4-6-1964

Brief for Petitioner

F. Lee Bailey
Counsel for Sam Sheppard

Benjamin L. Clark
Counsel for Sam Sheppard

Russell A. Sherman
Counsel for Sam Sheppard

SAMUEL H. SHEPPARD
Petitioner

v.

E. L. MAXWELL
Respondent

BRIEF FOR PETITIONER

F. LEE BAILEY
Boston, Mass.

BENJAMIN L. CLARK
Columbus, Ohio

RUSSELL A. SHERMAN
Elyria, Ohio

Counsel for Petitioner

SAMUEL H. SHEPPARD
Petitioner

v.

E. L. MAXWELL
Respondent

BRIEF FOR PETITIONER

F. LEE BAILEY
Boston, Mass.

BENJAMIN L. CLARK
Columbus, Ohio

RUSSELL A. SHERMAN
Elyria, Ohio

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF REFERENCES

CASES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

SAMUEL H. SHEPPARD
Petitioner

v.

E. L. MAXWELL, Warden
Respondent

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

This is an original petition for a writ of habeas corpus to the Warden of the Ohio State Penitentiary in Columbus, where petitioner is now restrained pursuant to a judgment of the Court of Common Pleas of Cuyahoga County, Ohio, upon a conviction for murder in the second degree. Petitioner has sought and obtained review in each of the state appellate courts available, and was denied certiorari by the Supreme Court of the United States; the conviction has never been reviewed for federal constitutional violations by any Federal Court.

The Bill of Exceptions (transcript of the evidence), briefs of the parties and opinions of the Ohio Courts are before this Court; in order to narrow the issues here to be considered, counsel for

petitioner and respondent have by means of stipulations drafted and filed certain Pre-Trial Orders (hereinafter referred to as PTO). The first of these outlines the procedure to be followed in the presentation of this petition and its issues to the Court. PTO-2 sets forth a short history of the case, and annexes as exhibits each of the opinions filed by the several courts which have reviewed the case. PTO-3 lists some twenty-two issues which arise from Sheppard's petition. PTO-3A specified the particular federal constitutional provision to which each issue relates. PTO-4 lists nine of the twenty-two issues where there is no dispute as to the facts, and sets forth stipulations of fact upon which, by agreement of counsel, the issues of law are to be decided unless the Court of its own motion should choose to look to the record for clarification.

Insofar as is humanly possible, factual reference in the arguments presented will be restricted to the Pre-Trial Orders; reference to any record or brief, where essential, will clearly indicate the particular record or brief in question.

It is noted that the legal opinions annexed to PTO-2 are page-numbered individually, and that such page numbers do not

correspond with those of the official reporters; all references to pages in the several opinions hereinafter made will relate to the pages of the Exhibits, rather than the reports.

STATEMENT OF FACTS

Inasmuch as Pre-Trial Orders 2 and 4 result from an effort to distill as finely as possible the facts relevant to the issues now before this Court, they are hereby incorporated by reference and will not be restated. References to the facts which appear under "Argument" will relate to the relevant PTO and page of that Order.

STATEMENT OF QUESTIONS INVOLVED

For the convenience of the Court, the issues (listed in PTO-4) will be set forth immediately before the arguments relating to them, under the section entitled "Argument."

LEGAL HISTORY OF THE CASE

Before turning to the individual arguments of law, a few observations concerning the legal background of this case are suggested as appropriate. The basic contentions of the petitioner disclose that he complains not only of a lack of due process of law in the state proceedings, such as is the ordinary basis for most habeas actions, but that he has been denied the equal protection of the laws as well. At the conclusion of his petition (para. XV(A)) Sheppard avers that he has been denied the benefit of standard remedies usually available in Ohio, because he had the misfortune to become a "cause" rather than a case, which circumstance impaired the general objectivity of the reviewing judges.

Certain recent Supreme Court decisions solidifying the rules to be followed in habeas actions in the United States District Courts have without question spurred litigation by many confined state prisoners who have both the time and inclination to seek release by any means available, and notwithstanding the total absence of any meritorious claim. The resulting flood cannot

help but give rise to the notion that federal judges have been positioned as supervisors of state criminal justice; criticism of this state of affairs has been rumbling within the legal profession, emanating from both state appellate judges who resent such interference and federal judges upon whom the additional burden is reposed. This is both natural and understandable, and it is not denied that many, even a majority, of the petitions presented are little more than frivolous.

Nonetheless, the United States Supreme Court has apparently seen the need for some closer federal supervision of constitutional violations in state criminal cases, for it has recently provided that application for certiorari is no longer (if indeed it ever was) a prerequisite to a habeas petition. Fay v. Noia, 372 U.S. 391, 435; 83 S. Ct. 822, 847. This is presumably because the number of state convictions plainly needing federal review is greater than the High Court can handle.

Although legal publications and opinions find it perpetually fashionable to indicate a denial of certiorari by the United States Supreme Court as in some manner adding weight to the decision of a lower court, the Justices of that Court have repeatedly and

persistently stated that such an inference is neither fair nor proper. One statement is that of Mr. Justice Frankfurter in this case (see Exhibit 5, PTO-2), wherein he says:

> "Such a denial of his petition in no wise implies that this Court approves the decision of the Supreme Court of Ohio. It means and means only that for one reason or another this case did not commend itself to at least four members of the court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision."

One may infer, without stretching the point, that between these lines lay a tacit invitation to seek federal review in another forum; now, nearly eight years and much litigation later, petitioner is finally in a position to obtain that review.

That the Sheppard case is unusual and bizarre - even unique - is a matter of common knowledge across the nation, in both lay and legal circles, and especially in Ohio, the state of its birth and growth. It has attracted the attention, and sometimes participation, of nationally famous people; it has spawned a book ("The Sheppard Murder Case" by Paul Holmes, David McKay Co., New York, 1961) wherein a reporter-attorney concludes, after a recitation of the facts which religiously follows the trial record, that the "whole business rubbed luster from American jurisprudence. . ."

It has given rise to one of the most remarkable opinions in the annals of legal history, wherein a divided court reached wholly anomalous results. The majority of the Ohio Supreme Court affirmed the conviction after conceding that petitioner had stood trial for his life in the atmosphere of a "Roman holiday" for news media. The minority concluded that Sheppard had been proven innocent by the evidence offered by the state. Against a schism in legal reasoning of this magnitude, the certainty of the law is drawn in doubt.

The purpose in the paragraphs above-set forth is to outline the framework into which this petition belongs. This is not a case where a shrewd jail-house lawyer has evoked some technical bit of legal rope with which he hopes to swing over the prison walls via the habeas route. Sam Sheppard takes the position, as he always has, that he is not guilty of the crime of which he was convicted; that the verdict of a jury and the rulings of several appellate courts notwithstanding, the procedure has misfired and the system has fallen upon its own flaws. It is the demonstration of these flaws, and why they caused the conviction of a defendant against whom there was inadequate legal proof, to which the following arguments are directed.

ARGUMENT

I. (Issue No. 1, PTO-3) Was the arraignment of petitioner on a capital charge in the absence of his counsel, whose presence petitioner requested which request was refused, a violation of his constitutional rights?

When petitioner was arrested at the unusual hour of 10:00 P. M. some 26 days after the homicide of his wife had been perpetrated, he was taken on a warrant signed by the Chief of Police of Bay Village and the City Council President. (The Mayor, J. Spencer Houk, had disqualified himself from acting on the case because of a personal involvement in it.) Because he had undergone substantial police interrogation and scrutiny right from the outset, petitioner had previously retained William J. Corrigan and Arthur Petersilge as attorneys (they later tried the case).

When petitioner was presented at the Bay Village City Hall, Gershom M. M. Barber was acting as magistrate in the absence of Mayor Houk. He inquired as to petitioner's plea. Petitioner asked to have the advice of his counsel, who had been notified of the arrest and were presumably enroute. This request

was denied, and petitioner was told that he could confer with counsel in the jail. He thereafter pleaded "not guilty," and was taken to confinement. (PTO-4, pp. 1-2). The charge was capital.

It has long been established that every citizen has an absolute right to the assistance of counsel at every stage of the proceedings in a capital case. In Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, where this federal right was first clearly defined, it was affirmatively stated that the right to counsel at every stage of the proceedings could not be abridged. "He (the accused) requires the guiding hand of counsel at every step in the proceedings against him." 287 U.S., 69. Since this decision was handed down in 1932, subsequent decisions have unequivocally affirmed its broad requirements until recently the right to counsel, as a federal constitutional guarantee, was held to include not only cases capital, but all "serious" crimes. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792.

In Spano v. New York, 360 U.S. 315, 79 S. Ct. 1202, it was said that an accused in a capital case was entitled to counsel even while undergoing interrogation. The Court in Spano emphasized that the need for counsel was as great before trial as during the trial itself:

> "Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself," 360 U.S., 325.

The Court quoted with approval the position taken by Professor Chaffee of Harvard, set forth in Chaffee, Documents on Fundamental Human Rights, Pamphlet 2 (1951-52), p. 541: "A person accused of crime needs a lawyer right after his arrest probably more than at any other time."

The precise issue presently before this Court was presented to the Supreme Court in Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157. In that case a defendant had pleaded "not guilty" to a capital crime without the aid of counsel. The state court had denied him relief because there was no showing that the defendant had in any way been prejudiced by pleadings in the absence of counsel. The Court pointed out several procedural steps which might have been undertaken by a lawyer at the arraignment, then concluded that no evidence of actual prejudice was essential to so fundamental an error:

> "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. Williams v. Kaiser, 323U.S. 471, 475-476; 65S. Ct. 363, 366; 89 L. Ed. 398; House v. Mayo, 324U.S. 42, 45-46, 65S. Ct. 517, 520, 89 L. Ed. 739; Uveges v. Commonwealth of Pennsylvania, 335U.S. 437, 442, 69S. Ct. 184, 186, 93L. Ed. 127. In this case, as in those, the degree of prejudice can never be known. Only the presence of counsel could have enabled the accused to know all the defenses available to him and to plead intelligently.
>
> Reversed."

Petitioner maintains that this decision requires that he be afforded a new trial, notwithstanding the fact that he was later arraigned in another court, this time with his counsel present. It is enough that at this first step in the long procedure which was to divest him of his liberty, petitioner was deprived of the attorney he had already employed, simply because of the impatience of a town official.

The Court in Hamilton, supra, mentioned one or two things which might have been attempted at the arraignment stage had counsel been present. Although not essential to his claim of error, petitioner can similarly point to what might have been done had he been permitted the assistance and advise of his counsel.

The Ohio Revised Code contains the following provision:

> "§ 2937.02: Procedure before court or magistrate.
> When an accused is taken before a court or magistrate and a warrant has been returned, such court or magistrate shall inform him of the charge against him and of his right to have counsel, and with the consent of the accused may proceed forthwith to examine the merits of the charge. Upon application on behalf of the prosecution or the defense, and for good cause shown, the court or magistrate shall postpone the examination for a reasonable time, not to exceed ten days except by consent of both parties. The absence of counsel or material witnesses is a reasonable cause for a continuance."

Thus it is seen that the very authority upon which petitioner was arraigned contains a specific mandate that he shall be afforded an opportunity to have his counsel appear for him. Of course it is unlikely that petitioner would have known this, and hence he did not assert his absolute right. He was here deprived not only of due process, but of the equal protection of the laws of Ohio.

Had counsel been present, he could have undoubtedly challenged the validity of the warrant, for it appears that it may have been invalid on its face; in that event petitioner would have been immediately freed, and the entire proceeding might have followed another, necessarily more favorable, course. As was earlier indicated, the Mayor had withdrawn from official activity in the case because he was material witness. His duties were assumed by the President of the City Council, Gershom Barber. It was he who signed the warrant, denied petitioner an opportunity to confer with counsel, and took his plea. The source of Barber's authority to so act is far from clear. § 2931.01, Revised Code, entitled "Definition of a magistrate," provides as follows:

> "As used in Chapters 2931. to 2953., inclusive of the Revised Code:
>
> (A) 'Magistrate' includes justices of the peace, police judges or justices, mayors of municipal corporations, and judges of other courts inferior to the court of common pleas."

There is no mention of a city council president qualifying as a "Magistrate," either directly or as one "acting" for a mayor. It is possible, perhaps even likely, that Barber had no authority to either cause petitioner's arrest or arraign him. These are matters which a lawyer might have raised. What the outcome of such a controversy might have been, or the extent to which petitioner was prejudiced, if at all, is of course immaterial. As was stressed in Hamilton, supra, no actual prejudice need be shown. Once it appears that an accused has been forced to plead to a capital crime without counsel, no demonstrated prejudice is necessary. It will be conclusively presumed.

Accordingly, petitioner submits that he is entitled to a ruling that his constitutional rights under the Sixth and Fourteenth Amendments were violated, and he is illegally detained.

II. (Issue No. 9, PTO-3) Did the ruling of the trial judge, denying petitioner his last peremptory challenge, violate petitioner's constitutional rights?

The means by which the make-up of an already sworn jury was altered, as set forth in the stipulation supporting Issue No. 9 (PTO-4, p. 2), was at best unusual and worst wholly improper. The trial judge, with knowledge that one member of the jury already

impanelled was to be discharged, proceeded to the impaneling of alternate jurors. But the first of these, necessarily, was intended to function as a regular juror even as he was being examined and sworn.

It is not contended that due process of law requires that a state allow a criminal defendant any set number of peremptory challenges, or, indeed, any peremptory challenges at all. Petitioner does contend, however, that where a state criminal justice system does provide that a defendant is entitled to certain peremptory challenges, the right is so fundamental and substantial that any abridgement thereof constitutes a denial of the equal protection of the laws and of due process under the Fourteenth Amendment.

The applicable law in the State of Ohio, with respect to peremptory challenges, is as follows:

> §2945.21, 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."

With respect to alternate jurors, it is provided in §2313.37 that ". . . each party is entitled to two peremptory challenges as to such alternate juror."

"The right of peremptory challenge is given, of course, to be exercised in the party's sole discretion." Frazier v. United States, 335 U.S. 497, 507, 69 S. Ct. 201, 206. The right is of such a fundamental nature that its denial will be reversible error in civil as well as criminal cases. In Kabatchnick v. Hanover-Elm Bldg. Corp., 331 Mass. 366, 119 N.E.2d 169, the defendants were a principal and an agent. It was provided by Massachusetts law that each party to a civil action was entitled to two peremptory challenges. The trial judge viewed the two defendants as one, and restricted defense counsel to a total of only two challenges. In reversing, the Supreme Judicial Court said:

> "The right to exercise peremptory challenges gives a litigant a limited opportunity of choice and allows him to have a juror withdrawn who, in his opinion, because of bias, prejudice, or some other personal characteristic, is not inclined with favor to look upon him or upon the nature of the controversy, where he lacks sufficient grounds to support a challenge for cause. The right is a valuable one, and where, as here, a party is deprived of its exercise, he has a just cause of complaint." 331Mass., 370, 169 N.E.2d, 173.

In Hale v. State, 72 Miss. 140, 16So. 387, the defendant contended on appeal that he had been denied an opportunity to question the prospective jurors, and hence denied an effective opportunity to intelligently exercise his allotted peremptory challenges. In sustaining these contentions the court said:

> "The office of the peremptory challenge is to protect the defendant against those legally competent, but morally or otherwise unfit or unreliable, to try the particular case; and to deny a full and fair examination of a juror in order to wisely exercise the peremptory challenge would be practically to nullify the right; for of what avail would a peremptory challenge be if exercised at random or blindly and without reason? The right to peremptory challenge is the last precious safeguard of a fair trial left to one before he puts life and liberty in the hands of sworn triors. It is not enough that a court, able and impartial, has pronounced the 12 (sic) competent and qualified, to pass upon the awful issue involving life or death. It is not enough, even after this, that the defendant may further challenge any of the competent 12 for cause. It is only enough when he has been permitted to challenge peremptorily, within the limits of the law, when, in his judgment, it is expedient or advisable to do so." 72 Miss., 149, 16So., 389.

In Pointer v. United States, 151 U.S. 396, 14 S. Ct. 410, the Court described the right of peremptory challenge in the following terms:

> "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. 'The end of challenge,' says Coke, 'is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial.' 3 Co. Inst. 27, c. 2. He may, if he chooses,

> peremptorily challenge 'on his own dislike, without showing any cause.' He may exercise that right without reason or for no reason, arbitrarily and capriciously. Co. Litt. 156b; 4 Bl. Comm. 353; Lewis v. U.S., 146 U.S. 370, 13 S. Ct. 136. Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned;" 151 U.S., 408 14 S. Ct. 414.

In Hayes v. State of Missouri, 120 U.S. 68, 7S. Ct. 350, the defendant sought to have declared unconstitutional a Missouri statute providing that in capital cases the prosecution should have eight peremptory challenges, except that in cities with a population exceeding 100,000 persons the prosecution should be entitled to fifteen such challenges. The conviction was affirmed. The Court in discussing the right of peremptory challenge used the following language:

> "Experience has shown that one of the most effective means to free a jury-box from men unfit to be there is the exercise of the peremptory challenge." 120 U.S., 70 7S. Ct. 351.

> "The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." 120 U.S. 71,7S. Ct. 352 (Emphasis supplied).

Thus it is clear that if Sheppard has been denied a right conferred upon Ohio citizens by Ohio law, he has been denied the equal protection of the laws in violation of the fourteenth amendment.

Upon facts strikingly similar to those at bar, California has held it to be fundamental and reversible error to deprive an accused of his full right of peremptory challenge. In People v. Diaz, 105 Cal. App. 690, 234 P. 2d 300, the defendant was on trial for murder for the third time, there having been two prior reversals of earlier convictions. The applicable law provided that the defendant was entitled to twenty peremptory challenges, and one additional peremptory challenge for each alternate juror. Because of a procedural mixup, defendant used a challenge on an alternate juror before the regular jury was complete; he was thus limited to twenty challenges in all even though thirteen jurors (one alternate) were impaneled. The conviction was reversed, with the observation that:

> "The denial of the right of peremptory challenge cannot be said to be a mere matter of procedure. The right is absolute. * * * The right may not be abridged or denied. Arbitrary abridgment or denial of the right runs counter to principles vital to the integrity and maintenance of the system of a constitutional right to trial by jury." 105 Cal. App., 696, 697, 234 P. 2d, 304.

The question must therefore resolve itself upon a determination as to whether or not petitioner was in fact deprived of an opportunity

to exercise a statutorily-conferred right to challenge a juror peremptorily. There is no dispute that the defense had one unused challenge of the six to which it was entitled. And it is agreed between the parties to this action that before the jury of twelve was sworn the trial judge knew that one of their number would be replaced. Had he dealt with the Manning disqualification before swearing the jury, defendant would without question have been entitled to exercise his remaining peremptory challenge on Juror Hansen when he was placed in the twelfth seat. Had the judge removed Manning after the jury was sworn and before any alternates were impaneled, when he first knew of the impending difficulty, the entire jury would have thereafter been discharged and a new one impaneled. But the judge did neither of these things. Instead, he took advantage of §2945.29, Revised Code, which provides that:

> "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 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 * * *."

The framers of this statute obviously contemplated a situation where a trial in progress might be interrupted by the sudden incapacity of one of the regular jurors. In that event it would of course be im-

possible to impanel a new juror who had not heard the evidence already presented, and the substitution of an alternate would be more reasonable. However, this was not the situation here.

When juror Hansen was being seated as the first alternate, the trial court then and there knew that he was actually being impaneled not as an alternate, but to deliberate as juror twelve on the regular panel. The defense was not informed of this fact by the court, although the press was already predicting the action to be taken. Consider then, even if the court had for the record stated what it intended to do, what the defense might have done.

It is true that the defense might have used one of its alternate challenges to eliminate Hansen when he was first presented; the defense might likewise have eliminated other alternate jurors until four challanges had been exhausted. This would not in any way have diminished its absolute right to excuse a total of six jurors on the regular panel. Had the challenge against Hansen after the substitution been allowed, as it should have been, the second alternate would have been seated and the defense would have exhausted its six challenges. The court could thereafter have impaneled additional alternates, allowing the defense two additional challenges for each alternate impaneled. §2313.37, Revised Code, does not restrict the number of alternates who may be used in a given case.

Instead the court ruled in such a way as to effectively deny to petitioner an opportunity to exercise a challenge, to which he was lawfully entitled, against a regular juror. In disposing of this assigned error in his memorandum opinion following the verdict, the court said:

> "(8) Dismissal of Juror Manning and substitution of alternate Jack Hansen. This, fortunately, took place before the viewing of the premises, before opening statements of counsel and before a word of evidence. This is not stated as an admission that it would have constituted error if the problem had developed later in the proceedings. The court believes that the substitution was made in strict conformity with the provisions of law and was not erroneous in any sense or particular." (PTO-2, Ex. 1, p. 3)
>
> "(9) Error in not permitting defendant to exercise a peremptory challenge upon such substitution. The law makes no provision for challenging an alternate juror except upon his impaneling as such alternate juror. If such a right existed it could, and undoubtedly would in many cases, defeat the entire purpose of having an alternate juror. On its face, this claim is without merit." (PTO-2, Ex. 1, p. 4)

The Court of Appeals overruled petitioner's claim of error with the following observation:

> "After a jury is sworn and charged with the delivery of the defendant, the trial is commenced, and unused peremptory challenges cannot thereafter be used; and, where an alternate juror has been selected and sworn as provided by law, he must be seated in the place of the discharged juror by order of the court." (PTO-2, Ex. 2, p. 15)

Thus, each of these courts disposed summarily of the matter, citing no authority to the proposition advanced, and without any regard whatsoever to the fact that the process of jury selection was still going on when it became apparent that Hansen would have to sit as number twelve. Both courts utterly failed to distinguish this case from one where a juror became incapacitated after the trial was under way, which happenstance the statute was designed to accomodate. The rights of the state could not in any way have been prejudiced by the allowance of the sixth peremptory challenge against juror Hansen; if the defendant had such a right, it must be presumed that he was prejudiced by its abridgment, since Jack Hansen voted for a verdict of guilty.

Curiously, neither of the parties in their briefs to the Court of Appeals, Supreme Court of Ohio, or Supreme Court of the United States seems to have mentioned the case controlling the instant question; further, neither the trial court not the Court of Appeals in passing upon that question makes mention of this case, or any case on the point. The Supreme Court of Ohio did not pass upon this issue at all.

In Koch v. State, 32 O.S. 352, the defendant contended that he had been deprived of a peremptory challenge. It appears that two peremptory challenges were allowed to both the prosecution and

defense. The defendant exercised one of his peremptory challenges, and waived the second. The state then exercised its two peremptory challenges, and in so doing exhausted the special venire which had been called for the case. A new talesman, one George Rice, was called from the regular venire. The defendant sought to challenge Rice, and the court ruled that his challenge had been waived. In reversing, the Supreme Court of Ohio said that:

> "When Juror Rice was called into the panel it then was a new jury and the defendant having up until that time exercised but one of his peremptory challenges, had the legal right to peremptorily challenge any of the jurors. The denial of that right was error." 32 O.S., 353.

The Koch case has not been overruled, and has been the law since it was decided in 1877. The effect of that decision was to recognize the creation of a "new" jury by substitution of a juror; applying it to the case at bar is not difficult: Upon the substitution of Hansen for Manning, the defendant should have been allowed to exercise his last peremptory challenge even if it had been "waived" when the original panel of twelve was sworn.

The defendant's contention upon Issue No. 9, therefore, is as follows:

(1) The ruling of the trial court constituted a violation of that provision of §2945.21, Revised Code, that says "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."

(2) The ruling of the trial court constituted a violation of the law of Ohio as that is enunciated by Koch v. State, supra.

(3) This ruling thus deprived petitioner of the equal protection of the laws of Ohio in violation of his federal constitutional rights.

(4) This ruling deprived petitioner of a right so fundamental to a fair trial that it abridged his right to due process of law. Pointer v. United States, supra.

III. (Issue No. 10, PTO-3) Did the action of the bailiffs in permitting the jurors, during deliberations and without authority from the court, to hold telephone conversations with persons outside the jury room, violate petitioner's constitutional rights?

The stipulation supporting this issue (PTO-4, p. 3) discloses that telephone calls were in fact made by jurors to persons outside the place of confinement of the jury; that the bailiffs who permitted these calls, without any authority so to do from the court, did not place the calls or make note of the parties called; did not note which jurors placed calls, or summarize what each juror said; and, most important, the bailiffs, although they were sitting close by, could not hear what was being said to the jurors.

The General Assembly of Ohio has sought to ensure that the sanctity and purity of a deliberating jury shall in no way be tainted by the influence of any person, either outsider or participant. §2945.33, Revised Code, provides that:

> "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 the 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, except by order of the court. * * *"

§2945.32 provides as follows:

> "When an order has been entered by the court of common pleas in any criminal cause, directing the jurors to be kept in charge of the officers of the court, the following oath shall be administered by the clerk of the court of common pleas to said officers: 'You do solemly swear that you will, to the best of your ability, keep the persons sworn as jurors on this trial, from separation from each other; that you will not suffer any communications to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by order of this court, or to ask them if they have agreed upon 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 wh- -lfully 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."

It is clear, therefore, since this was a "criminal cause," that the bailiffs who permitted these telephone calls flagrantly violated a law which requires that they be punished for felony. It is equally clear that the legislators intended this ominous sanction as a means of preventing absolutely the very thing which occurred. There can be no doubt that in thus attempting to prevent the tinge of any extrinsic influence upon the jury, the statute contemplates the protection of the rights of the litigants as its end.

Turning to a consideration of the circumstances which prevailed at the time this violation occurred, we find that there is every reason to believe that some actual prejudice resulted. The trial had lasted some nine weeks; the jurors commenced their deliberations on December 17, 1954. It is conceded by all that there had been a great barrage of publicity prior to and during the trial, and it is reasonable to assume that opinions on the guilt or innocence of the defendant were in abundance. The Christmas holidays were fast approaching, and the members of the jury were prevented from discharging the crescendo of hustle-and-bustle preparations which precedes that momentous day in most American families. It is no doubt correct to assume that the "loved ones" of the jurors (if in fact the calls were made to "loved ones" - the record gives us no assurance that this is the case) were anxious

that the families be reunited as swiftly as possible.

The Supreme Court of Ohio, in holding that no error had been shown, disposed of the issue with the following language:

> "In the situations such as those in the Adams and Emmert cases, it is easy to presume prejudice to the defendant as a result of the conduct of the bailiff. Can the same be said of the conduct of the bailiffs here in permitting jurors, who for several days and nights had been sequestered and unable to see or hear from their husbands, wives, or children, to telephone those members of the families? We do not think so. There is on the contrary, every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors minds as to personal matters and make them better, more conscientious jurors." (PTO-2, Ex. 4, p. 5)

This paragraph fairly seethes with error. The court has assumed that the only ones called were family relatives, although it is admitted that the bailiffs did not place the calls or hear the voices called. The court has assumed that the calls were made only after the jurors had been confined for "several days and nights," although the record does not disclose when the calls were made; it does clearly show that calls were allowed on more than one occasion (R. 7084). The court has assumed that each calling juror received only "assurances of health and welfare," while at the same time conceding that there is no evidence as to what was said to each juror, a most anomalous position for a state court of last

resort to adopt. Further, and most significantly, it is noted that appearing just before the paragraph above-quoted is an excerpt from §2945.33, Revised Code, relating to the duties of bailiffs in jury cases generally (set forth hereinabove). Conspicuously absent is any acknowledgement of §2945.32 Revised Code (supra) which deals with criminal cases. It is possible that the court overlooked this section, which is much more applicable, in deciding the case; it is much more probable (since this precise section was stressed in defendant-appellant's brief on the merits) that citation of this section, which describes a serious felony, was thought to be a poor selection to repose in an opinion which all but commended the perpetrators of that felony.

It will be no defense for respondent to point out that bailiff Francis stated (PTO-2, Ex. 4, p. 4) that he heard "not one word" said by the jurors about the case or the deliberations. It is not out of concern over what the jurors might say that the statute was enacted, for no juror could be influenced by his own statement. The critical factor is the textual content of what was said to the jurors, and that will never be known. This point was sought to be made by defense counsel while the bailiff was on the stand, but was summarily blocked by the court: (R. 7085)

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

"A. No.

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

"Mr. Danaceau: Objection.

"The Court: Objection sustained."

Thus the state prevented what might have proved to be the only saving grace in the situation, as the law below set forth indicates: proof that there was no prejudice.

We differ sharply with the assumptions indulged in by the Supreme Court of Ohio in reconstructing these events. If broad assumption is permissible, the rule is clear that it must operate in favor of the defendant (i. e., presumed prejudice) unless and until the contrary affirmatively appears. If we may speculate on what could well have been said by these unknown conversants, the following, in view of the attendant circumstances above set forth, seems far from unlikely:

"Gee I hope you're not much longer - we still need to do Christmas shopping."

"It's pretty hard getting along here, with the children and all - aren't you going to finish up soon?"

"Why are you taking so long? Everybody in the neighborhood knows he's guilty."

"If you find him not guilty we'll be run out of town - even the newspapers know he's no good."

Here was a jury under tremendous pressure. The public interest in the Sheppard case certainly exceeded that of any case before or since in Cuyahoga County. Each participant must have felt himself in the national spotlight. The foment and turmoil necessarily bred into any jury faced with this environment would in and of itself be sufficient to cast in doubt the objectivity and impartiality of any verdict resulting. The telephone conversations by the jurors, and the treatment of this event by the appellate courts, is but a crowning blow; there could be no better evidence that the might of an entire state somehow became aligned in an effort to obtain and hold together a criminal conviction.

We have said that the rule in cases where there is evidence of communications between jurors and third parties is that the burden will be on the prosecution to show affirmatively that no prejudice to the accused has resulted. In support of this position these authorities are presented.

In Mattox v. U. S., 146 U. S. 140, 145, 13 S. Ct. 50, 53, the following appears:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officers in charge, are absolutely forbidden, and invalidate the verdict,

at least until their harmlessness is made to appear."

In Wheaton v. U.S., 133 F. 2d 522, the defendant was convicted of using the mails to defraud. He sought a new trial on the ground that a court officer had communicated with the jury during the deliberations. In reversing, the court said: (The District Court had denied a new trial)

> "The law is that communications relative to a case on trial between jurors, third persons, witnesses or officers in charge of the jury are forbidden, and if it appears that such communications have taken place, a presumption arises that they were prejudicial, but the presumption may be rebutted by evidence showing that the communications were harmless." 133 F. 2d, 527.

In People v. Knapp, 42 Mich. 267, 3 N. W. 927, the mere presence of a court officer in the jury room, even though he did nothing but listen, was held sufficient to vitiate the verdict.

In LaValley v. State, 188 Wis. 68, 205 N. W. 415, it was held that:

> "The influences which may be exerted on such occasions (communication between jurors and third parties) are too indefinite and varied to be the subject of disproof, and the only safe rule to follow in all such cases is to set aside the verdict." 188 Wisc., 80 205 N. W. 417.

In the case of Tarkington v. State, 72 Miss. 731, 17 So. 768, a jury deliberated in the courtroom. Nine persons were present during the deliberations, two of whom had been witnesses for the state. No one at any time spoke but the clerk, who at one point asked if the jury "were likely" to agree upon a verdict. These circumstances were held to constitute reversible error.

Where evidence of communications between jurors and third parties is shown, the burden is upon the state to prove that no prejudice resulted. Rushnefsky v. State, 92 Tex. Cr. App. 433, 244 S. W. 372; State v. Bayless, 362 Mo. 109, 240 S. W. 2d 114.

Where the communication might have affected a juror, a new trial should be granted; only where it is shown that the communication could not have affected the juror will the verdict be sustained. Perry v. People, 63 Colo. 60, 163 P. 844. If there is a reasonable doubt as to whether the jury was affected, a new trial should be granted. Rhoades v. El Paso and S. W. R. R. Co., 248 S. W. 1064, 27 A. L. R. 1048.

In Planko v. Flintkote Co., 7 N. J. 55, 80 A. 2d 302, the court held that:

> "The test for determining whether a new trial will be granted for misconduct of jurors or intrusion of irregular influence is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with legal proofs and the court's charge, and the test is not whether the irregular matter actually influenced

the result but whether it had the capacity of doing so." 7 N. J., 61, 80 A. 2d, 305.

In People v. Migliori it was held that it was error to permit jurors to make telephone calls while they had the case for deliberation. People v. Migliori, 58 N. Y. S. 2d 361, 269 App. Div. 996.

In State v. Cotter, 262 Wis. 168, 54 N. W. 2d 43, there was evidence that a bailiff had spoken to the jury during deliberations; however, there was no evidence of resulting prejudice. The Wisconsin Court reversed, saying:

> "In criminal cases it has been held for many years that an unauthorized communication to the jury or a member thereof not made in open court and a part of the record is ground for the granting of a new trial. The rule is shown in the following quotation. 'The result of adjudications on this subject is to the effect that all proceedings in a case should be open and public, and in the presence of the parties, whenever practicable, so as to afford them all reasonable opportunity to participate in the proceedings, and if they are dissatisfied, to take such exception as the law allows. The due observation of this rule has led to a disapproval by the courts of any act by the judge, counsel, party or stranger, whereby communication is had with the jury after the case is submitted to them, and they have retired for deliberation on their verdict, except it be in open court, and with due regard to the rights and privileges of the parties. Whenever such communications were had, though they were not prompted by improper motives, and though they may not have influenced the jury in arriving at their verdict, still they are generally treated as in themselves sufficient ground for setting aside the verdict rendered, for the reason that no party should be subjected to the burden of an inquiry before the court, regardless of whether or not its conduct in this respect, or that of its officers or that of the opposing party, has tended to his injury * * *." 262 Wis., 171, 54 N. W. 2d, 44.

In State v. Rose, 43 Wash. 2d 553, 262 P. 2d 194, it was held that misconduct occurring in a felony trial would require a new trial in the absence of evidence showing no prejudice; and that where misconduct occurred during deliberations, a new trial would be required even though it be established that there were no actual prejudice.

Without belaboring further the applicable rule of law, it is clear that the defendant is entitled to at least a presumption of prejudice, barring some proof to the contrary. State v. Adams, 141 O. S. 423, 48 N. E. 2d 861, 146 A. L. R. 509. Upon the record it is equally clear that such proof was never offered or provided by the state, and the presumption should stand. Further, the circumstances are such that actual prejudice should be inferred, even if there were no presumption. Finally, the legislative mandate in Ohio is sufficiently strong to suggest that it was intended that a criminal defendant have absolute privacy for his jury, with the recourse of reversal for any impingement thereof.

It is submitted that the facts above set forth would require a new trial as a matter of due process without regard to Ohio law. But the matter of motions for new trial is governed by statute, an examination of which is appropriate at this time.

§2945.79, Revised Code, provides that:

> "A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the following causes affecting materially his substantial rights:
>
> (A) Irregularity in the proceedings of the court, jury, prosecuting attorney or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;
>
> (B) Misconduct of the jury, prosecuting officer, or witnesses for the state;
>
> (C) Accident or surprise which ordinary prudence could not have guarded against;
>
> (D) That the verdict is not sustained by sufficient evidence or is contrary to law; but if the evidence shows that the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without ordering or granting a new trial, and pass sentence upon such verdict or finding as modified, provided that this power extends to any court to which the cause may be taken on appeal;
>
> (E) Error of law occurring at the trial;
>
> (F) When new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing of said motion in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as under the circumstances of the case is reasonable. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses."

§2945.80, Revised Code, provides that a motion for new trial must be brought within one hundred and twenty days of the judgment of conviction.

§2945.83, Revised Code, provides certain condition when a motion for new trial shall not be granted:

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> (A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;
>
> (B) A variance between the allegations and the proof unless the accused is misled or prejudiced thereby;
>
> (C) The admission or rejection of any evidence against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;
>
> (D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;
>
> (E) Any other cause unless it appears affirmatively from the record that the accused was prejucided thereby or was prevented from having a fair trial."

We think that the action of the court officers complained of herein was a "misdirection of the jury" as that concept is defined by §2945.83(D), and that Sheppard was entitled to a new trial as a matter of Ohio law if it appears that he may have been prejudiced by the telephone calls. It cannot be disputed that all presumptions aside, he at least may have been thus prejudiced since the text of the conversations is not known. This being the case, Ohio has again denied petitioner the equal protection of its laws and his restraint must be adjudged illegal.

IV. (Issues No. 11 and 12, PTO-3) Did the action of the police, in seizing and holding petitioner's house, and excluding petitioner and his representatives from it, for the duration of the trial, with the concurrence of the trial court, violate petitioner's constitutional rights?

Was the refusal of the trial judge, as affirmed by the Court of Appeals of Cuyahoga County, to grant petitioner a new trial upon after-discovered evidence tending to show a third person in the murder room in corroboration of petitioner's defense, a violation of petitioner's constitutional rights?

Petitioner has chosen to consolidate the argument of these two issues, because the harm of the former is demonstrated by the substance of the latter, and hence they are inexorably intermeshed.

The stipulation supporting Issue No. 11 is sufficiently clear on its face to preclude the necessity of detailed factual statement here. It appears, first, that petitioner was most cooperative in permitting the police to enjoy full access to his dwelling house without their having to resort to warrants or court orders. It is equally apparent that this courtesy was never in the most remote sense reciprocated, but to the contrary.

There are numerous cases in the reports which deal with the return of seized property; most of these turn upon the legality of the seizure, or upon the contraband nature of the res, and would be of little help in resolving the issue herein presented; accordingly, they are not cited. We believe that the facts presented here are unique,

and that any decision resulting from them must sail incharted waters; we rely upon principles of fairness and logic, rather than precedent, to demonstrate the error which was committed.

It will be conceded that the state has a right to make a reasonable investigation whenever it is faced with the commission of a crime as horrendous as the murder of Marilyn Sheppard. And if there might in the ordinary case arise some question of the legal authority precedent to the invasion of a dwelling house, that question is absent here. Petitioner expressly permitted the police to enter, search, and look for evidence. It was not until he had been indicted and was facing trial, and the police had ostensibly concluded their investigation, that he (on August 24, 1954) most discreetly demanded that the Chief of Police return to him access to his home.

The record shows that the Chief refused on the advice of the prosecutor. It gives no hint as to what authority enabled the prosecutor to withhold that access, especially in view of the fact that the house then belonged not to petitioner, but to his son (it had been owned in fee by the decedent). In any case, counsel for petitioner filed no formal motion prior to trial for restoration of the house, and it was not until the state had rested that the effort precipitated by the letter to Chief Eaton was renewed.

The murder was committed in the bedroom of petitioner's home. That home was in the exclusive possession of the police. Petitioner claimed that his wife was killed by an intruder. The state claimed that he had killed her. If some resolution of this factual traverse were possible, the evidence most probably lay within the Sheppard home, and particularly in the murder room.

It may well be that the need for a detailed investigation of the premises did not manifest itself, in view of defense counsel, until the state had rested. At that point it no doubt became apparent that many of the questions which scientific inquiry might have answered had been left hanging by the prosecution. Whatever the thinking may have been, there can be no dispute that defense counsel took the necessary and proper steps to enable the defense to make its own investigation.

The state had rested. It had said, in effect, "We have proved Sam Sheppard's guilt." It could hardly have had any legitimate objection, at that point, to a reasonable effort by the defense to contradict that "proof" with its own.

The keys to the house were brought into court by means of a subpoena. As the stipulation indicates, when defense counsel first

demanded the keys, it was expressly suggested by the court that the keys be produced in this precise manner. When the court discovered that they had been so produced, he reversed himself and ruled that they could not be turned over to defense counsel in any event. In fact, he ruled that they belonged to the police. There is no conceivable authority by which this ruling may be judged proper. No title had passed to the prosecution or police. Their only possible legal entitlement to exclusive access to the house was evidentiary; this entitlement necessarily lapsed when the state rested its case. The ruling of the trial court at this point was not only arbitrary and unreasonable, and indicative of the general prejudice with which petitioner claims that he infected the entire proceeding; it was an unwarranted interference with the right of the defendant to investigate and prepare his case, a flagrant disregard of the minimum requirements of fairness which lie at the heart of that concept known in American jurisprudence as "due process of law."

Whether some error might be inferred from an unlawful seizure of this sort presents an interesting opportunity for legal debate; however, this question we need not approach here. That petitioner was actually deprived of evidence tending to exculpate him is manifest from the affidavit of Dr. Kirk (PTO-4, Ex. A)

The affidavit of Dr. Paul Leland Kirk is presented to this Court in its entirety, because it represents (in the view of petitioner) the most positive evidence that Sheppard is probably innocent. The circumstances under which it was received by the trial court, and discarded by both the trial and reviewing courts, must be carefully considered in attempting to determine the legal significance of these rulings.

It must be remembered that this was a case based entirely upon evidence of a "circumstantial" nature. No witness was ever presented upon whose testimony petitioner could have been found guilty; such guilt had to be inferred from the facts and circumstances which the jury could have believed from the evidence presented. Beyond that, a special rule of proof applies to such cases, in Ohio as in other jurisdictions, which supplements the rule of reasonable doubt. That rule is described by the Supreme Court of Ohio in the majority opinion as follows (PTO-2, Ex. 4, p. 6):

> ". . . it is conceded that the law of Ohio requires that the facts upon which a verdict of guilt is based must be established beyond a reasonable doubt. The facts so established must be entirely irreconcilable with any claim or theory of innocence and admit of no hypotheses other than the guilt of the accused."

Against this rule we submit the fact that a jury deliberated for nearly five full days before returning its verdict - there is a fair inference that the decision was a close one. It is also noted, as Judge Taft observed in his dissenting opinion, that "no effort has ever been made by anyone to state a set of facts and circumstances that the jury could have found from the evidence and that would not only support an inference of defendant's guilt, but that it supported only an inference of guilt." (PTO-2, Ex. 4, p. 10). The state in its briefs argued only that defendant "could have" been the murderer. The Court of Appeals in its opinion recited no factual pattern of guilt, but suggested several discrepancies which might raise a reasonable doubt as to Sheppard's innocence, in reverse of the correct reviewing procedure. These "discrepancies" were viewed in quite another light by Judge Taft (PTO-2, Ex. 4, p. 10-11).

The majority of the Supreme Court of Ohio purported to pass upon the question of sufficiency, then punted. Instead of looking to the evidence to determine just what proof of guilt had been presented, the court noted that the jury took the case under proper instructions and thus its verdict of guilty indicates that the evidence was sufficient. This was certainly a bootstraps operation at best; rather than discharge its own independent function of examining the proof, the appellate court bows to the jury verdict and

conclusively presumed that such verdict shows sufficiency as a matter of law.

Petitioner is not unmindful of the fact that his allegation of insufficiency of the evidence is a separate issue not presently before this Court for debate (see PTO-3, Issue No. 19). The references above set forth are not submitted for the purpose or urging a ruling on insufficiency at this time, but only to depict the state of the proof at the time the verdict was returned.

Shortly after the conviction was returned, petitioner's counsel were given the keys to the house; the police entitlement thereto was apparently thought to have expired when the case was over. Dr. Kirk was called in by petitioner's counsel, and commenced his investigation on January 22, 1955; it lasted for four days in Cleveland, and some additional time back at his laboratories, where various chemical tests were conducted. The results of the entire investigation are set forth in Exhibit A, aforesaid, and any attempt at detailed summarization would be presumptuous.

Dr. Kirk reconstructed the killing to an extent which the evidence reveals was never attempted by the state in its investigation, by examining the blood spatter, the velocity of the drops in various areas, the areas of no spatter indicating where the murderer must

have stood, the arc necessarily described by the swinging instrument, etc. Of primary importance to the issue as it reaches this Court is Dr. Kirk's discovery that one large spot of blood on the wardrobe door was of a type not belonging to either Marilyn or Sam Sheppard. No evidence could have been more crucial to the defense of the case.

Sheppard contended from the outset that he had been attacked by one or more intruders, who had killed his wife. The state asserted that there was no adult in the house at the time of the killing other than the defendant. Proof of the presence of a third person would have necessarily changed the verdict.

We will quickly concede that Dr. Kirk's affidavit offered more than a mere recitation of the factual proof his investigation had developed; he attempted to, and did in fact, analyze the evidence in the case as well as his own discoveries. In commenting upon this facet of the affidavit the Court of Appeals was caustic and brief:

> "In its total aspect, it is a most extraordinary and unusual document when related to the purposes to be served by it. The sole purpose of an affidavit offered to support a motion for a new trial on the ground of newly discovered evidence is to inform the trial court of the substance of the evidence claimed to be newly discovered which will be presented at a new trial if one is granted. It is never intended as a method to reconsider the evidence introduced at the trial of the case for the purpose of impugning the soundness of the verdict brought by the jury. If courts permitted such

> practices, the inherent certainty of a trial by jury would soon wane, and such function in our system of jurisprudence ultimately disintegrate and disappear. Yet a major part of Dr. Kirk's affidavit deals with evidence presented at the trial and ventures his opinions and conclusions with respect to it, together with a criticism of the methods of investigation and technical evidence presented by the prosecution. This, of course, was entirely beyond the scope of this instrument and the trial court had the indisputable right to disregard every particle of it, which it did. The affiant states in his affidavit that 'no instructions or suggestions were made to him as to what to find or what not to find by the attorneys representing the defendant.' We believe that Dr. Kirk could have spared himself much time and effort had he been told by the attorney for the defendant the narrow scope allowed him under the law for further investigation. Certainly much that is extraneous and redundant might have been left out of this affidavit." (PTO-2, Ex. 3, p. 7)

The Court fails to consider that Dr. Kirk was not an advocate hired to espouse the cause for the defendant; he was and is a most eminent criminologist, whose very business is the reconstruction and solution of crime. His qualifications, set out in Exhibit A (PTO-4) are lengthy and extensive, and would be sufficient to suggest to any impartial court that his conclusions and opinions might well be something more than wasted paper.

Dr. Kirk no doubt presumed that his affidavit would be examined, in the first instance, by an able and impartial judge whose paramount interest would be a determination as to whether or not there had been a miscarriage of justice. Although his experience as a witness must have made him aware of the restrictive nature

of the rules of evidence in a jury trial, he was perhaps also aware of the broad discretion reposed in trial judges to correct verdicts which are, or prove to be, factually erroneous. He had no reason to anticipate that a judge honestly seeking the truth would take offense at any help which so eminent an expert might be able to afford, whether it be analytical or factual. We think the excoriation of this witness by the Court of Appeals to have been wholly unjustified and chauvinistic; and if the trial judge did, as the Court of Appeals said, disregard utterly "every particle" of the affidavit not strictly devoted to some discovered fact, then the trial judge can hardly have approached the matter with an open mind or a disposition to seek the truth.

It is anomalous that judges, expert in the law but not in other matters, are given an almost blanket power to "overrule" science in areas where the judges cannot possibly have expertise. That this power should remain in the courts is necessary to our judicial system, but it ought certainly to be exercised with caution and deference to the superior knowledge of the scientist being overruled.

> "When professors of science swear they can thus distinguish, it would be taking too much on themselves for persons who like Judges, are not adepts, to say the witness cannot thus distinguish, and on that ground refuse to hear his opinions at all. By such a source the judge would undertake of his own sufficiency to determine how far a particular science, not possessed by him, can carry human knowledge, and to determine it in opposition to the professors in that science."

These words, written by Chief Justice Ruffin in 1851, (State v. Clark, 12 Ired. 154) have been echoed through the years by conscientious jurists. Mr. Justice Holmes once said, in a speech at Harvard College some seventy years ago:

> "Learning, my learned brethren, is a very good thing. I should be the last to undervalue it, having done my share of quotation from the Year Books. But it is liable to lead us astray. The law, so far as it depends upon learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary, and fixes the limits of our imagination; we cannot get away from it, There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."
>
> "I hope the time is coming when this thought will bear fruit. An ideal system should draw its postulates and its legislative justification from science. As it is now we rely on tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom . . ." (Speeches, Little Brown & Co., Boston, 1918)

In Boeche v. State, 151 Neb. 368, 383, 37 N. W. 2d 593, 596, it was said that:

> "Modern court procedure must embrace recognized modern conditions of mechanics, psychology, sociology, medicine, or other sciences, philosophy and history. The failure to do so will only serve to question the ability of the courts to efficiently administer justice."

A disregard of these deferential cautions has too often reflected unflatteringly upon courts which have peremptorily ruled a given scientific principle out of existence. Thus in People v. Berkman, 307 Ill 492, 139 N. E. 91, the Illinois Court not only rejected evidence of firearms identification (showing that a certain bullet was fired from a specific gun) given by a police expert, but ruled that such evidence was impossible:

> ". . . we feel very sure that no such evidence could be produced. The evidence of this officer is clearly absurd. . ."

This jumping of the judicial gun has in the past led to more than one miscarriage of justice; consider, for instance, those cases where defendants were adjudged guilty in paternity despite exclusionary blood test results: Berry v. Chaplin, 74 Cal. App. 652, 169 P. 2d 442; Harding v. Harding, 22 N. Y. S. 2d 810; State v. Clark, 144 O. S. 305, 58 N. E. 2d 773. It was not until 1949 (Jordan v. Mace, 144 Me. 351, 369 A. 2d 670) that the law was willing to concede that even the jury system could not compete for accuracy with the certainty of blood-grouping exclusionary tests; fortunately, it is now the rule

in virtually every jurisdiction that no jury verdict can stand against such evidence.

This circumstance is most appropriate to the issue at hand, because it represents the one area of scientific achievement where the legal process is willing to bow unequivocally, and accept "conclusive proof." Inasmuch as Dr. Kirk's principal discovery was the presence of a third person in the murder room proved by blood-grouping tests, we feel that both the trial judge and the Court of Appeals dismissed the significance of his affidavit much too lightly. If Dr. Kirk was correct in his testing, Sam Sheppard did not commit the murder for which he has now been incarcerated for nearly ten years.

Much was made by the Court of Appeals of a lack of due diligence on the part of Sheppard's attorneys in seeking access to the house for investigative purposes. Many officials came forward, upon the filing of the Kirk affidavit, to assert that the investigation could have been conducted at any time upon request, although a police officer would of course have had to be present. It may be that defense counsel did not take all steps possible to gain reasonable access to the house, but arguments against due diligence ought to be completely foreclosed by the ruling of the

trial judge that the keys "belonged to the police." This ruling was illegal and obstructionary. Defense counsel made a very concerted effort, and were frustrated arbitrarily by the court.

Holding that a man, though probably innocent, must languish in jail because of lack of "due diligence" by his counsel would be in and of itself a very sorry proposition to advance in a criminal case; in view of the demonstrable diligence apparent on the record, this ruling is unconscionable.

Defendant contends, therefore, that his constitutional rights were violated in this instance as follows:

(1) The ruling of the trial judge refusing defendant the keys to his own house after the state had rested its case constituted an unfair discrimination against him, deprived him of the effective right to counsel in the defense of his case, and violated his right to due process of law in the trial of his case.

(2) The ruling of the trial court, and the Court of Appeals, in refusing to recognize evidence which would have probably resulted in a verdict of not guilty by the jury had it been presented to the jury, does not rise to the minimum standard of fairness contemplated by the concept of "due process of law" in that this ruling disregards

the probable wrongful incarceration of a citizen of the United States.

V. (Issues No. 15 and 16, PTO-3) Did the trial judge, in permitting police officers to testify that petitioner had refused a lie-detector test, violate petitioner's constitutional rights?

Did the trial judge, in permitting a witness named Houk to testify that he had taken a lie-detector test, violate petitioner's constitutional rights?

The stipulations of fact relating to these two issues make it clear that evidence was presented to the jury that (1)petitioner had repeatedly refused to submit to a lie-detector test at the hands of the police, and (2) that J. Spencer Houk, a prosecution witness had been given such a test by the police. We argue these two issues together, because of their obvious similarity.

Before turning to the reported cases, however, we must observe that the first of these issues was never taken up on appeal in the Ohio Courts. Why this is so is difficult to understand, but since the chief architect of the defense is now deceased the explanation reposes with him, any harsh criticism would be unfair. As the law set forth below clearly indicates, the receipt of this evidence was easily the most horrendous and universally condemned error of law in the entire proceedings. In the history of our jurisprudence, there is not a single case which even suggests that refusal to submit

to a polygraph, or "lie-detector" test is competent evidence of guilt; there are many, many cases to the contrary. The law is so clear that we anticipate that respondent may concede the inadmissibility of this evidence, and argue that the failure to raise the issue (No. 15) in the state courts precludes its consideration here.

There are several reasons why such a contention should not be sustained. First, any error involved is necessarily the error of Sheppard's trial attorneys and not of Sheppard himself. With all due regard for the doctrine of waiver, denial of relief because of a serious error on the part of counsel is always an onerous method of procedure, and ought to be avoided except where circumstances fairly demand it.

Second, the error is so grievous that a recent case has held it to be reversible even where no objection to the evidence is taken at trial. State v. Driver, infra. Third, in view of the ruling of the Court of Appeals on Issue No. 16, which was appealed, and the failure or refusal of the Ohio Supreme Court to pass upon that issue, it is doubtful that the result would have been changed if a full appeal had been taken.

Fourth, there is no means whereby petitioner can now raise the issue in the Ohio Courts. His appeals are complete, the time

for filing a motion for new trial has long expired, habeas corpus is not available to raise matters which could have been raised on appeal, and there is no writ of error coram nobis. This is the only forum where a ruling can be had, and under the doctrine of Fay v. Noia, supra, the requirement of exhaustion of state remedies is met whenever there is no remedy available in state courts at the time the federal habeas is filed. Surely it cannot be said that Sheppard's failure to bring this issue up on appeal was due to laxity or negligence on his part; it resulted from, and only from, an error in judgment on the part of those who represented him at trial, when his rights were being preserved.

Fifth, and last, Issue No. 16 (as to which remedies were fully exhausted) is so close in kind to Issue No. 15 in type and kind that any ruling made upon one ought to apply to the other, and hence the distinction, if any, as to exhaustion, should be immaterial.

One other question may be presented by these issues, and that is whether or not the error, however grievous, can be said to comprise a violation of federal constitutional rights. We think that this question must be answered in the affirmative.

The Fourteenth Amendment guarantees, in essence, that every state must accord its citizens, in criminal cases, a "fair"

trial. This broad concept has been the subject of much concern to our Supreme Court. The right to counsel and the use of illegally obtained evidence, once thought to be beyond the purview of constitutional protection, have since upon reconsideration been included. The criterion seems to be, basically, a concept of fundamental fairness; the fairness which is "implicit in a concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149. If a man may not be convicted on illegally procured evidence, however probative, as a matter of constitutional protection, he must certainly not be convicted on evidence which is wholly incompetent. Any system of law which could overlook "evidence" of the nature hereinof complained would have to take a similar view of testimony of astrologists and witch doctors, whose opinions, grounded in the occult, might furnish evidence of guilt. Such were the guidelines which permitted the conviction and execution of Massachusetts women as "witches" before we had a federal constitution; they have no place in present jurisprudence.

As we shall see from the reported cases below-discussed, the courts have been quick to rule that evidence of refusal to submit to a polygraph test is presumed to be grossly prejudicial, even though it appear only in the form of a subtle inference. The reason for this position is very clear; for while the courts have consistently found

a lack of scientific certainty in the process of "lie-detection," the public has been given good reason to believe that the "lie-detector actually detects lies.

We think that as a matter of Common Knowledge this Court can take notice that news media frequently report that the police have "cleared" some suspect or other in a criminal investigation; or that police have obtained a confession following the failing of a "lie-detector" test. The instrument is something of which the public is very acutely aware, and although it is a much misunderstood technique it has worked its way into the public confidence in large measure. Therefore, notwithstanding judicial pronouncements to the contrary, people in general are most apt to attach no little significance to the reaction of an accused when he is faced with a lie detector test. This is why the courts have been adamant in inferring prejudice from the slightest mention of "lie-detector" during a trial.

In a case resting upon meager and equivocal circumstantial evidence such as the one at bar, evidence that the "only suspect" refused to submit to a scientific test of veracity must have resulted in incalculable damage to the presumption of innocence. We think it vitiated the entire trial as a matter of due process.

Inspection of the testimony of the police officers as this is set forth in PTO-4, Issue No. 15, Stipulation, raises serious questions as to its admissibility on any grounds, without regard to the lie-detector question; it appears that an accusation coupled with a denial is evidence of some sort, or was in this case. But in any event, and notwithstanding the belated objection and lack of exception by defense counsel, the prejudicial effect of this evidence cannot be denied.

It may be contended that the trial judge corrected the error with a curative instruction - but this is certainly not the case. He at no time instructed the jury that the evidence was not competent, or that no inference could be drawn from it; he only stated that defendant had no "legal obligation" to submit to the test, which did not lessen to any degree the damaging implication of his refusal.

The lie detector was first offered to a court of record in a reported case in 1923. Frye v. United States, 293 F. 1013. It was rejected as scientifically uncertain, "not generally scientifically accepted." Since that time well over one hundred cases have arisen with respect to the admissibility of polygraphic evidence, all with a uniform result - rejection. We will cite but a few. State v. Bohner,

210 Wis. 651, 246 N.W. 314 (1933); People v. Forte, 279 N.Y. 204, 18 N.E. 2d 31, (1938); People v. Becker, 300 Mich. 562, 2 N.W. 2d 503 (1942); State v. Cole, 354 Mo. 181, 188 S.W. 2d 43 (1945); State v. Lowry, 163 Kans. 622, 185 P. 2d 147 (1947); People v. Wochnick, 98 Cal. App. 2d 124, 219 P. 2d 70 (1950); Henderson v. State (Okla. Crim. Ct. App.) 230 P. 2d 495 (1951); Boeche v. State, 151 Neb. 368, 37 N.W. 2d 593 (1949).

At the time this case was being tried the ink was hardly dry on an Ohio decision ruling inadmissible lie-detector evidence. Parker v. Friendt. 99 Ohio App. 329, 118 N.E. 2d 216 (1954)

In State v. Kolander, (Minn. 1952) 52 N.W. 2d 458, on facts very similar to those at bar, evidence was admitted that defendant had been asked if he would submit to a lie-detector test. A motion to strike was denied; however, the court did instruct the jury as follows:

> "Of course, the jury understands he did not have to take one unless he wanted to and probably no inference adverse to him should be - the jury should not consider anything adverse to him, the fact that he did not take it." (p. 464)

This instruction was held to be an insufficient curative measure, and the conviction was reversed. It is noted that the instruction quoted above ordered that no inference be drawn from the refusal, something the trial judge in this case omitted.

In People v. Aragon, 154 Cal. App. 2d 646, 316 P. 2d 370, the defendant, a boxer, was convicted of fixing a fight. There had been evidence that he had taken and failed a lie-detector test. The appellate court reversed, saying:

> "If the result of the lie-detector test is inadmissible in the first instance, surely no one would contend that the results can be cloaked in the raiment of an accusatory statement and then slipped into evidence* * * We believe that the prosecution should not be permitted to introduce indirectly what would be highly improper if done directly." 154 Cal. App. 2d, 658; 316 P. 2d, 378.

In People v. Wochnick, 98 Cal. App. 2d 124, 219 P. 2d 70, a prosecution for murder, a polygraph examiner testified to a conversation with the defendant. Certain discrepancies on the polygrams were pointed out to defendant, and he was asked to explain them; his answer was equivocal. The conviction was reversed, on the ground that this in effect put before the jury an inference that defendant had failed the test, which was inadmissible and highly prejudicial.

In State v. Driver (N. J. 1962) 183 A. 2d 655, the prosecutor alluded in his opening statement to the fact that defendant had refused to submit to a lie test. No objection was taken to these remarks by the defense. The appellate court reversed, saying that the error was so horribly prejudicial that it required reversal even though never objected to.

In People v. Carter, 48 Cal. 2d 737, 312 P. 2d 665, a witness in the case (not the defendant) who had been a suspect himself was allowed to testify that he had submitted to a lie-detector test; the results were not mentioned. This was held to be prejudicial error, permitting the jury to infer that (1) the suspect had passed the test or he would not have mentioned it, and (2) if the suspect passed it the defendant could not have since their testimony was in conflict. This is precisely the harm complained of in Issue No. 16. A similar result was reached in Kaminski v. State (Fla. 1953) 63 So. 2d 339. In that case a prosecution witness whose testimony had been impeached was asked on redirect if he had submitted to a lie test. The affirmative answer was allowed to stand, but the results were not given. The case was reversed on the ground that this was tantamount to a showing that the government witness was telling the truth by means of inadmissible lie tests.

The rule is the same in Ohio. In State v. Smith, 113 Ohio App. 461, 18 Ohio Ops. 2d 19, the accused on cross-examination admitted that he had taken a lie-detector test, but did not know the results. The receipt of this evidence was held prejudicial, tantamount to informing the jury that the defendant had lied during the test. The conviction was reversed.

The string of decisions on this point are too numerous to set forth here without unnecessary redundancy, but the rule is universal, not only in the state courts but the federal courts as well. United States v. Stromberg, 179 F. Supp. 279; Szocki v. Cavell, 156 F. Supp. 179; United States v. Bando, 244 F. 2d 833.

The extent to which courts will go to presume prejudice from the mere mention of a lie-detector in connection with a criminal case is apparent in the preceding cases, and in Stockwell v. State, (TexCrRep 1957) 301 S. W. 2d. 669. In that case the jurors had read a newspaper story wherein the defendant had taken a lie detector test and his sister had later charged that the machine was defective. The conviction was reversed; the reviewing court felt that an inference would arise in the mind of the reader of such a circumstance that the results of the test had been unfavorable to the defendant.

Against this most formidable array of cases it cannot be seriously contended that the defendant was not highly prejudiced by the evidence used against him, in both its forms. The Court of Appeals in passing upon Issue No. 16 created the only decision which stands contra to the array. It said, "The results of the test were not inquired about, and the simple fact that a test was made

by agreement of the witness under the circumstances could not prejudice the defendant's case." (PTO-2, Ex. 3, p. 34) Every court, before and since, which has had occasion to pass on this issue has taken a directly opposite stand (including the courts of Ohio) as the above citations indicate. The Supreme Court of Ohio, of course, did not pass upon this issue although it was argued by brief.

We do not suggest that this result was reached because the judges of these courts were incompetent or unintelligent; on the contrary, they are no doubt most able and conscientious jurists. We do contend that this is but another striking example of the lengths to which these courts have gone in order to hold together, by the sheer force of judicial statement unsupported by reason, logic, or precedent, a criminal conviction whose perpetuation became too important to the "honor" of the entire state. It is because of wholly inexplicable rulings such as this that petitioner has claimed that he can have no justice at the hands of Ohio courts.

There is one additional facet of the "lie-detector" situation, inasmuch as petitioner comes to this court seeking not only strictly legal relief, but equitable relief as well. It is true that petitioner did refuse to allow police to give him a lie test; he did so on the advice of counsel, and after the police had informed him that they were con-

vinced of his guilt even though they could not prove it. Obviously, anyone who would submit to a test by those convinced of his guilt would have to be out of his mind. Petitioner testified, in explanation, that he was always willing to submit to a test by an impartial examiner. (It may well be that defense counsel did not object to the evidence because Sheppard's refusal had been blasted throughout the county by news media; perhaps, under the circumstances, it was tactically more sound to admit and explain, rather than block evidence about which the jurors had doubtless already heard.)

That Sheppard was sincere in his offer to take an impartial test was demonstrated in 1957 when he agreed to submit to examination by a panel of eminent authorities in the prison at Columbus. Permission for this test was granted by then governor C. William O'Neill, and then at the last minute withdrawn; no reason for this reversal was given. (Holmes, The Sheppard Murder Case, David McKay Inc., New York, 1961, pp. 280-284)

In 1961 permission for the test which the state had purported to so vigorously seek was requested of Governor DiSalle, and refused; a subsequent mandamus proceeding in the Ohio Supreme Court saw that court punt once again. The court could not aid, it was ruled; whether or not a polygraph examiner would be allowed to enter the prison would be left entirely to the warden - the court could not intervene; there was no right to enforce. State ex rel Sheppard v.

Koblentz, 174 O. S. 120, 187 N. E. 2d 40 (1962). With all efforts to demonstrate factual innocence blocked at every turn - even the lie-detector, which the state had wrongfully used to convict him and then prevented him from using for his own benefit - Sheppard filed this petition attacking the conviction on legal grounds. It is ironic that these very issues should be the strongest of his petition, but an examination of the applicable law would seem to indicate that such is the case.

The errors complained of deprived petitioner of that fundamental fairness required by the "due process" under the fourteenth amendment; the ruling of the Court of Appeals, which was made especially for and only for the Sheppard case and has never been applied in any other case in Ohio, together with the refusal of the Supreme Court of Ohio to review and correct that ruling, constitutes a denial of the equal protection of the laws. The conviction must be set aside.

VI. (Issue No. 17, PTO-3) Did the Chief Justice of the Supreme Court of Ohio, in appointing his own replacement in violation of the Ohio Constitution to sit on petitioner's appeal, violate petitioner's constitutional rights?

It is provided in the Ohio Constitution, Article IV, Section 2, that:

> "* * * If any of said Judges shall be unable, by reason of illness, disability or disqualification, to hear, consider or decide a cause or causes, the Chief Justice, or in case of the absence or disability of the Chief Justice, the Judge having the longest period of service upon that Court, may direct any Judge of any Court of Appeals to sit with the Judges of the Supreme Court in the place and stead of the absent Judge."

As is indicated in the stipulation supporting this issue, the Chief Justice disqualified himself because his son Richard had been connected with the prosecution of petitioner in the early stages of the case. He then appointed Montgomery, J., to sit in his place and stead. (Actually, Judge Montgomery was the second replacement appointed; a Judge named Middleton had earlier been appointed, and had sat on the motion for leave to appeal; thus the entry shows that an earlier order was "vacated.")

We think that the plain language of the Ohio Constitution requires a finding that the Court which heard and decided petitioner's case was illegally constituted. We concede that as a general rule the highest court of a state is empowered to interpret its own constitution, and is not subject to review on matters of state law. We further concede that due process does not require that any appeal be provided by a state, and certainly not a second appeal such as this was.

We do contend, however, that where a state law exists it must be applied to all of the citizens of that state on an even basis; that what happened here is so plainly contradictory to the state constitutional requirements that petitioner was thus deprived of equal protection of the laws.

It must be remembered that Richard Weygandt's role in the Sheppard case was not inconsequential. The editor of the Cleveland Press has preserved for us, in his autobiography (Seltzer, The Years Were Good, World Pub. Co., Cleveland, 1956, Ch. 26 and p. 256), the circumstances prevailing at the time there fell to Mr. Weygandt, as Law Director for Bay Village, the delicate task of determining whether there was sufficient evidence to justify the arrest of petitioner:

> "On July 30, the Cleveland Press published, again spread across the top of its first page, another editorial. This one was headed: 'Quit Stalling - Bring Him In.' Once more I wrote it myself. It was my neck I was sticking out.
>
> > 'Maybe somebody in this town can remember a parallel for it. The Press can't.
> >
> > And not even the oldest police veterans can either.
> >
> > Everybody's agreed that Sam Sheppard is the most unusual murder suspect ever seen around these parts.
> >
> > Except for some superficial questioning during Coroner Sam Gerber's inquest, he has been scot-free of any official grilling into the circumstances of his wife's murder.
> >
> > From the morning of July 4, when he reported the killing to this moment, 26 days later, Sam Sheppard has not set foot in a police station.
> >
> > He has been surrounded by an iron curtain of protection that makes Malenkov's Russian concealment amateurish.

> Certainly, Corrigan will act to protect Sam Sheppard's rights. He should.
>
> But the people of Cuyahoga County expect you, the law enforcement officials, to protect the people's rights.
>
> A murder has been committed. You know who the chief suspect is.
>
> You have the obligation to question him - question him thoroughly and searchingly - from beginning to end, and not at his hospital, not at his home, not at some secluded spot out in the country.
>
> But at Police Headquarters - just as you do every other person suspected in a murder case.
>
> What the people of Cuyahoga County cannot understand, and the Press cannot understand, is why you are showing Sam Sheppard so much more consideration as a murder suspect than any other person who has ever before been suspected in a murder case
>
> Why?' (op. cit., pp. 256, 273-75)
>
> That night Dr. Sam was arrested on a murder charge and taken to Police Headquarters."

We are given some picture, then, of Richard Weygandt poring over the evidence and exhibits, already under newspaper indictment for criminal conspiracy to obstruct justice because he, as a Bay Village "official," was thought to be one of those "protecting" petitioner. He did determine the evidence to be sufficient (one wonders how in the world he, or any other individual in his position, would have dared to do otherwise). On that evidence Sheppard was indicted and put to trial. Its sufficiency was a hotly contested question in all the courts. A reversal for insufficiency of evidence would at

His family, his Bay Village friends - which include its officials - his lawyers, his hospital staff, have combined to make law enforcement in this County look silly.

The longer they can stall bringing Sam Sheppard to the police station the more surer (sic) it is he'll never get there.

The longer they can string this whole affair out the surer it is that the public's attention, sooner or later, will be diverted to something else, and then the heat will be off, the public interest gone, and the goose will hang high.

This man is a suspect in his wife's murder. Nobody yet has found a solitary trace of the presence of anybody else in the Lake Road house the night or the morning his wife was brutally beaten to death in her bedroom.

And yet, no murder suspect in the history of this County has been treated so tenderly, with such infinite solicitude for his emotions, with such fear of upsetting the young man.

Gentlemen of Bay Village, Cuyahoga County, and Cleveland, charged jointly with law enforcement —

This is murder. This is no parlor game. This is no time to permit anybody - no matter who he is - to outwit, stall, fake or improvise devices to keep away from the police or from the questioning anybody in his right mind knows a murder suspect should be subjected to - at a police station.

The officials throw up their hands in horror at the thought of bringing Sam Sheppard to a police questioning for grilling. Why? Why is he any different than anybody else in any other murder case?

Why should the police officials be afraid of Bill Corrigan, his lawyer? Or anybody else, for that matter, when they are at their sworn business of solving a murder?

best reflect adversely on Richard Weygandt as a lawyer, and at worst leave him open to a charge of being derelict in his duty as Law Director, exposing him to civil damages for malicious prosecution.

In light of these circumstances, can it be said that Richard's father, as Chief Justice, was in any position to exert even the slightest influence on the case? However subconscious the notion might be, it is fair to infer (without casting any stones) that Chief Justice Weygandt had some desire to see Richard's determination of law receive the final, and most critical, endorsement of the state's highest court. This being the case there could indeed have been some inclination, again perhaps subconscious, to select a replacement Judge whose juridicial philosophy was known to lean in a given direction.

It is not as though the language of the constitutional provision left room for some interpretation, for its command is plain and unequivocal. It must be presumed that a Chief Justice is familiar with the constitution which it is his duty to follow, and hence the appointment could only have been made with the knowledge in mind that the constitution required otherwise. This we regard as a sufficiently clear error to require correction by a federal court under the provisions of the fourteenth amendment.

It is well-recognized jurisprudential principle that constitutions, expressing the sovereign will, may not be contravened by the executive, the legislative, or the judiciary. It is of course the judiciary which determines, in the final analysis, what certain constitutional provision may mean, and in view of this interpretive role it is somewhat paradoxical to say that the judiciary is bound by the constitution - and yet it cannot be denied that this is certainly the case. While the interpretive power is both broad and deep, it is not limitless; plain language is plain language.

In Travelers Insurance Co. v. Marshall, 124 Tex. 45, 76 S, W, 1007, 96 A. L. R. 802, a suit had been brought. The defendant sought an injunction to halt the suit, citing a Texas statute barring collection suits in emergency situations caused by economic depression. The plaintiff challenged the constitutionality of the statute as conflicting with the contract clause of the Texas constitution. The Texas court said:

> "Neither the legislature, executive officers, nor the judiciary can lawfully act beyond the limits of this constitution. * * * Necessity that is higher than the constitution can safely have no place in American Jurisprudence. That principle is necessarily vicious in its tendency, and subversive of the constitution. It should be, and is, limited by constitutional inhibitions." 124 Tex 51, 76 S. W. 1009, 96 A. L. R. 806.

The statute barring suit was declared void.

In People ex rel Sammons v. Snow, 340 Ill. 464, 173 N. E. 8, a defendant awaiting trial was denied bail because of his long criminal record. He brought habeas corpus, and the Supreme Court of Illinois ruled that his constitutional entitlement to bail in a non-capital case was absolute:

> "The constitutional right to be admitted to bail cannot be disregarded. The judge has no more right to disregard and violate the constitution than a criminal has to violate the law."

In State v. Arregui, 44 Idaho 43, 254 P. 789, the defendant was convicted on evidence illegally secured, in violation of the U. S. Constitution. In reversing, the Idaho Court said:

> "Law and Court-made rules of expediency must not be placed above the constitution * * * A continued disregard of the rights guaranteed under the Fourth and Fifth Amendments, and the principles thereof incorporated into the state constitutions, leads us directly to revolution against their usurpation." 44 Idaho 57, 254 P. 792.

In 21 C. J. S. 259, Courts, §168, the following appears relative to the power of an officer of the judiciary to designate a replacement judge:

> "However, an order of assignment is unsufficient in itself to confer jurisdiction where the chief justice or other officer making it is without power to do so * * *" To be valid,

> statutes relating to the assignment or detailing of judges to certain courts, or to the judges or judicial officers who may preside over such courts and sit for the trial of causes therein, must, of course, not contravene constitutional provisions."

Petitioner says, then, in sum, that Chief Justice Weygandt did not have the power to make a valid appointment of a replacement, because it was expressly denied him by the Ohio Constitution; that Judge Montgomery was improperly permitted to vote in the decision of the case, and that his unlawful participation vitiates the judgment of the Ohio Supreme Court. That judgment being void, petitioner is entitled to his freedom notwithstanding the power of the Ohio Supreme Court to rehear and determine the case.

VII. (Issue No. 20, PTO-3) Did the Supreme Court of Ohio, in failing to pass upon all of the errors assigned by petitioner in his appeal, as required by Ohio Statutes, violate petitioner's constitutional rights?

The position taken with respect to this claim of error is similar to that of the previous assignment; although the Supreme Court of Ohio had no duty to allow petitioner's appeal to be heard, having granted the right to be heard the court was bound by Ohio law to treat petitioner equally, observing the statutes providing for such review.

As was correctly pointed out by Judge Taft in his dissenting opinion (PTO-2, Ex. 4, p. 7), only assignments of error not argued by brief may be disregarded by the Supreme Court. §2505.21 Revised Code. The petitioner assigned 29 errors of law in his brief, and argued each; the majority passed on only three of these, which were "stressed in oral argument." (PTO-2, Ex. 4, p. 2) By what authority were the remaining 26 disregarded?

The majority purported to pass on (1) the excessive publicity, (2) the phone calls by the deliberating jurors, and (3) the sufficiency of the evidence. The opinion concludes by declaring:

> "We have carefully examined the other errors assigned and find none, either in the admission or rejection of evidence or the instructions of the court, prejudicial to the defendant."

In the first place, we feel that the court did not judicially determine even the three questions it discussed, at least not in accordance with any known method of judicial review. With respect to the publicity, it merely extolled the virtues of the jury system and the discretion of the trial judge; it made no comment whatsoever on the horribly prejudicial and damning front-page editorials such as the one quoted in Section VI, supra. It paid no heed to the inadmissible evidence proven through news media, the publication of

the jury list thirty days before trial, the prejudicial broadcasts of Walter Winchell and Bob Considine, or the refusal of the trial judge to investigate their prejudicial effect by questioning the jurors. All of these things were fairly shouted at the court in petitioner's brief, but evidently not thought to be worthy of consideration or mention.

As to the phone calls, the majority simply reversed the rule previously established (State v. Adams, supra,), whereby phone communications are presumed prejudicial until the contrary is shown, and with no evidence whatever to go on issued broad assumptions of no prejudice. This view of the issue in question has never been followed before or since; it remains as one of the "special" rules of law which was made by and for the Sheppard case, and that case only.

The issue of sufficiency was never passed on at all, although the court purported to review this question. There was no mention of the evidence which justified the submission of an issue of fact to the jury, no recitation of the facts and circumstances which the jury could have found that were legally sufficient to comprise proof

in a circumstantial criminal case. This issue was summarily disposed of through a presumption of some sort that the jury, having been properly instructed, must have been properly convinced of guilt. Thus the final arbiter of sufficiency in petitioner's case was not the Supreme Court of Ohio, but the jury; a most unusual procedure, to say the least!

Those assignments of error which the court said it had "carefully examined" and found to be lacking in prejudicial effect are of some consequence at this point, for if this is true the court has, however summarily, accorded petitioner at least some review.

There was no mention of the Houk lie-test evidence, although an examination of authorities in 1956 (when this opinion was written) would have revealed the same universality of judicial rule that is demonstrated by Section V, above. One might well expect that a Supreme Court, if it did intend to rule that such evidence was not prejudicial and thus create a contrary rule, might at least give the world a glimpse of the rationale which had led to this singular stand. And it is manifest from cases subsequently decided (State v. Smith, supra, 1960) that this is not the law of Ohio and that inferior appellate courts in that state do not recognize it as such. There seems to be some implicit understanding that the Sheppard case is unique, and therefore not general precedent to be fitted into the framework

of "stare decisis."

There was evidence, as the dissent loudly complained, that Nancy Ahern was told by Marilyn Sheppard that Marilyn had been told by a Dr. Chapman that Dr. Chapman had been told by Sam Sheppard that Sam was thinking about a divorce. This evidence, in the form of testimony by Nancy Ahern, was admitted over objection. The Court of Appeals, in passing upon this claim of error, said:

> "Statements such as were given in evidence or testified to by Mrs. Ahern as a statement by the decedent are always admissible to show that the statement was made or to establish the state of mind of the parties where their relationship is material to the issues of the case." (PTO-2, Ex. 2, p. 33)

It is not the purpose of this brief to impugn the intelligence of the Court of Appeals of Cuyahoga County, but no person with even a rudimentary knowledge of the rules of evidence can help but gag over this ruling - a ruling which the Supreme Court "carefully examined" and found to be less than prejudicial.

Analysis reveals that:

(1) If Dr. Chapman had testified as to a statement made by the defendant, this evidence would have been competent as an admission by a party to the litigation.

(2) If Marilyn had testified to what Dr. Chapman told her Sam had said, this would have been pure and unadulterated hearsay, and absolutely inadmissible for the purposes of proving that Sam had made the statement.

(3) When Nancy Ahern testified to what Marilyn had told her Dr. Chapman had said Sam had said, this was double hearsay and absolutely inadmissible under any theory of law ever recognized in all of English and American Jurisprudence, including all of Ohio Jurisprudence in every case before and since this most special Sheppard case.

The view of the Court of Appeals cannot be sustained by any stretch of juridicial reasoning. By indicating that such testimony was admissible to "prove that the statement was made" the Court apparently refers to the so-called verbal acts doctrine. This applies only when testimony of an utterance is offered not to prove the truth of the matter contained therein, but only that the utterance occurred. That Marilyn made such a statement is wholly irrelevant; the truth of her statement was wholly inadmissible and utterly prejudicial.

Nor was this evidence in any sense competent as proof of the "state of mind of the parties." It did not prove any state of mind as to Marilyn; it could not prove any state of mind as to petitioner. The only proof of that state of mind would have been Dr. Chapman. There is nothing in the record to indicate that Dr.

Chapman's testimony was requested by the prosecutor, or that his deposition was sought.

We will not belabor the point by thrashing out each of the assigned errors which, after "careful examination" was found to be lacking in prejudice. The two recited above are sufficient to prove the point. Bearing in mind that under the statute cited in Section III, supra, the admission of inadmissible evidence requires a new trial whenever it "may have been" prejudicial to the defendant, we are unwilling to accept the fact that the Supreme Court actually overruled exceptions of this gravity. We know that counsel for respondent, however diligently they may search, will find no case in which some other Ohio Court has cited the Sheppard case in approving lie-detector evidence or double hearsay; this can only be because these "rules" are not rules at all, but only a means of sustaining a conviction whose maintenance became a statewide project. Sheppard was in effect afforded very limited review, or no review at all, by a court which had granted him an appeal as of right. He was manifestly denied, in a very real sense, the equal protection of the laws. His restraint is constitutionally invalid. He is entitled to release.

CONCLUSION

With these contentions, petitioner submits to the Court his entitlement to relief. He well realizes that he is asking a District Judge to overrule all of the state courts in a celebrated and controversial case, and that the responsibility thus imposed is indeed grave. However, it is sincerely suggested that cases of the type herein depicted are the very root of the justification for the supervisory role into which Federal District Judges have been cast.

It is admittedly difficult to define just what is meant by the term "due process of law," and to ascertain where its limits have been transgressed. No one has ever been able to satisfactorily interpret this term into a foreign language, principally because no other country has ever nurtured this precise concept. It is unique. It is the strength of this country.

There have been some expressions of due process by our Supreme Court, and these are worthy of note, even if they are principally in negative terms.

> ". . an arbitrary and unreasonable requirement so inconsistent with the established modes of administering justice that it amounts to a denial of due process." Owenbey v. Morgan, 256 U.S. 94, 103.

". . . convictions cannot be brought about by methods that offend 'a sense of justice!'" Rochin v. California, 342 U.S. 165, 173.

". . . some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105.

"Representing profound attitude of fairness between man and man, and more particularly between man and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163.

With only these very broad guidelines, this Court is required by the Supreme Law of the Land to now exercise a wholly independent judgment on each question of federal law raised by these issues, giving no deference to what state judges may have ruled on federal questions. Townsend v. Sain, supra, Petitioner submits that in each of these issues he has a substantial claim that his constitutional rights have been violated; but that taking them all together, as they here appear, the accretion of error is so great and so contrary to that fundamental fairness "implicit in a concept of ordered liberty" that relief is more than warranted.

It is long overdue.

Samuel H. Sheppard
By his attorneys,

F. Lee Bailey
Benjamin L. Clark
Russell A. Sherman