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Defendant's Response to Plaintiff's Motion to Limit Discovery & State of Ohio's Objections to Proposed Pretrial Order

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CLERK OF COURT
COUNTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

| | | |
|------------------------|---|------------------------------|
| ALAN J. DAVIS, Special | : | CASE NO. 312322 |
| Administrator | : | |
| of the Estate of | : | JUDGE RONALD SUSTER |
| Samuel H. Sheppard, | : | |
| | : | |
| Plaintiff, | : | <u>DEFENDANT'S RESPONSE</u> |
| | : | <u>TO PLAINTIFF'S MOTION</u> |
| -vs- | : | <u>TO LIMIT DISCOVERY</u> |
| | : | |
| STATE OF OHIO, | : | |
| | : | |
| Defendant. | : | |

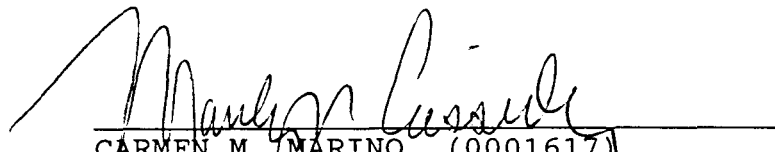
Defendant, State of Ohio, by and through counsel, Stephanie Tubbs Jones, Prosecuting Attorney, Cuyahoga County, and Assistant Prosecutors Marilyn Barkley Cassidy and Patrick J. Murphy, hereby respond to the Plaintiff's Motion to Limit Discovery, Establish Deadlines, and Set Case for Trial.

Defendant has no objection to the court setting a reasonable timetable for discovery together with a reasonable trial date. Plaintiff's motion, however, is fraught with inaccuracies. This motion, according to plaintiff is made pursuant to Rule 26 (C) which is the provision for protective orders. The State has not

yet served any discovery requests upon plaintiff. Additionally, plaintiff muddles his role in requesting the county prosecutor to open a criminal investigation and his posture as plaintiff in a civil action against the State into one, disorganized, legal heap. To the contrary, civil litigation concerning past, pending and potential criminal matters require careful legal analysis and differentiation of issues, as will be set forth more fully in the brief attached hereto and incorporated herein by reference.

Respectfully submitted,

Stephanie Tubbs Jones, Prosecuting
Attorney of Cuyahoga County, Ohio



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BRIEF IN SUPPORT

INTRODUCTION

This is a civil action alleging the wrongful incarceration of Dr. Samuel Sheppard. As such, the proceedings are subject to the Ohio Rules of Evidence and the Ohio Rules of Civil Procedure (See Civil Rule 1). Plaintiff's counsel has confused the underlying substantive question of Dr. Sheppard's guilt or innocence of a criminal offense, which constitutes an element to be proved by him in his civil case, with his simultaneous efforts to persuade the county prosecutor to open a criminal investigation into the murder of Marilyn Sheppard and the evidence relative thereto. The State of Ohio, as a defendant in this case, is at risk for large monetary liability exposure of taxpayer dollars and is entitled to the procedural safeguards afforded by the rules to ensure a fair course of proceedings and, ultimately, a fair trial.

HISTORY OF THE CASE

In October, 1995, plaintiff, Alan Davis, Executor of the Estate of Samuel Sheppard, filed a petition under Criminal case number 64571, State of Ohio v. Samuel Sheppard, seeking a determination that Dr. Sheppard was wrongfully incarcerated for the reason that he did not commit the murder of Marilyn Sheppard. At about the same time, plaintiff's counsel began urging the Cuyahoga County Prosecutor to open a criminal investigation relative to the

Marilyn Sheppard murder, implicating Richard Eberling as the probable culprit. Inasmuch as the Ohio Supreme Court has ruled that actions for determination of wrongful incarceration are civil in nature, at defendant's behest, plaintiff finally properly commenced a civil action in July of 1996.

Between October of 1995 and July of 1996, plaintiff's communications, through counsel, with the Office of the County Prosecutor continued. The communications involved plaintiff's assertions that the murderer of Marilyn Sheppard is in, truth, Richard Eberling. Plaintiff has devoted much time and resource into attempting to support this theory and has expended a great deal of energy in presenting its privately collected evidence to the office of the county prosecutor with a view toward persuading the Cuyahoga County Prosecutor to open a criminal investigation.

The Office of the Prosecuting Attorney has not opened any such criminal investigation. However, the Prosecuting Attorney has, quite appropriately followed up on information presented by plaintiff. Such follow up is a good faith effort to determine if enough evidence exists to warrant further criminal investigation into the murder of Marilyn Sheppard. For example, the order signed by the Honorable Ronald Suster directing that blood be taken from Richard Eberling for comparison purposes was made pursuant to a motion filed by the first assistant under the criminal case no. 64571, State of Ohio v. Samuel Sheppard. To date, the Office of the Prosecuting Attorney concludes that there does not exist enough

evidence to warrant a criminal investigation.

Mr. Gilbert, his client, and investigators have met frequently with Mr. Marino from this office. As discussed in paragraph eight of his Motion to Limit Discovery, Mr. Gilbert states that Mr. Marino contacted the F.B.I. Behavioral Science Unit to solicit their involvement. Any questions concerning the F.B.I.'s decision not to pursue a criminal investigation are best put to the F.B.I., as those matters are entirely within their discretion.

LAW AND ARGUMENT

I. CIVIL PROCEEDINGS ARE CONDUCTED SUBJECT TO THE OHIO RULES OF CIVIL PROCEDURE AND THE OHIO RULES OF EVIDENCE

A. Application in General

Ohio law is clear that wrongful imprisonment proceedings are civil in nature. See Walden v. State, (1989) 47 Ohio St. 3d 47, where the court determined that the General Assembly intended to apply the usual preponderance of the evidence standard to civil proceedings under R.C. 2305.02. The court also cites Schrader v. Equitable Life Assurance Soc. (1985), 20 Ohio St. 3d 41 in differentiating an acquittal in a criminal trial as a determination that the state has not met its burden of proof and a finding by a preponderance of the evidence that the accused is innocent.

Civil proceedings are subject to the Ohio Rules of Civil Procedure. Ohio Civil Rule 1 provides:

RULE 1. Scope of rules: applicability; construction; exceptions.

(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

(B) Construction. These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) Exceptions. These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

Under the foregoing, the civil rules apply to actions other than those specified and other "special statutory proceedings." Even where special statutory proceedings exist, the civil rules apply except to the extent that they are by their nature "clearly inapplicable."

With reference to wrongful incarceration proceedings pursuant to R.C. 2305.02 and R.C. 2743.48 the Ohio Supreme Court in Walden v. State, supra, noted the qualitative differences between

criminal prosecutions and civil litigation... :

"In the criminal proceeding, the burden of proof is upon the state...Moreover, self incrimination, privilege and discovery rules are different. In the criminal proceeding, the state may not depose the defendant nor require the defendant to testify involuntarily.

In a civil proceeding, not only is the burden of proof usually different, it is being placed upon the plaintiff . . . but also the rules concerning trial procedure, discovery, evidence and constitutional safeguards differ in important aspects."

Hence, the Ohio Supreme Court has clearly recognized those aspects of wrongful imprisonment proceedings which bear civil action characteristics. Logically, such proceedings are subject to the civil rules. While the State of Ohio has attempted to be reasonable in its dealings with plaintiff's counsel due to the volume of materials potentially subject to discovery, the State has not waived, nor will it waive the Ohio Rules of Civil Procedure and the Ohio Rules of Evidence.

B. Discovery Proceedings

Perhaps the most ridiculous assertion of plaintiff's motion appears after paragraph fifteen;

"The state has had one and half years to conduct discovery. Now it seeks to conduct discovery notwithstanding the fact that the State, or the Cuyahoga County Coroner's Office has been in possession of the evidence ... for almost 43 years, and all the new evidence has been shared with them."

This civil action was filed in July of 1996. For the past ten months, the State has examined and analyzed legal issues raised by the case and has filed its motions accordingly. It is appropriate that the court set a discovery schedule. It is not appropriate for the court to curtail time allotted to the state for discovery. It is noteworthy that, to date, the state has accommodated virtually all of plaintiff's requests. The state now wishes to be granted the discovery to which it is entitled under law, and to be extended the same professional courtesy that has been shown to plaintiff's counsel.

Plaintiff's motion to limit scope of discovery, is made pursuant to Ohio Rule 26 (C). Essentially, it is a motion for a protective order attempting to limit discovery on the part of the State. Other than inconvenience, plaintiff has cited no authority in support of his motion. Moreover, with regard to civil discovery for the purpose of this litigation, plaintiff continues to confuse his efforts to persuade the County Prosecutor to open a criminal investigation with civil discovery proceedings. Counsel has made sweeping, erroneous assertions which are addressed below:

EBERLING BLOOD SAMPLE

Blood drawn from Richard Eberling was drawn pursuant to a motion filed by First Assistant Carmen Marino in response to plaintiff's counsel's requests to reopen a criminal investigation into the murder of Marilyn Sheppard. The motion was filed under

the criminal case number and was not made pursuant to any Civil Discovery Rule. In fact, no civil action was pending before Judge Suster prior to July, 1996.

EVIDENCE INVENTORIED AT THE CORONERS OFFICE

Any meetings which took place between Marino and plaintiff's counsel for the purpose of inventorying evidence was done as a courtesy to plaintiff's counsel. Moreover, it was done with a view toward ascertaining whether or not enough evidence exists to reopen the criminal investigation concerning the murder of Marilyn Sheppard. If anyone is entitled to a protective order, it is the State of Ohio, who has voluntarily provided materials to counsel for Alan Davis. The State has yet to serve any discovery requests upon counsel for Davis.

PRODUCTION OF WITNESS KATHY COLLINS

Counsel for Davis states in paragraph seven of his motion that "Plaintiff's produced a key witness ... [she] flew to Cleveland from Jacksonville, Florida at her own expense to meet with prosecutors ... gave a complete statement, video, and affidavit. Once again, counsel has confused his efforts with reopening the murder investigation with civil discovery. The State will decide whether or not it wishes to take the deposition of Kathy Collins. At such time, her testimony will be under oath

before a certified court reporter. The taking of any such deposition will be subject to the Rules of Civil Procedure and the Rules of Evidence.

PRESENTATION OF DNA TESTING RESULTS BY DR. TAHIR

As set forth in paragraph twelve of plaintiff's motion, Plaintiff's counsel provided a presentation by Dr. Tahir of forensic analyses and his conclusions. Upon the conclusion of Dr. Tahir's presentation, the state remained unconvinced that a criminal investigation relative to the Marilyn Sheppard murder is warranted. As asserted earlier with regard to another witness, the State will decide if it wishes to depose Dr. Tahir. The deposition will be conducted pursuant to the Rules of Civil Procedure and the Rules of Evidence. The State will also decide if it wishes to retain its own forensic expert.

F.B.I. BEHAVIORAL SCIENCE UNIT

Plaintiff's counsel and his investigators met with First Assistant Prosecutor Carmen Marino in July, 1996 (See paragraph 8 of plaintiff's motion, which erroneously sets forth a meeting of July 1997). Any dialogue, evidence or communication that took place with those parties at that meeting was yet another accommodation by the Office of the Prosecuting Attorney in an effort to ascertain whether or not a criminal investigation is warranted. Contacts between law enforcement offices, such as Mr.

Marino's communication with the Behavioral Science Unit of the F.B.I., are appropriate in making such a determination. Whether or not the F.B.I. wishes to pursue the case further is a matter within the sound discretion of that agency. Neither this office nor the F.B.I. is compelled to provide Plaintiff's counsel an explanation as to the reasons underlying the decision.

STATUS CONFERENCES/SCHEDULING

Since the inception of this case, counsel of record, Ms. Cassidy and Mr. Murphy, have been circumvented by Plaintiff's counsel, who prefers to contact Mr. Marino to schedule meetings with the office of the Prosecutor, and for scheduling matters to be discussed with the court. Counsel was not contacted with regard to any meetings concerning this case on March 10, 1997, nor for April 7, 1997. If plaintiff's counsel is interested in the expeditious resolution of this case, then counsel should comply with the Civil Rules and with our requests for service of documents at our address of record.

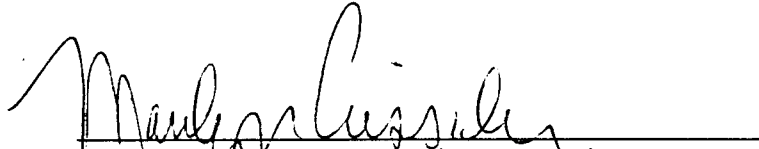
(See Civil Rule 5 (B)).

CONCLUSION

This case is in only the beginning stages of civil discovery. Defendant asserts that the rules of civil procedure and the rules of evidence work to safeguard fairness of proceedings for all parties. Accordingly, in light of the foregoing facts and principles of law, defendant respectfully requests that plaintiff's motion to limit discovery be denied.

Respectfully submitted,

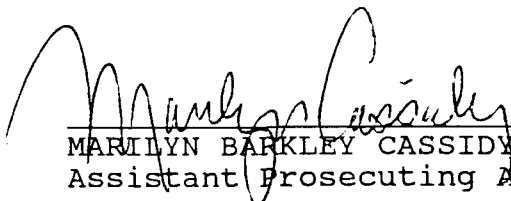
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CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition to Motion to Limit Discovery and Objections to Proposed Pretrial Order with Defendants Proposed Pretrial Order was served upon Terry Gilbert, 1700 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113, this 30 day of May, 1997, by ordinary U.S. mail postage prepaid and via telecopier.



MARILYN BARKLEY CASSIDY
Assistant Prosecuting Attorney