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Brief of Defendant-Appellant on the Merits and Constitutional Question #34615

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IN THE SUPREME COURT OF OHIO

APPEAL FROM COURT OF APPEAL OF

CUYAHOGA COUNTY

State of Ohio,

Plaintiff-Appellee

-vs- No. 34615

Sam H. Sheppard,

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT

ON THE MERITS AND CONSTITUTIONAL QUESTION

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Plaintiff-Appellee

HERBERT, TUTTLE, APPLEGATE
and BRETT

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IN THE SUPREME COURT OF OHIO

State of Ohio, :

Plaintiff-Appellee, :

- vs - : No. 34,615

Samuel H. Sheppard, :

Defendant-Appellant. :

BRIEF OF DEFENDANT-APPELLANT
ON MERITS AND ON CONSTITUTIONAL QUESTION

The parties will be referred to as they appeared in the trial court. At times the plaintiff will be referred to as the State or the Prosecution. All underscoring, parenthesis and other forms of emphasis are ours.

The defendant, his wife and son, Chip, resided in Bay Village, a suburb of Cleveland. Their home was on the shore of Lake Erie. The south exposure was toward Lake Road, a heavily travelled thoroughfare, and the north exposure faced the Lake. The home was on rather high land and the backyard descended downward over a bank to the shore of the Lake. There was a stairway leading from the immediate backyard down toward the beach, there being a landing at a small boat house a few feet above the actual surface of the Lake. (State's Ex. 17)

Sometime between the hours of 12:30 A.M. and 5:30 A.M., July 4, 1954, the defendant's wife -- Marilyn Sheppard -- came to her death while in the bedroom on the second floor by reason of repeated blows about the head by some object causing many fractures. The defendant was in the home at the time of the attack and death.

EVENTS OF THE PRECEDING EVENING

The defendant, Dr. Sheppard was on the Staff of a Hospital at Bay Village. During most of the day of July 3, 1954, the defendant had "worked on a little boy" who had been fatally injured (2186). A neighbor lady, Mrs. Ahern, and Mrs. Sheppard had made arrangements for the two families to have dinner together on the night of July 3rd and to spend the evening together (2020). The defendant, his wife and their son Chip came to the Ahern home about 6:00 o'clock in the evening. The defendant was called to the Hospital around 7:00 o'clock P.M. and returned at about 7:30 P.M. Mrs. Ahern served hors d'oeuvres and cocktails at her home. No one had more than two cocktails (2065). The families went to the defendant's home shortly after 8:00 o'clock P.M. and Mrs. Ahern and Mrs. Sheppard prepared dinner. Mr. Ahern and the defendant went down to the beach where the defendant mentioned that he had invited some interns to come up and ski the next

day. The Lake was quite rough and most of the beach was obscured. (2023-2024). The Ahern children were taken home and put to bed and Chip was likewise put to bed. The two couples then watched television and listened to the radio. This was around 10:20 P.M. (2027-2028). While watching the television the defendant sat in a chair beside his wife or on the floor in front of her and later he and his wife sat in the same chair. At about 11:30 P.M. the defendant laid down on a couch and after a few minutes went to sleep (2032-2035). The defendant was attired in a tan corduroy jacket, cord slacks, "T" shirt, brown loafers and white sweat socks (2021,2033). The Aherns left the Sheppard home at about 12:30 A.M. (2035). Defendant was asleep on the couch at that time. Mrs. Sheppard was pregnant and at some previous time had suffered convulsions during the pregnancy (2120-2121). During the evening and during the dinner and while it was being prepared Mrs. Sheppard appeared to be happy and gay (2186). She had prepared a berry pie as dessert because it was the defendant's favorite (2200-2221). The dinner was served on the porch (lakeside of the house) and after things had been put away Mrs. Ahern locked the door between the porch and the living room (2136-2137). The defendant and his wife never quarrelled nor were estranged (2165). It was not unusual for the defendant to fall asleep while visiting [illegible] night (2047, 2058). When the Aherns left

the Sheppard home around 12:30 A.M. there was one light in the kitchen, a light in the living room and two lights upstairs, one being in the defendant's study or dressing room (2036, 2037, 2157). Mrs. Ahern testified in her association with Marilyn that she never noticed that they were estranged, never quarrelled and there was no indication that there was any feeling between the parties (2165), and that the defendant never laid a hand on Marilyn (2245). That evening the Lake was "rough enough that it was coming in strong so that most of the beach was obscured" (2024).

THE MURDER IS DISCOVERED

Spencer Houk was Mayor of Bay Village and also operated a meat market. He had known the defendant for about three years and was a frequent visitor at the Sheppard home (2248, 2250, 2255, 2256). At about 5:50 A.M. July 4, 1954, the defendant called Houk, who was a near neighbor, saying "My God, Spen, get over here quick. I think they've killed Marilyn." Houk responded by saying "What?" and the defendant "Oh my God, get over here quick." (2263, 2264). Houk told his wife. The Houks went to the Sheppard home and entered the house from the Lake Road door -- it was not locked (2267-2270). There was a light in the upstairs window facing the road (2265). The defendant was in a room -- the den -- off

the hallway slumped down in a chair. Houk asked what happened or words to that effect and the defendant said, "I don't know exactly, but somebody ought to try and do something for Marilyn." Mrs. Houk then went upstairs to the room where the dead body of Mrs. Sheppard was lying on the bed.

Houk said to the defendant, "Get ahold of yourself, * * * can you tell me what happened?" and the defendant said, "I don't know. I just remember waking up on the couch and I heard Marilyn screaming, and I started up and the next thing I remember was coming to, down on the beach." (2272). Mrs. Houk offered the defendant some whiskey, but he declined to take any. The defendant was bare from the waist up.

Police officers and firemen arrived shortly thereafter and went upstairs (2277). Houk then left the Sheppard home and went to his own home and returned about fifteen minutes later (2281-2282). The Lake was still rough and there wasn't much beach -- about three feet (2285-2286). Houk and Police Chief Eaton went down to the beach where they observed some footprints and talked to a couple of fishermen (2291). The two fishermen stated that they had previously seen two men on the beach, but what became of them is not disclosed (2348-50). Houk observed a coat on the couch (2304). He noticed a swelling or "bump" on the side of defendant's head in the area of his right eye and defendant complained of a severe pain in his neck (2297, 2298).

Coroner Gerber arrived about 7:50 A.M. July 4th. In the bedroom were two beds, one next to the entrance door and the other bed on the other side which had not been slept in (2970, 3198). On the bed near the door lay the body of Mrs. Sheppard. Her head was about one-third of the way down from the head of the bed. The bosom and abdomen were exposed. Her pajama jacket was pushed up around her breasts (States Ex. 20). There was a pillow at the head of the bed up against it, half upright and half pushed down. Gerber testified "As I looked at it there was some splattered blood on the surface of the pillow that I could see and on the left hand side there was a sort of -- peeking out from the creases on the pillow was a big blood stain." (2968, 2969, 2970). There was no chemical or microscopic examination made of the pillow (3300). At about 8:00 A.M. a corduroy jacket was found lying on the couch and a picture was taken of it. (State's Exhibit 8). A great number of people had roamed about the downstairs after the discovery of the crime. State's Exhibit 61 discloses a small American flag standing on a table. State's Exhibit 12, another photograph, shows apparently the same flag lying on the floor. Obviously there was considerable disarrangement of things downstairs after the arrival of great numbers of people. Dr. Gerber went to the hospital where the defendant was hospitalized and took the clothing that he had been wearing the previous evening, consisting of a pair of pants, shorts,

socks, shoes, a belt and handkerchief. The pants were wet (2987, 2982). He also took a billfold which was wet (2988). There was a blood stain on the left knee of defendant's trousers (3017,3030). He found two pieces of broken teeth on the bed under the body of Marilyn which he then determined did not come from her teeth, but later decided that these chips of teeth did come from the dead woman's mouth (3019, 3219, 3237). There were three hundred milligrams of sand removed from the cuffs of the defendant's trousers (3401).

The victim's watch was found in the den. There was blood on the watch and on the band and on the face of the watch (3022, 3023). Officer Nichols found a piece of leather at the foot of the bed of the victim at 9:30 A.M. July 5th. This piece of leather is roughly triangular about five-eighths of an inch wide and five-eighths of an inch in length. It was compared to the defendant's effects and other property containing leather, but this piece of leather was not traceable or comparable to any of the leather material about him or his home. This piece of leather was turned over to Dr. Gerber (State's Exhibit 47A, pages 3502-03-04). At about 10:00 o'clock on the morning of July 5th several police officers again visited the bedroom and found a small piece of leather triangular in shape, about a quarter of an inch on [illegible] of the triangle and hypotenuse slightly longer. [illegible] leather was marked State's Exhibit 43 (3053,

3054). (It should be observed that there were two pieces of leather, of different sizes -- Exhibit 43 and Exhibit 47A -- found in the bedroom where the tragedy occurred.)

PREMISES THOROUGHLY SEARCHED

Sometime before 11:00 o'clock A.M. Officers Schottke and Gareau searched the area of the backyard between the house and the lake (3569, 3578). Later they searched the hillside "looking for a possible weapon." At the same time there was a group of boy scouts also searching for a weapon on the hillside in back of the Sheppard home "cutting down weeds and tramping over the area there looking for a weapon or any possible evidence (3578). At about 10:20 A.M. Carl Rossbach, a Deputy Sheriff, searched the area about the house and the beach but found nothing (3830, 3831).

Larry Houk testified that he found the green bag at about 1:30 P.M. (2944). The record at pages 2945-46 of Larry Houk's testimony proceeds:

> "Q. Now, when you saw this green bag that you have identified, where was it setting when you first saw it?
>
> "A. Around 15 feet up from the boat house.
>
> "Q. 15 feet up from the boat house?
>
> "A. And around seven or eight feet to the [illegible] of the steps.

"Q. Seven or eight feet to the east of the steps?

"A. Yes.

"Q. You didn't leave the bag lay, did you?

"A. No.

"Q. You didn't go up and get Dr. Gerber or Sergeant Hubach or any other police officer to come down and point out the spot where the bag was found by you, did you?

"A. No, but I marked it.

"Q. You didn't go up and get them, did you?

"A. No.

"Q. In marking, as you say you did, did you touch some of the brushes that was around there?

"A. There wasn't any brush at that time.

"Q. What was there?

"A. Well, the brush had been beaten down."

(It is a reasonable inference that this bag had been placed upon the brush after it had been beaten down by searchers prior to 1:30 P.M. and was not there when the brush was beaten down.)

There were probably a dozen searchers in the immediate vicinity when Larry Houk claimed that he found and picked the bag up, but none of them saw him do it (2945, 2946, 2947). None of the police officers in and around and about the Sheppard home went to the spot where Larry Houk claimed that he found the green bag (2949).

The defendant was in custody from about 6:00 A.M. and was not on premises at rear of the home.

This green bag contained a wristwatch, ring and key chain (4091). The watch showed that it stopped at 4:15 (4094). The defendant at the hospital readily identified the watch, chain and ring as his.

The maid, Elnora Helms, testified that she was a domestic employed one day a week at the defendant's home, having been first employed there in 1952 (3978-3979). She further testified that Mayor Houk was a frequent visitor at the Sheppard home, both when the defendant was there and when he was absent. In April, 1954, while Marilyn was confined to her bedroom, Mayor Houk visited in the bedroom with her (3888, 3889, 3890).

She further testified that the defendant always displayed an even temper, never mistreated his wife and "there was quite a bit of affection" between them (3992). The dog Koko was in heat frequently and left blood spots about the house (3996).

Straight lines were found on a desk and other articles that could be made by a cloth (4022). There was blood spots on the doors and walls on the east, on the west end of the room and the north side. There were also some [illegible] spots tested as human on the steps toward the basement [illegible] stairs.(4629, 4630, 4631).

The Coroner's technician received the piece of leather (Exhibit 43) on July 7th and compared it with other leather items taken from the house, but could not find any that matched the Exhibit (4670). No blood was found on defendant's belt, his shoes, his socks, but there was a spot of blood on the knee of the defendant's trousers and no where else (4681).

Human blood stains may persist for many years and it is impossible to tell how long blood spots have been present (2703, 4706). Blood clings to cloth and washing will not remove the stain and even boiling water would not necessarily remove blood stains (4721).

At page 4619 the technician testified that:

> "In the blood cells is a factor called antigen, which will react only with a specific anti body. In the blood grouping of the OAB Group there is the A and B antigen. There may be the A antigen present in cells, and we have Group A. We may have the B antigen group and have Group B. We may have no antigen present, and then we have a Group O, or we may have both antigens present in the cells, and then we have a Group AB."

BLOOD EXAMINATION AND TYPING

Mrs. Sheppard's blood was "Group O Rh Negative, Type MS." (4775). The yellow metal wristwatch, property of the defendant, yielded positive tests for human blood type "M." (4781). She further testified as follows:

"And you found that the type of blood on the watches was the same type as Marilyn Sheppard's blood, type 'O'?

"A. No, sir."

She further testified that her testing of the OAB Group was "inconclusive" (4755). (It may well be observed in considering the word "inconclusive" that had both A and B been absent the blood on the wristwatch would have been "O". However, there must have been some tracings of A or B which ruled out Marilyn's blood and made the tests "inconclusive" in that regard.)

THE DECEDENT STRUGGLED WITH HER ASSAILANT

The State and the defendant agree that there was a struggle between the decedent and her assailant. Her right wrist and back of the hand showed a severe abrasion. There is an abrasion over the right index finger (1707). Her right fifth finger was fractured (1708). There was almost a complete separation of the fingernail of the fourth left finger with the root of the nail exposed here, and there is a small bridge of skin which still holds the nail in place (1709). There was an abrasion over the right thumb on the forearm (1725). Material was scraped from under the fingernails of the decedent and turned over to the technician (1804). This material was considered important by the pathologist employed by the

Coroner (1804). Certain of the decedent's teeth were broken. There were certain abrasions within her mouth which in the opinion of the pathologist might have been caused by some foreign object in her mouth (1806).

NO SCRATCHES OR MARKS ON DEFENDANT

There was a swelling under the right eye of the defendant but no marks on him outside of the swollen eye. There were no marks on his forearms or hands or on his limbs (3577).

DEFENDANT'S INJURIES

The State put on the witness stand Dr. Richard Hexter who said that he examined the defendant on the afternoon of July 4th and observed a marked edema of the right cheek bone and a black eye and a swelling and redness over the right forehead (4444). Certain reflexes were absent, but Dr. Hexter said that he was not qualified to pass upon the injuries to the neck saying:

> "I didn't know enough about the technical area of the back of the neck for me to be able to make diagnosis as to whether there were any gross minute fractures. I thought that should be left more to a specialist." (4446, 4447).

On behalf of the defendant, Dr. Clifford C. Foster testified that he completed his high school and medical college course and then took further training at the University of Vienna. He took further training of five months in the Clinic of Professor Neumann in the training hospital for the University of Vienna (5834). He served further with Dr. Leonard Wrench of Cleveland. At about 2:10 P.M. July 4th he examined the defendant at the hospital (5836). His eye was swollen and there was "a faded area on the left side lateral to, I would call it, the thyroid cartilage, but we know it as the adams apple." (5836). There was a swelling at the base of the skull (5837) indicating an injury in that area. The defendant experienced difficulty in speaking due to an injury to the mandibular joint which controls the opening and closing of the jaw (5838). X-rays disclosed a separation of the tip in the region of the second cervical vertebrae characteristic of a "chip" fracture (5875).

Dr. Charles Elkins, a doctor of medicine, (the defendant was an osteopath) did his undergraduate work at Ohio Wesleyan University and graduated from the Western Reserve University School of Medicine (6692). He served his internship at the Cleveland City Hospital and was house officer in neurology and neuro-surgery and neurological surgery at Boston City Hospital, Boston, Massachusetts, and then served as a fellow in neurological surgery at Lehy

Clinic in Boston (6692). He then returned to the Boston City Hospital for another year and served as resident neuro-surgeon and then entered into the practice of neuro-surgery in Cleveland in 1941 (6693). He served two years as neuro-surgeon during World War II in the Army and was neuro-surgeon at a thousand bed hospital (6694, 6695). Upon returning to this country he became the Chief of neuro-surgery at Fitzsimmons General Hospital in Denver (6696). He was then transferred to Newton D. Baker General Hospital in West Virginia where he completed about a year and a half of service in this hospital -- a base hospital with about a thousand beds (6696). He then returned to Cleveland, renewed his practice of neuro-surgery and was appointed to the Staff of Western Reserve University School of Medicine in neuro-surgery. He was also neuro-surgeon at the Cleveland City Hospital (6697). Later he was appointed assistant clinical Professor at Western Reserve School of Medicine (6698). He served in other important and responsible institutions in the practice of neuro-surgery. He is a member of the Cuyahoga County Medical Society, the Cleveland Academy of Medicine, the American Medical Association, a Fellow in the American College of Surgeons and a diplomate in the American Board of Neurological Surgery and is immediate past president of the Ohio Society of Neurological Surgeons (6791). Dr. Elkins found that:

"The left triceps reflex not obtained."

This cannot be simulated. It indicated that there was a derangement in the nervous system (6717). It indicates something wrong in the mechanism controlling the reflex on the left side (6718). The left abdominal reflex was absent. This could not be simulated (6718, 6719). The cremasteric reflex was absent (6719). "The neck discloses tenderness over the spinous process of C-2" * * * "with spasmotic contraction of cervical muscles to pressure" (6720). "Defendant's neck muscles went into spasms when pressed." This cannot be simulated (6721). The conclusions reached by Dr. Elkins were that the defendant had suffered "cervical spinal cord contusions, which means a bruise of the spinal cord in the neck region" (6721, 6722). A blow in the back of the head in the area injured could cause unconsciousness (6722). This examination was held on July 6th and one month later on August 6th, Dr. Elkins re-examined the defendant at the County Jail in the presence of the Jail Physician (6723, 6724). He found moderate weakness of the left triceps (6725). The abdominal reflexes were present but the left "tires quicker than the right" (6727). The cremasteric reflexes were present but weak. They had been absent before (6727). The defendant was recovering from the injuries which he received on July 4th, but had not yet achieved normalcy (6729). There was still tenderness over the cervical vertebra, but the spasms had disappeared (6729). Dr. Elkins' findings on August 6th are as

follows:

"There is moderate weakness of the left triceps and left interossei. * * *

"There is hyposthesia (which means decreased sensation to pin prick over the ulnar distribution on the left hand) the left tricepts reflex is now present but diminished over the right. * * *

"Abdominal reflexes present but left tires quicker than the right. * * *

"The cremasteric reflexes are present but weak."

"Q. And tell the jury what conclusion you came to after August 6th?

"A. My impression was that Sam Sheppard had received a contusion of his spinal cord; that he exhibited certain positive signs of this injury back in July, and that one month later, approximately one month later, that his disease was improving and had improved." (6725, 6726, 6727, 6731).

Witnesses in large numbers, both for the State and for the defense -- many of them having known the defendant intimately, testified that he had a reputation for being quiet, peaceable, even temperament; at all times considerate and kindly to his wife. And others that knew his character testified that it was one of even temperament, never given to any loss of temper, was calm and collected and his propensities were peaceful and contrary to violence.

The State introduced in evidence the following statement given to it by the defendant:

"July 10, 1954, 11:40 a.m. Sheriff's Office, County of Cuyahoga.

"Dr. Samuel H. Sheppard you are now being questioned and may be charged with the crime of murder at a later date.

"The law gives you the right to make a statement if you so desire. Anything that you may say here may be used either for or against you at the time that you are brought to trial in court.

"Now that you understand these facts do you wish to make a statement telling us the truth about the facts that caused your questioning at this time?

"A. Yes.

"Has any drug or medicine been administered to you within the past 12 hours?

"A. Just about 12 hours ago I did have a grain and a half of seconal, which is a short-acting barbituate and should have no effect on me at this time.

"Q. Is there any doubt in your mind but what you can sit here and give us a true statement of what you know that occurred in your home on the night of July 3rd, 1954? at 28924 West Lake Road, City of Bay Village, Ohio?

"A. I feel that at this time I can tell all that I know.

"Q. Proceed.

"A. After having a difficult morning and early afternoon at Bay View Hospital where I am in charge of the accident room and the head of the Department of Neuro-surgery, I made a couple of visits and then proceeded home. I arrived home at a time later than five o'clock, realizing this because I had hoped to work in the yard with my family and found that it was too late to do so. My wife informed me that we -- correction --

that she had planned to get together with Mr. and Mrs. Ahern that evening. We were to go to their home for a drink before dinner and then return to our home for dinner. We realized that there were a couple of business matters involving vouchers that we should record and we did this before leaving the house. We compared notes and my wife recorded the material on the Sheppard Clinic vouchers. We soon thereafter went down to the Ahern's and drove our larger car as I recall. The Ahern's were both working in the yard with their children and we instructed them not to stop but to continue with their work as we chatted. My son was playing with youngsters in the yard. Mrs. Ahern insisted on going inside shortly thereafter and Mr. Ahern instructed his young son how to continue the lawn mowing with their power mower. We shortly went into their kitchen and some type of mixed drinks were prepared. I am not absolutely clear in regard to the exact nature of this drink since we often have done this in the past and I could confuse one incident with another. Shortly thereafter, or after being there for a short time, I received a telephone call from the hospital in regard to a youngster that had broken his femur which is the thigh bone. I had received this call as a result of reporting their number to the hospital in regard to my whereabouts. The type of fracture was described to me and I decided that I had best go to the hospital and evaluate the situation. I asked Mrs. Ahern to find me a clove so that I could put this in my mouth and overcome any slight odor. I got into the car and proceeded to the hospital where I examined the youngster and the X-rays that had been taken. This youngster, as I recall, was visiting here and lives in an area near Youngstown. I believe it was the father with the youngster, but I am not absolutely sure. I explained that the youngster should be treated in the hospital and we hoped could soon be transported to the Youngstown Hospital which I attend in the capacity of neuro-surgeon and traumatic surgeon. I then got in my car and returned toward my home, passing it since I did not see signs of

the Ahern's, my wife and the children. So I returned to the Ahern's home. Mrs. Sheppard shortly left to start the dinner. I and the Ahern's followed soon thereafter. I believe the children went with us but they may have run over by themselves, I really don't know. At our home Mr. Ahern and I chatted and the children played while the girls prepared dinner. The youngsters somehow evinced interest in my punching bag in the basement so I took them downstairs and placed a bushel basket under it so that they might reach the bag in order to hit it. I spent a moment or two with them showing them how it should be properly struck. I recall now that the children were fed in the kitchen before we ate. Shortly thereafter we four adults had dinner on the porch. It was quite breezy, the wind coming from the north generally, it may have been northeast or northwest but since the porch was cool, sweaters and jackets were in order and I put on my brown corduroy jacket. The others I am not sure of what they wore. I remember that my wife had baked pie which is my favorite dessert. The other types of food I can't truly remember.

"After we had completed a leisurely dinner, Mrs. Ahern made some mention of a movie but we recognized that it was too late to attend a movie so we kiddingly suggested the television movie. The girls must have cleaned up the dishes while Mr. Ahern and I went into the front room. I am not clear on anything from dinner to the time we watched television together, but the dishes were cleared up. I think Mr. Ahern took his children home and put them to bed and my youngster must have been put to bed by my wife but I don't remember. Mrs. Ahern, my wife and I started to watch the television movie or program, I think it was a movie and as I recall now, Mr. Ahern sat over in the northwest corner of the room, that's the side toward the Lake, with a small radio turned on just loud enough for him to hear it and listened to a ball game which was in progress. The three of us watched the movie and Mr. Ahern reported the

progress of the game a couple of times. He then either turned the game off or it had terminated and he came over to sit and watch television with us. My wife and I were sitting quite close in one chair and that's the last time I recall her in a relatively normal state, clearly. Mrs. Ahern seemed to be stimulated by our apparent affection and she sat on Mr. Ahern's lap for a short while.

"Some time within the next few minutes, my wife moved to the chair next to me because the cramped position as a result of the two of us in the chair, she said strained her back. Mrs. Ahern also moved either before or after that. We chatted as the program progressed and I became tired, relatively drowsy. I moved to the couch in the living room, situated on the west wall of the staircase and the east wall of the L portion of the living room which protrudes toward the road. I lay down with my head toward the television in a prone position, holding my head and watching television. The television is on the north side of the room. My head was nearer the television set than my feet. It was toward the television set. There may have been a pillow helping to hold my head. I evidently became very drowsy and fell asleep. I recall wearing summer cord trousers, a white T-shirt, mocassin type loafers with no shoe strings, I am not sure of the socks. I don't know whether I did at this time or not. The next thing that I recall very hazily, my wife partially awoke me in some manner and I think she notified me that she was going to bed. I evidently continued to sleep. The next thing I recall was hearing her cry out or scream. At this time I was on the couch. I think that she cried or screamed my name once or twice, during which time I ran upstairs, thinking that she might be having a reaction similar to convulsions that she had had in the early days of her pregnancy. I charged into our room and saw a form with a light garment, I believe. At that time grappling with something or someone. During this short period

I could hear loud moans or groaning sounds and noises. I was struck down. It seems like I was hit from behind somehow but had grappled this individual from in front or generally in front of me. I was apparently knocked out. The next thing I know I was gathering my senses while coming to a sitting position next to the bed, my feet toward the hallway.

"In the dim light I began to come to my senses and recognized a slight reflection on a badge that I have on my wallet. I picked up the wallet and while putting it in my pocket, came to the realization that I had been struck and something was wrong. I looked at my wife, I believe I took her pulse and felt that she was gone. I believe that I thereafter instinctively or subconsciously ran into my youngster's room next door and somehow determined that he was all right, I am not sure how I determined this. After that, I thought that I heard a noise downstairs, seemingly in the front eastern portion of the house. I went downstairs as rapidly as I could, coming down the west division of the steps, I rounded the L of the living room and went toward the dining table situated on the east wall of the long front room on the lake side. I then saw a form progressing rapidly somewhere between the front door toward the lake and the screen door, or possibly slightly beyond the screen door. I pursued this form through the front door, over the porch and out the screen door, all of the doors were evidently open, down the steps to the beach house landing and then on down the steps to the beach, where I lunged or jumped and grasped him in some manner from the back, either body or leg, it was something solid. However, I am not sure. This was beyond the steps an unknown distance but probably about ten feet. I had the feeling of twisting or choking and this terminated my consciousness.

"The next thing I know I came to a very groggy recollection of being at the water's edge on my face, being wallowed back and forth

by the waves. My head was toward the bank, my legs and feet were toward the water. I staggered to my feet and came slowly to some sort of sense. I don't know how long it took but I staggered up the stairs toward the house and at some time came to the realization that something was wrong and that my wife had been injured. I went back upstairs and looked at my wife and felt her and checked her pulse on her neck and determined or thought that she was gone. I became or thought that I was disoriented and the victim of a bizarre dream and I believe I paced in and out of the room and possibly into one of the other rooms. I may have re-examined her, finally realizing that this was true. I went downstairs. I believe I went through the kitchen into my study, searching for a name, a number, or what to do. A number came to me and I called, believing that this number was Mr. Houk's. I don't remember what I said to Mr. Houk. He and his wife arrived there shortly thereafter. During this period I paced back and forth somewhere in the house, relatively disoriented, not knowing what to do or where to turn. I think that I was seated at the kitchen table with my head on the table when they arrived but I may have gone into the den. I went into the den as I recall, either before or shortly after they arrived. The injury to my neck is the only severe pain that I can recall. I should say, the discomfort in my neck. I didn't touch the back door on the road side to my recollection. Shortly after the Houk's arrived, one of them poured half a glass of whiskey as they knew where we kept a small supply of liquor, and told me to drink it. I refused, since I was so groggy anyway. I was trying to recover my senses. I soon lay down on the floor. Mr. Houk and Mrs. Houk went upstairs, I am not sure of their actions. Mr. Houk called the police and the ambulance, this is my recollection, and also my brother Richard. I am pretty sure that Mr. Houk called the police station from my study because he said 'bring an ambulance' -- correction -- he referred to the need of an ambulance

and maybe two. He also called my brother Richard. I remember my brother, Dr. Richard, speaking with me for a moment and looking at me. I believe Officer Drenkhan spoke to me and asked how I had been injured. I can't recall my reply for sure. Soon thereafter I was on the floor trying to give my neck and head some support, when Dr. Stephen Sheppard assisted me to his car, which I think was his station wagon, which as I recall, was just behind the Bay Village ambulance. I remember no other specific vehicles. I was transported to Bay View Hospital.

"I related some of the incidents to Mary Houk and one or more of the Bay Village police officers. Later in the morning I was questioned by Dr. Gerber and at another time by two officers of the Cleveland Police Department, Officers Schottke and Gareau. Later, I believe, later in the day, I was again interviewed by Officers Schottke and Gareau in the presence of Chief Eaton of the Bay Village Police Department. At this time I was asked to explain some things that I had no explanation for. I was shown a green bag, a green cloth bag looked like heavy cloth. I thought it was eight or ten inches long and five inches wide. I was asked to identify it. It looked to me like a bag that is used to carry motor boat tools. This was similar to the bag, if not the same bag, that accompanied my Johnson outboard motor when I purchased it. I was also shown a watch that I identified as mine and questioned why there was blood on the band and crystal and why it had been found in this bag with some other articles in the weeds behind my house on the bank. I am not sure but I believe Officer Schottke said that there was also a ring and keychain, also in the bag but I don't believe that he showed me these articles. I told him, as I recall, that I had attended stock car races two or three days previously with my wife, Otto Graham and his wife, and I didn't mention the children as I recall, and was caught in a drenching rain, at which time I wore no coat or jacket but I don't think I explained this at that

particular time. I since recall having inadvertently water-skiied with my watch on in the past few days and had noticed a great deal of moisture in the crystal. I had commented on this to my wife and some other people, I am not sure who. My wife planned to take the watch to Halle Brothers in the near future where she had purchased it.

"I was subjected to a period of questioning, all of which I can't recall at this time but was reminded of this morning, and then the officers left.

"Q. How long had you known your wife Marilyn?

"A. Since we were in Junior High School, approximately fifteen years, or slightly more, in 1937 or 1938.

"Q. From the time you met her until you were married, did you see one another quite frequently?

"A. I should say yes, however, there was a period when she entered high school that I remained in Junior High School, that we saw each other very seldom for being sweethearts. In other words, we were not going together but still saw each other and liked each other.

"Q. When did you first begin to keep steady company with her?

"A. When we were in Junior High School, when she was in the ninth grade and I was in the eighth grade. She was a year and a half ahead of me in school. We had a so-called affair which, as I say, became inactive when she went to high school, but was revived when I reached high school and was able to assert myself. This continued throughout high school. She, as I say, was a mid-year but she took extra courses in order to stay in high school until June of 1941. Some time during my sophomore year, I had joined a fraternity and Hi-Y and I offered her my Hi-Y pin and eventually my

fraternity pin, which at that time signified going steady. During the following spring and summer, she displayed the intent to have dates with other fellows. She was staying with her grandparents out at Mentor-on-the-Lake. Early in the fall the following year, which was 1941, we resumed our former relationship. The following year I was a senior in high school and she went to Skidmore College. From that time on we considered ourselves engaged although it was not publicly announced and the fraternity pin was the only representation of this fact. This was a high school fraternity but a national organization and part of the laws of the fraternity insisted that only mothers, sisters and engaged sweethearts should wear the pin other than the active member himself. My freshman year in college, I joined a national college fraternity and she got that fraternity pin as soon as it was available.

"Q. When and where were you married?

"A. In 1945, I believe, February 21st, in Hollywood, California, First Methodist Church.

"Q. Where did you take up residence after you were married?

"A. In a small apartment on Sichel Street in Los Angeles.

"Q. How long did you live there?

"A. We lived there on that same street until the spring of 1951.

"Q. During the time that you lived in California, did you and your wife Marilyn have a misunderstanding whereby either one of you thought it best to part or separate?

"A. During and following my wife's pregnancy up to approximately two years following the birth of the youngster, my wife became quite

jealous. This was consistent with the termination of my didactice school work and the initiation of my work as a physician, which included contact with many women, both patients and fellow workers. This jealous reaction improved steadily until she became seemingly much more tolerant than I would consider the average female to be.

"Q. Did she ever consult an attorney in reference to your domestic difficulties?

"A. Not that I know of.

"Q. Is it true that some members of your family communicated with her, asking her to be tolerant and reconsider her action?

"A. Not that I know of, but I think that some members of her family, however, may have.

"Q. Since your removal to the State of Ohio, what has been your home life?

"A. Well, I considered it to be ideal in that she seemed to make it her business to be agreeable, tolerant and I should say, lovable. However, there were times when this little jealous streak would show up but I would always reassure her and she seemed to need no further support.

"Q. Did she ever directly or indirectly accuse you of having an affair with someone else?

"A. She indirectly may have in questioning me about my whereabouts at various times and in the form of reassurance I often took her with me when possible on visits to nearby cities or even the hospital.

"Q. How would these inferences affect you?

"A. Well, they affected me in the direction of reassuring her what seemed to satisfy her

and thereby produce a reversed action, whereby she would encourage me to be friendly with other women at social gatherings, whereas at other times she might have resented the same action which she had encouraged before.

"Q. Is it true, Doctor, that on several occasions, when you were discussing your marital troubles, that you flew into a rage?

"A. Absolutely not, never.

"Q. Did you ever have an affair with a Sue Hayes?

"A. I wouldn't call it an affair but we have been good friends for some time, which was known to my wife.

"Q. Had she been employed at Bay View Hospital?

"A. Yes, I don't know the exact dates. She was employed there when I initiated my work at the hospital and she terminated her work there some time last winter or early spring in 1953. She returned some time later in that year and terminated her work again at the hospital some time early in 1954. She went to California.

"Q. In what capacity was she employed at the hospital?

"A. Laboratory technician.

"Q. While at work you had considerable contact with her, didn't you?

"A. Yes.

"Q. To what extent?

"A. She did a great deal of the technical laboratory work on all of the doctors' patients in the hospital and was the only

technician practically that readily answered emergency calls on accidents or emergency surgical cases. I might also add that she was considered during her stay one of the authorities when special work was necessary.

"Q. Is it true that you socialized a lot with her?

"A. In the hospital, yes. I wouldn't call it socialize. We talked, we became good friends.

"Q. Nothing more than good friends?

"A. No.

"Q. What was the occasion for you purchasing a wristwatch for her?

"A. She was in California at the time I was there in March of 1954 and I had asked her with some of her friends to accompany me with a group of doctors and wives to a dinner, at which time or during the evening she lost her wristwatch. I paid the check for the dinner which, incidentally, amounted to more than the wristwatch was worth and knowing that she could not afford to purchase another one, I purchased one for her which was consistent with the one that she had lost, in price range.

"Q. Did your wife Marilyn know that you were contemplating purchasing this wristwatch or did she know immediately thereafter?

"A. My wife didn't know of this until in casually discussing the trip sometime during our trip home, that is, me and my wife, or after we had reached home shortly, at which time she became somewhat upset failing to understand the intent. I wish to add, I told her of this voluntarily.

"Q. Do you own a Jaguar sport car?

"A. Yes.

"Q. Where did you purchase it?

"A. I purchased it from M. G. Motors, which was at that time located on Lorain Road and has since been moved to Detroit Road.

"Q. Do you recall the salesman's name that negotiated the transaction?

"A. The only real salesman is the boss and that is Mr. Robert Lossman.

"Q. Did you have occasioned to meet his wife, Julie Lossman?

"A. I took care of her as a patient about a year and a half ago when they were involved in an accident.

"Q. Did you become very well acquainted with her?

"A. As a doctor-patient relationship, yes.

"Q. Now, is it true that a very close friendship resulted from this meeting?

"A. I would say a close friendship with both the husband and the wife.

"Q. Isn't it a fact that it developed into a love affair?

"A. No, not on my part certainly.

"Q. Of your own knowledge do you know whether or not there has been a discussion between Mrs. Lossman and her husband and you and your wife Marilyn, that there had been such an affair existing between you and Mrs. Lossman?

"A. That is difficult to answer. My wife and I were present at a time when Mr. Lossman and his wife discussed some of their marital problems. He at this time did mention the belief that she had shown particular like to

me. We merely attempted to act as referees, my wife and I.

"Q. How did this affect your wife Marilyn?

"A. She thereafter felt that it would be best that we not arrange frequent social affairs with the Lossmans and I agreed.

"Q. How long ago was it that you decided not to see the Lossmans so frequently?

"A. That was last summer in 1953 after the middle of the summer.

"Q. Isn't it a fact that you have contacted Mrs. Lossman by telephone since then?

"A. I never contacted Mrs. Lossman by telephone. She contacted me always in regard to some medical problem in regard to her little girl or herself. I saw Mr. Lossman frequently at the car agency and I saw them both infrequently at gatherings of the Sports Car Club, which is a club that I am not very active in but attend functions of occasionally here in the city.

"Q. Isn't it a fact that you dated Julie Lossman on several occasions?

"A. Absolutely not. I know there was some rumor to that effect but it is not true.

"Q. Did your wife Marilyn know of this rumor?

"A. Yes.

"Q. How did it affect her?

"A. She made it known to me and I reassured her and agreed that we should minimize our social contacts with the Lossman's and that was all there was to it. She had no particular objections as long as we kept it on a very infrequent basis.

"Q. Since this agreement with Marilyn about the contacts with the Lossman's, did your wife Marilyn show any coldness toward you?

"A. No.

"Q. Your home life was like an average normal couple's, had no bickerings or any petty quarrels?

"A. No, because she respected my decisions on all matters.

"Q. Directing your attention to the night of July 3rd, 1954, at which time your wife was murdered, are you directly or indirectly involved in this crime?

"A. Absolutely not.

"Q. Do you know of any reason why someone else would take her life?

"A. Possibly.

"Q. Will you state the possibility?

"A. Well, I don't know but I have heard of individuals who are maniacal enough that when they start something, an act like that, it becomes a compulsion, a means of satisfaction like the ordinary man has from an orgasm or something of that nature. She has spurned lovers, potential lovers.

"Q. How many of those potential lovers did she have?

"A. Three that I know of and I am pretty sure, more. I am certain that there were more.

"Q. Have you told the police about these three and revealed their identity?

"A. Yes.

"Q. The night of July 3rd, 1954, when you reached the top of the stairs, after you heard Marilyn's outcries, you say you saw someone standing beside the bed occupied by your wife, were they standing or stooping over the bed?

"A. I don't recall seeing anything from the head of the stairs, it happened so rapidly, it must have been when I entered the room and I don't know whether they were standing or stooping.

"Q. Immediately upon entering this room, did you have an opportunity to make some examination of your wife?

"A. No.

"Q. Why?

"A. Because as I told you, I seemed to be immediately engaged in grappling with someone.

"Q. Do you know what portion of the body of this person you were grappling with, that you had hold of?

"A. I don't recall holding any portion of the body in the bedroom.

"Q. You stated that you were assaulted from behind when you entered the room or -- you stated that you were assaulted from behind when you entered the room or immediately thereafter?

"A. I felt that I was engaged from a direction somewhere within 180 degrees in front of me and yet seemingly was struck from behind as I stated above.

"Q. At the time you were assaulted on the beach, what was the condition as to light or darkness?

"A. As I related before to Mr. Rossbach, it was just lighter than dark, it was not

as dark as darkest night. There was a light seemingly starting, about the best way I can put it, as though daylight was just barely beginning.

"Q. At the time when you and this man were tussling or fighting on the beach, about how many feet of beach was there?

"A. I don't know.

"Q. At the time when you were fighting with this man, could you feel any water in which you were fighting?

"A. I can't say for sure but it seemed like the beach was firm, as though it had been washed over and packed somewhat.

"Q. At the time when you woke up, will you explain your position on the beach as to this retaining wall, how many feet you were from this retaining wall?

"A. I don't know, I can't say, but I think I can say that I was between the easterly end of that retaining wall and the steps, but I cannot say how far I was north-southwise.

"Q. At the time when you woke up on the beach, will you tell us as to the condition of the wind and the waves?

"A. It seemed that it was somewhat windy and the waves were moderately high, I'll say too high to water ski and not too high to fish, not real high but moderately high.

"Q. Is there anything else that you can tell us about this, Doctor?

"A. Not that I can think of now. I wanted to say that I have come here of my own free will to help you in every way that I can to solve this tragedy and I hope that you will give me the opportunity to give you any additional information when and if I --

"Q. Is there anything else that you can tell us about this, Doctor?

"A. Not that I can think of now. I wanted to say that I have come here of my own free will to help you in every way that I can to solve this tragedy and I hope that you will give me the opportunity to give you any additional information when and if I shall be able to remember it or find it.

"Q. Have you been treated fairly during the course of this questioning?

"A. Yes, absolutely.

"Q. Have you read the above statement and is it the truth?

"A. Yes, it is the truth."

Defendant's briefs that were filed in support of motion to certify and on appeal on constitutional questions have been refiled for the consideration of the Court in determining the issues here presented. Many assignments of error are found in these briefs and attached thereto. We are not waiving any of those assignments of error but urge the Court to consider them most carefully. In the following argument we will consider and discuss a few of the assignments of error that have been filed. We will not take them up in numerical order, but will discuss them severally as follows:

ARGUMENT

First Assignment of Error: MISCONDUCT OF THE JURY AND THE OFFICIALS IN CHARGE OF THE JURY DURING ITS DELIBERATION.

The authors of our Federal Constitution, and those of the Constitutions of the various states as well as the bench and bar and the public generally have recognized that the jury system goes to the essence of our entire theory or system of government. In many states, including Ohio, statutes have been enacted in an effort to guarantee the purity and sanctity of the jury system. Courts have endeavored in all jurisdictions to reach that same end. There is a dictinction between the decisions in Courts where there are no such statutes and the decisions where such statutes are in effect. If we break down the sanctity and purity of the jury system and permit such sanctity and purity to be invaded here and there and at other times, then eventually the jury system will cease to serve its proper function in our system of government.

There are Ohio statutes expressing the intent of the General Assembly to keep the jury system, and all juries, inviolate. One of these Sections is 2945.33, Revised Code of Ohio, and is as follows:

> "When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict,

> or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. 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 officer or officers placed in charge of a jury during its deliberation are required to take an oath as provided in Section 2945.32, Revised Code of Ohio, as follows:

> "When an order has been entered by the court of common pleas in any criminal cause, directing the jurors to be kept in charge of the officers of the court, the following oath shall be administered by the clerk of the court of common pleas to said officers: 'You do solemnly swear that you will, to the best of your ability, keep the persons sworn as jurors on this trial, from separation from each other; that you will not suffer any communications to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged, and that you will not, before they render their verdict communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.' Any officer having taken such oath who willfully violates the same, or permits the same to be violated, is guilty of perjury and shall be imprisoned not less than one nor more than ten years."

The General Assembly impressed upon the statues of Ohio the vital importance of protecting the jury. This is not only indicated by the solemnity of the oath, but a

punishment for perjury in the event that an officer willfully violates his oath, by imprisonment in the penitentiary up to ten years.

Section 2945.34, Revised Code of Ohio, provides the following:

> If the jurors are permitted to separate during a trial, they shall be admonished by the court not to converse with, nor permit themselves to be addressed by any person, nor to listen to any conversation on the subject of the trial, nor form or express any opinion thereon, until the case is finally submitted to them."

This provision of the statute providing for such an admonition by the Court is controlling upon the conduct of the individual jurors themselves.

After the verdict of guilty was returned, testimony was taken relative to the conduct of the jury and the officers in charge of the jury during its deliberations.

While in the hotel during meal time after the case was submitted to the jury the women members of the jury were assembled and their picture was taken and then the male members of the jury were assembled and their picture was taken. What the photographer may have said to the two groups is not disclosed. However, it should be constantly remembered that all of the press of Cleveland were violently hostile to the defendant and that this picture as well as others were taken by photographers employed by violently

hostile newspapers (7071). At page 7071 of the record is the following:

> "The Court: Do you recognize those pictures? (Pictures appearing in the local papers on December 21st, which was during the deliberations of the jury.)
>
> "The Witness: (Francis, one of the officers in charge of the jury.) As near as I can recollect, that was taken in the hotel, too, all in the same room at the same time. I am not sure what room that was taken. It was taken in the Carter Hotel.
>
> "The Court: Do you recall specifically the taking of this picture?
>
> "The Witness: No, I don't recall this specifically. There were so many pictures taken --
>
> "The Court: Let me ask you, then: Were the jury at any time separated beyond the few minutes or moments that it would take to take those pictures in that fashion?
>
> "The Witness: No, sir, no time."

At page 7075 of the record which refers to incidents occurring during the deliberation of the jury and after the cause was submitted to it, as follows:

> "Q. Now, you had instructions from His Honor, Judge Blythin, about your obligation to this jury, is that right?
>
> "A. That's right.
>
> "Q. That there was to be no contact?
>
> "A. That's right.
>
> "Q. No communication.

"A. That's right.

"Q. Under any circumstances?

"A. That's right.

"Q. There was to be no contact, no communication, except -- I will withdraw that. That there was to be no contact and no communications without first consulting with his Honor, Judge Blythin?

"A. That's right.

"Q. You didn't do that in this instance, did you?

"A. No, I didn't.

"Q. You didn't do it in the instance where the jurors pictures were taken, where the five ladies was shown?

"A. No, that's right, Mr. Garmone.

"Q. And you didn't do it in the instance where the picture was taken where the seven gentlemen were shown?

"A. That's right.

"Q. Is that correct?

"A. Correct, sir."

At page 7079 while the officer in charge of the jury was on the witness stand is the following:

"Q. Did you talk with any members of the jury?

"A. I didn't talk to them.

"Q. You took it upon yourself to have --

"A. Yes. I did talk to them.

"Q. Who did you talk to?

"A. Well, the group. I just said, 'Would you mind having your pictures taken?'"

At page 7080 while the officer in charge of the jury was still on the witness stand the following occurred:

"Q. Did you go specifically to Mr. Bird, the foreman of the jury and ask his permission that the picture be taken?

"Mr. Parrino: Objection.

"The Court: Objection sustained.

"Q. Mr. Francis, when you were sworn in to be the guardian or the protective custodian of the jury in their travels from the court room to the hotel, and during their stay at the hotel, weren't you instructed that any communication between yourself and the jury would have to be to the Foreman, Mr. Bird?

"A. Yes.

"Mr. Parrino: Objection.

"The Court: Objection sustained.

"Q. You didn't follow those instructions in this particular instance, did you?

"Mr. Danaceau: Objection.

"The Court: Objection sustained."

We feel that the Court committed grave error in refusing to permit those questions to be answered for the simple reason that they would have shown conclusively that the officer in charge of the jury had willfully violated the instructions of the Court and would have been in contempt of Court. At page 7082 inquiry was being made of the witness Mr. Francis if he had consulted with the Court relative to

these various communications to the jury whereupon the Court said:

> "The Court: No, he did not, Mr. Garmone. We had no communication."

To emphasize that there was no communications whatsoever with the Court relative to matters affecting the jury at page 7082 is the following:

> "The Court: He has already said that he did not, and the Court will say to you that the Court had no communication of any such character with either one of the two bailiffs. That can be blanketed into the record."

An official by the name of Mr. Steenstra was the other officer in charge of the jury. Relative to telephone calls made by the jurors themselves page 7084 discloses:

> "Q. Were you present when any telephone calls were made from Mr Steenstra's room?
>
> "A. Once or twice.
>
> "Q. And those calls were made by the jurors themselves?
>
> "A. That's right, sir."

At page 7084 and 7085 is the following addressed to the official Mr. Francis:

> "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 calls?
>
> "A. No, The jury made the calls and I

sat in the chair right along side of the telephone.

"Q. You did not take the numbers and make the calls yourself?

"A. No, I did not."

At page 7085 is the following:

"Q. The conversations that you heard were from the side that you were on, is that right?

"A. That's right.

"Q. By the person making the calls?

"A. That's right.

"Q. Is that correct?

"A. That's right.

"Q. What it was said back to the juror you have no knowledge of?

"A. No.

"Q. And you can't say now at this time that there wasn't anything said about the case of Sam Sheppard from the other side of the telephone, can you, Mr. Francis?

"Mr. Danaceau: Objection.

"The Court: Objection sustained."

Again it is urged that the Court was grievously in error in refusing to permit Mr. Francis to testify what he knew about what was said from the other end of the line to the juror. Should Mr. Francis have replied that he learned from the juror what was said, it would have been of the highest importance. However, the Court would not permit that

vital information to be given. This was prejudicial error of extreme gravity and assails the very heart of the purity of our jury system and the proper conduct of a trial.

The record discloses (Pages 5427 to 5429 inclusive) that on the evening of December 5th, during the trial, a broadcaster, by the name of Walter Winchell, had broadcasted through a Cleveland outlet that a woman had been arrested in New York for robbery and that she had been a mistress of "Sam Sheppard," (the defendant here) and that he was the father of her dead child. This information was given to the Court in the absence of the jury and after persistent urgings the Court inquired of the jury after it had returned whether any members of the jury had heard this broadcast. Two members of the jury responded in the affirmative. The two jurors said that it would have no effect on their judgment.

This was an example of a direct violation by two members of the jury of the instructions given them by the Court not to listen to any communications or conversation or other information involving the case.

Winchell's broadcast was of course completely false. After the trial was over and judgment was pronounced upon the defendant, the trial court wrote a blistering letter to Winchell about making such unsupported and false statements. Just how such a letter was to help the defendant or aid in the administration of justice is not understandable.

At 9:15 o'clock A.M. November 22nd the defense moved again for a change of venue, the withdrawal of a juror and the continuance of the cause (3719, 3720). This was in the absence of the jury. In support of the motion, the trial court was advised that on the previous night -- November 21st -- Bob Considine, who was in daily attendance at the trial, broadcasted over station WHK at 6:30 P.M. in the Cleveland area about the Sheppard case. In this broadcast he compared Sheppard with Alger Hiss, a traitor to his country. Considine made a careful parallel between Sheppard and Hiss and indicated that Sheppard was probably as vile a creature as was Hiss. After relating to the Court this broadcast (Page 3723) the defense made a further request of the Court in this language:

> "I would like to have the court ask the jury if they heard that broadcast."

The Court refused the request, to which an exception was taken (3725). The Court in commenting upon listeners to a broadcast about the trial said (Page 3724) the following:

> "Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody."

The Court committed two grave errors, first in refusing to inquire of the jury if any of its members heard the vicious broadcast, and if so, what effect if any, it had on the members of the jury who may have been listening.

The Court closed the door completely to a proper invest into the conduct of the jury.

The Court's philosophy -- erroneous as it was -- is shown by its statement that it could not control people who wanted to listen to a broadcast. Certainly a Court can control a jury. If a Court instructs a jury what to do and what it shall not do, the Court has complete control over the jury, if it has the courage to exercise it.

State -v- Adams, 141 Ohio St., 423, has the following to say in the third paragraph of the syllabus:

> "The violation by a court officer in charge of a jury of Section 13448-1, General Code, (2945.32 R.C.) to the effect that he shall not communicate with a jury in his charge or custody except to inquire whether it has reached a verdict, will be presumed to be prejudicial to a defendant against whom, after such communication, a verdict is returned by such jury."

In the case at bar the bailiff or officer in charge of the jury communicated with it and permitted it to do things in violation of the statute. The Adams case holds that such a violation of a statute is prejudicial to the defendant.

The same statute in part provides that:

> "Such officers shall not permit a communication to be made to them, * * *"

It is undisputed that both officers in charge of the jury permitted the jurors to use the telephone while deliberating upon the case, permitted the jurors to make the

telephone connection themselves and did not know what had been said to the jurors from the other end of the telephone. This was a direct violation of the statute 2945.32, Revised Code of Ohio, as well as the oath set out in Section 2945.32. The officials in charge of the jury, by mandatory language of the statute, were ordered not to permit any communication with the jury "unless he does so by order of the court." The officials permitted numerous telephone calls to be made by jurors to other persons without the consent or knowledge of the court. The conduct of said officers, being in direct violation of two specific mandatory sections of the statutes, prejudiced the defendant. The Adams case holds that a similar provision, mandatory in nature being violated, is presumed to be prejudicial, certainly the violation of another mandatory provision of the statutes of equal importance would likewise be prejudicial to the defendant.

Farrer -v- State, 2 Ohio St., 54, holds in the syllabus as follows:

> "Theholding of conversations by the jury, while in their room, with persons on the street, in regard to any subject of their deliberations, before their verdict is rendered, is, in general, good cause for setting aside their verdict."

This case was decided in 1853. More than a hundred years have passed. Then the radio, television, newspaper, photography and other means of modern communication

were unknown. The law is elastic not that principles change, but that principles of law apply themselves to changing conditions. In the case at bar there were numerous conversations by members of the jury with sundry persons over the telephones. The officers in charge of the jury kept no record of such calls, permitted the members of the jury to make the telephonic connections, and did not know what was said from the other end of the line to the jurors. In the case at bar the members of the jury were permitted to hear broadcasts relative to the subject matter of their deliberation. The information broadcast was entirely false which added to the prejudice. There can be just as much if not more prejudice done to a defendant by modern means of communication to jurors as from calling from the street. We believe that the principle of the Farrer case is applicable. There should be no communications whatsoever by an outsider to a member of the jury unless with the knowledge and consent and order of the Court that there be eliminated any possible prejudice. This was not done in the instant case. The Court was left in complete ignorance as to what its officials were doing to and with the jury.

At page 59 of the Opinion the Court says:

"If the jury are permitted to separate either during the trial, or after the case is submitted to them, they shall be admonished by the Court, that it is

their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon, until the case is finally submitted."

This is quoted from the then new provisions of the Code.

Continuing further on page 59 of the Opinion the Court said:

"The record before us, shows a conduct very opposite to that required by such regulations; and, in a case of the least doubt, no verdict of a jury has or can have its usual and proper force and obligation with the court, if it appear, that the jury has exposed its privileges to abuse, or listened from its sanctuary to unsworn and irresponsible counsels."

This certainly was a case of doubt. It was builded entirely on circumstantial evidence, and so distorted by speculation that fiction mastered fact. The jury deliberated for approximately five days including night sessions. It was permitted to call over the telephone numerous other persons and the trial court would not permit the bailiff to testify what if anything such other persons said or may have said to the jury. During the trial of the case the jury was permitted, and did listen to broadcasts referring to the case which were not only highly prejudicial to the defendant but were utterly false. And in one

instance -- where the broadcaster Considine compared the defendant with Alger Hiss, the court refused to inquire of the jury or any member thereof if it or any member had heard such broadcast. Certainly "the jury has exposed its privileges to abuse, or listened from its sanctuary to unsworn and irresponsible counsels."

The attitude of the trial court is clearly shown in its admonition and threat to "Steve Sheppard" a brother of the defendant. This brother had endeavored in vain to counteract the avalanche of poisonous and vicious publicity loosed upon the defenseless head of the defendant, his brother. At page 3722 of the record it is disclosed that the trial court threatened to bar "Steve Sheppard" from the court room if he did not desist, but he permitted Bob Considine, a vicious radio broadcaster, to remain in court, continue his vicious and false broadcasts, without any admonition whatsoever from the court after it was brought to the attention of the court that the said Considine was using the power and influence of the radio to demean, disgrace and compare the defendant with one of the arch traitors of our country, Alger Hiss.

The court on page 59 in its opinion in the Farrer case continues in the following language:

"And these reflections may be the more readily and safely indulged, when we

consider the alleged insufficiency of the evidence to maintain the verdict in this case. I cannot but regard the conclusion arrived at by the jury as sufficiently doubtful in itself, to enforce the necessity of considering such misbehavior on the part of the jury, as may possibly have led to such a result. Such an illustration will be proper in itself, and it will enable us the more speedily to reach the correct determination of the question before us. Where a court doubts the sufficiency of the evidence to uphold a verdict, it usually silences the doubt, by recognizing the right of the jury, freely, independently, and purely, to answer, out of its own unhindered and uncontrolled deliberations, every question of fact. But when it is apparent that there has been either abuse by the jury of its rights and functions, or improper interference from without, it cannot be said that those questions have been answered as the law requires."

In the case of Briggs -v- Rowley, 10 Ohio Decisions, 177, the court in the syllabus stated the law in this language:

"Where a juror listened to the conversation of an interested party addressed to some third person, which may have been prejudicial to a party to the case -- as where a sister of plaintiff said within the hearing of the juror that she hoped the jury 'would bring in a verdict for her sister as the defendant had done her a great wrong' -- although such misconduct on the part of the juror is not a literal violation of the court's injunction to the jury -- admonishing them not to suffer themselves to be addressed -- certainly violates its spirit and purpose and constitutes a sufficient cause to warrant the court in granting a new trial, even though it is not shown, as a matter of fact, to have influenced the verdict."

In the Briggs case a comment by a sister of the plaintiff to the effect that plaintiff should have a verdict because the defendant had done her a great wrong -- certainly cannot be compared in its prejudicial and vicious effect upon a jury with a broadcast falsely claiming that the defendant, Sam Sheppard, had associated with robbers in New York City, had had as a mistress a woman consorting with criminals and had borne him a child. The comment of the sister of the plaintiff most obviously would not have nearly the effect upon a member of the jury as a broadcast comparing Sheppard, the defendant here, to Alger Hiss, a traitor to our country. The doctrine of the Briggs case is quite applicable, and its principles of law announced are wholesome, discerning, and courageous. At page 191 of the Opinion in the Briggs case the Court says:

> "It is the theory and policy of the law, that jurors should be very jealously guarded from any least suggestion or intrusion from the outside, and the policy of the law, here and elsewhere, in this respect, is clearly defined and abundantly attested by numerous adjudications of courts of last resort."

In Dillon v. State, 5 Ohio Law Abs. 102-103, the Court of Appeals, Second District, criticized severely certain telephone conversations had with a juror. The trial court was reversed on other grounds; however, the court said:

"Another error assigned was the fact that after the jury had retired one of the jury got permission from the trial judge to answer a phone call, she was escorted to the phone by a bailiff and talked in the presence of the trial judge, but not in the presence of the accused and his attorney."

The Court of Appeals in disposing of the question here raised said in its Opinion:

"Although the judgment will not be set aside on the ground that a juror was allowed to talk over the telephone, the action of the court in permitting it is improper, for while he heard the conversation of the juror he could not know what was being said by the person talking to her. A communication to be made by a juror under these circumstances should be made where court and counsel alike may hear all."

In the case at bar, without the knowledge or consent of the court, jurors were allowed without let or hindrance to put in their own telephone calls and listen to conversations that were not heard by anyone other than the juror. In the Dillon case, it was the court itself that was endeavoring to protect the purity of the jury. Under our statutes, the court itself is given some discretion, but there is no discretion given to the officers in charge of the jury. Here the officers in charge of the jury ignored the trial court, violated their solemn oaths, permitted jurors to communicate with strangers without using any safeguards whatever.

In Peart, etc. -v- Jones, etc., 159 Ohio St., 137, this Court at page 140 gave the following wholesome ruling and reasoning:

> "The basic and underlying principle of the right of trial by jury is that such trial shall be heard and determined by a jury of persons completely unbiased and uninfluenced by extrinsic considerations. It is universal practice in American courts to surround juries with safeguards to insulate them from influence of every kind. And any extraneous contact with a jury or any member thereof which would tend to influence the verdict in the slightest degree has been universally condemned."

Panko -v- Flintkote Co., 80 Atlantic (2nd), 302; 7 N.J. 55, has the following to say in the Opinion:

> "The test for determining whether a new trial will be granted for misconduct of jurors or intrusion of irregular influences is whether such matters could have a tendency to influence jury in arriving at its verdict in a manner inconsistent with legal proofs and courts charge, and the test is not whether the irregular matter actually influenced the result but whether it had the capacity of doing so."

Wheaton -v- U.S. (1943), 133 Fed. (2nd), 522, the Court said:

> "Communications between jurors and third persons or offices in charge of the jury are absolutely forbidden and if it appears that such communications have taken place a presumption arises that they were prejudicial, but the presumption may be rebutted by evidence."

In the instant case there was not only no rebuttal

but there was no effort to rebut the undisputed facts that there was utter laxity and looseness in permitting jurors to use the telephone, photographers to intrude upon them after the case was submitted to them, and listening to broadcasts on the case without reprimand by the court.

People -v- Migliori, 58 N.Y.S. (2nd), 361, 269 App. Div., 996, decided in 1945, the court said:

> "The court erred in allowing jurors to make use of the telephone facilities while criminal case was under consideration by them."

The court further gave this observation:

> "If the need for telephone communications by jurors is imperative the message or messages should be transmitted through an officer of the court."

> "Jurors should not be permitted to use the telephone during deliberation." See State -v- Gilmore, 8 S.W. (2nd) 431, 336 Mo. 784.

Oborn -v- State, 126 N.W. 737, 143 Wis 249, lays down this principle:

> "It is improper in the trial of a capital case to allow communications between jurors and outside parties unless strictly necessary and with knowledge of counsel on both sides."

State -v- Cotter, 54 N.W. (2nd) 43, (Supreme Court of Wisconsin 1952) the court laid down the law in this language:

> "Where unauthorized communications are made to jury after receiving case and before verdict has been reached, accused is not required to show prejudice."

Further the court commented as follows:

"In criminal cases it has been held for many years that an unauthorized communication to the jury or a member thereof not made in open court and a part of the record is ground for the granting of a new trial. The rule is shown in the following quotation. 'The result of the ajudications on this subject is to the effect that all proceedings in a case should be open and public, and in the presence of the parties, whenever practicable, so as to afford them all reasonable opportunity to participate in the proceedings, and if they are dissatisfied, to take such exception as the law allows. The due observation of this rule has led to a disapproval by the courts of any act by the judge, counsel, party, or stranger, whereby communication is had with the jury after the case is submitted to them, and they have retired for deliberation on their verdict, except it be in open court, and with due regard to the rights and privileges of the parties. Whenever such communications were had, though they were not prompted by improper motives, and though they may not have influenced the jury, in arriving at their verdict, still they are generally treated as in themselves sufficient ground for setting aside the verdict rendered, for the reason that no party should be subjected to the burden of an inquiry before the court, regardless of whether or not its conduct in this respect, or that of its officers or that of the opposing party, has tended to his injury * * *."

"The influences which may be exerted on such occasions are too infinite and varied to be the subject of disproof, and the only safe rule to follow in all such cases is to set the verdict aside. It is not only a most wholesome but necessary policy, to promote confidence in the administration of justice, to require litigants as well as their attorneys to abstain from all social relations and intercourse with

jurors during the progress of a trial under the penalty of vitiating verdicts which they may obtain."

State -v- Rose, 262 Pacific (2nd), 194 (Supreme Court of Washington, 1953) states the law in this language:

"Where statute specifies certain acts of jury members which bailiffs are required to prevent, such acts are prohibited to jury."

The Court in its Opinion approved the following principle:

"In the absence of a statute, prejudice will not be presumed. This is the holding of the Pepoon case * * * but, where the statute says thou shall or thou shall not, a presumption of prejudice follows."

Ohio has strict statutes providing for the conduct of bailiffs, jurors and courts. These statutes say what shall be done and what shall not be done. The violation of such statutes creates a presumption of prejudice.

State -v- Jones, 255 S.W. (2nd) 801 (1953), the syllabus is as follows:

"If separation or misconduct of jury takes place during progress of a felony trial, verdict will be set aside, unless state affirmatively shows that jurors are not subject to improper influences, and if separation or misconduct occurs after retirement of jury for deliberation and prior to verdict, defendant is entitled to new trial even though it be established that defendant was not actually prejudiced."

State -v- Bayliss, 240 S W. 2d, 114 (1951):

"It is well settled that jurors should not be allowed to use the telephone during the trial of a criminal case, or to receive communications except by direction and under the supervision of the court."

2. Assignment of Error: CIRCUMSTANTIAL EVIDENCE RELIED UPON DOES NOT SUPPORT THE VERDICT OF GUILTY BEYOND A REASONABLE DOUBT.

This is a circumstantial evidence case. In our briefs, that have been refiled, the law is cited which is to the general effect that when the prosecution relies upon circumstantial evidence to secure a conviction, such circumstances must point unerringly to guilt and establish guilt beyond a reasonable doubt. Any rational hypothesis of innocence must be excluded as well as any rational hypothesis inconsistent with guilt. The State relies upon the following circumstances to support the verdict of guilty as set out in its brief opposing defendant's motion for leave to appeal. We will set out the circumstances and discuss them solely and only in the light reflected upon them by the evidence of record in this cause. There will be no resort to guess, speculation, fantasy or imagination so characteristic of the inferences sought to be drawn from the circumstances by the Prosecution.

1. THE FOLDED JACKET

A folded jacket was seen on the couch upon which the defendant had slept when the Houks arrived at the Sheppard home about 6:50 A.M. July 4th. A picture of this jacket was taken at 8:00 o'clock. We see no inference whatsoever from this jacket other than that sometime during the night it was removed. It had no blood upon it nor any indication of having been worn or used in any violent encounter.

2. THE "T" SHIRT

The evidence establishes that when the defendant lay down upon the couch in the living room during the preceding evening, while the Aherns were in the Sheppard home, he wore a white "T" shirt, belt, trousers, white socks and loafer shoes. At page 60 of its brief against the motion in this Court the Prosecution claims as follows:

> "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 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 exhibits in the case -- photographs -- disclosed that splatters of blood fell on the side of the bed and downward. We agree completely with the State that the assailant, whoever he was, stood in the direct path of a veritable spray of blood.

However, it is conceded by everyone and the evidence is conclusive that there was not a single drop of blood on the defendant's belt, nor his trousers above the knees. There was no blood on his socks or his shoes. It is in defiance of all laws of human experience, as well as the laws of nature and gravity to say that blood in such huge amounts got on the T shirt until "it was covered with blood" and not one single drop get on the trousers above the knees or the belt of the defendant nor his shoes or socks.

When confronted with the impossibility of its inference, the Prosecution then suggests that he may have been wearing a T shirt that came down to his knees. At the former oral argument before this Court it was demonstrated that blood covering a T shirt would immediately penetrate the thin cotton material and get on the trousers. One member of the Court then inquired of the Prosecution how it explained that. The Prosecution had no explanation whatsoever. A member of the Court, it is recalled, suggested that perhaps the defendant was not wearing his trousers at the time. This suggestion is satisfied by the fact in evidence

that there was a blood spot on the left knee of the trousers. This was at about the height of the mattress of the bed which was soaked with blood. The defendant readily stated that he had leaned over his wife when he ascertained that she was dead. It is reasonable to infer that this spot of blood on the knee was then made. The State first assumes that because the defendant was in his home at the time of the tragedy, that he killed his wife. He was wearing a T shirt at about 12:30 A.M. and in the morning around 6:00 o'clock or before his torso was bare. The State draws a proper inference that the T shirt was removed sometime between those hours. From this a further inference is made that the T shirt was covered with blood, and from this it is then inferred that the defendant destroyed the T shirt or concealed it in some unexplainable manner.

The defense agrees that whoever the assailant was, the evidence from the exhibits, the blood all over the mattress, and the walls, is that the assailant stood in a veritable deluge of blood spray. Such blood got on the apparel, worn by the assailant. Such blood certainly sprayed on at least the upper part of the trousers. This is a reasonable inference. We contend that -- whoever the assailant was -- he stood in the path of the rain of blood and some of it got on his trousers. This inference -- and

it is more reasonable than the State's inference -- is inconsistent with guilt of the defendant, and consistent with innocence.

The law applicable is well stated in Dayton -v- Christ, 31 Ohio Law Abs., 64, where in paragraph five of the headnote is the following principle:

> "In a criminal case whenever a court or jury indulges in inferences from proven facts and returns a finding of guilty, such inference will not be supported if the proven facts would just as readily support an inference of innocence."

The State has absolutely no explanation or theory to explain why there was no blood on the belt or trousers of the defendant from his knee to his waist. We contend that a more reasonable inference is that in such a rain of blood some of it just had to get on the trousers of the assailant. Such inference from a fact, not only is inconsistent with guilt but points unerringly to the innocence of the defendant.

3. STRUGGLE IN THE ROOM

The parties are in agreement that a violent struggle occurred between the victim and her assailant. At page 61 of the State's brief against the motion for leave to appeal is this statement:

"It may well be, as the defense suggests, 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 * * *"

Foreign matter, wool and cotton fibers, vegetable matter were imbedded under the fingernails of the victim. One fingernail was torn almost off. What reasonable inference may be drawn from such an obvious violence of scratching by the victim? There were no scratches on the defendant. There were no marks or scratches upon his arms or his limbs. There was a "bump" in the region of the eye of the defendant. This was not caused by any scratch. It is common experience that a bump is caused by a blow by some solid object applied with considerable force. There was a blow on the back of the neck of the defendant of such violence as to cause a "chip fracture" of the C-2 (second cervical vertebra). This injury which deranged defendant's nervous system and was of such violence and effect as could cause unconsciousness, certainly was not made by the fingernails of the victim. Whoever the assailant was, certainly would have disclosed some evidence of scratches on his arms, limbs or chest. Not so of the defendant.

4. VICTIM'S RINGS ON HER FINGERS

The State devotes many pages to build up a strawman of a burglar and then tear it down. About the best that can be said concerning the things scattered around in the den, and other parts of the house downstairs is that whoever the assailant was, may have endeavored to simulate or fake a burglary. Certainly no burglar of any professional standing would be proud of the evidence that was left. However, a simulated or fake burglary will just as well apply to some other person as to the defendant.

5. NO EVIDENCE OF SEXUAL ATTACK

The State contends that there was no sexual attack because there was no proof of the completion of a sex act. There is no burden on the defendant to prove that there was a sex attack, a burglar, an addict or anyone else in a specialized group of persons. It is the burden of the State, and this burden never shifts, to produce proven facts and circumstances which point unerringly to guilt. The State must establish this proof beyond a reasonable doubt. It must exclude any rational hypothesis of innocence. It must exclude every rational hypothesis inconsistent with guilt. There is no claim that the reference to a sex attack was any

circumstance pointing toward the guilt of the defendant.

6. VICTIM'S WRIST WATCH

State's Exhibit 45 discloses that the wrist watch was drawn off victim's wrist and that as this was being done, several streaks of blood were formed pointing toward the thumb and first finger. Certainly the inference is reasonable that the blood was fluid and liquid otherwise it would not have formed such streaks. The State claims no inference from this wrist watch other than that "the jury and they had the right to draw all appropriate inferences therefrom." Whoever removed the wrist watch probably placed it downstairs where it was found later in the morning.

7. BLOODY SPLOTCH ON PILLOW

It is agreed that some object was used to beat the top of the head and the forehead of the victim and to fracture her skull in numerous places. We take sharp issue with the conclusion reached by the State in its brief against the motion for leave to file, wherein it is said at Page 63 that the Coroner testified that it was a surgical instrument or an instrument similar to a surgical instrument. The Coroner intended no such testimony and upon inquiry by the trial

court completely cleared the record of any inference that the Coroner was saying that it was a surgical instrument. The woman was killed and there was blood all over the bed, on the pillow, the walls and floor of the room. It therefore follows that the "bloody splotch on the pillow: is of no evidentiary consequence as identifying the killer.

8. BLOOD ON DEFENDANT'S WRIST WATCH

At page 64 of the State's brief heretofore filed it is said that " * * * defendant's watch, the crystal and the upper band of which was smeared with blood." We agree. The State goes at some length speculating, guessing and imagining about the blood on the wrist watch of the defendant which with his key chain and ring was found in the green bag. There is no need to resort to speculation. The evidence is frank and outright that the blood smeared on the crystal and upper band of the watch was not the blood of the victim or of the defendant. There was ample blood to test and to type. The Coroner's technician typed the victim's blood and the blood on the defendant's wrist watch. As pointed out in our review of the testimony Marilyn's blood was typed as "Group O Rh Negative -- Type MS." The blood on the defendant's wrist watch and its bracelet was typed "M". It is not necessary to go further. The blood on the

wrist watch was not the same as the victim's blood. But the testimony goes further. Miss Cowan definitely stated that the type of blood of Marilyn was not the same as the blood on the wrist watch. She may have modified her testimony by saying that tests for the OAB Group were "inconclusive." Inconclusive is not evidence beyond a reasonable doubt. There is no proven fact from which to draw an inference. The proven fact is that the blood on the watch was different in its typing than the blood of Mrs. Sheppard. Miss Cowan does not say that the blood on the wrist watch was Group "O". She expressly denies that. From her explanation as to the method of typing blood if both A antigen and B antigen were absent such a result would be positive and clear. If A and B were absent then the blood group on the wrist watch would be O, but Miss Cowan says no, it was not. Therefore, and here is where a reasonable inference may be drawn, there was a trace of A or B in the blood cells of the blood on the wrist watch which completely eliminated the main group O which was the blood of Mrs. Sheppard. There was no S factor whatsoever found in the blood on the wrist watch. The conclusion is inescapable that the blood on the wrist watch was not the blood of Marilyn Sheppard, but was the blood of the killer.

9. THE GREEN BAG

We can agree with some of the conclusions reached by the State as recited at pages 64 and 65 of its brief previously mentioned. There was no blood found on the green bag, and we are willing to go as far as saying that there was no evidence of blood on the green bag. We agree that "the defendant's watch, the crystal and upper band of which was smeared with blood." We agree that the jury would be justified in concluding that the wrist watch of the defendant, his key chain and ring were placed in the bag after the blood had thoroughly dried. We so agree not out of any theory, but because the evidence supports it. The evidence is quite conclusive that these articles were placed in the green bag sometime during the daylight hours of the morning of July 4th after the officers came upon the scene, and after the defendant was placed in custody and under surveillance. He was not in the backyard or Lake side of the home after the Houks arrived shortly before 6:00 o'clock A.M.

10. WHEN WAS THE GREEN BAG FOUND?

We refer to the evidence. Officer Drenkhan made a cursory view of the lake side of the house shortly after 7:00 A.M. He found no green bag, nor did he see it. There

was some brush growing on the bank. At sometime around 9:00 or 9:30 A.M. two experienced officers of the Cleveland Homicide Police Squad -- Schottke and Gareau -- made a thorough search of the area where the green bag was later found. They were looking for items of evidence. Such experienced police officers would not overlook a green bag. In order to be more certain that there were no items of evidence in the area, a systematic search was organized and from a dozen to fifteen young men, some of them with scythes, went over this area and cut down the brush and trampled it down in a thorough search for any objects whatsoever. This search continued for hours before noon. Officer Rossbach also made a thorough search of the comparatively small area. He did not find a green bag. Larry Houk found a green bag at about 1:30 or 1:40 P.M. July 4th. He said that he found the green bag in an area where there wasn't any brush at all "at that time" as it had been beaten down. Of course it was beaten down by the searchers and there wasn't any brush at the time the green bag was found. Now we draw a reasonable inference from a proven fact. A group of young men thoroughly searched a comparatively small area looking for evidentiary objects They beat and cut down the brush. They surely would have found a green bag right at their feet, as they were searching and beating down the brush, if it were there. The State has not answered the inquiry: When was the green bag placed

where it was found in such a conspicuous spot? The green bag was placed there sometime after a thorough search had been instituted and had been practically completed. That certainly gives a reasonable explanation as to why the blood was dried on the wrist watch when it was placed in the green bag. This green bag was about eight or ten inches in length and probably five or six inches in width. It was a motor boat tool kit. There was a boat house down near the beach. Naturally the motor boat tool kit or bag would come from the boat house.

11. ONE BLOODY SMUDGE ON DEFENDANT'S TROUSERS, BUT NO OTHER BLOOD

The above is quoted from page 65 of the State's brief. We agree with that. Where it came from may be the subject of speculation and guesswork. It is the feeling and belief of the writer of this brief that probably the blood smudge on the knee, being about the height of the mattress of the bed, came from the blood on the bed when the defendant was ascertaining that his wife was dead. It is significant, as the State concedes, that this single smudge or spot of blood on the left knee of the defendant's trousers was the only blood found any place on the rest of the trousers, his belt, his socks or his shoes. Blood cannot be washed out of clothing or from any absorbent substance. Even boiling water

will not take it out. That is the evidence.

12. ABSENCE OF FINGERPRINTS

We can hardly conceive that a husband would go around a house wiping out his fingerprints or those of his wife or of a maid or of his child or of his visitors. Husbands just don't do that. There was a desk that appeared to have been rubbed over with a cloth. What is the inference? A maid kept the house cleaned and women usually use a cloth in wiping dust off the surface of desks. Here the State is piling inference on inference. They find a desk that has been wiped off with a cloth -- that is an inference. On that inference is built the further inference that there were some fingerprints on it. From that it is inferred that the imaginary fingerprints were the defendant's. From that is the inference that the defendant wiped off the fingerprints. Yet there was a fingerprint of his found on the bed several weeks after the tragedy, but he didn't wipe it off. Chip's palm print was found, but it wasn't wiped off. A stranger, and this is the only possible inference, would endeavor to remove his fingerprints from the scene of his crime.

13. BLOOD STAINS AROUND THE HOUSE

There were some blood stains -- a few of them -- on the various steps that tested human blood. We have no reason to dispute that. The uncontradicted evidence of the State's witnesses is that blood spots will persist for years. There was no evidence that these were fresh spots of blood. There is hardly a house that has been inhabited for years, but what there are blood spots on different parts of it. Children cut their fingers. Sometimes there is a more serious injury producing blood. At times women in their misfortune cause blood to escape. The reasonable inference is that no one knows where these blood spots come from nor when. This inference should prevail as against the speculation and guess that those blood spots fell on July 3rd.

14. WATER UNDER DEFENDANT'S WRIST WATCH CRYSTAL

There was moisture under the defendant's wrist watch crystal. He was a water skier and spent a great deal of time about the lake in water sports. What possible inference of guilt can be drawn from the fact that there was moisture under the crystal of his wrist watch? The defendant explains that a few days before while boating he had jumped into the water forgetting to remove his wrist watch.

There was a violent struggle on the beach. Whoever killed Marilyn Sheppard had lots of blood on him. This watch was probably removed after this struggle and after the defendant lost consciousness. This inference is proper because blood on the wrist watch, according to the evidence, was not that of Mrs. Sheppard nor of the defendant, but that of a third and unknown person. At any rate someone knew about the boat house and the green bag. It was placed on the bank after the search had been about completed and the brush beaten down and the bag was found in plain sight where brush had formerly been. We can see no evidence of guilt whatsoever by reason of moisture being under the wrist watch. Strange that, according to the evidence, no police officer, or other official, inspected the place where the green bag was found.

15. THE DOG, KOKO, WAS NOT HEARD TO BARK

That is correct. Is it unreasonable to assume that if the dog did bark, that neighbors in the dead of night would hear him? It is in evidence that when the Houks arrived early in the morning there was no barking by Koko When stranger came into the house shortly thereafter there was no barking by Koko. In fact, Koko apparently didn't bark at all that morning, although there were strangers of

all kinds -- those strange to his scent and to his presence, yet he did not bark. Just where was Koko? At any rate, he offers no proof of guilt.

This completes the chain of circumstances upon which the State claims that the verdict of guilty was supported by evidence beyond a reasonable doubt It just doesn't. These various circumstances taken individually and collectively do not point unerringly to guilt but rather to the innocence of the defendant. The trial court erred in not sustaining the motion for a directed verdict and judgment should be here entered for the defendant.

Now we go to further circumstances which the State does not emphasize or even mention.

16. TWO PIECES OF LEATHER

(Exhibit 47A and Exhibit 43 were found in the bedroom on the morning of July 5th)

One was a piece of leather about five-eighths of an inch by five-eighths of an inch. The other was smaller. The Police Officers immediately sensed the evidentiary value of these pieces of leather <u>if they could be used against the defendant</u>. As soon as they were found a frantic search was made of the entire house to compare these pieces of leather with the possessions of the defendant. They were compared to the grips of his golf clubs, to a quirt, to his belt, his

shoes, to every piece of leather in the house, yet there was absolutely no leather whatsoever to match the two pieces that were found near the victim's bed. The State endeavors to gloss over this by saying that numerous people had come into the room. This is not true. This is a reflection upon the wisdom and police knowledge of the Cleveland Police Department. People did come in downstairs but very few were allowed in the death room. These were the Coroner and the scientific expert from the Police Department and a few trained officials. Had these pieces of leather matched any possession of the defendant one can imagine how loud would be the shouting of the Prosecution that such evidence established guilt. But since this evidence points to defendant's innocence the State forgets it. However, the State does not explain the presence of these two pieces of leather. A reasonable inference is that the assailant wore a leather jacket. The fibers were scratched loose by frantic struggle of victim.

17. FIBERS UNDER THE FINGERNAILS OF THE DECEASED

This was discussed in the supplementary briefs here refiled and need no further reference.

Second Assignment of Error: PILING INFERENCE UPON INFERENCE URGED UPON THE JURY

The State urged upon the jury inference upon inference. It urged inference where there was no facts or fact whatsoever to support it. The law of inference is well settled in Ohio.

Sobolovitz -v- The Lubric Oil Co., 107 Ohio St., 204, second syllabus:

> "An inference of fact cannot be predicated upon another inference, but must be predicated upon a fact supported by evidence."

15 Ohio Jurisprudence (2d), 619:

> "In criminal proceedings in which it is sought to establish the guilt of an accused through circumstantial evidence, an inference cannot be based upon another inference or upon a fact the existence of which in itself rests upon an inference."

Hope, etc. -v- Industrial Commission, 137 Ohio St., 367, second syllabus:

> "An inference of fact may not be predicated upon another inference but must be based upon a fact supported by evidence."

Dennis -v- State, 41 Ohio Law Abs., 573 at page 576:

> "The conviction could only be had from inference upon inference which is not sufficient in a civil action to sustain a judgment, much less would it be sufficient to sustain a conviction on a criminal charge, wherein the state must

prove the charge beyond a reasonable doubt."

State -v- Nevius, 147 Ohio St., 263, at page 275 of the Opinion:

> "In 1 Hanna Ohio Trial Evidence, 6, Section 7, it is correctly said: 'A fact may be proved to a moral certainty by circumstantial evidence as well as by direct evidence but the facts must be proved from which the inference may be drawn, for an inference of fact can not be predicated upon another inference, but must be predicated upon a fact supported by evidence.'"

The above principles of law have been repeatedly and without deviation stated and restated in the decisions in Ohio.

Third Assignment of Error: THE CHARGE OF THE COURT WAS CONFUSING AND PREJUDICIAL

At page 26 of defendant's supplementary brief in support of the motion for leave to appeal is set out the trial court's charge on circumstantial evidence. The charge itself is confusing and misleading. However, the court went all wrong by including in its charge on circumstantial evidence the following language:

> "If evidence is equally consistent with the theory of innocence as it is with the theory of guilt it is to be resolved in favor of the theory of innocence."

This is a statement of the rule in civil cases. It does not apply to criminal cases where the proof must be

beyond a reasonable doubt to support a verdict of guilty.

Defendant's counsel asked the court to give a special instruction on the law of circumstantial evidence which would have, if given, clarified the confusion and cured the error made by the trial court. The requested instruction is found at page 28 of the supplementary brief. It is the law of Ohio. The trial court refused to give this special instruction or in any other way to clarify the confusion in its charge or to correct its error.

15 Ohio Jurisprudence (2d), 744, Section 578, states the following:

> "It is prejudicial error in a criminal case to refuse to give a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge, or by another special charge which is given. This is true even though the request is made at the close of the general charge, instead of before the argument, or though it is made and refused before the argument and is not renewed thereafter."

In Grossweiler -v- State, 113 Ohio St , 46, at page 48 of the Opinion is the following:

> "It has been settled by this court in the case of Wertenberger v. State, 99 Ohio St., 353, 124 N.E., 243, that under Section 13675, General Code, it is not mandatory upon the court to give any instructions to the jury in a criminal case before argument. This declaration has never been overruled and this court is at this time in full accord with it. That case did not decide, nor has any other case decided by this court declared, that a request made before argument may be

ignored in the general charge. Neither has it ever been declared that it is necessary that the request be renewed after argument. Having carefully examined these requests, we are of the opinion that they state sound principles applicable to the case, and that the defendant was entitled to the benefit of those instructions as a part of the general charge."

Fouts -v- State, 113 Ohio St , 450, at page 464:

"This charge was refused by the court and was not given either verbatim or in substance in the general charge. The refusal to give this special charge or its substance was error."

Fourth Assignment of Error: THE COURT'S CHARGE ON REPUTATION AND CHARACTER WAS PREJUDICIAL TO THE DEFENDANT

The evidence discloses by at least a score of witnesses both for the State and for the defense that the character and the reputation of the defendant was that of peacefulness, quiet and even temper. It also established that his propensities were toward peace and absolutely contrary to any violence. The trial court made no distinction between reputation or character as to propensities of conduct in connection with the crime charged and other types of character evidence The defendant did philander. However, a philanderer may have propensities for peacefulness which would be directly contrary to engaging in mad violence. The court confused the jury by excluding from its consideration

upon the question of guilt or innocence the entire matter of character and reputation as established by the evidence.

As pointed out before the trial court referring to character and reputation charged that "it is not admitted because it furnishes proof of guilt or innocence * * *" He added the rather confusing language "but because it is a matter of common knowledge that people of good character and reputation do not generally commit serious or major crimes." The reputation and character here involved were propensities toward peacefulness.

The defendant asked for and submitted a proper charge on this type of evidence, but the trial court refused to give the requested charge.

It should be remembered that this is a doubtful case. The jury was out about five days including night sessions. There were numerous inferences and inferences on inferences. There were strong inferences directly based on fact inconsistent with guilt. This the record discloses. This court may properly consider this case to be in the doubtful class. Therefore reputation of propensities for peacefulness and quiet becomes of more importance than in a case where guilt is overwhelmingly established. In addition to the cases already cited in our supplementary brief, and other briefs filed heretofore, attention is called to the following cases: In U.S. -v- Hutchins, 4 Ohio Federal

Decisions 339, the Court held that evidence of good character is to be considered with other evidence on the question of guilt or innocence.

In U.S. -v- Means, 6 Ohio Federal Decisions, 434, the court held that in case of doubt, good character should turn the scale in favor of the defendant.

In State -v- Huck, 65 Weekly Law Bulletin 280, it was said that:

> "In a criminal prosecution, the defendant has a right to place his previous character for peace and quietness in the evidence, and the jury was entitled to consider it along with the other evidence giving it such weight as in its judgment the jury thought it to be entitled to."

Donaldson -v- State, 5 O.C.D. 98, in paragraph two of the law in this language:

> "An instruction that the whole testimony should be looked at together, and if on a fair consideration of the whole of it, a reasonable doubt of the defendant's guilt exists, it should go to his acquittal; but that if on the whole evidence there is no such reasonable doubt of his guilt, the jury should so find, notwithstanding the proof of good character, is misleading; for the reason that the language conveys the idea that evidence of good character is valuable only in an otherwise doubtful case."

At page 100 of the Opinion the court says:

> "If the evidence left it doubtful in their minds whether the defendant was guilty, the fact that he was a man of good character should turn the scale in his favor. This

language seems to imply that there was to be a consideration by them first, of the evidence other than that as to character, and that if that there was doubt of the defendant's guilt, that evidence of good character ought to decide it in favor of the defendant. But if on this other evidence the jury had reasonable doubt of the guilt of the defendant, evidence of good character was not necessary to his acquittal, and what was said to the jury rather leads to the conclusion that it was the idea of the trial judge that it was only when this other evidence raised a reasonable doubt that the evidence of good character should be considered to turn the scales in his favor.

"This we think is not accurate or correct."

State -v- Dolliver, 150 Minn., 155, paragraph four of the syllabus:

"In such cases defendant has a right to introduce character evidence of moral qualities having a definite relation to the crime with which he is charged, and to have it considered by the jury as a fact in the case which, if established, tends to support the original presumption of innocence with which he is clothed. It may be sufficient of itself to engender a reasonable doubt."

Paragraph five of the syllabus:

"An instruction that the 'good reputation of the defendant is not of itself a sufficient fact from which a reasonable doubt of guilt may arise' is erroneous and the error is not cured by the further statement that such doubt must arise from all the testimony in the case."

In the case of Osborn -v- State of Indiana, 213 Ind. 413, tenth paragraph of the syllabus:

> "Though the good character of the accused is not alone to establish innocence, it becomes a powerful influence when circumstantial evidence is relied upon and especially when the evidence is nearly balanced."

People -v- Pasquale Colantone, 243 N.Y., 134, first syllabus:

> "Evidence of good character, is a matter of substance, not of form, in criminal cases, and must be considered by the jury as bearing upon the issue of guilt, even when the evidence against the defendant may be very convincing."

Fess in his "Ohio Instructions to Juries" at Volume 3, page 211, says that:

> "If you find that previous to this difficulty he sustained a good reputation for peace and quiet, you will weigh it in his favor for what you, in your honest judgments, may think it worth. Where the question to be determined by you may be close, it should be sufficient to turn the scale in his favor."

20 American Jurisprudence, 303, Section 324:

> "Such evidence should have reference to the trait involved in the offense with which the defendant is charged. With this qualification a defendant's general good character or reputation is almost always admissible in his favor to evidence the improbability of his having done the act charged."

The same authority continues:

> "Evidence of good character is applicable to both the commission of the crime and the grade of the crime. * * * Proof of this

character strengthens the presumption of innocence, (citations) and by establishing good character a presumption is created that the accused did not commit the crime." (Citations)

DEFENDANT'S WOUNDS AND INJURIES

In reviewing the testimony in this brief we have confined it to that offered by the State with but one exception. This is the nature and extent of defendant's wounds. The doctor who testified on behalf of the State said that he was not a specialist and could not diagnose the injuries to defendant's neck and spinal cord. The defense called two doctors, both of whom had the very finest training. Dr. Elkins is recognized throughout the entire middle west as an authority in neurology. He found a serious injury to the second cervical vertebra. Several reflexes failed to respond indicating a derangement or injury to the nervous system. A month later the injuries were still evident but were yielding to proper care. Such injuries as these could not be self-inflicted. The State offers the theory unsupported by any evidence that he tried to kill himself by jumping off of the steps going down to the beach. If such a preposterous theory could be considered then it is immediately eliminated because a doctor would certainly find other less violent means to kill himself than to try

to break his neck.

There has been refiled Mr. Corrigan's brief and the other supplementary briefs. The Court's attention to these briefs is urged. There is the matter of widespread publicity, much of it false and all of it slanted to convict the defendant. Has the time come in Ohio when courts and juries merely are set up to return verdicts already dictated by inflammatory newspaper headlines and false and vicious broadcasts. We feel deeply that the evidence being such that it failed to establish guilt beyond a reasonable doubt, that defendant was denied due process of law, this Court should enter judgment for the defendant. In the event that the Court does not agree with us in this conclusion, then certainly the record is so saturated with prejudicial error that the cause should be reversed and remanded for retrial.

Respectfully submitted,

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Three copies of this brief were deposited in the United States mail and addressed to Frank T. Cullitan, Prosecuting Attorney, Cuyahoga County, on the 18th day of February, 1956.

/s/ Paul M. Herbert
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