10-1965

Petition for a Writ of Certiorari

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In the
Supreme Court of the United States

OCTOBER TERM, 1965

No.

SAMUEL H. SHEPPARD,
PETITIONER,

v.

E. L. MAXWELL, WARDEN,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Samuel H. Sheppard, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on May 5, 1965.

Citations to Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit is reported at 33 LW 2588, and is reproduced in the appendix to this petition at page Rs. 1. The opinion of the Court of Appeals for the Sixth Circuit denying rehearing

is unreported as yet, and is reproduced in the appendix at page Rs. 112. The opinion and order of the District Court is reported at 231 F. Supp. 37, and is reproduced in respondent's record-appendix [1] in the Court of Appeals at page Ra 393a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 5, 1965. Rs. 3. Rehearing was denied on July 12, 1965. Rs. 111. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Did the pre-trial publicity in petitioner's case so prejudice the community that no fair and impartial jury could have been impanelled?

2. Did the trial judge fail to adequately protect the petit jury, once impanelled, from prejudicial extrinsic influences?

3. Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?

4. Did the trial judge fail to maintain constitutionally adequate decorum in the courtroom during trial?

5. Did the trial judge deny petitioner a public trial by assigning nearly all of the seats in the courtroom to newsmen?

6. Did the trial judge, in the special circumstances of this case, violate petitioner's constitutional right to a fair and impartial judge by failing to recuse himself despite

[1] For convenience of reference, page numbers in the appendix to the petition will be preceded with "Rs"; page numbers in the respondent's record-appendix in the Court of Appeals will be preceded by "Ra"; and page numbers of the original transcript trial testimony will be preceded by "Tr".

his firm belief, undisclosed to petitioner, that petitioner was "guilty as hell" and that the case against him was "open and shut"?

7. Did the trial judge violate petitioner's federal constitutional right against self-incrimination by receiving evidence that petitioner had refused to take a lie detector test and truth serum? 7

8. Did the action of the bailiffs who permitted jurors to telephone outsiders during the course of deliberations in violation of Ohio law violate petitioner's federal constitutional right to a fair and impartial trial?

9. Did the court below deprive petitioner of proper review of other claimed federal constitutional violations?

10. Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?

11. Did the court below erroneously rule that no combination of individual errors, none of which rises to the stature of a federal constitutional violation, can in the aggregate show that the state court trial fell short of the requirements of due process of law?

Constitutional Provisions and Statutes Involved

Constitution of the United States

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Statutes

SECTION 2505.21, OHIO REVISED CODE. *Hearing on Appeal.*

"Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the

briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded. * * * ''

SECTION 2945.21, OHIO REVISED CODE. *Peremptory challenges in capital cases.*

''On the impaneling of a jury in a capital case, the state and the defendant, if there is only one defendant, may each peremptorily challenge six of the jurors, which challenges shall be exercised alternately. If there is more than one defendant, each defendant may peremptorily challenge six of the jurors, and the state may peremptorily challenge a number equal to the combined number allowed to all the defendants. Neither the state nor a defendant may be deprived of any of the challenges by reason of such order of exercising the same, or the time or manner of exercising the same.''

SECTION 2945.29, OHIO REVISED CODE. *Jurors becoming unable to perform duties.*

''If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and

has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

SECTION 2945.32, OHIO REVISED CODE. *Oath to officers if jury sequestered.*

"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 separating 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."

SECTION 2945.33, OHIO REVISED CODE. *Keeping and conduct of jury after case submitted.*

"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. Such officer shall not communicate to any person, before the verdict is delivered, any matter in relation to their deliberation. Upon the trial of any prosecution for misdemeanor, the court may permit the jury to separate during their deliberation, or upon adjournment of the court overnight."

Statement of the Case

Your petitioner, Samuel H. Sheppard, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio on April 11, 1963. He alleged that he was being restrained of his liberty in violation of his federal constitutional rights by the respondent, E. L. Maxwell, who was and is the Warden of the Ohio State Penitentiary at Columbus. Such restraint was caused by a judgment of conviction for murder in the second degree in the Court of Common Pleas in Cuyahoga County, Ohio, on December 21, 1954; this judgment had been affirmed by the Court of Appeals of Cuyahoga County and the Supreme Court of Ohio, 165 O.S. 293. (The opinions of the Ohio Courts are reproduced in record-appendix Ra, pp. 49a and 109a). This Court denied a petition for a writ of certiorari to the Ohio Supreme Court, *Sheppard* v. *Ohio*, 352 U.S. 910.

The allegations of the petition were reduced to twenty-three stipulated issues. As to nine of these, stipulations of fact were submitted by counsel and accepted by the District Judge. Four of the remaining issues were consolidated with other issues, and upon these evidence was received. One issue, No. 19 (Ra 150a(2)), relating to the sufficiency of the evidence at trial, was not considered by the District Court.

Each side submitted various briefs dealing with all of

the issues except the sufficiency of the evidence, and on July 15, 1964, the District Judge entered an order voiding the state court conviction and admitting the petitioner to bail pending possible retrial. Respondent filed a notice of appeal and moved to stay the order allowing bail; on July 23, 1964, the Sixth Circuit Court of Appeals denied the motion.

On October 9, 1964, the appeal was argued before a three-judge panel of the Sixth Circuit Court of Appeals; on May 5, 1965, that Court entered an order reversing the judgment of the District Court and remanding petitioner to the custody of respondent, one Judge dissenting. On June 14, 1965, a petition for rehearing and rehearing en banc was filed; both were denied on July 12, 1965, the same Judge dissenting as to each. On July 26, 1965, petitioner's motion to stay the mandate pending application for certiorari was granted.

Statement of Facts

At some time during the early morning hours of July 4, 1954, petitioner's wife was beaten to death in her bed by some weapon which has never been ascertained or located.[2] She was last seen alive at about midnight by certain guests named Ahern who departed the Sheppard home on the shore of Lake Erie in Bay Village, Ohio, while the victim bade them goodnite at the door. Petitioner was at the time asleep on a couch in the living room. Petitioner was and is an osteopathic neurosurgeon, and on the evening in question was exhausted from emergency surgery.

Shortly before six o'clock in the morning, J. Spencer Houk, Mayor of Bay Village who lived two doors distant from petitioner, received a call on the telephone. He heard

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[2] The facts contained in this statement are taken from the stipulated history of the case. Ra 31a.

petitioner say weakly: "Spen! Come quick! I think they've killed Marilyn!"

Houk arose and dressed, as did his wife Esther. They got their automobile and drove the few yards to petitioner's home. Upon entering they found petitioner slumped in a chair in the den on the first floor. His trousers were wet and he seemed groggy and in pain. Marilyn Sheppard was found lying in her bed in a pool of blood. The entire room was spattered with blood. It was later opined by the coroner and others that she had been struck thirty-five times on the head with some blunt instrument. Her skull was fractured in many places but not crushed. Examination of the first floor of the house disclosed abundant evidence of ransacking.

Petitioner related to the Mayor his recollection as to what had happened. It is a narrative which has never varied to this day.

Dr. Sheppard stated that he had been awakened at some point during the night by the sound of his wife screaming. He rushed up the stairs from the couch where he had been sleeping, and as he entered the bedroom he saw a form standing next to the bed. He was unable to distinguish whether he was looking at a man or a woman, and did not know how many people were in the room. Suddenly he was struck from behind at the base of his skull and rendered unconscious. He came to at some undetermined later time, and heard noise on the first floor. He ran downstairs and chased what appeared to be a male person through the screen door at the back of the house and down to the shore of Lake Erie. There he grappled with his unknown assailant; he was caught in a strangle hold of some sort and was a second time rendered unconscious, again for an undetermined period. He awoke with the lower half of his body in the water, made his way back to the house, and called Houk.

In corroboration of his story, Dr. Sheppard exhibited severe facial injuries and a fractured cervical vertebra. There was sand in his pockets and cuffs. There was one diluted blood-spot on the knee of his trousers where he had knelt next to his wife to take her pulse after returning from the lake. And following the trial, when police returned custody of the house to the defense, a criminologist named Dr. Paul Leland Kirk found blood in the murder room which did not come from Dr. Sheppard or his wife.

On the morning of the murder, investigations were commenced by the Bay Village Police Department, the Cleveland Police Homicide Unit, the County Sheriff, the County Prosecutor and the County Coroner. No suspects of consequence were ever isolated. Dr. Sheppard was interrogated at the hospital to which he had been removed by numerous law enforcement officials. One of these accused him of the murder, which he flatly denied. He was asked to submit to a lie detector test, which he at first refused because of his physical condition and later on advice of counsel. He similarly refused police demands that he submit to truth serum.

The initial publicity concerning the crime was substantial. A concerned community pressed for solution of the crime. There was talk by the coroner of an inquest, but none was called. After a few days the attention given to the case by the news media began to taper off.

At this juncture the editor of the Cleveland Press, a leading newspaper in the Cleveland area, suspected that petitioner was being sheltered because of his affluence or social position.[3] To prevent this "shelter", and to fore-

[3] The role of this editor in guiding the Sheppard case toward what he thought to be a proper result need not be surmised or inferred, for he has set to print what he did and what his reasons were. *Seltzer*, "The Years Were Good", World Publishing Company, 1956. The chapter of this autobiography specifically relevant to the Sheppard case is reproduced in our appendix. Rs. 180.

stall any loss of public interest in the case, the Press instituted a series of banner-headed front-page editorials. These called for the "grilling" of petitioner by "third-degree" methods, castigated him for refusing the alleged exculpatory tests, and criticized law enforcement generally for failing to bear down on Dr. Sheppard.

The campaign was eminently successful. Public interest did not diminish or die, but was whetted to near-frenzied proportions. Although no additional significant evidence developed after the first day of investigation, editorial demands by the Press that (1) Bay Village authorities yield charge of the affair to the Cleveland Police, (2) the coroner call a public inquest, and (3) that Sam Sheppard be arrested were followed with swift compliance by elected officials. On July 30, 1954, twenty-six days after the murder, petitioner was arrested on a charge of murder in the first degree. He was thereafter indicted and on October 23, 1954, was put to trial before Judge Edward Blythin of the Common Pleas Criminal Court and a jury. The jury began its deliberations on December 17, 1954, and on December 21, after nearly five full days, found petitioner not guilty of murder in the first degree but guilty of murder in the second degree.[4] He was sentenced to life imprisonment.

During the trial the jurors were permitted to go to their homes each night. The news coverage of the affair was massive, and much alleged evidence was announced and summarized by the prosecution prior to its offer in court.

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[4] The verdict of second degree murder is significant, for as Judge Edwards has pointed out in his dissent, the only case presented to the jury involved premeditation; the only motive suggested to the jury was petitioner's affection for one Susan Hayes, with whom he had philandered some months earlier. The jury's rejection of this latter element presents a very large question as to just what facts they found to support unpremeditated murder.

A good deal of what was described as damning evidence was never produced.[5]

Judge Edward Blythin, who assigned the case to himself, remarked to a court clerk prior to petitioner's indictment that petitioner was as guilty as he (Judge Blythin) was innocent of the murder of Marilyn Sheppard. While the jury was being impanelled, Judge Blythin visited in his lobby with Dorothy Kilgallen Kollmar, a nationally syndicated columnist. He remarked to her that petitioner was "guilty as hell" and that the case was "open and shut". He did not disclose these views to defense counsel, or recuse himself because of them.[6]

Prior to trial Judge Blythin caused to be erected inside the bar special benches. These, together with all save one of the regular benches, he assigned by name to various newsmen. Every major news service was represented at the trial. One bench was reserved for the families of the defendant and the victim. Others could gain admission to the courtroom only by exhibiting a special pass signed by Judge Blythin.

The newsmen constantly disrupted the proceedings, moving in and out of the courtroom at frequent intervals to shift off with teammates and making noise generally. Photographs and television pictures were taken constantly at each minute that the trial was not in actual progress. Petitioner was repeatedly photographed in the courtroom without his consent, and was depicted daily in the news. Frequent requests by counsel and occasional admonitions by the court did not maintain a peaceful and serene docorum.

Two policemen testified that petitioner had refused on several occasions to submit to a lie-detector test. When re-

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[5] See for instance the outrageous story in the Cleveland Press announcing expected testimony that petitioner was in fact a "Jekyll-Hyde". Rs. 109.

[6] These facts were found by the District Judge. Ra 458a.

quested to instruct the jury that such fact was of no consequence, the trial judge stated that no person had a legal obligation to submit to the test; he did not state that a refusal was of no probative weight.

Throughout the trial the news was peppered with anecdotes extraneous to the record. Robert Considine stated over WHK radio that petitioner's denial of guilt reminded him of the denials of Alger Hiss when Hiss was convicted of perjury. The trial judge refused to ask the jurors if they had heard this remark. Walter Winchell announced that a girl in New York then under arrest for armed robbery revealed that petitioner was the father of her illegitimate child. The trial judge asked the jurors in a body if they had heard the story, and two said that they had but would not be influenced by it. The Cleveland Press bannerheaded the fact that a "bombshell" witness would soon testify that Marilyn Sheppard had once privately described petitioner as a "Jekyll-Hyde". No witness so testified, and the jury was not interrogated as to this disclosure.

The trial judge, over objection, permitted Mrs. Dorothy Ahern to testify that she had been told by Marilyn that Marilyn had been told by a Dr. Chapman that Dr. Chapman had been told by petitioner that petitioner was considering divorce.[7]

Motions for continuance and change of venue were presented before and repeatedly during the trial, and all were denied.

The judgment of conviction has been under litigation constantly during the past eleven years.

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[7] Cf. dissenting opinion of Ohio Supreme Court judges Taft and Hart. Ra 121a.

Reasons for Granting the Writ

Petitioner respectfully suggests that there are several different reasons for granting a writ of certiorari to the Court of Appeals. First and foremost is the fact that this trial was, as the District Judge remarked, a "mockery of justice", and ought not to be allowed to permanently stain the record of American jurisprudence. Second, there are numerous individual violations of the federal constitution which cannot now be vindicated without action by this Court. Third, the reviewing process in the Court of Appeals fell far short of that required by current habeas corpus decisions of this Court; and finally, the conduct of prosecuting officials and newsmen which the Court of Appeals now condones was so flagrant and abusive that the stamp of approval they now enjoy should be eradicated.

We will deal first with those questions confronted by the District Court and the Court of Appeals; second with those alleged constitutional violations noted but not considered by the District Judge and summarily rejected by the Court of Appeals; and third with the failure of review described above.

I. The Publicity and Control of the Courtroom and Jury

Among the exhibits certified to this Court by the Court of Appeals are five bound scrapbooks, green in color. The parties stipulated in the District Court that these scrapbooks contain all of the newsclippings in the Cleveland area from the day of the murder until the rendition of the judgment of conviction.[8] Several of the most objectionable headlines and editorials have been reproduced as foldouts in the appendix to this petition. Also in the appendix is trial counsel's affidavit describing the circumstances in the court-

[8] See Ra 297a.

room during the trial. All of the opinions of the Ohio Courts, and the opinion of the District Judge who freed petitioner, are contained in respondent-appellee's record-appendix in the Court of Appeals. Nine copies of this three-volume record-appendix have been transmitted to this Court for examination in connection with this petition. The record-appendix further contains a history of the case, stipulated facts bearing on some issues, extracts from the trial transcript relating to other issues, and statements of the witness who had conversation with Judge Blythin.

A. *The Pretrial Publicity:*

Judge Weinman, in his opinion, has set forth in some detail the text of certain of the "news" stories which appeared in Cleveland between the date of the murder and the commencement of the trial. It was these stories which led him to apply the principle of *Rideau* v. *Louisiana,* 373 U.S. 723, to the present case and rule that no fair and impartial jury could have been impanelled in Cuyahoga County in October, 1954. These excerpts, however, are but a very small part of what was written about Sam Sheppard during the months in question. The sheer volume of material which was heaped upon the citizenry can only be ascertained from the aforementioned scrapbooks.

While it is certainly true that the law cannot promise or indeed furnish jurors who have read and heard nothing about the case to be tried, this Court has in several instances been confronted with situations where it was necessary to conclude that the jury had been tainted by exposure to news releases. *Irvin* v. *Dowd,* 366 U.S. 717; *Rideau* v. *Louisiana,* 373 U.S. 723; *Janko* v. *United States,* 366 U.S. 716, *Marshall* v. *United States,* 360 U.S. 310. Petitioner contends that circumstances here warrant the same result.

Collisions between the right of a free press and the right

to a fair trial do present, as the District Judge has noted, problems most difficult of resolution. To preserve prospective jurors in a wholesome and impartial condition while allowing full run to the public's "right to know" doubtless requires some treading upon a legal tightrope. But there is in this case one element which the decisions above-cited lack; publicity which did not flow from the natural stream of news activity, but which was deliberately and maliciously contrived and disseminated in a manner *calculated* to prejudge a criminal case. It is this aspect of the Sheppard case which the Court of Appeals refused to confront despite the fact that the opinion of the District Court found it to be of prime significance.

Because of its constitutionally-guaranteed freedom, a newspaper wields great power. Aspiring politicians as well as those holding office can be destroyed by an irate press. It is therefore of considerable importance to note that all of the persons whose official action is claimed by petitioner to have wrongly produced his conviction were elective, and that some—including the prosecutor and the judge—were facing an imminent election as the trial began.[9]

Mr. Seltzer, the editor who decided to "move" the Sheppard case, has made no bones about his intentions, his methods, or the results he produced. His agent, a reporter named Forrest Allen, correctly stated over WHK radio in Cleveland on the day the trial began, "I think the Press handling of the Sheppard story produced the trial that we have got going on over there today because I don't think the officials were going to do anything about it." Of significance is the fact that the Press continued to use its might to produce a conviction— a conviction which by that time it badly needed to stave off subsequent libel suits—by reporting un-

[9] Prosecutor Mahon was successful in winning election to the Common Pleas bench. Judge Blythin won re-election by a landslide. Dissenting opinion of Judge Edwards, appendix B, Ra 101.

true, inadmissible and prejudicial information throughout the trial.

We think it highly doubtful that any citizen can enjoy a fair trial in a community permeated by a large newspaper which has as its purpose prosecution and conviction. Judge Weinman noted that:

> "If ever there was a trial by newspaper this was a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public." Ra 453a

Sam Sheppard was not arrested because officials had or came upon some piece of evidence tending to show that he had killed his wife. He was arrested because editor Seltzer wrote an editorial of the front page of his newspaper which was bannered "WHY ISN'T SAM SHEPPARD IN JAIL" and thereafter changed the banner to "QUIT STALLING — BRING HIM IN". The fact that arrest followed hard on the heels of this editorial rather than upon the discovery of some new facts is ample proof that the processes of the law had crumpled before the power of a man who cared little for the rights of an American citizen. It is this shocking conduct which the majority in the court below have chosen to enshrine with the condonation of the law—a condonation which ought to be sharply stricken down.

Beyond the vicious attacks of the Cleveland Press and the shabby but less virulent me-tooism of the other Cleveland newspapers, there was one significant event which

further aggravated the hostile undercurrent against which petitioner vainly tried to swim. County Coroner Samuel Gerber, immediately upon the demand of the Press (see appendix Rs 117, 118 (called an inquest. Although such proceedings were customarily held in the county morgue, Coroner Gerber staged the Sheppard inquest in the gymnasium of the Normandy School in Bay Village. He explained at trial that he took this unusual step because he wanted to have an audience (Tr. 3453) and desired to "satisfy" the people (Tr. 3452).

We submit a description of these proceedings as we believe them to be relevant to the issue of pre-trial prejudice in the community. A pre-trial proceeding may well cause disruption which affects the constitutionality of the trial itself. *Estes* v. *Texas,* U.S. , 85 S. Ct. 1628.

The inquest was attended by the county prosecutor, who acted as advisor to the coroner, and two detectives, who acted as bailiffs. The petitioner was subpoenaed, as were members of his family. The gymnasium where the inquest was held seated several hundred people, and was crowded to capacity. Across the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment was set up in the room. Two live microphones were placed, one in front of Coroner Gerber and one in front of the witness stand, so that all which was said by the coroner or the witness was broadcast. A squadron of newsmen was present, and photographs were constantly being taken.

When petitioner and his brother, Dr. Stephen Sheppard, entered the room they were searched in full view of the audience.

Petitioner's counsel were present at the outset but were ordered not to in any way participate by the Coroner. When counsel objected to some part of the proceedings he

was forcibly ejected from the room. Delighted ladies ran up to Coroner Gerber and hugged and kissed him for this splendid move.[10] The inquest commenced on July 22 and ran for three full days. At its conclusion Gerber announced for the news media, "I could order Dr. Samuel H. Sheppard held for action by the grand jury." Why he did not take such a step was unexplained; but having in mind that Dr. Gerber was and is a member of the bar, perhaps he was troubled by a lack of probable cause.

The District Court has adequately set forth enough of the publicity before trial to warrant a conclusion that the Cleveland community was in no condition to furnish a jury sufficiently impartial to reach minimium standards of due process. Additional material contained in the green scrapbooks reinforces this position very soundly. We submit that the Court of Appeals was in error in rejecting as clearly erroneous the District Judge's finding of fact, and that examination of the matter by this Court warrants granting the writ.

B. *Publicity During Trial:*

Defense counsel sought vehemently to postpone the trial until what it felt was public prejudice could subside, and to change the venue to some other county not saturated with the invidious art of the Cleveland Press. The trial judge denied these motions. Although the fact is relevant to a subsequent issue, we are constrained to point out that the trial judge was a candidate for re-election to this post in November, 1954. He was the subject of laudatory articles by the Cleveland Press, which on October 9, 1954, published the following:

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[10] See the opinion of the District Court, Ra 443a.

"JUDGE BLYTHIN AT 70 HAS INSPIRING CAREER"

"Judge Edward Blythin will be 70 tomorrow. The Press wants to be the first to congratulate him and does so now, even if it means jumping the gun.

The milestone is important. It calls for hearty wellwishes. The career can't be emphasized too often either. It is the answer to those who try to make you believe the doors of opportunity are now closed.

The Blythin rise to high office is a heartening story of a young Welch bookkeeper who came to America to visit a brother, who decided to stay and who in time became the Mayor of the big city of his adoption. It is a story of ambition, of struggle, of determination, of triumphs.

Judge Blythin is a forthright man, a plain man and a hardworking man. One almost hesitates to say he has a sense of humor. So many men credited with that happy faculty really lack it. Judge Blythin has the rare quality. It has sustained him in many difficult situations.

One can go on in length about the man and his career. The birthday, though, is the affair now at hand, or nearly so.

Happy Birthday, Judge Blythin. And may you enjoy many more happy, fruitful years."[11]

The reason that the Press "jumped the gun" in issuing these warm felicitations is made clear by another matter which it printed the same day. The Press had learned that defense counsel, in order to prove that a change of venue was necessary, had begun a move in the nature of a Gallup poll to demonstrate the widespread public belief that petitioner was guilty.

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[11] This editorial and the one set forth below are contained in the newsclips in the scrapbooks.

"NON-LEGAL NONSENSE"

"Whatever the motive of the mass-survey of opinion on the guilt or innocence of Dr. Sam Sheppard, the technique is wrong, and dangerous.

The surveyors are asking for an off-the-cuff verdict from people who have not heard the evidence.

The 'findings' of this survey will be based solely upon hearsay, upon personal and uninformed opinions.

And yet the result will, unquestionably, be introduced into the trial, presumably in an effort to move the trial to some other city.

The whole scheme is non-judicial, non-legal nonsense.

It smacks of mass jury-tampering.

Defense Attorney William Corrigan should know that, and call the whole thing off immediately.

And the Bar Associations, which are always so sensitive to any outside effort to interefere with the Courts, should come forward to resist this effort, too."

Thus in none too subtle fashion, the Press informed Judge Blythin that it was opposed to any changes of venue. Since the judge never articulated his reasons for denying such relief, we think it impossible to say that he was not influenced by the conduct of this newspaper.

If there had to be a trial in Cleveland, the judge had a duty *sua sponte* to sequester the jurors once they were picked. He well knew that the trial was going to become a newsman's holocaust, for he had spent some time making the unusual arrangements to accommodate reporters and exclude the public.[12] The Court of Appeals was of the

[12] Judge Blythin also knew that the jurors were reading the newspapers. Juror Barrish explained on voir dire that he had been reading

view that this duty did not exist unless some motion for sequestration had been made by the defense. Rs 9. We think this a most unfair position to take. Defense counsel had sought the proper remedy, and it had been denied them. They were not bound to seek alternative remedies which might later be held to have watered down such appellate rights as had accrued through denial of a change of venue. If Judge Blythin sincerely felt that twelve people could be found who would be impartial at the outset, he should have used his full powers to preserve what impartiality there was.

As Judge Edwards has pointed out in his dissent, failing to lock up the jury was only one of the ways in which the trial judge fell short in his obligation to preserve its freedom from taint. He did not *order* the jurors to refrain from exposing themselves to news accounts of the trial or the case in general; he did not interrogate the jurors when it was brought to his attention that outrageous false stories and opinions were being broadcast by nationally prominent newsmen. And he did not declare a mistrial when it became apparent that the news media were conducting their own trial of petitioner quite apart from any court control. When approached by counsel about these extrinsic influences, he repeatedly threw up his hands and disclaimed any power to remedy the situation.

For his failure to take these steps in at least an attempt to secure to petitioner an impartial jury, it must be said that Judge Blythin's handling of the trial did not comport with what our constitution means by "fair trial". This proceeding was more in the nature of a sham and a circus,

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all about the Sheppard case every day since his name had been published in all three Cleveland papers as a prospective juror, and that he had been "following it up because if I was chosen I'd know something about the case". Tr. 62.

used to transmute into a legal judgment the dictates of a greedy and glutted press.

Also pertinent to a determination as to whether this trial is constitutionally defective is the courtroom atmosphere which prevailed. This is especially true in view of the recently announced principles of *Estes* v. *Texas,* U.S. , 85 S. Ct. 1628. For although various Justices of the Court have differed in approach, we read the *Estes* case as establishing beyond question that substantial disruption and distraction in a courtroom is constitutionally impermissible. And while the Sheppard trial did not have live television in open court, the record discloses distractive influences beside which the *Estes* trial was the picture of serenity.

The District Court in voiding petitioner's conviction noted and disapproved of the unusual arrangements made by the trial judge to accommodate the news media:

> "It is one thing to accommodate the news media; it is quite different when a major portion of the courtroom is reserved for it. Here a comparatively small courtroom was reserved primarily for the news media and the trial was its showpiece. The Supreme Court of Ohio characterized the atmosphere surrounding the trial as "a Roman holiday for the news media". Under such circumstances, the requisite atmosphere for a fair trial could not, and in fact did not, exist." Ra 451a.

Judge Edwards, dissenting in the Court of Appeals, noted in some detail the objectionable courtroom setting. Rs 59. And ample description thereof is furnished by trial counsel's affidavit in support of his motion for new trial. Rs 158.

In addition to the confusion and distraction which must

result whenever a trial is given over entirely to newsmen, we think as fatal error there can be no worse constitutional violation than the continual spotlighting of the jury—in this case with the approval and cooperation of the trial court.

> "And special note must be given the attempt of the newspapers to influence the jury. It was startling to find photographs of the entire jury and of individual jurors (at times giving their home addresses) in no less than 40 issues of the Cleveland newspapers. The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting." Ra 452a.

This observation by Judge Weinman is especially pertinent to what Mr. Justice CLARK has said in *Estes* v. *Texas,* U.S. , 85 S. Ct. 1628, 1634; speaking about jury exposure to the community through the medium of television, which is different in *kind* from the instant case but certainly not in degree:

> "The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that their friends and neighbors have their eyes upon them. If the community be

> hostile to an accused, a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused***'."

In comparing the Estes circumstances with the case at bar, we feel that the following points are germane:

> (1) The Estes jury was sequestered. Thus they did not see the publicity during trial, were unaware as to what public and press sentiment was, and were not exposed to sidewalk opinions which might have led them to understand that an acquittal would have been most unpopular. The Sheppard jury did not have this protection.
>
> (2) If the Estes jury feared that its result would be second-guessed by a public which had observed the evidence firsthand, at least that jury enjoyed the comfort of knowing that what the public viewed was actual evidence. But the Sheppard jury knew that the public was largely unaware of all of the *evidence*, since it learned only those sensational portions which newsmen saw fit to excise from the proceedings. The Sheppard jury must have been aware that the case against petitioner as reported by the press was far more grave than the case disclosed by the actual evidence, and thus must have felt pressure to make its verdict conform to that which the public would have been seduced to expect.
>
> (3) Even though the Sheppard jury was not subjected to live television in the courtroom, the publicity which each juror was afforded was sufficient to produce exactly the situation which live television would have produced. Because of constant photographing and listing of names and addresses of individual jurors,

each juror must have felt that he or she was going to be held publicly accountable for his or her vote by stranger and acquaintance alike.

Both the District Judge and the dissenting judge in the Court of Appeals have pointed up numerous specific violations of petitioner's right to have his jury insulated from extrinsic influence, and to have the effect of such influence carefully investigated once exposure to prejudicial material has been shown. We do not repeat those instances here, but we respectfully suggest that they show beyond question that the trial court's handling of the entire matter was woefully inadequate, and operated to deprive petitioner of a fair trial.

II. The Impartiality of the Trial Judge

The District Judge found as a fact that the state judge who presided over petitioner's trial had said in July, 1954 (before there was an indictment), "Sam Sheppard is as guilty as I am innocent"; and that he said in October, 1954, "This is an open and shut case—he is as guilty as hell!" The District Judge ruled that such expressions of prejudgement by one entrusted with the supervision of a capital case removed the presumption of impartiality to which all judges are entitled, and that the failure of Judge Blythin to recuse himself under the circumstances violated Dr. Sheppard's federal constitutional right to a fair and impartial trial.

To this view the majority of the Court of Appeals took exception. After reviewing numerous authorities wherein it is declared as a matter of black-letter law that statements adverse to deceased persons are to be regarded with suspicion, and then accepting as fact the findings of the District Judge, the Court of Appeals held that such decla-

rations raised no presumptions as to impartiality and destroyed none. After reciting several of the trial judge's self-serving declarations which proclaimed his absolute impartiality in the case, the Court of Appeals concluded that whatever he may have said prior to trial was insufficient to justify a presumption that the presumption of impartiality was removed. This ruling was, we contend, erroneous.

For his defense of Judge Blythin and the judiciary generally the author of the majority opinion in the Court of Appeals is to be commended. Indeed, what he has said is correct in principle, we hasten to agree. If those whose lot requires that they bestride the bench in cases of white-hot controversy were not protected from frivolous attack and careless slander, it is doubtful that the judiciary of this nation would command the Bar's top echelon if every judge whose lot it was to make close judgment were immediately opened up to impeachment because one party or the other was discontent with the result. And no matter how great the reluctance to venture an attack upon one whose burden it is to preside at the trial of a difficult lawsuit, certainly that displeasure increases tenfold when such a move must be made posthumously.

There is, nonetheless, the need to face the fact that petitioner was tried in a volatile atmosphere under conditions where every fiber of a strong and courageous presiding judge was essential to any hope of a trial that the framers of our constitution would have thought to be "fair". The obstacles facing Judge Blythin were considerable. The popularity of the state's cause had been articulated repeatedly in the news media. Judge Blythin was a candidate for re-election by popular vote *during the course of the trial.* He had been publicly praised by the newspaper which most needed a conviction, for reasons of prestige and financial security. The trial counsel for the state was a

brother (but not a competing) candidate. Judge Blythin thought petitioner to be guilty, as the District Judge has found. This was, we think, under the circumstances of this particular case, sufficient reason for the judge to recuse himself, *sua sponte*.

But the greatest evil in this situation was the expressed notion by Judge Blythin that the case was "open and shut". Just what he meant by this phrase can never be exactly known. But the plain import of such words is that the trial was a mere formality to legally endorse a prejudged result. We submit that any judge who prior to trial in a case of this sort felt that the cause he was about to hear was of an "open and shut" nature should have recognized his preconception of the matter and withdrawn from the case. Especially significant, in view of the elaborate voir dire of the jurors, is this evidence that Judge Blythin himself had been so convinced of petitioner's guilt that he could not withhold his opinion from an eminent newslady (who was at most a perfect stranger) whom the judge wished to be advised as to the "inside" scoop. Since the judge had obviously been no part of the investigation of the case, one must conclude that he persuaded himself of Dr. Sheppard's complicity either through the conduct of the news media, or through some private communication with his son who was a member of the Cleveland homicide bureau.

In either case, we submit that this judge was not in a position to render those delicate decisions which a case of these proportions necessarily involves. There can be no doubt that a continuance or change of venue would have incurred the probable wrath of the public, and the certain wrath of the Cleveland Press. As against either kind of disfavor, Candidate Blythin was in no proper position to exercise what appellate courts generally describe as the "discretion" of the trial judge.

That there was a close decision to make as to whether a verdict might have been directed in favor of petitioner cannot now be disputed. That the judge who made this decision, unpopular and final as it might have been, should have been free from any and all extrinsic influence is manifest upon the circumstances. That Judge Blythin did not meet these requisite qualifications is similarly manifest from the evidence accepted by the two lower courts.

The Court of Appeals has expressed the view that an arbiter of Judge Blythin's bent is nonetheless qualified to preside over a trial of such overwhelming proportions, and that the principles announced by this Court in decisions relating to the necessary impartiality of a trial judge were not in point. Thus the Court of Appeals has distinguished *Tumey* v. *Ohio*, 273 U.S. 510, *In Re Murchison*, 349 U.S. 133, and other cases on their facts and has held that they do not apply to the matter at bar. With this construction of the cited cases we respectfully disagree.

This Court did not hold, in either *Tumey* or *Murchison*, that demonstrable prejudice by a presiding magistrate was shown. Both cases stand for the principle that insofar as is possible, essential fairness demands that the judge have no substantial interest in the controversy over which he presides.

The fact that petitioner had a jury does not, we submit, eliminate this principle, as the Court of Appeals has ruled. This trial judge had far too much in his own hands to escape the requirement that he approach his task, however onerous, with a courageous determination to hew to the hard rule of law without one whit of thought to what the public might appreciate. The fact that there was a jury in this case was Judge Blythin's doing in the first place. The fact that the case went to the jury was Judge Blythin's doing in the second place. And the infinite number of times when he exercised his discretion—a discretion which the

Court of Appeals seeks to rely upon—cannot be assessed. We submit that:

(1) A judge who is up for election *during* an extremely controversial and publicly watched criminal case is not a fit magistrate to preside in such a case;

(2) A judge who, being up for election, is lauded by a newspaper which has a substantial pecuniary interest in the outcome of a criminal case is not a fit magistrate to preside in such a case.

(3) A judge who harbors a personal belief that an accused is "guilty as hell" before a trial over which he is to preside commences has an obligation to make such feeling known to the accused or his counsel.

(4) A judge who harbors a personal belief that an accused is "guilty as hell" before a trial over which he is to preside commences has an obligation to recuse himself *sua sponte.*

(5) A judge who personally believes that an accused has an "open and shut" case of guilt before the trial of such accused begins has an obligation to make such fact known to the accused or his counsel.

(6) A judge who personally believes that an accused has an "open and shut" case of guilt before the trial begins has an obligation to recuse himself *sua sponte.*

(7) A trial judge who, being assigned to preside over a circumstantial controversial case, finds that he is (a) up for election by popular vote during the trial, (b) his son is a member of the police team for the prosecution, (c) a newspaper with a substantial pecuniary interest in a conviction is backing such judge for re-election, (d) has a deep personal feeling that the accused is guilty, (e) has a firm personal belief that

> the case over which he is to preside is "open and shut", is not a fit judge to preside over such case.

Petitioner thus respectfully submits that the writ ought to be granted upon the question of the trial judge's impartiality, in order that some rule may be had upon the fitness of a presiding justice who is himself so infected with preconception that he believes the defendant committed to his charge to be guilty, summarily, before the trial opens.

III. The Lie Detector Evidence

The stipulations show that (1) police officers testified that petitioner refused a lie detector test, and (2) that J. Spencer Houk (who was accused by Steve Sheppard of being the murderer) was allowed to testify that he had "taken" such a test, without giving the result. The District Judge held that such evidence violated petitioner's federal constitutional rights. The Court of Appeals did not hold that such evidence was *not* so prejudicial as to rise to the stature of a federal constitutional violation, but ruled instead that petitioner was estopped to complain because the receipt of such evidence was the considered tactical choice of petitioner's trial counsel.

Because no question has been raised as to the sufficiency of this event as a violation of the due process clause, we will not beleaguer this petition with the myriad cases which uniformly hold that the receipt of lie detector evidence is horrendous error in any trial. We turn instead to an examination of the facts upon which the Court of Appeals has bottomed its holding that estoppel is appropriate.

The Court of Appeals said, in avoiding direct confrontation of this issue:

> "The conduct of defense counsel regarding lie detector testimony has been discussed at length because we believe it spares us the need of determining the precise constitutional question suggested by the opinion of the District Court." Rs 47.

The lower court held in effect that defense counsel's tardy objection to testimony that petitioner had refused a lie detector test by police, and the trial judge's failure to instruct that such refusal had no probative effect *in the face of a request to do so*, were not viewable as what might otherwise be constitutional violations because of the conduct of counsel.

We submit that this most erroneous approach, ignoring completely the doctrine of *Fay* v. *Noia*, 372 U.S. 391, distorts the facts which it purports to assert as its unbilical cord. When Mr. Corrigan tried to continue or change the venue of the Sheppard trial, he cited specifically the wide publication given petitioner's refusal to take a polygraph test from police. The evil inherent in such publication was carefully noticed by the District Judge. Ra 436a. When Mr. Corrigan was faced with a trial he did not want and did not believe could be fair from the outset, it is reasonable to assume that he determined to arrange his tactics nonetheless to persuade the jury he was forced to confront.

One must assume that he believed—for indeed he so asserted without equivocation—that each tales juror, and each petit juror, knew that Sam Sheppard had shunned the police polygraph. That he did not object to, and thus highlight, the offered testimony concerning the lie detector ought not to now be asserted as evidence that he wished the jury to know these facts. We think that under the circumstances his choice—if indeed any there was, as the Circuit Court has ruled—was necessary and involuntary. To rule that in the face of such obstacles as were thrust

upon petitioner's able trial counsel it was incumbent upon him to protect the record at the risk of paying an unwarranted penalty for the exercise of such right requires the imposition of a harsh and totally unrealistic rule of law. We suggest that the Court of Appeals has, in constructing its defense to this claimed error, woven a most unsavory mantle for the reluctant trial lawyer to wear. If in fact an advocate faced with trial before what he believes to be a hostile and tainted jury must, in order to protect his client's rights, abandon all hope of an acquittal on the merits and build a record for appeal, much has been taken from our inherent thought that ours is the world's finest system for the administration of justice. We respectfully suggest that the Court of Appeals has strained unreasonably to circumvent this most serious error; and that even assuming as true all that the Court of Appeals has said, the rule it has applied is repugnant to notions of due process as these have evolved in our jurisprudence.

The writ should be granted for review of this treatment of the consequences of evidence that the accused has failed to submit to a lie-detector test.

IV. The Telephone Calls By the Jurors During Deliberations

As the opinion of the Court of Appeals discloses, members of the Sheppard jury made certain telephone calls which were not authorized by the trial court. This was done in violation of two Ohio statutes. Section 2945.32, Ohio Revised Code, provides as oath to be administered to bailiffs in charge of a sequestered jury; it further provides that an officer violating this oath—as these officers did, unquestionably—may be punished by imprisonment for one to ten years. Section 2945.33, Ohio Revised Code, speci-

fically prohibits any communication to a juror by an outsider.

The Ohio Supreme Court, in reviewing this question, refused to apply the ordinary rule that proof of communication to a juror raises a presumption of prejudice which stands until rebutted. *State* v. *Sheppard,* 165 Ohio St. 293, 296-299; Ra 113a. The District Judge viewed this as a misapplication of Ohio law, but held that under the circumstances due process had been violated in any event. Ra 473a. The Court of Appeals rejected this ruling and held in essence that because defense counsel produced no actual evidence or prejudicial content in the telephone conversations, there was no error.

As the record discloses, the bailiffs from whose phones these calls were made did not dial the numbers or hear the voices of the parties called. In view of this we think the Ohio Supreme Court's pure speculation that these conversations were innocuous, and consisted of no more than "assurance of health and welfare" by the jurors' loved ones, to be completely unwarranted.

This was a case where the pressure on the jury must have been tremendous. The fact of prolonged deliberations had no doubt alerted the public to the fact that the case was a close one in the view of the jurors. And it is reasonable to believe that the "loved ones" of these jurors, during the period of sequestered deliberations, were being given an earful of opinion by all and sundry. Some of this opinion must certainly have advocated petitioner's conviction, and it is likely that the juror's families were apprehensive of community criticism in the event of an acquittal—especially in view of the "evidence" printed in the newspapers which never was produced in court.

Added to these tenuous circumstances is the fact that the largest holiday of the year was only a few days away. Anxious husbands and wives must have been concerned

about unfinished Christmas shopping and other festive preparations. To hypothecate that a tired and puzzled citizen forced to decide Dr. Sheppard's fate was not influenced by the still unknown content of these telephone conversations does a flat injustice to petitioner. Some inflection, innuendo, or subtle hint of encouragement by a juror's spouse could easily, even if subconsciously, have done much to tip the delicately balanced judgment of a juror troubled with some reasonable doubt.

To bolster its refusal to recognize felonious conduct by the keepers of the jury as a constitutional violation, the Court of Appeals has sought to once again penalize petitioner for what it describes as a procedural default on the part of his counsel inasmuch as they failed to produce evidence of the content of these telephone conversations. But under both Ohio law and the weight of authority (*State* v. *Adams*, 141 Ohio St. 423; *Emmert* v. *State*, 127 Ohio St. 235; *Mattox* v. *United States*, 146 U.S. 140) proof of communication between jurors and third persons is presumptively prejudicial till the contrary has been made to appear. Dr. Sheppard's counsel, therefore, had no reason or obligation. If these communications were in fact harmless, it was the duty of the State to prove such fact. Under all of the circumstances in which this jury deliberated this case, there is no possible justification for reversing the general rule and holding, as the lower court has done, that these conversations were presumptively non-prejudicial.

V. Other Constitutional Violations

The District Judge, after noting what he considered to be five individual violations of the federal constitution, concluded that it would not be necessary to review the other claimed errors. He pointed out, however, that some of these had "significant merit". Ra 476a. The Court of Appeals

purported to consider each of these, and rejected them all in one summary phrase. We contend that the violations claimed were not properly disposed of in such abrupt fashion, and that in any case some of these were sufficient to have required petitioner's release.

A. *Arraignment Without Counsel:*

The stipulations clearly show that Dr. Sheppard was arraigned on a capital charge without counsel to represent him. In *Hamilton* v. *Alabama*, 368 U.S. 52, 55, this Court said: "When one pleads to a capital case without benefit of counsel, we will not stop to determine whether prejudice resulted."

We think that these circumstances are more aggravated than those in *Hamilton*, for this petitioner had counsel, asked the arraigning magistrate to wait until counsel arrived before requiring petitioner to plead, and was refused with the directive, "You can see your lawyer in jail." Counsel was at that time en route to the town hall; for some reason many newsmen had been tipped in advance that Dr. Sheppard was to be arrested (only hours, of course, after the Cleveland Press had demanded an arrest), but counsel were not informed.

Although petitioner was later arraigned again with counsel after the indictment, we think that there is no clear reason why the principle of the *Hamilton* case ought not to be applied. The arrest was not legitimate; it was triggered not by evidence amounting to probable cause, but by editorial demands. Had Mr. Corrigan been present when petitioner was brought before the magistrate, he might have taken some step to halt the snowball which was even then gaining momentum rapidly in its course to bury the petitioner. There was no excuse for not waiting for counsel to arrive, except that possibly the presses were already rolling on a last edition with the big news.

B. *The Denial of a Peremptory Challenge:*

It is stipulated that after juror Manning was excused at the request of the prosecution and alternate juror Hansen was substituted in his place, defense counsel asserted their sixth and last peremptory challenge. This was denied them by the trial judge, and juror Hansen voted to convict.

This was a denial of the equal protection of the laws. This Court has made very plain the important nature of the right to peremptory challenge. *Pointer* v. *United States,* 151 U.S. 396. Six peremptory challenges were allowed petitioner by statute, Section 2945.21 Ohio Revised Code, supra, and the trial court arbitrarily abridged this right. On very similar facts Ohio had held years before that such abridgment was prejudicial error. *Koch* v. *State,* 32 U.S. 352.

We submit that the only reason why the trial judge refused this last challenge is because it would have left the jury with no alternates, and required a mistrial if a juror became disabled. He had the means to correct this situation, but chose instead to do so at petitioner's expense. This was discriminatory action under color of state law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

C. *Spoliation—The Seizure of Petitioner's House and Concealment of Evidence:*

The stipulations disclose that (Ra 150a(9)) Bay Village Police Chief took the keys to petitioner's house, with petitioner's consent. The police concluded their investigation of the premises on August 16, 1954. On August 24, a written demand by petitioner that the house be returned to him was refused. At trial, the Chief was summoned to the stand, and defense counsel took the keys. The trial court ordered that they be returned, and that they belonged to

the police. The defense was thus denied investigative access to the house until after trial.

When the verdict had been returned, a criminologist named Dr. Paul Leland Kirk was hired to reconstruct the crime. By careful study of the blood spatter he was able to do just this, as his affidavit sets forth. Ra 150a (17). In addition to showing that the killer was left-handed (petitioner is not), Dr. Kirk discovered a large blood spot in the murder room which *did not come* from petitioner or his wife.

Had the jury which decided the case had this evidence, it is almost certain that they would have acquitted. Dr. Sheppard was pounded again and again by the prosecuiton for a lack of any proof to corroborate his "fantastic" story. This was such proof. When it was presented as grounds for a new trial, it was turned aside by Ohio Courts, principally on the ground that counsel had not tried hard enough to get the keys prior to the close of the evidence.

In view of the patently incorrect ruling by Judge Blythin that the keys belonged to the police, even though the prosecution had rested its case, we think that ruling of the Court of Appeals (Ra 90a) was wrong. But in any event, because their decision rests at least in part on the assertion of a procedural default against the petitioner—in circumstances where no waiver by him can possibly be found—it should be no bar in habeas corpus. *Fay* v. *Noia*, 372 U.S. 391. The Court of Appeals has left unillumined its reasoning in concluding that state action which deprives a defendant of exculpatory evidence is not an error of constitutional magnitude; but illumined or no, we suggest that such a view is incorrect.

D. *Conduct of the Ohio Supreme Court:*

The initial determination that there was sufficient evidence to warrant petitioner's arrest was made by Richard

Weygandt, then Law Director of Bay Village. Richard's father was Chief Justice Carl V. Weygandt of the Ohio Supreme Court. The Chief Justice disqualified himself, and then appointed his own replacement, in violation of the Ohio Constitution, Article IV, Section 2, which provides that when the Chief Justice is disqualified his replacement will be appointed by the Judge remaining with the longest period of service on the court.

The case was admitted to the Ohio Supreme Court on an Appeal as of Right, and Dr. Sheppard argued by brief twenty-nine errors of law. Three of these were stressed in oral argument, and only with these three did the majority opinion deal. Ra 110a. We think under the circumstances this was a failure of review, and a denial of the equal protection of the laws—especially in view of the fact that the Court was illegally constituted in the first place. These irregularities, when viewed against the total facts of the entire case, were sufficiently important to have warranted the attention of the Court of Appeals. The failure of that Court to deal with them has further deprived petitioner of the review to which he was entitled.

VI. The Sufficiency of the Evidence:

Petitioner claimed in his petition that the Ohio Supreme Court had used a constitutionally impermissible standard in determining that the trial record contained sufficient evidence to sustain the judgment of conviction. Ra 15a. The District Judge in disposing of the case specifically withheld judgment on this issue. Ra 403a. The Court of Appeals held that a reading of the opinion of the Cuyahoga County Court of Appeals showed that the record was not so devoid of evidentiary support as to violate due process. Rs 58. It is significant that the District Court was unwilling to subscribe to such a position. It is more signi-

ficant that no court in the entire chain of review of this case has been able to state the evidence which showed that petitioner killed his wife. We trace briefly the treatment of this issue in order to highlight the frail underpinnings of the judgment which has cost a citizen ten years of his life.

The first indication of the absence of any sound case against Dr. Sheppard is found in Prosecutor Mahon's attempt to sum up for the trial judge, at the close of the state's presentation in chief, the evidence which should bar a directed verdict. We have reproduced this argument in our appendix, because it clearly shows an absence of any legal proof to connect petitioner with the death. Rs 165. When Mr. Mahon had completed his efforts, Judge Blythin said:

> "I have one question: * * * is all this * * * equally as consistent with the innocence of Sam Sheppard as his guilt?" Tr. 5001; Rs .

Judge Blythin then ruled that this was a question for the jury, which it clearly was not. It is fundamental that evidence tending to support equally two inconsistent propositions is not proof of any kind, insufficient to support a civil judgment. He therefore avoided a critical ruling of law.

The Cuyahoga County Court of Appeals summarized at some length (Ra 63a-80a) the evidence in the case, but offered no rationale as to why such evidence might be viewed as excluding all reasonable hypotheses other than guilt. We strongly contend that this summary does *not* pass the initial barrier of showing a case "not so totally devoid of evidentiary support" as to violate due process.

The majority of the Ohio Supreme Court purported to confront this issue, but did not. It held that where a circumstantial case is submitted to a jury under proper instruc-

tions, a resulting conviction is ample proof that there was sufficient evidence. Ra 114a. This circuitous reasoning is totally invalid, for under such a rule no evidence at all would be necessary—only a proper charge by the trial court.

The dissent in the Ohio Supreme Court was, however, remarkable indeed. Judge Kingsley A. Taft (now Chief Justice Taft) expressed the opinion that not only had the state failed to prove guilt; it had in fact *proved innocence with its own evidence:*

> ". . . the state established by its evidence facts and circumstances which cannot be reconciled with any hypothesis other than defendant's innocence." Ra 119a.

We do not ask this Court to now review on certiorari the entire trial transcript is an effort to determine whether the record is barren of evidentiary support. But we do contend that if it were to be found that none of the other claimed violations are found to require issuance of the habeas writ, this issue has not been adequately litigated by a federal court. And certainly the paucity of relevant proof is of prime importance in assessing the prejudicial nature of the other errors, for on such a close question as this jury had before it seemingly minor irregularities in the proceedings could easily have influenced the verdict.

The "Great Writ" is certainly one of our noblest institutions, and its flexibility as a means to prevent unjust restraint has recently been re-emphasized by this Court. It has in many situations effectuated the release of criminal defendants where the record showed clear proof of guilt. But even though it reaches violations of important rights rather than errors of fact committed by juries, it can have no higher purpose than the release of innocent men wrongly incarcerated. Your petitioner sharply challenges the valid-

ity of the Ohio judgment in fact as well as in law, and vigorously contends that someone, somewhere, ought to be required to show proof of his crime which satisfied minimum requirements of due process. This has not been, and indeed cannot be, done.

VII. The Aggregation of Error

The majority of the Court of Appeals has held that where in its judgment none of the violations found by the District Judge rises to constitutional stature, the combined effect of these errors can be no greater than any of the individual claims. Rs 93. Judge Edwards in his dissent challenges this principle as incorrect, and maintains that possible constitutional violations must be viewed against the total background of the case.

We respectfully contend that the majority have committed fundamental error in their holding. Incidents such as the decisions below have reviewed cannot be fairly excised from the context in which they occurred, and judged in a vaccum. Nor can it be said that the combination of intrusions upon a defendant's rights can never be more grave than any of the parts.

The record we challenge is fairly riddled with error of every kind. Every basic element essential to a fair trial is shown to be lacking. The violations visited upon Dr. Sheppard are frequently interconnected with each other, showing a pattern of official conduct which time and time again fell below minimum standards of due process. The jury was tainted, the judge was biased, the prosecutor was unfair, the evidence was unfair and the reviewing courts of Ohio dodged and strained to pull together the shreds of a shabby conviction. If no single incident in these entire proceedings was sufficient to vitiate the conviction, certainly the aggregate is more than sufficient. With irregularities at

every turn, it cannot be said that this defendant had a fair trial.

A legal case must be viewed not only as a chain, but as a cable; and it is this which the Court of Appeals has failed to recognize. After examining what it saw as a chain, that court determined that none of its links, no matter how badly tortured and twisted, had actually snapped; thus the conviction could be held together. But this approach ignores the necessary corollary view that just as a cable which is so frayed that many of its strands are broken will not hold against its load, a trial peppered with errors of less than reversible magnitude is too infirm to warrant the deprivation of a citizen's liberty. Although we think that neither chain nor cable survives this record, we suggest that the Court of Appeals has made a serious jurisprudential mistake in holding as it did. Judge Weinman thought this trial to have been a "mockery of justice". Ra 476a. Against this view of the total matter, the Court of Appeals sought to whittle down, through the process of isolated dissection, the defects found. We respectfully contend that on this ground alone a writ of certiorari should be granted.

Conclusion

For the reasons stated above, petitioner respectfully suggests that a writ of certiorari ought to issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted.

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