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Defendant's Brief in Opposition to Plaintiff's Motion to Exclude Testimony from 1954 Trial

William D. Mason
Cuyahoga County Prosecutor

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IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

ALAN J. DAVIS, Special Administrator
of the Estate of
SAMUEL H. SHEPPARD,

Plaintiff,

vs.

THE STATE OF OHIO,

Defendant.

Judge Ronald Suster

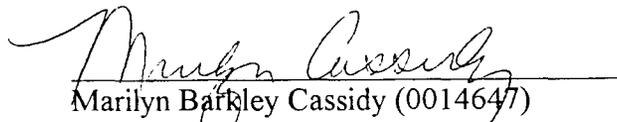
Case No. 312322

**DEFENDANT'S BRIEF IN
OPPOSITION TO PLAINTIFF'S
MOTION TO EXCLUDE
TESTIMONY FROM 1954
TRIAL**

Defendant, State of Ohio, through and by counsel, William D. Mason, Prosecuting Attorney, Cuyahoga County, Assistant Prosecutor A. Steven Dever, and Assistant Prosecutor Marilyn Barkley Cassidy, requests that this court deny Plaintiff's Motion To Exclude Testimony From 1954 Trial. The reasons for denying the motion are set forth fully in the attached brief, which is incorporated by reference.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting
Attorney of Cuyahoga County, Ohio



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BRIEF IN OPPOSITION

I. INTRODUCTION

The State of Ohio intends to introduce the testimony of witnesses who are unavailable due to death or otherwise through their former testimony given in the 1954 criminal trial of Sam Sheppard. Pursuant to Evid.R. 804(B)(1), former testimony is not inadmissible hearsay and plaintiff does not challenge the relevance of the prior testimony. Nonetheless, plaintiff seeks to exclude the former testimony by relying on exclusionary rules inapplicable to civil jurisprudence generally and particularly inapplicable to the instant case.

II. THE EXCLUSIONARY RULE OF **GILBERT v. CALIFORNIA** (1967), 388 U.S. 263, 87 S. CT. 1954, IS INAPPLICABLE TO THE INSTANT CASE.

Plaintiff rests his argument on the proposition that the Supreme Court's decision in Sheppard v. Maxwell (1966), 384 U.S. 333, 86 S.Ct. 1507, subjects all the evidence from the 1954 trial to the exclusionary rule applied in Gilbert v. California (1967), 388 U.S. 263, 87 S.Ct. 1951. This is a grave mischaracterization of the applicability of Gilbert.

In Gilbert, the Supreme Court held that a post-indictment pretrial lineup in which the accused is exhibited to an identifying witness is a critical stage of the criminal process and therefore requires that the defendant be afforded his/her Sixth Amendment right to counsel at the post-indictment lineup. The Gilbert court held that it was error to allow introduction at a criminal trial of evidence of the identification of the defendant which occurred at a pre-trial line-up because the line-up violated the

defendant's Sixth Amendment right to counsel. That is, the identification evidence was illegally obtained. As such, the evidence was inadmissible in a trial aimed at convicting the defendant whose rights had been violated.

In the instant case, the challenged evidence (sworn testimony from the 1954 trial) is not being used to criminally convict anyone. It was not illegally obtained. Plaintiff has not cited any case (because none exists) applying the Gilbert rule to a civil trial to prohibit the introduction of evidence by a civil defendant during the trial of a civil lawsuit.

Moreover, the evidence excluded in Gilbert was constitutionally flawed because it was illegally obtained. In the instant case, the testimony from the 1954 trial was not constitutionally flawed and plaintiff's reliance on Sheppard v. Maxwell (1966), 384 U.S. 333, 86 S.Ct. 1507, is misplaced.

In Sheppard v. Maxwell, the Court determined that the trial court failed to protect Sheppard from the environment in which the 1954 trial occurred. The problematic environment was "the massive, pervasive and prejudicial publicity that attended his prosecution." Id. at 335, 86 S.Ct. at 1508. Nowhere in Sheppard v. Maxwell is the quality of the testimony criticized must less ruled constitutionally flawed as required for application of the Gilbert exclusionary rule.

The gravamen of the Sheppard v. Maxwell ruling was that the jury was not shielded from the bombardment of outside influences and the onslaught of information received other than in open court, i.e., media reporting . The quality of the courtroom testimony was not the problem. The exclusionary rule of Gilbert v. California

does not prohibit admission at the trial of the instant case of otherwise admissible prior testimony from the 1954 trial.

III. THE “FRUITS OF THE POISONOUS TREE”
EXCLUSIONARY RULE IS INAPPLICABLE TO THE
INSTANT CASE.

Plaintiff next argues that the testimony of the 1954 trial is subject to the “fruit of the poisonous tree” doctrine as solidified in Wong Sun v. U.S. (1963), 371 U.S. 471, 83 S.Ct. 407. Once again, Plaintiff has mischaracterized the holding of the Supreme Court precedent he cites.

In Wong Sun, the defendant’s statements made while under arrest and evidence discovered therefrom were held to be inadmissible because the statements were made during the course of an arrest which violated the defendant’s Fourth Amendment rights.

Simply stated, the “fruit of the poisonous tree” doctrine applies to protect a criminal defendant from conviction based upon secondary/derivative evidence that is obtained in a seemingly lawful manner, but which was actually discovered only through a violation of the criminal defendant’s constitutional rights.

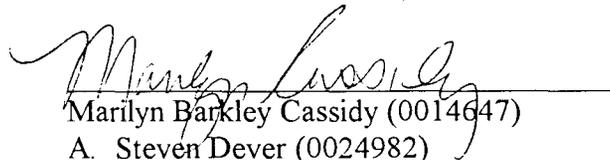
The 1954 trial testimony at issue was not discovered through any illegal activity, it was simply presented at a trial that was deemed not to be “fair” because the jury was not sufficiently shielded from extra-judicial information. The substance of the 1954 trial testimony did not flow from an illegal search/seizure or other unlawful conduct. The U.S. Supreme Court in Sheppard v. Maxwell, supra, did not suppress the testimony, it simply allowed for a retrial.

CONCLUSION

Relevant testimony from the 1954 trial is admissible if the declarant is unavailable within the meaning of Evid.R. 804. This Court should reject plaintiff's attempt to inappropriately apply rules of exclusion applicable only for the protection of criminal defendants in criminal trials to block the admission of competent testimony in this civil action. Plaintiff's Motion to Exclude Testimony From the 1954 Trial should be denied.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting
Attorney of Cuyahoga County



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CERTIFICATE OF SERVICE

The foregoing Defendant's Brief in Opposition to Plaintiff's Motion to Exclude Testimony From 1954 Trial was served upon plaintiff's counsel Terry Gilbert at 1370 Ontario Street, 17th Floor, Cleveland, Ohio 44113, this 24 day of January, 2000, by ordinary U.S. Mail, postage prepaid.


Marilyn Barkley Cassidy (0014647)
Assistant Prosecuting Attorney