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Brief of Defendant-Appellant, Sam Sheppard, Eighth District Court of Appeals Case No. 23551

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No. 23551

IN THE COURT OF APPEALS

Eighth Judicial District of Ohio

Cuyahoga County

STATE OF OHIO,

Plaintiff-Appellee,

vs.

SAMUEL H. SHEPPARD

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

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PRELIMINARY STATEMENT

To warrant the granting of a Motion for a new trial on the ground of newly discovered evidence, the requirements are as follows: (1) The new evidence must be such as would probably change the result if a new trial is granted; (2) it must have been discovered since the time of trial; (3) it must be such as could not have been discovered before the trial in the exercise of due diligence; (4) it must be material to the issues; (5) it must not be merely cumulative to former evidence; (6) it must not merely impeach or contradict the former evidence. Sheen v. Kubiac, 131 Ohio St. 52; State of Ohio, Appellee, v. Petro, Appellant, 148 Ohio St. 509.

The evidence submitted on the Motion for a new trial on

the ground of newly discovered evidence fulfilled all the requirements hereinabove set forth. The evidence presented on the Motion for a new trial brings to light new and independent truth of a different character than that produced at the trial of the case.

> Kroger, Admr. v. Ryan, 83 Ohio St. 299, Syllabus (1):
>
> "Cumulative evidence is additional evidence of the same kind to the same point. Therefore, where evidence offered on a motion for new trial is merely additional upon the same point upon which evidence was given by the party at the trial, such evidence will be rejected as cumulative. But where the evidence thus offered is respecting a new and distinct fact, although it tends to establish the same general result sought to be established by evidence given at the trial, such new evidence is not cumulative and, if otherwise competent, will be received."
>
> Canton Stamping Co. v. Eles, 124 Ohio St. 29, syllabus:
>
> "A petition for a new trial, based on newly discovered evidence, which could not have been discovered prior to the trial, will not be granted if the evidence is cumulative in character only, and not such as would probably have produced a different result at the trial had the evidence then been available. The fact that the evidence is cumulative in character does not of itself establish its insufficiency to sustain the motion or petition for new trial. When the Trial Court finds the newly discovered evidence tendered is such as will probably produce a different result on retrial of the case, it then becomes the duty of the Trial Court to vacate the judgment, if judgment has been entered, and grant a new trial."
>
> See also Gandolfo v. The State of Ohio, 11 Ohio St. 114, at page 119.

We claim that the Court committed prejudicial error in overruling the Motion for a new trial. See Eastwood v. Mardorf, 15 O. L. A.

752, the syllabus of which is as follows:

> "The overruling of a motion for a new trial based upon affidavits containing after discovered evidence which is material, which could not, with reasonable diligence, have been discovered and produced at the trial, and which, if produced at the trial, would probably have produced a different result, is prejudicial error."

The newly discovered evidence discloses that the appellant did not murder his wife. The person who did commit the crime is in part identified.

In the Application for a new trial on the ground of newly discovered evidence we rely upon the affidavit of Dr. Paul Leland Kirk, which discloses new evidence which would undoubtedly change the result if a new trial were granted, evidence that is material to the issue and not evidence which merely impeaches or contradicts the former evidence. It was, as will be shown, discovered since the trial and could not have been discovered before the trial in the exercise of due diligence.

The jury returned its verdict finding the appellant guilty of second degree murder, on December 21, 1954. The Coroner took possession of the house in which the murder occurred on July 4th, the day of the murder, and thereafter possession of the house was kept by the Coroner, or by the police subject to the direction of the County Prosecutor, until two days after the verdict was in. During the interim numerous demands for the keys were made by the appellant and by the executor of the will of Marilyn R. Sheppard, deceased, and by their attorneys, but the keys to the house were not turned over to the appellant's attorneys until December 23, 1954.

Promptly thereafter counsel for appellant contacted Dr. Paul Leland Kirk, who is one of the top criminologists in the country. He is an eminent scientist, a professor of biochemistry and professor of criminalistics in the School of Criminology at the University of California. He has engaged in extensive investigation work on behalf of public authorities in the West and wrote the curriculum for the course in criminalistics at the University of California.

Criminalistics is the application of the techniques and principles of the basic sciences, particularly chemistry and physics, to the examination and interpretation of physical evidence.

His qualifications cover three typewritten pages (See Affidavit No. 7 of Paul Leland Kirk).

His standing as a criminologist is attested to by the fact that his book on criminal investigation is used as an aid and reference book by the office of County Coroner Gerber (R. 4722), by the Cleveland Police Department (R. 4354-55), and in the medical-legal courses taught at Western Reserve University (R. 4722).

Dr. Kirk consented to make an examination of the premises and of the facts and circumstances surrounding this crime. His affidavit sets forth that counsel for the defense agreed to pay him his expenses and such other necessary fees as would compensate him for the time he would devote to his examination, investigation and research,

> "but with the specific understanding that his work in this regard was to be entirely objective and his determinations would be without bias or prejudice to the case of the State of Ohio or the defendant, and that his work was to be on no other basis. He further

> states that no instructions or suggestions were made to him as to what to find, or what not to find, by the attorney representing the defendant, or by any other party interested in the cause of the defendant; that his investigation, examination and research would be strictly impersonal, and that the facts would be reported exactly as he found them to be." (Affidavit of Paul Leland Kirk, page 4).

Dr. Kirk, being engaged in teaching at the University of California, could not come immediately, but did come to Cleveland as soon as possible and made an examination of the physical evidence connected with the murder of Marilyn R. Sheppard during the period January 22-January 26, 1955. He then returned to California and performed a number of experiments in his laboratory testing the significance of the facts which he found in his examination and investigation while in Cleveland. These experiments took time and it was not until April 26, 1955, that we were able to obtain his affidavit, detailing what he had found. Promptly thereafter we filed the Motion for new trial and in time allowed by the statutes.

His original affidavit, including Appendices A through J and the 46 photographs attached thereto as exhibits, all made a part of the affidavit, shows the thorough and painstaking nature of his work. It presents new facts which were not available at the time of the trial and which establish that Marilyn Sheppard was murdered by someone other than this appellant. If the Court will read carefully Dr. Kirk's original affidavit, the answering affidavit of Dr. Roger W. Marsters which was filed by the State, and Dr. Kirk's reply which is incorporated in the affidavit of William J. Corrigan, we believe that the Court can arrive at only one conclusion, namely, that justice demands that this

appellant be granted a new trial. The arguments which support this conclusion follow.

I

DR. KIRK'S AFFIDAVIT SETS FORTH NEW EVIDENCE MATERIAL TO THE APPELLANT

The State tried appellant for the murder of his wife upon the theory that he had the exclusive opportunity to kill her; that there were three people in the house when the Aherns left and there were only two alive the next morning, one being the boy Chip, who could not have committed the crime, and the other being appellant. The State utterly disregarded the fact that the rear door was unlocked and claimed there was no evidence of forcible entry. The State having introduced the statement of the appellant, as part of its case, and having shown by that evidence there was an intruder in the house, it is indefensible and conflicting with the evidence in chief for the State to maintain there was no intruder in the house.

The only thing produced by the State with certainty is that the appellant, Marilyn and Chip were in the house when the Aherns left and that when the Houks arrived in the morning Marilyn was dead and the other two were living. So the State maintains that because of this fact the appellant must have committed the murder and then poses the question, "If he didn't, who did?" The affidavit of Dr. Kirk strikes at the very root of the State's case, because it establishes that there was a third person present in the murder bedroom at the time of the murder. This is supported principally by two things:

First, that a large spot of blood on the wardrobe door, which could not have come from impact spatter or from back-throw of the weapon, is the blood of a third person who was neither Sam nor Marilyn.

Second, that the murderer was left-handed. (Appellant is right-handed (R. Affidavit No. I).)

There are also numerous other subsidiary and supporting facts which are developed by Dr. Kirk's analysis, which we wish to point out to the Court in summary form below.

A. The Large Blood Spot on the Wardrobe Door.

When Dr. Kirk was at the Sheppard residence during the period January 22-January 26, 1955, the condition of the room was the same as when it was turned over to the defense on December 23, 1954 (affidavits of Drs. Stephen A. Sheppard (Affidavit No. 3) and Richard N. Sheppard (Affidavit No. 4).) The blood spots on the walls, doors, radiator cover, windows and curtains had not been removed by the police. The original blood pattern was therefore available for study.

The testimony of Detectives Michael Grabowski and Henry Dombrowski was that from a study of the blood spots, it is possible to determine how far the person was away from the place where the blood landed, and the angle at which the blood was thrown onto the surface and other information from the secondary splatters which surround the blood spot, but that the police did not make any analysis of the blood pattern in order to determine those things (R. 4071-4072). This room was avoided by the investigators (R. 4374). Dr. Kirk did study the blood pattern in

the murder bedroom and from that study, together with his subsequent experiments, determined:

1. That during the beating the attacker stood close to the bottom of the bed on the east side and balanced himself with one knee on the bed.

2. That Mrs. Sheppard was struck with low angular blows.

3. The kind of weapon which was used.

4. That the weapon swung to one and one-half feet from the wardrobe door during the striking of the blows.

5. That Marilyn's head was on the sheet during most if not all of the beating.

6. That Marilyn's slacks had been partially removed from her before the murder.

7. That the blows were struck by a left-handed person.

8. That the largest spot of blood on the wardrobe door could not have come from impact spatter or back-throw of the weapon.

The spot on the wardrobe door measures about one inch in diameter at its largest dimension, was much larger than any of the other drops and is clearly discernible on the photographs (Ex. 1 and 16). After Dr. Kirk's experiments had established that a spot of this size could not have come from the back-throw of the weapon or from impact spatter, he determined that the spot called for further study. (See Appendix I). He therefore requested that this spot, together with a small spot near by, be removed from the door and sent to him. This was done, and he then made further tests which compared these two spots with known blood of the murder victim which he had removed from the top

mattress cover.

In other words, he performed the same tests on three samples of blood, the first being the known blood of Marilyn Sheppard from the mattress cover, the second being the small spot from the wardrobe door, and the third being the large spot from the wardrobe door. He found that the blood from the small spot on the wardrobe door tested the same as the blood from the mattress, and was the blood of Marilyn Sheppard. He found that the large spot of blood, although belonging to the same general blood group 0 did not react the same as the other two samples; that there were distinct and significant differences in the reactions of the blood from this large spot which established that it was not the same as Marilyn's blood. He had previously tested the blood of the appellant and found that his blood was group A, probably A_2, and that the large spot definitely was not the blood of the appellant.

Marilyn's blood had been determined by the Coroner's report to be "Group O RH negative Type MS" (R. 4775). Both Sam's watch and Marilyn's watch had blood on them. Miss Cowan tested this and was not able to determine the blood group but determined that the blood on each one was "Type M" (R. 4781).

There are four major blood groups, namely, the O group, the A group, the B group and the AB group. There are many types of blood in each of those groups. About 40 to 45 per cent of the population have group O blood and about 80 per cent of the population carry the M factor in their blood (R. 4766 and affidavit of Paul Leland Kirk, page 20).

He performed agglutination tests, and determined that in

every instance and with tests for both A and B factors, agglutination was much slower and less certain with the blood from the large spot on the wardrobe door than it was with the blood from the small spot on the door or the blood from the mattress. The agglutination of blood from a pregnant woman such as Marilyn is more rapid than from non-pregnant persons. This gives added significance to the fact that agglutination of the very large spot from the wardrobe door was delayed. This shows clearly that it could not have been Marilyn's blood or it would have reacted rapidly as it did with the two other spots (Affidavit of Paul Leland Kirk, page 20; Affidavit No. 8 of William J. Corrigan, page 4, paragraph 8).

The delayed agglutination of the blood from the large spot on the wardrobe door in testing for A and B factors is significant in another respect. A and B factors are ordinarily more readily determined in dry blood than is the M factor, so that the universal grouping can be determined more readily than the presence of the M factor. The Coroner's office found enough dry blood on the watches of the appellant and of the murder victim to determine that in both instances the blood contained the M factor, but was unable to determine the universal blood group of that blood. This is not consistent with the blood on the watches being Marilyn's, whose blood group was determined easily. Nor was it Sam's blood which was A_2. The only explanation is that the blood on the watches was from the same source as the large spot on the wardrobe door and was the blood of the intruder (Affidavit of Paul Leland Kirk, page 21; affidavit of William J. Corrigan, page 4, paragraph

10).

In answer to Dr. Kirk's affidavit the State filed the affidavit of Dr. Roger W. Marsters, who has had experience in typing whole blood or fresh blood, but who does not state any qualifications in the adsorption grouping of dry blood. (Affidavit of William J. Corrigan, paragraph 1). The technique of grouping fresh blood is entirely different from that of grouping dry blood. He is not a criminologist, claims no competency in that field and has neither the training or qualifications to challenge Dr. Kirk. Is it not strange that the State of Ohio and the Police Department and all the forces connected with the prosecution of the appellant and with the power that rests in them, could bring forward no competent challenge to this affidavit of Dr. Kirk?

The affidavit of Dr. Marsters contains no reference to the fact that the blood of Marilyn Sheppard was that of a pregnant woman. He apparently was not aware of this fact and had received no information on this point.

> "It is well known that agglutination of cells in the presence of blood from a pregnant woman is more rapid than for non-pregnant persons. Agglutination in presence of known blood from the bed on which the victim died was even more rapid than was that of the controls, which was found also with the lower spot from the wardrobe door. Both were in very marked contrast to the very slow speed of agglutination of the identical serum-cell system containing extract of the large spot. All were determined simultaneously with the same serum, cells and equipment, and all were repeated for verification with the same results." Statement of Dr. Kirk. (See Affidavit No. 8, paragraph 8, page 4.)

Most of Dr. Marsters' affidavit is devoted to pointing out that the tests which Dr. Kirk made are difficult to control and that if

he did not make the tests accurately, or if he permitted foreign substances to get into the experiment, the results would not be decisive. He also states that Dr. Kirk apparently did not use a proper background control, so that the test might have been thrown off by the presence of paint, fingerprint powder or other substances from the door.

So far as the latter point is concerned, Dr. Marsters is clearly wrong. Dr. Kirk did use a control. The second blood spot, the smaller one which was taken from the wardrobe door, was the control spot. This was close to the large spot and if there was any background contamination from paint, fingerprint powder, etc., the same contamination was present in that spot. The fact that this smaller spot reacted the same as the blood from the mattress cover, but that the large spot reacted differently than either of the other two spots, and that it was not the same blood group as Sam's, shows conclusively that it was the blood of a third person.

As far as the suggestion is concerned that Dr. Kirk might not have made the test accurately, there is no reason to believe that an outstanding authority like Dr. Kirk would fail to take every precaution and to be absolutely correct. Of course, Dr. Marsters does not know what Dr. Kirk did, has not seen his notes of the experiments, and cannot determine from this distance how accurately he weighed the stain. Dr. Marsters never saw and never made any test himself of this blood and neither did any of the other experts in the Coroner's office or in the Police Department. During the entire five and one-half months that they kept possession of the house, they had ample opportunity. They

failed to do anything about it, and the best that they can do, now that Dr. Kirk has made the tests which they should have made, is to suggest that maybe he was careless.

B. The Murderer was Left-Handed.

The appellant is right-handed (see affidavit of appellant). The analysis of the blood pattern, together with the subsequent experiments performed by Dr. Kirk, show that the blows must have been struck by a left-handed person because

> "Such blows could be struck in two ways only.
>
> "1. By a right-handed person striking vertical blows, and situated slightly to the left of Marilyn Sheppard's head, i.e., toward the hall doorway. This is not possible, because the attacker did not intercept blood spots at this location; and vertical blows would have placed some blood on the ceiling.
>
> "2. By a left-handed person, situated at the known position of this attacker, striking either angular or vertical blows (the latter excluded). This is completely consistent with observed facts." (Affidavit of Paul Leland Kirk, page 17).

C. Additional Facts Developed by Dr. Kirk.

There was a great deal of supporting evidence developed by Dr. Kirk. We will not attempt to repeat it all in this brief, but wish to merely mention some of the principal points which he established. These are:

1. That the original motive of the crime was sexual.

2. That the victim obtained a firm grip with her teeth, and that the defensive reaction of the attacker in dragging away was violent enough to break the teeth.

3. That Marilyn's teeth were broken outward.

4. That blood welling from the resulting wound was thrown in a very large drop on the wardrobe door.

5. That the weapon used to beat Mrs. Sheppard was not over one foot in length and had on it an edge quite blunt but not protruding; that this edge was almost certainly crosswise to the axis of the weapon and could have been the flared front edge of a heavy flashlight.

6. That the weapon was not similar in any serious respect to the alleged impression of a surgical instrument on the pillow case nor to any of the large variety of possible weapons that had been suggested by the Coroner or by the police.

7. That a spot on the lower sheet near the east edge of the bed in which the blood is highly dilute and hemolyzed, shows that the blood was present in spattering drops before the other diluting fluid was present; that this is shown by the fact that the blood was carried laterally with the flow of the diluting fluid and that the original spots are still evident; that there was not enough diluting fluid subsequently imposed to soak through to the mattress or pad; that this kind of spot was consistent with what would have happened if appellant had come up from the lake as he related and had pressed his wet knee on the mattress while taking his wife's pulse, and that this would also account for the large spot of dilute blood on the knee of appellant's trousers.

8. That material found by Dr. Kirk on the floor of the bedroom was a red lacquer of the kind commonly used to coat small objects and could conceivably be chips from the murder weapon.

9. That the sand in the defendant's pockets and socks and in the insoles and linings of the toes of the shoes could not have come from wading into the lake to wash off, but is consistent with appellant's account of how he was knocked out on the beach and came to being wallowed back and forth by the waves.

When the jury heard this case there was direct evidence that there was an intruder in the house, as shown by the statement of the

appellant introduced in evidence by the State, but the position of the State was that that statement was false and should not be believed. The appellant could only argue, among other things, that someone else committed the murder because of the absence of fine droplets of blood on the appellant's trousers, from the presence in the room of such unexplained items as the two pieces of leather or leatherette, the chip of nail polish and the chip of paint on the floor, the tooth chip found under the bed, the red and blue fibers found under Marilyn's fingernails, from the cigarette butt found in the upstairs toilet, and from the woman's footprint on the beach, as well as from the testimony of Stawicki and Knitter that they had seen a bushy haired man in front of and near the Sheppard residence early on the morning of July 4th, and from the fact that Mrs. Sheppard's teeth were broken and there was an abrasion on the inside surface of the lower lip and there was no wound on the outside of her mouth. Dr. Kirk not only has discovered a number of new facts which support the appellant's statement, but has for the first time produced direct evidence other than that given by the appellant that someone other than the appellant was in the room at the time of the murder and that the murderer (unlike appellant) was a left-handed person.

In overruling appellant's motion for a new trial based upon this newly discovered evidence, the Trial Judge went to great lengths, even concluding at page 12 of his memorandum that the production of this testimony "certainly" would not have resulted in a different conclusion by the jury. We respectfully submit that this statement is contrary to reason; that the State had based its entire case upon the

proposition that the appellant had the exclusive opportunity to kill his wife, that his story of an intruder was fantastic and incredible, and that there was no evidence, other than what the appellant said, that any intruder was present in the house. If the jury could have heard as eminent a criminologist as Dr. Kirk explain to them the evidence which is set forth in his affidavit, the only logical conclusion is that the jury would in all probability have reached a different verdict.

II

THE APPELLANT COULD NOT WITH REASONABLE DILIGENCE HAVE DISCOVERED AND PRODUCED THIS EVIDENCE AT THE TRIAL.

On July 4th Coroner Gerber took possession of the house and from that time on the house was continuously in the possession of either the Coroner or the police, who were acting under the supervision of either the Coroner or the County Prosecutor. Dr. Sheppard and the members of his family were excluded from the house, except that on a few occasions they were permitted to enter with a policeman in attendance and remove a few articles of clothing or food or other personal possessions. Demands for possession were from time to time made by or on behalf of the appellant, and on behalf of his deceased wife's estate, but these were refused, although the Prosecutor stated that if we wanted to get in we would first have to make arrangements with the Bay Village police and that there would have to be a police officer with us at all times.

The record in the case shows that the public authorities completed their examination of the home on August 12, 1954. After it

was generally known that the authorities were through with their examination of the house, demand was made for return of the house on August 23, 1954 (Defendant's Exhibit 13). The demand was refused on the instruction of the County Prosecutor (R. 2848).

On September 15, 1954, Dr. Richard A. Sheppard was appointed as executor of the will of Marilyn R. Sheppard. While the jury was being selected, appellant's family received word from the Prosecutor's office that the Prosecutor was ready to turn back the house to the proper representative. Mr. Petersilge, who represented the estate, interviewed Mr. Danaceau on this point and Mr. Danaceau confirmed that the Prosecutor would turn back the keys and surrender possession as soon as he got a receipt for the keys signed by the executor. Such receipt was obtained and delivered to him, but Mr. Danaceau advised that there had been a change in the attitude of the Prosecutor's office and that they would not surrender the keys.

Subsequent demands were made upon the Prosecutor's office after the State had finished its testimony, but the Prosecutor's office refused to surrender possession and turn over the keys until December 23rd, two days after the jury had returned its verdict.

Some time after the State had completed its case, Mr. Petersilge went to Mr. Danaceau and said:

> "When I came back from lunch I met Mr. Mahon just at the foot of the stairs down here, as he was coming up, and mentioned the conversation I had with Mr. Danaceau, and said to him that we thought we were entitled to full possession of the house. That they were through with it now, and why couldn't we have it.

> Well, Mr. Mahon said, "I know there are a couple of schools of thought on that but," he said, "I have got my mind full of this examination this afternoon. Don't bother me now. Let's talk about it later."
>
> So, after the afternoon session was over, the examination was completed, I went to Mr. Mahon again and renewed the request and Mr. Mahon said, "Well, there are two schools of thought on it. Some think you ought to have the keys and some think you ought not to." He said, "I am not in the position to turn them over to you."
>
> So, I had some further conversation along the line that it was our right to have it and why wouldn't they turn over to us the keys; that we couldn't prepare our case properly without having the keys, but Mr. Mahon said, "Well, I can't do anything about it," and he returned to his office." (Record on Motion for New Trial on Newly Discovered Evidence, p. 72 et seq.)

At the hearing on the motion for new trial the Prosecutor's office insisted that the motion should be denied for the reason that the appellant had not exercised due diligence in failing to have Dr. Kirk examine the house and present his report at the original trial. This was also the position taken by the Trial Judge.

We respectfully submit that any such conclusion is not consistent with the facts and puts a premium upon the unlawful conduct of the public authorities and their outrageous disregard of the rights of the appellant and of the murdered woman's family. The police and the Prosecutor may have had the right to rope off the house and grounds for a limited time in order to make a proper examination of the premises, which they did not do, but whatever that right may be it certainly does not extend for five and one-half months and until after the trial was finished.

The Prosecutor and the Court knew that while we were engaged in the long trial it was impossible to bring any possessory action to recover the house and its contents, which rightfully belonged to the appellant. We tried by every means that was open to us to recover that house, and during the course of the trial subpoenaed Chief Eaton of the Bay Village police force to bring the keys of the house into court. When they were produced, counsel for the appellant took possession of them but the Court ordered the keys returned to the police (R. 6074), and refused to come to the assistance of the appellant.

The record shows that the State had finished its examination of the house and its contents by August 12. We do not concede that the State had any right to keep the defendant out of possession during the six-week period from July 4 to August 12. But what reason did they have after August 12? There is only one possible reason, namely, to handicap the defense in preparing its case. While the jury was being picked the Prosecutor's office decided to turn back the house to the appellant and then suddenly reversed itself. Why? The only reasonable explanation is that somebody in the Prosecutor's office realized that the defense could not properly prepare its case as long as it was out of possession of the house, that the appellant and his attorneys could not bring an action to recover possession while they were tied up in the defense of the criminal trial, and that they could handicap the defense by withholding the keys.

The Prosecutor, who unlawfully deprived the appellant of his property, piously urged upon the Court below, with his tongue in his

cheek, and will no doubt urge in this Court, that the appellant could have arranged for Dr. Kirk to make his examination before or during the trial by making proper arrangements with the police and by having a police officer present to observe everything that was done. Does this Court think for one moment that the police would have allowed Dr. Kirk unlimited access and freedom to examine the home and its contents, to remove sweepings from the floor, to remove blood spots from the walls and to conduct the examination in such way as he chose? It seems obvious to us that any such conclusion is not only implausible but also that it comes with ill grace from officers sworn to uphold the law who flouted the appellant's rights as they did in this case.

The State had exclusive possession of the house for six weeks and was free to make any examination that it chose without let or hindrance from the defense. All that the defense wanted was the same chance to make its examination free from any hindrance by the prosecution or the police.

Suppose, however, for the sake of argument, that we had been given possession of the house on August 23rd; that we had had experts examine the house and that they had failed to discover that the large spot of blood on the wardrobe door was blood from a person other than Marilyn or Sam. If then, after the trial was over, Dr. Kirk had made his discovery that the large spot on the wardrobe door was blood of a third person, surely this would have qualified as newly discovered evidence. The Trial Judge says at page 15 of his memorandum overruling the motion for new trial that the two blood spots taken from the door

for the purpose of testing were not new; that they had existed since the date of the murder. This is true, but the issue is not whether the spots are new, but whether the information about the type of blood that is in the spots is new, and whether that could have been discovered by reasonable diligence. The State had its experts there and they failed to discover that this blood belonged to a third person. In fact, they did not even make any attempt to type the blood. How then, if our expert had been in the room before the trial was over, could they have complained that our expert failed to do something which they themselves had not done? Certainly the appellant cannot be charged with a lack of diligence because of failing to foresee that the State's experts would not do a thorough job of analyzing and testing the evidence in that room. The presence of the blood spots was known, but their significance was not known. We submit that under the circumstances the motion should not be denied on the ground that the appellant failed to use due diligence.

III

DR. KIRK CONFIRMED BY NEW EVIDENCE THE THEORY ADVANCED BY THE DEFENSE THAT THE MURDER WAS PROBABLY THE RESULT OF A SEX ATTACK.

While the evidence at the trial suggested that Marilyn Sheppard was killed by a sex attack, it was also developed on the cross examination of the Coroner that the murder could have been the act of a schizophrenic (R. 3355). There is also in the evidence the suggestions that the murder resulted from jealousy or revenge.

The investigation and examination by Dr. Kirk developed new evidence that shows that this murder follows the accepted pattern

of a murder during a sex attack.

> "1. The original motive of the crime was sexual. Examination of the slacks in which the victim was sleeping shows that they were lowered to their approximate final position at the time the blood spatters were made, as discussed above. Leaving the victim in the near nude condition in which she was first found is highly characteristic of the sex crime. The probable absence of serious outcry may well have been because her mouth was covered with the attacker's hand.
>
> 2. The victim was not moved after being beaten. This follows from the fact that her head was at the same point as the center of the blood spot pattern. Since her legs protruded under the lower crossbar of the bed, it follows that she had drawn up her legs in a defensive action, and moved downward during the early stages of the struggle. At the time of death or unconsciousness, her muscles relaxed and the legs straightened to a position similar to that in which she was found." (Affidavit of Dr. Kirk, p. 28, 29)

The Court in overruling the motion for a new trial on newly discovered evidence summarily dismissed the findings of this noted scientist and criminologist by quoting six lines of the report, and made the extraordinary statement, "assuming the theory to be correct," "the original motive of the crime was sexual" (page 28, Kirk Affidavit), "it does not exclude Sam Sheppard as the attacker," (page 14, Court's Opinion overruling the motion for new trial on newly discovered evidence).

We will point out how wrong this part of the judgment of the Court is. The record shows:

1. The appellant's kindness, friendliness, calmness and his devotion to his profession.

2. That his wife was very much in love with him and on the night of July 3rd the attention of the appellant to his wife and she to him was so affectionate that the guest, Nancy Ahern, was aroused to say, "You are not the only persons here who can be loving," and as a result she sat in her husband's lap (R. 2166-67).

3. That on the night of July 3rd he was so worn out from his work during the day he fell sound asleep in the presence of his guests, slept while they visited, while a radio blasted a ball game and a television set gave forth a volume of sound; that the stir of the departure of his guests did not awaken him.

4. That he slept in the samebed or in the same room with his wife for nine years.

5. If the appellant sought sexual satisfaction from his wife, she being a woman in love with him, would not only yield but would welcome his embrace, for the sexual act between a husband and wife is the culmination of love. It is the height of absurdity to even suggest in view of what is in the record that Marilyn Sheppard would resist the attention of the man with whom "she was very much in love," or to conclude, as apparently the Court did, that the appellant, upon the refusal of his wife to engage in marital relations, would rise from the bed, leave the room, secure a weapon and hack her to death.

CONCLUSION

The examination and investigation by Dr. Kirk scientifically and conclusively determined that there was a third person in the

murder room, where he stood, how he wielded the weapon, how the blows were struck, the kind of a weapon that was used and a partial description of the murderer. The affidavit was tossed aside and the scientific findings of new evidence was characterized by the Court as "loaded with criticisms, conjectures and conclusions."

The Court and the Prosecutor assert that the new evidence comes too late. When is it too late to obtain justice in a criminal case?

The newly discovered evidence is vital to the defense and strikes at the very heart of the State's case. In the event of a new trial it will demolish the theory that the appellant had the exclusive opportunity to kill his wife and that no one else was in the house. In all justice the Court should grant a new trial in order to prevent a gross mis - carriage of justice and to give an innocent man the chance to prove his innocence.

In presenting evidence of the appellant's innocence or the State to prove his guilt beyond a reasonable doubt, we collide with a mental block that is reminiscent of the stand against Galileo when his scientific research of the theories of Copernicus determined that the sun was the central body and the earth and other bodies moved around it.

His opponents cried out, "Can't you see that the sun moves around the earth, and did not Joshua command the sun to stand still, and did it not stand still at his command through power given to him by God?" So when the evidence of the State lacks proof of the appellant's guilt and the scientific research shows that the murder was committed by an intruder and the appellant is innocent, we meet the general

cry, "He must have done it; he was the only person in the house capable of the murder."

Respectfully submitted,

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Copy of the within brief was served on attorneys for the State of Ohio this 31st day of May, 1955.

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