to the defense a trial by an impartial jury due to mass hysteria and the state of public

opinion created by publicity, etc.

The merits or demerits of this claim must be judged upon the entire record. This Court is fully convinced that it is without merit.

Two of the jurors who served in this cause were called to testify upon the motion now being considered but it is not quite clear to the Court which, if any, of the 40 complaints was supposed to be supported by their testimony.

They were Louella Williams and Mrs. Louise Feuchter. Each was asked if she had made statements indicating enmity or bitterness toward the defendant before or during the trial. Each emphatically denied the suggestion and not a word of evidence was produced to indicate that either one of them had.

Mrs. Williams was also asked if she had received a communication during the trial. She admitted she had and stated she had immediately handed it to the bailiff who, in turn, had handed it to the Court. It was promptly produced and was a wholly meaningless drivel, the product of the activities of a known unfortunate citizen of unsound mind. All the prospective jurors, including Mrs. Williams, had received communications from the same person following receipt of their summonses for this cause. They were fully questioned about them on voir dire examination as shown by the record. No sensible person could possibly be influenced by such a communication and Mrs. Williams testified that she did not even read it and was not influenced in any manner. The envelope and communication were received in evidence on this motion and speak for themselves. The effusions of the unbalanced mind of Amad Nora Heavedoy (real name

Earnest Pierce) had long since been cancelled out as harmless by every person having any connection with this cause, including the twelve jurors.

It is to be noted that not a single person or agency connected with the investigation of, or prosecution for, the crime involved escapes the anathema of the defense. These include the police, the coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the grand jury, its foreman, the trial jury, the public, the bailiffs and the Court. The sense of search for truth and the declaration of justice seems to have vanished from a whole community as if by magic and overnight. The news agencies of every kind and character are thrown in for good measure. In spite of all the charges made not a single specific item is cited in support of the claims made. Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did.

SUPPLEMENTAL MOTION

What the Court has seen fit to designate as a supplemental motion was filed, adding another ground or reason for the granting of a new trial. That is based upon a complaint that only men bailiffs were placed in charge of the jurors, men and women, during their deliberations. It is asserted that a female bailiff should have been placed in charge of the female jurors. Again we are left with nothing beyond a definite distrust of jurors. No law is cited in support of the contention made nor is there one

word of suggestion that any men or women jurors were approached or communicated with by anyone; nor that any of them misconducted themselves in any manner. The jurors, men and women, were properly guarded at all times and in strict accordance with the provisions of law.

The Court named Simon Steenstra, permanent criminal jury bailiff and Edgar Francis his own courtroom bailiff as the persons to have charge of the jury in their movements during the period of deliberation. They were named in open court in the presence of all interested parties. Both were well known to all parties, with the possible exception of defendant, and not a word of objection was voiced by anyone. Furthermore, one of counsel for the defense saw the Court in chambers prior to the selection of said bailiffs and inquired of the Court who he intended to appoint to take charge of the jury during the deliberation period. Upon being informed that the Court would name Bailiffs Steenstra and Francis he expressed his whole-hearted approval.

CONCLUSION

The Court is convinced that there is no merit in any of the complaints made by the defendant; that he was accorded a fair trial by an unusually intelligent and impartial jury and that the verdict rendered is supported by the evidence adduced upon the trial.

The motion, as originally filed and as supplemented, is therefore overruled and exceptions noted. It is ordered that this memorandum be made a part of the record in this cause.

EDWARD BLYTHIN
JUDGE

OPINION OF THE COURT OF COMMON PLEAS ON THE MOTION FOR NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

May 9, 1955
BLYTHIN, J.:

Defendant in this cause has heretofore and herein been found guilty of Murder in the Second Degree; has been sentenced to life imprisonment in the penitentiary and his motion for a new trial has been overruled. The cause is now pending on appeal in the Court of Appeals of the Eighth District of Ohio. Within 120 days of the rendition of the guilty verdict, and after perfecting his appeal, the defendant filed his motion herein for a new trial on the ground of newly discovered evidence, as authorized by law, and the cause is now before this Court for adjudication on that motion.

Subparagraph F of Section 2945.79 Rev. Code, provides as follows:--

> "When new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing of said motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the Court may postpone the hearing of the motion for such length of time as under all thecircumstances of the case is reasonable. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses."

Section 2945.80 Rev. Code of Ohio, in its pertinent part provides:

> "Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days following the day

upon which the verdict was rendered."

The trial of a cause in a court, whether to a jury or to the Court, is aimed to serve two purposes:

(1) To arrive, if possible, at the justice of the situation by the processes prescribed by the law; and

(2) To end the dispute in a civil case and to determine guilt or innocence in a criminal case.

No trial de novo is authorized in a criminal case in any appellate court. Proceedings in the latter court are confined to the passing on claims of errors upon trial which would, if found, be such as were material in themselves and prejudicial to the defendant. What may be termed the usual and natural grounds for seeking a new trial are those necessary to bring to the attention of the courts the claimed errors upon trial, and a motion on those claims must be filed within three days of the rendition of the verdict.

The motion now before the Court is one made under what might be termed a special provision of law and not based upon any claim of error having been committed in the course of the trial already had. It is essential that it be based on something material to the defendant and which was not in the trial had at all. One hundred twenty days is allowed for the filing of such a motion. For the reasons already stated, motions such as the one now before us are not favored by the courts. 12 Ohio Jur. Par. 647, Page 662. "Applications on this ground, however, have never been favored by the courts; on the contrary, the courts are properly cautious in granting new trials upon the grounds of newly discovered evidence." (Gandolfo vs. State, 11 O.S. 114).

... one must be based are very specific and conditional. There must be evidence; it must be newly discovered; must be material to the defendant; must be such that could not with reasonable diligence have been discovered and produced at the trial and, finally, must be supported by the affidavits of those by whom the evidence will be given.

The courts have, in their interpretation of the statute, held that the "new evidence" must neither be cumulative nor impeaching. State vs. Lopa, 96 O.S. 410. At page 411: --

> "The new testimony proffered must neither be impeaching nor cumulative in character. Were the rule otherwise the defendant could often easily avail himself of a new trial upon the ground claimed. Unless the trial court or court of error, in view of the testimony presented to the Court and jury, finds that there is a strong probability that the newly discovered evidence will result in a different verdict, a new trial should be refused."

This rule is well established and generally followed by the courts -- see 20 R.C.L. Page 294. It is true that new evidence may be cumulative but it must not be merely cumulative.

Defendant has filed, in support of his motion, seven (7) affidavits accompanied by forty-six (46) photographs which are referred to in the affidavit of Paul Leland Kirk (Exhibit N.D.E. 7) and which are designed to illustrate statements made or theories advanced in such affidavit. Defendant has also filed one (1) rebuttal affidavit. (Exhibit N.D.E. 8.)

Affidavit N.D.E. 1 is that of the defendant and merely deposes that he is right handed.

Affidavit N.D.E. 2 made by Arthur E. Petersilge, one of counsel for defendant. It sets forth that, on several occasions during the trial, he sought delivery to the defendant of the keys to the home of the defendant and his murdered wife, and that such request was refused by the office of the County Prosecuting Attorney until December 23, 1954 -- two days following the rendition of its verdict by the jury.

Affidavit N.D.E. 3 made by Stephen A. Sheppard, brother of defendant. It sets forth that he received the keys to the defendant's home on December 23, 1954; that without using them for any purpose he turned them over promptly to his brother Richard N. Sheppard.

Affidavit N.D.E. 4 made by Richard N. Sheppard, brother of defendant. It sets forth that he is Administrator of the Estate of the murdered Marilyn Sheppard; that he received the keys from Stephen A. Sheppard on December 23, 1954 and that on January 23, 1955 he made the premises (scene of the murder) available to Dr. Paul Kirk and that Dr. Kirk examined the premises on January 23rd and 24th. Affiant says that there was no change of any kind made in the interior of the dwelling from the time he received the keys until after completion of investigation and examinations within the dwelling by Dr. Kirk.

Affidavit N.D.E. 5 made by Dr. Virgil E. Haws, an Osteopathic Physician and Pathologist. He states he visited the home (scene of the murder) on February 12th, 1955 accompanied by Dr. Richard Sheppard, Dr. Stephen Sheppard and Reverend Robert G. Scully, Pastor of the Rocky River Methodist Church. He states that the purpose of the visit was to remove two (2) blood spots from the wardrobe or closet door on the

east wall of the bedroom which was the scene of the murder. He describes in careful detail how the purpose was accomplished and states that the spots were placed in separate bottles and sealed in a mailing tube and handed to Reverend Scully, marked Spot "A" and Spot "B".

Affidavit N.D.E. 6 made by Reverend Robert G. Scully. He corroborates the recital of Dr. Haws as to the removal of the blood spots; states the mailing tubes were then and there sealed and handed to him; that he mailed them to Dr. Paul Kirk, Berkeley, California on February 14, 1955.

Affidavit N.D.E. 7 made by Dr. Paul Leland Kirk an authority on Criminalistics who is at present in charge of theSchool of Criminology of the University of California. We shall consider its contents later.

Defense Affidavit N.D.E. 1, by Sam H. Sheppard, defendant, merely asserts him to be right handed. This fact has not been disputed at any time. It was testified to upon trial and the theory was then advanced that the murderer of Marilyn Sheppard was left handed. It is still in the realm of theory as no proof of it has yet been found possible, nor is there evidence at all of it.

Affidavit N.D.E. 2 is that of Arthur E. Petersilge of Counsel for the defense. It merely asserts that demand was made upon the County Prosecuting Attorney for the keys to the Sheppard dwelling and such demand refused.

The County Prosecuting Attorney had, following the murder, taken possession of the keys to the Sheppard dwelling -- which dwelling

remained unoccupied from the date of the murder until after the trial. The furnishings remained intact in the dwelling during the period mentioned, with the possible exception of a few minor items being removed for purposes of investigation and prosecution.

The State has produced four (4) affidavits aimed to impeach the witnesses for the defense. They have been marked Exhibits N.D.E. - A-B-C and D.

Affidavit N.D.E. -A, Made by Saul S. Danaceau, Assistant County Prosecuting Attorney. He claims that in November, 1954 there were discussions touching the subject of turning over the keys of the house to defendant or his representatives and that the request made was denied. He also states that from the time the Prosecuting Attorney or his assistants entered into the case in July 1954 to the present time (April 1955):

> "he does not know of any instance where the defense was denied a request to inspect the said home or to make any investigations therein."

The Prosecuting Attorney took possession of the home immediately following the murder and held such possession until December 23, 1954 -- two days following the verdict.

It is quite clear to the Court that the Prosecuting Attorney retained the keys to, and possession of, the premises but it is asserted, and also quite evident, that the defense was not denied access to the premises for any and all proper purposes of its own, provided, however, that any visitor or visitors be accompanied by a police officer of the City of Bay Village, in which city the home is situated. The defense argues that the possession was

illegally held by the Prosecuting Attorney and that permission to inspect the home in the presence of a police officer was not satisfactory and that proper investigation could not be made under the prescribed condition.

Affidavit N.D.E. -B. made by Dr. Samuel R. Gerber, Coroner of the County. He asserts that in October 1954 Fred Garmone, of Counsel for the defendant, visited his office and there, in the presence of Thomas Parrino, an Assistant Prosecuting Attorney, inspected a large number of articles which were held for evidence and which came from the house of tragedy. The articles are listed in detail under captions: Bedding from bed of victim; Clothing of victim, Marilyn Sheppard; Clothing of Dr. Sam Sheppard; Jewelry, property of Marilyn Sheppard and Property of Dr. Sam Sheppard, in "Hallmark" box. He also states that counsel was shown a model of the head of the victim and made notes of his view of said articles and model.

Affidavit N.D.E. -C. made by Leona Phalsgraff and Raymond Keefe, Secretary and Property Custodian, respectively, of the Coroner's office. They assert that Dr. Anthony J. Kazlauckas, a former Deputy Coroner of the County, visited the Coroner's office in October 1954 and, on behalf of the defendant was permitted to examine all the items which were examined by Mr. Garmone, as set forth in the Coroner's affidavit, and that Dr. Kazlauckas further examined: --

> "Autopsy protocol, Case 76629 (M. 7280) Marilyn Sheppard. Conclusions from Laboratory findings.
> "X-rays of Marilyn Sheppard, Case 76629 taken at Coroner's office."

The Court will not now undertake to pass on the legality or

otherwise of the Prosecuting Attorney's action in taking possession of the murder home and holding it until after the trial of Sam H. Sheppard and the rendition by the jury of its verdict. Seldom indeed does the entire interior of a home become as important as the interior of this home seemed to be in the period in question and while complete exclusion of the representatives of the defense would not be justified it is only rational to believe that the Prosecuting Attorney was fully justified in preserving the scene and status quo pending trial and its outcome. The two affidavits last mentioned and the statements of all counsel in open court clearly indicate that the prosecution had no desire to conceal anything and must lead the Court to the conclusion that there existed neither concealment nor hindrance and that the condition imposed, already mentioned, was merely precautionary. It is not unlikely that failure to take possession of the property and failure to take the precaution taken could very well have been subject to just criticism.

It is interesting to note that the verdict in this cause was rendered on December 21, 1954 and the keys and complete possession of the home were turned over to the Sheppard interests on December 23, 1954, but no examination was made by the defense expert, Dr. Kirk, until January 22, 1955. The motion, based on his report, and now under consideration, was filed April 15, 1955. The rule of required diligence does not, of course, apply after the original trial but diligence is always cogent evidence of faith in one's cause and a determination to reveal whatever facts may be available. Especially is this true in a case of this character, in which time and elements play a part in the possible dilution of the value

1 of claimed findings. That precise situation is evidence here by the clash

2 of expert opinion (Dr. Kirk and Dr. Marsters) concerning the effect of

3 time, foreign elements and even light on the bloodspots claimed to constitute

4 or support material new evidence.

5 The keys to the Sheppard home were in court at the time of

6 trial and were produced by Police Chief Eaton. Possession of them was

7 demanded by the defense and the Court refused to order them turned over

8 and, himself, took possession of them for the moment, but holding they

9 "belonged to the police at the moment." Pages 6070 (4458) to 6075 (4463)

10 of the Record.

11 Chief Eaton was a defense witness and he was cross-exam-

12 ined by the State. On pages 6076 (4464) et seq is found the following:

13 "Mr. Mahon:

14 Q. Chief, since you have had that key -- you got it some time in November, the key to the house,

15 is that right?

16 A. Yes, sir.

17 Q. From that time down to date has the house been accessible to the Sheppard family?

18

19 A. Yes, it has.

20 * * * * * * *

21 Q. Have they ever been denied at any time the right to go into that house since you have had possession

22 of the keys?

23 A. They have not."

24 **Re-direct** examination by Mr. Corrigan: --

25 "Q. Each time any member of the Sheppard family went in the house they had to get your permission?

1 A. That's right.

2 Q. And each time they went in they were accompanied by a police officer?

3

A. Yes, sir.

4 * * * * * * *

5

Q. And the order that Sam Sheppard could not go

6 into his home, where did that come from?

7 * * * * * * *

8 A. There was no order he could not go into his home.

9

Q. The order that Sam Sheppard could not go into

10 his home except in the custody of a policeman or with a policeman, how did that originate?

11

A. That was suggested, I believe, by the prosecutor's

12 office."

13 There is here no claim that any new evidence has been dis-

14 covered other than in the Sheppard home which was the scene of the murder;

15 there is no claim of the discovery of any evidence which could and would not

16 have been discovered between mid-July 1954 and October 18, 1954 -- the

17 date of opening of the trial-if the examination and investigation made in

18 January 1955 had been made within the period last mentioned. There is no

19 evidence whatever of denial of access to the premises provided such access

20 was had in the presence of a police officer. It borders on the ridiculous to

21 say that the examination and investigation made by Dr. Kirk within the

22 dwelling could not have been made with precisely the same ease and effect

23 in the presence of a police officer as was the case without him. Had the

24 prosecutor at any time during the pendency of the case assumed an unreason-

25 able attitude on the matter of the right of defendant to examine house, clothing

or other property or material likely to produce, or which might produce, valuable evidence in the case the presiding judge in the criminal division of this court would certainly have solved that problem upon being requested to do so.

On the matter of diligence the Court must hold that, as a matter of fact, the defense was not denied access to the Sheppard home during the pendency of this cause and that under the circumstances disclosed by the record the condition of entry imposed -- that a police officer be present -- was normal, natural and reasonable, and that no showing has been made as to how or why any such presence would in the slightest degree prevent, impede or affect the investigator in his search for facts which, in his judgment, could or might aid the defense.

The Court finds that the tendered matter is not matter or evidence that could not, with reasonable and most ordinary diligence, have been found long prior to the trial and, therefore, fails to come within the clear requirement of the law in that regard.

The Court would feel constrained not to attach final importance to some lack of due diligence if there was produced some real new evidence, even though such new evidence be not irrefragable.

Reliance is had by the defense upon the affidavit of Dr. Paul Leland Kirk, already herein mentioned. It is difficult indeed to understand how it can be seriously claimed that it discloses the discovery of a single item of new evidence unless it be what is claimed concerning two spots of blood referred to in Defense Exhibit N.D.E. 5 as spot "A" and spot "B". These spots were taken from the wardrobe or closet door on the east

wall of the murder bedroom. Defendant's Exhibit N.D.E. 5, pictures 14, 14A and 16. Marilyn Sheppard's blood was type O and it is asserted by Dr. Marsters that there are no sub-groups of type O blood. State's Exhibit N.D.E. D. Dr. Kirk does not question the type and he concedes it to be O. He also reports that the particular blood spots now being discussed - "A" and "B" are O type. Dr. Kirk, however, maintains that these two spots differed in solubility and that one of them produced a slower and less certain reaction. From what he observed he arrives at the conclusion that the larger spot had a different individual origin than did the smaller one and was therefore from someone other than the victim. It is not claimed by anyone that any of the blood mentioned came from the defendant. Even though the spots are type O (Marilyn's type.) Dr. Kirk, because of the size, shape and behavior of the one spot in particular, arrives at the conclusion that

(1) the larger spot could not have come from impact spatter;

(2) it is highly improbable that it could have been thrown off a weapon;

(3) it almost certainly came from a bleeding hand;

(4) it most probably occurred at a time different from the time that hand was wielding a weapon; and

(5) could only have belonged to the attacker.

Page 19. Defendant's Exhibit N.D.E. 7.

Dr. Roger W. Marsters who for the last eight years has been in charge of the Maternity Rh Laboratory at the University Hospitals in Cleveland (a clinical laboratory), in his affidavit, State's Exhibit N.D.E. - D, states that variability occurs in blood grouping tests under ideal

conditions and that the variables are almost always quantitative rather than qualitative. He recites the problems involved in the grouping of dried blood and finally concludes that: --

> "For that matter, the presumption of individual differences of blood origin on the basis of a difference in solubility is certainly unwarranted."

Dr. Marsters finally deposes that: --

> "to assume the existence of another quality of type O and especially an individual source on the basis of some quantitative difference in reaction and solubility employing and admittedly complex technique cannot be justified."

Dr. Kirk was furnished a copy of the affidavit of Dr. Marsters and, over the telephone, dictated his reply which is here and identified as Defendant's Exhibit N.D.E. 8. It traverses the contentions of Dr. Marsters.

On this single piece of claimed new evidence we have opinions which are poles apart by two recognized experts with a claim made by Dr. Kirk that the field of dried blood is a very different field from that in which Dr. Marsters finds himself at the University Hospitals, thereby suggesting that the opinions of Dr. Marsters need evaluation with that in mind.

It is not reasonable to believe that production of the testimony of Dr. Kirk at the trial, and the counter-testimony of Dr. Marsters, would have made the slightest difference in the total evidence, and certainly not resulted in a different conclusion by the jury.

The Court does not desire to extend this memorandum beyond its proper limits but feels he should comment on the affidavit of Dr. Kirk, upon which affidavit the defendant chiefly relies to support his motion. It is loaded with criticisms, conjectures and conclusions wholly foreign to

that which is contemplated by the law to disclose a basis for a new trial on the ground of newly discovered evidence. The affidavit seeks to conduct a post-mortem examination of the trial had. To state it more graciously, he seeks to review the case and to conduct his own trial. One or two quotations will clearly illustrate what has just been stated:

Page 6, 7.

> "The actual investigation details and results are broken into suitable categories which follow, along with a discussion of the status of the case as it was presented by the prosecution and on which the present guilty verdict rests. It is considered important to review these matters because they are either indicative of guilt as accepted by the jury, or they are a fabric of errors of ommission, commission, or both."

It is surely proper to observe that the jury accepted the presentation of the prosecution as indicative of guilt and there is no justification for any review of its finding by the route attempted here.

Page 11. After presenting his views on the "Green Bag and Contents" and the testimony concerning them the affiant concludes:

> "Regardless of interpretations that may be placed on any of this evidence, it clearly has no value of proof of the guilt of the defendant, and actually is better interpreted in the contrary terms."

Page 11, 12. --

> "Summary.
>
> "Analysis of the technical evidence offered by the prosecution shows it to be superficial, incomplete, and erroneous in interpretation. Little if any of it had a direct bearing on the guilt or innocence of Dr. Sam Sheppard. At the most, it establishes that the victim was beaten to death by a weapon of unknown type; that there was some blood found in various places in the house; that the murderer attempted to give an impression of a burglary; that it was so amateurish and clumsily performed as to fool nobody; and that certain details appeared to be inconsistent with the story repeatedly told by the defendant. Even these apparent inconsistencies were so minor as to be of little value if correct, and no

certainty of the correctness of interpretation was established. Briefly, no actual proof of a technical nature was ever offered indicating guilt of the defendant, and the facts that were established and offered are even more readily interpreted in several respects in terms of another murderer than the defendant."

The above quotations are taken without particular selection but they are illustrative of the type of so-called "affidavit" supplied. The affiant reconstructs the entire picture of the crime in most minute detail and proceeds to draw interferences and firm conclusions from his own picture. His conclusions are based on his own theories, do not necessarily eliminate Sam Sheppard nor are they necessarily consistent with the theories of the defense at the trial.

Page 28, 29. --

"The original motive of the crime was sexual. **** Leaving the victim in the near nude condition in which she was first found is highly characteristic of the sex crime. The probable absence of serious out cry may well have been because her mouth was covered with the attacker's hand."

Assuming the theory to be correct, it does not exclude Sam Sheppard as the attacker.

Page 26. (Concerning the murder weapon)

"A large cylindrical instrument like a piece of pipe flared on the end is more reasonable, and consistent with the type of injury and the reconstruction of its mode of application. If the weapon was carried into the room to be used as it eventually was used, a wide variety of possibilities exist. **** A third possibility exists, viz. that it was an object carried for another purpose, but serving as a murder weapon when needed. Such an item is a heavy flashlight, several designs of which fill nearly all of the necessary specifications. The most serious argument against this possibility is the (presumed) absence from the room of glass which would be likely to have broken. A plastic lens might answer this objection. **** With the available limited information, it is not possible to infer an exact weapon, but

certain of its characteristics are quite definite and can be safely assumed."

Page 29.

"The weapon was almost certainly not over 1 foot in length, and had on it an edge, quite blunt but protruding. This edge was almost certainly crosswise to the axis of the weapon and could have been the flared front edge of a heavy flashlight."

All of this is diametrically opposed to the theory of defense at the trial. Great pains were taken to demonstrate that the wounds were approximately the same length, same width and equidistant apart and were not caused by any such weapon as Dr. Kirk imagines but by a multi-pronged instrument that struck but a few times to cause the wounds on the head which were vividly shown on color slides on a screen.

Several states have statutes similar to the one in Ohio under which this motion is made and, while the reported cases are not very many in number they express in the clearest possible fashion what is construed to be newly discovered evidence. Not in a single case in this state or elsewhere has the Court been able to find a single instance in which material such as is proffered here has been either accepted or even offered. Even the two featured blood spots are not new. They have existed since the date of the murder. They have been available. They are type O blood as was Marilyn Sheppard's blood, but a conclusion is reached that they were not her blood on the basis of tests reported by Dr. Kirk and certain conclusions reached by him thereon, which conclusions are seriously, and with forceful logic, challenged and held not justifiable by Dr. Marsters.

The Court will not undertake here to discuss the Ohio cases

on the subject but will cite just a few which clearly show the type and quality of "evidence" required to call for the granting of a new trial under favor of Sec. 2945.80 of our Revised Code. State vs. Lopa, 96 O.S. 410. Koenig vs. State of Ohio, 121 O.S. 147. Canton Stamping & Enameling vs. Eles, 124 O.S. 29. State vs. Petro, 148 O.S. 505. State vs. Dean, 90 Ohio App. 398.

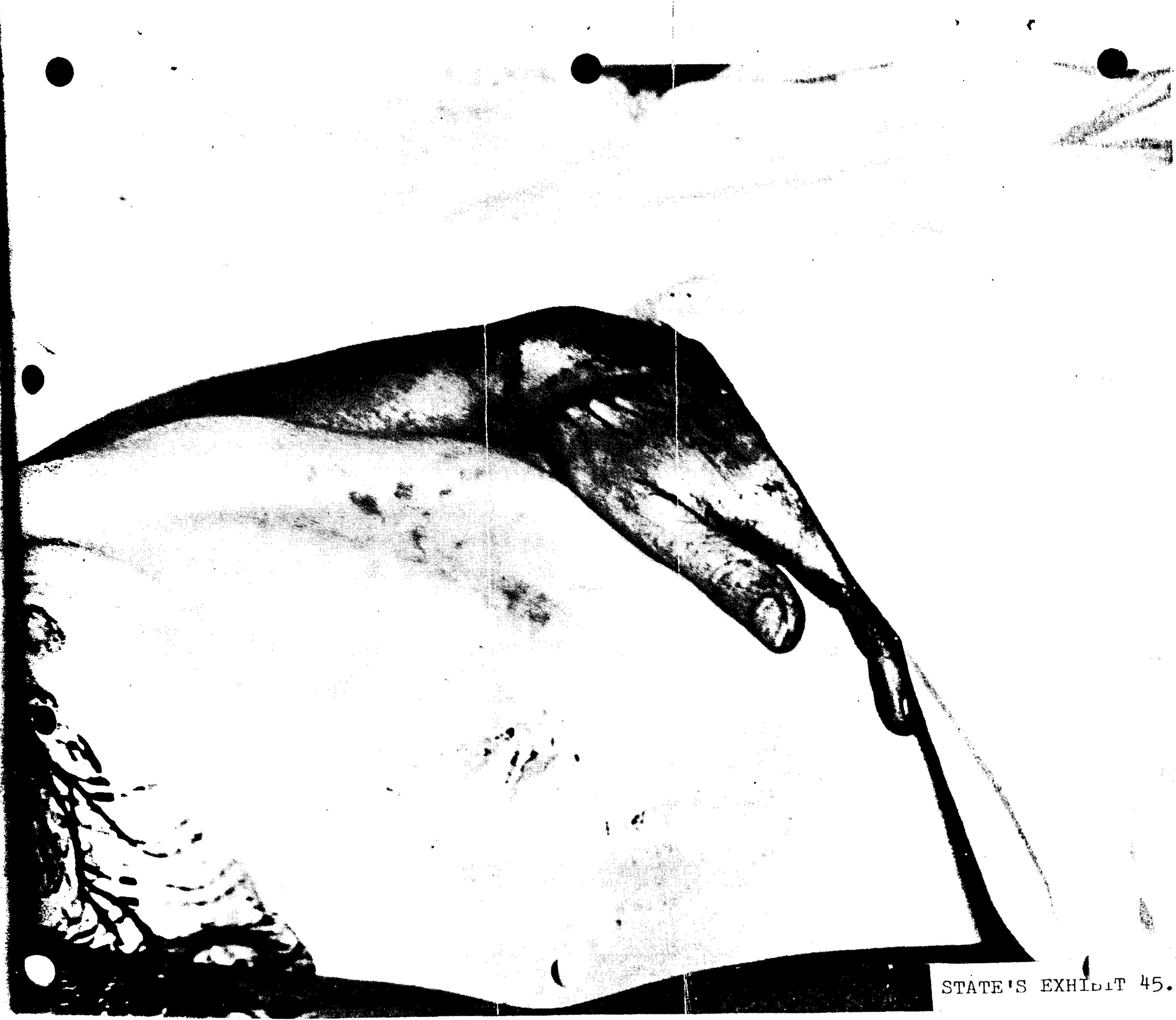
After careful review of the authorities; a thorough examination of the proferred evidence and consideration of presentations of counsel the Court is forced to the conclusion that what is offered has been available from the time of the murder and could easily have been secured in ample time for presentation at the trial; that it is neither of the type nor quality of evidence required to justify the granting of a new trial and that it is definitely not of such a character as to lead the Court to believe that its presentation upon trial would produce a different result.

For the reasons stated the motion of defendant will be overruled and entry will this date be made to that effect, and exceptions noted.

EDWARD BLYTHIN
JUDGE

STATE'S EXHIBIT 9.

STATE'S EXHIBIT 34.



STATE'S EXHIBIT 45.