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Cuyahoga County Court of Common Pleas

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MSL ACADEMIC ENDEAVORS

RETRIAL OF SAMUEL H. SHEPPARD

VOIRE DIRE -- OPENING STATEMENTS
TESTIMONY -- CLOSING ARGUMENTS
JUDGE'S CHARGE TO JURY:

VOLUME 5:- PAGES 1168--1743

THE COURT: Counselor Bailey or Sherman?

MR. SHERMAN: The defense will call Mr. James C. Redinger, your Honor.

- - -

THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness JAMES C. REDINGER, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF JAMES C. REDINGER

By Mr. Sherman:

Q For the record will you state your name, please?

A James C. Redinger.

Q How do you spell your name?

A R-e-d-i-n-g-e-r.

Q Where do you live?

A 974 Cahoun Road, Westlake, Ohio.

Q How long have you lived at that address?

A Three years.

Q Going back to 1954, where did you live at that time, Mr. Redinger?

A 29503 Lake Road, Bay Village.

Q At the present time, Mr. Redinger, where are you

employed?

A At Hayden-Miller and Company.

Q How long have you been in that position?

A Going on seven years.

Q And what is your position with Hayden-Miller?

A Stockbroker.

Q Now, previous to 1954 did you know the defendant in this case, Doctor Sam Sheppard?

A Yes, I did.

Q How did you come to know Doctor Sheppard?

A I had an injury when I broke my leg, down in Huntington Beach, and I believe it was shortly thereafter I met Doctor Sam who at that time set my left leg.

Q Do you know what date this was, approximately?

A It was in the summer of 1952.

Q Did you thereafter know Doctor Sheppard other than as a physician?

A Yes, I did.

Q And did you know where Doctor Sheppard lived?

A Yes, I did.

Q Did you have occasion on the morning of July 4, 1954, to go to Doctor Sheppard's house?

A Yes, I did.

Q Do you recall what time this was?

A It was between, I would estimate, 8:30 the earliest,

and 9:30 the latest.

Q With whom did you go to Doctor Sheppard's house?

A I went down with Matthew Clark, Stan Feeley, and Larry Houk.

Q When you arrived at Doctor Sheppard's house, would you tell the Court and jury what you did, what did you do when you arrived?

A We arrived at the house, we looked around the grounds, and we walked around the grounds free will.

We did walk into the house, I personally walked into the house through the front door, went into the living room, and I sat down in a chair for a very short period of time, I would say a minute at the most.

I came back out, looked in the den, and I saw a black satchel overturned in the den, and a man bending over the satchel and the contents doing something.

I walked towards the kitchen, I looked into the kitchen, and at that time somebody had said, "We better get these people out of the house."

Q And did you then leave the house at that time?

A That's correct.

Q Was there anyone in the house with you at that time that you know of?

A There was one I explicitly remember.

Q And who was that?

A Matthew Clark, Junior.

Q Do you know if Matthew Clark, Junior, had any official business in the house at that time?

A I did not know if he had any official business, no, sir.

Q Was he a man about your age at that time?

A That is correct.

Q By the way, Mr. Redinger, how old were you at that time?

A Seventeen.

Q After you left the house would you tell the Court and jury again what you did at that time?

A We walked out of the house, we walked around the grounds again at free will.

I remember explicitly looking into the back of an automobile that had some sheets with blood that was on the sheets.

There was a period of time that passed before we were asked to go down and search the bank.

Q Now, as you first entered the house and as you later walked around the grounds, did anyone attempt to stop you from walking around the grounds in any way?

A No, they did not.

Q Do you have in mind the number of people that were on the grounds at that time?

A I couldn't give you a definite number but there were

numerous people.

Q Did you then later have an occasion to go down on the bank behind Doctor Sheppard's home?

A That is correct, I did.

Q Do you recall about what time that was?

A It was in the morning, again I would estimate before twelve o'clock before noon.

Q Who was with you when you were down on the bank?

A There were numerous people. People I explicitly remember, of course, was Larry Houk, Stan Feeley, Matt Clark, and Dave Heintz.

Q What were you doing on the bank?

A We were searching the bank for anything to be found on the bank.

Q Do you recall anyone finding anything on the bank?

A Yes, I do.

Q And who was that?

A Larry Houk.

Q Do you recall what Larry found?

A He found a green bag.

Q Now, handing you what has been marked as State's Exhibit Number 26, can you recall if that is the green bag that was found at that time?

A I cannot definitely recall if that is the green bag. It looks similar to the one I remember that was found.

Q Now, did you see Larry Houk find this bag?

A Yes, I did.

Q Where were you at the time he found the bag?

A I was slightly behind him and to his right.

Q What did Larry Houk do with the bag when he picked it up?

A He picked the bag up, I walked up next to Larry, he took the contents and dumped, I remember explicitly, the watch and the ring that were in the palm of his hand.

Q After dumping the watch and the ring in the palm of his hand, what if anything did you do?

A I remember reaching over and grabbing the watch with the thumb and forefinger, not taking it out of his hand, but just more or less grasping it and looking at it.

Q Did you ever remove the watch from his forehand?

A I did not.

Q Did you ever remove the ring from his hand?

A I did not.

Q What, if you know, did Larry Houk then do with the watch and the ring?

A The contents were put back in the bag, and Larry walked over to the stairs and handed -- this is the stairs to the beach -- and handed it to a man who was standing on the stairs at that time.

Q Do you recall what time this was?

A I cannot give you a definite time, no.

Q In relation to the top of the bank, how far down was this bag located?

A Again, this is an estimate. I would estimate twenty, fifteen to twenty yards from the top of the bank, and --

Q Excuse me. Do you know where the stairway is proceeding down from the top down to the beach?

A Yes, I do.

Q In relation to the stairway, where was this bag found?

A I would estimate ten to twelve yards, facing up the bank, left of the stairway.

Q Which would be then in an easterly direction, is that correct?

A That's correct, yes.

Q After finding the bag, what did you do at that time?

A We searched more until somebody had said that is enough, we just dispersed.

Q What time did you leave the residence on that day?

A It was sometime between one and two o'clock, I would estimate.

Q Up until that time, if you recall, had the area been roped off in any manner?

A No, it had not, to my estimation, to my knowledge.

Q Did you have an occasion after July 4th to see Doctor Sam Sheppard?

A Yes, I did.

Q And when was that?

A It was either the next day or two days later at his brother's house.

Q Would you describe how Doctor Sheppard looked when you observed him at that time; his physical appearance?

A Doctor Sheppard came out of the house, talked to us, he looked very puffed. He had a neck brace on at the time.

It appeared that the left side of his face seemed larger than his right side.

He just looked like his face was oversized.

MR. SHERMAN: You may inquire.

THE COURT: Counselor Corrigan or Spellacy?

CROSS EXAMINATION OF JAMES C. REDINGER

By Mr. Spellacy:

Q What brother's house did you see him at two days later?

A I don't know which, I don't remember which brother it was. I know it is the house to the left facing the lake of the hospital.

Q And you went over there to visit him?

A That is correct.

Q And you are sure it was the left side of his face that was puffy, is that correct?

A If I remember rightly, it was the left side.

Q When Larry Houk found this bag, it was found it was found in the brush, wasn't it?

A We had been using a grass cutter, if I remember right.

Q Do you understand, it was down in the brush on the side of the hill?

A This is correct, yes.

Q And the brush was quite thick down there, wasn't it, prior to going down there?

A This is what I wanted to explain. We used a grass cutter to cut the brush down.

Q But prior to cutting it down, it was two or three or even maybe four feet high, is that correct?

A That's correct, yes, sir.

Q And after Larry Houk found the bag, he gave it to a detective, isn't that right?

A Yes, he did.

Q And he called the detective over and he pointed out the area in which he found the bag to the detective, didn't he?

A I don't remember this.

Q At this time Larry Houk and you were good friends?

A This is correct.

Q You know, of course, that Larry Houk is in Korea, don't you?

A Yes, I do.

Q Now, going back to the two days later, you don't recall what brother's house it was at?

A No, I do not.

Q But you did go over there to see Doctor Sam, is that correct?

A That's correct.

MR. SPELLACY: Nothing further.

MR. SHERMAN: Nothing further, your Honor.

THE COURT: You are excused, Mr. Redinger.

Ladies and gentlemen of the jury, it is now four o'clock and rather than commence with another witness, we will adjourn for the day. We have a long day.

While you are away, ladies and gentlemen, on your overnight adjournment, your pre-holiday adjournment, you will bear in mind the instructions given you on each occasion when you leave this room, that is, you shall not discuss this case or what you have heard of it amongst yourselves.

You shall not permit anyone else to discuss it with you; nor shall you permit yourselves to overhear anything that relates to this case by any means of communication, bearing in mind the

details specifically given you with respect to newspapers, radio and television.

We will stand adjourned until 9:15 tomorrow morning.

(Thereupon an adjournment was taken to 9:15 a.m., Friday, November 11, 1966, at which time the following proceedings were had:)

I N D E X

WITNESSES

Defense (cont'd.)	Direct	Cross	Redr.	Recr.
Rev. Robert Scully	1168	1181		
Dr. Stephen Sheppard	1183	1194	1225	
Dr. Clifford Foster	1242	1252	1264	
Dr. Richard E. Koch	1268	1275		
Dorothy Sheppard	1277	1282		
Samuel R. Sheppard	1283			
Dr. Gervase C. Flick	1286	1295	1331	1335
Kathryn Capodice	1339	1353		
Jay H. Hubach	1369	1375	1378	1380
Anna Franz	1384	1388		
Marcella Hahn	1389			
Elizabeth Vetter	1393	1396		
Dr. Horace M. Don	1400	1413	1436	1437

Friday Morning Session, 9:15 a.m., November 11, 1966.

THE COURT: Good morning, ladies and gentlemen.

THE JURY: Good morning.

THE COURT: Counselor, please proceed.

MR. BAILEY: May we have Reverend Scully.

- - -

THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness REVEREND ROBERT GARDNER SCULLY, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF REV. ROBERT GARDNER SCULLY

By Mr. Bailey:

Q Would you tell us your name, sir?

A Robert Gardner Scully.

Q Where do you live?

A Springfield, Ohio.

Q What is your occupation?

A Clergyman.

Q In 1955, were you also a clergyman, sir?

A Yes, sir.

Q And what was your parish?

A I was pastor of the Rocky River Methodist Church.

Q At that time, did you know any member of the Sheppard family?

A Stephen was a member of my congregation.

Q Now, sometime in February of 1955, were you requested to go to the home of Sam Sheppard?

A Correct.

Q And did you do so?

A Yes, sir.

Q Can you recall who was with you?

A Stephen Sheppard, Richard Sheppard, and Doctor Haas.

Q Doctor Haas, do you know his full name?

A I am not sure of it. Is it Richard Haas? I am not of his first name. Doctor Haas is all I remember.

Q When you got to the Sheppard house, did you go to some particular room in that house?

A We went to the bedroom.

Q When you were in the bedroom did you happen to observe the east wall of the bedroom and in particular the certain closet door?

A Yes.

Q I call your attention, Reverend, to Defense Exhibit M and ask you whether or not you can recognize the door to which I just referred, in that photograph?

A I do.

Q Now, on that door do you recognize any particular spots?

A Well, I recall these two spots in particular here at the foot of the door.

Q Now, in your presence in that bedroom was something done to those spots that you can recall?

A They were scraped off by Doctor Haas and put into a container.

Q I show you Defense Exhibits O and P, showing two cylindrical containers, and ask you if you recognize these two containers?

A Yes, sir, I do.

Q Are those the containers into which the scrapings were put?

A Yes, they were.

Q And did you do something with those containers?

A I mailed those to Doctor Kirk.

Q Where were they mailed from, Reverend?

A From the Rocky River Post Office.

Q And whether or not they were registered?

A Yes, they were registered.

MR. BAILEY: That is all.

CROSS EXAMINATION OF REV. ROBERT GARDNER SCULLY

By Mr. Corrigan:

Q Reverend Scully, referring to what is marked for purposes of identification as Defense Exhibit M, will you look at that, sir?

A Yes, sir.

Q Will you tell us what that is, if you know?

A This is the closet door, as I came into the bedroom it was to the right side of the bed, on the right side of the room, on the east side.

Q And is that a fair and accurate representation of what you saw when you appeared there on that day in February of 1955?

A Yes, sir, it is.

Q Referring to that which is marked as Defense Exhibit D, can you identify that, sir?

A Well, as I understand it, this is the enlargement of this spot here, and the lower spot, enlargement here.

Q So that you are pointing at two large spots on Defense Exhibit D, and indicating that it is an enlargement of two large spots appearing on a door depicted in Defense Exhibit M, is that correct?

A That's the way I understand it, yes.

Q Now, in observing these doors, when you were there in February and prior to the removal of those spots, did you

observe the condition of these doors?

A Oh, I looked at them.

Q Describe for the jury what their general condition was?

A They seemed to be splattered with blood.

Q Did you notice anything else on them?

A Anything else on them? I really just noticed the blood spots is all I recall.

Q Calling your attention to a black substance that generally seems to be in contrast to the white paint on the door, do you recall that, sir?

A You mean these?

Q What appears to be wipings?

A I don't recall that. I don't recollect seeing that at the time. I do remember the blood spots. I don't recall seeing this.

Q Do you recall seeing any powder on those doors?

A No, sir, I didn't see any.

Q Nevertheless, you do say that these pictures do portray the doors as you saw them at that time, is that correct?

A That is the way I recall, yes.

MR. CORRIGAN: I see. Thank you.

No further questions of this witness.

MR. BAILEY: Thank you.

THE COURT: You are excused.

- - -

THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness DOCTOR STEPHEN SHEPPARD, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DOCTOR STEPHEN SHEPPARD

By Mr. Bailey:

Q State your name, please, sir?

A Stephen Sheppard.

Q Where do you live?

A 3811 West Valley Drive in Fairview Park.

Q And what is your occupation?

A I am a surgeon.

Q In 1954 were you also a surgeon?

A Yes.

Q How long have you been licensed to practice medicine in the state of Ohio?

A Since 1946.

Q I ask you to observe the defendant Doctor Sam Sheppard, and tell us whether or not he is your brother?

A He is.

Q In 1954, Doctor Sheppard, where were your offices?

A 2204 Lorain Road, Fairview Park.

Q Were these offices known as the Sheppard Clinic?

A Yes.

Q And were you connected at the time with any hospitals?

A Yes.

Q What hospital was that?

A Bay View Hospital.

Q Do you have another brother, Richard, who is also a physician?

A Yes.

Q Now, whether or not Doctors Sam and Richard Sheppard were also connected with the same hospital?

A They were.

Q Do you know what kind of medicine Doctor Sam Sheppard practiced at that time?

A Yes.

Q What was it?

A Neurosurgery and orthopedics.

Q Doctor Sheppard, have you in the course of your experience and practice as a physician, ever had occasion to install or remove casts?

A Yes.

Q Can you tell us how a cast is generally removed, and I refer now to a plaster cast used to place a weakened or broken limb?

MR. SPELLACY: Objection.

THE COURT: Overruled.

A A cast is removed by a device known as a striker saw which vibrates a blade very quickly, making a groove in the cast, following which a cast spreader is inserted into the groove, and pressure is exerted on the handles of the spreader in such a way as to cause a cast to fracture and be separated.

MR. BAILEY: Mark this, please.

(Defendant's Exhibit TT was marked for identification by the reporter.)

Q Doctor Sheppard, I show you Defendant's Exhibit TT and ask you if you can recognize that?

A Yes, sir.

Q What is it?

A It is a cast spreader.

Q Have you ever seen this particular cast spreader before?

A Yes.

Q Do you know who owns it?

A Yes.

Q Who?

A The Bay View Hospital.

Q Now, you have indicated that the nose of the spreader is inserted into a groove cut in the cast, and then the cast is fractured, like so?

A Yes.

MR. BAILEY: Defendant's Exhibit TT is offered without objection, your Honor.

THE COURT: It may be received.

Q Doctor, I call your attention to the morning of July 4, 1954, and ask you where you were first on that morning?

A In bed.

Q Where were you living at that time?

A 19027 Englewood Drive, Rocky River.

Q Sometime early on the morning of July 4th did you receive a telephone call?

A Yes.

Q From whom?

A Dorothy Sheppard.

Q As a result of that call did you go somewhere?

A Yes.

Q Where did you go?

A To Sam's home in Bay Village.

Q And when you arrived at the home, was someone present?

A Yes.

Q Who was there when you arrived?

A Doctor Richard was there. A number of policemen and firemen were there. Doctor Sam was there. I can't recall who all else.

Q Do you recall or did you know prior to July 4, 1954, a J. Spencer Houk?

A Yes.

Q Did you know his wife, Esther?

A Yes.

Q Do you recall whether you saw either of them on the morning of July 4th at Sam's house?

A Yes.

Q When you first observed your brother, Sam Sheppard, where was he?

A He was lying on the floor in the den.

Q What was his position on the floor, was he on his back or side or what?

A He was on his back with his feet toward the north which would be toward the lake.

Q What was the position of his hands, if you recall?

A He was holding his neck.

Q Did you make any observations as to his condition?

A Yes.

Q What did you observe?

A I thought that he was dead. I touched him. He was cold. I immediately left the room.

Q Did you notice anything about his face that was unusual, just from visual observation?

A Yes.

Q What?

A The right side of his face was swollen. There was

blood on his mouth.

Q After you left the room did you talk to somebody?

A Yes.

Q At some subsequent time did you go somewhere with Doctor Sam?

A Yes.

Q Where did you take him?

A To Bay View Hospital.

Q By what mode of transportation did you go to the Bay View Hospital?

A My automobile.

Q How far away from Sam's house is the Bay View Hospital located?

A Perhaps three miles.

Q In which direction?

A East.

Q And was it situated on the same street?

A Yes.

Q Lake Road?

A Yes.

Q Who was present in the motor vehicle that took Doctor Sam to the Bay View Hospital?

A I was present. Doctor Sam was present. Doctor Robert Carver was present. And my wife, Betty.

THE COURT: I am sorry,

Counselor, I did not get that name. Doctor Robert?

THE WITNESS: Doctor Carver, C-a-r-v-e-r.

Q How long were you at the home of Sam Sheppard before he was removed to the hospital?

A Perhaps ten, fifteen minutes.

Q Had you conferred with any police officers or anyone else between the time you first saw Doctor Sam and the time that you left with him?

A No.

Q Were there any police officers in the vicinity as you drove out of the Sam Sheppard driveway and headed to the hospital?

A Yes.

Q Did any police officer at any time object to his being removed?

A No.

Q Did you see Patrolman Drenkhan there that morning?

A Yes.

Q Had you known him prior to the morning of July 4th?

A Yes, I had.

Q Did you know any of the other Bay Village police officers?

A Yes.

Q Which one?

A I knew Chief Eaton. I knew Jay Hubach. I knew Officer Cavanaugh. I knew Cliff Mercer.

Q How long did it take to reach the Bay View Hospital, approximately?

A Eight minutes.

Q When you arrived, what happened to Doctor Sam?

A He was placed on a gurney cart and taken to room 115.

Q What is a gurney cart?

A A gurney cart is a stretcher with wheels.

Q When he arrived at room 115, what was done to him?

A Mrs. Anna Franz, the nurse in charge, and one of the aides, disrobed him and put him to bed, covered him with hot water bottles and blankets.

Q Do you know whether or not any X-rays were taken of Sam Sheppard on that morning?

A Yes, I do.

Q Who ordered those X-rays?

A I did.

Q And approximately what time was he taken into X-ray?

A I would guess 7:30, quarter of eight.

Q How long were you in attendance at the hospital after Sam Sheppard arrived?

A Perhaps an hour.

Q Did you subsequently contact any other physicians for the purpose of having them examine and evaluate the condition

of Doctor Sam Sheppard?

A Yes, I did.

Q Who?

A Doctor Charles Elkins and Doctor Clifford Foster.

Q What specialty in the area of medicine did Doctor Elkins practice, if you know?

A He is a neurosurgeon.

Q Did you have conversation on July 4th at any time with the then mayor of Bay Village, J. Spencer Houk?

A Yes.

Q And did you have any further conversation with the mayor on other days in connection with this case?

A Yes, sir.

Q Can you tell us what dates you talked with Mr. Houk?

A I talked with him on the 5th, again on the 6th, in his office, again on the 7th, in his home, again on the 12th in his office, and again on the 14th in the parking lot of the Bay View Hospital.

Q Referring to the meeting of July 14th, 1954, who called for that meeting?

A Mr. Houk.

Q And how did you receive the call?

A I was in surgery at the Bay View Hospital and I was paged.

Q As a result of the page, did you pick up the telephone?

A Yes.

Q And did you recognize the voice of the speaker at the other end of the line?

A Yes.

Q And who was it?

A J. Spencer Houk.

THE COURT: Would you fix the date, Counselor? I am sorry, would you fix the date?

MR. BAILEY: Yes, your Honor, July 14, 1954.

THE COURT: I am sorry. I missed it.

Please proceed.

Q What did he say over the telephone?

A He said he would like to speak with me immediately.

Q And as a result of that request, did you go to the parking lot?

A No. We discussed where this meeting should take place. I explained to him that I had worked that morning, and that I couldn't get away conveniently, and suggested that perhaps he could come to the office later that afternoon.

He said it was of the utmost importance, and he felt that he should talk with me that morning.

I suggested that I might be able to come to the emergency entry if he would come to the hospital and we could talk at that time.

Q And did he later appear at the emergency entrance?

A Yes, he did.

Q How much later?

A Eight or ten minutes.

Q And did you confer with him?

A Yes.

Q Where?

A In his automobile in the parking lot.

Q How long did this conference take?

A Ten or fifteen minutes.

Q Will you give us the conversation that you had with J. Spencer Houk on that morning in the parking lot in his car behind the Bay Village Hospital?

A Mr. Houk said that he felt I should do everything in my power to influence Doctor Sam to plead guilty to manslaughter; that his friends, meaning Doctor Sam's friends, and everyone would understand, and that they would be united in an attempt to help him in every way possible.

He said that he felt that the problem had developed to the point where something just had to be done, and he urged and recommended that this be the course followed.

Q Did he make any other statement that morning that you

can recall?

A No.

Q Now, having in mind that known J. Spencer Houk previously, did you notice anything unusual about his manner or condition on that morning?

A Yes.

Q What did you notice?

A He was extremely agitated. He smoked continuously, and he had the odor of alcohol on his breath.

MR. BAILEY: Your witness.

THE COURT: Counselor Spellacy or Corrigan?

CROSS EXAMINATION OF DOCTOR STEPHEN SHEPPARD

By Mr. Spellacy:

Q Doctor Sheppard, what is your specialty?

A Abdominal surgery and urology.

Q Abdominal surgery and neurology?

A Urology.

Q Urology?

A Yes.

Q How long have you been engaged in this?

A I graduated in 1944. I returned to Cleveland in 1946, and I should say there for twenty-two years.

Q You graduated in 1944?

A Yes.

Q From where?

A The Los Angeles College of Osteopathic Physicians and Surgeons in Los Angeles.

Q And you returned to Cleveland in 1946?

A Yes.

Q During the interim were you in some sort of internship?

A Yes, I interned at the Los Angeles County General Hospital, and took a residency there, following my internship.

Q Doctor Sam also went to Los Angeles County Hospital, is that correct?

A He went to the same medical school, and he also interned and took a residency at the County Hospital, yes.

Q Just as you did?

A It was a different residency, but it was the same institution.

Q And approximately when did he finish school?

A I believe he graduated in about 1950 or perhaps '49, and returned to Cleveland sometime in '51.

Q '51?

A I believe so.

Q And in 1951 he was a neurosurgeon, is that correct?

A He had completed a residency in neurosurgery.

Q And he performed neurosurgery in connection with Bay View Hospital, is that correct?

A Yes.

Q Now, you have indicated to us a type of cast spreader, is that correct?

A Yes.

Q I think it is referred to as Defense Exhibit TT?

A Yes.

Q There are a number of types, aren't there?

A This is the only kind I am familiar with.

Q You have never seen any other kind of cast spreader or cast cutter?

A Different sizes perhaps, but the shape and the basic design, so far as I know, is this.

MR. BAILEY: Excuse me, before you -- your Honor, I object. The question is duplicitous. He said cast spreader or cast cutter, they being different instruments.

THE COURT: Overruled. We understand from the record that a cast cutter is a saw.

MR. BAILEY: No, I think not, your Honor.

THE WITNESS: Excuse me, if that is what the question was, I misstated myself.

There is a manually operated cast

cutter, which is quite different from the cast spreader.

Q When you told us before about how a cast was removed, you told us about the manner electrically, is that correct?

A The striker saw --

Q Yes.

A -- and the cast spreader, which is certainly used today in I think every hospital in the United States.

Q Going back to 1954, wasn't it done manually on several occasions?

A It may have been.

Q Now, this would not be a cast cutter, would it?

A No, this is a cast spreader.

Q Well, what does a cast cutter look like?

A The electric cast cutter, the striker saw looks like a saw.

A cast cutter, manual cast cutter, looks like an instrument with fat handles and jaws which grip the cast between the jaws, and by exerting pressure the cast is gradually split in the same way that the striker saw does it, only it takes a great deal more time.

Following this the cast spreader is inserted into the groove made by the cast cutter, and again the cast is spread with this kind of an instrument.

Q Now, you indicated that the cast cutter has jaws

on it?

A Yes.

Q Now, how about bone forceps, is there such a tool?

A Yes.

Q What do they look like?

A Well, there any number and shapes and sizes of bone forceps, but they usually are in the shape of grasping jaws which can be tightened occasionally.

There is a thread screw that can be tightened down to maintain them in position.

Q Would it simply look like a pair of pliers?

A I wouldn't think so. They are considerably more complicated than an ordinary pair of pliers.

Q Well, to a layman would they look like a pair of pliers?

A I don't think a layman would ever mistake a --

Q You don't think so?

A -- a bone instrument that you described as a pair of pliers, no.

Q Do they work on the same principle?

A They are hinged.

Q Just like a pair of pliers is hinged in the middle?

A Hinged like a pair of pliers, but certainly the appearance is quite different.

Q And is there another name for those?

A Not that I know of.

Q Is there such a tool as the rongeur?

A Rongeur, yes.

Q What is that?

A It is an instrument which is used for biopsy purposes, and for chewing out small sections of bone and tissue and cartilage. It is used most frequently in the removal of a spinal cord disc.

There is a petuitary rongeur which is used for that purpose. It is a very slender instrument which inserts into a small opening or incision, and bits of tissue can be removed by means of this.

Q Does this also work on the same principle as a pair of pliers?

A If you mean is it hinged and does it have jaws, yes.

But certainly it would not be mistaken for a pair of pliers.

Q Well, it works on the same principle, doesn't it, doctor?

A Basically.

Q And you say it is used for removing discs, is that correct?

A That is one of the uses.

Q And this would be a neurosurgeon's work, wouldn't it?

A Yes.

Q Now, Doctor Sam was a neurosurgeon, wasn't he?

A Yes.

Q Now, you lived on Englewood in 1954, which is in Rocky River, is that correct?

A That is correct.

Q And this, Englewood is about three blocks north of Hilliard off of Wooster Road, isn't it?

A I think it is two blocks.

Q And it runs east off of Wooster Road?

A That's correct.

Q How far is it from there to Bay View Hospital?

A Roughly two miles.

Q About two miles. Doctor Sam lived on the other side of Bay View Hospital, didn't he?

A He lived west of Bay View Hospital.

Q You lived east of it and he lived west of it?

A That's true.

Q And your brother Doctor Richard Sheppard lived next door to Bay View Hospital?

A Just to the west.

Q Now, you would have occasion to see Doctor Sam Sheppard quite often, wouldn't you?

A Yes.

Q Not only in connection with Bay View Hospital, but

socially as well, isn't that right?

A That is true.

Q And, of course, being his brother, you knew his activities and what activities he was engaged in, didn't you?

A For the most part, yes.

Q You knew, of course, that he was a good athlete?

A Yes.

Q And that he was always in good shape physically?

A Yes.

Q And that he engaged in a number of athletic events, even in 1954, isn't that true?

A Well, not competitive events. I think he was the coach or the trainer or perhaps the athletic team physician and observed a number of these events, and worked out with the members of the team.

Q And he played basketball?

A Yes.

Q In his yard. He did a lot of water skiing, is that correct?

A Yes.

Q And he played tennis?

A I think that is true.

Q In fact, he was quite a good tennis player, wasn't he?

A I never played tennis with him.

Q You didn't know?

A I never played tennis with anyone.

Q Well, have you heard that he was quite a good tennis player?

A No.

Q You never heard that?

A No.

Q Well, did you know that he played tennis?

A I believe he and his wife played tennis on occasions. I never saw them.

Q You never saw them. Well, when you were growing up did you know that he played tennis?

A No.

Q You didn't know that. Were you in Los Angeles together?

A Yes.

Q Did you know he played tennis out there?

A I am told he played tennis while he was interning, but I wasn't there at that time.

Q Now, he had a punching bag in his basement?

A Yes.

Q And he used his punching bag quite often, didn't he?

A I can't tell you how often. I know that he and his son used it.

Q Well, you say his son used it. Where was this punching bag located, was it on the ceiling?

A I believe it hung down from a holder of some sort.

Q Now, Doctor, you indicated before a cast cutter.

MR. SPELLACY: Do you want me to have this marked?

MR. BAILEY: I don't care.

MR. SPELLACY: I will just ask him.

Q Is this a type of cast cutter --

MR. BAILEY: Excuse me, If you are going to question him on it, I do want it marked.

MR. SPELLACY: All right. Mark this.

(State's Exhibit 71 was marked for identification by the reporter.)

Q Other than the electric kind that you have told us about, this is -- referring now to State's Exhibit 71 -- this would be another type of cast cutter, would it not?

A Yes, that is a manual cast cutter.

Q And this is different than a cast spreader, is that correct?

A Quite different.

Q It is used for a different purpose, isn't it?

A They are both used for the removal of casts, but they have quite different functions in that operation.

Q Now, it is not uncommon, is it, Doctor, for doctors to order tools specially made?

A I would say it is uncommon. I have never done it.

Q You would say it is uncommon. Well, have you ever heard of doctors ordering tools specially made?

A Yes.

Q You know that it is done on occasions, isn't that right?

A It is done, yes.

Q Many people who are engaged in delicate surgery find various needs for various type tools, isn't that true?

A Yes. This is how most of the instruments have been developed.

Q And on occasion doctors will have friends or somebody that they know in the manufacturing business make tools for them, isn't that correct?

A On occasion.

Q A neurosurgeon is engaged in very delicate work, isn't he?

A Yes.

Q Because he is working with the nervous system or the spinal cord on a great number of occasions, isn't he?

A Yes.

Q Now, directing your attention again to July 4, 1954, what time did you receive this call?

A Just before 6:00 a.m.

Q Just before 6:00 a.m.; I believe you got the call from Dorothy Sheppard, is that correct?

A Yes.

Q And that would be Richard's wife, is that correct?

A That is correct.

Q Do you know where she got a call from?

A She told me that Doctor -- no, she told me that Mr. Houk called her, I believe.

Q And you learned then that Spencer Houk had called Richard's house relative to this matter, is that correct?

A Yes.

Q And that he had called there sometime before six o'clock?

A Certainly before I was called.

Q You immediately got dressed, I assume, and drove out to your brother's home?

A Yes.

Q Did you learn in the call from Dorothy Sheppard that someone had been hurt or that someone was dead?

A Yes.

Q Now, did you learn from Dorothy Sheppard that Spencer Houk had called there?

A Yes.

Q -- from the Sheppard home?

A That's my recollection.

Q Did you take anything with you when you went out there?

A Yes.

Q What did you take with you?

A A .38 caliber stub nose revolver.

Q And was this on your person, or in your car when you left the house?

A On my person.

Q Was it in your clothes when you put your clothes on?

A No. I went to a cupboard where I kept this revolver, and put it in my clothes, and it was there when I left the house.

Q You knew that somebody had called from the Sheppard residence that someone was hurt and that you should get out there as a physician, isn't that correct?

A Nobody asked me to get out there as a physician.

Q Did you take any physician's instruments with you?

A The things that were in my automobile, they are always there.

Q Did you know that they were in your automobile that morning?

A Yes.

Q You had them with you?

A Yes.

Q Did you take them in the house with you?

A No. They are always in my car. You mean in the house when I got to Doctor Sam's?

Q Yes.

A No, I did not.

Q When you got there you saw that an ambulance was there, didn't you?

A Yes.

Q I believe you indicated that Doctor Sam was laying on the floor, lying on the floor, holding his neck?

A Right.

Q And that you thought he was dead?

A At first, yes.

Q And when you thought he was dead, you ran downstairs, is that correct?

A No, I touched him and he responded and moved and groaned, and I knew he wasn't dead, so I left the room.

Q Well, prior to this time, when you got there, the police were there, weren't they?

A Yes.

Q Patrolman Drenkhan was there, wasn't he?

A Yes.

Q Do you know if Sam had any conversation with Patrolman Drenkhan prior to your arrival?

A Not of my own knowledge.

Q Do you know if he had any conversation with Mr. Houk prior to your arrival?

A I have heard that he did.

Q At any rate, when you got there he was laying on the floor, he was cold, and you thought he was dead, is that right?

A When I first looked into the room, yes.

Q Then you proceeded upstairs?

A Yes.

Q What way did you go to go upstairs?

A I went into the dining portion of the living room and through the living room, around by the fireplace and up the stairs.

Q You had been in that house a number of times, had you?

A Many times.

Q The shortest route from where you were in the den would be to go through the kitchen right up the stairs, isn't that right?

A As I recall --

Q Doctor, do you understand my question?

A Yes.

Q The shortest route would have been to go right through the kitchen right upstairs?

A The most direct route, yes.

Q The shortest route, too?

A Yes.

Q Did anyone direct you to go upstairs?

A No.

Q You had a feeling that something was upstairs, isn't that right, that Marilyn was upstairs?

A I can't recall what my feelings were. My assumption was that she was upstairs.

Q And that was a natural assumption, wasn't it, Doctor?

A I think so.

Q So you went upstairs, then?

A Yes.

Q No one had directed you to go upstairs, had they?

A Not that I recall.

Q It was just a natural assumption on your part that Marilyn was probably upstairs?

A I am sorry, I didn't hear you.

Q It was a natural assumption on your part that Marilyn was probably upstairs?

A Possibly.

Q So you went upstairs?

A Yes.

Q Was anyone upstairs when you went up there?

A No.

Q Did you see Mr. Houk in the house when you got there?

A Not that first time.

Q How many times were you at the house that particular day?

A Twice.

Q What time was the next time that you were there?

A A little before eight.

Q A little before eight; is that eight in the morning?

A Yes.

Q Were you there later in the day at any time?

A I believe I went back later in the afternoon, but I didn't go in.

Q What time would that have been?

A Possibly around four.

Q Around four. Now, where was Patrolman Drenkhan when you got in the house the first time?

A I believe he was in the den.

Q Do you know what he was doing in the den?

A As I recall, he was talking on the telephone. Perhaps that is when I came back downstairs.

Q Do you know who he was talking to?

A I believe he was talking to the Cleveland Police Department.

Q Up until that time all the people that were there were Bay Village policemen, isn't that right?

A And firemen.

Q And firemen. As a matter of fact, there was a stretcher

in the house, wasn't there?

A Yes.

Q The firemen had taken the stretcher into the house from the ambulance that was parked in the driveway, is that right?

A I would assume that.

Q Was your brother, Doctor Richard, there at that time?

A Yes.

Q Where was he?

A I don't recall that I saw him.

Q Well, do you know that he was there, though?

A I have learned that he had been and was there, yes.

Q Well, when you went there of your own knowledge, did you see him?

A I don't recall that I did.

Q Do you recall having any conversation with him then at that time?

A I think I saw Doctor Richard in the lower level after I came back downstairs.

Q The lower level would be the first floor?

A The first floor.

Q Where on the first floor do you recall now having seen him?

A In the living room, I believe.

Q What portion of the living room?

A I believe in the dining area.

Q You recall that, that you saw him in the dining room?

A I was in and out of that house so many times that day that I can't pinpoint this.

Q Where was Doctor Sam at this time?

A In the den.

Q Still on the floor?

A Yes.

Q Still grasping his neck?

A As far as I know.

Q Doctor, how many times were you in and out of that house that day?

A I was there on the first occasion early. I went to the hospital, came back just before eight, and I was in and out two or three times on that occasion.

Q The first occasion how many times were you in and out of the house?

A Once.

Q Just once?

A Yes.

Q Now, when you talked with Doctor Richard, was this -- Sam was still on the floor in the den, is that correct?

A That is my recollection.

Q Was anyone with him?

A With Sam?

Q Yes.

A Officer Drenkhan was in there, and I believe Chief Eaton was there by this time.

Q Did you know at this time if he -- you had realized, of course, that he was alive, is that correct?

A Yes.

Q You had assured yourself of that prior to talking to Richard?

A Yes.

Q Do you know whether he was conscious or not?

A He was conscious when I went in and spoke with him.

Q And he talked back to you?

A He responded.

Q So he was conscious?

A Yes.

Q When you had this conversation with Richard in the dining area of the front room, do you know where the stretcher was?

A No.

Q You know that it was still in the house, though, don't you?

A I don't know that.

Q Well, Officer Drenkhan was calling the Cleveland Police, is that right?

A Yes.

Q About what time was this?

A Quarter of seven, perhaps seven o'clock.

Q Now, did you have occasion to remove Doctor Sam from that house that day?

A Yes.

Q Prior to removing him did you make a diagnosis of what was wrong with him?

A No.

Q He was laying on the floor holding his neck, and as you indicated you thought he was dead, did you at that time make a diagnosis of what was wrong?

A At what time?

Q At the time that you assured yourself that he was not dead?

A No.

Q You did not make a diagnosis?

A No.

Q How did you remove Doctor Sam Sheppard from the home that morning?

A I asked him if he thought he could walk. He said that he thought he could, that he had been walking, that he felt certain that he could.

Q Do you understand my question, Doctor?

A We, Doctor Carver and I, assisted him to his feet, and we put both of his arms around each of our shoulders,

and we conducted him, half carried him, and took him to my station wagon.

Q You indicated that when you got to the hospital, Bay View Hospital, that you placed him on a gurney cart after you got him there and wheeled him into the hospital, is that right?

A He was placed on a gurney cart. I didn't personally do this.

Q Now, back in the home, you had him stand up and you walked him out of the home, is that correct?

A Yes.

Q There was an ambulance there, wasn't there, Doctor?

A Yes.

Q And there was a stretcher in the house, wasn't there?

A I presume there was a stretcher in the area.

Q Doctor Carver assisted you?

A Yes.

Q Doctor Carver at that time was an intern at Bay View Hospital, is that correct?

A Yes.

Q What time did you arrive at the hospital that particular morning?

A I would guess shortly after seven.

Q Shortly after seven?

A Yes.

Q And you indicated that Doctor was treated there at the hospital?

A Yes.

Q And was he treated by you?

A Yes.

Q You were in charge of his treatment and care?

A Yes.

Q You saw fit to call in a neurosurgeon, is that correct?

A Yes.

Q What time did you call in the neurosurgeon?

A I can't remember. Later in the day.

Q Pardon me?

A Sometime later in the day. I don't know the time.

Q Sometime later in the day. Approximately what time later in the day?

A I have no recollection of the time. I think the chart would probably reveal it.

Q The hospital records would indicate that?

A I should think so.

Q I think you indicated before that that was Doctor Charles Elkins, is that correct?

A Yes.

Q I believe you had X-rays taken there, is that right?

A Yes.

Q Now, directing your attention to July 4th, did you

have occasion to examine those X-rays on that day?

A Yes.

Q And what did those X-rays show on July 4th?

A A chip fracture of the second cervical vertebra.

Q Would that be a fracture of the spinous process of the 2nd cervical vertebra?

A Yes.

Q That was your interpretation of it, is that correct?

A Yes.

Q Did you have occasion to have X-rays taken at a later date?

A Yes.

Q On how many occasions on a later date did you have X-rays taken?

A I can't remember.

Q Well, to refresh your recollection, on July 6, 1954, weren't X-rays taken?

A That is entirely possible.

Q And isn't it true, Doctor, that the X-rays on July 6th showed that there was no fracture of the spinous process of the 2nd cervical vertebra?

A The finding was not confirmed.

Q Well, after that finding wasn't confirmed, wasn't a second set of X-rays taken on July 6th?

A I don't remember.

Q And didn't the second set of X-rays show that there was no fracture of the spinous process of the 2nd cervical vertebra?

A All of the films all that were taken on subsequent occasions failed to confirm the findings on that first day.

Q That's right.

A That's right.

Q So that --

MR. BAILEY: Excuse me. May the comment be stricken, your Honor, "That's right," and questions be put.

THE COURT: Please proceed, Counselor. Overruled. It may stand.

Q So on July 6th, the X-rays did not confirm the fracture of the spinous process of the 2nd cervical vertebra?

A I believe that is correct.

Q Now, prior to this time, though, you had told somebody that Doctor Sam has a broken neck, isn't that right?

A Yes.

Q But the X-rays taken on the 6th of July didn't confirm that, did they?

A No.

Q Now, did you examine him on the 4th -- strike that. Did Doctor Elkins examine him on the 4th?

A Yes.

Q Will you tell us what kind of an examination Doctor Elkins gave him on the 4th?

A A neurological examination.

Q What is a neurological examination?

A It is an evaluation of the central nervous system, and the peripheral nervous system.

It consists of a study of the reflexes of the eyes and the cranial nerves and the deep tendons, and other portions of the body.

THE COURT: I am sorry, Counselor, did you fix a date?

MR. SPELLACY: I was talking about July 4th.

I believe the witness has indicated that Doctor Elkins examined him on that day.

Q Is that correct?

A Yes.

Q Now, were you present when this examination took place?

A I was present during the portions of it.

Q Do you know what Doctor Elkins' findings were on the 4th after this neurological examination?

A Yes.

Q What were they?

A He found certain reflexes were missing.

He found that there was swelling at the site of Sam's mouth, that the eye was swollen and almost completely closed.

Q This was on July 4th?

A I believe so. That the muscles in the back of the neck were spastic, and he responded to touch in a way that would indicate injury.

MR. BAILEY: It will take a bit of time to examine this, your Honor, if it is intended to be used.

THE COURT: May I see Counselors, please?

(Thereupon Court and counsel conferred at the Court's bench out of the hearing of the jury.)

THE COURT: Ladies and gentlemen of the jury, Counselors have agreed that now is the time to take a recess.

So we will have a recess, our morning recess, at this time, rather than the customary time of about a quarter of eleven.

While you are away on your recess, ladies and gentlemen, you will bear in mind the instructions given you on each occasion as you leave this room.

You shall not discuss this case or what you have heard of it amongst yourselves.

You shall not permit anyone else to discuss it with you, nor permit yourselves to overhear anything that relates to this cause by any means of communication.

We will have our morning recess.

(Thereupon a recess was had.)

MR. SPELLACY: Will you mark this, please.

(State's Exhibit 72 was marked for identification by the reporter.)

Q Doctor Sheppard, showing you what has been marked for identification purposes as State's Exhibit 72, would this be the case summary record of Bay View Hospital with regard to Doctor Sam Sheppard?

A Yes.

Q And these records were kept by the Bay View Hospital with regard to his case, is that correct?

A Yes.

Q Referring to page 12, what has been marked page 12 of these records, you told us before that Doctor Elkins examined Doctor Sam Sheppard and found -- and I am referring now to the 4th of July, 1954 -- and found reflexes missing, is that correct?

A Yes.

Q Now, this is page 12, sir, and is this correct:

"Doctor Sam is alert and answers questions lucidly. There is swelling of the right periorbital tissue.

Pupils are equal and react. Moves all extremities well. No Babinski's.

He has voided. Complains of occipital headache. Cervical collar in place.

Neck not examined.

Impression: Cerebral concussion. Advise average fluid. Sedation. C. W. Elkins."

A Yes.

Q Do you know when this was made?

A Yes.

Q When was that made?

A July 4th of 1954.

Q Is there anything in this report of Doctor Elkins that indicates that certain reflexes were missing?

A No.

Q As a matter of fact, in here, the impression that is given by Doctor Elkins is that there is a cerebral concussion?

A Yes.

Q And what is a concussion?

A Injury to the brain.

Q When one is knocked out, that is a concussion, right?

A Yes.

Q And how does somebody diagnose a concussion?

A By the appearance of the patient, the history of the injury.

Q Where do you get the history of the injury?

A From the patient.

Q So that it is a subjective thing insofar as the patient is concerned that all a person can rely upon is the history of the case, unless there are objective signs present, is that correct?

A Yes.

Q Pardon me?

A Yes.

Q Was there any notation of objective signs present in this report?

A Not by Doctor Elkins. I am sorry, I think he did mention swelling. That would be an objective sign.

Q Swelling of the right periorbital tissue?

A Periorbital, that is around --

Q That is the right eye, is it not?

A Yes, around the eye, periorbital.

Q That doesn't mean concussion, does it?

A No of and by itself, no.

Q So you don't know where Doctor Elkins got his information to arrive at the cerebral concussion, do you?

A I believe he obtained it from the patient.

Q Then he just relied on what the patient told him, is

that correct?

A And his findings.

MR. BAILEY: I object to that. I don't think this witness can testify what another doctor relied on.

THE COURT: Sustained. The jury is instructed to disregard the doctor's response.

Q Doctor, the records would indicate what time the patient arrived at the hospital, would they not?

A Yes.

Q What time does it indicate that the patient arrived at the hospital?

A 6:30 a.m.

Q That would be 6:30 on the morning of July 4, 1954?

A Yes.

Q And that is what time he arrived at the hospital, is that correct?

A Yes.

MR. SPELLACY: I have no further questions.

THE COURT: Counselor Bailey?

MR. BAILEY: I would like this to be received in evidence.

MR. SPELLACY: Fine, I will offer

it right now.

MR. BAILEY: Might it be received, your Honor?

THE COURT: Yes, it is received.

MR. SPELLACY: State's Exhibit 72.

MR. BAILEY: Yes.

REDIRECT EXAMINATION OF DOCTOR STEPHEN SHEPPARD

By Mr. Bailey:

Q Doctor Sheppard, I believe you testified you had seen your younger brother participate in athletics when he was young?

A Yes.

Q At some time, did he play football?

A Yes.

Q Did he play in the backfield?

A Yes.

Q Have you ever seen him perform surgery?

A Many times.

Q From having known him all of his life, do you know whether or not he is right or left handed?

A Yes.

Q What is he?

MR. SPELLACY: Objection.

THE COURT: He may answer.

A Doctor Sam is righthanded.

Q Have you ever seen him use his left hand for eating?

A Sandwiches.

Q Have you ever seen him use it for surgery?

A No.

Q Did anybody else examine Doctor Sam who was not connected with Bay View Hospital on the fourth day of July, 1954?

A Yes.

Q Who?

A In addition to Doctor Elkins, you mean?

Q Yes.

A Doctor Gerber was there and examined him briefly. Doctor Hexter was there, as a physician requested by Doctor Gerber. He examined Doctor Sam.

Q How long was Doctor Hexter with him?

A Perhaps a half an hour.

Q Had you known Doctor Hexter prior to this incident?

A I knew of him.

Q I take it he was not connected with the Bay View Hospital?

A No, he was not.

Q Did you know what specialty of medicine he had, if any?

A He was a general practitioner.

Q Where is Doctor Hexter now, if you know?

A I know he practices and lives in the area, but I don't know where he is just now.

Q No, I mean is he still practicing in Bay View?

A Yes.

Q Were any other doctors permitted to examine Sam Sheppard at any time between July 4th and the trial, to your knowledge?

A Yes.

Q Did Doctor Hexter ever examine him a subsequent time after July 4th?

A Not to my knowledge.

Q Did any other doctors not requested by the defense or the Sheppard family examine Doctor Sam?

A Prior to the trial?

Q Yes.

A Yes.

Q Were any of these doctors --

THE COURT: Counselor, would you fix the date, if there was another examination?

MR. BAILEY: Yes.

Q Give us the approximate date, if you can?

MR. SPELLACY: Is this as to his own personal knowledge?

MR. BAILEY: I don't know.

Q Were you present at any examinations?

A No.

Q How did you learn of them?

A Doctor Sam told me.

Q Do you know a doctor named Spencer Braden?

A Yes.

Q What is his specialty?

A Neurology. Neurosurgery.

Q Doctor Sheppard, you have testified that the initial X-ray report reflected a chip fracture of the cervical vertebra?

A Yes.

Q Who did the initial interpretations of the X-rays films?

A Doctor Gerry Flick, the roentgenologist.

Q What is a roentgenologist?

A A roentgenologist is a specialist who interprets X-ray films.

Q Might he also be called a radiologist, or is there a difference?

A A radiologist is involved in the use of X-ray for treatment of malignancy and athletic injuries.

Q Where was Doctor Flick employed at that time?

A He worked at the Bay View Hospital.

Q Where is he today, do you know?

A He is no longer living.

Q When did he die?

A I think perhaps three or four years ago.

Q Now, the record being State's Exhibit 72 discloses an entry signed by Doctor Flick saying:

"There is a chip fracture in the inferior-posterior margin of the 2nd cervical vertebral spinous process. There is rather marked hypertrophic change at C-5-6. As a matter of fact, there is bridging between these vertebral bodies. Soft structures in the anterior are negative."

Now, where, so that we can understand it, was this chip fracture located as described by this entry?

A Just at the base of the skull. The 2nd cervical vertebra is the second one down and it would be perhaps an inch and a half beneath the base of the skull.

Q And what does a chip fracture mean?

A The bone is broken.

Q I believe you said something earlier about spastic muscle condition. Will you tell us what a spasm is?

A A spasm is an involuntary tightening or tension of the muscle.

Q What causes this involuntary tightening or tension?

A Usually pain, injury.

Q Is any external stimulus required to demonstrate a spasm?

A No.

Q Can a spasm be voluntarily created by the patient?

A No.

Q Now, in the normal practice of medicine, doctor, in making diagnoses, whether or not it is customary to rely to some extent on the history given by the patient?

A It is.

Q You said that there was evident a swelling around the right eye; is this consistent with injury to the head?

A Yes.

Q As an objective finding on which no reliance is placed on what the patient says?

A Yes.

Q Now, did you as a physician make any diagnosis of injury to the neck or skull?

A Yes.

Q And was this in some part based on the history given to you by Doctor Sam Sheppard?

A Yes.

Q What history were you relying on, what did he tell you had happened to the base of his neck?

A He told me that he had been struck and knocked unconscious on two occasions.

Q Now, this record also disposes that Doctor Elkins diagnosed on one examination a contusion of the spinal cord; are you familiar with that?

A Yes.

Q What is a contusion of the spinal cord?

A It is an injury of the spinal cord --

MR. SPELLACY: May we have the time of that examination?

A Literally a bruise.

MR. BAILEY: Excuse me. Let me get the entry.

MR. SPELLACY: I believe it is page 13.

Q Referring to page 13, then, of State's Exhibit 72, there is an entry here signed by Charles W. Elkins relating an examination made on July 6th of 1954.

Did you know of that examination?

A Yes, I did.

Q And the final entry just above the signature of Doctor Elkins, "Cervical spinal cord contusion," and the word "Imp"?

A Impression.

Q Does that "Imp" customarily mean impression in the construction of hospital records?

A Yes, or diagnosis.

Q Where does the spinal cord run with reference to the skull and back of the neck?

A Down into the passageway in the vertebral bodies,

the spinal column. The spinal cord is protected by the spinal column, completely surrounded by it.

Q These vertebrae, then, are round bones with a hole down the middle?

A No, the vertebrae are round bones with a passageway directly behind the round portion which you describe as round bones, those are the vertebral bodies.

Directly behind those is a passageway through which the spinal cord passes, and on all sides of the spinal cord are the lamina and the spinous processes, which protect the spinal cord from injury in the ordinary events of the day.

Q What is a contusion?

A A contusion is a medical term for bruise.

Q Now, Doctor, in circumstances where X-rays additionally show a chipped fracture, as they did in this case, and subsequent X-rays do not, does this mean necessarily that the original X-rays were erroneous or defective?

A No.

MR. SPELLACY: Objection.

THE COURT: The answer is ordered stricken and the jury will disregard the answer.

Q What might cause, Doctor, a chipped fracture visible on July 4, 1954, not to appear in later films, if you know, from your experience?

A Differences in the technique of the person taking the

film, and variation in the distance of the tube from the patient's anatomy.

Q How many people in the Bay View Hospital operated the X-ray machine in July of 1954, just roughly?

A Six.

Q Were these people physicians or were they assistants?

A They were technicians.

Q The record discloses that a schauntz collar was applied; will you tell us what that is?

A A schauntz collar is a device which is employed to protect the neck and hold the head in an upright position, so that the muscles of the neck won't be required to hold it up there by reducing and relieving muscle spasm and pain.

Q Do you recall when a schauntz collar was first applied or fitted to the neck of Doctor Sam Sheppard?

A A temporary collar was fitted immediately after his admission.

Q Doctor, you testified that after observing Doctor Sam Sheppard in the den, you went upstairs?

A Yes.

Q Prior to going upstairs, had you observed the entire first floor?

A I had observed the entire den and the entire kitchen.

Q And what about the living-dining room area?

A I had been in the dining area and the living area when

Mrs. Sheppard and I stepped in there prior to my going into the den.

Q Were there any other rooms on the first floor that you did not observe?

A The only other room was the one around through the L by the fireplace.

Q You went up from couch or living room side of the stairs rather than through the kitchen, is that correct?

A That is correct.

Q And when you observed all these rooms on the first floor, I take it you did not see Marilyn Sheppard?

A That is correct.

Q Doctor, you told us that when you left the house that morning in response to a telephone call, you took a pistol?

A Yes, I did.

Q What information were you given in that telephone call by Dorothy Sheppard?

A She said that something terrible had happened up at Sam and Marilyn's house and they thought Marilyn was dead.

Q Was there any other information?

A Not that I recall.

Q Was it because of that telephone conversation that you took with you the pistol?

A Yes.

Q Did you have any knowledge as to whether or not the

causes of the trouble and possible death to Marilyn Sheppard was still around the house?

MR. SPELLACY: Objection.

THE COURT: Sustained.

Q Doctor, prior to going to the second floor, and after you had first observed Sam Sheppard on the floor of the den, did you speak to him?

THE COURT: I am sorry, I didn't follow your question.

MR. BAILEY: After Doctor Stephen Sheppard had entered the house and saw Doctor Sam Sheppard on the floor of the den, and prior to the time that he went to the second floor, I asked whether or not he spoke to him.

A Yes.

Q And did you give some instructions?

A Yes.

Q To whom?

A To my wife, Betty.

Q Where was she at the time you spoke?

A In the dining area of the living room.

Q Doctor, when you arrived at the home, how many vehicles were in the driveway?

A The driveway was completely filled with vehicles, with the exception of one spot and that is where I put my

car. I would estimate eight.

Q Did you observe the ambulance there?

A Yes, I did.

Q And whether or not the ambulance had access to Lake Road or it was blocked?

A It was blocked.

Q Do you recall whether or not Chief Eaton was present when Doctor Sam Sheppard was first removed from his home?

A I do.

Q Was he present?

A He was.

Q Do you recall whether or not he was informed whether Sam was going?

A He could see it.

Q In other words, from where he was standing, Sam was in his view as he was removed by yourself and Doctor Carver?

A Correct.

Q Did Chief Eaton have anything to say to the notion of removing Doctor Sam Sheppard?

A He made no comment.

MR. BAILEY: Has this been received?

MR. SPELLACY: No.

MR. BAILEY: May it be received, your Honor, State's Exhibit 71?

MR. CORRIGAN: If you will offer it as a Defense Exhibit. We are not going to offer it as a State's Exhibit.

MR. BAILEY: I will be happy to offer it as a Defense Exhibit.

MR. CORRIGAN: No objection.

THE COURT: It is received.

(State's Exhibit 71 was remarked for identification by the reporter as Defendant's Exhibit UU.)

Q Doctor, you told us that it is customary for physicians to have instruments made of their own design?

A Yes.

Q But you said that you had never ordered such an instrument?

A I never have.

Q To your knowledge, had Doctor Sam ever ordered one?

A He never did.

Q Doctor, showing you State's Exhibit 35, a pillow found on Marilyn Sheppard's bed, I direct your attention to an impression on this blood-stain, two points here, and the rough perimeter. I will ask you whether or not in all your experience in medicine you have ever seen or known about a surgical instrument that would fit that pattern even approximately?

A Never.

MR. BAILEY: No further questions.

However, your Honor, I ask before the witness leaves that I be allowed to read State's Exhibit 72, for the reason that some of the handwriting is his, and I may need assistance in having it read.

THE COURT: May I see Counselors?

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

THE COURT: Do you want to make your request?

MR. BAILEY: Yes. The defense requests an opportunity at this time to read State's Exhibit 72.

THE COURT: May I see it, please?

MR. BAILEY: Surely. Withdraw the request.

THE COURT: The request to have State's Exhibit 72 read into the record is withdrawn.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

THE COURT: Anything further of this witness?

MR. BAILEY: Yes.

By Mr. Bailey:

Q Do you know a Doctor Clifford Foster?

A Yes, sir, I do.

Q Did you know him on July 4, 1954?

A Yes.

Q Did he have an area or specialty in the field of medicine?

A Yes.

Q And what was it?

A Otolaryngology.

Q Spell that, and then interpret it, please.

A O-t-o-l-a-r-y-n-g-o-l-o-g-y, eye, ear, nose, and throat.

Q Do you know whether or not he examined Sam Sheppard on that day?

A He did.

Q By the way, Doctor, you identified this as the record of Sam Sheppard's case from the Bay View Hospital; when was the last time prior to today that you saw this record?

A The previous trial.

Q Twelve years ago?

A 1954.

Q I take it, it has not been in the Bay View Hospital in the interim, then?

A Not to my knowledge.

THE COURT: Can you fix a date,

Counselor, of Doctor Foster's examination?

MR. BAILEY: July 4th, your Honor.

Thank you, Doctor, I have no further questions.

THE COURT: Counselor Spellacy?

MR. SPELLACY: No further questions.

THE COURT: You are excused, Doctor.

THE WITNESS: Thank you, Judge.

- - -

THE COURT: Counselor Bailey?

MR. BAILEY: Your Honor, rather than call another witness, I should at this time like to read in the testimony of Doctor Foster, as arranged for yesterday.

THE COURT: As agreed upon between counselors yesterday in Chamber?

MR. BAILEY: Yes.

THE COURT: Ladies and gentlemen of the jury, yesterday counselors reached an agreement in Chamber with respect to reading into the record the testimony of Doctor Foster given in the 1954 trial, subject to their rights at this time to object where they feel necessary to the testimony as admitted in 1954.

Counselor Bailey will now proceed to read that part of -- he will proceed to read Doctor Foster's testimony.

Please proceed, counselor.

MR. BAILEY: Yes, your Honor. If it please the Court, and ladies and gentlemen, I am going to read Question and Answer in each case.

THE COURT: Keep your voice up, counselor.

MR. BAILEY: I will, your Honor.

MR. SPELLACY: May the record reflect, Judge, that it will be both direct and cross examination?

MR. BAILEY: I will read the entire testimony. For the record, your Honor, I am reading from Page 5833 of the transcript of the 1954 trial, Wednesday Morning Session, December 8, 1954, 9:15 o'clock a.m.

(Reading:)

"THEREUPON, the defendant, further to maintain the issues on his part to be maintained, called as a witness CLIFFORD C. FOSTER, who, being first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION OF CLIFFORD C. FOSTER

"By Mr. Garmone:

Q Will you state your name, please?

A Doctor Clifford C. Foster.

Q Where do you live?

A 1260 Andrews Avenue, Lakewood, Ohio.

Q Are you married?

A No, sir.

Q How long have you lived in and around the County of Cuyahoga?

"A With the exception of being away to school, all my life.

Q How old are you, Doctor?

A 47.

Q Did you attend school in the City of Cleveland?

A Yes, sir.

Q What is the first school that you attended?

A St. Joseph Academy.

Q After leaving St. Joseph Academy did you enter high school?

A Yes, sir.

Q What high school did you attend?

A Cathedral Latin.

Q After your graduation from Cathedral Latin did you further your education?

A Yes, sir. I attended the College of Osteopathy and Surgery, Kirksville, Missouri, graduating in 1930.

Q After your graduation in 1930 from the College in Missouri did you further your education abroad?

A Yes. I spent seven months at the University of Vienna, that is at the Allegeimeines Krakenhas, which is a training hospital for the University of Vienna, and that was in the clinic of Professor Newmann, the ear, nose and throat clinic of that particular hospital.

Q And how much time did you spend at that institution,

Doctor?

"A I would say approximately five months.

Q Now, when is the first time that you took your profession up at the Bay View Hospital, what year?

A Six years ago, 1948, with the inception of the hospital.

Q Had you had some training before coming to Bay View at any other hospital?

A Other than at Newmann's Clinic, I served a preceptorship, or what might be known as an assistantship to Doctor Leonard Rench, a certified eye, ear, nose and throat specialist in the City of Cleveland, and following that is when I went to the University of Vienna.

Q Do you specialize in any particular branch?

A I specialize definitely in eye, ear, nose and throat. I am a certified member of the American College of Opthomalogy and Otolaryngology and have held that, have practiced eye, ear and nose and throat exclusively in the past ten years.

Q Now, coming down to the 4th day of July, 1954, did you see Doctor Sam Sheppard?

A Yes, sir.

Q And where did you see him?

A In his room in Bay View Hospital.

Q And will you tell the jury the approximate time of

your visit in the room that was occupied by Doctor Sam Sheppard?

"A The approximate time was 2:10 in the afternoon.

Q Now, after your entrance into the room, did you make some observations of Doctor Sam Sheppard?

A Well, I observed that he had a marked swelling of the right side of his face.

Q Did you make any other observations?

A That his eye was rather swollen and he had an ecchymotic appearance of the eye, that is, it was beginning.

I noticed that he had a faded area on the left side lateral to, I would call it, the thyroid cartilage, but we know it as the Adam's apple.

Q Now, at that point, when you say a faded area, can you be a little more specific on that particular observation, please?

A Well, a faded area would be where there had been an extravasation of blood, but it was more or less fading out.

That's the only way I can describe it. Maybe you could describe it as being a livid area.

Q Did you make any further observations of his person?

A Yes. He had a swelling at the base of the skull. As I recall it, it was more to the left side. It was not discernible as far as the patient being erect or lying in bed, but it was discernible if you flexed his neck forward

you could see evidence of swelling, and certainly you could palpate swelling.

"Q Did you palpate swelling in that area that you have just described?

A Yes, sir.

Q Now, the area that you just described to the jury prior to the last description of the baded mark around his Adam's apple, as a doctor did that indicate injury to you?

A Well, it would indicate that he had -- that the patient must have had some injury to that area.

Q Now, how much time would you say you spent in performing the observations that you have described to the jury and other things that you did while you were in the room?

A Well, the entire time, Mr. Garmone, was from 2:10 and I recall very specifically writing on the chart and noting the time was 2:50, so I would say that I was in the room at least forty minutes.

I did go out of the room to obtain an ophthalmascope to examine Doctor Sam's eye grounds and his pupiliary reflexes, and I asked him about pain, where he had pain. He told me in his neck, as I have described.

He couldn't open up his jaw very well. He was not incoherent, but --

Q Well, at that point, during the course of the conver-

sation, was he able to speak fluently?

"A Oh, I would say mentally he could, but he had to talk kind of through closed lips. He couldn't open his mouth very well.

Q What was the reason for that, from the observation you made, Doctor?

A Well, I would say an injury to his cheekbone. I know it as the malar bone, and when we have an injury there, it can affect the temporal mandibular joint, which opens and closes our jaw.

Q Now, during that period, were you able to observe how far he was able to open his mouth during the conversation that you have just related? Can you express an opinion?

A Well, he couldn't open it to the full extent.

Q Doctor, when you made this examination where you looked into his eyes, did you do something in that room at that time?

A Well, the room was semi-dark.

Q And what did you do, if anything?

A I didn't tilt the venetian blinds, I lifted the one venetian blind in order to have proper illumination for better evaluation of his injuries.

Q Now, you kept the venetian blind lifted while you made the observations and examinations of his eyes?

A No, sir.

"Q Did you later --

A Technically, I used the ophthalmascope and examined his fundi, the nerve head, whether or not he had any retinal separations that can happen from a blow, and it was following this that I asked him if he had any more pain, and he said in his right chest.

Q Did you do anything concerning that pain in the right chest by way of examination?

A May I answer that in my own way, Mr. Garmone?

Q Yes.

A Using an ophthalmascope or a small flashlight, you might say, it was certainly not adequate to observe the chest or observe to the full extent his facial injury, and I --"

MR. BAILEY: At this point an objection is noted in the record. Shall I skip these, your Honor, or read them in?

THE COURT: May I see counselors, please?

MR. BAILEY: Yes.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury.)

THE COURT: Please proceed, gentlemen.

"Q Well, what did you do regarding the pain that he com-

plained of in the area of the chest, Doctor?

"A In order to adequately observe it, I lifted the venetian blind so I had proper illumination.

Q Now, during that period that the blinds were up, was there some complaint that came from Sam by the way of talk?

A Yes, sir. He complained that the light hurt his eyes, so I kindly dropped the venetian blind.

Q That was the only day and the only time that you had seen Sam, is that right?

A Yes, sir.

Q After the 4th of July, I believe you left the City of Cleveland and went to the City of Detroit?

A That's right. I attended a convention at Detroit.

Q Now, Doctor, I will hand you what has been identified here as Defendant's Exhibit YYYY, and ask you if in this report, hospital report, your report is incorporated therein?

Will you look it over and see?

A Yes, sir.

Q And your report is depicted on page 11 of Defendant's Exhibit YYYY, is that correct?

A Yes, sir."

MR. BAILEY: May the record reflect, your Honor, that what is recorded in this testimony

as Exhibit YYYY is present as evidence in this case as State's Exhibit 72, the hospital record.

MR. CORRIGAN: It is so stipulated, your Honor.

THE COURT: The record may so show.

"Q Now, during the period that you were in Doctor Sam Sheppard's room, Doctor Foster, did you observe his emotional state?

A Well, I would say the boy was extremely upset.

Q What if anything did you observe him do?

A Well, you mean -- he was lying in bed, he was somewhat restless.

Q Anything else?

A I don't quite get pointedly what you --

Q What is the fact whether or not he was crying during the period you were --

A Oh yes. I meant to cover that with "upset." He was crying. He was certainly, in my interpretation, rather in mental shock.

Q How long have you known Doctor Sam Sheppard, Doctor Foster?

A Oh, I have known Sam since he has been a little boy. Professionally, I believe Doctor Sam came to Bay View in a professional status in 1951 or 1952. I believe it is '51, the summer of '51.

"Q Were you there prior to the time that Sam came to Bay View in a professional status?

A Definitely.

Q And for how long a period prior to his coming?

A Well, that would be -- the hospital opened up in 1948 to '51 would be three years.

Q Now, Doctor, I will again hand you the exhibit that has been marked Defendant's Exhibit YYYY, and ask you to read to the jury the report that you made that is incorporated in the Bay View Hospital report.

A Well, under "Findings," I have here "A marked swelling, an ecchymosis of the right eye and orbital tissue extending over entire right side of face.

"A contusion is noted on the left side of the neck anteriorly.

"2. Marked edema, suboccipitally."

Under "Diagnosis," I have "Contusion of eye and orbital adnexa.

"2. Probable fracture of maxillary," and in parentheses "the malar and zygomatic bone."

I don't have "bone" there, but I refer to that as malar and zygoma.

"Contusion of left side of neck. Contusion of suboccipital tissues.

"Recommendation: Intermittent hot and cold packs

or ice bag to the face, and to X-ray the facial bones," meaning the maxillary and the zygoma or the malar bone.

"Q Now, this report was prepared by you?

A Definitely.

Q And on what day?

A July 4, 1954.

Q Shortly after you had made the observations and the observation that you have described to the jury, is that correct?

A Yes, sir.

"Mr. Garmone: That is all, Doctor.

"CROSS EXAMINATION OF CLIFFORD C. FOSTER

"By Mr. Parrino:

"Q Now, I see in this report, Doctor, that there was something about a fracture of the --

A Malar.

Q Where is that, please?

A "Probable fracture of the maxillary. (Malar and zygoma.)" That is part of the maxillary bone.

Q Where would that be?

A That is the bone, Mar. Parrino, that is more or less the lateral side of the orbit, and the zygoma bone is this bone here that is an extension of the temporal bone.

Today it is known in the later anatomies -- the anatomy I have refers to it as the malar bone, but I notice in later

nomenclature that this is the -- this is known as the whole zygomatic arch.

Q Well, as a matter of fact, you later learned, as a result of certain X-rays that were taken, that there was no fracture of that bone, isn't that correct?

A Yes, sir. I assumed there was no fracture.

Q Did you determine that or did you not?

A By X-ray?

Q Yes.

A I assumed that inasmuch as I did not have an X-ray report to the fact that it was not fractured, that it was not fractured.

Q Well, you knew that X-rays were taken of the bones of his face, did you not?

A Yes, sir.

Q Did you ever examine those X-rays?

A I looked at them very briefly on a wet film, and the technique used would certainly not bring out, by proper positioning -- let me state it this way --

Q Well, the question is simple, I think, Doctor: Did you ever examine the X-rays?

A Yes.

Q And when did you examine them?

A I examined those after I had left Doctor Sam's room, and they were wet. They were still in solution.

"Q What time did you examine the X-rays?

A Well, I would say approximately it was after I left there, 2:50 or five minutes of three, three o'clock.

Q And you say the X-rays were still wet?

A Yes, sir.

Q On those wet X-rays did you see any fractures? Yes or no?

A No.

Q Did you examine those X-rays later?

A No.

Q At any time?

A They were not suitable, Mr. Parrino, for my observation.

Q Well, did you examine those X-rays later at any time?

A No, sir.

Q Now, Doctor Foster, you have examined a patient, have you, before the 4th, who was suffering from brain injuries, in your experience as a doctor?

A Yes, sir.

Q And I presume that you have done that on numerous occasions in your years of work?

A In suspected brain injuries, yes, sir.

Q Well, have you ever examined persons with actual brain injuries? Yes or no?

"A Yes, sir.

Q In numerous cases?

A I wouldn't say numerous, no, sir.

Q Now, in some of these cases that you have examined where there were brain injuries, did you ever examine the eyes?

A Yes, sir.

Q And in these cases where there was brain injuries, is there something unusual that occurs insofar as the eyes are concerned?

A Well --

Q The eye grounds.

A Do you want a recent injury or one that has been for some time?

Q A recent injury, within the last twelve hours?

A Two hours, eight hours, twelve hours?

Q Yes.

A Would you restate that question again, Mr. Parrino?

Q Yes. Where you have a brain injury and you examine that patient within, oh, eight or nine hours, what happens to the eye grounds?

A Well, edema, papule edema, as it is known, may occur.

Q What does that mean?

A A swelling of the nerve head, but depending on where the brain injury has occurred.

"Q What else happens to the eye grounds where you have brain injury that you can observe within eight or nine hours?

A Perhaps loss of vision. Maybe that isn't answering your question directly.

Q What else?

A All that I can state would be papule edema.

Q Well, you didn't find any of that with Doctor Sheppard, did you?

A No, sir.

Q What does your report say as to what the results were of your examination of his eyes?

A The report states nothing, because I did not find any papule edema.

Q So that, then, your findings were negative as to the eye grounds, right?

A Yes, sir.

Q They were normal as to the eye grounds?

A Yes, sir, to the best of my knowledge.

Q Now, you say that you examined the anterior part of the neck, isn't that correct, Doctor, or the front of the neck?

A Observed, yes, sir.

Q And there you saw what you described to Mr. Garmone as a faded area, is that correct?

"A Yes, sir.

Q And what was the size of this faded area?

A I would say three-quarters of an inch by three-quarters, something like a thumb mark.

Q A thumb mark?

A Yes, sir.

Q Now, there was no laceration there, was there?

A Definitely not.

Q Now, Doctor, where I would take my thumb and press it up against some part of my body, like my forehead here, with some force, for some period of time, say, minutes, ten minutes, an hour, two hours, and apply substantial force, then I remove it, will you describe to the jury what happens in that area beneath where the force was applied?

A Is this a pressure or impact?

Q A pressure, as I have indicated, pressure against the forehead, against the thigh, against the arm, any part of the body, what happens to that part of the body at the skin and beneath the skin where the pressure is applied?

A In my opinion, at first it would be faded.

Q At first it would be faded, you say?

A By that I mean blanched.

Q Yes.

A Depending upon the force of the pressure used, that would injure the capillaries, and those capillaries could

extravasate blood and you would have a blue discoloration.

"Q I see. And for how long would that continue, that blue discoloration? How long could you see it? Minutes later or hours later?

A Well, that would be rather --

Q In your experience?

A -- difficult to tell. I haven't had any experience of one putting a thumb and holding it that long, Mr. Parrino.

Q I see. Well, assume that a person would be holding his hands behind his neck in this way (indicating) to support the neck -- can you see that, doctor?

A Yes, sir.

Q (Continuing) -- and perhaps with his thumbs in front of the neck, in the anterior portion thereof, and holds the back with force for some time, would you have that fading in the back of the neck?

A Are we talking about the back of the neck or front?

Q Yes, we are talking about the back now. Would you have that same fading in the back of the neck?

A Well, I suppose you could, yes, sir.

Q There is no doubt about it, is there, Doctor?

A Well, there's always doubt and there's always probability, Mr. Parrino.

Q I see. Now, at the time that you saw Doctor Sam, did

you have any conversation with him?

"A Yes, sir.

Q Did you ask him what happened on the morning of the 4th and the night of the 3rd?

A Yes, sir.

Q And did he tell you?

A Yes, sir.

Q What did he say?

A I asked him what happened.

Q What did he say?

A He said that all that he could remember was a scream, that he ran upstairs, using his word, he was clobbered; that he didn't know whether it was by one or two people or assailants, and that he followed an assailant to the beach and there he was struck again.

And I said, "Well, Sam, what in the world were you hit with?"

And he said, "I don't know, Cliff." He said, "I think it was a hand, a judo blow, a fist."

Q He said that to you?

A Yes, sir.

Q All right. What else did he say?

A And that he awakened lying in the water with his head up on the beach.

Q Anything else?

"Q That is your total description, is it, sir?

A Well, I can go in -- I mean, how far do you want me to go?

Q I think that is enough for the time being, sir.

Now, you say that he was somewhat restless, is that a fact?

A Well, a man crying at intervals and being upset, I would say the man was restless. He was certainly uncomfortable.

Q Well, he wasn't -- he didn't appear to be unusually uncomfortable or unusually restless to you, did he?

A For him, yes, sir.

Q For him. But in answer to one of Mr. Garmone's questions, you did state that he was just somewhat restless, did you not?

A I probably used that term.

Q Yes. Now, in examining the man, and speaking with him, did he appear alert to you?

A I would put it as alert as one can be under the circumstances.

Q How?

A As alert as one can be under the circumstances.

Q Well, using the term alert as we normally know it to be, laymen, the jury, the persons in this courtroom, yourself, in the general sense of the word?

A As far as cerebrating, yes.

"Q Did Sam appear to be alert?

A As far as being able to think, yes, sir.

Q And was he able to answer all questions clearly and lucidly?

A Well, I don't think my questions were that pointed for clarity and lucidly.

He answered questions, yes, sir, I mean, it would be a normal thing for a friend and colleague to ask him what happened; he told me.

Q Now, my question is this: Did he appear to answer these questions to you clearly and lucidly? Yes or no, if you can.

A Yes, sir.

Q He did. But still you say he was in a state of mental shock, right?

A Oh, from the standpoint of his being upset and crying, emotionally upset, yes, sir.

"Mr. Parrino: That is all. Thank you, Doctor.

"REDIRECT EXAMINATION OF DR. CLIFFORD C. FOSTER

"By Mr. Garmone:

"Q Doctor, holding the neck, as was described to you by Mr. Parrino, would that in and of itself cause the swelling that you described that you received through the palpation

that you performed on the back of his neck?

A Well, Mr. Parrino, Mr. Garmone, stated specifically to hold it for a certain period of time, two hours, as I recall, and I don't think that his neck -- that he held it continually for any stated period of time. I don't know.

Q Well, would it bring about the swelling that you discovered by your palpations?

A No, sir. I am of the firm opinion that it had to come from injury, not from holding.

Q Now, Doctor, have you ever observed, in your experience where concussion was present but there was absent the papule edema?

A Will you state that again, Mr. Garmone?

Q In your experiences, have you witnessed where there was present a concussion but an absence of papule edema?

A You mean palpable edema?

Q Palpable edema.

A Certainly. I have picked them out of automobiles with a broken neck with no edema or no palpable edema.

Q Doctor, have you ever been present in surgery with Doctor Sam?

A Many times.

Q And during that period of times that you were present in surgery with Doctor Sam Sheppard, were you able to observe his temperament?

"A Yes, sir.

Q Will you tell the jury what kind of temperament Doctor Sam Sheppard has under the conditions that your observations were made in surgery?

A I would say that Doctor Sam in surgery is a very calm, even surgeon. I know I have observed the boy in many instances where if it were me working, perhaps under the conditions -- I would say he is quite a calm surgeon and I have never seen him really become flustered in surgery.

Q Have you, in your experiences as a doctor, seen other doctors lose their temper in surgery, Doctor Foster?

A Definitely, yes.

"Mr. Garmone: That is all, Doctor. Thank you.

"RECROSS EXAMINATION OF DR. CLIFFORD C. FOSTER

"By Mr. Parrino:

"Q Will you name one doctor that you saw lose his temper while performing a surgical operation, Doctor?

A I don't think that -- this may be beside the point, Mr. Parrino, but --

Q How?

A I don't think that is a fair question to me, Judge, to name a doctor, professionally --"

MR. BAILEY: After a ruling, the answer is given by the witness:

"A Yes, I have seen Doctor Lusinger over in Philadelphia, when an assistant would get in his way, he would rap his knuckles. In fact, I was assisting him one time and he rapped my knuckles.

Q I see. And you would call that losing his temper?

A Well, and I also --

Q The point is, sir, this -- will you answer my question?

A Yes, I have seen him lose his temper by throwing a hemostat down and obviously losing his temper.

I have seen him -- I mean, I have seen that situation, and in some situations the dismissal of a surgical nurse because perhaps she didn't hand over the right instrument at the right time. Yes, sir, I have seen those things.

Q Now, Doctor, you say that you didn't think that Doctor Sam Sheppard held his neck for two hours, is that correct?

A You proposed the question of holding a neck -- or holding an area for a certain length of time. I stated that I don't know.

Q How?

A I don't know, but I don't think that Doctor Sam held his neck continuously for any two-hour period of time.

Q Were you at Sam's home on the morning that this crime occurred?

A No, sir.

Q You don't know whether or not Doctor Sam Sheppard was

holding his neck for one minute, five minutes, ten minutes, one hour or two hours, isn't that correct?

A Continuously, you are correct.

Q How?

A Not for any continuous time. I don't know that.

Q You didn't see him until 2:10 in the afternoon?

A Yes, sir."

MR. BAILEY: And that concludes the testimony of Doctor Clifford Foster.

THE COURT: May I see counselors, please?

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. CORRIGAN: At this point I think the jury should be instructed and the record should reflect, that it is stipulated by and between counsel for the defense and the State, that if Doctor Foster were here, he would testify as was read from the record by counselor Bailey.

THE COURT: Counselor Bailey?

MR. BAILEY: Agreeable.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

THE COURT: Ladies and gentlemen

of the jury, it has been stipulated by and between counselors for the parties to this action, that if Doctor Foster had been present this morning, that he would have testified to you as has been read to you from the transcript of 1954, which has just been read to you by counselor Bailey; and you will regard it as evidence and testimony in this case.

Now, ladies and gentlemen of the jury, it is the luncheon hour, so we will recess for lunch; and while you are away on your luncheon recess you will bear in mind the instructions given you on each occasion when you leave this room.

You shall not discuss this case or what you have heard of it amongst yourselves. You shall not permit anyone else to do so, nor shall you permit yourselves to overhear anything that relates to this cause by any means of communication, bearing in mind in detail the specific instructions given you with respect to newspapers, printed material, radio or television.

We will stand recessed until 1:30.

(Thereupon an adjournment was taken to 1:30 p.m., Friday, November 11, 1966, at which time the following proceedings were had:)

Friday Afternoon Session, 1:30 p.m., November 11, 1966

THE COURT: Counselor Bailey?

MR. BAILEY: Mr. Bailiff, would you call Doctor Koch from the witness room, please.

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THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness DOCTOR RICHARD E. KOCH, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DOCTOR RICHARD E. KOCH

By Mr. Bailey:

Q Will you tell us your name, please?

A Richard Edmund Koch.

Q Where do you live?

A 999 Shorewood Drive, Medina, Ohio.

Q What is your business or occupation?

A I am a dentist.

THE COURT: Counselor, excuse me for interrupting, but how does the doctor spell his last name, please?

THE WITNESS: K-o-c-h.

THE COURT: Thank you. Please proceed.

Q How long have you been practicing dentistry?

A I have been practicing fifteen years.

Q In 1954, Doctor Koch, where was your practice located?

A In 1954, I was at 4352 West 222 Street.

Q Did you have an office there for the practice of dentistry?

A Yes, I did.

Q Do you know the defendant Sam Sheppard?

A Yes, I do.

Q Did you know him in 1954?

A Yes, I did.

Q Did you ever give him professional services?

A Yes, I did.

Q Drawing your attention to the month of May, 1954, did you see the defendant during that month?

A Yes, I did.

Q Do you have some records with you, Doctor?

A Yes, I have.

Q Will you tell us what those records are, what they reflect?

A On May 26th of 1954, I saw Doctor Sam as a patient on a routine examination and check-up.

Q Did you examine his teeth on that date?

A Yes, I did.

Q Did you photograph them at all?

A Yes, I photographed them, also.

Q By what means?

A X-ray, I x-rayed his teeth.

Q Was this your own equipment?

A Yes.

Q When did you next see Sam Sheppard after May 28th?

A I saw -- I want to correct this -- that was May 26th I saw him for that period.

Q Yes.

A And then I saw him May 28th, which was two days later, when I placed one filling on one of his teeth.

And then -- excuse me, what was your next question?

Q When did you next see him after May 28th?

A Then I saw him on June 4, 1954, when I prepared another tooth for an inlay.

Q Did you do the inlay on that date?

A I prepared it and put a temporary filling in the tooth. I did not put the inlay in at that time.

Q Did you observe his entire mouth on that day?

A Yes, I did.

Q When was the next time that you saw Sam Sheppard?

A The next time I saw Sam Sheppard was on July 15, 1954.

Q And where did you see him?

A In my office.

Q Did you examine his mouth on that date?

A Yes, I did.

Q What did you observe?

A Let me read it, I think it is probably more accurate.

"Examination and X-ray of the upper right quadrant" -- or the upper right side of his mouth -- "revealed the upper right third and fourth tooth both slightly loose and chipped."

The upper right third would be the upper right cuspid, and the tooth right next to it, the upper right fourth, which would be the upper right bi-cuspid, side by side. Chipped and fractured about a quarter of an inch from the cusp tip, through the enamel which is an eighth of an inch layer, into the dentine, which is the layer below the enamel.

So that the chips or the fractures were anywhere from an eighth of an inch to a quarter of an inch on both teeth.

The teeth were still sensitive, since the fractures were into the dentin. Both teeth were ragged on the edges and loose.

Q How did you determine that they were loose?

A By mobility, finger mobility of the teeth.

Q Were you able to move them?

A Yes.

Q What did you do if anything with respect to the raggedness that you found on these two teeth?

A I smoothed them off or ground them down to remove the jagged edges. That was the extent.

Q The condition that you found on this date, July 15, did that represent a change from the condition you had last seen on June 4th?

A Yes, because on June 4th they were not chipped. They were a total tooth at that time.

Q Did you observe anything unusual with respect to the flesh on the inside of the mouth in the vicinity that you described?

A The mouth was lacerated inside, parallel to the jagged teeth.

Q When was the next time after July 15th, that you checked the teeth for looseness?

A The next time was when I was a witness twelve years ago in the courtroom, and I examined the mouth at that time for looseness.

Q In open court?

A In open court, yes, sir.

Q And were the teeth tightened up by then?

A Yes, they were.

Q Is that a natural healing of the process, that teeth loosened by some force will tighten up?

A Yes, they will, yes.

Q Did you ever see Sam Sheppard between July 15th and the time you observed him in the courtroom?

A Yes, I saw him in the jail one time.

Q What was the purpose of seeing him in the jail?

A If I go back to -- I prepared an inlay on June 4th, 1954, prior to the day I saw him with his chipped teeth.

I had placed a temporary filling, and a temporary filling is a temporary filling.

Sometime after that I got a call from the jailer that his tooth was bothering him, and would I put the inlay in, or could I do something.

So I was called down to the jail and I placed the inlay in the mouth in the jail, and that was the last time I have seen him.

Q Doctor Koch, do you have with you some X-ray films?

A Yes, I have.

Q May we see them, please?

A Yes.

MR. BAILEY: Will you mark these, please.

(Defense Exhibits VV, WW, and XX were marked for identification by the reporter.)

Q Doctor Koch, I show you Defendant's Exhibit WW, and ask you if you can identify it for us?

A Yes, this is the X-ray I took of Doctor Sam prior to the time the teeth were chipped. That was on the 26th of June.

Q Now, does this X-ray that is dated 5-28-54, does that

indicate the same area of the defendant's mouth that you subsequently found to be damaged?

A Yes. The only thing this X-ray does not show one of the teeth that were chipped. It does not include it. It is not a big enough X-ray to include it.

It shows one of them but not the other one.

Q But does this show the area of the tooth in question?

A Yes.

Q -- which was subsequently chipped away?

A Yes.

Q Now, I show you Defendant's Exhibit XX, and ask you if you can identify that?

A Yes, this is the one that I took the day that I smoothed the edges of the teeth when they were fractured.

Q And does that X-ray reflect the absence of the portion of the tooth that was there on the 28th day of May?

A Yes, it does.

Q Now, Doctor, I show you Defendant's Exhibit VV, and ask you to tell us what that is?

A That is another picture of the same, the chipped teeth.

MR. BAILEY: These are all offered by the defense, your Honor, as exhibits.

MR. SPELLACY: No objection.

THE COURT: They may be received.

Q Doctor, from your observations and examinations of

Doctor Sheppard, having in mind what you saw July 4th and what you saw subsequently, and the extent of the damage that you did observe, do you have an opinion as to whether or not injury of this sort to the area where it was located could be self-inflicted?

A I do not think it could be self-inflicted.

MR. BAILEY: That is all. Thank you.

You may examine.

CROSS EXAMINATION OF RICHARD E. KOCH

By Mr. Corrigan:

Q Doctor Koch, you said that you do not think it could be self-inflicted; do you rule out the possibility absolutely?

A Do I rule it out? I think that would be difficult to determine. I just don't feel you could self-inflict damage of that sort to yourself.

Q But you don't rule out the possibility?

A I don't think it could be ruled out, no.

Q You don't know when these teeth were chipped prior to the 14th of July, do you, of your own knowledge?

A I haven't any idea, no.

THE COURT: Counselor, excuse me, your question was the 14th of July?

MR. CORRIGAN: That was the date.

MR. BAILEY: The 15th.

MR. CORRIGAN: The 15th, I am sorry.

Q You do not know?

A I haven't any idea.

MR. CORRIGAN: No further questions of this witness.

MR. BAILEY: Thank you, doctor.

May I have a moment before the next witness comes in?

THE COURT: You may have whatever time you deem necessary. Be at ease, ladies and gentlemen.

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THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness DOROTHY SHEPPARD, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DOROTHY SHEPPARD

By Mr. Bailey:

Q Your name, ma'am?

A Dorothy Sheppard.

Q Where do you live?

A 23346 Lake Road, Bay Village, Ohio.

Q Is that located next to the Bay View Hospital?

A The first house immediately west.

Q How long have you lived there?

A Since January of 1949.

Q What is the name of your husband?

A Doctor Richard N.

Q Richard N. Sheppard?

A Right.

Q How long has he been a physician?

A Since graduating from medical school in 1941.

Q Do you know whether or not he is the brother of the defendant in this case, Doctor Samuel Sheppard?

A Yes, he is.

Q Mrs. Sheppard, I call your attention to the morning of July 4, 1954, and ask you whether or not you received any unusual phone calls early that morning?

A At about ten minutes of six, our phone rang. Doctor Richard answered the phone.

Q And as a result of that phone call, did you place some phone calls?

A Yes, my husband asked me to.

Q Did you call Doctor Stephen?

A I called Doctor Stephen Sheppard.

Q Did you call anywhere else?

A I called Doctor R. A. Sheppard, my father-in-law.

Q And did you make any calls to the hospital?

A No.

Q Now, at some time on the morning of July 4th, were you in the Sam Sheppard home?

A Yes.

Q About what time did you get there?

A Around 10:30.

Q While you were there, did you do something?

A Yes, we needed clothing for young Sam.

Q Were you familiar with the home of your brother-in-law prior to this?

A Yes.

Q You had been there many times?

A Many times.

Q Now, twelve years ago today, Mrs. Sheppard, where were you?

A Twelve years ago today, Armistice Day, court was in session, and we had been very concerned about Sam's home --

Q Did you go to his home for some reason?

A Yes.

Q What was the purpose of the trip?

A We went up there to see about the furnace, get the heat turned on in the house, check on the pipes.

Q When you say we, to whom do you refer?

A Doctor Richard, my husband, and I.

Q Was anyone else present?

A Yes, we had police officer Hubach with us.

Q That is Sergeant Hubach of the Bay Village police at that time?

A That is correct.

Q Was it just the three of you who were present?

A That's right.

Q While you were in the home checking on the heat, I will ask you if anything happened with reference to a waste basket located in that home?

A Yes, sir.

Q What?

A I was concerned because the waste basket in the kitchen,

which was located just east of the sink, was very full of trash, there was an odor in the kitchen, empty milk cartons were in there, and I asked Officer Hubach if it couldn't be emptied, and he said yes.

Q And did you do something with it?

A He took the waste basket, was going to take it out and empty it out, and when he lifted it up, I said, "There is a key on the floor."

Q And did you observe the key, in fact?

A Yes, I did.

Q Was something subsequently done with that key, in your presence?

A Yes, sir.

Q Who handled the key, if anyone?

A Officer Huback picked up the key and took it to the back door.

Q When you say the back door do you refer to the Lake Road door?

A Lake Road door.

Q Did you see him do something with the key with reference to that door?

A Yes.

Q What?

A He put it in the lock, it turned, you could open and close the door with that key.

Q Now, how many times had you been in Sam's home between June 4th and November 11, 1954?

A July 4th, as I said, at about 10:30 in the morning.

Q Just roughly how many times, had you been in there at all between those dates?

A Yes, to get the clothing for Marilyn's funeral.

Q Any other occasions?

A And the latter part of July with possibly Chief Eaton.

Q Will you describe with particularity this waste basket that you had reference to, just as best you remember?

A I would say it was about eighteen inches to twenty-four, twenty to twenty-four inches high, approximately, say, fifteen by ten, as I recall.

Q What material was it made, if you recall?

A I believe plastic.

Q Now, the key that was noticed by you in the waste basket was lifted by Sergeant Hubach, had you ever seen that key around the kitchen floor before?

A No.

Q This was in the kitchen, was it?

A That is correct.

Q Do you remember what portion of the kitchen the waste basket was located in prior?

A Yes.

Q Where?

A It was just east of the sink, between the sink and the kitchen cupboards, which were on the east wall.

MR. BAILEY: You may inquire.

THE COURT: Counselor Corrigan, please proceed.

CROSS EXAMINATION OF DOROTHY SHEPPARD

By Mr. Corrigan:

Q Mrs. Sheppard, in 1954 you testified substantially to the same thing, did you not?

A I was never a witness in 1954.

Q You were never a witness in 1954?

A No, I was not.

Q Was your husband a witness in 1954?

A That is correct.

Q Were you in the courtroom when your husband testified in 1954?

A No, I was not.

MR. CORRIGAN: No further questions of this witness.

MR. BAILEY: Thank you, Mrs. Sheppard.

THE COURT: You are excused.

Has another witness been called, Counselor?

MR. BAILEY: Yes, your Honor.

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THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness SAMUEL REESE SHEPPARD, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF SAMUEL REESE SHEPPARD

By Mr. Bailey:

Q What is your name?

A Samuel Reese Sheppard.

Q Where are you now living, Sam?

A In Miles Standish Hall, Boston University.

Q Are you a student at the university?

A Yes, I am.

Q A freshman?

A Yes.

Q When you are not away at school, where do you live, what is your permanent residence?

A On Lake Road in Bay Village, Ohio.

Q With whom do you live?

A With my father and stepmother.

Q How old are you now, Sam?

A I am nineteen years old.

Q I ask you whether or not you remember the morning of July 4, 1954?

A Very faintly.

Q Are you aware of anything unusual that happened that was brought to your attention then?

A Well, I was taken away from the house in a slight state of confusion.

Q Sam, on the night prior to July 4, 1954, did you sleep at the home on Lake Road in Bay Village where your parents lived?

A Yes, I did.

Q Have you ever had any memory from that day right up until today of being awakened at any time during the night on that night?

A No, I do not.

MR. BAILEY: Your witness.

THE COURT: Counselor Corrigan or Spellacy?

MR. CORRIGAN: No questions, your Honor.

MR. SPELLACY: No questions.

THE COURT: You are excused, Sam.

- - -

MR. BAILEY: May we approach the bench, your Honor?

THE COURT: Counselors. Be at ease, ladies and gentlemen, and you may visit amongst yourselves if you wish.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury.)

THE COURT: Counselor Bailey and Corrigan, have you reached a stipulation, and will you read it to the record, please, whatever your stipulation is?

MR. BAILEY: We have, your Honor. As with the witness Doctor Foster this morning, it is agreed between the State and the defense that the testimony from the 1954 trial of Gervase Charles Flick, the roentgenologist mentioned by Doctor Steve Sheppard, who is now deceased, may be read into the record under the same terms and conditions.

THE COURT: Will you spell the name for the record.

MR. BAILEY: G-e-r-v-a-s-e, Charles, Flick, F-l-i-c-k.

THE COURT: Thank you.

MR. BAILEY: His testimony, your

Honor, commences on page 5868 of the record of the first trial. The direct examination was conducted by Mr. William Corrigan.

(Reading:)

"Thereupon, the defendant, further to maintain the issues on his part to be maintained, called as a witness GERVASE CHARLES FLICK, who, being first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION OF GERVASE CHARLES FLICK

"By Mr. Corrigan:

"Q Will you state your name?

A Gervase Charles Flick.

Q Why do you read your name off an envelope?

A What's that?

Q I say why do you read your name off an envelope?

A Why?

Q Yes.

A Well, I don't have to. I know my name; I think I do right now, anyway.

Q I saw you take the envelope out and read your name off.

A Well, I am careful.

Q How do you spell your name?

A G-e-r-v-a-s-e.

"Q What is your business or profession?

A Osteophathic radiologist, an osteopathic physician.

Q And where do you live, Doctor?

A 3137 Rocky River Drive, Cleveland.

Q How long have you lived in this community?

A I think three years yesterday.

Q And where did you live prior to coming here?

A Well, for 23 years, or a little better, I was in Boston, Massachusetts, at the Boston -- The Massachusetts Osteopathic Hospital as radiologist, and previous to that I was in Delaware, Ohio, at the old sanitarium down there from January, '25, until almost '28. That is when I started.

Q Do you specialize in some branch of medicine or surgery?

A Well, I specialize in radiology, diagnostic and therapeutic. In Boston I was doing quite a bit of internist work. In Delaware I was doing internist work with radiology, because it was a smaller hospital, 50-bed hospital.

Q The term that is used by doctors for that particular specialty is roentgenologist, is that the term that is used?

A Yes, roentgenologist, in honor of Roentgen, who discovered it.

Q Discovered the X-rays?

A That's right. In 1903, about, I think.

"Q And in order to be a roentgenologist, and recognized as such, does it require special training?

A Yes, it does.

Q And have you had that special training?

A Yes. I am the second osteopathic radiologist in Ohio. There was only one here when I started practice here, so I --

Q Now, then, do you do the radiology work at Bay View Hospital?

A Yes. I think we do close to eight thousand cases a year. It runs between 25 and 30 a day.

Q And the taking of the picture of the X-ray, the picture itself, do you take the picture?

A No. I haven't taken any pictures since I have been here. We have technicians that do that.

Q There are people specially trained to operate those machines and take the pictures?

A That's right.

Q Now, Mrs. Huge was here yesterday and testified that she took some pictures of Sam Sheppard.

A That's right.

Q You are familiar with those X-ray pictures?

A Yes.

Q Is that correct, Doctor?

A Yes, I am familiar with them.

Q Now, after the picture is taken, does it require the

interpretation--the interpretation of those pictures, does that require special training and knowledge?

"A Yes, it does.

Q Do you have that?

A I should think I was qualified.

Q Now, the X-ray pictures that were taken or films that were taken on the 4th day of July, did you examine those?

A I did.

Q Now, I will hand them to you. I will hand you what has been marked in this courtroom as State's Exhibits 46-B, C, D, E, F, G, H, J, L, M and P.

Will you look at those films that I have just given to you, Doctor, and state whether or not you can identify them with July the 4th, 1954, and Sam Sheppard?

A Yes. These films have the imprint of Bay View Hospital and Sam Sheppard's name, and, as I recall, I identified these for Doctor Gerber several months ago.

Q And where were they the last time that you saw them, Doctor, before you saw them today?

A Well, Doctor Gerber's office, I suppose. I don't know how to identify it by any other classification.

Q When did you see them in Doctor Gerber's office?

A I don't know that date.

Q Well, if you can approximate it. Was it along in July of this year?

6

"A I would say so.

Q Do you recall the date of the -- the time -- never mind the date -- do you recall the time of the inquest that was held in Bay Village? Did you know of that event?

A Well, I didn't have much to do with that.

Q No. Did you know --

A I recall that there was one made.

Q Now, was it after that that you were in Coroner Gerber's office?

A Yes.

Q And were you requested by him to bring those films to his office?

A That's right, I was.

Q And did he then take possession of them?

A Yes. I identified them and he took possession.

Q And that was the last you saw of them?

A That's the last I have seen them.

Q Until you have seen them today?

A That's right.

Q Now, those films that I have handed to you, does one of them show an X-ray of the second cervical vertebra?

A Yes, it does.

Q And which film is that that shows the --

A This film.

Q That is marked State's Exhibit 46-J.

Now, Doctor, this picture that the jury has just looked at shows the outline of the bony part of the jaw and shows the head resting upon the atlas of the spinal column, and it shows the cervical vertebrae, that is the vertebrae that is in the neck, is that right?

A That's right.

Q And when you talk about the second cervical vertebra, first you have the atlas upon which the head rests and twists and turns, and then the next vertebra is number what, the next bone?

A Well, the third. Atlas, axis and third. The third cervical.

Q So the second cervical vertebra would be the bone of the spine just below the axis, is that right?

A Yes, first, second and third.

Q First we have the bone that we twist our head on, that the head rests on, and the next bone is the second cervical vertebra. Did your examination of that film show in which direction the picture was taken?

A Well, it shows that it was taken with the film on the left side.

Q The film on the left side?

A Yes.

Q And the rays that were penetrating through the neck were coming from the right side?

"A That's right.

Q And the result of those rays penetrating through the neck, through the lower part of the jaw, how was that registered on the film that was on the left side, just what is the process of that?

A Well, it penetrates the bone, and you get an idea of the bone density.

Q Well, the result is that some of the rays go through, do they not?

A Yes, and hit the film.

Q And hit the film, and some of the rays are stopped by the bony structure?

A Yes.

Q And the bony structure then throws a shadow on the film, is that not so, Doctor?

A You see the rays that penetrate, the rays that penetrate have to meet the film before they, of course, would give you a picture.

Q Well, in X-rays we are dealing with shadows, aren't we?

A Yes.

Q Now, then, did you see in examining that film any injury, or what indicated to you there was an injury to the second cervical vertebra?

A Well, I saw a shadow that was consistent with a

separation of what we call the inferoposterior, the lower back tip.

"Q There was a chip there?

A Well, yes -- tip. I said the tip. The separation of the tip, which would be a chip. The chip refers to the size. That was a little thing, and, of course, it is what we characterize as a chip fracture.

Q That's a c-h-i-p, chip fracture?

A Yes, chip, just like a wooden chip.

Q And in this Exhibit 2 -- no -- Defendant's Exhibit YYYY, page 23 --"

MR. BAILEY: Which was the hospital record, your Honor, and our Exhibit 72.

"Q -- appears your report, does it not, or a copy of your report?

A Yes.

Q And do you have your original report here?

A This is my original report.

Q Well, taking your original report, you have the term lateral neck in it?

A Lateral neck.

Q And does that refer to this film marked as --

A The one we showed around.

Q What?

A It refers to the film we showed around. It refers to

this film.

"Q That we showed to the jury?

A That's right.

Q And what is your statement as reported on that particular film, lateral neck?

A I said, "There is a chip fracture in the inferoposterior margin of the second cervical vertebral spinous process."

That's called the spinous process, that one in the back.

Q Is there anything further that you state as to the lateral neck?

A Yes, there is.

"There is a rather marked hypertrophic change at C-5-6. As a matter of fact, there is bridging between these vertebral bodies."

And that refers to this. I mentioned this and then I mentioned this. (indicating)

Q Oh, you've got to get down here because the jury can't see what you are talking about unless I hold it up.

"Thereupon the witness leaves the witness stand and stands in front of jury."

Q Now, point out --

A Well, this is the chip that I saw, but down here is what I call a bridge. See, there are various terms to describe that, lipping or spiking or bridging. Lipping,

spiking or bridging.

"Q And this --

A This other is the chipping.

Q That is up here on the second cervical?

A It's right here, it's right below. Yes, second.

Q Right below.

A This other is the fifth and sixth."

"Mr. Corrigan: All right."

MR. BAILEY: That concludes the direct examination of Doctor Flick.

Cross examination was as follows by Mr. Parrino:

"CROSS EXAMINATION OF DR. GERVASE FLICK

"By Mr. Parrino:

Q Now, Doctor Flick, when was the first time that you saw Sam Sheppard on the 4th, if you saw him on the 4th?

A I saw him at 12:30. I wrote on the chart that I found no evidence of skull fracture. I wrote on his chart in the progress notes.

Q And how did you determine that?

A What?

Q When you say you found no evidence of skull fracture, how do you come to that conclusion?

A Well, I reviewed all these films, of course. The two

apparent re-focalized films here. All the rest of them were in here, see.

"Q Let me get this correct. I'm sorry, but I want to understand this, if I can.

At 12:30 p.m., July 4th, was the first time that you saw Sam, right?

A That's right, I saw him.

Q These pictures or X-ray film that we have here are those that were taken by Eileen Huge, is that correct?

A Yes.

Q And do you have any information as to what time those pictures were taken?

A Well, no, except earlier in the morning. As I remember, they sent for me with the idea that I should come and interpret the skull films to see --

Q I see. And what time did you arrive there that morning?

A Well, I can't tell you definitely, but I would say that it was about -- it must have been around ten o'clock or a little later I looked over the films.

Q How?

A It was around ten o'clock onlSunday, July 4th, or possibly a little later.

Q What time was it when you first went over the films?

A Well, I went over the films that morning.

"Q About what time?

A Well, let's say between ten and 12:30 sometime.

Q Where were the films when you went over them for the first time?

A I think they were in my office.

Q Was anyone present at that time?

A Not that I recall. Do you mean while I was interpreting?

Q Yes.

A Not that I recall.

Q How did the films get to your office?

A Well, I don't -- I can't tell you exactly whether Mrs. Huge put them there or whether a resident or an intern put them there.

Q Did Doctor Steve put them there?

A I wouldn't know. I wasn't -- you see, I didn't get there until ten o'clock.

Q I see. Then all that you know is that shortly after you got there you found the films in your office ready for your examination and interpretation, is that correct?

A That's right.

Q You did not examine the films at all while they were wet?

A No, I don't think I did. I don't know whether I did or not, but I don't think I did.

"Q After an X-ray is taken, I presume that that negative, if I use the correct word, is developed, is that correct?

A Well, it isn't a negative until it is developed.

Q I see. Well, this film that we have here before us, how long does it take that film to dry?

A Well, in our dryer, with very few films in it, they should dry anywhere within 25 to 30 minutes.

Q And then after you remove the film from the X-ray camera, you can take that film, develop it and within 25 or 30 minutes, it is in the process of being dried, is that correct?

A In the process of being dried?

Q Yes.

A Yes, I would subscribe to that.

Q And then within a half hour, let us say, that film will be dry, ready for your interpretation, is that correct?

A Yes, I would say so.

Q Now, while the film is -- withdraw that.

Have you ever looked at film, X-ray film, that was still wet?

A Oh, daily, almost.

Q That is when you are in a hurry and you want to immediately --

A Well, an emergency or something.

"Q Yes. When there is some grave and serious emergency and you want to look at it quickly, isn't that correct?

A That's right.

Q Now, as you look at wet film, isn't it a fact, Doctor, that if you examine it carefully enough you can see on wet film substantially everything that you can see on dry film, isn't that a fact?

A No, I don't subscribe to that.

Q You wouldn't. Well, then, why is it that in the case of an emergency you look at wet film?

A Well, you do the best you can in a case of emergency. That's why, I understand, it's an emergency.

Q I see. But even on wet film you can get fairly substantial impressions as to what is the nature and extent of a particular injury, is that right?

A You are getting kind of complicated now.

Q How?

A You are getting kind of complicated, fairly substantial and a lot of relative words.

Q Well, I'll withdraw the question.

Even on a wet film, you can see pretty well what the nature of an injury is?

A It depends on how gross it is.

Q I see. Were the injuries very gross in this case?

A Well, here they are.

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"Q No, I am asking you this question, sir: Were the injuries very gross in this case?

A As regards size, no; as regards effect, they may have been. It depends on what category you are talking of.

Q As regard to size, they were not gross, is that correct?

A No, not visually gross.

Q Yes. And as regard lto -- what is that other word you used?

A Category, importance. That wouldn't be very big to put in your hand; it would be pretty big in your eye.

Q As regard to size, they were not very gross, these injuries, is that correct?

A That's right.

Q But as regard to effect -- that is the word you used -- as regard to effect, they may have been, isn't that correct?

A Yes. That is, indirectly they may have been as regard to effect.

Q Well, that is what you said?

A Yes, that's what I am saying, as regard to effect, but you'll have to distinguish now between effect on the bone or effect on the tissue around it.

Q Now, at whose order were these X-rays made?

A I don't know that, either. They weren't made at my

orders.

"Q Under whose directions were these X-rays made?

A That, you would have to ask -- that would be a question for Mrs. Huge to answer, not me.

They hand me a package. I don't know how the package was made up.

Q According to the information you had, who were the doctors in charge of Sam?

A Doctor R. N., Doctor R. A., that would be his older brother and father.

Q Doctor R. N., that's Richard N. Sheppard, according to your records, was in charge of this patient, is that correct?

A Partly.

Q Doctor Richard Sheppard, Sr., was also in charge of this patient, does your record show?

A Partly, but it really means that I make records for these people, these doctors whose names are here.

"Referring doctor: R. A. Sheppard, R. N. Sheppard," means that I make -- that I see that they are sent records. That's what it really means.

Q Well, does your information show that Doctor Stephen Sheppard is in charge of this patient?

A Yes. His name is on, too. Doctor S. A. Sheppard. Three Sheppards are on.

"Q So all of them, according to your official records which you have with you, were in charge of the patient, is that correct?

A No. That's a wrong inference. All of them that appear here were to get copies of this report. That's all it means to me.

Q All right. How many copies of this report were there?

A Well, according to our signal with my secretary and me, there were six copies. She gives my initials, her initials, and then the number of copies she made.

Q And who got these six copies?

A I got one of them.

Q You got one.

Q Presumably these three doctors got one.

Q Well, don't you know?

A I can't follow them out. I am not a messenger boy. I just do what I am told to do.

Q I see. Well, don't your records show who got the three others?

A (No response.)

Q Well, let me ask you this: Did Richard get a copy, according to your records?

A I don't know. She was told to send him one. That's what this tells me.

Q Did Steve get a copy?

"A Presumably, from this, I would say it was sent to him.

Q And Richard, Sr., got a copy, according to that?

A Yes.

Q And what happened to the other two copies?

A Well, I suppose one went on the chart.

Q One went on the chart.

A That accounts for five, doesn't it?

Q Yes.

A I don't know who got the sixth one.

Q All right. Now, when did these people get these copies, according to your records?

A Well, the girl wrote this -- typed this report on the 6th. That would be Tuesday, with the 4th on Sunday.

Q They wouldn't be mailing these copies to Richard and Steve and Richard Sr., would they, at the hospital there?

A This is when she wrote them.

Q What is that, please? 7-6-54?

A Yes. Sunday was the 4th, Monday the 5th, Tuesday the 6th.

Q According to this information on that record you brought into this courtroom, copies of your official report as to the nature and extent of the injury to Sam's neck were not sent to Richard, Richard Sr., and Steve until two days later, July 6, 1954, is that right?

"A Now, wait. The content of this was sent to them on the 6th.

Q All right.

A Is that all right?

Q That's fine. Thank you. Now, do you have that view of the neck there again, please, of the second cervical?

A That's it.

Q Now, we are referring to State's Exhibit 46-J again. Was this the only X-ray taken of the cervical vertebrae of Sam's neck?

A Taken when?

Q On the 4th.

A Yes, it's the only one I know of.

Q Well, this was the only X-ray that was submitted to you by Mrs. Huge, apparently, that had a view of the second cervical, is that correct?

A Well, I think maybe if we looked on some of these others of the lateral skulls we might find something. I don't know.

No, that's cut off. Well, these are over exposed, of course, that low down, so they wouldn't be of any diagnostic quality.

Yes, that's the only one.

Q Now, when you got to your office that morning after being called, all of the film that has been shown to you

here this morning was in your office awaiting your interpretation, isn't that correct?

"A Well, I am pretty sure it was.

Q Will you check that, please?

A How can I check it? I don't know whether it was in there or not. I don't know whether it was in my office when I went there.

Q Well, you looked at -- withdraw that.

A I looked at all these films on July the 4th.

Q And you looked at all these films on July 4th when you arrived at your office that morning?

A That's right.

Q And at that time all of the films that were in your office that we have here in the courtroom were dry, isn't that correct?

A Yes, I would say so.

Q And in that film that was -- withdraw that. Do you have a film here of the jaw area, Doctor, in here somewhere? Would you pick it out, please?

A I don't think I have the jaw except in the --

Q Here it is, I think.

A This is the one we are talking about.

Q Yes. The jaw area would be --

A Oh, yes. I see what you mean. It is the same film.

Q And we are referring now to State's Exhibit 46-J

again. Did you ever see that?

"A Have I ever seen this?

Q Yes.

A This is the one we handled this morning.

Q And when you saw that in your office on the morning of the 4th, you say you did examine it, of course?

A Yes.

Q And that includes the jaw area?

A Here is the jaw here.

Q Well, this picture includes that area?

A Yes.

Q And this film was dry at the time you examined it in your office, isn't that correct, on the morning of the 4th?

A Yes, I'm pretty sure that's correct.

Q Now, there are certain markings, arrows, and the like, on this exhibit, are there not, Doctor?

A Yes.

Q Now, were there any marks on the exhibit, this negative or film when you first saw it?

A No. These are my marks.

Q All of them here?

A Well, this is not my marking.

Q All the markings that are made --

A This pencil thing was my marking.

Q Pencil or pen, are those all yours, sir?

"A Yes, I numbered them. I called attention to this portion. I saw this that I wondered what it might be, and, of course, this (indicating).

Q Now, in this exhibit -- and we will continue to refer to State's Exhibit 46-J until we speak of it otherwise -- you have here the picture of the vertebrae, the cervical vertebrae, do you not?

A Yes.

Q And shown here is the second cervical vertebra, is it not?

A Second cervical vertebra.

Q Vertebra?

A Singular.

Q I am sorry. And within the second cervical vertebra and other vertebrae, there is an opening, is there not, Doctor?

A Between the two? I don't quite get that.

Q Well, what is the name of the opening in the vertebrae through which the spinal cord passes? Does it have a name?

A Yes. The spinal canal. It runs down vertically.

Q Is that the only name that it has?

A Well, I don't know what other names --

He wants to know what the name of the canal is that runs down through the spinal column. Is that --

"Q Yes.

A Well, I call it the spinal canal.

Q All right. Now, on this picture you have an arrow pointing in the region of the spinous process of the second cervical vertebra, is that correct?

A That's right.

Q And this arrow points to -- would you step down here, please.

(Witness does as requested.)

Q This arrow points to the very tip of the spinous process, is that correct?

A Well, you can be a little more specific. It is the under part and posterior part, the back part and under part.

Q As you can clearly see in this picture, the spinous process is this area that I am pointing at back in here, is it not?

A That's right.

Q And the spinous process, that is part of the vertebrae that is closest to the skin in the back, isn't that correct?

A That's right.

Q And it is that part of the vertebrae that is farthest from the spinal cord, isn't that correct?

A Yes.

Q It extends backward and downward, as you can clearly

see in this picture, isn't that correct?

"A Yes, that's right.

Q Now, would you please point to the area in this picture where it is claimed that there was some fracture of the spinous process? With the back of my pen. Don't mark it up.

A This much is spinous process. The tip of the hook -- the continuity of the border was interpreted as interrupted in what we call a postero-inferior portion of the spinous process.

Q And can you see that on that film, Doctor?

A Yes. I can see it in the bright light. You can see a black line running through there.

Q Now, just point to the same area so that the jurors at this end can see it, please.

A I have to hold it. You can't see it except in bright light. I am pointing to what we call the chip in the chip fracture.

Q Point to it again, please.

A The continuity of this outside line is interrupted right through there, so that the reasoning is that you have --

Q When you say right through there, Doctor, you were pointing right --

A The black line there.

"Q This area in here at that tip?

A That's right.

Q The lower tip of the spinous process, is that correct?

A That's right.

Q Now, Doctor, I presume that you have interpreted X-rays where you would find a dislocation of a vertebra, would you not?

A Yes.

Q And where you would have a dislocation of the vertebra, in many instances there might be some pressure of that vertebra up against the spinal cord, is that a fact?

A Yes.

Q And that would be classed as an extremely serious injury, isn't that correct?

A That's right.

Q Now, an injury or a fracture of the spinous process certainly would not be classed as an extremely serious injury, would it, Doctor?

A Not in itself, no.

Q Not in itself. Now, a spinous process, as it is shown here, is that portion of the vertebra to which muscles may be attached or ligaments may be attached, is that not correct?

A Yes.

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"Q Now, a fracture, if I understand it correctly, is a separation of the normal continuity of the bone, is that a description of it?

A Yes, that is correct, with certain modifications. I mean sometimes it isn't grossly separated.

Q It was not grossly separated in this case, was it?

A Yes. You have a black line between it.

Q Well, Doctor, did you experience some little difficulty in arriving at the conclusion that there was a fracture of the spinous process in the second cervical vertebra?

A Did I?

Q Yes.

A Well, I took a lot of time to it.

Q Well, was there some doubt in your mind, as you first looked at it, that there was a fracture there?

A Well, I presented two things: Is this a fracture or is this an artifact?

A Well, first tell the jury what an artifact is?

A Well, an artifact is from the same Latin stem as artificial is. It is something that -- well, it is just a happenso, in the lingo of X-ray interpretation.

So, for instance, a kidney may be taken out and maybe a week or two weeks afterwards you get a film of that area, and you will think you saw the kidney. Well, of course,

there is no kidney there. Now, that would be an artifact.

An artifact would be where something happened in the process of taking a film.

For instance, maybe they will pull them out of the envelope fast and you will have streaks of lightning across, and all that sort of thing. That would be artifact.

It is something that -- well, let's for instance, take the Mona Lisa and suppose that the man that painted it didn't want her smiling, and it just happened that she was smiling, that would be an artifact.

It wouldn't be something that was intended, there was no intent. It was something that was just a happenso when the thing was -- well, it could be in the Cassett, in the film, in the way the -- the direction of the film, all that sort of -- direction of the ray and all that sort of thing. That would be called an artifact.

So the question, of course, in interpretation would be: Is this something that just happened or is this a fracture?

Now, then, of course, remembering that a roentgenologist is also a doctor, and that he has to infer a lot of things, then he is interested in what we call the context of the situation. And you would have to include that in your reasoning. I guess that is as nearly as I can explain an artifact.

"Q That's it. Now, summarizing all that, would it be a fair statement to say that an artifact is something that occurs in an X-ray which prevents a true picture of what might be actual injury?

A Once you have established that it is an artifact, your definition would hold.

Q An artifact, then, prevents a true reading, right, a true reading of the film? That's all it amounts to, isn't that correct?

A An established artifact.

Q Yes.

A Now, no generalities. An established artifact would prove that.

Q Well, when you first looked at this film, there was some thought in your mind, was there not, that there might be an artifact in this film?

A That's right.

Q Now, for how long was it that you continued to have this impression as you were looking at that film?

A Well, if you will notice, when I wrote my report on Sunday, I said -- I didn't say anything about it. I kept that -- of course, I noticed this thing and I kept it in reserve and I studied it several times, for instance, and I discussed also, for instance, with Doctor Gerber and Doctor Elkins.

"Q Well, you did notice some, what you thought to be some artifact in this film as you first looked at it, did you not?

A Well, I wanted to ponder it more, if that's -- I don't know what the thought is in the back of your head, but I wanted to ponder it more.

Q You did ponder it more, I presume?

A Yes. I looked at it and I reasoned that if it was one, it had to be recent because because there was no -- it wasn't pulled away as you would expect from an old accident.

Q For what period of time was it that this problem as to whether or not there was an artifact existed in your mind?

A Well, there must -- now, wait a minute. What is that again? Let's have that, the first part of that sentence.

"(Question read by the reporter.)"

A I am going to change that and say the possibility of an artifact existed in my mind until I made out the report on 7-6. That would be 48 hours, when I said, "Lateral neck: There is a chip fracture in the inferoposterior margin of the second cervical vertebral spinous process."

Q Well, in the first report that you made --

A That's it.

Q -- to anyone as to a -- withdraw that.

You say that the first report you made was on the 6th,

then, is that right?

A The first written report.

Q Yes."

THE COURT: I am sorry, counselor, the first what?

MR. BAILEY: The first written report, your Honor.

THE COURT: Please proceed. I didn't hear the word "written."

MR. BAILEY: May I see how much further this goes, your Honor? I am about ready --

THE COURT: Should we have a recess at this time, gentlemen?

MR. BAILEY: My throat would appreciate it, your Honor.

THE COURT: Mr. Ferguson or Mr. Patrick, can we get some air in here during the recess, please?

Ladies and gentlemen of the jury, we will have our afternoon recess, and while you are away on your recess, you will bear in mind the instructions given you on each occasion when you depart from the room, and that is you shall not discuss this case or what you have heard of it amongst yourselves; you shall not permit anyone

else to discuss it with you, nor permit yourselves to overhear anything that relates to this case by any media of communication.

We will have our afternoon recess.

(Thereupon a recess was had.)

THE COURT: Please proceed, counselor, when you are ready.

MR. BAILEY: Yes, your Honor; I am picking up the cross examination of Doctor Gervase C. Flick, at page 5900.

Do you have, Mr. Romito, the last question and answer I read?

(Record was read by the reporter.)

MR. BAILEY: (Reading:)

"A I made the report about the skull fracture immediately, 12:50 -- 12:30 July 4th I wrote it on the progress record.

Q As to the skull fracture?

A Yes.

Q Did you find a skull fracture?

A No. I wrote on there that I did not find a skull fracture, but that's what I was sent for.

Q Well, on the 4th, did you make a report anywhere saying that there was a possibility of an artifact in this film?

A Not a written report.

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"Q You didn't record that on the hospital chart, did you?

A No.

Q Did you record any of the findings that you made as to this film on Sam's hospital chart?

A Yes. I made the report that there was no evidence of skull fracture.

Q And is that the only entry you made?

A I wrote that at 12:30 on the 4th.

Q Now, you say that between the fifth and sixth cervical vertebrae you find some what you refer to as hypertrophic changes?

A Hypertrophic bridging.

Q Bridging?

A There it is. (indicating)

Q I see.

A A stalactite-stalagmite formation, the one above sending down a little bonecicle and the one below sending up a little bonecicle and they meet.

Q Well, might that indicate some growth of bone in that area?

A That's what I figured, that it was probably an old football injury.

Q I see. Well, that in no way was involved with any injuries that Sam might have received on the morning of

the 4th, isn't that correct?

"A That's right, but it becomes important later on.

Q I see. But that arrow that you have between --

A It looked like there might be a piece of bone there. Do you see that?

Q Well, was there?

A I couldn't say that there was. I just marked it and put a question there. You have to have suspended judgment once in a while.

Q All right. Now, you later learned that there was not, did you not?

A A fracture further down?

Q Yes.

A No. As a matter of fact, I didn't learn anything about that.

Q Well, as to this arrow and question mark that you have here in the region of C-4, the fourth cervical --

A Do you see that shadow there?

Q Yes.

A Well, I didn't know -- it's possible there might have been something knocked off there. You see, here's the long bone, here's the short bone, here's the long bone again (indicating).

Q I see. Now, there were some more X-rays taken again on other days?

"A Yes.

Q And when those X-rays were taken, you described that there was no fracture anywhere on the cervical vertebrae, isn't that correct?

A No. I discovered that the other X-rays did not show it. I ordered a repetition of this technique with the man on his back, the weight of his head on the table.

I ordered this same technique repeated so that I could work out whether or not that was an artifact or that was a fracture.

Had it occurred the second time, of course, the probability of its being an artifact would be lessened. Then if I had done it again and it happened again, then I would say it was definitely a fracture.

Q Well, when were the next X-rays taken of the neck?

A Well, I guess they were taken 7 -- they were taken 7-6. I asked for checks, you see.

Q In other words, on this occasion you ordered a second series of X-rays taken because you wanted to be sure that what you saw in the first series was correct, isn't that right?

A Well, you wouldn't hardly have an artifact happen two successive days. That was the idea.

Q Well, sir, my question is this: You had the second series of X-rays taken because you wanted to be sure what

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you had seen in the first series was correct?

"A That's right.

Q Yes. Now, will you look at these, please -- and let's keep these apart so we don't confuse them -- now, which of these was taken on the second series and what is the order in which they were taken, if you can tell me?

A Let's count these the first.

Q Yes, those are all the first. I think these are all the second.

A This is the second. And it showed, instead of the black streak, it shows a white streak across there, which starts way down below and goes way up over.

Q Is this in the region of the second cervical?

A That is, right across that black mark. So --

Q Before we get to that, in other words, on this second X-ray that was taken, there was an artifact in this film, is that correct?

A That's right.

Q So --

A In that portion of the film.

Q When was this taken, by the way?

A This was taken on the 6th.

Q Was this --

A See, we had a holiday, Sunday and then we had a holiday Monday.

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"Q I see here that this is dated -- July 7, 1954, is that correct?

A No.

Q Well, would you read that, please, in typing?

A Yes. It says that on there, but it was corrected above.

Q And then typed here we have "date" and in type we have July -- or, 7-7-54, isn't that correct?

A Yes.

Q And that's crossed out, is that correct?

A Yes.

Q And then above it you have another date?

A 7-6.

Q Now, who changed the date on this X-ray film?

A Probably Kerner, the man who took the film.

Q Well, do you know, Doctor?

A I know I didn't do it, and I know the report is given as dictated -- yes, the girl copied it that way.

Q Well, the fact of the matter is, Doctor, you don't know who it was, of your own knowledge, that changed the date on this film, referring to State's Exhibit No. 46, isn't that right?

A Yes, that's right. I don't know who changed it. Is it changed consistently?

Q Yes. I don't know if it is.

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"A Yes, there's a white -- Kerner always used a white pencil, so it would be --

Q All right. What is this information that is contained in this area here? What is that called?

A We call that a plate.

Q And who puts the plate in the position that it is here?

A When the film is taken, there is lead on the film which leaves you an unused portion of the film here.

Then we have a machine, and that goes in, and a light is thrown on it so that the plate is recorded on the film, and the technician takes it automatically.

Q Shall we look at that plate together, Doctor, and we see here on this plate "Bay View Hospital," is that right?

A That's right.

Q "Name: Sheppard, Dr. Sam, 7-6-54, X-ray No. 54-5506. Date: 7-7-54," with a line through it, is that right?

A Yes, that's right.

Q And then you have "Referred by," is that right?

A Yes.

Q "Referred by R. N. S." Would that be Richard N. Sheppard?

A Yes. And then this, too.

Q And "SAS." Would that be Stephen Sheppard, Stephen A.

Sheppard?

"A Yes.

Q And then you have "R.A.S.," and that would be Richard A. Sheppard, right?

A Yes.

Q So apparently this was referred to whoever took these pictures by all three of these doctors, isn't that right? Isn't that right?

A Well, that's right, as far as that printing goes, but--

Q Now, it also says here, "Age: 30. Height" -- what is that? -- "6-1 or 6-5"?

A Six feet.

Q Six feet. "Weight: 180"?

A That's right.

Q So then after you examined State's Exhibit 46, you discovered an artifact in it. What did you do then?

A I told them to clean his neck with alcohol and to take the film without the collar.

Q Now, who did you tell that to?

A I told that to Kerner.

Q Apparently, then, this second X-ray was taken as Doctor Sam had his orthopedic collar on, is that right?

A Yes.

Q Now, you asked him to wash his neck, did you not?

A Well, cleaning it off with alcohol.

"Q Or to clean it off with alcohol. Now, was the reason for that that there might be some salve on the neck that might interfere with the X-ray?

A Well, yes. That was to make sure that he had a neutral neck, if you want to --

Q Well, exactly, then, why was it? Will you tell the jury, please?

We may not understand these things as to why it was that you gave the instructions to have this technician wash Sam's neck before this third X-ray of the neck was taken.

A Because I wanted to have proof that there would be no artifacts on the second -- on this film. This would be the third film.

Q And if there were something on the neck it is possible that that might produce an artifact, isn't that right?

A Possible, yes.

Q Now, thereafter, then, a third X-ray was taken of the neck. Do we have that here?

A Well, I don't know.

Q I think these are all we have here. Look them over, please.

A This must be it. It is written on. This we don't want (indicating.)

Q Well, keep them all here. These are separate from

those others.

"A Yes. This is the third one. "Collar off and neck cleansed with alcohol. Patient erect. 72 inches."

Q Now, we are referring to State's Exhibit 46-K, is that right, Doctor?

A Yes.

Q 46-K?

A That's right.

Q And the film with the artifact in it that was taken on the second occasion would be 46-I?

A I.

Q Okay?

A Yes.

Q Now, on this film, 46-K, do you see any artifact in this film?

A No, I don't.

Q You don't?

A No.

Q Now, in this film -- withdraw that.

This is a film of the same area that we have in -- I want to withdraw that.

Referring to State's Exhibit 46-K, 46-K is the same area as 46-I, is it not?

A What do you mean 46-K? Is that the Number one film or Number two film?

"Q Well, they show the same region of the neck, the cervical area of the neck, do they not?

A Oh yes, yes.

Q And in 46-K, the last picture that was taken, do you see any fracture of the spinous process of the second cervical vertebra?

A No, I don't.

Q Now, in other words, Doctor, the results of the X-rays--the third X-ray film that you examined, and that was taken on the 6th, did not show a fracture of the spinous process that you interpreted in the X-ray film of the neck taken on the 4th, isn't that right?

A That's right, but what you are forgetting is that I ordered --

Q Doctor, I am not forgetting anything, sir.

A Well, I know. That makes it worse, as far as I can see.

Q Now, do you want to add something to your answer, sir?

A Yes, I want to add something to my answer.

Q Add as much as you wish.

A You take a fracture where you find it, when you find it, and lots of times they are very difficult to demonstrate. The first technique was with the man on his back at 36-inch distance.

The second was 72-inch distance. Sure it didn't show

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it, but it didn't prove that it wasn't on the first at 36 inches.

"Q Now, on the 6th, at the time the second film was taken of Doctor Sam's neck, was that from a lying position or from a standing position that that film was taken?

A Sitting, I think.

Q Does it so state in your report, Doctor?

A I think it is written on the films. I think it is written on the films. Oh, the second time -- the one with the white streak?

Q Yes.

A "Patient's neck cleaned with a" -- oh, no. Second 72-inch film of the lateral neck. "Patient erect." That may have been standing, I don't know.

Q So he was standing?

A Yeah.

Q As to the third film, was he lying, sitting or standing, do you know?

A Well, as a matter of fact, the one I just read to you was the third film.

Q Well, how about the second one?

A The second film, "Lateral neck, patient erect, coned down at 72-inch distance. There is evident a white streaking through the film which detracts from its value. This film does not show findings interpreted on the previous

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film as a chip fracture of the spinous process of C-2."

"Q Well, Doctor, my question is: Was he standing, sitting or lying down?

A It says "Patient erect."

Q How was he? Don't your records show other than "Patient erect"? What does that mean?

A It means that his trunk was vertical.

Q And it doesn't say then if he is sitting or standing?

A No, it doesn't say.

Q As to the second X-ray of his neck, at what distance was that X-ray taken?

A That is after he was cleansed with alcohol?

Q The second picture was taken -- well, let's put it this way: The first picture that was taken on the 6th.

A The first picture that was taken on the 6th?

Q Yes.

A Was 72 inches, patient erect.

Q As to the second picture taken on the 6th, what was the distance?

A Second, 72 inches. Film on the lateral neck. Patient erect.

Q Now, referring to the picture taken on the 4th, was the patient, according to your records, lying, sitting or standing when that was taken?

A He was supine.

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"Q Where does that say that on your report?

A No, it doesn't say.

Q It doesn't say, does it?

A No.

Q Does the report on the 4th as to the picture that was taken on the 4th, does that report tell you the distance at which that picture was taken of the neck?

A No, I don't think it does.

Q Do you know at what distance the picture of the neck was taken?

A Yes.

Q At what distance?

A 36 inches.

Q Now, you say that the pictures that were taken on the 6th were both taken at 72 inches, right?

A That's right, yes. That's right.

Q Now, is there any technical reason why you did not have the pictures on the 6th taken at 36 inches again, please?

A Yes. They ignored my -- Huge didn't take the second picture. Doctor Kerner -- or Mr. Kerner took the second picture and took it at 72 inches.

Q Now, we are referring now to the first X-ray or the first picture of the 6th, aren't we?

A Yes.

"Q Did you give instructions that that picture was to be taken at any specific distance?

A Yes. I asked for it at 36 inches. I didn't write them. As a matter of fact, I thought until I measured them -- when Doctor Gerber came in and Doctor Elkins measured them and saw that they were smaller, and then I knew that they hadn't taken them the way I wanted them.

Q So then, as to the first pictures that were taken on the 6th, you gave instructions for those pictures to be taken at 36 inches, is that right?

A Yes.

Q And that wasn't done?

A That's right.

Q Now, then, after you found that there was some artifact or defect in those first pictures of the 6th, you wanted another set of pictures taken, right?

A Yes.

Q Of the neck?

A Yes.

Q And did you again give instructions that those pictures were to be taken at 36 inches?

A No. I assumed that the first one was taken at 36 inches.

Q So then we have -- you have no pictures in your possession that were taken at the same distance that the first

pictures were taken, is that right?

"A That's right. The first ones were taken at 36 inches.

Q Now, to summarize your findings as to those pictures, Doctor, would you state to me whether or not this is a correct summary of what you found, as to the pictures, or as to the picture of the neck that was taken on the 4th, there was what you thought might perhaps be a fracture of the spinous process in the second cervical vertebra; as to the first picture that was taken on the 6th, there was an artifact, so you could not accurately read that picture --

A Because --

Q Just a moment. As to the third picture that was taken on the 6th -- as to the second picture that was taken on the 6th, you found no evidence of fracture any place on the neck, isn't that right?

A That's right.

"Mr. Parrino: You may inquire.

"REDIRECT EXAMINATION OF GENVASE CHARLES FLICK

"By Mr. Corrigan:

"Q Doctor Flick, in the first picture that was taken on the 4th of July, that was taken by a technician named Mrs. Huge?

A That's right.

Q The distance was 36 inches?

A That's right.

"Q And Doctor Sam was lying down?

A He was supine.

Q And when you examined that film, after you pondered over it and examined it, you found a chip fracture, didn't you?

A That's what I -- that was my conclusion and that's the way I wrote it.

Q And that shows on the film?

A Yes.

Q You also found, did you not, between the fifth and sixth cervical vertebrae some evidence of bony deposits that showed on that film of July the 4th?

A Yes. What I call -- I think I called it bridging.

Q Bridging. Now, you tell the jury what that is, so they will understand what that was on the 5th and 6th cervical vertebrae.

A Well, the borders of the bodies start shooting out little bony spikes. The sixth shot its spike out and up. The fifth shot its spike out and down, so that there was practically bridging. That's what we call bridging. They go out and up.

Q That was a building of bony deposits?

A That's what is called an osteophyte, and an osteo means bone, and phyte means a plant, an excresent.

Q And that takes some time to develop, doesn't it?

"A Oh, yes.

Q Is that what causes arthritis?

A Well, it is a manifestation of the groundwork of an arthritis.

Q And you found that present in this film of July the 4th?

A That's right.

Q And you determined that that was the result of something that occurred a long time ago?

A Well, frankly, it isn't -- I thought he got it hurt playing football.

Q Now, then, when the second films were taken on the 6th of July, it was a different technician, wasn't it?

A Different technician and different technique.

Q On those particular films, the films were taken with the body erect --

A Trunk erect, at least.

Q And the distance was 72 inches?

A That's right.

Q Now, in examining those films of July the 6th, the two films that were taken on July the 6th, do you find any evidence on those films of the bony deposit that you found on the film of July the 4th?

A No, none at all.

Q Now, then, does it occur in the taking of X-rays that

you will get one result from one sort of technique and another result from another technique?

"A It certainly does.

Q And can you explain that to the jury, and have you had experience in that occurrence, in occurrences of that kind?

A Yes, I have.

Q Will you tell the jury?

A Well, as I said this morning, you take your fractures where you find them because very often you have what you call hidden fractures.

I have in mind the one I took the day before yesterday. I took a child's leg. On the first film it didn't show at all; on the second film it showed a fracture.

Q Yes. Now, although the film did not show a fracture in the first instance, the child still had a broken leg, didn't it?

A Yes.

Q Now, then, you were asked the question by Mr. Parrino in regard to the fracture that appeared on the spinous process, and he stated, "That that of itself is not serious, is it, Doctor?"

And your answer was, "No."

Do you have anything to add to that?

A Well, I did, I think, at that time. The thing of itself

is just a piece of bone knocked off of there, but the position of that chip would mean that the blow had to hit it at right angles, and you don't know how much jar there might be to a nerve or to the spinal cord; and, of course, that's only speculation for me, but it had to be a pretty violent blow hit from a certain direction.

Q But you do know this, Doctor: That in order to chip a bone or a piece of bone off the spinal column, it requires force?

A Yes.

Q And what type of force?

A Well, mechanical force.

Q Of what type of -- how heavy a blow?

A Well, a pretty heavy blow, I would think.

"Mr. Corrigan: That is all.

"RECROSS EXAMINATION OF DR. GERVASE C. FLICK

"By Mr. Parrino:

"Q But, Doctor, after this third -- withdraw that. After the second picture was taken on the 6th from a distance of 72 inches, and you found that there was no evidence of any fracture on the neck, you did not order another picture of that neck taken from a distance of 36 inches, did you?

A No, I did not at that time, as I told you before.

Q Now, Doctor, referring to this hospital record, on page 25, is this your report, sir?

"A That's my writing.

Q Now, when was this report made? What is this date up here, please? What does that represent?

A 7-7.

Q And is that the date on which this report was made?

A The date 7-7 should read 7-6.

Q Well, on what date was this report made, then?

A Well, this is it, it was made on the 7th -- it was made on the -- it apparently was made on the 8th, but it should read up here 7-6. This means the films were taken on the 6th, which would be Tuesday.

Q Yes.

A But the report was made on the 8th, which was Wednesday. That is, that's when the girl put it down.

Q But on the 6th -- withdraw that.

It was on the 6th, was it not, that you knew that the second and third pictures were taken from a distance of 72 inches, isn't that correct?

A Say that again.

Q What?

A Say that again.

Q It was on the 6th after the second and third pictures were taken that you knew that those pictures were taken at a distance of 72 inches, isn't that correct?

A Let's see. Let me see that. Well, I don't know. I

found it out when I was conferring with Doctor Gerberrand Doctor Elkins, because I noticed that when we put them all up there together, the one was smaller, and I measured them in front of them and saw that this was --

Q Doesn't your report here of the 8th specifically state:

"Lateral neck: Patient erect, come-down at --"

A Cone.

Q Comb?

A Cone; put a small spot on it.

Q Well, there's a letter missing from that word, then?

A Oh, yes, that's an "m" instead of a "n".

Q It's "cone-down at 72 inches"?

A Yes.

Q Well, you knew at that time, did you not, that the pictures were taken at 72 inches on the date that this report was made, July 8th, 1954?

A Yes. I wrote it on the 8th.

Q Yes. On what date did you make this entry here, "the date 7-7-54 should read 7-6-54, G. C. Flick, D.O."? What date did you write that?

A I wrote that on the 8th.

Q All right. So that on the 8th you did read this report and determined that the date up here was wrong, so you corrected it?

"A Yes.

Q And then in reading the report, you knew that those X-rays of the 6th were taken at a distance of 72 inches?

A Yes, and I knew it on the 8th.

Q Yes, that's right.

A I knew it on the 8th.

Q All right."

MR. BAILEY: And that terminates the testimony of Doctor Flick.

THE COURT: Gentlemen, is it agreed by and between counselors that if Doctor Flick had testified in this room this afternoon, that his testimony would be as has been read by Mr. Bailey?

MR. CORRIGAN: It is so stipulated by the State, your Honor.

MR. BAILEY: And the defense.

THE COURT: Ladies and gentlemen of the jury: You will consider what has been read as evidence and testimony in this case.

Counselor Bailey, have you called another witness?

MR. BAILEY: I have, your Honor.

THE COURT: Thank you.

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THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness KATHRYN CAPODICE, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF KATHRYN CAPODICE

By Mr. Bailey:

Q Will you tell us your name, please?

A Kathryn Capodice, C-a-p-o-d-i-c-e.

Q Did you at some time use the name Post?

A Always when I worked for a newspaper.

Q In July, 1954, were you employed?

A Yes, sir.

Q By whom?

A By the Lorain Journal.

Q That is the newspaper in Lorain, Ohio?

A It is.

Q Where did you live at that time?

A I lived in Cleveland, Ohio.

Q And do you recall the address?

A Yes. 11501 Mount Overlook Road.

Q Had you ever worked for other newspapers previous to the Lorain Journal?

A Yes.

Q How long had you been working at the Lorain Journal as of July 4, 1954?

A One month.

Q Who was the editor of the paper?

A Colonel Edward C. Lapping.

Q Was there at some point on or about July 4th, brought to your attention as a newswoman that there had been a murder in Bay Village?

A Yes, sir.

Q And whether or not you covered that murder or wrote any stories about it for the Lorain Journal?

A I did, sir.

Q Did you at some time meet with Coroner Samuel Gerber in connection with your coverage of the murder?

A Yes, sir.

Q When was the first time that Doctor Gerber in connection with the Sheppard case?

A It was on July 6, 1954.

Q At that time, did Doctor Gerber give you anything?

A Yes, sir.

Q And what was that?

A He gave me some pictures that were photographed from another angle at the Sheppard home.

We did not have a photographer and he volunteered and he gave me the pictures.

Q And were those for use of the newspaper?

A Yes, sir.

Q Now, as a result of this favor by the coroner, did you at some later time have occasion to meet with him?

A Yes, sir.

Q At whose suggestion was the meeting held?

A At Colonel Lapping's.

Q Who contacted Coroner Gerber and arranged the meeting?

A I did.

Q Between July 4, 1954, and the date that this meeting was arranged -- by the way, can you tell us approximately when you called him to arrange this meeting?

A It was shortly after he gave me the pictures.

Q Between July 4, 1954, and the date of your actual meeting with Coroner Gerber, how many times did you call him?

A One time, sir.

Q Did you ever call him fifteen times?

A Never.

Q Where did the meeting take place?

A It took place at the Castle-on-the-Lake, which is a restaurant in Lorain, Ohio.

Q And who was present?

A Colonel Lapping, myself, and Doctor Gerber.

Q Did you have something to eat?

A Yes, sir.

Q Do you remember the specific day or date?

A No, I don't.

Q You said it was shortly after the 6th?

A It was at the end of -- it was in the middle to the end of July, of 1954.

Q What was the purpose in asking Doctor Gerber to lunch?

A To thank him for the gracious gesture of having favored us with the pictures.

Q I take it the lunch was on the newspaper?

A (No response)

Q What time did you meet on that date, do you recall?

A It was about 4:30 in the afternoon.

Q While you were having something to eat, did you have some conversation between yourself, the Coroner, and Colonel Lapping?

A Yes, sir.

Q Did you talk about the Sheppard case at all?

A No, sir.

Q Can you tell us whether or not there was ever any discussion in the course of that conversation about a potential woman suspect from Elyria?

A There never at any time was anything along those lines discussed.

Q Was there any talk about any woman suspect from any place?

A There was.

Q Who injected the name of this woman suspect into the conversation?

A Colonel Lapping.

Q Did Doctor Gerber make any statement at that time with reference to his opinions about the cause of the murder?

A He did.

Q And what did he say?

A Well, the remark that I am going to quote the Coroner as saying, came only after a good bit of preliminary discussion, but before the dinner ended he said --

MR. SPELLACY: Objection.

THE COURT: Sustained.

Q Was there any talk by the Coroner about a woman connected with the murder?

A Yes, there was.

Q What did he say in that context?

A He said that only a woman could have been guilty, because a man would have done a cleaner job and not continued on after their adversary was finished.

Q You clearly remember that statement by the Coroner?

A I distinctly remember it.

Q At some time following the murder did you have occasion to interview Mrs. Houk?

A Will you rephrase that question?

Q Yes. At some time after the murder did you have an occasion in connection with your coverage of the case, to interview Mrs. Esther Houk?

A I did, yes, sir.

Q Were you in her home?

A Yes, sir.

Q In what part of the home?

A In the living room.

Q Did you make any observations with reference to the fireplace when you were in her home?

A Yes, sir.

Q What did you see in the fireplace?

A I saw the remains of the logs that were in the fireplace.

Q Was there a grill in the fireplace, something to hold the logs?

A There was a fire basket, and the logs were in the fire basket.

Q What did you see of the logs, so-called?

A Just the ends.

MR. SPELLACY: May we have a time, Judge?

MR. BAILEY: Yes.

Q When did these observations take place?

A On the 6th or 7th of July, 1954. I don't recall which.

Q Did you have some conversation with Mrs. Houk about her activities on the night of July 3rd and the morning of July 4th?

A Yes, sir.

Q And what did she tell you that she had been doing?

MR. SPELLACY: Objection.

THE COURT: Sustained.

MR. BAILEY: May we approach the bench and offer proof?

THE COURT: Yes.

(Thereupon Court and Counsel conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. BAILEY: This is to contradict the State's witness, Esther Houk, and this witness would testify in substance that she interviewed Mrs. Houk and noticed the burned logs in the fireplace, and Mrs. Houk told her several points about a very fascinating magazine article or story that she had been reading early in the morning of July 4th, and that after mention was made of this one or more times by Mrs. Houk, this witness asked Mrs. Houk, "What was the story that you were reading?" And Mrs. Houk said, "I don't remember."

THE COURT: Is that your proffer?

MR. BAILEY: That is my offer of proof.

MR. CORRIGAN: No objection to that. We will withdraw the objection. That is not inconsistent with her testimony.

THE COURT: This is my point. I will sustain the objection.

Please let us go forward.

MR. BAILEY: May I show for the record, the inconsistency?

THE COURT: Yes. Are you claiming one?

MR. BAILEY: Yes. The inconsistency being that although it is not unusual for Mrs. Houk at this time, that is to say, in her testimony in this case, to be unable to remember the magazine article she was reading twelve years ago, that within a forty-eight hour period after the incident had occurred, that it is highly unusual, since this is the way she accounts for her time, the defense attempting to show that is how her time was spent.

THE COURT: Objection sustained, gentlemen.

(Thereupon proceedings were resumed within the

hearing of the jury, as follows:)

THE COURT: Please proceed, Counselor.

By Mr. Bailey:

Q Now, Madam, did you ever meet or encounter a man named Jack Krakan?

A Yes, sir.

Q Had you ever met him before the murder of Marilyn Sheppard?

A No, sir.

Q At some time subsequent to the murder did you meet him?

A I did, sir.

Q And was there one meeting or were there several?

A There were several.

Q And did you have some conversation with him about something he had observed in the house?

A I did, sir.

Q Did you ever have occasion to take his affidavit with reference to what he had observed in the Sheppard house at some time?

A Yes, sir.

Q And did his conversation -- without telling us what it was -- did it have reference to any individual that had been seen in the house?

A Yes, sir.

Q And did you determine who that individual was by his reference to some means of identification?

A Yes, sir.

Q And who was it?

MR. SPELLACY: Objection.

MR. CORRIGAN: Objection.

THE COURT: Sustained, and Counselor will not proceed or pursue that line of inquiry. You may make a proffer if you wish, Counselor.

MR. BAILEY: I will make a proffer.

(Thereupon Counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

THE COURT: Mr. Bailey, please proceed.

MR. BAILEY: The witness would say that the witness Mr. Krakan identified J. Spencer Houk of Lake Road, Bay Village, as the man he had seen in the home in December, the same man who was the recipient of the key.

THE COURT: Anything further, Counselor?

MR. BAILEY: Yes, there certainly is.

The defense has every right to prove that the crime was not committed by the defendant, but by a third person.

This is a substantial piece of circumstantial evidence tending to show --

THE COURT: Hold it down, keep your voice down, please.

MR. BAILEY: That J. Spencer Houk was the recipient of a key to the Sheppard home given him by Marilyn Sheppard.

The evidence will show that the key was not present in the home on July 4th, and that it was not present several days thereafter, perhaps months while the investigation was active.

And that same key, at least by inference, is the one which was found in the presence of Sergeant Hubach on November 11, 1954; circumstantial evidence to show the key could only have been deposited by someone who had access to the house, a number of these, other than the officials, J. Spencer Houk, as the evidence shows.

MR. CORRIGAN: This witness is not testifying to what somebody else told her, that

somebody else at the time not then being under oath, we are denied the opportunity of cross-examining this other witness.

MR. BAILEY: You have already cross-examined him.

MR. CORRIGAN: Not on that. It is pure hearsay as with regard to this witness here, and should go out for that reason, and for the reason that we are also denied the opportunity of cross-examining him on any identification that he made.

MR. BAILEY: You could have cross-examined him when he was here.

THE COURT: Let the record show that the objection is sustained.

The testimony is precluded on the basis that it is rank hearsay, and predicated on that which would be highly speculative and conjectural.

Please proceed.

MR. BAILEY: The evidence will show that this witness pointed to a picture of J. Spencer Houk and said, "That is the man that I saw," and he gave affidavits naming J. Spencer Houk as the man he saw in the house, in December.

THE COURT: Hold it a moment.

Are you finished, Counselor?

MR. BAILEY: Yes.

THE COURT: (Addressing the jury)

Ladies and gentlemen of the jury, please be at ease and visit amongst yourselves, if you wish.

In support of its ruling, the Court cites for the record, 21 Ohio Jurisprudence, 2nd, at page 536, and quotes from it as follows:

"Where identification of a person is one of several seen together, at a specific time and at a designated location, becomes material, photographs of the person in question shown to be good likenesses of him, and to have been shown to the witness shortly after the time in question, who was then able to identify the photographs as the likenesses of the person in question, may properly be used by such a witness" -- and underscore witness -- "to identify the person after the lapse of several years."

And let the record show that this Court requested that the term at that point be underscored.

And the ruling stands, and let's

proceed, gentlemen.

MR. BAILEY: If it please the Court, I bring to the Court's attention the fact that I could not properly bring out from the witness Krakan, whose picture he had identified because that was hearsay.

But this witness saw him identify the picture as the man he had seen in the house, and this witness knows who that picture represented.

Krakan never saw J. Spencer Houk from December, 1953, until he took this witness stand, and the most he could say is, "I identified a picture and somebody said that it was Houk."

Now, he could say he saw a newspaper picture, but that, too, is hearsay, the fact that a newspaper captions a picture J. Spencer Houk is not competent evidence that it is Mr. Houk.

I am putting this evidence in the only proper way it can be offered. This witness can say that Krakan looked at this picture and he said that is the man. I saw the picture and I knew that was a picture of J. Spencer Houk, because I knew J. Spencer Houk.

THE COURT: I understand your position, Counselor.

Let the record show that the Court's ruling stands.

Further in support of its ruling the Court cites Chapter 13, Hurd and Long, at paragraph 13.1, page 246 and 247, and Counselor is instructed not to pursue this line of questioning with this witness any further.

MR. BAILEY: All right. I wish to make a further objection to an order of the Court that I not be permitted to proceed further to lay the foundation for what I regard as entirely proper evidence.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

MR. BAILEY: You may examine, sir.

CROSS EXAMINATION OF KATHRYN CAPODICE

By Mr. Corrigan:

Q When did you first go to work for the Lorain Journal?

A I believe a month before the Sheppard case.

Q A month before the Sheppard case; specifically what were your duties there?

A I was hired specifically just to report the Sheppard case.

Q The Lorain Journal was interested in reporting the

Sheppard case?

A Yes, they were.

Q And they hired you for that purpose?

A Right.

Q Where had you worked before working for the Lorain Journal?

A I had worked for other newspapers.

Q Keep your voice up, please.

A I had worked for other newspapers.

Q Other newspapers?

A Right.

Q What other newspapers?

A The Hearst Newspapers.

Q What Hearst Newspapers?

A I worked for the Herald American, which is now defunct.

Q The Herald American where?

A 326 West Madison Avenue, Chicago, Illinois.

Q How long did you work for the Herald American?

A About a year and a half.

Q When did you work for the Herald American?

A From about August of 1946 until about eighteen months later.

Q Where did you work after working for the Herald American?

A I worked for the Washington Herald Post as special services.

Q Where was that employment?

A It was in Washington, D. C.

Q How long did you work in that employment?

A I would say about two years.

Q Then where did you go to work after that?

A I worked in Hearst Management.

THE COURT: I am sorry, I cannot hear you.

A I worked in Hearst Management.

Q Where was that at?

A That was in New York.

Q How long did you work in Hearst Management?

A About eighteen months.

Q Then where did you work after that?

A I came home and I went to work for the Lorain Journal. Mr. Lapping had worked for Hearst and he became the editor.

Q I see. You came home -- is Lorain your home?

A No, sir. Cleveland, Ohio is.

Q Cleveland, Ohio, is your home?

A Yes.

Q How long did you continue to work for the Lorain Journal?

A Partway through the Sheppard case.

Q Partway through the Sheppard case. Now, somewhere through the Sheppard case did you leave the Lorain Journal?

A Yes, sir.

Q And when was that?

A Sir, I would say about in October of 1954.

Q Then where did you go to work?

A I went in business for myself.

Q I see. What type of business did you go into?

A The mortgage loan business.

Q The mortgage loan business?

A Yes.

Q What was the name of this business that you ran for yourself?

A It was Capodice Mortgages.

Q Capodice Mortgages?

A It was located at 750 Broadway in Lorain, Ohio.

Q Specifically what was the function of this mortgage finance business?

A The function of it was the procurement of FHA and GI loans for the brokers in Lorain, financing of commercial shopping centers, for people who asked for it. That was the function of it.

Q Did you go into this business with someone else?

A No, sir.

Q Alone?

A Yes, sir. Charles E. Miller of Miller Insurance shared the office with me. But it was my own business, and

the insurance was a separate department.

Q How long did you continue in that business?

A I would say about two and a half years.

Q And that would bring us then up to somewhere around 1957, is that correct?

A No, sir. In between 1954, I stopped working and I didn't do anything. And in 1960 I opened up the mortgage loan -- in 1959, I opened the mortgage loan office.

Q Now, you said in between 1954 and what date you stopped working; you were at the Lorain Post in 1954?

A No, sir, the Lorain Journal.

Q The Lorain Journal. And then --

A I stopped working.

Q You stopped working, for how long a period of time did you stop working?

A I stopped working from 1954 until 1958 or '59 when I got my real estate license.

Q I see. When did you go into the mortgage loan business?

A I went in about April of 1959.

Q I see. So you didn't go into the private business immediately after leaving the Lorain Journal?

A No, sir.

Q What did you do by way of employment during that period of time?

A I had a perfectly good husband who enjoyed supporting

me.

Q I see, and your husband's name?

A John Capodice.

Q Were you married to Mr. Capodice when you worked for the Lorain Journal?

A I surely was.

Q Were you married to Mr. Capodice when you worked for the Hearst newspapers?

A I surely was.

Q Were you married to Mr. Capodice when you worked in Washington, D. C.?

A I married Mr. Capodice April 28, 1937, in Cleveland, Ohio.

Q But the point is you were married at the time you were working in Washington, and in New York, and for the Lorain Journal, is that correct?

A That is correct, sir, yes, sir.

Q So that after you left the Lorain Journal then Mr. Capodice supported you solely from that point on, is that correct?

A Sir, I was always supporting me one hundred percent. Whatever I made was a sheer bonus.

Q I see. Where did you live after leaving the Lorain Journal?

MR. BAILEY: I object, your Honor.

This is irrelevant.

THE COURT: After she left the Lorain Journal, Counselor?

MR. BAILEY: After all the transactions she testified to were past, yes, taken at the beginning of the first Sheppard trial; where she lived after that is irrelevant, and I object.

THE COURT: May I see Counselor?

(Thereupon Court and Counsel conferred at the Court's bench out of the hearing of the jury.)

THE COURT: Overruled. Please proceed, Counselor.

MR. BAILEY: In view of the representations at the bench, my objection is withdrawn.

MR. CORRIGAN: Mr. Reporter, will you read the last question back, please?

THE COURT: Mr. Reporter, please read the last question.

(Following question was read by the reporter:)

"I see. Where did you live after leaving the Lorain Journal?"

A I lived at 3104 Colorado Avenue, Lorain, Ohio.

Q With whom did you live at that address?

A I lived there with my husband, and I lived there with Colonel Lapping whom I had known previously.

Q This is the same colonel that is the editor and the publisher of the Lorain Journal?

A He is not the publisher. I never said that. He was the editor.

Q The editor?

A The Horwitz family is the publisher.

Q Is this his home on Colorado Avenue?

A No, it isn't. It was a rental home.

Q How long did you live at that address after leaving the Lorain Journal?

A I lived there two years.

Q Then, where did you live after that?

A I bought my own home in Lorain.

Q Did you continue to live in your own home then thereafter?

A Of course.

Q Are you living in that home today?

A No, sir. I sold it and I bought another -- I still own it, and I bought another home that I am living in today.

Q Now, have you lived continuously in Lorain ever since 1954?

A No, sir.

Q Where else did you live, other than Lorain?

A Avon Lake, which is where I live now.

Q Avon Lake?

A Right.

Q Did you live anyplace else other than Avon Lake?

A No, sir.

Q Now, you indicated that you had a meeting with Doctor Gerber, is that correct?

A Yes, sir.

Q Doctor Gerber gave you some pictures in connection with the Sheppard case?

A He surely did.

Q Then the colonel advised you to call Doctor Gerber for the purpose of having Doctor Gerber have dinner with you and he, so that you may return the kind gesture for him turning the pictures over to you, is that correct?

A One hundred percent.

Q Did you have any difficulty reaching Doctor Gerber?

A None whatsoever.

Q Where did you call him?

A I called him at the County Morgue.

Q And did you talk with his secretary?

A No, I didn't. I asked for Doctor Gerber. I don't know who answered the phone.

Q Then you subsequently did talk with Doctor Gerber?

A Mr. Corrigan, I did talk with Doctor Gerber, yes, and

he accepted my invitation.

Q Yes. At that time did the colonel tell you when to fix the date for the dinner?

A He said any time at Doctor Gerber's convenience.

Q Then it was by mutual arrangement between you and Doctor Gerber as to when it was convenient for him, is that correct?

A Right.

Q You say at that time, there was no discussion about a woman in Elyria being involved in this matter?

A Absolutely none whatsoever.

Q Was there some discussion between Doctor Gerber and you and the colonel relative to the Lorain Journal being desirous of scooping the Cleveland Press on a story?

A None whatsoever.

Q I see.

A We didn't even have a photographer on this trial. That is how interested we were in scooping anyone about anything at anytime. We were giving it the minimum coverage.

Q But you were hired to cover this trial as a reporter?

A Yes, sir.

Q And that was your sole function?

A Sir, you asked me that and I told you.

Q And did you cover it, as a matter of fact, did you not?

A Until October of that year. You just asked me that.

Q What was your reason for leaving the paper midway through that trial or during October of that year?

A For the simple reason the Lorain Journal was not the kind of paper anyone would like to work for. The wages were poor. We were overworked and underpaid, and I could no longer go on.

Q You advised the colonel of that?

A I did.

Q And then you left on your own accord?

A I did.

Q And you had made this determination as to being overworked and underpaid in working for them in a period of how long?

A From July until October.

Q July until October. What was significant about noticing some burnt logs in the fireplace of Mrs. Houk's home?

A It was signigicant to me that anybody would have a fire at that time of year. It seemed very strange.

Q Did you see any coal in that fireplace or in the vicinity of the fireplace?

A Everything had been burned out pretty well. Mrs. Houk told me that there had been some coal in it, as I recall, or at least she did. This is twelve years ago.

Q Did you see any coal?

A I didn't get up and make a minute inspection to find

out.

Q But you saw some logs?

A Yes, I did.

Q And on what date was this?

A It was on July 6th or 7th, 1954.

Q Did you comment at that time about there being burnt logs in the fireplace?

A I don't remember. I did bring to Doctor Gerber's attention that I thought it was odd she had a fire, when he came to dinner.

Q Now, this name, Mrs. Post, you used that in connection with your writing?

A Right. Post is my maiden name. It is my father's name.

Q Other than covering the Sheppard case, have you been a reporter with these other newspapers?

A No, because I was always in special services and special assignment.

Q Now, what do you mean by special services and special assignment?

A I mean that I covered anti-vivisection for the Hearst newspapers, which was in accord with Mr. Hearst's personal wishes. That was one special assignment that I had for them.

Q Which Mr. Hearst is this?

A Mr. William Randolph Hearst.

Q Is he alive today?

A No, sir.

Q How long has he been dead?

A He died in the early 50's, I would say.

Q It was his wish that you be employed and given special assignments with his newspaper, is that correct?

A Right.

Q How long have you known the colonel that edits or did edit the Lorain Journal?

A I would say from 1943.

Q Is the colonel still alive?

A He is.

Q Where is he living now?

A He is living in Buffalo.

Q How long has the Lorain Journal been out of business?

A It is not out of business.

Q It is still in business?

A It publishes every single day.

Q How long has the colonel been disassociated with the Lorain Journal as editor?

A As near as I can recall, since September of 1956.

Q You had testified that Doctor Gerber said that only a woman could do this, is that correct?

A Yes.

Q And the colonel heard that?

A He was sitting there, he must have.

Q You were at that time, employed by the Lorain Journal for the purpose of writing about the Sheppard case, is that correct?

A Mr. Corrigan, you have asked me that nine times. That is correct and you are right.

Q Now, did you at any time, write in the Lorain Journal that Doctor Gerber said, "Only a woman could have done this"?

A No, sir.

MR. CORRIGAN: No further questions.

MR. BAILEY: Thank you very much. No further questions.

THE COURT: You are excused.

THE WITNESS: Thank you, your Honor.

THE COURT: Ladies and gentlemen of the jury, it is after four o'clock, and we have had a long day.

While you are away on your overnight adjournment, you will bear in mind the instructions given you on each occasion when you leave this room.

You shall not discuss this case or what you have heard of it amongst yourselves. You shall not permit anyone else to discuss it with you, nor shall you permit yourselves to overhear

anything that relates to this case by any means of communication, having in mind and specifically in detail the admonition with respect to printed material, radio, and television.

We will stand adjourned, ladies and gentlemen, until 9:15 tomorrow morning.

(Thereupon an adjournment was taken to 9:15 a.m., Saturday, November 12, 1966, at which time the following proceedings were had:)

Saturday Morning Session, 9:15 a.m., November 12, 1966

THE COURT: Counselor Bailey?

MR. BAILEY: If it please the Court, while Mr. Patrick goes for the witness, I have here two certified documents from the United States Weather Bureau, reflecting certain data for July, 1954, which may be admitted by agreement of counsel, I understand.

THE COURT: Is it so stipulated, Counselor?

MR. CORRIGAN: It is so stipulated, your Honor.

THE COURT: Mark them for identification.

(Defendant's Exhibits YY and ZZ were marked for identification by the reporter.)

THE COURT: They are received.

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THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness JAY H. HUBACH, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF JAY H. HUBACH

By Mr. Sherman:

Q For the record, will you state your name and spell it, please?

A Jay H. Hubach, H-u-b-a-c-h.

Q Mr. Hubach, where do you live at the present time?

A 26631 Knickerbocker Road, Bay Village.

Q And how long have you lived there?

A Since 1957.

Q Where are you employed at the present time?

A I am with the a plating company.

Q And how long have you been there?

A A little over two years.

Q What was your employment before the plating company?

A On Bay Village Police Department.

Q What was your position on the Bay Village Police Department?

A From patrolman to chief.

Q When you left the Bay Village Police Department,

you were then Chief of Police?

A Yes, sir.

Q Going back to the year 1954, where were you employed at that time?

A Bay Village Police Department.

Q What was your position on the Bay Village Police Department; and would you keep your voice up, please?

A Sergeant.

Q In 1954, you were Sergeant on the Bay Village Police Department?

A Yes, sir.

Q Going back to the morning of July 4, 1954, do you recall being at the Sheppard home on Lake Road in Bay Village?

A Yes, sir.

Q You were there as a result of an investigation of a murder, is that correct, of Marilyn Sheppard?

A Yes, sir.

Q How many times do you recall being in the home on your investigation?

A I would hesitate to say. Many, many times.

Q During your times at the home, do you recall going up the stairs in the home from the first floor to the second floor?

A Yes, sir.

Q Do you recall whether or not there was a rail or a

banister on the stairway going up those stairs?

A Going up the stairs on the left was more of a solid banister type affair.

On the righthand side was a hand rail that was fastened to the side wall.

Q From your trips up the stairs, did you at any time notice anything unusual on this hand rail on the righthand side?

A Yes, sir.

Q Would you tell the Court and jury, please, what you observed on this hand rail?

MR. SPELLACY: May we have a date, your Honor? What date are we talking about?

Q Officer, during what period of time were you in and out of the Sheppard home?

A Well, to put a definite pinpoint, I can't. I was in and out of that home many, many times.

Q You were in the first time on July 4th, on this investigation?

A Yes, sir.

Q To pinpoint the time, can you give us any time, was it before the trial started?

A I would say yes.

Q Is there any way that can pinpoint it closer than this as to the actual date?

A No, sir.

Q In one of your trips up and down the stairs, again, I ask you if you noticed anything unusual on this railing?

A I saw what appeared to be --

MR. CORRIGAN: Objection.

MR. SPELLACY: We still haven't established the time.

THE COURT: Sustained, Counselor.

MR. SHERMAN: May we approach the bench?

THE COURT: Yes.

(Thereupon Counsel and the Court conferred at the Court's bench out of the hearing of the jury.)

MR. SPELLACY: All right, let him testify to it.

MR. SHERMAN: May the reporter read the last question, your Honor?

THE COURT: Mr. Reporter, would you read the last question to Mr. Hubach?

(Last question was read by the reporter.)

A I saw what appeared to be a bloody fingerprint.

Q After you observed what appeared to you to be a bloody fingerprint, was this pointed out to anyone by yourself?

A Yes, sir.

Q To whom was it pointed out?

A I believe that Fred Drenkhan was right with me at the time.

Q Fred Drenkhan, you are referring to the Patrolman of the Bay Village Police Department?

A He was patrolman at that time, yes, sir.

Q Do you know what Patrolman Drenkhan's duties were at that time in connection with this case?

A Being the first officer at the scene, he was with the Sheriff's Department most of that, the early part of the investigation. They worked together.

Q Do you recall, Officer, or, excuse me, Mr. Hubach, returning to the Sheppard home with Mrs. Dorothy Sheppard at any time?

A Yes, sir.

Q And do you recall when this was?

A To the best of my knowledge and recollection, it was in November.

Q How many times have you been in the Sheppard residence with Dorothy Sheppard?

A To the best of my knowledge, that was the only time.

Q On this time, that you were at the house with Dorothy Sheppard, do you recall if anyone else was there at the time?

A I believe the elder Doctor Richard was there, Dorothy,

Dave Phillips, and I am not sure if it was the young Richard Sheppard or Doctor Steve.

Q At this time, Mr. Hubach, do you recall if anything was found in the house?

A Yes, sir. A key was found.

Q And where was this key found?

A It was found in the kitchen near a waste basket.

Q Did you observe the key under the waste basket or near the waste basket?

A That's going back twelve years, but it was close thereby. I don't know exactly.

Q Officer, in 1954, did the Bay Village Police Department have a scientific investigation unit?

A No, sir.

Q Officer, do you know if that waste basket at any time had been moved from this area previous to the time when you were there with Dorothy Sheppard?

A Yes, sir.

Q Do you know if it had been carried around or emptied prior to this time?

A I know it had been carried around, and I believe it was emptied more than once.

Q So this key that was found on that date, to your knowledge, was it there prior to that date?

A Not to my knowledge, it wasn't.

MR. SHERMAN: Your witness.

THE COURT: Any cross examination, gentlemen?

MR. CORRIGAN: Yes, your Honor.

CROSS EXAMINATION OF JAY H. HUBACH

By Mr. Corrigan:

Q You testified in this matter in 1954, did you not, Officer?

A I testified at the trial, yes, sir.

Q And today I understand that you said this key was found in the open?

A I can't recall. It was close to the waste basket, sir, on the floor.

Q Is it not a fact, sir, that in 1954, you testified that the key was found under the waste basket?

A I don't recall that.

MR. SHERMAN: Objection, your Honor.

THE COURT: Overruled.

MR. CORRIGAN: On page 5185.

Q In 1954, what was your rank on the Bay Village Police Department?

A Sergeant, to the best of my knowledge.

Q And what was the rank of Officer Drenkhan?

A Patrolman, sir.

Q You testified here this morning that you saw what you thought was a bloody fingerprint on the banister, is that correct?

A It appeared to be, yes, sir.

Q Now, do you know as a matter of fact, whether or not, it was a bloody fingerprint?

A I was not a fingerprint man.

Q You were asked the question whether or not you had told anybody about this or conveyed this to anyone; do you recall that question being asked of you?

A Yes, sir.

Q And your answer was, "Fred Drenkhan was there at the time"?

A Yes, sir.

Q Now, the question was, did you tell anybody?

A We discussed it. We were together at the time.

Q You discussed it with Fred Drenkhan?

A Yes.

Q Was there not a time, sir, when you were in that home pointing out what appeared to be blood spots to Mary Cowan from the Coroner's Office?

A I was there. I know when Mary Cowan was there. I can't recall that, though, as a definite thing.

Q Did you point out to her any spots on the banister?

A Not I, no, sir.

Q Did you make -- as a Sergeant of the Bay Village Police Department -- did you make a report of what you thought to be a bloody fingerprint on that banister?

A No, sir.

Q Didn't you feel that that was important, Sergeant?

A I suppose it was, sir.

Q But you made no report?

A No, sir.

Q Did you ever point this out to Lieutenant Poelking of the Cleveland Police Department?

A Not to my knowledge.

Q Did you ever point it out to Sergeant Dombrowski of the Cleveland Police Department?

A I am not quite sure on that one.

Q Going back to the key, sir, you say now that you observed the key to be where?

A To the best of my recollection, sir, it was on the floor near the waste basket when it was brought to my attention.

Q It was on the floor near the waste basket when it was brought to your attention, is that correct?

A Yes, sir.

Q And by whom was it brought to your attention?

A To the best of my knowledge, it was Mrs. Sheppard.

MR. CORRIGAN: I have no further questions of this witness.

MR. SHERMAN: Your Honor, we are going after the record, and I would like to have it before we finish with the witness. It will be here very shortly.

THE COURT: Be at ease, ladies and gentlemen.

REDIRECT EXAMINATION OF JAY H. HUBACH

By Mr. Sherman:

Q Going back to 1954, Mr. Hubach, to your knowledge as Sergeant of the Bay Village Police Department, who had charge of this investigation?

A Chief Eaton had charge originally.

Q And was this investigation later changed to someone else's authority?

A The Cleveland Police were called that very morning, the first thing, because we realized it was a bigger thing than we had encountered and were capable of handling.

Q So at that time, at the time of the investigation -- strike that.

At the time when this fingerprint that you observed was found by you, were the Bay Village Police Department in charge of the investigation at that time?

A No, sir.

THE COURT: Page 5185, Counselor.

MR. CORRIGAN: 5185.

MR. SHERMAN: Your Honor, it is 5185 on the left, and the large number is 6801.

Q Handing you, Mr. Hubach, the transcript of the first trial, page 6801, would you refresh your memory from that, please?

A Just this one page?

Q In regards to the location of the key, have you found that, sir?

A Yes.

Q Now, after reading your testimony in the 1954 trial, can you state as to whether or not at that time your statement was that the key was under the basket?

A I didn't say that in this record that I can see.

Q And where did you say it was in 1954?

MR. SPELLACY: May we see it?

A To the best of my recollection, it was out in the open near the waste basket.

Q When you testified in 1954, Mr. Hubach, who called you as a witness?

A The prosecution.

MR. SHERMAN: That is all.

RECROSS EXAMINATION OF JAY H. HUBACH

By Mr. Corrigan:

Q Sir, on redirect examination, you had indicated that the time you saw the bloody fingerprint, the Cleveland Police Department was in charge of the investigation, is that correct?

A Yes, sir.

Q When did you see the bloody fingerprint?

A Sometime within the first two or three weeks, but I couldn't put a definite time on it.

Q You don't know when?

A No, sir.

Q When did Cleveland take over the investigation?

A At that time it was Bob Schottke and Pat Gareau came in, that very morning.

Q That was on July 4th, is that correct?

A Yes, sir.

Q And then they took over on that day?

A Well, I will get into that if you will allow me to. The chief was naturally in charge being our particular city.

But when Schottke and Gareau came in, they reported to Chief Eaton, and asked him what they should do, and he said, "You fellows know more about this thing than we do, and that is why we wanted you out here, we will leave everything in your hands."

We asked if we should take statements for them or anything like that, and they said no, they would handle everything themselves.

Q Was Cleveland there on the 5th of July?

A Very possible. I couldn't say, sir. I was in and out.

Q Was Cleveland there on the 6th of July?

A I couldn't say.

Q Was Cleveland there on the 7th of July?

A I know they were in and out, but what days they were there, I do not know. I had my work back at the station.

Q Were you there on the 5th of July?

A I was probably in there sometime on the 5th of July.

Q Were you there on the 6th of July?

A I would say very probably.

Q On the 7th of July?

A I don't know. I can't recall.

Q Anybody from Cleveland tell you what to do?

A No, sir, we just stayed back out of it.

Q From whom did you get your orders?

A Our orders were not to touch anything, observe but don't touch. This was the job of the investigators and why they were asked to come in.

Q So from the 4th of July on, all you did was make observations, is that correct?

A Yes, sir.

Q From the 4th of July on, all that you observed was one bloody fingerprint on the banister, is that correct?

MR. BAILEY: I object. He was only asked about one phase of this. That question is unfair.

THE COURT: Overruled. Do you understand the question, sir?

THE WITNESS: Could it have it repeated?

THE COURT: Surely. Mr. Reporter, would you be good enough to read the question, or do you want to restate it, Counselor?

MR. CORRIGAN: Will the reporter read the question, please.

(Question was read by the reporter.)

A I saw many things. I can't say I just picked out one bloody fingerprint.

Q With regard to that one bloody fingerprint, you don't know when you observed that?

A No, sir.

Q And you made no report of it?

A No, sir.

MR. CORRIGAN: No further questions of this witness.

MR. SHERMAN: That is all.

THE COURT: Gentlemen, I have a question from my notes.

On July 4th, Mr. Hubach, were you a patrolman or were you -- did you have another rank?

THE WITNESS: I was Sergeant at the time, sir.

THE COURT: And when did you leave the Bay Village Police Department?

THE WITNESS: Two years ago, October.

THE COURT: Anything further, gentlemen?

MR. SHERMAN: Nothing further, your Honor.

THE COURT: You are excused.

THE WITNESS: Thank you.

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THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness ANNA FRANZ, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF ANNA FRANZ

By Mr. Bailey:

Q Will you tell the Court and jury your name, please?

A My name is Mrs. Anna Franz.

Q Will you please try to keep your voice up so the ladies and gentlemen in the back row can hear you.

Where do you live, Mrs. Franz?

A I live at 22449 Lake Road in Rocky River.

Q In Rocky River?

A In Rocky River.

Q How long have you lived there?

A We just moved recently, two months ago.

Q Where are you employed, Mrs. Franz?

A I am employed in Bay View Hospital.

Q How long have you worked there?

A I finished my twenty-sixth year on last March 16th.

Q What kind of work do you do at the Bay View Hospital?

A I am a nurse on the surgical floor.

Q Now, in 1954, were you employed at the Bay View

Hospital?

A I was, sir.

Q And were you on duty on the morning of July 4th, 1954, a Sunday?

A I was.

Q Do you know the defendant Sam Sheppard?

A I sure do.

Q And did you see him on the morning of July 4, 1954?

A I did.

Q Where did you see him?

A I saw him brought into the hospital.

Q Do you remember who was present or who brought him in?

A Well, I was alerted that he was coming, that they were bringing him in, and I went up to the ramp and they were pushing him on the cart.

We had the room ready for him.

Q Do you remember the room that you took him to?

A 115.

Q Do you recall, Mrs. Franz, about what time this was that he arrived?

A Well, it was between 6:30 and 7:00, because we were doing our morning work.

Q What time were you scheduled to go off duty that morning?

A At 7:30.

Q Now, when you first saw Doctor Sam, can you describe any observations that you might have made about his apparentecondition?

A Yes, his face was all swollen. He was bleeding from the mouth. His clothes were wet, and he was shaking.

Q Did you have anything to do with getting him from the cart into the bed in which he was put?

A Yes, I did.

Q And whether or not he was undressed?

A No, we had to take his clothes off. There was about three or four of us.

Q Did you participate in the removal of his clothes?

A I did, I helped, yes, sir.

Q Did you make any observations, Mrs. Franz, with reference to his skin at the time you took his clothes off in the hospital?

A He was cold and clammy, and he was in apparent pain.

Q Did you notice anything with reference to the condition his skin was in, generally?

A Well, his skin was cold, and the whole body was cold.

Q Anything other than the temperature that you could see that was unusual?

A Well, you can tell when a person is shaking like that, that they are in apparent shock.

Q How long did you attend to Doctor Sheppard on that morning?

A Well, we helped to get his clothes off, and put some hot water bottles, wrap them up in blankets, and I stayed until they came to take him to X-ray.

Q Did you go off-duty that morning on schedule?

A I did. While we --

Q I am sorry?

A I don't know if it was exactly 7:30, but I was to go off at 7:30, but I don't know just when --

Q Did you come back on duty the next day?

A I did not. That was my night off, so I didn't come back that night.

Q So after you left the morning of July 4th, going off duty, you didn't see Doctor Sheppard again that day?

A I did not.

Q Or the next day?

A No, sir.

Q When you last saw him, was he in bed in room 115?

A They were coming with the cart to take him to X-ray.

MR. BAILEY: Okay, thank you, Mrs. Franz.

You may have the witness.

THE COURT: Counselor Spellacy or Corrigan?

CROSS EXAMINATION OF ANNA FRANZ

By Mr. Spellacy:

Q Mrs. Franz, you indicated that you removed the clothing from Doctor Sam Sheppard, is that correct?

A Yes, sir.

Q And was it damp or was it wet?

A It was soaking wet.

Q It was soaking wet?

A Yes, sir.

Q Do you recall whether or not there were any puddles from his clothing?

A In the shoes. The socks were pretty wet.

Q How about the pants when you took them off, did they drip water?

A They didn't drip exactly, but they were pretty wet, because it took about four of us to help to get the clothes off of him.

MR. SPELLACY: No further questions.

THE COURT: Counselor Bailey?

MR. BAILEY: All right, your Honor, thank you, we have no more questions, Mrs. Franz. Thank you.

THE COURT: You are excused.

THE WITNESS: Thank you.

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THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness MARCELLA HAHN, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF MARCELLA HAHN

By Mr. Bailey:

Q Would you tell us your name, please, ma'am?

A Mrs. Marcella Hahn.

Q Where do you live, Mrs. Hahn?

A I live on 621 Columbia Road.

Q How long have you lived there?

A About nine years.

THE COURT: Counselor, will you have the witness spell her last name?

Q Would you spell your last name?

A H-a-h-n.

Q You live there with your husband, do you?

A I do.

Q Mrs. Hahn, are you employed at the present time?

A Yes, I am.

Q Where do you work?

A I am a nurse at Bay View Hospital.

Q How long have you worked at Bay View Hospital?

A Fifteen years.

Q What are your duties generally, at the hospital?

A I am general nurse. I do general duty.

Q Were you a nurse at Bay View Hospital in July of 1954?

A Yes.

Q Do you know the defendant here, Sam Sheppard?

A Yes, I do.

Q Had you known him prior to July, 1954?

A Yes.

Q Where were you on the 4th of July, 1954, Mrs. Hahn?

A I was working on the seven to three shift.

Q You come on at seven in the morning and work until three in the afternoon?

A Seven to three, yes.

Q Where did you live at that time?

A I lived on Lake Road, 22486 Westlake Road.

Q Mrs. Hahn, where was Doctor Sam when you first observed him on the fourth day of July, 1954?

A He was in his room. He had come from the emergency room, and he was in his room, and I was assigned to that room.

Q How soon after you came on duty, did you first see him?

A Oh, right away, as soon as we report --

Q A matter of a few minutes?

A Yes.

Q What did you observe when you first saw Sam Sheppard at that time?

A Well, I observed he seemed to be in pain. He was holding his neck and he said, "My neck, my neck."

Q Did you observe anything about his face?

A Yes, he was bruised on the right side of his face, and I gave him a drink of water, and water hurt him, so he called out, because his teeth were broken on the right side.

Q When you attempted to give him the drink of water, did he react in any manner?

A Yes, as if he were in pain.

Q Did you notice anything about his mouth?

A Well, his lips were cut, bruised, like.

Q Did you see any blood or just bruise?

A Bruises, yes.

Q Do you know whether or not anybody had cleaned him up prior to the time you took over?

A Well, naturally, he had come from the emergency room, and he was in his room and he was cleaned up, yes.

Q You remained on duty that day until three in the afternoon?

A Until three in the afternoon.

Q Did you continue to attend to Doctor Sheppard?

A Yes.

Q And were you in and out of his room in the course of the day?

A Yes.

Q And were there any further observations that you made with reference to his condition that you can recall?

A Well, he had seemed to be in pain all the time.

MR. BAILEY: Thank you, Mrs. Hahn.

THE COURT: Counselor Corrigan or Spellacy?

MR. CORRIGAN: No cross examination of this witness, your Honor.

THE COURT: You are excused.

THE WITNESS: Thank you.

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THEREUPON the defendant, further to maintain the issues on his part to be maintained, called as a witness ELIZABETH VETTER, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF ELIZABETH VETTER

By Mr. Bailey:

Q Will you tell the Court and jury your name, please?

A Elizabeth Vetter.

Q Where do you live, Mrs. Vetter?

A 1474 Woodward Avenue, Lakewood.

Q Would you speak as loudly as you can so these ladies and gentlemen can hear you in the back row?

THE COURT: Will you have her spell her last name, Counselor, please?

A V-e-t-t-e-r.

Q Are you presently employed, Mrs. Vetter?

A No, sir.

Q Were you employed in 1954?

A Yes, sir.

Q What was your occupation at that time?

A Charge nurse at Bay View Hospital, three to eleven.

Q Three to eleven?

A Yes.

Q What do you mean when you say charge nurse?

A Well, I had charge of the floor, supervise.

Q When did you first become a nurse?

A In 1925.

Q Have you worked in some hospitals other than Bay View prior to coming there?

A Oh, yes. Huron Road, Cleveland Clinic.

MR. SPELLACY: I am sorry, I cannot hear you, Mrs. Vetter, I can't hear you.

A Huron Road and Cleveland Clinic.

MR. SPELLACY: Thank you.

Q Mrs. Vetter, calling your attention to the fourth day of July, 1954, I will ask you whether or not at any time on that day you were on duty at Bay View Hospital?

A Yes, sir.

Q Do you know the defendant, Sam Sheppard?

A Yes, sir.

Q Was he at the time a staff physician at the Bay View Hospital?

A Yes.

Q When did you first see him on that day, if you saw him?

A Around supper time.

Q And where was he when you observed him?

A In his room, in bed.

Q Did you observe anything unusual about his apparent condition?

A Well, he was nervous.

Q Did you see anything about his face?

A Yes, he had a black mark on his face, right side.

Q Did you notice anything about his mouth or lips?

A They were swollen.

Q Puffed out, is that what you mean?

A Pardon me?

Q Were they puffy?

A Yes.

Q Did you notice anything with reference to his neck?

A Well, he had difficulty in moving.

Q Was he able to talk with you on that day?

A Yes, he talked.

Q Do you recall whether or not anyone brought him some supper, while you were on duty?

A I did.

Q And do you remember whether or not he ate anything of the supper?

A No.

Q Did he have any solid foods while you were on that shift on July 4th?

A No, sir.

Q Do you have any recollection as to how long it was before, from your memory of the affair, before Doctor Sheppard began to eat solid food?

A That I couldn't remember.

Q From page 6016, if it please the Court; I am showing you your testimony from the last trial, in 1954, Mrs. Vetter, and these are the questions that were put to you, and the answers that you gave.

Do you want to see if that refreshes your recollection at all as to how long before he began eating solid foods?

Does that help you to remember how long it was before he had a solid meal?

A Three days.

THE COURT: Counselor, I didn't hear either of her responses, and I doubt that the jury did.

Q Would you repeat that so the jury can hear?

A Three days.

Q Thank you, Mrs. Vetter.

MR. BAILEY: You may examine.

CROSS EXAMINATION OF ELIZABETH VETTER

By Mr. Spellacy:

Q Mrs. Vetter, how long was he in the hospital all together?

A I really couldn't recall.

Q If I were to tell you that by July 8th, on July 8th, 1954, he was discharged from the hospital, would that refresh your recollection?

A I really can't remember when he was discharged.

Q Do you recall a time when he was discharged, though, from the hospital?

A No, I can't recall.

Q Now, on the fourth of July, the first time you saw him, was that six o'clock in the evening, is that correct, or when you took him dinner?

A Around five, five-thirty.

Q Around five, five-thirty, then did you talk to him at that time?

A Yes.

Q Did you have any trouble understanding him?

A No.

Q He could talk all right, couldn't he?

A Yes.

MR. SPELLACY: Nothing further.

MR. BAILEY: Thank you, Mrs. Vetter.

THE COURT: You are excused, Mrs. Vetter.

MR. BAILEY: Call Doctor Don, please.

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THEREUPON, the defendant, further to maintain the issues on his part to be maintained, called as a witness DR. HORACE M. DON, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DR. HORACE M. DON

By Mr. Bailey:

Q Will you tell us your name, please?

A Doctor Horace M. Don.

Q Where do you live?

A Okmulgee, Oklahoma.

Q Oklahoma?

A Yes.

Q You say that your name is Doctor Don; what is your occupation?

A I am a physician.

Q What kind of practice do you have?

A I have a general practice.

Q How long have you been a physician, doctor?

A I graduated in 1952.

Q Do you know the defendant, Sam Sheppard?

A Yes, sir.

Q When did you first meet him?

A I met Doctor Sheppard when I went to Bay View Hospital as an intern in 1952 to '53.

Q Was your internship, sir, immediately after you graduated from medical school?

A Yes.

Q Did you have occasion to work with Doctor Sheppard as an intern?

A Yes, sir.

Q What was he when you first came to the hospital, was he an intern or was he a doctor?

A Doctor Sheppard was the head of the Department of Neurology and Orthopedic Surgery.

Q Do you know whether or not there were any other neurosurgeons in the Bay View Hospital staff when you first went to work there?

A No, sir, there was not.

Q Just Sam Sheppard?

A Yes, sir.

Q Did you have occasion to work with him on medical cases within and outside the limits of the hospital?

A Yes, sir.

Q Did you ever observe him performing surgery?

A Yes, sir.

Q Did you ever observe him engage in any other activities

such as eating?

A Yes, sir.

Q Any sports?

A Yes, sir.

Q Can you tell us with certainty, doctor, whether he is right or lefthanded from your observation?

A He is righthanded.

Q Now, doctor, had you completed your internship by July, 1954?

A July, 1953.

Q So that you were then a resident, is that correct?

A No, I went out in general practice in Bay Village.

Q I see. Did you have an office there?

A Yes, sir.

Q Where was the office?

A On Bassett Road.

Q In addition to your general practice, did you render any other kind of medical service?

A I worked with Doctor Sheppard in the Emergency Department at the hospital.

Q And were you on the hospital staff at this time?

A Yes, sir.

Q Did you have any other position not connected with the hospital as a physician?

A I was police physician at Westlake.

Q At the same time Sam Sheppard was?

A Yes, sir.

Q I take it then you divided up the work between you?

A Doctor Sheppard was out of town quite a bit doing surgery at other hospitals. In that event I took his calls.

Q Now, in connection with your duties as police physician in Westlake, did you have occasion to have anything to do with a case involving a party named Corino?

A Yes. I don't recall just how they spell that.

Q Was thisprior to or subsequent to the murder of Marilyn Sheppard?

A It was approximately one month prior to the Sheppard case.

Q In connection with your duties in that case did you have occasion to meet Coroner Sam Gerber?

A Yes, sir.

Q Where did you meet him?

A I met him in the Police Department in Cleveland.

Q Do you remember the date?

A It was on a Sunday. I don't recall the date.

Q You say it was about a month prior to the murder?

A Yes.

Q Was anybody with you at the time you met him?

A There was another officer from Westlake and I believe his first name is Tony, but I don't recall his last name.

Q What were you doing in the police station on that day?

A There had been a shooting of the two brothers, they were held up early morning, early Sunday morning, and there was a suspect that they wanted to take down for questioning at the Cleveland Police Department, and they asked me to accompany the police officer to bring this man into the department.

Q This was a Westlake police officer?

A Yes.

Q And is this the man you called Tony?

A Yes, sir.

Q Now, do you remember where it was in the police station that you first saw Sam Gerber?

A It was in one of the offices. I couldn't tell you just exactly which office.

Q Were you introduced to him at some time?

A He introduced himself.

Q And did you have conversation with him?

A Yes, sir.

Q Did some part of that conversation relate to the Sheppard matter?

A Yes, sir.

Q Will you tell us what was said, by you and by Doctor Gerber?

A He introduced himself and he asked me my name. I told him that I was Doctor Don, and I was the police physician for Westlake.

And he said, "What hospital do you work out of?"

I said, "Bay View Hospital."

He said, "Are you one of the Sheppard clan?"

I said, "Well, if being on the staff at the hospital makes me one of the members of the clan, I guess I am."

And at that point he made the remark, "I am going to get them some day."

Q Doctor Don, calling your attention to the 4th day of July, 1954, did you have occasion to see Sam Sheppard on that day?

A Yes, sir.

Q Where was he?

A At Bay View Hospital.

Q What time did you first see him?

A Somewhere around 10:00 in the morning.

Q Did you make any observations about his condition at that time?

A He was swollen about the face, eye, cheek.

Q Did you have any conversation with him or hear him say anything?

A No, well -- he was in a state of shock and under sedation at the time.

MR. BELLACY: Objection.

THE COURT: Sustained, counselor.

It is not responsive.

Q Without reference to his condition, do you remember hearing him saying anything?

A Yes, he kept saying, "Why did they do it, why didn't they do it to me?"

Q Did you ever hear him in the course of that day or any other time making reference to the events that had happened or that he claimed to have happened the night before, without using the word "they," in other words, did he always refer to more than one assailant or did he ever say, "he" or "she" that you can recall?

A He said "they".

Q How long were you in his presence on that day on the first occasion at the hospital?

A Oh, that must have been about five or ten minutes.

Q Now, have you ever been to Sam Sheppard's house before the 4th of July?

A Yes, sir.

Q Once or more times?

A Oh, several times.

Q Had you ever been there late at night, say around midnight?

A Yes, sir.

Q And were the occasions that you were there late at night socially or professionally?

A Professionally.

Q Would you tell us the circumstances under which you would go to the Sheppard house late at night prior to July, 1954?

A If we would have an accident case brought to the hospital, and if it wasn't serious and it was just a matter of deciding whether there was a fracture or some injury, instead of calling Doctor Sam to the hospital we would get the X-rays and take them out to his house to have him view the films as to what we should do with the case.

Q In other words, to seek his advice?

A Yes.

Q As head of the Department of Neurosurgery?

A Yes, sir.

Q Doctor, did he have a shadow box at the house?

A Did he have a what, sir?

Q A shadow box at the house?

A He had a view box.

Q Would you tell the jury what that is, just briefly?

A A view box is a box that has lights behind it, behind a plate glass, that you put your X-ray films up to, to give your viewing.

Q When you came to the Sheppard home late at night for

the purpose of having X-rays viewed and obtaining the advice of Doctor Sam Sheppard, can you tell us what door you would enter by?

A The door that faced Lake Road.

Q And can you tell us whether or not on those occasions the door was locked or unlocked?

A Unlocked.

Q By the way, did you ever have to awaken Doctor Sheppard personally, rouse him out of his sleep?

A Occasionally at the hospital, if there had been an accident or so, and he would lay down on one of the carts, I have had to awaken him.

Q This is prior to July, 1954?

A Yes, sir.

Q When you had to wake him on these occasions was he the kind of person who would snap to quickly, or was he difficult to wake up?

A He was diddicult to wake up.

Q On the occasions when you would go out to the house with these X-rays, how would you see to it that Doctor Sheppard was awakened then?

A Occasionally we would call him first on the phone. Other occasions we would just go out to the house and call upstairs and have him come down.

Q Now, did he wake up first, or did someone else?

A Usually Marilyn.

Q And then she would get him up so you could talk to him?

A Yes.

Q After you saw Sam Sheppard on July 4th at the Bay View Hospital, did you go somewhere?

A I went out to the house.

Q You mean Sam Sheppard's house?

A Yes.

Q When you arrived was anyone else there?

A There were a number of police officers, Doctor Gerber, some of his men from his department, I imagine.

THE COURT: Fix the time, Counselor, please.

MR. BAILEY: Yes, your Honor.

Q What time did you go out to the house, if you recall?

A That would have been around 10:30 in the morning.

Q This was right after you observed Doctor Sheppard in the hospital?

A Yes.

Q How many people would you say were in and about the Sheppard home when you got there at 10:30?

A Well, I would say there was a dozen or so.

Q And were they all adults?

A No, there was one child that I recall in the house.

Q Was there any conversation between this child and Doctor Gerber in your presence?

A The child had asked permission to go into the house.

Q And did you hear any response by Doctor Gerber?

A He said that he could go in.

Q Did you see the child go in the house?

A Yes, sir.

Q How old a child was this, doctor?

A Oh, I would say about ten, eleven.

Q Boy or girl?

A Boy.

Q For how long a period of time were you inside the house?

A Quite a while. I don't recall how long exactly.

Q Would you say an hour?

A I imagine about an hour, hour and a half.

Q Were you doing something while you were there?

A Several officers along with myself had gone through the house completely looking for any type of object that could have been used as the murder weapon.

Q What rooms in the house did you personally search?

A One or two of the bedrooms, and the living room, and in the basement.

Q Prior to your departure from the house on that day, did you hear any additional conversation involving Doctor Sam Gerber?

A Yes, sir.

Q Where did this take place?

A Outside the home.

Q And do you recall who he was talking with or did you know the people he was talking with?

A Well, they were other gentlemen, again, I imagine from his office.

Q Is this shortly after you arrived or when you were leaving, or can you fix the time for us?

A This was about an hour, or hour and a half, or two hours after I had arrived.

Q And what did you hear Doctor Gerber say on that occasion?

A He stated that it was evident that the doctor had done it, and that they should go and get a confession from him.

Q Was this prior to noon time on July 4th, 1954?

A I don't recall.

Q Do you remember what time you left on that day?

A It was about around noon, one o'clock.

Q Do you know what a rongeur is, doctor?

A Yes, sir.

Q Tell the jury what it is?

A A rongeur is an instrument that we use in neuro and orthopedic surgery.

Q What does it look like?

A Well, there are several types of rongeurs. But it is, I suppose, an object something like pliers. It has a pulling mechanism.

Q What do you use it for?

A There are cutting rongeurs that are used to cut bone, such as this.

Q When you searched the Sheppard home on July 4th, did you see any cast spreaders such as Defense Exhibit TT hanging around?

A No, sir.

Q Did you see any cast cutters such as Defense Exhibit UU hanging around?

A No, sir.

Q I am going to show you an impression, what has been termed an impression, on State's Exhibit Number 35, one pillow, and I will ask you to look at that bloodstain, doctor, and view this outline here.

Now, have you ever seen a surgical instrument that would fit that pattern?

A No, sir.

Q Did you ever see anything in the house that day, surgical or otherwise, in the way of an instrument that was similar in size and shape to the impression disclosed by that pillow?

A No, sir.

MR. BAILEY: You may have the witness.

THE COURT: Counselor Corrigan or Spellacy?

CROSS EXAMINATION OF DR. HORACE M. DON

By Mr. Spellacy:

Q Sir, when did you graduate from school?

A Sir?

Q When did you graduate from school?

A In 1952.

Q What school was it that you graduated from?

A Des Moines.

Q Des Moines what?

A Des Moines College.

Q Des Moines College?

A Osteopathic Medicine and Surgery.

Q Where is that located?

A Des Moines, Iowa.

Q Then you came to intern at Bay View Hospital in Cleveland, is that correct?

A Yes, sir.

Q And you interned there for how long?

A One year.

Q And after the one year what did you do?

A I went out in general practice in Bay Village.

Q Where did you live at that time?

A In Fairview Park.

Q Fairview Park?

A Beg your pardon -- yes, Fairview Park.

Q That would have been what year?

A That was '53, '54.

Q 1953 to '54?

A Yes, sir.

Q Where did you live in Fairview Park?

A I don't recall the street.

Q Well, approximately, was it south of Lorain Road, north of Lorain Road?

A It was north of Lorain Road.

Q And how long did you practice in Bay Village?

A For approximately a year.

Q Approximately a year?

A Yes.

Q And did you practice in the Cleveland area after practicing in Bay Village?

A I did for, oh, about two or three months after the murder.

Q Where did you practice?

A When, sir?

Q Well, after practicing in Bay Village where did you

practice at?

A On July 1st of '54 I had moved to an office in Parma.

Q And how long did you practice in Parma?

A Just a few months.

Q Did you then move to Oklahoma after that?

A I moved to Iowa.

Q Pardon me?

A I moved to Iowa; Tipton, Iowa.

Q When did you go to Tipton, Iowa?

A About September of '54.

Q You practiced then in Tipton, Iowa?

A Yes, sir.

Q How long did you practice in Tipton, Iowa?

A For approximately a year and a half.

Q Now, after Tipton, Iowa, did you then move to Oklahoma?

A No, I stayed in Iowa until 1958.

Q Well, did you practice in other towns other than Tipton?

A Yes, sir.

Q What other towns did you practice in?

A Albia and Bussie, Iowa.

Q Pardon?

A Albia and Bussie, Iowa.

Q Then in 1958 you moved to the area that you live in

now?

A No, I bought a hospital in Holden, Missouri.

Q Holden, Missouri?

A Yes, sir.

Q How long did you remain in Holden, Missouri?

A Another doctor and I owned and operated the Holden Hospital and Clinic from '58 to '61.

Q From '58 to 1961?

A Yes.

Q Then from Holden, Missouri, did you move to where you are now?

A Yes.

Q And you operated or practiced as a doctor in the town that you have told us about from 1961 to the present time, is that correct?

A Well, I have just been there about seven months.

Q About seven months. Prior to -- what is the name of the town, again?

A Okmulgee.

Q Prior to Okmulgee where did you practice?

A Malika, Oklahoma.

Q How long were you in Malika?

A Again, I operated a hospital for four years at that time.

Q Four years?

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A Yes.

Q Sir, in 1954, you were in general practice in July of 1954, is that correct?

A Yes, sir.

Q Prior to this time you had been in general practice for how long?

A Since July of '53.

Q So about a year?

A Yes, sir.

Q And you lived in Fairview Park during that period of time that you were out in practice?

A Yes, sir.

Q Is it not a fact, sir, that you were a close friend and associate of Doctor Sam Sheppard?

A I was an associate in the hospital with Doctor Sheppard, I worked with him.

Q Well, you had some common interests together, didn't you?

A Yes.

Q I mean like sports cars?

A Yes, sir.

Q On occasions you would come over with your sports car and take Doctor Sam for a ride, or he had a sports car, too?

A Yes.

Q You had this common interest together, didn't you?

A Yes, sir.

Q Incidentally, do you know how many cars he had?

A At that time I believe he had two.

Q Do you know what kind of cars?

A Ford convertible and the Jaguar, and he had an MG prior to that, too.

Q Are you sure it was a Ford convertible?

A I am not sure. It was another car.

Q Do you recall a Lincoln Continental?

A Yes, I believe I did.

Q In July of 1954 he had a Lincoln Continental, didn't he?

A I don't recall.

Q Now, you have indicated while you were interning at Bay View Hospital, that you had occasion to go over to the Sheppard home, is that correct?

A Yes, sir.

Q At night?

A Yes, sir.

Q What time at night?

A Oh, it could be at all hours. Usually accidents start later in the evening, and would go all night.

Q You would take the X-rays out to him?

A Yes, sir.

Q To have his interpretation of the X-rays, is that correct?

A Yes, sir.

Q Who would take the X-rays?

A I would.

Q You would take the X-rays?

A Yes, sir.

Q You would ask for Doctor Sam Sheppard's interpretation of the X-rays?

A Yes, sir.

Q He was the head of the neurology department, is that right?

A He was head of the Department of Neurology and Orthopedic Surgery.

Q And, of course, I think you indicated he was the only one in the department, is that correct?

A Yes, sir.

Q Now, when you took these pictures out to him at all hours of the night as you have indicated, would you ring the door bell?

A No, sir.

Q Pardon me?

A No, sir.

Q What would you do?

A Walk into the house.

Q Just walk into the house?

A Yes, sir.

Q You wouldn't call or anything beforehand?

A Occasionally we might put in a phone call. Not always.

Q You say occasionally, not all the time?

A No, sir.

Q Well, sometimes it would be necessary for him to come down to the hospital, wouldn't it?

A If the accident was large and involved a number of people, he would, we would call him and he would come down to the hospital.

Q But you are telling us that if it were a minor accident that you would have the X-rays taken and -- you would take the X-rays out to his house for his interpretation?

A Yes.

Q Well, if the interpretation were then something that was not minor, but major, it would be necessary for him to go back to the hospital with you, wouldn't it?

A Yes, sir.

Q But you didn't call him before going out to his home?

A Occasionally.

Q Pardon me?

A Occasionally.

Q You would go out there unannounced?

A Yes, sir.

Q And walk into the house?

A Yes, sir.

Q Did you have a key to the door?

A No, sir.

Q When you went into the house would you call?

A I would walk to the bottom of the stairway, and holler up.

Q Was there a door bell on the house, do you know?

A I don't recall.

Q You would walk to the bottom of the stairs and call up; did you ever go upstairs?

A No, sir.

Q When you went to the bottom of the stairs, would you have to call once or would you call twice or how many times would you call?

A Usually a couple or three times.

Q Two or three times?

A Yes, sir.

Q And Doctor Sam would come down?

A Eventually, yes.

Q How was he dressed on these occasions?

A Different ways.

Q Well, tell us different ways.

A Well, sometimes he would have shorts, T-shirt. Sometimes he would have trousers on.

Q What kind of a T-shirt?

A Just regular undershirt, T-shirt.

Q When you say regular, do you mean the kind with the sleeves on them?

A Yes.

Q The kind with a collar around here?

A Yes, sir.

Q Were there occasions when he wouldn't have a T-shirt on?

A Yes, sir.

Q Sometimes he would have a T-shirt on and sometimes he wouldn't?

A Yes, sir.

Q And sometimes he would have trousers on, is that correct?

A Yes, sir.

Q And other times -- did he wear pajamas?

A No. He evidently wore shorts.

Q He wore shorts. Now, how many occasions did you go out to the house like this?

A Oh, I would say half a dozen or so.

Q Do you know when they were that you went out to the house like this?

A No, I don't recall any dates.

Q You don't recall any dates. Well, was it winter, was it summer, was it spring, or was it fall, can you tell us?

A It could be any time of the year.

Q It could be any time of the year?

A Yes.

Q Now, this incident involving the Careno -- the Careno incident you told us about, that had to do with a shooting on Lorain Road, didn't it?

A Yes, sir.

Q Careno's is a restaurant on Lorain Road, isn't that right, or they owned a restaurant on Lorain Road?

A Yes.

Q Or is it Center Ridge Road, I think it is?

A I don't recall the name of the road right now.

Q Were you an intern at the hospital at that time?

A No, I was out in practice at that time.

Q You were the police surgeon for Westlake?

A For Westlake.

Q You shared this duty with Doctor Sam Sheppard, is that correct?

A Yes, sir.

Q Did you have a badge, too?

A Yes, sir.

Q Now, did you have anything to do with the Bay Village Police Department?

A Unofficially.

Q Pardon me?

A Unofficially.

Q You were the unofficial police surgeon for Bay Village?

A Yes, sir, along with Doctor Sheppard.

Q Was he an official, or unofficial, if you know?

A I don't recall.

Q At any rate, you had occasion to see Doctor Gerber, you told us about?

A One occasion.

Q One occasion. That is the first time you had ever met Doctor Gerber?

A The first time was the shooting a month prior to the murder.

Q And that would have been in June of '54?

A Yes.

Q That was at the Cleveland Police Station?

A We had brought the person to be questioned down to the Cleveland Police Station.

Q The meeting with Doctor Gerber took place in the Cleveland Police Station?

A Yes, sir.

Q Did he participate in the questioning, do you know?

A That I don't know.

Q Were there Cleveland detectives present?

A I believe so.

Q Do you know their names, the Cleveland detectives?

A No, sir.

Q Was it in the Homicide Unit?

A I really don't know.

Q Do you recall what floor it was on?

A No, I don't.

Q Doctor Don, you testified in the first trial, didn't you?

A Yes, sir.

Q Did you at any time tell Mr. William Corrigan about this particular incident with Doctor Gerber?

MR. BAILEY: I object unless it is shown that he was questioned about it.

THE COURT: Overruled.

MR. BAILEY: I am sorry; was the question did he at any time tell Mr. Corrigan not only during trial but at any time?

MR. SPELLACY: At any time.

MR. BAILEY: The objection is withdrawn.

A Which Mr. Corrigan are you referring to?

Q Mr. William Corrigan, the man who asked you questions in the first trial, the man who represented Doctor Sam Sheppard.

A Yes, I told him about it.

Q You told him about it. Did he ask you this question

in the first trial?

A No, sir.

Q So you didn't testify to this in the first trial?

A No, sir.

Q Of course, you know now that Mr. William Corrigan is dead, don't you?

A Yes, sir.

Q Tell me, on July 4th, 1954, what time did you go to the hospital that morning?

A It was somewhere between nine and ten o'clock in the morning.

Q Nine and ten o'clock?

A Yes, sir.

Q Why did you go to the hospital?

A We had received a call from Doctor and Mrs. Selnik that Marilyn had been killed.

Q That was the nature of the call?

A Yes.

Q But you went directly to the hospital from your home?

A Yes, sir.

Q Did your wife accompany you?

A No, sir.

Q You went alone?

A Yes, sir.

Q Now, did you know that Doctor Sam Sheppard was at the

hospital when you left your home to go to the hospital?

A No, sir.

Q Did you know where Doctor Sam Sheppard was when you left your home to go to the hospital?

A No, sir.

Q What time was it that you arrived at the hospital?

A Probably ten minutes or so after I received the call.

Q What time did you receive this call, again?

A Somewhere between nine and ten o'clock.

Q Somewhere between nine and ten you received this call?

A Yes.

Q And you went directly to the hospital?

A Yes.

Q Who was the first person you talked to when you went to the hospital?

A I don't recall. I imagine I talked to one of the nurses.

Q Well, did you see Steve Sheppard there that morning at the hospital?

A Yes.

Q Now, without telling us the conversation you had with Steve, did you talk to Steve?

A I had gone --

Q Do you understand my question, doctor? Without telling us the conversation that you had with Steve, did you talk to him, yes or no you can answer that?

A No.

Q You didn't talk to Steve?

A No.

Q Let me ask you this: Where did you see Steve Sheppard?

A I beg your pardon, I asked him one question.

Q Where did you ask him this question?

A This was in Doctor Sam Sheppard's room.

Q He was in the room with Doctor Sam Sheppard?

A Yes.

Q What time was this?

A Shortly after I arrived at the hospital.

Q This would have been between nine and ten o'clock?

A It would have been about fifteen minutes after I had received the call.

Q Did you see Doctor Samuel Gerber at Bay View Hospital, or around that time?

A No, sir.

Q Do you know if he had been there at the hospital at that time?

A When I left the hospital he was out at the house.

Q When you left the hospital he was out at the house?

A Yes.

Q When you got to the hospital, you assured yourself that Marilyn was dead, is that correct?

A I had been told of this.

Q Now, you talked with Doctor Steve Sheppard?

A I asked him one question.

Q And was this question asked in the room where Doctor Sam Sheppard was?

A Yes.

Q Tell me, at this time did you examine Doctor Sam Sheppard?

A No.

Q How long were you in that room?

A Probably three to five minutes.

Q You didn't have occasion to examine him as a physician?

A No, sir.

Q Sir, based upon your own knowledge, you don't know what was the matter with him at that time, is that correct?

A The only thing I observed was multiple abrasions and contusions about the face.

Q Multiple abrasions and contusions?

A Yes.

Q What are multiple?

A Many.

Q How many did you see?

A' Well, you take a glance, the whole face seemed to be swollen and his cheek and his eyes.

Q My question was, how many multiple abrasions did you see?

A I didn't count them.

Q Can you give us an estimate as to how many you saw?

A Probably three or four.

Q Where were they located?

A About the mouth, the cheek, eyes.

Q Where on the mouth?

A Around the lips.

Q How many on the lips?

A I didn't count them.

Q You did notice the swelling on his right side of his face, didn't you?

A Yes.

Q Is this why you said many?

A Yes.

Q Now, from the hospital you went out to the Sheppard home, is that correct?

A Yes.

Q Did anyone request you to go out to the Sheppard home?

A No, sir.

Q You knew that Marilyn had been killed, is that correct?

A I found that out.

Q And you knew that the police were out there, is that correct?

A I surmised that they were.

Q You went out to the home?

A Yes, sir.

Q Did you go out to the home to assist the police?

A I went out to see if there was anything I could do.

Q You conducted an investigation out at the home, is that correct?

A There were several officers and myself that were asked to go through the house to see if we could find anything that might be used as a weapon.

Q Now, doctor, what officers were there?

A Mr. Drenkhan, Mr. Hubach --

THE COURT: Patrolman Drenkhan, is that your testimony? Officer Drenkhan was there?

THE WITNESS: Yes.

THE COURT: Please proceed, Counselor.

Q Was Sergeant Hubach there?

A Yes, sir.

Q That was Sergeant Hubach at that time, is that correct?

A Yes, sir.

Q Was Chief Eaton there?

A Yes, sir.

Q Was Doctor Gerber there?

A Yes, sir.

Q Did you know at that time Patrolman or Detective Pat Gareau?

A No, I did not, at that time.

Q Was he there at that time?

A I don't recall.

Q Was Officer Robert Schottke there at that time?

A I don't recall. I don't know him.

Q Well, when you arrived there was the body of Marilyn Sheppard still there?

A No, it had already been removed.

Q Pardon me?

A It had been removed.

Q The body had been removed already, is that correct?

A Yes.

Q When you arrived there?

A Yes.

Q And this is the first time you arrived there that day?

A Yes.

Q Now, you don't know whether or not Doctor Samuel Gerber

had been to Bay View Hospital before you went there, do you?

A No, I don't.

Q How long did you remain at the home that morning?

A Roughly an hour and a half.

Q Hour and a half?

A Two hours.

Q And you conducted a search of the premises?

A I was one of several.

Q One of several, how many?

A I believe that there were about four or five other officers.

Q Did you go down to the beach?

A We were primarily looking in the house itself.

Q Sir, do you understand my question? Did you go down to the beach?

A I believe I did later.

Q Did you go down the side of the hill?

A I went down the steps.

Q Did you search on the side of the hill?

A No.

Q There were people searching on the side of the hill, weren't there?

A Yes, sir.

Q The brush there was quite heavy, wasn't it, on the

side of the hill?

A In areas there was quite a bit of brush.

Q The steps there were quite steep going down to the beach, weren't they?

A Yes, sir.

Q Do you know if anything was found while you were there?

A Before I left that morning a couple of boys brought in a packet that had a watch and other things in it.

Q Did they bring this into the house?

A I don't recall if it was brought into the house or brought to the men outside.

Q Were you there when this was done?

A I don't -- I recall that they stated that they had found this, but I didn't see it.

Q You didn't see them find it?

A No.

Q If I told you this was about one o'clock that they found it, would that refresh your memory, to your recollection?

A It doesn't bring it back.

Q Well, now, you mentioned that Doctor Gerber made a statement to somebody; do you recall that?

A Yes, sir.

Q Who did he make that statement to?

A I would imagine they were men --

Q No, do you know who he made that statement to?

A No, I don't know the names of the individuals.

Q Do you know if they were Bay Village policemen?

A I don't believe they were, unless Chief Eaton was there.

Q Unless Chief Eaton was there?

A Yes.

Q Was Patrolman Drankhan there?

A I don't know if he was in that party at that time.

Q Was Sergeant Hubach there?

A I don't recall that he was in that party at that time.

Q Were they Cleveland detectives?

A I surmise that they were.

Q You surmise, you don't know, though?

A No.

Q Then you left the house that day, is that correct?

A Yes.

Q Did you return to the house at any time after that?

A Later on in the afternoon.

Q And did you go back to conduct a further investigation?

A No, I took another party over to the house.

Q How long did you remain at the house that time?

A Oh, probably 15 minutes or so.

Q Did you go back to the house after that?

A Not that I recall.

MR. SPELLACY: No further questions.

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REDIRECT EXAMINATION OF DR. HORACE M. DON

By Mr. Bailey:

Q Doctor, you have told us that Coroner Gerber said on the morning of the 4th, "It looks like the doctor did this, let's go get his confession."

Now, did you testify to that at the last trial?

A No, sir.

Q I will ask you to study this.

A Oh, yes, sir, I did.

Q Did you also testify about your trips to the Sheppard home with X-rays, at the last trial?

A Yes, sir.

Q Now, have you ever prior to today told anyone other than Bill Corrigan, the prior defense lawyer, about the remarks Sam Gerber made in June in the Cleveland police station?

A I told the family about it.

Q Had you ever met me before I came into this trial?

A I met you last January or February.

Q And where was that?

A At Doctor Steve Sheppard's house.

Q You were in town for some occasion at that time?

A Yes, sir.

Q And did you have conversation with me at that time?

A I talked to you at that time.

Q Did we have conversation about this incident in the Cleveland police station?

A Yes.

MR. BAILEY: That is all.

RECROSS EXAMINATION OF DR. HORACE M. DON

By Mr. Spellacy:

Q When you say you told the family about it, that was the Sheppard family?

A Yes.

MR. SPELLACY: No further questions.

THE COURT: You are excused.

I will be with you in a minute, gentlemen, please.

MR. BAILEY: All right, your Honor.

THE COURT: Ladies and gentlemen of the jury, there is not another witness available at this time. However, it is ten minutes to 12:00 and we are near our customary luncheon recess hour, at any rate. So we will adjourn for the day.

While you are away on your weekend adjournment, you will bear in mind the instructions

given you on each occasion when you leave the room. You shall not discuss this case or what you have heard of it amongst yourselves.

You shall not permit anyone else to discuss it with you, nor shall you permit yourselves to overhear anything that relates to this case by any means of communication, having in mind the instructions given you specifically with respect to printed material, radio, or television commentators, or comments made through the news media.

We will stand adjourned until 9:15 on Monday morning, and may I see counselors in chambers, please.

(Thereupon an adjournment was taken to 9:15 a.m., Monday, November 14, 1966, at which time the following proceedings were had:)

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I N D E X

WITNESSES

Defense (Cont'd.)	Direct	Cross	Redr.	Recr.
Richard Eberling	1441	1481	1483	
Dr. Charles Elkins	1449	1485	1501	1503
Rebuttal				
Jerome Poelking	1506	1510		
Dr. Roger Marsters	1513	1531	1565	1566

Closing Argument of Spellacy	1588
" " " Sherman	1624
" " " Bailey	1642
" " " Corrigan	1698
Court's Charge	1719

Monday Morning Session, 9:15 a.m., November 14, 1966

(Thereupon the following proceedings were had in Court's Chambers:)

THE COURT: Gentlemen, I would like to go on the record with respect to a conference that we had here Saturday after trial on November 12th.

At that time, gentlemen, I advised all counselors in Chambers that in the event there were to be any special requests to charge, included in the Court's General Charge, that these be submitted to the Court for his study and review on or before the end of trial date, today, November 14th.

At that time I also advised counselors that there would be no special requests to charge given before argument, since it is not the practice or my practice or custom, and I have not as yet in this court given special requests prior to argument, but have advised counselors in this case that I would consider their special requests, any special requests to charge that they may have, which the Court may choose to include in its general charge.

So, gentlemen, if you have such requests at this time, I would appreciate it. If not, you

are instructed you will have them here before four o'clock this afternoon.

MR. BAILEY: I have ten requests drafted, your Honor, and I apologize for their appearance. This has been in my hotel room on the typewriter, but I am hopeful I can get Mr. Corrigan's office to Xerox them and we can give you the originals.

MR. CORRIGAN: Nothing on the part of the State, your Honor.

THE COURT: All right; are we ready to proceed, gentlemen?

MR. BAILEY: We are.

THE COURT: Let's proceed.

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(Thereupon proceedings were resumed in the courtroom, in the presence and hearing of the jury, as follows:)

THE COURT: Counselor Sherman or Bailey, have you summoned a witness?

MR. BAILEY: Yes, we have, your Honor.

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THEREUPON, the defendant, further to maintain the issues on his part to be maintained, called as a witness RICHARD EBERLING, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF RICHARD EBERLING

By Mr. Sherman:

Q Will you tell the Court and jury your name, please?

A Richard Eberling.

Q And would you spell that, please, for the record?

A The last name?

Q Yes.

A E-b-e-r-l-i-n-g.

Q Where do you live, Mr. Eberling?

A 3961 Bradley Road, Westlake.

Q And how long have you lived at that address?

A Since 1939.

Q Are you employed, sir?

A Yes.

Q What is your employment?

A I own and operate Dick's Window Cleaning.

MR. BAILEY: Can't hear the witness.

Q Would you keep your voice up so the Court and jury and everyone can hear you.

You are employed where?

A I own and operate Dick's Window Cleaning.

Q How long have you owned and operated this particular business?

A Since I was in high school, in 1946.

Q What area do you operate this business in, sir?

A Western suburbs.

Q Is included in that area Bay Village?

A Yes.

Q Do you know or did you know Marilyn Sheppard?

A Yes, sir.

Q How did you come to know Marilyn Sheppard?

A I was recommended by Mrs. Richard Sheppard for cleaning services.

Q And did you do cleaning services for Mrs. Sheppard, Marilyn Sheppard?

A Yes.

Q When did these cleaning services start, if you recall?

A When they moved in their new home.

Q Do you recall what time that was?

A It was in the spring.

Q Of what year, if you recall?

A I'm not sure if it was '52 or not, but it was as they were moving in.

Q What services did you perform for the Sheppard family?

A Well, a man that worked for me washed their kitchen down and did their windows the first day that they had moved in.

After that I had done windows in the house on a regular basis, and also did the combination storm windows, on an average of twice a week.

Q By the way, do you know Doctor Sheppard?

A I had met him once at the breakfast table, briefly.

Q I take it, then, all your contacts were with Marilyn Sheppard?

A Yes.

Q Did you know that on the 4th day of July, 1954, that Marilyn was killed?

A Yes.

Q Did you have an opportunity at any time shortly before that to be in the Sheppard residence?

A Yes.

Q Do you recall when that was, Mr. Eberling?

A It was around the 1st of July.

Q What was the occasion that you were there on or about the 1st of July?

A I was doing the spring changeover of storm windows and screens, washing them.

Q Is there any reason why it was the 1st of July that you were changing over from screens to storm windows?

A Well, she had asked to have them done earlier, but this being the peak season, she waited until I had a chance to get caught up with my work, and so I waited until then.

Q Now, while you were there on the first or second of July, did anything unusual happen to you?

A Yes. While I was working in the kitchen on the last day that I was there, I had cut my hand, or, my finger, on the combination storm windows.

Q What did you do after you cut your finger on the combination storm windows?

A Well, it was bleeding a bit and I washed my hand in the kitchen sink, and then went about my work, as I wanted to get done and get out of there.

But I went to the basement to get the screens for the kitchen.

Q Was your hand bleeding when you went to the basement?

A Yes.

Q And did you go anywhere else in the house?

A Yes, I went upstairs, but I don't recall how long I was up there or where I went.

Q You stated you knew your hand was bleeding when you went down to the basement; do you know if your hand was bleeding when you went upstairs?

A No, I don't.

Q Do you know what your blood type is, sir?

A "A".

Q "A"?

A Positive.

Q On the occasions that you went to the Sheppard residence, in what manner did you gain access to the home?

A I went through the library door facing the front.

Q When you speak of the front, you are speaking of the side towards the lake?

A Yes.

Q Now, was this door locked or did you have a key or how did you gain access through this door?

A No, I was told by Marilyn Sheppard that when I --

MR. SPELLACY: Objection.

Q Not what you were told, but just what you actually did?

A I went, I knocked on the back door, and there was no answer, I went around the front and went in.

Q This was your normal procedure?

A Yes.

Q Do you know how many times you had been in the Sheppard home that you gained entrance in this manner by going through the unlocked door?

A Well, I would say between six and eight times in a year.

Q Now, do you recall that the Sheppards owned a dog at that time?

A Yes.

Q Did you ever have an occasion to see this dog while you were on the premises?

A Yes.

Q Would you explain the reaction of the dog when you had occasion to see him in or around the house?

A One time in the winter, I recall, when I went in, the dog was in the chair sleeping and never got out of the chair.

Q Never so much as bothered that you were roaming around the house?

A No.

MR. SHERMAN: Your witness.

MR. BAILEY: May we approach the bench?

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

THE COURT: Mr. Corrigan?

MR. CORRIGAN: At this time we ask that this witness be excused, but that he remain in the building, subject to our cross examination after the completion of the next defense witness.

THE COURT: Any objection, Counselor?

MR. SHERMAN: We have no objection.

MR. BAILEY: Well, is there cross examination other than as to his criminal record which can be accomplished now? In the event you find he has no felony record, it won't be necessary to put him back on the stand.

THE COURT: Let's leave it this way, so we can move through it. The Court will grant the prosecution's request, that this witness be excused now subject to further recall on the part of the State for cross examination this morning.

MR. BAILEY: May we see the information that just walked in, your Honor?

THE COURT: Gentlemen, I am going to grant the request. Let's proceed. We will proceed and I will excuse this witness subject to his being available for cross examination, if any, on the part of the State.

MR. BAILEY: No object.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

THE COURT: Mr. Eberling, the

Court is going to excuse you now as a witness in this cause, but hold yourself available in the building this morning, in the event the State wishes to cross examine. Will you do that, sir?

THE WITNESS: Yes.

THE COURT: Please remain in the building in the event the State wishes to cross examine you before the morning is over. Thank you.

THE WITNESS: Yes.

MR. BAILEY: Call Doctor Charles Elkins, please.

- - -

THEREUPON, the defendant, further to maintain the issues on his part to be maintained, called as a witness DR. CHARLES ELKINS, who, being first duly sworn, was examaned and testified as follows:

DIRECT EXAMINATION OF DR. CHARLES ELKINS

By Mr. Bailey:

Q Will you give us your name, please, sir?

A Doctor Charles W. Elkins.

Q Where do you live, doctor?

A Tucson, Arizona.

Q What is your address in Tucson?

A 6230 Miramar Drive.

Q And your profession?

A I am an M.D. with a specialty in neurological surgery.

Q Do you have a practice in Tucson, Arizona?

A That's correct.

Q Where are your offices there?

A 601 North Wilmot.

Q In 1954 did you practice in Cleveland?

A I did, sir.

Q Do you know the defendant, Doctor Sam Sheppard?

A I do.

Q Had you known him prior to July 4th, 1954?

A Yes, I did.

Q Doctor, would you give us your educational background and your qualifications as a neurosurgeon?

A I took my undergraduate work at Ohio Wesleyan University in Dover, Ohio, which institution I graduated from in 1932.

I attended Ohio State University the following year for a short period of time, and entered Western Reserve School of Medicine in 1933, and from this institution I graduated with a Doctor of Medicine in 1937.

The next year I served my internship, which was a general internship, at Cleveland City Hospital.

In 1938 I was house officer in neurology and neurosurgery at the Boston City Hospital, Boston, Massachusetts.

The following year I served as a fellow in neurological surgery at the Lady Clinic, Boston, Massachusetts.

My final year in Boston was 1940, '41, at which time I returned to Boston City Hospital as resident in neurosurgery.

In 1941 I returned to Cleveland and entered the private practice of neurological surgery in this town.

Very shortly afterwards the war was declared, World War 2, and I was sent to Australia with the Western Reserve University unit, whose unit, which was known as the Lakeside unit. I spent approximately two years as Chief of Neurosurgery at that institution, in Melbourne, Australia.

Returning to the United States I was Chief of Neuro-

logical surgery at Fitzimmons General Hospital in Denver, Colorado, for a short period of time, because just before D-day my outfit was moved or my service was moved to the east coast, where for approximately two years I was Chief of Neurological surgery at the Newton D. Baker General Hospital.

After my discharge from the army I returned to Cleveland, and again I entered the practice of neurosurgery.

I served on the staffs of several hospitals, including Lakewood Hospital, Lutheran Hospital. I was on the staff of Cleveland City Hospital.

I was also attending neurosurgeon at the Veterans Hospital, the Crile Veterans Hospital.

Subsequently I was made chief consultant at the Veterans Hospital.

I was made chief of neurosurgery at Cleveland City Hospital then. It is now, I understand, Cleveland Metropolitan Hospital.

I was made assistant professor of neurological surgery at Western Reserve University and was on the staff of the University Hospitals.

In 1954 I elected to move my family to Tucson, Arizona, and I have been practicing neurosurgery in that city since 1954.

Q Are you affiliated with any hospitals in the Tucson, Arizona, area?

A Yes, we have several major hospitals. St. Mary's, Tucson Medical Center, Pima County Hospital, and the Veterans Hospital in that city.

MR. CORRIGAN: May I object at this time? I don't think that that answer was responsive to the question, your Honor.

THE COURT: It may stand. I agree with your objection, however. Please proceed, Counselor.

Q My question, doctor, was whether or not you are affiliated with any of the hospitals you just named?

A Yes, sir.

Q Doctor, whether or not you are certified by the American Board of Neurosurgery?

A I have been certified by the American Board of Neurological Surgery.

Q As of when?

A I think 1948.

Q Doctor, what is the specialty of medicine which is the business of neurosurgeons?

A Neurological surgery deals particularly with the diseases to the nervous system which are surgical in nature. It deals with injuries to the nervous system, the brain, spinal cord, and other nerves in the body.

Q Do you know what the specialty of Doctor Sam Sheppard

was when he was a practicing physician in 1954?

A I believe I do.

Q What was it?

A I believe that he did general surgery. I also am acquainted with the fact that he had some training in neurological surgery and I believe this was in California.

Q Did he ever consult with you professionally for advice on difficult cases?

A Yes, he did.

Q And whether or not any cases were ever referred to you by Doctor Sam Sheppard?

A That is correct.

Q Did you know a Doctor Richard Hexter in Bay Village when you were here in 1954?

A Yes, I did.

Q And do you know whether or not he had any specialty in medicine?

A I think Doctor Hexter was a general practitioner in medicine.

Q Did he ever refer any cases to you for neurological treatment?

A I believe he did.

Q How long had you known Doctor Sam Sheppard prior to July 4th?

A I can't be sure. I would say two years, perhaps.

Q Approximately how many neurosurgeons were practicing in the Cleveland area in July, 1954, if you know?

A I would estimate that ten were in this general area.

Q By the way, do you know Doctor Spencer Braden?

A I am acquainted with Doctor Braden.

Q Did you know him in 1954?

A Yes, I did.

Q And did he have a specialty?

A He was a neurological surgeon.

Q Doctor Elkins, I call your attention to July 4th, 1954, and ask you whether or not on that date you had occasion to see Sam Sheppard?

A I recall distinctly seeing Doctor Sam Sheppard on July 4th.

Q Where was he when you first saw him?

A At the Bay View Hospital.

Q Did you consult with him as one physician to another, or was he a patient?

A I was asked to see him as a patient.

Q Had you ever seen him before as a patient?

A No, sir.

Q Had you ever treated him for anything?

A No, sir.

Q Now, when you saw him on this day, can you describe his condition when you first saw him, your observations?

A May I perhaps refer to the hospital chart which I have here?

Q Yes; that is State's Exhibit 72, I believe, for the record.

A Over "Report of Consultation" -- and there is no date on this sheet of paper, but I recall distinctly it was on July 4th, that I stated, "Doctor Sam was alert and answers questions lucidly."

"There is a swelling of the right periorbital tissue," which means tissue around the eye.

"The pupils are equal and react," and by that I interpret that certain pupillary reactions occur when light is flashed in the eye, or when vision is changed from near to far vision, pupils contract and expand.

He moves all his extremities well. I stated that there were no Baginski's. This is a reflex which is obtained by stroking the sole of the foot, and an abnormal response is the toes will fan and the large toe will be extended or drawn upward.

The normal response is for the toes to curl and the large toes to move downward, the large toe to move downward.

I reported that he had voided. This was an important part of the history. I was trying to determine the extent of his injuries. When an individual is able to void voluntarily, the attention of the examiner is somewhat

drawn away from certain types of injuries, which may or may not be permanent.

He complained of headache in the occipital region which is the base of the skull.

He had a collar in place. We call it a cervical collar. Therefore, at that time I noted that the neck was not examined on that date. I advised that he be sedated, and that fluids be urged, because I recall that he looked as if he needed fluids. In other words, he was in a state of dehydration.

I felt that he was sick, and deserved to be watched carefully for development of any further evidences of damage to his nervous system.

Q I take it that on your first encounter with Doctor Sam Sheppard following the death of his wife you did not do a detailed neurological examination?

A That's correct.

Q Is the reason that you didn't do that related to the condition in which you found him?

A Not only in this individual but with any individual who I believe to be sick, I try to determine the state of the patient in relationship to consciousness, just where he stands, is an emergent matter, and if it is not then I delay more meticulous examinations for future date.

Q Did you on some future date, that is, after July 4th,

1954, do a more meticulous examination?

A Yes, sir, under date of July 6, 1954, I then proceeded to more carefully evaluate what actually was going on in this nervous system.

Q Prior to the beginning of this examination on July 6th had you studied and interpreted any X-rays?

A I believe I had seen an X-ray of his neck.

Q Did you find anything abnormal about the X-ray that you observed?

A I thought there was a small chip fracture demonstrable on this set of X-rays.

Q Would you explain to the jury, doctor, what a chip fracture consists of, where it is found, or where it was found in this case?

A A chip fracture simply means a small piece of bone or fragment which has broken away from its main body. It can lie close to or at some distance from the main body.

In particular relationship to the bones of the neck, the bodies of the vertebrae are cylindrical and they have borders, and if a small piece of bone has been broken off, it can usually be seen as an abnormality on appropriate X-ray.

Q If a chip, doctor, is broken away from the main body of the cervical vertebra, what is it that holds it in place or suspends it, in the same general area as the main body

from which it was broken?

A There are certain ligaments and muscles that hold this chip within close proximity to the main vertebral column.

THE COURT: Counselor, before you proceed, does the record reflect when Doctor Elkins reviewed this X-ray to which he makes reference?

Q Do you recall the date on which you first saw X-rays of the neck of Sam Sheppard that disclosed a chip fracture?

A I believe it was on July 4th.

Q Can you tell us what examination you conducted of the defendant on the 6th day of July?

A Well, in the first place I talked to him, and his complaints at that time now became somewhat focused on his urinary tract. He complained of urgency on urination.

Q What does that mean, doctor, urgency?

A A desire to urinate frequently and not being able to contain the bladder. The urgent nature of performing the act of voiding.

Q All right, continue.

A He had been incontinent of fecal material on that morning. He had attempted to pass gas and had soiled his sheet with fecal material.

This is an abormmal thing, and, again, it focuses the examiner's attention on what is going wrong with this nervous system, or what has gone wrong with this nervous system.

He furthermore complained of numbness over the left hand in what we call the ulnar distribution, and this is part of the ring finger or digit 4, and all of the little finger or digit 5.

So I proceeded then with my examination.

The bruise or ecchymosis around the right eye had improved.

I again noted that his pupils were equal and reacted. This I have tried to explain in my previous examination, the meaning of this.

The movements of his eyes were normal, the extra-occular movements. In other words, he could look to the right and he could look to the left, up and down, and do this in a conjugate fashion. The eyes moved together.

There was no evidence of muscle weakness. This part of the examination has to do with the functions, not so much of the spinal cord, but of the brain itself.

I noted there were no facial weakness, there was no facial weakness. This, again, is part of the examination of the nervous system above the spinal cord.

The muscles that move the face are part of the supra-spinal cord nervous structures.

I examined him for dimminution of sensation over this sensory distribution of the ulnar nerve, and he responded that there was decrease in sensation.

Some of the small muscles of the hand which were also supplied by this nerve seamed weak to my examination.

I made note now that the left triceps reflex was absent or not obtained. The right one was. The triceps muscle is behind the arm above the elbow. It is the muscle in which we use to strike a downward blow with a hammer. The reflex is obtained by sharply tapping the tendon of the triceps muscle, and the response to it, the normal response to the tapping of this triceps tendon is his extension of the forearm on the arm.

Q Would you, doctor, for the benefit of the jury, just point to the place where the tap is made to test the triceps muscle?

A Just above the elbow.

Q Where your index finger now is?

A Where my index finger now is.

Q Thank you, doctor. Go ahead.

A For clarification the response of the normal triceps reflex is extension which is downward movement of the forearm, in contradistinction to a reflex which is obtained on the other surface of the arm, at this area, which is the biceps reflex, where the normal response is flexion of the arm.

Doctor Sheppard had a normal biceps muscle on both sides. His triceps reflex on the right side was present,

and was absent on the left side. This to me represented neurological abnormality.

I next made note that the right abdominal reflexes -- and there are two, upper and lower -- were active, but the left abdominal reflexes were absent.

These reflexes are obtained by stroking the abdomen with a reasonably sharp object, and the normal response is an involuntary contraction of the abdominal muscles.

The absence of the left abdominal reflexes, particularly when they were associated with an absence of the left triceps reflex, again, to me indicated a neurological abnormality.

The reflexes which are called the cremasteric were both absent. These reflexes are obtained by, again, stroking the inner surface of the thigh, and the normal response is a sudden involuntary retraction of the scrotum and testicles.

This did not occur in Doctor Sheppard at the time of the examination and again indicated to me a neurological abnormality, particularly when it was related to the absence of the abdominal reflexes on the left, and the absence of the triceps reflex on the left.

Now, at this point I would like, your Honor, to correct my previous statement. I believe it was on July 6th that I observed these X-rays, because I have a note that, "Cervical X-rays show chip fracture spinous process of C-2."

This is under this date of July 6th.

On that morning I performed a spinal tap. This is done by inserting a needle into the space which contains cervical spinal fluid, and this needle is usually inserted in the low back.

I found the pressure to be normal, 150 millimeters of water, 150 millimeters of spinal fluid. I reported normal dynamics. This is medical terminology, and it simply means that by pressure on the jugular veins in the neck, while recording the pressure with a pneumonometer of the spinal fluid in the normal region, that there was a normal rise and fall of the spinal fluid.

This indicates to the examiner that there is no mass lesion causing a block in the pathway of the flow of cervical spinal fluid.

On this day I examined Doctor Sheppard's neck and found, I stated that local examination disclosed tenderness over the spinous process of C-2. This is high on the neck, with spasmodic contractions of the muscles in the neck to pressure.

I had the spinal fluid sent to the laboratory for certain examinations, including cell count and protein determination.

My impression at this time is that Doctor Sheppard had sustained a cervical spinal cord contusion, or bruise.

This concluded my examination.

Q Did you ever after July 6th make a subsequent examination of the defendant Sam Sheppard?

A I believe I did, approximately one month later, I examined Doctor Sheppard at the County Jail.

Q And did you make specific examination with reference to the reflexes that you had found absent on the 6th day of July?

A This is a matter of recollection, because I don't have a copy of that examination here. But I believe that his reflexes were now, had now returned.

The triceps reflex was obtainable. The cremasteric reflexes were back; and as I recall, however, they were weaker than I would anticipate them to be in an individual of thirty-some years of age.

And the same thing is true with his left abdominal. I felt that while it was returning, that it was still weak.

Q Doctor, what kind of shape was Doctor Sam Sheppard in when you examined him in July and August, physical shape, other than the difficulties that you have noted for us?

A Well, I felt that he was an athletic type of individual, with strong heavy musculature, well coordinated.

Q Do you say that the cremasteric reflex, the one indicated by a stroking of the inside thigh, is present in every human being, or is it sometimes absent as a matter of

course?

A It is sometimes absent as a matter of course, as a matter of age, really.

Q Is its absence related to the age of the patient?

A Its absence can be related either to the age of the patient, or some disease of the nervous system.

Q And did you find from Doctor Sheppard's history that he had any disease of the nervous system that would cause the absence of the cremasteric reflex prior to July 4th?

A I don't believe that he did have.

Q Whether or not a young man, that is, a patient thirty years of age, as you examined, the reflex would be more or less unusual than an older gentleman?

A The absence of this reflex in a young individual would certainly be more unusual than in an older individual.

Q Doctor, you spoke in terms of reflexes; will you tell the jury what a reflex is and what makes it work, why you tap?

A A reflex is totally involuntary. While some may be simulated, to a trainer examiner it is quite evident that the reflex is being simulated.

Insofar as the abdominal reflex and the cremasteric reflexes, I do not believe that they can be simulated.

Now, there is an anatomical pathway for all reflexes. There is the sensory path of the reflex, where the stimulus

which in the case of a knee jerk where you tap the tendon below the patella, or the knee cap, is carried through the sensory nerve to the spinal cord, and then is without voluntary action sent out through the motor portion of this channel to reach the muscle, the muscles involved.

In a normal individual, without disease, without injury, or without any reason for this reflex to be interfered with, there is the jerking of the leg which occurs involuntary.

Q All right. Doctor Elkins, having in mind that Doctor Sam Sheppard had training in neurology, do you have an opinion as to whether he had the power, if he had wanted to do so, to make his reflexes appear absent despite your examination so that you would be fooled and think that they were absent because of injury?

MR. SPELLACY: Objection.

THE COURT: Sustained.

Q Can the absence of these reflexes in your opinion be feigned?

A I think the absence of certain reflexes might be feigned. But in this instance I don't think it would be possible.

Q Doctor, as part of your present practice, do you have some experience with automobile injury cases and other kind of personal injury cases?

A Unfortunately, yes.

Q Have you had experience with the so-called whiplash injuries?

A Yes, I have.

Q Can you tell us whether or not the field of neurology has developed tests in order to determine whether or not claimed injuries actually exist to the spinal cord or the nervous system in general?

A I think in most instances if there is a spinal cord injury, that this can now be pretty well determined by a trained observer.

Q And have you made a number of such examinations for litigants?

A Yes, I have.

Q And have you testified in court before?

A Yes, I have.

Q Doctor, what about muscle spasm, what is that indicative of to you when you find it in the back of the neck as you did in this instance?

A In this instance I felt that there had been an injury to the muscles of the neck.

Q What is it that you objectively observed when you say you see spastic activity?

A Well, either at rest or upon stimulation such as pressure, the muscles contract, and, as we say, go into

spasm, and it hurts.

Q Now, you had indicated, by the way, I believe you said your impression was a contusion of the spinal cord?

A That's right.

Q Will you tell us or explain to us how you are able to arrive at this conclusion based on the examination you made and the reflexes which you found to be absent, why do these reflexes indicate damage to the spinal cord?

A Well, in summary, we have an individual who in the first place stated that he had been hit, who had tender spastic muscles in the neck, who had an X-ray that to me at that time demonstrated a fracture at the level at which he was tender; who had an absent triceps reflex on the left; an absent left abdominal reflex, and both cremasteric reflexes were not obtained.

This added up to me to be an individual who had injury to his spinal cord, because through this spinal cord runs the sensory motor pathways that I have mentioned.

Q How is the spinal cord carried in the spine itself? First of all, what is it, what does it consist of, the spinal cord?

A Well, the spinal cord consists of all those pathways running to and from the brain.

The pathways running to the brain generally are the sensory pathways.

Those pathways running away from the brain are the motor or motion pathways.

That is a simple explanation of what consists of the spinal cord.

The spinal cord is the direct extension of the stem of the brain. It is encased in a bony canal called the spinal canal and extends from the base of the skull down to approximately the first lumbar vertebra. That is high on the low back in the adult.

At each segment or each vertebra there are nerves that go out from the spinal cord, and these are the motor nerves, and there are nerves that come in and these are the sensory nerves.

Q Now, is the spinal cord protected in any way from abuse?

A It is encased in a bony canal. In the front there is a heavy, rather heavy body, or cylindrical piece of bone, and then arches past backward from this body, and meet in the middle, and form the protrusions which everyone can feel in the midline up and down the back, and these are called the spinous processes.

Q These are the bumps that one feels?

A The bumps up and down the back.

Q And whether or not these protect the spinal cord in the normal course of activity?

A Yes, this is a protective bony mechanism over nervous

tissue.

Q Will you tell us how a contusion in the spinal cord may be caused?

MR. SPELLACY: Objection.

THE COURT: It is general in character, Counselor. The question is proper but will you restate it, please.

MR. BAILEY: Let me be more specific, then.

Q Can the application of force to this area between, for instance, the 2nd and 3rd cervical vertebrae, cause a contusion of the spinal cord if that force is sufficient?

A It can.

Q Now, would you distinguish for the jury the difference between a concussion and a contusion of the spinal cord, if there is such a difference?

A There is a difference. It is pretty impossible to state shortly after injury, unless it is a devastating injury with total paralysis, to determine whether or not there has been a concussion or a contusion.

A contusion simply means a bruise, as a result of a more severe force applied to the nervous system than would be a concussion.

A concussion simply may be described as damage to nervous tissue which is not permanent, but is transient,

and that recovery takes place within a reasonable length of time, a few weeks, a few months.

Q Doctor, have you done much work with paraplegics?

A Yes, I have.

Q What is a paraplegic?

A A paraplegic is an individual who is paralyzed in one or more extremities, one or all four.

If all four extremities are paralyzed the individual is then known as a quadraplegic.

Q That is both arms and both legs?

A Both arms and both legs. This can occur from injury. It can occur from other diseases of the nervous system.

Q If there is a severance of the cord or any part of the cord, can that be repaired?

A No.

Q If there is a contusion or bruise to the cord, does that tend to heal itself, or is some treatment needed?

A Frequently it can heal itself.

Q Does that depend on its original severity whether or not it will heal?

A Yes, I think that is a fair statement.

Q Doctor, when on August 6th, if that was the date, about a month after your first examination, you saw the defendant in the jail and noticed the return in part at least of some of these reflexes, did that tend to confirm or

contradict your original diagnosis of contusion of the spinal cord?

A I sort of changed my mind. I thought perhaps it was a concussion of the spinal cord rather than a contusion, because of the rapidity of the recovery.

Q I see.

A Although one can't be one hhndred percent. This again becomes a matter of terminology. This could have been a mild contusion, or a severe concussion. But it certainly wasn't a severe contusion.

Q The difference, I take it, between a concussion and a contusion can be one more or less of degree?

A It is a matter of degree.

Q Is this the first case in which you had ever seen or diagnosed a spinal contusion or concussion?

A It certainly was not.

Q Did you have much experience with diagnosis of and treatment of spinal cord injuries prior to this time?

A Yes, I did.

Q Now, doctor, having in mind the injury which you found from the evidence which you discovered, can you say whether or not in your opinion this injury could have been inflicted by Doctor Sheppard himself on his own neck?

MR. SPELLACY: Objection.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury.)

THE COURT: Let the record reflect that the objection is withdrawn.

MR. SPELLACY: Objection is withdrawn.

THE COURT: Doctor, do you know what the question is, sir?

THE WITNESS: I believe I do.

THE COURT: Please proceed.

A I think it would be most difficult for an individual to self-inflict this type of an injury. I must qualify this by saying there are lots of ways of injuring yourself.

If you wanted to throw yourself in front of an automobile you certainly could sustain this type of an injury.

Q Or jump out of a second story window?

A Or out of a second story window.

Q My question was whether or not, doctor, it would be in your opinion possible or reasonably medically probable that one just by hitting his own neck with the leverage one could get on the arm, normal body condition, would be sufficient to knock off a chip from the vertebra and contuse the spinal cord?

MR. SPELLACY: I object to that question.

THE COURT: Sustained, Counselor.

Q Doctor, you indicated in some people the cremasteric reflex, which is demonstrated by movement of the testicles and the scrotum, is always absent, in some people I believe you said it is not found?

A That's correct.

Q If you have an individual where the cremasteric reflex is naturally absent, whether or not on later examination it would appear, as you have testified about Doctor Sheppard on your jail examination?

A I don't believe this comes and goes.

Q So if it is absent naturally it is absent all the time?

A I would think so.

Q Was the recovery of the cremasteric reflex consistent with the state of apparent recovery of the other reflexes on your second examination, from your recall?

A This was part of the whole picture.

Q And was there a consistent degree of recovery throughout the whole system so far as you could see?

A I felt this was true.

Q And was the extent of this recovery that led you to modify your opinion insofar as the severity of the injury was concerned?

A That's right.

Q Doctor, can you tell us what happens or what may happen to an individual who is knocked unconscious by a blow in the area of the base of the skull or the back of the neck with respect to his memory for events immediately preceding the concussion?

MR. CORRIGAN: Objection, your Honor.

THE COURT: Sustained.

Q Do you have any experience in this phase of neurology as to the effect upon memory of concussive injuries?

A I certainly do.

THE COURT: Sustained on a different basis, Counselor.

MR. BAILEY: May we approach the bench so I may make my offer of proof?

THE COURT: Yes.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. BAILEY: I think the doctor would testify, and I will make as my offer of proof, his testimony that where a concussive injury is experienced, the normal and sometimes probable result may be amnesia or partial amnesia for events immediately preceding the injury.

MR. CORRIGAN: I have no quarrel with

that but it will vary from case to case. Somebody can go into a coma forever, somebody can have amnesia for a minute or an hour or a month.

MR. BAILEY: You can bring that out on cross.

MR. CORRIGAN: You have an area of absolute speculation and it doesn't relate to this case here, and I think it is immaterial and irrelevant.

MR. BAILEY: No, the defendant contends since you put in his statements, you claim a variation, he certainly is entitled to show that if the jury believes he was struck they could also find on the basis of the testimony of this expert, that his confusion as to the events as he charged up the stairs just before he was struck, and as to the events on the beach, and his general confusion in wandering about the house, was caused at least in part by the amnesia result of being concussed on two separate occasions.

MR. CORRIGAN: Again, I will withdraw the objection. It has no place. But I will withdraw the objection.

MR. BAILEY: All right.

THE COURT: You are withdrawing

the objection?

MR. CORRIGAN: Yes.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

THE COURT: Let the record show the objection is withdrawn.

MR. CORRIGAN: I will withdraw the objection, your Honor.

THE COURT: Doctor, do you have the question in mind?

THE WITNESS: This one I would like repeated.

THE COURT: Do you wish the reporter to read the question back, Counselor, or do you wish to restate it.

MR. BAILEY: Well, if the objection has been withdrawn to that specific question, perhaps we better have the reporter read it back.

(Last two questions were read by the reporter.)

THE COURT: Doctor, do you have the question in mind?

A Yes; and I have experienced this.

Q Can you tell us what may happen to a person who gets a concussion insofar as his memory is concerned?

A An individual who has been knocked unconscious by a

blow anywhere around the head may have the foggiest of memory of events immediately preceding the accident or injury, and as a matter of fact may never recall events previous to this.

This is known as retrograde amnesia, and it occurs fairly frequently.

In automobile accidents, and I think of it as a sort of situation --

MR. SPELLACY: Objection now to that.

THE COURT: Sustained.

Q You say it is a fairly common phenomenon in connection with injuries to the head or the base of the skull?

A Retrograde amnesia is, yes.

MR. SPELLACY: May I object to that. He didn't say with regard to injury. He said with regard to concussions.

THE COURT: Sustained as to that conclusion drawn by the doctor.

Please proceed, Counselor.

Q You say, doctor, that retrograde amnesia occurs only when concussion is present, or an injury generally?

A I meant to imply that retrograde amnesia only occurs in injuries which produce at least concussion, and unconsciousness.

Q Did you in this case have an opinion as to whether or

not the defendant suffered a concussion?

A My first impression was that he had had a concussion of the brain.

Q And is a concussion consistent with the damage which you found by way of the X-rays and the neurological examination?

A I believe this is two matters. I think that we did not become aware of the spinal cord findings until 48 hours.

But the fact that he had been unconscious, according to the history that was given to me, was quite compatible with either a blow of the high cervical region or around the vault of the skull, that concussion in either areas can produce unconsciousness.

Q What very briefly is a brain concussion?

A A brain concussion can be defined similarly to a spinal cord concussion. This is in a different location, results of an injury which is reversible and may produce light unconsciousness for a brief period of time, with complete recovery of function of the nervous system, with the possible exception that if the concussion is of sufficient severity there may be confusion or absence of memory of events occurring about the time of the accident.

Q Are you able to say that a vagueness of recollection as to the events immediately preceding the sustaining of the injury causing confusion, is consistent with such an injury?

A That's correct.

Q Now, Doctor Elkins, do you recall whether or not at some time in the course of your examinations of Doctor Sam Sheppard you conferred or spoke with Doctor Sam Gerber?

A Yes, sir, I did.

Q Had you known him prior to the occurrence of the murder of Marilyn Sheppard and your subsequent examinations of Sam?

A Yes, I had known him.

Q Did you recognize him when you saw him and conferred with him?

A That is correct.

Q Doctor, did you ever say to Doctor Sam Gerber that there was nothing wrong with Sam Sheppard?

A I did not, sir.

Q Do you recall whether or not Doctor Gerber ever conferred with you to get your opinions as to the extent of the injuries?

A I believe that he discussed them with me.

Q Do you remember when that night have been?

A I think this was on the 6th of July.

Q Was this following your neurological examination where you found the reflexes absent?

A That is correct.

Q And did you hold back any information from Doctor Gerber at that time?

A Not that I would recollect.

Q Had you worked with Doctor Gerber before and cooperated with him?

A Yes, I had.

MR. BAILEY: Your witness, sir.

THE COURT: May I see counselors, please?

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury.)

THE COURT: Ladies and gentlemen of the jury, we will have a brief morning recess, and while you are away on your recess you will bear in mind the instructions given you on each occasion when you leave this room.

You shall not discuss this case or what you have heard of it amongst yourselves; you shall not permit anyone else to discuss it with you, nor shall you permit yourselves to overhear anything that relates to this case by any means of communication.

We will stand recessed briefly.

(Thereupon a recess was had.)

THE COURT: Counselor Spellacy or Corrigan?

MR. SPELLACY: Mr. Eberling.

THEREUPON a witness, RICHARD EBERLING, resumed the witness stand, and was further examined and testified as follows:

THE BAILIFF: Mr. Eberling, you had been sworn in this case. Kindly remember you are under oath.

MR. SHERMAN: May we approach the bench, first?

THE COURT: Yes.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

THE COURT: Let the record reflect that with respect to inquiring into a previous criminal record on the part of this witness, Mr. Eberling, that the Court has satisfied himself that authority to ask this question is given to the State under 56 Ohio Jurisprudence, 2nd, paragraph 363, under the sub-title "Witnesses" at page 800; and 56 Ohio Jurisprudence, 2nd, at page 528.

MR. BAILEY: Well, the defense is satisfied that the Court is probably right in its ruling. In any event, any error caused by it would not be reversible, so we save no rights.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

CROSS EXAMINATION OF RICHARD EBERLING

By Mr. Spellacy:

Q Mr. Eberling, in the year 1960 were you engaged in the business of window washer at that time?

A Yes.

Q Did you have your own business in 1960?

A Yes.

Q Mr. Eberling, have you ever been convicted of a State or Federal offense?

A Yes.

Q What was that?

A It was for a misdemeanor.

Q What was it?

A Pardon?

Q For what?

A Petty larceny.

Q Petty larceny?

A Yes.

Q And when was that?

A About seven years ago.

Q Would that have been on February 5th of 1960?

A Yes.

Q Was that here in this county?

A Yes.

Q Did it have any connection with your business as a window washer?

A Yes.

MR. SPELLACY: No further questions.

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REDIRECT EXAMINATION OF RICHARD EBERLING

By Mr. Sherman:

Q Mr.Eberling, who did you first tell about the cut on your hand, in regard to a police official?

A The Cleveland Police Department.

Q And when was that?

A The day after the murder.

Q Have you had any conversation since that time with Doctor Gerber, the county coroner?

A Yes.

Q When was that?

A That was back when I was arrested.

Q In 1960, approximately?

A Yes.

MR. SHERMAN: No further questions, your Honor.

- - -

RECROSS EXAMINATION OF RICHARD EBERLING

By Mr. Spellacy:

Q Do you recall what Cleveland policeman you told it to?

A I believe Parrino, a little short man --

Q Would that be at that time Assistant County Prosecutor?

A I believe so.

MR. SPELLACY: No further questions.

MR. SHERMAN: That is all, your Honor.

THE COURT: You are excused, Mr. Eberling.

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THEREUPON, the witness DR. CHARLES ELKINS resumed the witness stand and was further examined and testified as follows:

CROSS EXAMINATION OF DR. CHARLES ELKINS

By Mr. Spellacy:

Q Doctor, this morning prior to the recess you told us about examining Sam Sheppard on July 4th, 1954; do you recall that?

A Yes, sir, I did.

Q Now, approximately what time did you make this examination?

A I believe it was late in the afternoon.

Q Would it be fair to say it was around five or so?

A I think after five o'clock.

Q After five o'clock?

A Yes.

Q How did you happen to make this examination?

A His brother requested that I examine him.

Q Would that be his brother, Steve?

A That's correct.

Q And had you known Steve prior to this, also?

A Yes, I had.

Q Did you know the Sheppard family generally prior to July 4th, 1954?

A No, I can't say that I knew the family generally. I had known Doctor Sam and I had known his brother, Steve. But to the best of my recollection I had never met his second brother nor had I met any other member of the family, to the best of my recollection.

Q But you knew Steve. Did you know Steve the same way that you knew Doctor Sam, through consultations, and so forth?

A I don't recollect that I ever saw consultation for Steve. It was always that I was called by Doctor Sam.

Q You say, you indicated that you had known Doctor Sam for about two years prior to this?

A To the best of my recollection.

Q Did you ever perform any neurological exams on Doctor Sam prior to July 4th, 1954?

A No, sir.

Q Doctor, I believe in giving us or reciting your qualifications, that you had spent a great number of years as a resident in the specialty of neurology, is that correct?

A That is correct.

Q How long did you spend in the field of neurology prior to the beginning of your practice?

A Prior to my first beginning in practice it was three years in the specialty.

Q In the specialty?

A That's right.

Q And those three years were devoted solely to the specialty of neurology, is that correct?

A That's correct.

Q This was prior to going out into practice of neurology?

A That's correct.

Q Now, did you receive a phone call from Doctor Steve on the 4th of July, 1954?

A I have talked with him on the phone, I believe that he called me --

Q Prior to going to Bay View Hospital?

A Yes, there was a telephone conversation.

Q And did you receive this phone call on the morning or in the afternoon or in the evening?

A I believe it was in the afternoon.

Q How much before this did you receive the phone call before going there, if you can recall?

A Vaguely I can recall that I played golf, for example, on Sunday afternoon. It was after my golf game that I received the telephone call. So I assume it was somewhere between four and six o'clock.

Q And did you receive this at your home?

A That's correct.

Q I believe -- were you living on the west side at that

time?

A Yes, I was.

Q You indicated that you moved to Tuscon; when was it you moved to Tuscon?

A It was just before Labor Day in 1954, because I had to get my boys in school.

Q It was shortly after, let's see, that would have been in September of '54, is that correct?

A That's correct.

Q Then I believe you came back and you testified in the first trial in this matter, is that correct?

A That's correct.

Q Now, you got this call some time in the afternoon on the 4th of July, and you went immediately to Bay View Hospital?

A Well, it was in a short period of time.

Q Had you been to Bay View Hospital before this?

A Yes, I had.

Q And had this been in connection with the consultations that you and Doctor Sam had had?

A That's correct.

Q Did you make any examinations at any time prior to this at Bay View Hospital?

A Yes, sir, I did.

Q And would these have been neurological exams?

A Yes.

Q You worked then on some cases in connection with or in conjunction with Doctor Sam Sheppard, is that correct?

A I consulted with him, yes.

Q Doctor Elkins, when you examined Doctor Sam Sheppard on the 4th of July, 1954, of course, you made a notation on the hospital chart as to what your examination consisted of, and what your findings were; is that correct?

A Yes, I did.

Q And this is a routine practice that consulting physicians engage in, is that correct?

A It is my routine practice.

Q You were called there as a neurosurgeon to consult on the case at hand, is that correct?

A Yes, that's correct.

Q Did you perform any neurological examine that day?

A According to my record I performed a cursory examination, as I have explained, to determine just what this situation was.

Q What is a neurological exam?

A A neurological examination consists of many things.

Q Well, testing the reflexes would be a nuerological examination?

A It would be part of an examination.

Q It would be part of it; and you have described on

direct examination by Mr. Bailey, how you test a reflex, and the reflexes give you some indication if there is any damage to the spinal cord; is that correct?

A That's correct.

Q You test the reflexes on the triceps, is that correct?

A That's correct.

Q And the abdominal reflexes; and what other reflexes do you test, other than the abdominal and the triceps?

A I mentioned the reflexes of the eyes, the pupils contracting and dilating.

Q Is this part of the neurological exam?

A It would be part of the neurological examination.

Q Did you perform that particular test on the 4th of July, 1954?

A If I did I made no record of it.

Q Now, doctor, of course, if you had found anything abnormal with regard to that, you probably would have made a record of that, is that correct?

A Not necessarily.

Q Well, do you recall if you found anything abnormal as to the examination of the eyes?

A No, I don't recall.

Q Do you feel that you would have made a notation of that if you had found something abnormal?

A I think if I had seen something abnormal, I certainly

would have made a record of it.

Q Would it be a fair statement, then, doctor, that you didn't find anything abnormal when you looked at the eyes on the 4th of July, 1954?

A That is a fair statement.

Q Did you check any reflexes on the 4th of July, 1954?

A If I did I made no record of it.

Q Once again, doctor, if you had checked the reflexes and found that some reflexes were missing, this would be abnormal and you probably would have made a notation of it, is that correct?

A I probably would have made a notation of it, yes, sir.

Q But there is no notation as to the 4th of July, 1954, that any reflexes are missing, is that correct?

A I would like to return to your original question about the eyes, if you don't mind.

Q Yes, please.

A I did make a record that the pupils were equal and reacted, which I have explained, and this was a normal finding.

Q Right.

A I made no record of abnormality in reflexes, and I don't recall whether or not I tested his reflexes at that time.

Q But with regard to the eyes, then, you found nothing

abnormal insofar as you as a neurosurgeon were concerned, is that correct?

A That's correct.

Q Now, of course, doctor, is there such a thing as an eye-grounds test?

A Yes.

Q What is that?

A This consists of looking into the back of the eye with a light, a scope, and one observes the mechanism of vision insofar as the eye is concerned, the retina, and one can actually see the ending of the optic nerve.

Q And is this part of a neurological exam?

A Yes, it is.

Q Is that what you refer to when you say that the eyes are normal and react to light?

A I have made no record of doing this type of an examination, but I may say that I am absolutely certain that I did this, and had there been any abnormality I would have recorded it.

Q So then you are satisfied, doctor, that on July 4th, 1954, there was no abnormality insofar as the eyes were concerned?

A Not only on July 4th but also on July 6th.

Q My question now, we are concerned with July 4th, doctor.

A Correct.

Q Now, on July 4th your record doesn't reflect there, or the hospital record, does not reflect any absence of any reflexes on the 4th of July, 1954; is that correct?

A That's correct.

Q Now, I believe you testified before that you didn't have occasion to see the X-rays on the 4th of July?

A I don't believe I said that. I said on the 6th I had a notation that I had seen the X-rays and I don't remember whether they were on the 4th or the 5th or the 6th.

Q Well, do you recall seeing them on the 4th? Let me ask you that.

A No, I can't specifically recall that date.

Q Did you know that X-rays had been taken earlier that morning?

A I presume so.

Q You presume so?

A Yes.

Q You mentioned, doctor, the 5th of July; did you see Doctor Sam Sheppard on the 5th of July?

A I believe I dropped in to see him on the 5th.

Q And on the 5th of July, 1954, did you perform any neurological examination?

A I don't believe so.

Q Insofar as the records are concerned, the first time that you performed any neurological exam was on July 6,

1954, is that correct?

A I believe so.

Q Now, when you viewed the X-rays that you have talked about on the 6th of July, did you come to the conclusion that there was a fracture of the spinous process of the 2nd cervical vertebra?

A I did.

Q And did you have some doubt in your mind at that time?

A Not at that time.

Q Doctor, didn't you order or suggest that possibly other X-rays should be taken to confirm this, and when these other X-rays were to be taken that possibly the collar should be removed that he was wearing?

A I don't recall this specifically.

Q Doctor, do you recall testifying in 1954 when certain questions were asked of you, and I believe this is on -- I am fairly sure it is on cross examination by Mr. Parrino -- do you remember Mr. Parrino?

A I remember Mr. Parrino.

Q Do you remember these questions, "Let me put the question this way," and I am referring to page 5145, on the lefthand side, and page 6761 on the righthand side, and about 3/4ths of the way down the page, "Let me put the question this way: Did you see any X-rays that morning of the 6th

of Doctor Sam's cervical vertebrae?"

Answer: "Yes, I believe I did."

Question: "And did you evaluate what you saw?"

Answer: "Yes, sir."

Question: "And what is your opinion, doctor, as to whether or not you saw a fracture of the spinous process of the 2nd cervical vertebra?"

Answer: "I did."

Question: "Was there a fracture there, doctor?"

Answer: "I can't say whether there was a fracture there. I saw a set of X-rays which showed a defect in the spinous process of the 2nd cervical vertebra, and at that time I made a statement that this looked like a fracture, I couldn't tell whether it was recent or old, but it had looked like a fracture and I advised, and I believe this to be correct, although I can't be sure, these X-rays were taken with Sam's collar in place, and I advised repeating the X-rays without the collar; in other words, I was not certain of this thing."

Is that correct, doctor?

A I said it; it is correct.

Q Do you know if subsequent X-rays were taken?

A I believe they were.

Q Doctor, do you know if those following X-rays showed a fracture of the spinous process of the 2nd cervical

vertebra?

A As I recollect, I could not see the fracture on subsequent X-rays.

Q They did not show a fracture, then, is that correct?

A I couldn't see it.

Q Well, the X-rays didn't show them, is that correct?

MR. BAILEY: I object. He said he couldn't see them. What they showed might be interpreted by a radiologist.

THE COURT: Objection sustained.

Q Now, going back to the 4th of July, again, doctor, and your notations on the hospital records as to your impression on that particular day -- what was your impression on the 4th of July, 1954?

A Cerebral concussion.

Q Cerebral concussion?

A Yes.

Q What is that?

A Well, I think I have described this. It is a temporary derangement of the brain.

Q And did you see any objective signs of that on the 4th of July, 1954?

A No.

Q Now, when we talk about objective -- of course, on the other hand, you have subjective complaints, is that

correct?

A That's correct.

Q Subjective is what somebody tells you as a patient, is that correct?

A That's correct.

Q And objective is, of course, what you as a trained neurological examiner sees, is that correct?

A That's correct.

Q And this impression that you received on the 4th of July, with regard to a cerebral -- am I pronouncing it right -- cerebral concussion, was that objective or subjective?

A This was a conclusion reached on subjective complaints.

Q In other words, it was a conclusion that you came to as a result of what Doctor Sam Sheppard told you, is that correct?

A That's correct.

Q Now, I believe you indicated, Doctor Elkins, that you saw Doctor Sam Sheppard again on July 5th, 1954; is that correct?

A I believe I dropped in to see him.

Q And I believe you did not perform any neurological exam on that particular day?

A Not that I recall.

Q On the 6th, of course, you examined Doctor Sam Sheppard is that correct?

A That's correct.

Q And I believe he complained to you about a sensation in his left hand, is that correct?

A Yes.

Q Or absence of sensation, is that right?

A Yes.

Q Was this the first time this complaint was made to you?

A I believe so.

Q Of course, the absence of the feeling in the left hand indicated to you that as a neurosurgeon that there might be something wrong with the spinal cord, is that correct?

A That's correct.

Q But this complaint had not been made to you prior to this time?

A Not that I know of.

Q Doctor, on the 6th of July you came to the conclusion that there was a contusion of the spinal cord, is that correct?

A I believe this is true.

Q And a contusion is a bruise, is that right?

A As I have defined it, yes.

Q Much the same as a bruise on the right side of the face, is that correct?

A That's correct.

Q And on the 4th of July, of course, you noticed that there was a bruise on the right side of the face?

A Yes.

Q And this was evident?

A This is objective.

Q Right, and, I mean, you could see this?

A Yes.

Q And, of course, a contusion of the spinal cord is the same as a bruise, isn't it?

A By definition that is certainly correct.

Q Now, tell me, doctor, is a contusion of the spinal cord an immediate thing, or is this a progressive thing?

A It can be both.

Q In other words, it could take place some few days after?

A The bruising --

MR. BAILEY: Excuse me, your Honor, I am going to have to object, because we don't know after what. "Few days after" is the question.

THE COURT: Overruled.

Q Is this a delayed reaction type thing?

A The effects of a contusion can be progressive.

Q They don't show up immediately?

A Not necessarily.

Q Oftentimes do they show up immediately?

Q A contusion, as you indicated, would be similar to the bruise on the eye which was evident on the 4th of July, is that correct?

A That's right.

Q But you didn't find on the 4th of July any evidence of contusion of the spinal cord?

A That's right.

Q Nor did you on the 5th of July find any evidence of contusion of the spinal cord?

A I have no record of the 5th of July.

Q The first time you found any was on the 6th of July, is that correct?

A The first time I found any was on the 6th of July.

Q You don't know how much before that this contusion had existed, is that correct?

A No, I don't.

Q I believe later on, though, on direct examination you indicated to Mr. Bailey that on August 6, 1954, that this was not a contusion but a concussion of the spinal cord, is that correct?

A That is correct.

Q This is the impression you had in August of 1954?

A (Witness nods.)

Q Well, is that a less serious thing than a contusion, a concussion?

A Yes, it is.

MR. SPELLACY: Excuse us just a moment, your Honor.

I have no further questions.

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REDIRECT EXAMINATION OF DR. CHARLES ELKINS

By Mr. Bailey:

Q Doctor Elkins, you have indicated that you did not evince any contusion of the spinal cord on the 4th or 5th days of July, but you found it on the 6th?

A That is correct.

Q Is that the first time you looked for it, by way of neurological examination?

A I believe this is true.

Q Do you have any evidence that the damage present on the 6th was not there on the 4th?

A No.

Q Do you find anything in the hospital record showing that Sam Sheppard suffered any trauma while he was a patient in the hospital?

A No, I don't think so.

Q Is the damage to the spinal cord consistent with the trauma to the back of the neck?

A Yes, it is.

Q You told us earlier that the difference between a

concussion and a contusion is one of degree, the contusion being the more severe?

A That's correct.

Q Now, what kind of force to the head can cause a concussion, need it be in any particular part of the head?

A No, sir.

Q Is it any force that will cause the brain to slam against the skull?

A It is usually a direct force.

Q Could it be applied to the face?

A Yes, it could.

Q Could a good hard smash in the face cause a concussion?

MR. SPELLACY: Objection.

A Yes.

THE COURT: Overruled. The answer may stand.

A Yes.

Q You say that it could. You did see objective evidence on Sam Sheppard's face of some kind of contusion?

A That's correct.

Q What, again, doctor, was your reason for not making the examination on the 4th when you were first called?

A I felt that Doctor Sam was too sick to warrant a complete and detailed examination.

Q You satisfied yourself that no emergency treatment

was necessary?

A That is right.

MR. BAILEY: Thank you. That is all.

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RECROSS EXAMINATION OF DR. CHARLES ELKINS

By Mr. Spellacy:

Q Doctor, did you satisfy yourself that there was nothing neurological wrong with him on July 4th, 1954?

A Within limitations, yes.

MR. SPELLACY: No further questions.

MR. BAILEY: What do you mean by within limitations?

THE WITNESS: I felt that he had sustained a concussion --

MR. SPELLACY: Objection.

THE COURT: Sustained.

MR. BAILEY: We have no further questions, doctor. Thank you.

MR. SPELLACY: I have nothing further.

THE COURT: You are excused, doctor.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury.)

THE COURT: Counselor, do you wish to make a statement?

MR. BAILEY: I do, your Honor.

The defense rests.

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THEREUPON THE DEFENDANT RESTED

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THE COURT: Ladies and gentlemen of the jury, you have just heard Counselor Bailey observe that the defendant rests.

The orderly procedure now provides that the State of Ohio may or may not offer rebuttal witnesses or testimony as it chooses. We are at the luncheon hour, at any rate, ladies and gentlemen, it is 12:15, and we are going to adjourn for lunch, recess for lunch.

While you are away on the luncheon recess you will bear in mind the instructions previously given you.

You will not discuss this case or what you have heard of it among yourselves. You will not permit anyone else to discuss it with you, nor shall you permit yourselves to overhear anything that relates to this case, by any means of communication.

Ladies and gentlemen of the jury, Judge John Peck from the U. S. Circuit Court of Appeals is here in town, and he is going to speak at the

Cleveland Bar Association luncheon at the Manger, which is now under way and has been under way since noon. I would like to hear Judge Peck. The luncheon meeting ordinarily adjourns at 1:30. I will be back here shortly after 1:30. So we will plan on commencing at 1:45 this afternoon, rather than at 1:30 as has been our custom.

So we will stand recessed for lunch until 1:45.

(Thereupon an adjournment was taken to 1:45 p.m., Monday, November 14, 1966, at which time the following proceedings were had:)

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Monday Afternoon Session, 1:45 p.m., November 14, 1966

THE COURT: Counselor Corrigan or Spellacy, please?

MR. CORRIGAN: Lieutenant Poelking.

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REBUTTAL

THEREUPON, the State of Ohio, further to maintain the issues on its part to be maintained, and to rebut the testimony adduced on the part of the defendant, recalled as a witness LT. JEROME POELKING, who, being previously sworn, was examined and testified as follows:

DIRECT EXAMINATION OF LT. JEROME POELKING

By Mr. Spellacy:

Q Lieutenant, you have been sworn previously, as Mr. Patrick has indicated.

A Yes.

Q And you did testify earlier in this matter, is that correct?

A Yes, I did.

Q Lieutenant, I believe earlier in your testimony you had indicated I believe that you had occasion, on a number of occasions, to go to the Sheppard residence on Lake Road in

Bay Village, is that right?

A Yes, I did.

Q At that time you were a member of the Scientific Investigation Unit of the Cleveland Police Department?

A Yes.

Q I believe earlier you had indicated you had occasion to go to the bedroom where MarilynSheppard was found, is that correct?

A Yes.

Q And this was in the latter part of July, in the year 1954?

A That's correct.

Q What did you do in that room?

A Well, I examined it for fingerprints, and I took photographs.

Q Did you have occasion, Lieutenant Poelking, to dust that room, and particularly now the doors located on the east side of the room?

A Yes, I did.

Q And what did you dust them with?

A Fingerprint powder.

Q Did you have occasion to put this fingerprint powder over bloodstains that were located on that door?

A Yes, I did.

Q And when did you do that?

A That was in the latter part of July, or the first of August.

Q Referring to Defendant's Exhibit D, can you take a look at that picture and tell us whether or not fingerprint dusting powder appears with regard to blood spots that are located in that picture?

A Yes, sir, it does.

Q Where is the fingerprint powder with regard to those blood spots?

A All over it.

Q Did you put that fingerprint powder on?

A Yes, sir, I did.

MR. SPELLACY: No further questions.

MR. BAILEY: May we approach the bench?

(Thereupon counsel and the court conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. BAILEY: Unless it be shown that some connection evidence is coming, that is to say, the presence of fingerprint powder on dry blood might affect the blood grouping test run by Doctor Kirk, I think this testimony is irrelevant and I move to strike it rather than cross examine.

If there is such evidence coming, I will

make no such motion.

MR. CORRIGAN: The purpose of this testimony and the evidence is to show that there was in fact dusting powder on there before Doctor Kirk went into the room.

It is our recollection thatDoctor Kirk testified that the door was not -- that there was no dusting powder on there. This is rebuttal to that testimony.

MR. BAILEY: He said he found none, no fingerprints, and observed none on the door when he got there. How will the presence of dusting powder relate to his conclusions? Is there to be some evidence that this would contaminate the dry samples?

MR. CORRIGAN: There may be testimony that the blood would be contaminated by dusting powder, and that this would have an effect on the rate of agglutination.

MR. BAILEY: If there should be such testimony, then I won't make my motion. Then I will cross examine.

(Thereupon proceedings were resumed in the presence and hearing of the jury, as follows:)

THE COURT: Counselor Bailey,

MR. BAILEY: Yes, your Honor.

CROSS EXAMINATION OF LT. JEROME POELKING

By Mr. Bailey:

Q You say that you dusted the wardrobe door?

A Yes, sir.

Q How did you dust it, Lieutenant?

A With fingerprint powder and the camel hair brush.

Q What kind of powder did you use?

A It is a commercial powder manufactured by Fargo Company out in San Francisco.

Q Of course, there are several compounds, are there not?

A Yes.

Q In the Cleveland Police Department don't you sometimes mix your own?

A We used to years ago but we found that the commercial powders were just as good and it is a lot easier. It is not quite as messy.

Q How about in 1954?

A In 1954 we were using the Fargo.

Q You were not mixing it yourself?

A No.

Q I would assume that since this is a light surface you were using dark powder?

A Right.

Q What is the chemical composition of that powder, do

you know?

A No, I couldn't give you the exact chemical composition of that powder. It is a closely guarded secret. Various fingerprint companies are reluctant to tell you what is in them.

Q So you have no idea what it is made up of?

A No, well, it is probably -- I couldn't tell you exactly, no.

Q You have no idea, I take it, whether or not it would be absorbed by dry blood?

A No.

Q What happened to the powder, did it remain on the door?

A Yes, it did.

Q Showing you Defense Exhibit D, I call your attention particularly to blood spots larger than the others, one in the upper section of the panel depicted, and one near the lower edge, and ask you whether or not you dusted that panel?

A Yes, I did.

Q Did you dust both spots?

A I assume. I went over the entire panel.

Q In other words, any dusting that took place with relation to the large spot would also affect the low spots, since you covered the whole thing equally, right?

A Yes, sir.

Q No special treatment given to any section of that panel?

A No, sir.

Q And you found no prints at all?

A No, sir.

MR. DAILEY: That is all. Thank you, Lieutenant.

MR. SPELLACY: No further questions.

THE COURT: Counselor Corrigan or Spellacy?

MR. SPELLACY: Doctor Roger Marsters.

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THEREUPON, the State of Ohio, further to maintain the issues on its part to be maintained, and to rebut the testimony adduced on the part of the defendant, called as a witness DR. ROGER MARSTERS, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DR. ROGER MARSTERS

By Mr. Spellacy:

Q For the record would you please state your name?

A Roger Wescott Marsters.

Q Spell your last name?

A M-a-r-s-t-e-r-s.

Q Where do you live, sir?

A I live in Cleveland Heights, Ohio.

Q The street and the address, please?

A 1319 Cleveland Heights Boulevard, Postal Zone 21.

Q Now, sir, do you have a profession?

A Yes, sir, I do.

Q And what is that?

A I am a clinical chemist and immunohematologist.

Q What is that?

A Well, a clinical chemist works with blood and he is a specialist interested in the biochemistry of blood and other body fluids. An immunohematologist is an expert in blood banking.

Q How long have you been engaged in that type of work?

A For almost 19 years. Since 1947.

Q Since 1947?

A Yes.

Q Will you give us an outline of your educational background, please, doctor?

A Yes, in 1939 I graduated from the State University of New York at Albany with an A-B degree in chemistry.

In 1942 I received a Master of Arts degree from Cornell University at Ethica, New York, in human physiology.

In 1948 I received a Doctor of Philosophy degree in biochemistry from Western Reserve University here in Cleveland.

Q In connection with those degrees did you have occasion to teach anything?

A Oh, yes, I taught physiology and biochemistry, and in the last 19 years I have specialized in blood banking and immunchematology, and have taught this to medical students, to clinical pathology residents, in the medical school in our Department of Pathology, and also to medical technology groups.

I was associate director of the school at Metropolitan General Hospital; and also to medical and laboratory technician groups, on invigation.

Q Doctor, while you were at Cornell did you have occasion

to teach there?

A Yes, physiology and physiological chemistry.

Q You indicated that you also had occasion to teach at Western Reserve University, is that correct?

A Yes, mostly there -- not so much biochemistry, but blood banking in immunohematology.

Q You indicated blood banking; what is that, doctor?

A Well, blood banking is the typing of patients and also donors, the matching up of donors with patients, and certifying that a particular donor is compatible with a particular patient for blood transfusion.

Q Have you had occasion to work at hospitals with regard to the blood banking?

A Yes, I have. At the present time I am associte head of the Department of Clinical Laboratories at St. Luke's Hospital here in Cleveland, where I have been since October of 1964, and in that capacity I am associate head with the Director, Doctor Clydeman, over all clinical laboratories which includes chemistry, blood banking, where my principal interests lie in these two areas, and also hematology and bacteriology.

While at Cleveland Metropolitan General Hospital where I was from 1955 up until October of 1964 I was Director of the Blood Bank and also Director of Clinical Chemistry.

Q What were your duties as Director of the Blood Bank,

doctor?

A Well, my duties were instruction and training; supervision of the technicians which amounted to five at Metro; and at St. Luke's we have four, we have a smaller transfusion service.

And the duties of the Blood Bank Director are to make sure that the blood typing is carried through correctly, to insure that the techniques are up to date, that they are safe and accurate and reliable, and to train new people, and also to investigate transfusion reactions, which occasionally occur, and I had the same experience at the University Hospitals, although there I did starting my consultation work.

Q What is your consultation work?

A Well, in September of 1950 I began to perform blood tests in disputed paternity cases, and I have done this continuously since September of 1950, and I have now completed 665 of these blood tests personally in cases of disputed paternity.

Q In connection with your profession, doctor, do you belong to any organizations, are you a member of any organizations?

A Yes, I have been an individual member of the American Association of Blood Banks since 1948, which was just the second year of its existence.

I have been a member of the American Association of Clinical Chemists. In fact, I have fellow status in the Clinical Chemists.

I have been a member of the American Academy of Forensic Sciences for at least ten or eleven years, I don't know exactly when I became a member, but I have fellow status in the American Academy of Forensic Sciences.

And I have the usual memberships of Sigma Psi, and American Association for the Advancement of Science.

Q Are you certified, doctor, with any organization?

A Yes, I am certified by the American Board of Clinical Chemistry, which is very much analogous to the medical certifying boards in medicine and surgery, and I am certified as a certified clinical chemist, certificate number 82.

Q Doctor, what is your specialty?

A Well, my specialty is blood and I guess most aspects, at least, the biochemistry and the serology aspects.

Q You mentioned biochemistry and serology aspects; what would that be?

A Well, by serology I was referring in broad terms to all blood banking, that is, blood typing.

Q Blood typing?

A Yes.

Q What do we mean when we say blood typing?

A Well, blood typing or blood grouping and some people

differentiate between these two, but the differentiation is really a delicate one, and not of concern here.

It simply means that you take red cells from an individual as whole blood and separate the red cells, and then by the use of appropriate antiserums you can then group these red cells for certain factors, and this is what blood typing consists of.

Q How about dried blood?

A Well, I have done some work in the dried blood field over the years, and I have also worked with saliva, and a few occasions with human perspiration and with human urine. You can actually type urine, saliva --

MR. BAILEY: I object. I think he is going way past the answer.

Q All right. Have you had occasion to do work with dried blood?

A Yes.

MR. BAILEY: Excuse me. May we have a time when he began these?

MR. SPELLACY: Yes.

Q Will you tell us when you did this?

A I began this during my time at the University Hospitals, and I began there in August of '47, and I was starting the saliva work by the early 1950's.

Q Doctor, have you any research interests?

A Yes. My research interests have included the use of albumin in blood banking practice. Albumin happens to be important in some of the RH antibody titrations. I have publications in my disputed paternity work, I have at least two, one with Walter Whitlach here in Juvenile Court, and other articles that I have written.

Q And have you had occasion to write other articles with regard to blood?

A Well, I contributed a chapter in Doctor Moritz' last book, the Handbook of Legal Medicine, on the Individuality of Blood, Chapter 14, which just came out about two years ago.

I also collaborated with about fourteen other professional people in getting together the Handbook of Clinical Laboratory Data, which was just published about a year ago by the Chemical Rubber Publishing Company, up here on Superior Avenue.

Q And have you had occasion to design or patent anything?

A Yes, I have. When I was at Cleveland Metropolitan General Hospital I got an idea for a new type of incubator, that is, a water bath, except this one was a waterless water bath, it was made of aluminum block, for use in blood banks.

And, actually, I made the first one in my home basement workshop, and we applied for a patent, and I have a

patent in my name, and this is now being manufactured and sold, and over eight hundred of these have been sold and are in use in blood banks all across the United States.

Q Doctor, you indicated you are associated with St. Luke's Hospital?

A Yes.

Q What is your capacity there?

A My capacity is associate Head, Department of Clinical Pathology, which is just another term for Department of Clinical Laboratories.

Q What are your duties there?

A My duties are to have associate chief responsibilities in operating the clinical chemistry laboratory, the blood bank, hematology, and also the bacteriology laboratories.

Q You indicated before that your specialty is blood, is that correct?

A This is correct.

Q Any particular phase of blood?

A Well, I am interested in I would say all phases of it, because of my work with fresh blood, and my work with blood-stains, and also my work in the biochemistry of blood.

Q Now, doctor, for the purposes of this question I want you to assume the following statements as true:

That on July 4, 1954, blood was left on a wall, that the blood -- that there were two spots of blood left on the

wall on July 4, 1954, and that those spots remained on the wall until February of 1955.

I want you to assume further that the wall on which these spots remained was dusted with fingerprint powder and was covered with fingerprint powder.

I want you to assume further that there were windows in the room where the blood was located on the walls, and that sunlight at various times and occasions would come in those windows.

I want you to assume further, as I indicated before, that these spots remained there until February of 1955; that they were removed in February of 1955, and sent by mail to California, where approximately February of 1955 the two spots that we refer to as "A" spot and "B" spot were ddissolvedd in distilled water; that one spot, namely, the "A" spot dissolved more readily than the "B" spot.

I want you to assume further for the purposes of this question that these were then placed in a refrigerator overnight, that the following morning the spots or the distilled water containing these two spots was then tested for blood grouping.

I want you to assume further that the two spots both as a result of this test were type "O".

I want you to assume further, however, that one spot did not agglutinate at the same rate of speed as the other.

Now, based on the statements that I have just given you, doctor, do you have an opinion as to whether or not it is possible to tell whether or not those two spots came from a different origin?

A I do, yes.

Q Pardon me?

A I have an opinion.

Q What is your opinion?

MR. BAILEY: I object.

THE COURT: May I see counselors?

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. BAILEY: I object to the following facet of the hypothetical question:

First, there is no evidence that these were covered with fingerprint powder at any time, nor is that term clear.

Second, there is no evidence that sunlight ever came into the room and landed upon that door, and the geography of the case as shown by the evidence makes it unlikely that that did happen.

Third, the use of rapidly, more rapidly, or less rapidly, does not conform to the testimony given by Doctor Kirk showing the degree of difference

in the solubility, and the same objection applies to the degree of difference in agglutination.

Next, the hypothetical question does not embrace the fact that Doctor Kirk immediately noticed a very rapid solubility, in his terms, of the blood attributable to Marilyn, as against the blood of the large spot on the wardrobe door.

Fourth, it does not show the presence of controls taken from other segments which were matched up; and, next, it does not assume as the evidence shows that these spots were treated identically from the moment they landed on the doors to an environment, dusting, removal, and everything else.

I think on all of those points, the question does not sufficiently embrace the evidence which has been demonstrated in the case, and therefore the answer would be irrelevant.

MR. SPELLACY: The question is is it possible.

MR. SHERMAN: I think it is speculative.

MR. BAILEY: It is admitted this witness never tested any of the blood, so he is answering strictly in terms of answering as to

evidence in this trial, which came only from Doctor Kirk. Certainly his question has not embraced the facts which Doctor Kirk has alleged as supporting bases.

He placed great emphasis on the marked degree of solubility, the unusually high solubility of Marilyn's blood, not only on the lower spot but also as demonstrated by controls.

He placed great emphasis on the marked difference in the rate of agglutination.

All this witness has been told is that there was a difference and we concede that minor difference wouldn't make a basis of distinction, whereas major ones do, in the opinion of Doctor Kirk.

MR. CORRIGAN: I think that we will have no difficulty amending the question to embrace those things that you have made reference to.

MR. BAILEY: Okay. May it be so amended, then.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

By Mr. Spellacy:

Q Doctor, I will rephrase the question that I just asked

you, and delete from that portion of the question the having to do with sunlight shining in the windows, and for the purposes of the question the fact that it remained on that wall from July 4, 1954, until February of 1955, a room in which there were three windows located, and it remained there both day and night during that period of time.

And I want you to assume further that upon arriving in California, that the following tests were made, that the blood from the two spots represented by -- as we have referred to them before -- as Exhibit A and B, were treated simultaneously, the same amount of each in the same way, with the same amount of reagents throughout, that the material was placed in a small tube, then distilled water was placed thereon, the same amount in both tubes, and they were shaken to dissolve the blood;

That immediately there was a very notable difference apparent because the blood from the lower spot, which is depicted as Exhibit A, went into solution and colored the solution red immediately, just with two or three shakes of the tube that solution became red.

Assume further as true that the other solution never became red as this; that the hemoglobin was not soluble to anything like the same degree, and shaking it even for a prolonged period did not show any color.

Finally both of them were placed in the refrigerator overnight, and the next morning you could see a trace of color in the large spot, which is represented in Exhibit B, full color. It looked almost as dark as blood, in the little bit represented in the spot in Exhibit A.

The solution was then evaporated on the slides and an antiserum added, and test cells were added, and the grouping was carried out in duplicate in the same manner, the same material, the same dilution of antiserum, from the same bottle, made at the same time, actually from the same tube of antiserum.

And observations were made with respect to agglutination which results with O blood, with both the A and the B factors test.

There was a very marked striking difference. The cells added to the sample which contained the blood from the lower spot, or, the extract from the lower spot, agglutinated almost immediately.

This was very rapid agglutination, even a little faster than our controls which contained no extract.

The other spot barely agglutinated in twenty minutes, and we refer to the B spot.

So there was a drastic difference in the rate of agglutination, and this was true both with the A test and the B test.

That anti A serum, plus A cells, and anti B serum and B cells were used, in the indicator system for B, that is, the B cells, and that these two differences were noticeable, very marked, and instantly noticed just in connection with the grouping of the blood.

There was later another test run, months later, a test which is referred to as the electrophoretic test. This test was used with remnants of what little blood was left, and that there were differences with regard to this test. However, they were not so marked.

Now, based upon what I have just read you, and upon your experience, do you have an opinion as to whether or not it is possible to tell if the A spot and the B spot came from a different origin?

A Just so I am not confused, Mr. Spellacy, you are asking me if I have an opinion whether or not these two spots could have a different individual origin, this is the question?

Q Whether or not it is possible --

A On the basis of all of this that you read me?

Q Yes.

A Yes, I have an opinion.

Q What is your opinion?

A Well, my opinion would be that it would not be justified to infer a different individual origin of these two spots

on the basis of these long extensive tests that you read to me.

MR. BAILEY: Move to strike the opinion. It is non-responsive. The question was could they have a difference in origin.

THE COURT: Overruled. The answer may stand.

Q And why do you say that, doctor?

A Well, I say this because the technique of grouping dried blood -- and this is true even if it is a day old dry stain or a seven month old dry stain -- is a very difficult and a very tedious field to work in. It is time-consuming. There are many problems.

In the first place, when you have a stain you first have to establish that it is blood.

You then have to establish that it is human blood.

MR. BAILEY: I object to this answer and ask that it be stricken. It is not responsive to the question, and it is irrelevant.

THE COURT: Overruled.

A In the grouping reactions you have no intact red cells to work with, which you have in fresh blood, and therefore you have to set up a complicated system of grouping called absorption or inhibition, and this is fraught with all kinds of problems and modifications and variations in the

activity.

In many stains you are fortunate if you can come up with the same group. In many bloodstains, perhaps fifty percent of them, in the experience of many experts in this field, half of the stains that you work with you cannot reliably decide the major blood group.

So establishing that these stains were from both type O group would be an accomplishment in itself, and would be where I would stop.

MR. BAILEY: Move to strike the answer, again, as non-responsive.

THE COURT: Overruled.

Q Doctor, what percentage of the population is type M?

A About 29 percent of Caucasians are type M.

Q Doctor, you indicated that in 1954 -- in 1954 where did you work?

A I was Director of the RH laboratory at McDonald House, University Hospitals of Cleveland. At that time I was also Director of the main blood bank at University Hospitals of Cleveland.

Q In 1954 did you know one Mary Cowan?

A Yes, I did. I have known her for many years.

Q And did you have occasion in July of 1954 to examine a watch in connection with Mary Cowan?

A Yes, I examined two watches, one that she told me was

from Marilyn Sheppard, which was a small gold watch, a typical lady's watch; and a second watch which was a man-type gold watch which she told me was from Doctor Sam Sheppard.

Q What did you notice about that man's watch?

A Well, it was speckled with blood spatters.

Q Doctor, was that contact blood?

A If by that you mean, Mr. Spellacy, could the blood have been attached to the watch by smudging or contact, the answer is no, definitely not.

Q What type of blood was it?

A It was spatter stain, which we group for the M and N factors.

MR. BAILEY: Excuse me. I am going to object to this witness giving this testimony unless he gives some qualifications in this area. He has shown none on blood spatter. He is no criminalist.

THE COURT: Overruled.

MR. SPELLACY: No further questions.

MR. BAILEY: May we have for our cross examination State's Exhibit 42, with an appropriate projector screen? I will begin the cross while it is being obtained.

THE COURT: May I see counselors?

(Thereupon counsel and the Court conferred at the

Court's bench out of the hearing of the jury.)

CROSS EXAMINATION OF DR. ROGER MARSTERS

By Mr. Bailey:

Q Doctor Marsters, do you know Coroner Sam Gerber?

A Yes, I do.

Q Can't hear you?

A Yes, I do.

Q How long have you known him?

A I would say at least 16, 17 years.

Q You knew him before the first trial of Doctor Sam Sheppard and in fact the murder of Marilyn?

A Oh, yes.

Q And you had done work for him prior to that time?

A No, I hadn't.

Q Had you done any work for or with Doctor Gerber prior to your connection with this case?

A I honestly don't know, Mr. Bailey. I can say this, that we would type from time to time fresh blood specimens which were referred from the Coroner's Office, but none on bloodstains, and I assume that is what you are getting at.

Q No; my question was had you done any work for him?

A Well, I am not sure, I honestly --

Q Your answer is you are not sure?

A That's right.

Q But in any event you had done no work for him with dried blood?

A I believe that is true, yes.

Q He hadn't called on you previously?

A No, sir.

Q How long had you been available in Cleveland as a man working with blood prior to 1954?

A Since '47.

Q When did you first meet the Coroner?

A I honestly can't remember.

Q Well, was it two or three or four years before the murder, if you know?

A I honestly don't know.

Q All right. Had you had any specific training in the grouping of dried blood, doctor, before 1954?

A I had extensive with grouping reactions, and antibody titrations, which grouping of dried blood is based upon.

Q My question was, had you had experience with the grouping of dried blood as such?

A No, I haven't.

Q Had you ever tried prior to 1954 to group dried blood yourself?

A No, I hadn't.

Q So the first effort you made was with respect to the

two watches presented to you by Mary Cowan?

A This is so.

Q Would it be fair to say that prior to 1954 you had no experience whatsoever in making such grouping tests, would it?

A In this narrow field, yes.

Q Your work was with whole blood, wasn't it, doctor?

A This is correct.

Q You worked on paternity cases, with blood banks, and this is all liquid blood?

A That is correct.

Q There are some different problems encountered in grouping dried blood, are there not?

A Yes.

Q Doctor, were you requested at some time in 1954 to examine the murder room of Marilyn Sheppard?

A No, I was not.

Q Have you ever seen that?

A No.

Q Did anybody ever ask that you make comparisons of the dried blood that was found in that room by the police?

A No.

Q Are you a criminalist, doctor?

A No.

Q Are you called in non criminal cases at any time as an expert on dried blood?

A No, I am not.

Q Is this the first case you have ever testified in as to dried blood?

A Yes, I believe so.

Q Prior to 1954 and in fact early in 1955 no one had given you, no one experienced in the field, had given you any training or supervision in the grouping of dried blood, had they?

A This is correct.

Q This is correct. You filed an affidavit in 1955, after reading an affidavit filed by Doctor Paul L. Kirk, did you not?

A Yes.

Q And at the same time you filed that affidavit, questioning some of the things in Doctor Kirk's affidavit, had you actually tried to group any dried blood?

A Yes, by that time I had.

Q Did you try it only because you were called in on this case in connection with Doctor Kirk?

A Yes, I would say that's right.

Q Doctor, as a man of science, it is common among scientists in a given field, to consult one with the other, is it not?

A Yes.

Q Of course, it is also common to read the various

publications which may bring one up to date in the field of general concern of the particular science, true?

A That's correct.

Q Prior to 1954 had you read anything about the grouping of dried blood?

A Oh, yes.

Q You had?

A Yes.

Q You just hadn't tried it. Now, after you were called into this case -- and, by the way, when was that?

A Well, this was in early July, 1954.

Q For the purpose of checking the watches with Miss Cowan?

A That's correct.

Q What steps did you take in order to determine the best method of grouping dried blood prior to the time that you made the tests that failed to type the blood, that is, to group it?

A Would you repeat that question?

Q Certainly. What studies did you make, or what sources did you go to, in order to learn the proper method for grouping dried blood before you made your unsuccessful attempt to group the blood, that is, dried blood, on both watches?

MR. SPELLACY: Objection.

THE COURT: Objection sustained as to the characterization, counselor, of the result. You may restate the question.

Q Did you make an attempt to group the blood?

A Our grouping for the M factor was not unsuccessful on the watches.

Q Of course, M factor is a sub-type, is it not?

A It is just another system, Mr. Bailey.

Q Doctor, didn't you in fact try to get an O-A-B group on this blood?

A Yes, and --

Q Did you get an O-A-B group on the blood?

A No, we --

Q That's all. Now, prior to the time that you tried to get a group, not a type, but a group, O-A group on this blood, did you make some studies or consult some authoritative sources as to how the tests should be made?

A Yes, I did.

Q You read up on the subject some?

A Yes. I had great interest in all aspects of blood grouping long before the Sheppard case.

Q You had great interest but not great experience so far as dried blood?

MR. SPELLACY: Objection to the statement.

THE COURT: Objection sustained, Counselor. It is argumentive in form as to whether or not he was experienced.

Q Among the authorities that you consulted on how dried blood should be grouped, did you read anything by Paul Leland Kirk?

A No, I didn't.

Q Did you know at that time whether or not he was an authority in the field of grouping dried bloodstains?

A No, I didn't consider him to be an authority in that field.

Q You didn't?

A No.

Q Do you know how many papers he had written on the subject and how much work he had done on it prior to 1954?

A No.

Q Had you ever read anything that he had written?

A Yes, I had.

Q And have you kept up pretty well with the things that Doctor Kirk has published with relation to dried blood?

A Well, I know, Mr. Bailey, that in '57 he published a paper in the Journal of Forensic Medicine on the electrophoresis of dried blood.

Q Of course, you know he has published many many more articles than that, don't you?

A Yes, I do.

Q Have you read generally just about what Doctor Kirk has written in this field, do you know?

A No, I haven't, because he publishes in a journal that is published in South Africa.

Q Of course, they are distributed in the United States, aren't they?

A Yes.

Q The Journal of Forensic Medicine is commonly available in the United States?

A Yes, but I don't happen to read it.

Q You don't happen to read it. You say that you were unaware, if he is such an authority, that Doctor Kirk was an authority on the grouping of dried blood, is that right?

A That's correct.

Q Did you ever hear of Charlotte L. Brown?

A I believe she was one of the female graduate students.

Q You read something by her?

A Yes, in 1957.

Q What about Frederic R. Sylvia?

A I don't know of Sylvia.

Q Did you know he had written an article with Doctor Kirk about the Individuality of Dry Blood, reprinted in the Journal of Forensic Medicine in January of 1961?

A No.

Q You don't know that article existed?

A I don't know that paper.

Q Now, do you know what electrophoresis is?

A I think quite well, yes.

Q Do you use it in the grouping of dried blood?

A No, never.

Q You never have?

A Never.

Q Do you know whether it is used by people in the profession?

A I don't believe that it is.

Q Then, of course, I take it that you never read any articles about electrophoresis?

A Yes, I have.

Q You have?

A Many.

Q And having read these articles do you still say that you are unaware that it is used for blood testing or grouping?

A I know of no one that is using it outside of Paul Kirk and his graduate students.

Q I see; and you have never tried it?

A That's correct.

Q Now, since the connection you first had with the Sheppard case, where you were initially confronted with the

problem of grouping dried blood, how many other cases have you been involved in where you had to group dried blood?

A Oh, perhaps two or three dozen.

Q Two or three dozen?

A Yes.

Q Some were criminal cases?

A Yes.

Q And in these cases you were working with dried blood? Right?

A Yes; or with semen stains or body secretions.

Q Of course, semen doesn't type the way blood does, does it, doctor?

A Well, yes, it does.

Q It has an A and B factor?

A And that is exactly why we do it.

Q You say your experience in semen stains is applicable to the testing of bloodstain?

A Very definitely.

Q Had you done that prior to 1954?

A Yes, I probably have, but I honestly can't remember. I never kept records on this.

Q Prior to the time you filed the affidavit in connection with this case, doctor, which affidavit was filed in April, 1955, I believe -- is that correct?

A I don't recall when it was filed, Mr. Bailey.

Q I assume that you had given some stody to the findings that Doctor Kirk claimed to have made?

A Yes, I had.

Q Had you ever called him to ask for any detail in his affidavit disclosed as to the size of the samples, the amount tested, the method used, and so forth, or consulted with him personally?

A No.

Q That was not done?

A I have never met Doctor Kirk.

Q The method which he described as to differences in solubility and agglutination was something with which you were not then familiar, I take it?

A No, that it not so.

Q That is not so?

A No.

Q Had you prior to your entry into this case attempted to resolve differences in bloods, dried bloods of the same group by differences of solubility or agglutination?

A By agglutination, but certainly not of solubility.

Q So that you had no experience in doing that?

A Well, as a practicing biochemist for some years previous to this, I think I am reasonably well qualified in the solubility of blood and blood pigments and hemoglobin in water and other solutions.

Q My question, doctor, was did you have any experience in distinguishing between dried bloods of the same group that came from different origins, prior to 1955?

A No.

Q Now, I believe you said in your affidavit that the presence of fingerprint dusting powder on the blood samples might affect the difference in solubility, is that right?

A Yes, I think that's true.

Q You do?

A Yes.

Q This, of course, would assume that one sample had fingerprint powder and not the other, I take it?

A Well, I assume that both of them had fingerprint powder but in different amounts.

I don't see how you could decide whether they had the same or unlike amounts of fingerprint powder.

Q Did you ever attempt to determine whether or not they had been given different treatment with fingerprint powder?

A No, I don't know what samples Doctor Kirk had.

Q Well, did you talk to the fingerprint man right here in Cleveland to find out if he gave them different quantities of powder?

A Well, all I know that those stains were liberally dusted with fingerprint powder.

Q My question was, did you talk to a fingerprint man to determine whether or not he treated them --

A No, but I seen pictures of the wall, and the entire pictures of the wall seems to be dusted quite liberally with fingerprint powder.

So I assume that the stains had been covered with it, too.

Q Doctor, from your experience that you accumulated since entering the Sheppard case, can you tell us whether or not fingerprint powder or its presence in blood samples affects the rate of solubility?

A Well, I assume that it would have an effect, yes.

Q You assume it, but you haven't tried it, right?

A Well, actually, I have tried it, and I can't say that fingerprint powder changes the rate of solubility, but it tends to make the reading of the reactions less easy.

Q It makes it less easy?

A Yes, it is not as certain.

Q So that your assertion in this affidavit -- and I realize this is pretty difficult to read -- that fingerprint dusting powder might affect the results, was not borne out by your tests?

MR. SPELLACY: Objection.

THE COURT: Objection is

overruled. He may answer.

A Would you ask that question again, Mr. Bailey, please?

Q Yes. The assertion that you made here in your affidavit that the presence of fingerprint dusting powder on Doctor Kirk's samples might affect the outcome of his tests, through contamination, was not borne out by the test you made, was it?

A Well, I didn't test the samples that Doctor Kirk tested.

I simply said that they might interfere and I think that is still correct.

Q You do?

A I think so, yes.

Q I must ask you, doctor, whether or not you are the author of a paper or chapter called Factors Affecting the Deterioration of Dried Blood Stains, in conjunction with one Frederick C. Schlein, B.S., Cleveland, Ohio?

A Yes.

Q This was a report of your studies of the different factors which might affect the examination and identification of dried blood stains?

A Yes.

Q Is that correct?

A That's correct.

Q This study was published in 1958, was it?

A I don't remember exactly but it was published in the Journal of Forensic Sciences.

Q And it reported experiments that you had made, very carefully, taking samples of dried blood and subjecting them to different conditions to see what contamination might take place, right?

A That's correct.

Q And, as a matter of fact, you reported 22 different pairs of samples, all subjected to different things like temperature and urine and soap?

A (Witness nods.)

Q And about six of the samples were mixed with fingerprint powder, were they not, subjected to it?

A Yes.

Q One of your purposes was to attempt to determine whether or not the presence of the fingerprint powder would in any way contaminate or interfere with later examination of the dried blood, is that right, sir?

A That's correct.

Q Now, tell the jury what you found?

A Well, I believe that we found that the fingerprint powder, even though it confused the readings, we were still able to make proper readings in all of those reactions.

Q So that there was no interference according to the studies that you did, so far as testing the blood later on?

A As far as the fingerprint powder under the conditions of our experiments, this is true.

Q Now, based on this, doctor, do you have an opinion as to whether or not the fingerprint powder, if any there was, of the type used by Lieutenant Poelking in dusting that door, did or did not interfere with the tests run by Doctor Kirk?

A Well, I don't know how Doctor Kirk ran his tests.

Q Do you mean that without determining how his tests were run, you filed a counter affidavit suggesting the incorrectness of his procedure?

A I simply suggested, Mr. Bailey, the possibility of incorrectness.

Q You suggested the possibility?

A That is right.

Q You never meant to say that his tests were not accurate, did you?

A I simply meant to say that I would certainly never draw the conclusion that Doctor Kirk did under the circumstances of his tests.

Q And this, of course, was your first experience with dried blood?

A That's right.

Q As a matter of fact, when you suggested that his conclusions were unwarranted, you had never in a prior case worked with dried blood, I believe you told us?

A That's right.

Q By the way, when you wrote this paper on blood identification, do you recall citing an article by Kirk, Paul L.; Brown, C,; and Connors, B., as authoritative?

A Well, I think I cited quite a few references.

Q No, I don't think you heard me. Did you cite an article by Kirk, Paul L., Brown, C., and Connors, B., called "Some Problems in Blood Testing and Grouping," Journal of Criminal Law, Criminology and Police Science, 45: 80-84-1954, did you cite that?

A I don't recall, but if you are reading it from my bibliography, then the answer is yes.

Q Does that refresh your recollection by looking at it, here, from your bibliography?

A Yes, yes, I did.

Q You cited it as authoritative for the propositions contained in it, do you remember?

A I pam not sure whether we used it to support or whether we criticized his work. I would have to read the paper again to decide. We cite a lot of papers sometimes to criticize, as you know.

Q Surely. But in this case you reported in your article, "Attention has been previously called to non-reliability of tests performed on bloodstains contaminated with surface agents such as" -- what is that word, do you know? --

"safranines and detergents," by Kirk, Brown and Connors?

A Right.

Q So you were relying on the tests they made to determine which contaminants would interfere with blood grouping?

A No. We knew that detergents had a deleterious effect on blood cells, and that is basically why we use them.

In that reference I was apparently quoting Kirk and his co-workers in their previous statement that this would interfere.

In other words, we found the same results that apparently Kirk had found previously.

Q So you adopted the statement he had made in his paper about these particular items that would interfere, is that right?

A Yes.

Q Up until that time when you published this book, is that the only article by Kirk you had read?

A No, I don't believe so, because I had used his biochemistry book some years before.

Q Now, at the time you published this article, you of course had been involved in this case and you read Doctor Kirk's affidavits, and filed your own, had you not?

A Yes, that is correct.

Q The title of your article is Factors Affecting the Deterioration of Dried Bloodstains," and that was your general subject matter?

A Yes, that is correct.

Q Now, did you find any of the factors which have been brought to your attention in this case, that were present in the Sheppard case to have affected the two spots that Doctor Kirk removed?

A Well, we found in our research, and I had known this from my studies with blood grouping, semen, and vaginal contents in rape cases, that body secretions will very definitely interfere with the results from the inhibition technique of bloodstains.

Q Do you know anything about any body secretions ever being placed upon or contaminating the blood samples in question?

A No, I don't --

Q Your answer is no.

MR. SPELLACY: Objection.

A Well, with a qualification, Mr. Bailey, that I think it is perfectly probable, certainly possible --

Q No, I am sorry, please don't speculate. I asked you if you knew of any contamination by body secretions, personal knowledge?

A I have never been in the house --

Q All right.

MR. SPELLACY: Pardon me; let him finish the answer.

MR. BAILEY: He says he has never been in the house.

Q Then you know of no such contamination?

A I assume it to be present.

Q Why do you assume body secretions to be present on the closet door?

A Well, I would assume a closet door in a bedroom, that inevitably human skin would be in contact, people being in the process of disrobing and all you need to do is brush against the painted wood surface to leave a smear of perspiration and this will contaminate and it will very definitely interfere as we showed in our work.

Q You mean because the panel is near the knob, human hands might have brushed against it?

A Or somebody's knee, any skin surface with perspiration on it can contaminate.

Q Doctor, do you know how far off the floor on this panel these spots were?

A I don't believe it was above the door knob level.

Q No, I asked you do you know how far in inches off the floor these spots on this panel were?

A No, I can't tell you in inches how far off the floor

it was.

Q Then how were you able to make assumptions about what portions of the body might or might not touch the door, whether or not they might have clothing on them, without any idea where they were located?

MR. SPELLACY: Objection.

THE COURT: He may answer.

A Well, I saw pictures of these spots and I seem to recall that they were below the level of the door knob. Now, I may be wrong on this.

Q Of course, before you drew your conclusion you took note of the height of these spots off the floor, right?

A I just assume in a bedroom that human skin is from time to time going to come in contact with the paint on a closet door.

Q You mean the whole closet door is probably covered with human secretions?

MR. SPELLACY: Objection.

Q Tell us what portions you think would be covered in a matter of course, from your experience on human secretions?

A I would say up to about a foot above the door knob would be an area reasonable to suspect that would be contaminated with human secretions.

Q You mean from the very bottom up to a little above the door knob you expect to find on any surface on the closet

door in the bedroom human secretions?

A I would not want to rule out the possibility.

Q Did you ever make tests on closet doors to find out what human secretions were present on that area?

A No.

Q Had you ever done it in your life?

A No, not on closet doors.

Q So you are just assuming that from speculation?

A No, I am assuming it from our work on human secretions.

Q You are able to understand from your work on human secretions the probability that they would be found on bedroom doors?

A Well, just from living I assume that.

Q Well, from your experience with living, you are referring now to your own closet doors, they probably have secretions?

A Perspiration, yes, I would suppose that.

Q You brush up against your doors, then, in your own experience when you perspire?

MR. SPELLACY: Objection.

THE COURT: Sustained. The jury is instructed to disregard the comment of counsel.

Q Doctor, did you ever read a paper called Latties' Individuality of Blood?

A Yes, I did.

Q Did you read it before or after you entered this case?

A Well, I honestly don't know, Mr. Bailey, but I can tell you that I have been keenly interested in blood for many years and I think the probability is very good I read it before this case, really.

Q Did you take into consideration before you filed your affidavit, the material that you found from Latties' experiments, and so forth?

A Yes.

Q You did?

A Yes, I think so.

Q Did you regard that paper as authoritative or that the work was competently performed?

A I think Latties did his work before World War I, didn't he? As I recall it was 1916. That is a very old paper.

Q I am asking you if you regarded the paper as the work of a competent expert in the field?

A I would say that Latties was competent at that time, yes.

Q Have you undertaken to prove or disprove any of the facts which he states as being facts in his paper on the Individuality of Blood?

A No, I haven't.

Q Now, you would agree, I take it, that there are means

of determining within the Group O individualities of the blood?

A Not in the field of bloodstain identification, no.

Q You mean you never have done it or it has never been done?

A I have never done it and it has never been done, to my knowledge.

Q Never been done to your knowledge. So I take it in giving us your opinions based on what you have read by others, you completely discount anything Doctor Kirk said?

A Pretty much, yes.

Q Do you agree with the statement in Latties that the blood of a pregnant woman is apt to be highly soluble than that of a non-pregnant woman, of similar conditions?

A I don't know of any recent corroboration of that statement.

Q Do you know of anything to contradict it?

A No, I don't know of any data on that point.

Q You do know that Mr. Latties said that this was true, from reading his paper?

A No, I can't say that I recall that, no.

Q Now, doctor, I believe that you said that you examined the watch attributed to Sam Sheppard and you found spatter all over it?

A That's correct.

Q Now, have you ever been involved in a case before where you were asked to distinguish between blood spatter and bloodstains of other origins, such as smears and drips, and so forth?

A Never.

Q Is there any way that you have in your experience of telling from looking at a drop of blood whether it came from spatter, from drip, or from being placed there with an eye dropper?

A Not on a small drop, no.

Q Tell the jury what you saw when you looked at this watch by way of blood spatter, just describe what you saw on the watch for us?

A Well, the watch was flecked with very small blood droplets.

Q What parts of the watch?

A All over the case and the expansible band.

Q I take it that the only thing visible to you at the time of your examination were droplets?

A Yes, that is correct; there was a very large droplet that seemed to have a peculiar shape that was on the band but very close to the case. I remember this very vividly because Miss Cowan and I were attempting to find stains which there would be enough bulk to them that we could lift for our absorption test.

Most of the stains were so thin you could actually

see right through them and see the metal of the case or of the band, right through the blood.

Q How much blood do you say it takes, dried blood, in order to successfully group it, what quantity?

A Well, usually it is very difficult to measure, but I would say somewhere around eight to ten milligrams.

Q Eight to ten milligrams. Would that be half a thimble-full?

A Oh, no. It would be enough to cover the head of a small pin.

Q So a pinhead of blood would be sufficient to make a grouping, ordinarily, of dried blood?

MR. SPELLACY: Objection.

Q Is that your statement?

A Well, this would be difficult to do, satisfactory grouping, on this quantity.

Q Keep your voice up.

A A quantity of dried blood that you could put on top the head of a small pin would be I would say the absolute minimum quantity that you could use for a reliable grouping of dried blood.

Q Supposing you had five whole pinheads of blood, would that be enough to make a grouping?

A I would say so, yes.

Q It shouldn't be any problem with that amount, isn't

that right?

A Yes, I would say so.

Q And this is in order to make a determination of the O-A-B group?

A Yes.

Q So when you made your tests, I take it you didn't have a sufficient quantity to get the grouping, is that right?

A Actually, Miss Cowan did the O-A-B groupings, and I worked with her on the M-N grouping, and for that we did have an adequate quantity, and we were able to successfully M and N type this blood and we found it to be type M.

Q At the time you made the M and N groupings, had Miss Cowan reported to you some difficulty in getting an O-A group?

A She reported, Mr. Bailey, that she felt that the probability was very high that the blood on the crystal of Doctor Sam's watch was type O.

But she said that she did not feel enough confidence in it to report it out as such.

Q And she reported it out as inconclusive, is that right?

A I think that is correct.

Q What further test did you make whether or not it was in fact type O, did you make any?

A I did not make any, Mr. Bailey.

Q Was it because you did not have enough blood?

A That is correct.

Q How many spatters would you say you saw on the crystal when you examined it or little droplets of blood?

A Well, I didn't see very many, and I think that Miss Cowan had already lifted one or two stains on the crystal for the O-A-B typings.

Q How many spatters would you say you saw on the band?

A Well, there were just dozens.

Q Dozens of spatters?

A Yes.

Q But no evidence of smearing either on the crystal or the band, isn't that right?

A I didn't see anything that I would consider smearing, no.

Q You didn't see any smears across the face of the crystal, then?

A No.

Q And you didn't see any smears on either side of the band?

MR. SPELLACY: Objection. Let him finish his answer.

Q Have you finished your answer?

A I didn't see any smears, and the flecks of blood were on the side of the case. They were down in the cracks between the joints of the expansible band, and they seemed to

me to be spatters.

Q Did you make a careful examination of the watch, I mean did you hold it or put it under a microscope to satisfy yourself that what you saw in fact was a group of spatters?

A I did not touch it, but we were working on a clean surface and we handled it with forceps and we turned it over many times.

I remember very very vividly we spent a half an hour working on this watch trying to find an area where there was an adequate quantity of stain to work with.

Q Was that your primary interest, just to find a quantity to work with?

A Yes, because there were --

Q Where was the greater quantity of blood, on the face of it, that is, on the crystal, or on the band?

A There was one rather peculiar and crustaceous on the band, I remember very well it was close to the case, and I think it was at the 6:00 end of the case.

Q Now, did you make an examination of the band or the face of the watch for blood spatters that might disclose the direction of travel of possible flying blood?

A No, not at all, Mr. Bailey.

Q Did you have any experience with diagnosis of direction and velocity?

A No, I don't. I wouldn't want to try to answer that

question.

MR. BAILEY: May we have the projector, please, is the equipment available? May we have one minute, your Honor? It appears to be available, or would you prefer to have a recess?

THE COURT: Ladies and gentlemen, we will have our afternoon recess. While you are away bear in mind the instructions given you on each occasion when you are gone from this room.

You are not to discuss this case or what you have heard of it amongst yourselves; you shall not permit anyone else to discuss it with you, nor shall you permit yourselves to overhear anything that relates to this case by any means of communication.

We will have our afternoon recess.

(Thereupon a recess was had.)

THE COURT: Are we ready to proceed, gentlemen, with the equipment?

MR. BAILEY: Yes, your Honor.

By Mr. Bailey:

Q Doctor Marsters, I believe before the recess we were discussing your examination of the Sam Sheppard watch.

THE COURT: Is that State's Exhibit 24, counselor?

MR. BAILEY: It is, your Honor, the male watch.

Q Doctor, I would like you to look at State's Exhibit 24 and tell us whether or not you recognize it as the watch you examined with Miss Cowan in 1954?

A Yes, that looks like the watch, although I --

Q And absent the blood, of course?

A That is what I was going to say. I was wondering --

Q The blood is gone?

A Yes.

Q I take it you noticed the broken band when you made your examination?

A Yes, I remember.

Q Do you remember the date of that examination?

A No, but it was during that first week of July, probably it was around the 8th or the 9th of July. I don't remember the exact date.

Q How long did you spend examining it?

A Well, we spent about 25 minutes going over it.

Q Pretty thorough examination?

A Well, I thought so.

Q Doctor, I wonder if you would point out to the jury as I hold up Exhibit 24, with the numeral 12 at the top, the areas where you observed spattered blood?

A Well, the spattered blood was all over the case, and

particularly on the band, and one large droplet that was unusual was down here, on, perhaps maybe on the second link, I have forgotten now exactly.

But it was very close to this connecting link on the end of the band where the case joins it.

Q If you will observe I have the watch on my left wrist; did you make an examination to determine whether or not all of the spots of blood were on surfaces exposed when the watch is worn thusly?

A No, I did not.

Q Then you didn't make any observations as to whether there was some spattered blood on surfaces that could only be exposed if the watch were held and folded, is that right?

A No, I didn't make any such examination.

Q But you do have a good mental picture of it and recall no smears?

A That's correct.

MR. BAILEY: May I have the able assistance of Mr. Lockwood?

(Thereupon the projection screen and projector were set up in the courtroom.)

Q Now, Doctor Marsters, is that a fair representation of the watch as you saw it on or about the 8th of July?

A Yes, this looks like the watch as I remember it.

Q I call your attention to this area down in here, doctor, and ask you if you observed that area when you first examined the watch with Miss Cowan?

A Yes.

Q And you say that this is not smeared at all?

A I didn't feel that this came from contact at all, because much of the blood was in fine flecks down in the cracks of these spaces.

Q Doctor, my question, do you say this area of the band is not smeared?

A I would say that it is not smeared, yes.

Q And do you say that this area of the crystal is not smeared?

A I don't believe it is smeared, no.

Q And did you discuss your observations with Miss Cowan when you made them?

A Yes.

Q As you look at the watch now, does it appear to be, the blood, as you see it here, in just the same position as it was then?

A Yes, I believe so.

Q By the way, when you had your discussion with Miss Cowan, did she agree with you that there was no smear on the crystal?

A Well, I don't remember whether we were discussing the

crystal blood.

Q Do you remember whether or not you discussed smears?

A Well, yes, I remember that very vividly, that we decided the great bulk of the blood on the watch was spatter.

I am not saying there couldn't be a single area of smear on this.

Q Did you jointly agree at that time, Doctor Marsters, that there was no smearing down on the band?

A Yes, we did, very definitely.

Q And do you remember any opinion that you may have jointly held as to the smearing on the crystal?

A No, I can't say that we had any opinion about that.

Q Doctor, I want to call your attention to these two spots right here, do you see them?

A Yes.

Q Did you notice those on July 8, 1954?

A I can't recall, Mr. Bailey.

Q Do you notice where they are located?

A Yes, I see them.

Q Now, do you see on the top of the photograph where the back of the watch band is folded so it is at 90 degrees to the body of the watch and slopes downward?

A Yes.

Q And do you see from the photograph where the inside of the connecting link is facing at 90 degrees to the watch,

instead of parallel to the body such as this one?

A Yes.

Q And did you notice at that time these blood spots right here were on the inside of the link?

A No, I honestly can't say that I did.

Q This is the first time that has been brought to your attention?

MR. SPELLACY: Objection.

A Yes, I believe that's right.

MR. BAILEY: No further questions.

That is all. Thank you.

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REDIRECT EXAMINATION OF DR. ROGER MARSTERS

By Mr. Spellacy:

Q Doctor, in dealing with whole blood, that is, blood that is in liquid form -- is that correct, when we talk about whole blood?

A Yes.

Q In dealing with whole blood, is it possible even in whole blood when you have the same type O blood to tell that it came from different origin or a different person when you have the same type?

A No.

Q You indicated that dried blood is much more complicated, is that correct?

A Yes, it is, it is very difficult to group.

Q When you have the same type present in two particular spots, dry blood, is it possible in dry blood that they came from two different origins?

A I know of no way to establish this.

Q Have you ever heard of any way?

A No, with the possible exception of some of the work of Paul Kirk.

Q Do you know anybody else in this field that has ventured or even given an opinion in this matter?

A Absolutely not.

MR. SPELLACY: No further questions.

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RECROSS EXAMINATION OF DR. ROGER MARSTERS

By Mr. Bailey:

Doctor, how many papers have you authored on the subject of dried blood beside the one I called your attention to?

A That's the only one.

Q That is the only one?

A That is correct.

Q You represent to this jury that there is no way to determine or separate out people who are in the same blood group, by examining the blood?

A Yes.

Q So if you are given O blood, once you group it as O, that

is as far as you can go?

A Yes. I would be pleased if I could correctly establish that it was group O.

Q And that is about as far as you can go, a man is either O or something other than O, but within the O groups there is no sub-grouping, is that correct?

A That is correct.

Q The presence of the M or the N or M-N factor, that is meaningless to you?

A No, that is not so.

Q And the presence of the R-h factor --

MR. SPELLACY: Objection.

A I am sorry, Mr. Bailey, I thought you were talking about the major blood group system.

Q Just so we understand each other, doctor, my question is, whether or not you are telling this jury that within blood group O there is no way for a competent man to distinguish human origins for blood of the same group?

A Of group O, that is correct.

Q So there are no M-N factors in group O?

A Yes, but do you want to talk about group M-N or M, or the M-N system, let's talk about that.

Q Those are basis of distinction within the group, are they not?

A Yes.

Q What about the R-h factors, is that a basis of distinction?

A Not with dried blood, no.

Q With whole blood that Mr. Spellacy was just talking about?

A With fresh blood, very definitely.

Q As a matter of fact, it would be extremely dangerous to give somebody with group O positive, some negative O blood, is that correct?

A That is correct.

Q You have to make these distinctions all the time?

A That is my business.

Q When you do paternity testing, doctor, of course you have to sub-group considerably sometimes to eliminate a punitive father?

A Yes.

Q And you do eliminate some punitive fathers by matching the blood of the baby and the man who is supposed to be the daddy, is that correct?

A Yes.

Q How many different sub-factors do you find beyond the M-N, and the R-h, within a given blood group?

A Well, within the R-h system we are dealing with five different R-h factors, and we can separate these down to almost a hundred different classes, but this is with fresh

whole blood.

Q You have never been successful in sub-grouping dried blood?

A Not for the R-h factors, no.

Q Did you ever take two samples of O blood of known different origin and simulate the tests that you read in Doctor Kirk's affidavit that he performed?

A No, I never did.

MR. BAILEY: That is all.

MR. SPELLACY: Nothing further.

THE COURT: May I see counselors?

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. BAILEY: The defense in order to rebut a possible charge in final argument, if one might be made, that Doctor Horace Don, who testified about a certain threatening statement made by Coroner Gerber early in July of 1954, a charge that this statement on the part of Doctor Don was recently fabricated for purposes of this trial, was not true, the defense is able to offer the testimony of Mr. R. E. Dwight of Willoughby, Ohio, who would say that prior to the 1954 trial Doctor Don told him about this incident, and after

whole blood.

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MR. BAILEY: That is all.

MR. SPELLACY: Nothing further.

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the 1954 trial Mr. Dwight said to Doctor Don, "Did you bring this evidence?" and Doctor Don said, "No, but I told the defense attorney and he didn't use it, and I don't know why."

These are the two conversations I would use to --

THE COURT: Mr. Corrigan, do you have any further rebuttal to offer for and on behalf of the State at this time?

MR. CORRIGAN: No, we do not.

THE COURT: Let the record show that the Court having been advised that there is no rebuttal on the part of the State, the Court regards the evidence as suggested by Mr. Bailey by way of proffer as being hearsay at its very best, and also the Court does not feel that there is any necessity for allowing sur-rebuttal in this case, and accordingly is ruling that sur-rebuttal of the type suggested by Mr. Bailey is not in order, and accordingly would not be admitted if this witness were called.

MR. BAILEY: Your Honor, may we at this time put our request on the record for a written charge in this case, put our request on record for a written charge?

THE COURT: Yes, let the record so show, that the defense has requested a written charge, which charge will go to the jury.

MR. BAILEY: And after you dismiss the jury, and prior to final argument, the defense has several motions to make.

THE COURT: We are going to hear those tomorrow, gentlemen.

MR. BAILEY: That will be fine, your Honor, but may we have on the record that the evidence is closed?

THE COURT: Yes. As I understand it, there is no further rebuttal on the part of the State, is that right, Mr. Corrigan?

MR. CORRIGAN: That's correct.

THE COURT: And there will be no sur-rebuttal. You have no other sur-rebuttal you wish to offer?

MR. BAILEY: No, your Honor.

THE COURT: Except as indicated. So there will be no further testimony in this case. Tomorrow we will proceed with the matters of law, and I would instruct the jury that they probably will not be called or needed here until about 10:00.

(Thereupon proceedings were resumed within the

hearing of the jury, as follows:)

THE COURT: Counselor Corrigan?

MR. CORRIGAN: May it please the Court, the State rests.

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THEREUPON THE STATE OF OHIO RESTED.

- - - -

THEREUPON THE DEFENDANT RESTED.

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TESTIMONY CLOSED.

THE ABOVE AND FOREGOING, TOGETHER WITH THE EXHIBITS OFFERED AND RECEIVED IN EVIDENCE, WAS ALL OF THE EVIDENCE OFFERED AND RECEIVED UPON THE TRIAL OF THE ABOVE-ENTITLED CAUSE IN SAID COURT OF COMMON PLEAS, CRIMINAL BRANCH, IN AND FOR CUYAHOGA COUNTY, OHIO.

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THE COURT: Ladies and gentlemen of the jury, as you have just heard, the State of Ohio now has rested insofar as rebuttal is concerned, and there will be no further evidence or testimony taken in this case.

The next matter that the Court will take up will be issues or matters of law with counselors.

The Court will do this tomorrow morning rather than this afternoon. It is anticipated, ladies and gentlemen, that arguments will not commence in this case much before 10:00 or 10:30 tomorrow morning.

Depending upon what the day brings tomorrow by way of time consumed for arguments, the Court will either charge you or give you its charge of law or instructions of law tomorrow afternoon, or possibly on Wednesday morning. We will make that determination tomorrow.

But you can reasonably expect that this matter will be given over to you for your deliberations some time late tomorrow or possibly on Wednesday morning. That can be your expectation.

So while you are away, ladies and gentlemen, on your overnight adjournment, you will bear in mind the instructions given you on each occasion when you leave this room. You shall not discuss this case even now, you shall not discuss this case, or what you have heard of it amongst yourselves.

You shall not permit anyone else to discuss it with you; nor shall you permit yourselves to overhear anything that relates to this case,

by any means of communication, having in mind the specific instructions given you with respect to reading, you are forbidden to read written material, to listen to radio, or television, with respect to this case or comments thereon.

We will stand adjourned until -- well, ladies and gentlemen, we will adjourn until 9:15, but we can work out arrangements for you so that we will not expect need of your services much before 10:00 or 10:30 tomorrow morning, but that will be worked out with your court constables with whom you are so familiar.

(Thereupon an adjournment was taken to 9:15 a.m., Tuesday, November 15, 1966, at which time the following proceedings were had:)

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Tuesday Morning Session, 9:15 a.m., November 15, 1966

(Thereupon the following proceedings were had in the absence of the jury:)

THE COURT: Mr. Reporter, does the record reflect the presence of counsel and the defendant.

Gentlemen, we have reached the point now where will hear the motions of the defendant, if any.

Counselor Bailey or Sherman?

MR. BAILEY: Your Honor, the first motion that the defense presents relates to -- the exhibit number doesn't occur to me offhand -- which consists of a written statement typed and initialed by the defendant and others.

There was a page therein which was admitted over objection relating to conversation between the defendant and his interrogator, whoever that may have been, inquiring about a relationship with a Susan Hayes.

We contended at the time the evidence was inadmissible in a second degree case, but in any event the substance of it remains that the defendant was asked if he knew a Susan Hayes.

And he said he did, she was a good friend, that he bought her a watch and that was the end of it.

Susan Hayes has not appeared in this case. All of the conversation relating to her, as derived from that document, is now irrelevant and immaterial.

But there is another facet to the matter. It is very doubtful to me that anybody in the City of Cleveland fails to recollect the prominent part that Susan Hayes, the so-called mystery woman, paramour, or what have you, played in the original trial.

At least one of the jurors said on query that he recalled something about activities of the defendant other than professional, which were broadcast back in 1954.

We were not permitted to get more specific on the voir dire, but the inference is plain that these refer to the activities of the defendant as they were described in the last trial.

The reference to Susan Hayes, unsupported by any evidence connecting it to this case,, unsupported by any suggestion that she played any role in the murder of Marilyn Sheppard, as a motive-participant or anything else, is extremely damaging

to the defendant, because even though the jurors who professed that they had forgotten there was a Susan Hayes, certainly remember it now.

We feel that that evidence should be stricken, and that a very careful and thorough instruction should be given to this jury delineating the reasons for striking this evidence; instructing them that Susan Hayes has nothing to do with this case and they are not to consider her or any other woman in connection with evidence against the defendant, except, of course, for the deceased Marilyn Sheppard.

I feel that on the state of the record now the innuendo remains, despite the absence of any evidence on that, solely because of the unique history of this case, it is extremely dangerous evidence, and that your Honor should strike it out.

That is our first motion.

THE COURT: Overruled.

MR. BAILEY: Now, the second motion relates to the question which was permitted over objection to one of the Houks, I believe it was J. Spencer Houk, wherein he was asked, "Did you hear the brother of the defendant say, 'Sam, did you have anything to do with this?' and Sam replied,

'Hell no'"?

This evidence we think is inadmissible. We thought so at the time and we so stated it for the record, as it is extremely damaging, because although there is no competent legal basis for the admission of such evidence, it being an accusation or a question accusation, coupled with a flat denial, which is not admissible in any jurisprudence, the plain inference remains that at least the brother of the defendant thought he was capable of participation in this kind of butcherings and certainly that is damaging insofar as the jury is concerned, especially since that brother did not appear and did not testify.

Indeed we saw no need to call him simply to deny evidence that we don't think is admissible. We think that evidence should be stricken out.

THE COURT: Before ruling on the second motion, let the record further show that the defendant's first motion addressed itself to State's Exhibit 27, which was excised and amended from its original form.

Let the record further show that the defense on cross examination inquired into a portion of the statement, the original statement,

which the Court had ordered excised, and that is in further support of the Court's ruling overruling the motion, couched in the first motion of the defendant.

With respect to the second motion of the defendant just presented, the Court overrules the motion.

Please proceed, Counselor.

MR. BAILEY: The third motion of the defendant relates to that testimony of Robert Schottke, wherein he told the jury that at or about 3:00 on the afternoon of July 4th he approached the defendant Sam Sheppard accused him of murder, giving the benefit of his judgment as of that time that in his opinion Sam was guilty.

The opinion of a police officer is not admissible, of course, nor is the accusation of a police officer, when it is flatly denied. We objected to this evidence. We object to it again now, and suggest that it is damaging. It is damaging for the following reason:

The jury may well infer that a police officer, being experienced in matters of murder, made a judgment based on information that has been kept from them, or a judgment based on information

that he alone as some kind of expert could interpret, and may draw some kind of inference or innuendo from the fact that Robert Schottke, whoever he is, saw fit to walk in at that time and tell Sam Sheppard that in his judgment he was a murdered. Sam Sheppard denied the accusation. There was nothing equivocal about the denial. The evidence was admitted. It was prejudicial. We think it should be stricken.

We think the jury should be very thoroughly instructed to disregard it, to give it no weight, that it is meaningless, it has nothing to do with this case; and we so move.

THE COURT: Let the record show that the motion with respect to Officer Schottke's statement is hereby overruled. And let the record further reflect that the motion, second motion, relating to conversation overheard by Mr. Houk concerning the question asked by Doctor Richard of Doctor Sam, could not in any fashion be interpreted as accusatory in nature. It was merely an inquiry on the part of Doctor Richard.

Both motions are overruled.

Please proceed, Counselor.

MR. BAILEY: Your Honor, our fourth

and final motion relates to a renewal of our motion for directed verdict. This motion was presented at the close of the evidence presented by the State of Ohio, and as the record reflects, at that time denied.

As a matter of law we contend that no case of homicide, indeed, any possible included crime, has been demonstrated to that minimum level of sufficiency against the defendant Sam Sheppard.

The Chief Justice of the Ohio Supreme Court writing for a dissenting body pointed out quite cogently that nobody since the 4th day of July, 1954, has ever undertaken to state a set of facts and circumstances which could possibly exclude every hypothesis of innocence, and prove the guilt of the defendant to that point where reasonable men would have a factual question presented to them.

Chief Justice Taft further said that the best that was shown was that Sheppard could have killed his wife. And as he said in his opinion, this is not enough evidence to go to the jury in a civil case, let alone a criminal case.

Now, the presentation of this motion,

where the only evidence which the State can possibly rely upon is circumstantial, because the only direct evidence in this case is that of the defendant as proven by the State; of course, if that is accepted the defendant is not guilty as a matter of fact as well as law. The only evidence is circumstantial.

The presentation of the motion challenging the sufficiency of that evidence, is a challenge to counsel for the State of Ohio to state for the Court and for the record those facts and circumstances upon which the State of Ohio relies.

When I presented this motion to your Honor at the close of the State's case, Mr. Corrigan spent 182 seconds mentioning briefly his judgment as to inconsistent statements of the defendant, and some remarks about a watch.

Neither of these items, singly or taken together, prove any case against the defendant.

The overwelming weight of the evidence is entirely inconsistent with guilt, and whereas in the last trial, as was pointed out correctly or not by your Court of Appeals of Cuyahoga County, there was at least a conflict as to whether or not he was injured.

The State has produced not one shred of medical evidence to contradict Doctor Elkins, the neurologist, Doctor Koch, the dentist, Doctor Foster whose testimony was read in the record, Doctor Steve Sheppard, three nurses, all of whom showed beyond question that injuries were sustained.

Now, this is not a case where the State of Ohio can suddenly suggest that perhaps there were three or four other participants. The indictment charges Sam Sheppard, and Sam Sheppard alone. It does not charge John Doe. It does not charge accessories before and after the fact.

It is inconceivable that the defendant could possibly have injured himself to the extent that the overwelming weight of the evidence shows, and although credibility is a question for the jury, their power is not unlimited to simply cast aside with no demonstrable reason for so doing, an accumulation of testimony from men whose integrity and competency has not even been challenged or scratched by the state.

Now, aside from the weight of the evidence, every single piece of evidence that the State has presented, from its first witness,

Doctor Adelson, who proved murder and only murder, which we do not deny, to his last witness, is equally consistent right down the line with innocence as well as guilt, and that is not a circumstantial case in any court of law in the United States.

There never was enough evidence in this case; but whatever there was in the first trial, your Honor is certainly familiar with those opinions as you have demonstrated, there is less in this trial.

An American citizen cannott be convicted on speculation, guess work, or wild ideas.

I suggest to this Court that neither Mr. Corrigan, nor indeed the Court, is able to state those facts and circumstances which your law requires, facts and circumstances which inexorably point to the defendant and only the defendant, and are inconsistent with his guilt, anything that constitutes proof of guilt. It isn't there; it can't be done. It certainly can't be done in 180 seconds. I don't think it can be done in an hour. But I think the State has an obligation to state now and for the record just what it is that is being given to this jury to decide.

Now, the question of sufficiency of the evidence at its threshold is one for your Honor. It is not for a jury.

This is not a case where there are serious questions of credibility to be resolved. If we took every State witness, and assumed the truth of every fact that he testified to, and even granted credibility to the opinions of these witnesses, there is no case against the defendant.

And I say again Mr. Corrigan or Mr. Spellacy for the State cannot state such a case. No court has ever stated such a case. No prosecutor has ever stated such a case, and it cannot be stated now.

And until that point is reached, until some kind of logical presentation is shown, that evidence which if it went all in favor of the State, asking the jury to stretch its imagination on every question of credibility, and to draw every possible inference from every piece of evidence upon which the State has or may rely, does not prove Sam Sheppard killed his wife.

As a matter of fact, as Chief Justice Taft has said, the State of Ohio with its own evidence has excluded in the last trial, and

certainly in this one to a larger degree, every reasonable hypothesis other than innocence.

And if I have overlooked some theory, if there is some proof staring me in the face as defense counsel, and my associate Mr. Sherman, and indeed the defendant, which we do not see because we are blinded in his cause, then it will be a simple matter for the State of Ohio to enlighten us in this regard.

But they can't do it, they never could do it, and they cannot do it now. They cannot give your Honor a reason to allow this case to go to the jury, and I feel and I feel very strongly the court has a duty and an obligation to discharge this defendant for failure of proof; and we so move.

THE COURT: Let the record show that with all due respect and deference to Judge Taft's opinion, minority opinion, in 1956, in connection with the first Sheppard case, reported at 165 Ohio State at page 293, that Judge Taft's opinion was disagreed with by five out of seven judges, in 1956.

Not only for that reason, however, but the Court believes that this is not the Sheppard case of 1954. This is the Sheppard case of 1966,

new, and with a new start. The Court believes that this record reflects that there is circumstantial evidence in this case of a different character and nature than that which was adduced in 1954, stronger in character, in some areas.

Accordingly the motion for discharge is overruled.

Anything further, counselors?

MR. BAILEY: No, your Honor.

(Thereupon the jury was brought into the courtroom, and the following proceedings were had in the presence and hearing of the jury:)

THE COURT: Good morning, ladies and gentlemen.

THE JURY: Good morning.

THE COURT: Ladies and gentlemen of the jury, we have reached that point in the proceeding where we will now hear the closing arguments or summations of counselors.

You will recall that at the very outset and commencement of this proceeding you heard opening statements, and the Court instructed you at that time that neither opening statements nor closing arguments, if we reached that point in this proceeding, would be considered by you as evidence

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Anything further, counselors?

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in this case.

So now we are about to undertake and listen to the summations of counselors for each party to this lawsuit; and you are hereby instructed that these closing arguments are not evidence in this cause, and will not be so considered by you.

For purposes of the opening statement for and on behalf of the State of Ohio, the Court will call Counselor Corrigan or Spellacy?

MR. SPELLACY: Yes, if it please the Court.

CLOSING ARGUMENT BY MR. SPELLACY

MR. SPELLACY: If it please the Court, your Honor, Judge Talty, Mr. Bailey, Mr. Sherman, ladies and gentlemen of the jury:

As Judge Talty has just indicated to you, we have reached that part of the case which has been referred to as closing argument; and he has also instructed you that what we are about to say here in this particular case is not evidence.

As you know from the time that we impaneled you on voir dire, that the only evidence that you are to consider, of course, was the evidence that came from the witness stand from

the lips of the witnesses and the physical exhibits that were offered and received into the evidence.

What we say here by way of closing argument is certainly not to be considered by you as evidence.

We are given this opportunity, though, to give you our ideas as to what we think the evidence in this case showed.

With that in mind, certainly, if my interpretation of the facts differs from yours, disregard my interpretation and accept your own, because you and you alone are the sole and exclusive triers of the facts in this case.

Before I begin the argument, I would like to take this opportunity to thank his Honor Judge Talty for the judicial manner in which he has presided over this trial.

I would like to thank Mr. Bailey and Mr. Sherman for the manner in which they have conducted their defense.

And I would like to take this opportunity to thank each and every one of you, particularly, each and every one of you, for the time and trouble that you have taken out of your every-day lives, to come in here into this courtroom, and to devote it

to our system of justice, for this defendant and for the people of Ohio.

Certainly you were called upon to suffer great personait sacrifice, away from your families, and away from your loved ones.

Your services here as jurors to this defendant and to the people of Ohio certainly is just as important as those members of our armed forces who are presently serving in Viet Nam, or watching over the Berlin Wall.

Your service and duty here as jurors is just as important as those members of our armed forces.

On behalf of the County Prosecutor's office, we would like to thank you.

Now, you know that the reason you are here is because of an indictment returned by the Grand Jury, and you know, of course, that the indictment is not evidence in this particular case, and I will refer to it only for the purposes of aiding you.

And at the conclusion of the case, his Honor Judge Talty will read to you the indictment, and he will instruct you as to principles of law, and you will learn that the indictment charges that

on the 4th day of July, 1954, that the defendant Sam Sheppard purposely and maliciously killed Marilyn Sheppard.

At the conclusion of the case his Honor Judge Talty will give you the definition and the instructions of law as to what is purposeful, and what is malicious.

Purposeful he will tell you means intentionally. When we have that particular instruction of law in mind, of course, we can look at the testimony of Doctor Lester Adelson as to whether or not this killing was purposeful, and whether it was intentional.

And certainly we don't have to be too concerned with these elements when we look at the slides; and it wasn't pleasant to put on those slides, but it was necessary, because we have an obligation and a duty to illustrate that on the third day of July, 1954, Marilyn Sheppard was a living human being, and that on July 4, 1954, she met her death because of a purposeful and malicious act.

And certainly 35 wounds to the head, as Doctor Lester Adelson told you, was a purposeful and malicious act.

We asked the doctor how many blows would it take to inflict 35 wounds, and he told us 25 blows. Certainly 25 blows was a purposeful and malicious act.

We said, "Doctor, what type of instrument inflicted all those blows?" and he said there was a different type of instrument, because, as you recall, you remember that the eyes were black, the nose was broken, there weren't any cuts or lacerations around the eyes.

A different type of weapon inflicted those wounds than inflicted the wounds in the top of the head, and around the head and on the hand.

This is important about Doctor Lester Adelson's testimony, because once again it shows that two separate or a number of weapons were used, or a number of instruments, and that this was a purposeful and malicious act, that the eyes were blackened, the nose was broken but not cut, and the head was cut.

"Doctor, where was the great number of wounds?" and this is significant when you picture that body laying on the bed, "Where were the great number of wounds?" The greatest number of wounds were on the lefthand side of the head. And the

body, of course, was laying on its back with the greatest number of wounds on the lefthand side.

And this is important when you come to your ultimate conclusion as to how the blows were struck, and how many were struck.

So we know from the testimony that Marilyn Sheppard died as a result of a number of blows inflicted to the head, and that there were at least 25 of these blows; that they were struck with such force and strong enough to shatter the frontal bone, and we saw the slides of those and we have pictures in the evidence here.

We know that a great deal of strength was needed to inflict the number of wounds that caused the death of Marilyn Sheppard.

We know from the evidence on her hands that she was struggling, that these are defense wounds, and they are present on both hands. We know that from the evidence, too.

But let's move on. We know that on July 3rd, 1954, Marilyn Sheppard was alive; that on that particular evening Mr. and Mrs. Donald Ahern, who came in here and testified, they had cocktails over at the Ahern's house.

They went from the Ahern's house to the

Sheppard house, and there at the Sheppard house they began to have dinner, and this dinner started about 9:00.

Prior to having dinner Donald Ahern, Sam Sheppard, went down and checked the water. The water was too rough for water skiing.

There was some concern about a party that they were supposed to have the next day. The lake was too rough for that, they thought.

So they went down in the basement, and Doctor Sam Sheppard worked on the punching bag. He took off a jacket he had on, and all he had on at that time was a white T-shirt.

So they went back up to eat. And Mrs. Ahern told you how she and Marilyn prepared the dinner, how they ate out on the porch, and it was quite windy that night, and it was chilly.

So it was necessary for Donald Ahern to get a jacket, Mrs. Ahern went in and got him a jacket, one of Sam Sheppard's jackets.

It was necessary since Sam Sheppard at this time only had on a white T-shirt to get a jacket, and he got a brown corduroy jacket, and he put the brown corduroy jacket on when they were out on the porch eating dinner.

And they finished eating dinner about 10:00. This is important because what they had to eat, what time they finished, is important in establishing the time of death.

And we know from Doctor Gerber, and it is unrefuted, that the time of death was between 3:00 and 4:00; 3:00 in the morning, and 4:00 in the morning.

Let's go on with the Aherns; that they came back in the house, and Mr. Ahern testified -- and this is unrefuted -- that the house was quite chilly that evening, and they left their jackets on, and they began watching television and he listened to the baseball game over in the corner.

Sam Sheppard became tired. He lay down on a couch, while the rest of them were watching television, and he lay down on the couch and they left that house at 12:30. Sam Sheppard was asleep on the couch, and he had on State's Exhibit 1, the brown corduroy jacket.

We know that at 12:30 Marilyn Sheppard was alive. When the Aherns left she accompanied them to the door.

When she accompanied them to the door she closed the door behind them, and there were lights on in the house, there were lights on down-

stairs, and there were lights on upstairs. This we know from the Aherns' testimony. This was at 12:30.

And we know the next morning at a quarter to six that a call comes from the Sheppard home, and, now, mind you, death occurs between 3:00 and 4:00.

The next thing we hear is that a quarter to six or roughly thereabouts, a call comes from Sam Sheppard to Spencer Houk; and, strangely enough, isn't daylight starting to break.

As daylight breaks a call comes to the Houk home, "Something happened to Marilyn, get over here quick."

And, oh, there is a great deal to do about did you call the police then, did you as mayor call the police.

You remember Esther Houk's reply, "He was able to call us, why didn't he call the police? He is the police surgeon."

But there is a great deal to do about why they didn't call the police.

So they go over, as a friend they go over, and they go in and they find Sam Sheppard sitting in a chair.

And what happened to Marilyn, what happened?

And he says, "I was asleep on the couch, I heard a noise or I heard Marilyn scream, I ran upstairs, I got clobbered; the next thing I can remember coming to on the beach, I wandered around."

This is the first statement, the first time he has contact with the outside world.

And, then, of course, we know Esther Houk runs upstairs; and a great deal to do on cross examination, "Why did you run upstairs? Did you see the body downstairs?"

There is nothing mysterious about that. Steve Sheppard testified that he went upstairs, naturally. This was the natural thing to do.

But an inference is trying to be made to you people that Esther Houk had something malicious in her mind when she ran upstairs.

She went upstairs, and she came right back down and she said, "My God, call the police, call everybody," and the police are called.

And we know that Patrolman Drenkhan got there at one minute after six, and he was the first policeman on the scene.

But let's go back to when the Houks

arrived, and they came down, Esther Houk came downstairs, and the defendant got up and he says, "Oh, my neck," as he is walking into the kitchen and back into the den.

And she offers him a drink and he says, "No, no, I don't want it, I have got to think."

With that the brothers come; Richard comes and Steve comes. Richard comes into the house, he goes upstairs, according to the testimony of the Houks, and he examines Marilyn Sheppard and she is dead.

He comes back downstairs into the den and he says, "Sam, did you have anything to do with this?"

MR. BAILEY: Objection.

THE COURT: Overruled.

MR. SPELLACY: And the reply is in the record, "Hell no," and this is unrefuted.

Then Steve Sheppard arrives, and by 6:30 Sam Sheppard is in Bay View Hospital. The hospital records bear that out.

And we know from our common knowledge and common experience that it takes a little bit of time to get from the Sheppard home to Bay View Hospital.

But be that as it may, Patrolman Drenkhan

responds to the call, and he arrives, and he asked the same question, "What happened?" and the same response is given.

"Marilyn screamed, I woke up, I ran upstairs, got clobbered, came to on the beach."

But Patrolman Drenkhan on his way upstairs sees something peculiar, insofar as these stories are concerned.

He sees State's Exhibit 1, which is not thrown on the couch, which is not on the body of the defendant, which was on the body of the defendant at 12:30 when the Aherns left.

Where is this coat? It is placed at the end of the couch like that (indicating). This right away was so important that that morning they took a photo of it, because it just didn't jibe with his story.

This coat was not slept on. It was not thrown off in his hurry to get upstairs. It was placed there, as he took it off and went upstairs, not in response to any cries or screams.

Let's go back to Spencer Houk. We have the story that he first told him on the morning about how he came to on the beach, that's all he remembers.

You remember Spencer Houk -- and this is

also unrefuted -- that the conversation he had with him at Bay View Hospital in the evening, where he said, "What happened, Sam?" and he starts telling him about it.

And he said, "I woke up on the floor. I heard a noise downstairs. I chased a man down."

"Can you describe him for us?"

"Yes, I can. He is bigger than I am. Six-two, six-three, or six-four, big broad shoulders that tapered down to a narrow waist. He has got hair that stands straight up."

And isn't this story corroborated by Detective Schottke, who got the same thing at 10:00 in the morning, that this man was six foot two, or six foot three, and at that time he told him it was a dark complected white man.

But he tells Spencer Houk that he could recognize the profile of this man, that so easily knocked him out on the beach.

And then we have another conversation with Spencer Houk, all of which is also unrefuted, at the house, at Spencer Houk's home --

MR. BAILEY: I object to the use of the word "unrefuted."

THE COURT: Overruled.

MR. SPELLACY: Where they talk about, there is a conversation about the police, and about the accusations being made to Spencer Houk.

And Spencer Houk says, "Sam, is this true, have you done this, have you said this about me?"

And Sam's reply is, "Don't pay any attention to those fellows; they are trying to put one of us against the other."

And then, also, of course, there are conversations at City Hall, two conversations, which are also unrefuted --

MR. BAILEY: I object, again.

THE COURT: Overruled.

MR. SPELLACY: Where he says, "Maybe the man wasn't six foot two, or six foot three, or six foot four, maybe I just imagined it because he over-powered me so easily when I was down on the beach; really he could be 180 pounds and five foot ten."

And then another conversation he says to Spencer Houk, the man he called and requested to come over as a friend, he says, "You know Doctor Moritz has expressed some interest in you."

And we know also from Spencer Houk that he was accused by Steve Sheppard down at Central

Police Station. This is the man they called as a friend, whose name just happened to come in, whose telephone number just happened to come into his mind on the morning of July 4, 1954. His name just happened to pop in.

Yet on that bed in the bedroom, or right beside the bed was a telephone, on the night stand. Was that used when he found that Marilyn was beaten so badly? No. Were the police called at that time?

No. Were the police ever called by Sam Sheppard? No.

Now, getting back to the first policeman that responded to the scene, Patrolman Fred Drenkhan, now Chief of Police in Bay Village. He told you about the investigation he conducted there in that house that day, and certainly we can see from the pictures that are in the evidence here, and from the evidence, that certainly there was no burglary, there was no forcible entry into that home, because all the doors were checked, the windows were checked, and we can see from the pictures that that was a phony burglary, because what burglar pulls out drawers in a desk and stacks them on top of one another?

What burglar pulls out drawers in a desk

and leaves them all even?

This is just a make-believe burglary. There is no question about that. They even conceded that in their opening statement.

But Drenkhan not only checks the house but he goes down on the beach, because he has in mind now the story that was given to him by Sam Sheppard, and he goes down and he looks down on the beach.

"Did you see any marks on the beach?" "No, there were no marks; I didn't see anything at the foot of the stairs."

Then, of course, we have the conversation with Drenkhan on July 8, 1954, and the significant thing about this conversation is that he heard Marilyn scream, he ran upstairs, he was struck from behind, he came to, and, mind you, this is on July 8th, he took the pulse and he went back downstairs.

He didn't hear any noises. He went back downstairs, and he saw a form going out the door, and he chased this form.

Once again we have a man who has a bushy-hair, that succombs and knocks him out on the beach. Of course, Drenkhan also told us about a conversation

they had out at Fairview Police Station. They asked him if Marilyn had any admirers, and he didn't know any.

They asked him about his extramarital activities and he admitted he had some.

MR. BAILEY: I object, your Honor.

THE COURT: Overruled.

MR. SPELLACY: We go back, and Drenkhan realizes this case is too big at this particular time, so he calls Cleveland, and Cleveland is called in as a courtesy matter on the 4th of July.

They send out a scientific man who arrives at the home, and we all know of course that it was Mike Grabowski. And as a courtesy matter on the 4th of July Patrolman Schottke and Gareau go out to the home.

Of course, Detective Schottke testified here, and he told us that the only contact they had with the case was on the 4th of July, and we know from the testimony of other witnesses that Cleveland didn't officiall get into this case until July 23rd, when Sergeant Dombrowski and Lieutenant Poelking and a few more fellows from the Scientific Unit went out to the home.

So that on the 4th of July at about 9:00,

Schottke and Gareau had been assigned by Captain Hauschild to go out and give assistance to Bay Village; and they respond to this call and they arrive at the home around 9:00, I believe.

And they talk first of all to Doctor Gerber who had arrived at the home prior to when they did. And they go up and they check the room, and, of course, you have heard over and over again a description of the room, the position of the body, and it is depicted in the photos here.

It is not necessary and I won't belabor you by going over it again, but they described what they saw when they entered the room, and they checked, and then they went back to Bay View Hospital where they met for the first time Sam Sheppard; and this was at 10:00 in the morning.

And what did Sam Sheppard tell them at 10:00 in the morning? He told them that he was asleep on the couch, that he had fallen asleep when the Aherns left at 12:30, and that he heard his wife scream, he got up from the couch, raced upstairs, was struck from behind, or, on the side, came to, heard a noise downstairs, went downstairs.

"Were there any lights on in the house?" No, there were no lights on in the house.

But Patrolman Drenkhan told us there was a light switch at the bottom of the stairs, and at the top of the stairs. The lights were not on in the house.

"I chased this form down to the beach, and when I got down to the beach I got knocked out again."

They asked him, "Can you describe this form for us?" This is at 10:00 in the morning, and I ask you to remember that this is after Doctor Gerber has talked to him at 9:00, and I will get into his testimony later.

But at 10:00 in the morning they asked him, "Can you describe this man?"

"Yes, I can."

"He is a dark complected white man, much bigger than I am, about six foot three inches. I didn't get a good look at him, but he is about that big. He is a dark complected white man."

So they then ask him, "How long did Marilyn's screams last?"

"All the time I was running upstairs."

So they talk to him at that time and that is all he tells them or essentially all he tells them.

They go back to the Sheppard home, and at 1:00 what we have marked here as State's Exhibit 26, a green bag, State's Exhibit 24, a man's watch, and State's Exhibit 25, the ring,and the key chain, State's Exhibit 23, are found. They are found by Larry Houk on the side of the hill in about three or four feet of brush.

And they are given to Detective Gareau, and, of course, we won't go into how they were handled. They were handled carefully by the detectives.

These articles were taken back to Bay View Hospital, and they said, "Are these yours?"

"Yes, they are mine, I was wearing them."

And with that they say, "How does blood get on the watch?"

Now, mind you, the first time they talked to him he said, "I heard a noise downstairs, I got up and I ran down after this noise."

"How did blood get on the watch?"

"I remember now, when I woke up on the floor, I took my wife's pulse by the throat, and that's how blood got on the watch. And then I chased the man downstairs or the noise downstairs."

"Well, this man," the police asked him,

"If this man were so interested in getting your watch, and intent upon robbery, why didn't he take your wallet?"

And then Sam Sheppard says, "Yes, I remember now, the wallet was on the floor beside me, my badge was shining in the light, the little light was there, and I picked this up, put it in my pocket, went in and checked Chip, and then I heard the noise downstairs."

All these stories are inconsistent with one another and they are all unrefuted..

MR. BAILEY: I object, again.

THE COURT: Overruled.

MR. SPELLACY: Another significant thing, when they look at the watch when it is taken out of the bag it is stopped, and what time is it stopped at? 4:15.

What time were the Houks called? A quarter to six. That is a lapse of an hour and a half.

Then we have the testimony of Doctor Gerber, who has been County Coroner here in this county for thirty years. He arrived at the home at about eight o'clock, and he went up and he checked the room that the body was in, and he described it; he made sure, of course, it was

obvious that Marilyn was dead.

Then he had occasion after Mike Grabowski came -- and Mike Grabowski took a photo of this jacket as Patrolman Drenkhan did, because it just didn't jibe with Sam's story, and it doesn't.

This jacket was on him at 12:30, and according to his own story he fell asleep with it on; and it wasn't on him when the Houks came in the house. In fact, he was bare from the waist up.

We know also that he had a T-shirt on when the Aherns left, and that a T-shirt was underneath the brown corduroy coat.

And, of course, when the Houks arrived he is bare from the waist up. I will have a little bit more to say about the T-shirt a little later on.

But Doctor Gerber went out then to Bay View Hospital and he got the clothes that Sam Sheppard was wearing, the pants, the shoes and the socks, and he had a conversation with the defendant.

And, mind you, this is about 9:00, an hour before Schottke sees him; and, mind you, he tells Schottke that the man is six foot two, six foot three.

He tells Doctor Gerber, which is also unrefuted, that he went to sleep, that Marilyn called, that he went upstairs, that he was knocked out there,

that he heard a noise downstairs, that he chased this noise down, that he was knocked out again on the beach, and then he came to and he wandered around in a dazed condition.

Then Gerber asked him, "Can you describe the person that you saw in the room?"

"No, I can't, I can't tell you. All I remember is a form."

"Can you describe the person that you chased down the steps?"

"No, I can't. All I can tell you is that it was a form."

This is an hour before he tells Schottke the man is a dark complected white man, six foot two, six foot three.

Which statement are you going to believe? Doctor Gerber tells you that after getting the clothes he goes back to the house, and when he goes back to the house the body is moved, and he learns at that time the amount of rigor mortis that has set in; and he establishes the time of death between 3:00 and 4:00. He says 4:00 at the latest, somewhere between those hours.

And he tells you that he then conducts an examination of that room, certain things are noticed,

This can only mean one thing, that that pillow had to be moved at one time or another, and that some object was laid on this pillow, and the pillow was moved again, and this took time.

And can you tell me that Sam Sheppard was laying on the floor in the bedroom or in the hall or on the stairs or wherever he was while this was being done, while the watch was being taken off Marilyn Sheppard, while this pillow was being moved around, while an object was laid on this pillow long enough to make this impression? Is this reasonable?

We had the testimony of Sergeant Dombrowski. There was really nothing too significant about it other than he took photos and he checked the house also with Patrolman Drenkhan and they found no means of forcible entrance.

But it was significant that they checked and dusted the doors; no prints on the doors.

He checked the desk; no prints on the desk. He checked the den; there are no prints on any objects in the den.

What objects do we have in the den? We have the statuettes that are broken on the floor. We have the green box that is depicted in one of

the exhibits, the photos, and what is significant about all these things, that they are the same marks that are on the desk, are on the desk in the den, are on the green box, and are on the statuettes.

And this took time to do this, to make those marks as though something had been wiped off; and it took time for that watch to get down into the-- Marilyn's watch -- to get down into the den.

And if I may, while I am talking about the watch, let's just take a step backwards, about the statement that Sam Sheppard made to Patrolman Schottke, when he said to Patrolman Schottke, "I got the blood on the watch when I took her pulse." Let's follow that story through logically.

That means that he got the blood on the watch after he came to in the bedroom. So he came to in the bedroom,and then to believe his story he heard a noise downstairs. He has the watch at this time. He chases the man downstairs, and he chases and he loses on the beach, and he has the watch on then, when he is on the beach, to follow this story through logically.

And do you believe that the man then took his watch off, took his key chain off him, and his ring off him, went back up those long flight of stairs

some 52 steps as Patrolman Drenkhan testified, went back into the house, back up the stairs to Marilyn's room, took Marilyn's watch off her, came back into the den, got the green bag out of the den, and then went down the stairs, the foot of the stairs, where Sam Sheppard was laying, just knocked out, and threw the bag. Is this logical? It just doesn't fit.

We know from the evidence from Detective Grabowski, from the green bag, from the watches, that what took place in that house took time.

And remember that the time of death was between three and four o'clock, and that it was just a coincidence that the Houks were called when daylight was starting to break. Something had to be done.

And were the police called? No. The Houks were called.

We know from the testimony of Sergeant Dombrowski about the blood in the house, and that there was blood going down the stairs, going out the front door, on both sides of the stairway, the stairway going through the L-shaped living room, and the stairway going down to the kitchen, and both out the front door and out the back door, and that

there was blood going down the basement, and that the blood going down the basement was human blood. We know this from the precipitin test that were tested by Henry Dombrowski and by Mary Cowan, and we know there was human blood from the second floor to the first floor, on the precipitin test, tested by Mary Cowan and Henry Dombrowski.

Then we have the testimony -- I might just call this to your attention, you remember the testimony of Detective Dombrowski as to the chair, the red chair that was in the room?

He testified that he found blood on the chair on the lefthand side, on the side here. And this is important when you consider the testimony of Mary Cowan, because although she didn't get a benzidine test, or positive benzidine reaction to the back of the left pant leg, she got a luminol reaction. And isn't this consistent with right in there, when he sat on the chair.

And she told you that she examined those pants, and we have them in evidence here, she testified that she saw on the front of these pants in this area, and she described for you, brown, reddish-brown specks that tested positive on the luminol test as blood.

But, of course, she was honest and she told you she didn't get a benzidine reaction, and she told you why she thought she didn't get a benzidine reaction, because she knows through her experience that blood that is placed on an object, a fabric such as this, and then comes in contact with water, will wash out readily; and you don't get a positive reaction on the benzidine.

Then they try and say that is copper sulphate. Their own doctor, Doctor Kirk, said copper sulphate is a bluish material. These are reddish-brown stains, and they are on the front of the pants, they are on the cuff of the pants, and they are on the back of the left leg.

And she can tell you there is a larger spot that she did get a positive for blood, and it was blood, and I believe she typed it and I believe she got a type M on those particular pants.

And, of course, Marilyn Sheppard we know is a type O-M.

Then we have Mary Cowan's testimony as to the watches. She testified as to the examination she made on the watch, State's Exhibit 24.

And we have slides and photos of this watch as they appeared when she examined on the

5th or 6th of July, 1954, and of course it is completely different than it is today.

She told you what she saw on that particular watch. She told you that she saw splatterings of blood, and she described what a splattering is.

We don't have to be an expert, when we saw that particular slide on the screen there. Those are splatterings.

And isn't it strange that the watch being worn on the left hand, that the splatterings are down in this area, and they are void up in here, on this side, that most of them were below the numeral 6, as she testified.

And isn't this consistent with somebody standing over the bed, because you wouldn't get blood on the back side here, but you sure get it on the front. But, "no, I got this when I took her pulse."

It is also significant that she tested the green bag, and the green bag tested negative, no blood on it.

This means both the inside and the outside of the green bag had no blood on it.

This means that the watch which had blood

on it had to be dry when it was placed in that green bag, and the other objects were placed in that green bag; the blood on that watch had to be dry, and this takes time. And, of course, we had time here.

Now, Mary Cowan concluded the State's case in chief.

I anticipate that at the conclusion of the arguments Judge Talty will instruct you as to principles of law, and he will instruct you about circumstantial evidence. Listen to that instruction.

There is nothing mysterious about circumstantial evidence. It is just common ordinary sense. And it is allowed in all criminal cases, because by its very nature crime isn't committed at the 50-yard line between the Cleveland Browns and Philadelphia Eagles game. Crime is committed in the nighttime, when there are no witnesses.

The Legislature saw fit to allow circumstantial evidence. As I say, there is nothing mysterious about it. It is just common sense, and I am sure if you look at the common ordinary sense factors in this case, such as the watch, and as I said, we don't have to be an expert to see the blood splattering on that watch, this can only mean one

thing, that that watch was in the room, he was wearing it when Marilyn Sheppard was killed, and the splatters are on it. There is nothing mysterious about this.

Last week my little boy who is three years old went out in the kitchen where there was a chocolate cake on the stove and he came back in the front room and he had frosting on his hand, I didn't see him put his hand on the cake; but I didn't have to be Einstein to figure out that he did.

This is just common ordinary sense. We have the T-shirt. When the Houks got there, there is no T-shirt.

And we know by their own admission that the man who inflicted these wounds had to intercept the blood that was coming up from the bed; and where would he intercept that blood? On the T-shirt.

And we know from Mrs. Franz, who came in here as a nurse, that it took four people to get his pants off of him, that were soaking wet.

Well, how many people would it take to get a T-shirt off? How many of you when bringing your children home after they have fallen asleep in the car have trouble getting their snowsuits off, which would zip off? This is just common ordinary sense.

Can you tell me that a man who is knocked out on the beach, that another man or whoever this intruder was, was going to take the time to pull off his T-shirt? What did he want, a souvenir? This is ridiculous.

Then we have the jacket, State's Exhibit 1. You know, witnesses come in here -- and this is what is so nice about circumstantial evidence -- and, of course, you have a duty and an obligation to weigh the witnesses -- circumstances don't lie, nor are they mistaken, these are just facts, and it is a fact that this coat was laying on the couch where he allegedly fell asleep, and he was wearing that coat at 12:30.

Yet at 6:00 we have that coat laying on the couch, and we also know from the evidence from Mr. Ahern, it is uncontraverted, that it was chilly in the house that evening.

And we all know from our common experience that you get cooler in the middle of the night, and I don't believe that he took that coat off and laid it down at the edge of the cot where his feet were and then went back to sleep. This is just not reasonable.

Then we have, of course, the absence of

any marks on the beach. The story he told is refuted there.

Patrolman Drenkhan said he looked down there. There were no marks on the beach.

Then, of course, we have the various stories told by Sam Sheppard to various people at various times, and they all vary.

These stories are consistent with only one thing, they are consistent with guilt, they are consistent with the fact that on the 4th day of July, 1954, Sam Sheppard purposely and maliciously killed Marilyn Sheppard.

Thank you.

MR. BAILEY: May we approach the bench, your Honor?

THE COURT: Yes.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. BAILEY: The record will reflect that on each of several occasions, when referring to an interrogation which the evidence showed involved only one person, that is, the witness and the defendant Sam Sheppard, the prosecutor persisted in using the term "unrefuted."

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There is a string of cases that holds this is a comment on the failure to take the witness stand of the defendant, and I think it is grounds for a mistrial, and I so move.

THE COURT: Overruled.

MR. BAILEY: The prosecutor told the jury that there was evidence that the defendant had admitted to infidelity. There was no such evidence.

Patrolman Drenkhan tried to volunteer it and I objected and the question was stricken out.

There is nothing in the written statement about it.

It is horribly prejudicial. I objected when the remarks were made, and I think that, too, is grounds for a mistrial, and I so move.

THE COURT: Overruled.

MR. BAILEY: I ask that a special instruction be given as to the lack of evidence as to any indication of infidelity, and the jury be told that it has no part in this case.

THE COURT: Overruled.

MR. BAILEY: My rights are saved to each. Is the Court going to permit the prosecutor to continue to use the word "refusted"? Because I

should like to get authorities. That is a Federal Constitutional violation.

THE COURT: I am interested in any authority you have, Mr. Bailey. But right now we will hear the opening argument from the defense, and at that time perhaps we will --

MR. SHERMAN: I will only take about fifteen minutes at the most, your Honor.

THE COURT: All right.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

THE COURT: Ladies and gentlemen of the jury, for purposes of opening argument for and on behalf of the defendant, the Court will call counselor Sherman. Counselor Sherman, please.

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CLOSING ARGUMENT BY MR. SHERMAN

MR. SHERMAN: If the Court pleases, Mr. Corrigan, Mr. Spellacy, ladies and gentlemen of the jury: At this time, again, I would reiterate what has already been said, what we say to you now is not evidence.

It is only our ideas of what the evidence showed. What Mr. Spellacy just stated is what he thinks the evidence showed.

Before I continue, I want to come back, and thank you members of the jury for being so attentive during this long trial, and I know that you will continue to do as good a job that you have. We want to thank all of you for your work.

The State has presented quite a bit of evidence here. You will recall when you started this trial that under oath each and every one of you stated that you would give to this defendant that presumption of innocence that the law says he must have, and that you would continue to give him that presumption of innocence until the State of Ohio, not the defendant, until the State of Ohio proved the defendant guilty

beyond a reasonable doubt, as defined by the Court.

The duty is on the State of Ohio, and I would like to talk to you now merely on the State's evidence, forgetting for the moment while I am talking to you that the defendant produced any evidence.

What did the State produce to carry this burden beyond a reasonable doubt? It produced the Aherns, friends of the Sheppards.

But what value did the Aherns' testimony have to proving Doctor Sheppard guilty beyond a reasonable doubt? They stated that he had the jacket on when they left. They stated there were lights on when they left.

And, important, they stated the lake side door was bolted but they didn't know if the Lake Road door was bolted or not.

Everything that they said is just as consistent with the innocence of Doctor Sheppard. There is nothing inconsistent with that.

Doctor Adelson was brought on. We stated at the beginning of this case, ladies and gentlemen, we all know that there was an ugly murder that night, and this is what Doctor Adelson proved, and we admit that Marilyn Sheppard was

murdered that night. Then came the Houks; and what did both the Houks prove or add to the testimony of the guilt or innocence of Doctor Sheppard?

Spencer Houk observed Sam's injuries. He stated his face was swollen. He observed the injury to Sam's face, and he heard Sam's story, and I will talk more about the stories later; and he saw a footprint in the sand which will show or can show that someone else could very well have been on the beach.

But there was never a cast taken of that print, never anything done with it.

Esther Houk testified that the front door was open when they came. Again, this is consistent with the doctor's innocence, that someone else could have very easily gotten in that house, at any time, without any forcible entry.

All the testimony is that that Lake Road door had been opened and unlocked.

And I question whether their reactions are normal on that night. I think if we each put ourselves in that position of the husband getting a phone call, would he take his wife with

him on such an emergency phone call, unprepared for anything?

And would you women go into a room where there was a badly beaten body and not run down the stairs, come down the stairs and calmly say and not as the prosecutor said, but calmy say, "Call the police, call the ambulance, call everybody."

I don't think this is the normal action for a woman under the circumstances.

We have Officer Drenkhan's testimony, and how many times has this coat in testimony been referred to as the neatly folded coat, and any time anyone neatly folds it, they take it and throw it and it becomes neatly folded, the same as when you would get up if you are sleeping and you are warm and you take your coat off, and you lay it at the end of the couch, it is now neatly folded.

Certainly it is consistent with laying the coat at the end of the couch, that each and every one of you would do if you took it off.

And you have the weather reports. The temperature that night was 70 degrees. That is not cold.

Officer Drenkhan's testimony is important for something else. They searched that house high and low, and they searched the grounds and they had divers in the water and there was no weapon found. If Doctor Sheppard committed this, where did the weapon go? There is no evidence he left the house.

Someone carried a weapon away from that house, someone who was not in that house when the Houks arrived.

And we heard that there were no marks on the beach when Drenkhan went down to the beach.

You are allowed to use your common sense, ladies and gentlemen, and water washing back and forth on the beach, how many marks do you have left?

Robert Schottke, again, I want to point out one very important difference in what was just referred to you.

One of the statements was that when asked, when Schottke asked Doctor Sam, "How did you get the blood on this watch?" he said, "I took her pulse."

Recall the statement that Mr. Schottke said Sam was confused, as you and I would have been confused under such circumstances, and he said, "I may have." He didn't say definitely "I took her

pulse." We don't know. He says he may have. That was an explanation that he might have done it. He did not say he did it.

And again Mr. Schottke observed the injuries to Doctor Sam's face, although as an investigator he felt for some reason that it was not important to find out if he was injured.

I think you as individuals using your common sense, it must have been very important whether Doctor Sheppard was injured that night.

Coroner Gerber, we won't dispute the time of death. We told you that at the beginning of the trial, I believe.

Coroner Gerber attempts to make an imprint, a surgical instrument out of this print in the pillow.

He searched the United States in twelve years and hasn't been able to find what he says was the instrument, because there was no instrument on that. If it was it was not a surgical instrument, as he would like you to believe.

And he contradicts his own Doctor Adelson. Doctor Adelson testified, if you will recall, that the teeth could have been broken by an outward pull. Doctor Gerber says no, but he does say the inside

of the tooth could have taken the blow from the lower teeth. Isn't this consistent with a pullout?

He says there was no blood on the belt. This I believe is only consistent with the innocence of Doctor Sheppard.

There would have been blood all over the belt.

Marilyn's watch was taken from her wrist, and we are to believe that there was some long period of time intervening.

Doctor Gerber testified that blood on the wrist would take up to three minutes to dry, to dry, not to get tacky, to dry.

There was plenty of time, or, it would take a very short time for blood as it was on the wrist to form the impression. It wouldn't to have even been dry when the watch was removed.

The detective testified that the fingerprints were all wiped out of the house. Whose fingerprints are more natural in that house, and who would be the last person to want to remove his fingerprints from his own house? The defendant.

Someone who did not want their fingerprints found in that house removed them, not the defendant.

This is the natural place for his finger-

prints.

Lieutenant Poelking, the thumbprint on the headboard of his wife's bed, this is a natural place for the husband's thumbprint.

We have the spots throughout the house. Sergeant Dombrowski checked the spots and said there were spots throughout the house, and he checked two of them and out of the two one was human blood. We don't know how many of these spots were human blood. But even if they were, the spots throughout the house or not, inconsistent with the defendant's innocence; whoever did it could just as well have made these spots. There is nothing saying that it had to be the defendant who did this, even if we assume that they are blood spots.

Mary Cowan, she found minute brown stains on the front of the pants. And I ask you, after looking at the photos, if any murderer would have minute brown stains on the front of his pants? He would have large stains all over his pants.

And they tested positive, luminol, and negative, benzidine.

The blood that the detective tested on the door, the two spots tested positive luminol, but only one turned out to be human blood.

And we know that at least copper sulphate and rust can cause luminol to react, we know at least these two items can.

The large spot on the knee, if these spots on the top did not react to benzidine, why did the large spot on the knee react to benzidine, and they had the same treatment. It doesn't add up.

The large spot on the knee wasn't there before or after the water came. Mary Cowan stated it was there before.

If we as a matter of argument accept that, this could very easily have gotten there when Doctor Sheppard checked his wife the first time.

There is nothing inconsistent with his innocence.

The blood on the watch, we don't even know whose blood this is on the watch.

Mary Cowan testified that she could not type the blood on the watch. It was inconclusive.

Yet we know she typed smaller spots of blood, and if it is the blood of Marilyn Sheppard, from the door, testimony there was spots on the door, spots on the wall, and on the floor, of the

hallway, even, is it inconceivable that Marilyn was still alive and the beating was still going on when Sam came up the stairs in response to the scream, and that there was blood flying when he came into the room?

But I wonder how close an examination of that watch was really made.

We know from testimony that there had to be fingerprints on that watch. We know it was handled after it was found. It was handled by the boys. It was handled by the police, and yet her examination reveals no fingerprints.

How close was this watch really examined, ladies and gentlemen?

And again she testifies that there was no blood on the belt. They never identified the red substance on the floor whether could have come from a third person, and she testified that there was sand, there was sand in the cuffs, and in all but the lefthand front pocket of Doctor Sheppard.

Everything consistent with his innocence, and inconsistent with his guilt.

The prosecutor has asked you how long it would be to take off a T-shirt. I think I could tear a T-shirt off a person in about half a second;

and it wouldn't take four people to take it off; it wouldn't take two people to take it off. It would take one jerk to tear a T-shirt off of anyone.

You will recall in the opening statement that we stated we would agree with 90 percent of the evidence the prosecution presented, and we still agree with 90 percent of the factual evidence that the prosecution presented.

We can't agree with all their erroneous opinions drawn. But we can agree with most of the facts.

But the circumstantial evidence must point to the guilt of that man, and that man alone, and to convict him it must have no other reasonable hypothesis. And I don't think from summing up the total evidence that the State alone, not even considering the evidence that the defendant has produced, that this test can be met, or that the defendant can be convicted.

I said I would speak on the stories of the defendant. There were differences in his stories. Some were more complete, some were less complete.

And I would ask each of you to think,

if this happened to you, after all this happened, after being knocked out twice, could you get up and repeat a story bing, bbing, bing, bing, right down the line, and never leave a thing out, add a thing, subtract a thing, or change a thing?

If you could you would be lying, because you had a memorized story.

The differences show that the defendant was telling the truth because this is a natural difference for anyone to go through such circumstances.

I think, ladies and gentlemen, when you deliberate this case you will do one thing and one thing only, and that is to find the defendant not guilty.

Thank you.

THE COURT: Ladies and gentlemen of the jury, it is 11:30, and we will have an early luncheon recess, following which we will hear the concluding arguments, so we will stand recessed for lunch until 1:00.

But it is the Court's hope and intent that we start promptly at 1:00, so perhaps you can get returned here or be returned here shortly before 1:00, so that we can commence as close to

1:00 as we possibly can.

Counselors have already indicated to me that they will be prepared to go forward at 1:00.

So while you are away on your luncheon recess, you shall carefully observe the instructions given you on each occasion when you have gone from this room, and that is that you shall not discuss among yourselves what you have heard of this case. You will not permit anyone else to discuss it with you; nor shall you permit yourselves to overhear anything that relates to this cause by any means of communication; having in mind specifically the instructions given with reference to printed material, radio, or television, we will stand recessed for lunch until 1:00.

(Thereupon an adjournment was taken to 1:00 p.m., Tuesday, November 15, 1966, at which time the following proceedings were had:)

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Tuesday Afternoon Session, 1:00 p.m., November 15, 1966

(THEREUPON, the following proceedings were had in Court's chambers:)

THE COURT: Let the record show that we are in chambers with counselors, and that the Court has discussed with counselor Bailey his objections to that portion of the argument made by Counselor Spellacy earlier this morning relating to certain unrefuted testimony and evidence adduced by the State during the trial of this case.

The Court overruled Mr. Bailey's objections, and his motion for mistrial, and these rulings are at this time reaffirmed; the Court believing that the record of this case will show that refutations of this claimed testimony could have come from persons other than the defendant himself, had the defense chose to adduce such witnesses, or to examine witnesses adduced by the defense in the areas in which Counselor Spellacy argued.

However, the Court in a desire to be fair and also having in mind several United States Court of Appeals decisions, which has spoken in this area, is now advising Counselor Bailey and

Sherman that in its charge the Court will instruct the jury as follows:

That the defendant has seen fit to exercise his constitutional right and not testify from the stand in his own behalf. In making this decision he was within his legal rights. The fact that the defendant did not testify must not be considered by you for any purpose in arriving at your verdict. You are not permitted to draw any inference from his failure to testify.

The Court also is advising counsel that it intends to further instruct the jury in language perhaps not precisely as now given, but in substance, which will be as follows:

The State in closing arguments referred to certain unrefuted testimony presented by the State. I charge you as a matter of law that any intimation or suggestion in such argument attempting to place the burden on the defendant himself to deny such testimony, must be wiped from your mind and memory and disregarded by you in your deliberations.

Anything further, gentlemen?

MR. BAILEY: May the record also disclose that we have had reproduced for the

benefit of the Court two pages extracted from the testimony on direct examination of Fred Drenkhan, police officer, wherein Mr. Drenkhan was asked: "Did you have further conversation with him?"

Answer: "We asked him if he had any extra-marital affairs. The only one he mentioned at that time was Susan Hayes. He said this was the only person he knew."

"Mr. Bailey: May we approach the bench?"

"The Court: Yes."

The objection to the line of questioning was lodged, and it was sustained.

We feel this record is barren of any evidence that justified the comments on defendant's infidelity or extra-marital affairs as the case may be, and it was prejudicial error, again, because as we stated in our motion for directed verdict, although some of these people may have forgotten about Susan Hayes, it takes very little to resurrect her as an image of infidelity attributable to the defendant, and we think the area being as sensitive as it is, this is what resulted from the mention however quick and oblique as made by Mr. Spellacy in his opening argument.

THE COURT: Again, the Court in overruling the defendant's objection to this line of argument had in mind not only the testimony just referred to by Counselor Bailey, which he has reproduced, but also State's Exhibit 27, which has been received as an exhibit in this case, wherein reference is made to the Susan Hayes affair.

Anything further, gentlemen?

MR. BAILEY: Well, for the record, I suppose, your Honor, to indicate the purpose of bringing this up I should renew my motion for mistrial, on the infidelity comment.

THE COURT: Let the record show the motion is overruled.

(Thereupon proceedings were resumed in the courtroom, in the presence and hearing of the jury, as follows:)

THE COURT: Good afternoon, ladies and gentlemen.

THE JURY: Good afternoon.

THE COURT: Ladies and gentlemen, you will bear in mind that at the outset of the closing arguments and summations this morning, the Court instructed you that these final arguments or summations are not evidence, and will not be so considered by you.

That is true of what you have heard by way of argument, and what you will now hear by way of further argument.

For purposes of the final argument for and on behalf of the defense, the Court will call Counselor Bailey.

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CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. BAILEY: If it please the Court, gentlemen for the State, and ladies and gentlemen: It may seem somewhat anomalous to you that you were forced to sit for days on end to listen firsthand to the evidence, and then suffer through the procedure whereby the lawyers get up and tell you what you have heard.

I am sure your collective minds have retained more of this evidence than I can recount, and I will not attempt to.

This is not, although it is often wrongfully characterized as such, an argument, because you can't argue death.

Jurors by definition are silent and they speak but once, but very important words. And if in days past lawyers made big names by lofty oration and adventure into some wild rhetoric, I am not of that caliber, I am afraid, and I have no lofty oration for you.

You were given a nasty job to do, and you have some nasty evidence to look at. It is laid out on this table and I shall allude to it in the course of my argument; and my purpose is only to

appeal to your logic, your analysis, and your ability to put together from the evidence produced by the State and by the defendant all of the truth that has reached your minds and is accepted by you as true, and come up with an answer if you can; and if you cannot, you at least tried, if you cannot resolve your doubts as the law says you must.

I have no notes, no outline, I have no planned presentation to give you. If I seem over-enthusiastic at times, please bear in mind that today is November 15, 1966; five years, 1,826 days we have waited for this hour.

First, I think we should settle just exactly what we are not trying to do. A lawsuit is a contest. Attorneys by definition and by obligation are required to take a side, and to point with tenacity toward everything that benefits their side of the controversy, and to point with doubt at everything that does not.

This does not mean that we are trying to buffalo a jury. I think that lawyers who try to fool juries have very little success.

There is too much combined intelligence in twelve citizens to buffalo. It is not a contest between the good guys and the bad guys, or the white

hats and the black hats, and I have no hesitation in saying that in many jurisdictions where I have appeared and tried cases, I have never met lawyers of any greater caliber than you have seen representing the State of Ohio in this case.

When Mr. Spellacy concluded his closing argument, it took me a while to realize that this was not a strong case, but it was a very good lawyer describing it.

And it is well, I think, because this is an important case to the defendant as well as to the State of Ohio, that good representation has been had. So that you may be satisfied that you need not go out and look for some theories never advanced.

If there is a good case for the State, it has come from Mr. Spellacy or it will come from Mr. Corrigan, or it doesn't exist. Speculation by the jurors is not necessary.

We have also been benefited -- and I throw no kudos at the bench because it can do the defendant no good at this point, his fate is in your hands -- by a very able trial judge who has conducted the trial in the kind of decorum that the people who wrote the Constitution of the United States intended.

It is a serious business, and you have been sharply limited, you have been sacrificed to protect yourselves from the dissemination of information not guarded, not refereed, by the one man who can allow you to hear a fact, or who can rule that you must not hear that fact because it is no good in this case, and that is Judge Talty. So the sacrifice you have made, although difficult, is certainly worthwhile.

Now, we attempted to narrow down at the very outset of this case what we would and would not litigate. Ninety percent we said of the prosecutor's opening was admitted, and we now say and we may make comment, that ninety percent of it as to the guilt or innocence of Sam Sheppard is equivocal or meaningless.

There is only one statement that I recall from that opening statement, which was a promise to you, the jury, a promissory note which is payable now when the case is dumped into your hands, that has been demonstrated to any degree. The prosecutor said, "We will prove that only one man was in that house that night."

There are two kinds of evidence in this case, but only one upon which the State relies.

There is direct evidence, by an eye witness, who has given a story which has been placed before you, and he reports that they, two people, were in his house that night and killed his wife.

But the State, because they cannot accept that story and still allege guilt, tells you no, disregard this witness, depend on the circumstances. Fine, fine. We like circumstantial evidence, too. It can be very reliable.

I am sure you people had a bellyfull of voir dire examination of jurors, those of you who were chosen earlier and had to sit through the questioning of the rest, you are all satisfied that there is a way to determine that rain has fallen without seeing it fall.

On the other hand, lest one too quickly concludes that circumstances point where they do not, rigid tests are applied, they will be given to you by the Court and they must be conscientiously applied by you, or this system of justice that we value so highly can easily misfire.

There is nothing much more horrible to contemplate in a free society than a man sitting in a cage for something he didn't do.

You must understand in fairness to all

of us, that by the nature of the procedure we adopt, we do not get to sit down with you at the end of the day and say what did you think about this, what do you think about that, and more or less keep you up to date.

I am sure you have some thoughts about this case even though you have had no discussion, and we may touch upon things you already agree with.

You think to yourself, why is this lawyer trying to ram something down my throat that I have already accepted? Well, be patient, if you will. It has been a long trial. There has been a lot of evidence, a lot of testimony, and just bear in mind I have no way of knowing what you already know, or whether or not something needs to be brought to your attention, and if there is a doubt I am required by my oath as an attorney to do the job all the way, and not just partly.

I don't think any man likes to heap criticism upon his fellows, especially when they are or have been probably diligent and sincere in their purpose.

But this is serious business. This is a grave challenge, and it is far better to call a spade a spade than to lightly pass by things

that should be brought to your attention, things that were done that shouldn't have been done, and much more important, many of the things that were never done that should have been done.

There is an old story which fits this case like a glove. A man walked down the street and saw a lady looking around under a street lamp. And he said, "Madam, can I help you?"

She said, "Yes, I dropped a dollar and I am looking for it."

He said, "Where did you drop it?" And she said, "Oh, about fifty feet down the road."

He said, "Why are you looking here?" And she said, "Because the light is better in this area."

The reason that Sam Sheppard was accused was because he was the handiest guy, and that's all.

And while this was going on, while attention that should have been open and flowing out in every direction for two people at least, was focused upon the handiest object, two murderers were walking around the streets of Ohio. And I suggest to you unless they have died they still are.

Marilyn Sheppard was murdered. This was himicide. It was committed by a human being,

there is no question about that, there is no point in arguing it.

You didn't see Doctor Lester Adelson cross examined at any length. There is no question but what he found a dead body, and his opinion that an instrument caused it, there is no question about that either.

Now, the people have a right to redress upon a human being. A citizen is wiped out, in this brutal fashion. And one of the people that has that right, the right to pin the blame on the guilty party, is the widower who is left behind.

This case is the People of the State of Ohio against Sam Sheppard; and too easily the notion creeps in that the jurors are the people.

You have for purposes of this trial been lifted out of the people. You are the judges that pass between the people as represented by counsel, and the defendant as represented by my brother Sherman and myself. These are not your attorneys for this purpose.

The only way that a fair trial can be had between a power as mighty, as large, and with as many resources as the Juggernaut that is the State of Ohio, and one single citizen who is the

defendant, is if the barrier of a jury is thrown in between.

Despite your silence and the fact that you are herded from place to place at times all strictly controlled by the Court, despite the fact that all the action is generated by the attorneys and through the witnesses that they produced and examined and cross-examined, and to some extent by the Court as rulings are made as to whether you should or should not be given certain facts; when all is said and one, and the smoke is cleared away, the power is all yours.

And this is our last opportunity before we hand you the responsibility, all that this defendant has to his name, to take with you and judge.

Citizens in this country really can do two things that I consider most important; they can vote in elections and make their collective weights felt, and they can sit on juries.

The defendant has the power to say, "I don't want a jury; I will take a judge, or more than one." But there is no man in this country too small to demand a jury, to demand a judge, and to demand counsel, and there is no man in this country so large that he can't be brought before a jury, and be judged.

This is the great equalizer. This is probably why we like to say this is the best country in the world. This is probably why people go to Viet Nam, or wherever they have to go and shed blood and fight. It is this courtroom right here. This is our unique institution. This is the greatest system of fair play, with its many many drawbacks, that we have ever been able to devise, and this is what we really are defending when we battle.

Other countries have other systems. We don't use them. We use this system. It is clumsy. This country does not trust human power.

We split our government into three groups, each one checking on the other. Those who make the laws cannot sustain the laws.

Those who have the power to strike down the laws cannot make them.

And so it is with the trial of a legal lawsuit. We don't put too much power in any one area and that is why we cannot call one citizen to be a jury, the dangers are too great.

But the collective power of twelve people, with the checks and balances inherent in different backgrounds and different reasonings, are the safety that we rely upon.

Oddly enough we extract you from society, and you must have no detailed experience or you probably wouldn't be allowed to sit. Professional jurors don't exist.

A long time ago jurors used to be made up of people who knew something about the case, back when the system was first devised.

Now we insist on people who don't know something about the case, so that they will decide solely on what they are told lawfully in the courtroom.

And once you have acted, once this collective power is exercised, and it is the greatest power in the world, the only power in the United States that can under appropriate circumstances lawfully wipe out a human life, then we disband the power. You jurors can never be reassembled, and always always bear in mind as you will be told, you are the final judges of the facts.

We may appeal what the judge does, but not what the jury does; and you can never be reassembled to reconsider what you have done.

If you fail to recognize a reasonable doubt, you make a mistake, you can't correct it.

Now, with that in mind, let's proceed

to the case of the State of Ohio against Sam Sheppard and see what it consists of.

I have referred to the more than able argument of Mr. Spellacy, and I anticipate a corker from Mr. Corrigan, and the State is entitled to their say, certainly.

But precious little reference was made this morning to the exhibits themselves. If there is a story to be told, it is not the attorneys conjuring up that story, but it is the evidence that must tell it, because as the Judge says, what we say is not evidence, nor should it be.

We didn't see the crime committed. We weren't even around. We had nothing to do with it. But these things may tell a story.

There were photographs produced by the State, some by the defendant. These have preserved the scene of the crime for your study, and these photographs tell a story.

Your diverse backgrounds I hope will enable you to collectively understand the evidence in this case and to piece it together and to see a great deal more truth than has ever been extracted from it before.

According to your background in one area,

science, you will be able to help the others as to the technical testimony that came in.

Those of you with just common ordinary good sense and a lifetime of human experience, will be able to make a judgment on the probabilities as to whether or not a certain thing happened.

But there are two things that you are required to do by law, and these are no more than a descipline. It is like getting up when you are in the Army and marching at six o'clock in the morning for no reason other than you have to march. It isn't logical but you have to do it.

There are reasons in the wisdom of the law for these two propositions, and whether or not you understand them you will recall that counsel were very careful in selecting you, to ascertain that no man or woman sitting on this jury would put himself or herself above the law and say, "I don't like that rule and I won't follow it."

In the civil law, probabilities are important. In a civil case, a suit for money or property, whoever has the greater weight of the evidence, the probability of truth in his favor, is entitled to a verdict.

In the criminal law, because of the

horrendous potential results, a safeguard is injected so that no mistake can be made if it is humanly possible to avoid it, and that safeguard is all summed up in the term reasonable doubt.

The Legislature of Ohio has defined a reasonable doubt. In other jurisdictions courts have defined it. There are many definitions.

The irony of the matter is that a reasonable doubt is no more, no less than what you say it is, because you will never be called back into this courtroom to define what you thought it to be in this particular case. You took an oath to speak guilty or not guilty and no more.

But it is important to understand the concept because there is an area between probability, if you should reach that level, and I suggest that you ought not to, but between that level and the point of reasonable doubt, that is to say, a doubt with a reason behind it, a doubt that would prevent you from feeling sure, somewhere in that gray area the temptation to find the fact of guilty despite a reasonable doubt, is strong.

It may seem unfair that the State has to go so far, but this is the safeguard; and it is only good if you exercise it.

We have no check on it but the integrity that we thought you had when we said, "Take the juror, pass the juror," both sides.

I think you can easily recall, although it is a week or so ago, the questions that were asked and understand the reasons why.

Neither side sought any advantage in picking a jury of predisposition. You came in here with clean slates, blackboards, in your minds without a character or symbol written there. That is all we ask because then the case is on the evidence.

And you were asked at that time, and I reiterate it now, because you have heard much evidence which may have sparked old memories, whether or not you could put aside anything you might remember, triggered by something said in the course of the trial that you knew came from outside this courtroom and not appeared in evidence, and all of you said on your oaths that you could, and if that has happened, we must assume that you will do so, and that those rules will bind.

The other rule which is thought to be perhaps illogical, that you agreed to accept, and you will be given by the Judge, is the appearance of the defendant. As you were told, the defendant

didn't have to present any evidence. The defendant did not take the stand. He has a Federal Constitutional right not to do so. These are the rules of the game.

You have no way of knowing what the defense might have done if the rule were otherwise, because this is the rule that we operate under, and that we depend upon, and in making the decisions necessary to determine how this trial will be run we have to assume that this rule will be followed conscientiously, whether you admire it or don't like it. It is the law of your country.

The failure of the defendant to take this stand and go through his story now after twelve years, and subject himself to whatever questions the State might now have to put to him, is no basis for any inference that he is hiding something.

An indictment is the legal means by which we bring a man into court to answer to a charge, but to an innocent man it is an insult. And unless and until the prosecution in any criminal case proves or produces some good evidence of guilt, there is no call upon a citizen to personally answer that insult.

The evidence makes this case crystal clear.

Circumstantial cases are built out of pieces of evidence that eventually put together a structure of some kind, call it a building for analogy. If the evidence is there, the building will be complete, and the truth will stare you in the face. And if it falls short, there is a failure of proof, and the defendant is by law to be discharged.

And so we start with the proposition that we have a decedent. There is murder. The sole question is, does the evidence single out the defendant? Is he the man, must he necessarily be the man on all that is proven, all that you believe?

My brother Sherman has attempted to demonstrate to you or to suggest to you in appropriate fashion that even the evidence of the State if you had been left with that, falls far short of singling out Sam Sheppard as the culprit beyond a reasonable doubt.

There are chancy little bits and pieces which don't really point in any direction, consistent with innocence and consistent with guilt.

There are some pieces of evidence in the State's case that are wholly inconsistent with guilt, and I shall mention them.

The fact that Sam Sheppard could have killed his wife, if you believe that he could -- and not a shadow of a reason has been given to you why he might want to after that pleasant evening on the 3rd of July -- the fact that a man could do something is not proof of anything. It would not be enough to get a verdict in a civil case. You must find in your hearts and your minds that you are sure that he did, or your job is acquittal.

Now, in building the structure which is the murder of Marilyn Sheppard, you take the evidence that you find to be reliable and put it in place.

Sam Sheppard had a story to tell. It has been reproduced for you through several witnesses, and it is all he could give at that time, and it was vague.

How suspicious might you be if every time somebody said, "What happened?" a button were pushed and word for word the story came out? Contrivance? Sure.

And if that had happened very able counsel for the State would be here arguing that it is a pat story.

But here is a man who slept, and from the evidence slept deeply; and from your own experience

you know, those of you who also sleep deeply, that one wakes up groggy, disoriented, the eyes slowly unsnapping and beginning to see what goes on.

And then he was struck in the back of the head. Is there any doubt of that? Has there been any shred of evidence produced by the State to the effect that this man was not injured?

Was one doctor called to that stand to say that he wasn't hurt? Were the doctors called by the defendant with good sound objective proof of serious injury, were they destroyed, torn apart, or shown to be liars or incompetent?

Now, if he was knocked out and if he was later knocked unconscious -- and at this point I don't know what the State's position is -- witnesses said they didn't check the sand on the beach. There is no question but what he was down there. Your job, what was he doing?

He said he went down there and he fought, he got sand in his pockets, he had been in the water, his body was clammy when he was taken to the hospital. All of that was corroborated.

He said he was struck in the back of the neck. That was corroborated.

Every single substantial piece of his

story is borne out by the evidence. And I suggest to you that you ought to find, if you are ever called upon to do so -- and you are not -- that this man's innocence is demonstrable beyond any doubt.

But if you reject his story, you cannot by rejecting it say that there is proof of guilt simply because you don't believe what he says.

Then you start from scratch. Then you either put this case together out of the circumstantial evidence offered to you, and believe by you, or you don't have a case; and I ask you what can you build with this?

The evidence presented by the State of Ohio, with all due respect to the skillful manner in which it was presented, amounts to no more than ten pounds of hogwash in a five pound bag. It does not solve the problem presented to you, did Sam Sheppard kill his wife, in any affirmative way.

Would Sam Sheppard have done the following things? Assume, if you will, that for reasons that you are going to have to dream up, because none are offered to you through any evidence, he decides he is going to get rid of poor Marilyn.

Now, this crime charged is second degree

murder, that is to say, murder not thought upon for very long, but rather sudden, without premeditation.

A seven-year old boy asleep at the time was never awakened. You have a right to draw an inference from that.

Did this thing happen out of the blue, if Sam did it, or was there a quarrel going on, something that got very hot, and what was it about?

Do you want to indulge in guesswork, because nobody has told you or given you any help in making that decision.

Could this thing possible have happened with Sam as the killer, without some God-awful battle? Did he have the kind of injuries you would expect if he had gotten in a battle with a woman?

Or did he without ever getting a scratch on himself just strike her down 25 or 35 times? Is that what you would expect of a neurosurgeon? Do you have any explanation, any reason, anything to satisfy you, because behind every deed there is a why somewhere.

No, the State doesn't have to prove a motive, but you have every right to consider it in determining whether or not they have proven guilt.

And the motive in this case is not shown, does not exist, and the law does not permit you to indulge in guesswork.

You know, it is very easy to say something with words, just as Roger Marsters said, "That watch is covered with speckled blood." The photograph doesn't show that, but it is up to you, you are entitled to make a judgment with your own eyes.

But until the photograph is flashed on the screen you would perhaps assume it was covered with blood; just like the nearly folded brown jacket, as Fred Drenkhan says, "Yes, it was."

Well, we don't have to take Drenkhan's word. Somebody took a picture of it. If you think this is neatly folded you are entitled to think so, but I suggest it is not. It is meaningless.

But the State begins with a jacket. This is an item of importance they say. They say it tends to point somewhere.

Now, either Sam got up and took the jacket off as he explained to one of his interrogators, because it was getting warm, or he didn't, he took it off at some other time and concealed that fact.

You have a Defense Exhibit, ZZ, which will

go to the jury room with you, and we are fortunate that part of the money we pay for sometimes onerous taxes is given to the Weather Bureau to keep records, and that exhibit will show you, if you will read it, that on the 3rd day of July beginning at about 11:00 p.m., the temperature at the Cleveland Airport -- and you may use your own judgment in determining whether or not the same temperature is likely to exist elsewhere in the area -- was 69 degrees; that at midnight it went up to 70 degrees; at 12:30 it was 69; at 1:00 it was 68; in determining whether or not that house was chilly that night, it was chilly out on the porch with the wind blowing, and whether or not the defendant might naturally have gotten up and gotten out of a jacket that was warm.

And in determining whether or not that was likely you will also determine with respect to the matter of temperature certain other evidence relating to chills which I will point to later on.

The defendant says, "I charged upstairs, I saw a form." Well, in the light described, you saw the house, how much more do you think a man freshly awakened is likely to remember?

Is there any contradiction to that story whatsoever? Is it even unlikely on the face of the

evidence you have seen? Of course not.

Now, remember the first words he spoke to anyone, in trying to take this case apart and seeing whether or not Sam Sheppard contrived to kill his wife, and then cover it up with a crazy story, he said, "They." "They." "They have killed Marilyn," and he never said anything else but "They."

There is no way in the world, no way that you can conceive that Sam Sheppard approaching an intruder or killer standing by that bed, in the place we know that killer stood from the scientific evidence from both the State and the defense, no way that that person could reach out and rap him on the neck with the force that you have seen must have been applied.

This takes two people, and he was struck down, he was unconscious. Perhaps he saw who hit him.

As Doctor Elkins told you, he could not well remember those things that happened in the last instant, the last flash or second before he was rendered unconscious by a trauma to the back of the neck or brain concussion or whatever you find happened.

It is unlikely that any honest man

recovering from these circumstances would have anything but a confused state of mind or a dim recollection of some events. Important matters, yes.

Now, he says when he woke up the glint of the badge in his wallet caught his eye. There was a badge in the wallet, no question about that. He said it was lying on the floor. Is that likely? Does it make sense? Of course.

And he checked his wife, he checked his son, and suddenly the next important thing that happened he heard a noise downstairs.

Now, he says that he tore down the stairs or ran down or went down and he saw somebody going out the lake door, the front door, as it were.

It is important because you have a right to try to put this case together, involving others than the defendant as the guilty party, and somebody not familiar with the house I think would not go out the lake door because they wouldn't know where it led to, or whether that was a good means of escape, and absent some evidence that there was a person right out front who could see them, the Lake Road door who could see them, and that is not the case.

Assumptively somebody else would be out

there at that time and you would have another witness and you wouldn't have to be content only with the story of Sam Sheppard.

My brother suggests that the burglary was faked. I think the question is not clearly resolved, but it seems likely, it seems likely.

It was not the kind of burglary that Doctor Sheppard could be expected to fake if he were trying to cover up a murder he just committed, and there are many reasons why he could not have done so.

But I think we can trace the path of the responsible party fairly closely.

Now, a murder was done in the room; somebody, somebody had an awful hate for Marilyn Sheppard. I am sure that none of you had ever experienced this, but try to conceive of the kind of hate that would not cool down before you had butchered a woman's head with 25 smashes in the face.

Somebody had a hate that this defendant could never have known, and they sprayed that hate all around that bedroom with her own blood. And suddenly Sam intervenes.

Now, did he see and recognize anybody?

There was no time to ask him. He was knocked out. But unless this is an intruder, if this is somebody who feels that he or she may turn up as a suspect, just through routine investigation, we better do something to throw people off the track, because you must understand that at that point no killers had any idea that over-anxious authorities would shirk their responsibility and go after the only guy they happened to be able to put a finger on, without even bothering to check and see whether or not he was so badly injured that he could not have committed this murder.

Sam's watch you may infer was on his wrist. Being righthanded as all the evidence shows he was, he would wear it this way.

Some of you must wear watches with expansion bands like this one, and you take them off probably every night when you take a shower; and when you do so, habitually, the thumb goes under and you pull it off.

Being a doctor, more important, a surgeon, it is likely that just as a matter of instinct a man would not consciously want to damage his own timepiece.

This watch wasn't taken off Sam's wrist that way although it was certainly taken off. It was

yanked like this.

This is the only way in which this band which you know was broken when the watch was first discovered, could have been broken at that spot, the only consistent way, and that I suggest to you is what happened.

Off came Sam's ring. He said he fought with somebody, or got hit, without remembering the details.

Nobody seemed to notice that an onyx stone was smashed, except a couple of scientific people in the laboratory.

But prior to questioning him and throwing out the filthy accusation while he is lying in bed hurt, just become a widower, nobody bothered to look at this.

And so these things are taken, the key chain, carried in the pocket, removed, hurriedly; as the watch was broken in the haste, so the pants are ripped. You have the exhibit. Is it likely that a man removing his own key chain would rip his pants down like that? It never happened.

Now, Marilyn's watch, Exhibit 22, it is no longer bloody but it was then. The photographs are clear. How did it get that way? Well, there

certainly was blood all over her wrist. But more important, the evidence was left on the wrist, not as the Coroner would like to have you believe, and thank goodness you are entitled to draw your own conclusions from facts proven to you.

Blood dries rather quickly. I think that has been established. This watch was stripped off a hand that was soaked with fresh blood.

If you will examine Exhibit 29, when you get to your jury room, you will be forced to that conclusion, because where the watch is normally worn there is a band, the blood that was left there when it was pulled away.

More important, as it was stripped off the wrist just like a bulldozer pushing snow, it carried with it a quantity of fresh blood which then streamed and ran down the hand.

Even tacky blood couldn't possibly do that. And so this happened rapidly.

Now, it is unlikely, I agree, that any burglar who came in for the purpose of stealing would kill Marilyn Sheppard, or if he did, kill her that way and with that kind of vengeance, or be interested in jewelry of this sort. Who would steal these if he really wanted value?

What good is that, with a symbol, to any burglar?

Down the stairs goes someone with these items in hand, bloody.

Now, anybody in that room when the striking was going on is going to have some blood. Blood was flying, there is no way in the world you can doubt that.

The photographs for the State as well as the defendant show that the room was covered, and the only reasonable inference is that that blood was spurting around that room like a water fountain.

And it is logical that the killer in taking this watch off Marily's hand would have to get bloody, after if not before, he or she, and so the watches may be expected to be bloody, and they were.

Down the stairs they go to the den where the toolbox is open, and this bag is found.

Because blood dries so rapidly, once it becomes tacky it is unlikely to adhere to a surface like this green bag and in fact it did not.

And there is no question, I think, from the physical evidence that someone tried to stuff all these objects in the bag and Marilyn's watch fell out and it was left in the den, but that's where

these items were put in the bag.

And then cursory efforts were made to pull out drawers, rip things up. Why? What was taken? Nothing. To make it look like a burglary, to divert suspicion from someone, someone who felt that investigation would point the finger in his or her or their direction, and so that is why this was done.

This is not consistent with any planned or unplanned murder on the part of Sam Sheppard. There is no sense behind any of it. It is some after-thought to cover up.

But in this content it does make sense, and I suggest to you that with all due respect to your powers to decide the facts of this case, that this is precisely what happened.

Would Sam Sheppard, having cooled down to the point where he could think, and begin to make some plan to hide what he had done, having cooled down that far, would he take and break trophies that had been awarded to him for some achievement of one kind or another?

Now, the photos show and the evidence shows that these were broken, but would someone else who had a hate for Marilyn Sheppard as demonstrated by the way she was left, and perhaps for Sam, too,

we don't know, just out of spite smash them up. Well, that's the way they were found.

Sam says, "I pursued someone out the lake door." We know, according to Mrs. Ahern, no reason to doubt her, that door was locked. So someone had unlocked it, and across the front lawn they went and down the set of stairs that you had to negotiate, in the dark of night, in the dark of night. Could you do it?

Could you, being a total stranger, run down those stairs without falling and breaking your head? No. But if you knew them well, you might stumble along in the dark just as Sam did, he didn't break his head going down.

But when running, this green bag -- and Lord knows where it might have ended up -- is suddenly an encumbrance, and so it is cast aside, exactly where it was found, within easy throw of the stairs going down.

And getting there first, and being faced with a man who awakened from a deep sleep, Sam is badly struck down and injured.

It is doubtful that the person who struck Sam was a woman, but for reasons I will suggest to you, I will suggest that you consider with care, you

may well infer that the person who killed was a woman.

There was a fight on the beach, and a weakened man, not too difficult at this point to subdue, is knocked unconscious again.

It is unfortunate we have no way of knowing when the action began. We have no way of knowing how long the periods of unconsciousness persisted. We have only a vague estimate as to the time of death. We have nothing in the way of reports and examination of these watches to tell us whether or not the times at which they were stopped when they were found was significant.

There is a disparity of about an hour, but we know that this one would run when you picked it up and shook it.

How much time it was caused to run from the time it may have originally stopped when it was cast through the air or handled we don't know.

We do know that there was time between Sam's being knocked out, and Sam's going downstairs to start the chase, for somebody to do the things that were done and were found by the first arrivals.

We do know that Sam stayed in the water long enough to give the appearance of being soaked,

to have leather shoes soaked through, to have a wallet soaked through; and you may examine it. Every card in there is run with dye that came from that wallet, and the dye has run into the trouser pockets, as everyone agrees; lying half in and half out of the water, unconscious, until just about the break of dawn.

How long was he there? We only know that when he arrived at the hospital his body was clammy; or would you disbelieve the ladies who appeared and testified, nurses around the clock who accounted for every shift, would you disbelieve them and say they contrived their testimony to help this man? Or do you think they told the truth?

In putting this case together it takes more than the unbridled enthusiasm and unfortunately ignorant lunging of irresponsible people who jump too quick.

Sam Sheppard was the police surgeon. One would expect since he knew how to call the police, that when this thing happened he would call the police who had guns.

The last Sam knew he was in a fight, perhaps a serious one, perhaps his own life was at some point at stake and the killer left before killing

him, and they might still be around.

He stumbled back into the house, and here his story continues, the eyewitness whose testimony the State offers to you and then tells you to disbelieve.

I think you have no doubt from what Miss Cowan said and what Doctor Kirk said, that the killer was spattered with blood and had to be.

Sam's T-shirt, of course, was gone; probably the first thing that would go in any fight. After all, this is no skinny kid, and probably whoever knocked him out the second time had to fight, or the first, we don't know, we don't know.

But we do know that if he was trying to contrive a killing and get rid of a bloody T-shirt, there were a bunch down in the laundry that he could have put on before calling the police.

Miss Cowan said that these trousers had only one provable spot of blood, and that is the state of the evidence, there is no basis on which you can find as a matter of fact that there was blood elsewhere.

But certainly there was not the kind of blood that you would expect a man from the waist down to the level of that bed, where the blood spatter was

blocked, to have.

And more important, although you can tell we sharply disagreed with her opinion, Miss Cowan said this blood spot may well have been there before he went into the water. Well, that's fine. If that is so, and it didn't wash off, then where is the rest? The rest the guilty Sam would have to have carried with him.

This is an unpleasant exhibit to foist off on twelve citizens. But your duty is not a pleasant one to begin with.

Exhibit 28 shows -- and nobody from the State of Ohio ever thought enough of this to try to match it up with the knee stain -- that somebody with a wet knee put that knee against the blood spot and as Doctor Kirk told you, the blood flowed away from it, as it is natural.

So Sam Sheppard's story once again is corroborated.

Now, says the State of Ohio, Sam said he had his watch on when he checked the pulse the first time. He didn't say that at all.

Here is a guy lying in the hospital, being bombarded with questions, trying to help, contusion or concussion of the spinal cord as it

developed, and he is shown a bloody watch and asked, "How did that get there?"

Well, he doesn't know. That is one possible explanation, but I think you ought not find that that is what happened. The evidence doesn't bear it out.

All of these things in the green bag were part of the effort of someone to cover up. But this watch, says the State, in its original condition before someone wiped it off, which is unfortunate because you are prevented from making a personal and direct examination, this watch is important, this shows that Sam Sheppard was the killer.

Well, not having surmounted the problem of explaining how a righthanded Sam was suddenly switched to the lefthand and used almost sidearm blows to smash his wife to pieces, and not really having resolved the problem as far as the position they will take, and we will learn when Mr. Corrigan has his final say whether Sam did it with his right or left hand, nevertheless the watch is suggestive.

Now, there were spots on the watch, there is no question about that. It is a little difficult to determine what the State's evidence is, because Miss Cowan says some of it was smeared. Doctor Marsters said no, even though he is looking right at it.

But this is why we have a jury. You will get Exhibit 42, you can look at it, decide for yourselves.

If this watch were worn on the hand, and it would have to be the left one that caused the death that swung the instrument, whatever it was, that spattered the blood, the spray if any there came would all have to be from one direction. Most of it would probably skip. Some might catch the edge; although as you try to reconstruct this in your deliberations you may find it unlikely that any would hit.

But in any event, the watch that is presented to you, not here, but through Exhibit 42, cannot have been on that wrist at that time.

If I may have the lights, Mr. Ferguson, just for a moment, I think this fact so clearly demonstrable that we need wast no further time with State's Exhibit 24.

(Thereupon the projection screen was set up in the courtroom.)

Ladies and gentlemen, this is the only evidence we have of what Sam's watch looked like when it was picked up, even though we know it was handled by one or more youngsters before the police

ever got a hold of it, and failed to run it right down for fingerprints in order to find out who killed Marilyn Sheppard as they should have, and you will find on close examination that there are smears all over the place, there are as Miss Cowan said smears on the crystal. There are some drops. That room was full of flying blood and whoever stripped this watch off Sam probably caught some of it.

But there is one blood spot that is able to reach out from 1954 and tell you this was not on the wrist of the man that swung the instrument.

As Exhibit 42 will show, this watch was positioned in such a way so that this half of the band below the 6 was hanging down, and the top half of the band was folded back, and you can see it here, when the picture was taken, and staring you in the face is a spot of blood.

That spot of blood, ladies and gentlemen, as the photograph shows, is right here on the inside, on the inside -- may I have the lights now?

This link right here, and you can see the spot of blood when you examine the exhibit in your deliberation room, that spot could not have gotten there on the inside if the spatter took place while the watch was worn on the left wrist. Again, Sam's

story checks out.

Now, why is the killer of Marilyn Sheppard walking the streets of Ohio? Well, first of all, as has been made perfectly clear, this was no investigation at least at the outset; it was a circus. Everybody piled in to have a look. The neighborhood kiddies were in.

The Coroner gave one special permission, unless you think Doctor Don is a liar, and there is no basis in his testimony for saying so. The kiddies even conducted a search.

No responsible police officer knowing that important evidence might be found, and that its momentary handling could destroy the signature of the person who was a brutal killer, would send teenagers out to find the evidence.

Well, they did. And they got just what they deserved. They found the green bag, pulled it out, Jim Redinger said, "Thumb and forefinger."

No competent expert using the proper method, powder, checked that watch then or at any later time, because they should have found Jim Redinger's prints; but, no, none were found.

And yet somewhere on this band, if careful handling had been the key, rather than tossing it

back and forth for detectives to go down and throw at Sam Sheppard, if careful handling had been the key there might have been the answer and saved an awful lot of nonsense and an awful lot of years.

Who was in charge of this holocaust of an investigation? We have evidence that the Cleve-land police were called. Why? "This is too big for us."

Well, that makes sense. There is no crime laboratory out in Bay Village, no experienced homicide investigators. Call in the best; and you should be entitled to the best.

After all, Sam Sheppard has some rights, don't you know, this was his wife that was killed, and he had a right to have it investigated correctly. This was a sorry job.

The fingerprints from the watch, nobody ever thought of. Fingerprints in the house, meaningless, except, except the one thing that Grabowski in his short trip that day, a couple of hours, which satisfied him as to the necessary investigation, one thing he found had Sam Sheppard right out of this case.

The only person whose fingerprints in that house would not incriminate him is Sam Sheppard.

The State of Ohio would prove nothing by showing that his prints were all over the place, and indeed they should have been, just as yours were in your house on the day you left it some weeks ago.

But if there were other prints there, if somebody else was there, then it became a matter of importance.

Now, from the time we are twelve or thirteen on, from watching Captain Midnight or wherever we derive our information from in this area, everybody knows that fingerprints point to criminals, and that everything is fingerprinted when a crime is committed, and it wouldn't take a person with very special experience to realize that a wipe with a cloth would be necessary to remove that evidence before somebody with a powder kit arrived. And it was done.

Grabowski found not the fingerprints, they were gone; he found the wipings caused by a person who couldn't have their prints in that house.

In my brother Spellacy's most able argument I found there to be lacking any mention whatsoever of the uncontradicted evidence that Doctor Sam Sheppard was injured.

Now, you were presented with the following

testimony. Jurors ought not to just cast aside evidence on a whim. Unless you have a reason to disbelieve a distinguished scientist or doctor, you should accept what he says, or at least part of it, or the substance.

We read to you the testimony of the deceased radiologist and he said he found a fracture, a small one, but certainly nothing the defendant could ever have caused to himself.

Pictures taken later on at a different distance and contrary to his instructions, did not disclose the same fracture. But that doesn't mean it wasn't there in the first instance.

A Doctor Foster, whose testimony was read to you -- and I apologize for the boredom that must have accompanied that experience, but it was important and we felt that we should give it to you -- he examined, and, yes, he found injury, he described it in his testimony.

But Sam was the only neurologist in that hospital, and not in any condition to treat himself. So what would you expect his brothers, all doctors, to do?

They are not neurologists and they don't pretend to be, and they called in the best man they

could find; and it would be hard to imagine a more qualified man than Doctor Charles Elkins. He was the best there was. He wasn't any ringer for the Sheppards. He was no part of the plan to cover up this deed by phonying up a hospital record.

He just happened to be a good doctor, and they thought Sam needed attention and they called him and he found, not on the first day, of course not, because he said Sam was too sick, they didn't want to move him.

But when he did examine, something that to a doctor is important -- we use experts, ladies and gentlemen, in the trial of lawsuits because there are some things that are beyond your experience. You can't look at a spot and tell whether it is blood. People who can are allowed, if they are qualified, to give you opinions.

But where your own common experience will enable you to grasp a situation, experts are not used. As to reflexes that are part of the neurological pattern emanating from the spinal cord, it takes an expert.

And so Doctor Elkins either lied to you under oath on this stand, for reasons you will have to dream up, or that man was badly hurt on that day

and he is not guilty of any murder.

Take Doctor Koch; is he a liar? Well, we don't much care whether he is a liar, because he brought objective evidence. He brought the X-rays.

What happened to that piece of tooth? He said it was broken off. He filed it on the 15th day of July.

The evidence of blood in the mouth is abundant. Even the State's witnesses who didn't see very much saw that, and they so testified.

So do you say that Sam Sheppard took his fist and smashed his own face and broke a tooth off? Well, Doctor Koch told you that that couldn't be done, and I suggest to you that it not only couldn't be done but nobody in his right mind would do it to cover up a murder or any other purpose.

Now we come to the final and most important part of this case. Something that was never done, with all of the excitement that ran rampid, with all of the many officials who got their finger in the pie and showed up a couple of weeks late, of course, but showed up, nonetheless, late in July, to make a scientific investigation, nobody got very scientific.

This is not intended as a personal attack

on any of the people involved, but it nonetheless is perfectly clear that stories which that murder room had to tell anyone diligently seeking the truth, went unheard because nobody listened to them.

Now, although it is not necessary to the defense of Sam Sheppard and was not because the other evidence is overwhelming in favor of his innocence, the testimony all by itself, without anything else in this case, of Doctor Paul Leland Kirk, is the touchstone to the truth, and you should consider it. It was not seriously contradicted by anybody who had any comparable experience.

I suggest to you that someone who saw fit to undertake his training, his first experience in grouping dried blood, in a case as immense as this cannot carry very much weight, especially when he is forgetful of his own articles on the subject.

Doctor Paul Leland Kirk was one of the scientists, as he told you, that worked on the Manhattan Project of the United States of America.

His qualifications take so long to recite that they tend to put a jury asleep and yet it is important that you hear them, because on the testimony of this man depends the solution which you can find

if you wish to pursue these facts forward to a conclusion, something you need not do once you resolve Sam's guilt, but because the State of Ohio has raised the challenge for us to prove any theory of the proven facts inconsistant with guilt, we have done so.

And so after the first trial is all over, in comes Doctor Kirk, and he studies and observes and he sees. He sees the things that should have been seen long before and never were.

He sees the things that were perfectly available to the scientists and experts of the State of Ohio when they took the photographs that have been shown to you and which you will study again, showing that same closet door.

And here it is. These are the spots that are different. These are the spots that tell something. These are the spots that demonstrate beyond any question that the back swing of a weapon dripping with blood terminated somewhere near that door, and the reversal of the direction shook off drops that were far too large to have come from spatter, or to have come from the swing of the weapon when the small drops would go off at high velocity.

But more important, do you have any

evidence that anyone in the whole State of Ohio in the investigation of this case ever noticed that large spot? You know perfectly well that if they did it never occurred to anybody to type it.

Doctor Marsters says to you that the typing done by Doctor Kirk was not in his opinion reliable because it was difficult to do, that is the essence of it.

Curiously, of course, he never tried to duplicate the experiment or he might well have found that a man of Doctor Kirk's reputation and background does not lightly make a judgment of this immensity.

That is the area describing the arc of the swing of the weapon, and not a backhanded swing; nobody would swing backhanded 25 times; it is too awkward. The force is there but it is not anywhere near as strong; and so progressively we blow it up.

Doctor Marsters says, desperate for some means to cast out this evidence, this so damaging evidence that the State of Ohio can't live with, he says there may be contamination, from his experience, bodily contamination, it gets on closet doors twelve to eighteen inches off the floor, even though the panels are inset.

Well, you are entitled to rely on your

experience. That is not a matter within the aegis of any expert.

But these two spots, these are important, they are the whole case. We know they were both "O" so that lets Sam out.

There has never been any serious contest, although curiously no one ever bothered to check Sam's blood type until Doctor Kirk did it.

This large spot the doctor says attracts his attention because it is too big to have been flung off any weapon carrying dripping blood.

Obviously there has to be some limit to the size that any weapon will carry, no matter what its shape, unless it is a spoon.

All the other spots are within the perimeter of the maximum size except this one, so he notices it but doesn't disturb it.

He goes back to California, makes his experiments and then sends for the blood. And he says beyond question that is "O" blood that did not come from Marilyn Sheppard.

And so suddenly the State of Ohio has before it if it wants to use it and certainly would have if it occurred to the State to hire Doctor Kirk before the defense did, evidence that somebody else

was in that room, but it is too late, too late, the show is over.

And so rather than go out and get some other competent expert in dried blood to come in and contradict Doctor Kirk, because no such expert would do so, they bring in Doctor Marsters, and you may have his testimony for what you think it is worth.

Now, where did this spot come from? We are obliged to put this case together, and here is the probable answer.

This tooth is broken and it is broken at an angle. It was found outside the mouth. There is no evidence that it ever was inside the mouth.

How did it get there? Several possible ways, one of which is that Marilyn Sheppard fighting for her life, as the evidence clearly shows with her hands up, being punched one or two times, perhaps, blows not inflicted with this weapon, whatever it was, bites a finger and it is yanked from the mouth, and it breaks a tooth out, out, as you may find when you examine this, because that is where the tooth was found, out.

On that finger is a big drop of blood which unlike the weapon accumulates until it is cast off.

So we have the signature of somebody not Sam Sheppard who didn't mean to leave it, but bled in the murder room.

The pillow, does it help you? Well, does it really mean anything? Sure, there are spots on both sides. You may decide from your own experience that if wet blood were here, and the pillow were creased, Doctor Gerber said he saw a crease, that that would blot in this fashion, that the blood would run and leave an outline.

You may not. You may see an instrument there. You may see an object.

Well, is it fair of Sam Gerber to say that in his opinion that represented a surgical instrument, to foist off on you, as a doctor of his experience, if he couldn't produce the instrument? Oh no, we have the confession of Sam Gerber.

I said, "Where is the instrument, doctor?" He said, "I looked all over the United States for twelve years and I just couldn't come up with one."

But, then, desperate, he tries. He drew you a picture, he said it was a cast spreader. You will decide if that fits the pattern or indeed if it could afflict any of the blows that you will see in Marilyn's head, and you will have to remember, of

course, that Doctor Adelson said a blunt instrument.

So in cross examining Steve Sheppard, to give the other side of the coin, the State offers a cast cutter, not used any more. It doesn't fit the imprint much better than the other, but you can look at it if you like.

You will recall and you will notice that although it was marked initially as a State exhibit, we put it in evidence and that is why you will take it to the jury room.

Now, the State of Ohio, although its counsel have every obligation to present to you the best they can of this case in the best way that they can present it, and to persuade you if they can, is just faced with too much physical evidence.

If Mr. Corrigan has a case, and I exhort him to tell you if he does, he can make it out of this evidence and not out of any other.

This is Exhibit 72, and you may read it, and you will decide, because it has been in the hands of the State for twelve years, whether or not this was concocted with the connivance of about fifteen people to protect Sam Sheppard and to show phony injuries that never existed.

Because if it wasn't, just as Mr. Spellacy

has demonstrated to you by failing to touch on the point at all, by failing to acknowledge that he couldn't bring you one piece of medical evidence to show a lack of injury, not one doctor did he produce on the stand for the State, the injuries the State of Ohio can't get around.

The charge here does not suggest that Sam Sheppard was one of a squadron of killers who might have fought later among themselves. It says that Sam and only Sam committed this crime.

Now, I will wrap up pretty quickly. You have been pretty patient.

Why did Sam Sheppard make the phone call he made instead of the one he should have made to the police? Did he have something in his subconscious memory that caused the name to come out illogically?

But more important, as Mr. Sherman said very briefly, is there a man on the jury among you who on being called and being told by a neighbor, "Joe, they, they have just killed Marilyn," would fail to call the police on the spot, or would fail to pick up a weapon and go charging over to help, or would at least go over by himself.

How could anyone know that the danger was gone? Did Sam say so? Oh, no. He said, "They killed

Marilyn." They might be inside the house, outside the house, they might have him by the throat. No more detail was asked for. And you will have to determine why.

Behind every killing, ladies and gentlemen, there must be a reason. This is very difficult to suggest to you and I am going to skirt it as delicately as possible, but the evidence is before you. I don't have to slap it down on the rail.

Someone was angry, angry enough to kill, someone who didn't have the strength in her arm that Sam Sheppard had, for indeed he would have crushed that skull like an egg shell, with the frenzy that was taking place, just as any of you would. Twenty-five blows and you would have found nothing left but bits.

Why was that person so angry? What had happened? What had Marilyn done to anger that person? We will never really know.

Putting together the evidence as best you can, you should decide and decide quickly, because this case does not take profound deliberation, although you certainly have an obligation to consider it until you are satisfied one way or the other.

Unless some satisfactory explanation can

be worked out of the evidence that is sitting in your lap, unless you can be shown how Sam Sheppard created these injuries out of whole cloth, unless you can be satisfied that Doctor Kirk is an incompetent or a liar who doesn't know his business, on any one of those points, Sam Sheppard is excluded; and if you should get by all of those things, and you sit down to do the thing that the law says you must do, and that is put together from the facts and circumstances a picture of what happened, where no other picture, no other theory can stand, then you can quickly say that this man is and always was not guilty.

And I ask you to find him not guilty without hesitation, and, ladies and gentlemen, I ask you to do it with dispatch.

Thank you very much.

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THE COURT: Counselor Corrigan?

MR. CORRIGAN: May I suggest at this time a recess, your Honor?

THE COURT: Yes, it is a good idea. Ladies and gentlemen of the jury, we will have our afternoon recess, which we customarily do. While you are away on this recess you will bear in mind the instructions given to you in detail, on each occasion when you have gone from this room, and that is you shall not discuss this case nor what you have heard of it amongst yourselves.

You shall not permit anyone else to discuss it with you; nor shall you permit yourselves to overhear anything that relates to this cause by any means of communication.

We will have our afternoon recess.

(Thereupon a recess was had.)

THE COURT: Ladies and gentlemen, for concluding argument for and on behalf of the State of Ohio, the Court will call prosecuting attorney John T. Corrigan. Counselor Corrigan.

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CLOSING ARGUMENT BY MR. CORRIGAN

MR. CORRIGAN: May it please the Court, counsel for the defense, and ladies and gentlemen: At this time on behalf of Mr. Spellacy, may I extend to Mr. Bailey and Mr. Sherman our gratitude for the manner and way in which they conducted their business in defending their client.

I wish to extend to the Court our sincere gratitude for the judicious manner in which the Court has conducted this trial; and, ladies and gentlemen, certainly to you who have endured these many weeks with great patience, we extend our deepest gratitude, and we extend the gratitude of the people of the State of Ohio.

I do not feel that my remarks are going to be too lengthy. At the outset I think it is necessary that we visit the defense side of the case, and perhaps as good a place as any to begin in visiting the defense side of the case is with the statement that Mr. Bailey made, and that is that there was a filthy accusation made somewhere in this case.

In 1954 Marilyn Sheppard was murdered. But in 1966 in this room with the very first witness, the character and the reputation of Marilyn

Sheppard was put in issue in this trial. You remember the first witness, Mr. Jack Krakan.

Do you recall that he testified on two occasions he was at Marilyn's house and he saw an elderly gentleman there.

And on the second occasion he say Marilyn pass a house key to this elderly gentleman and make a comment something to the effect, "Don't let Sam know about it."

What could be the reason for bringing that testimony before this jury, other than to put in issue the reputation and make a filthy accusation as regards the character of Marilyn Sheppard?

The second witness, you will recall, was a Miss Post. Miss Post was a young lady who was employed for the sole purpose of covering the Sheppard case, and that is her testimony. She was employed in June of 1954 for the sole purpose of covering the Sheppard case.

The killing didn't occur until July. Some way, somehow or other she was employed in June for that sole purpose.

And she was brought on to tell us that Doctor Gerber had told her that it had to be a woman. This is part of the mystery with which we

find this case shrouded by virtue of the testimony and evidence coming from the defense.

It had to be a woman, said Miss Post, quoting Doctor Gerber. But she who was hired for this purpose of reporting the Sheppard case, and her editor, who was along with her, never saw fit to print or publish this scoop.

I don't think anything more need be said with regard to Miss Post.

Then we move on to the next witness, a Doctor Don. Doctor Don comes on for the purpose of adding further attack to the credibility of Doctor Gerber, when he says that in the month of June or thereabouts, the month preceding the killing of Marilyn Sheppard, that he met Doctor Gerber in the Cleveland Police Station, and Doctor Gerber said something to the effect that he was going to get those Sheppards.

Well, I wonder at this point, did Doctor Sheppard then go out -- or, did Doctor Gerber then go out and create the incident that occurred on the 4th of July, 1954, to get the Sheppards?

But Doctor Don was brought on for another reason. You see, the theory of the keys had now evaporated, it is gone, and now we move to the open

door policy. And Doctor Don is in and out of Doctor Sam Sheppard's house all hours of the night, many times a week, without the benefit of even making a courtesy telephone call to let him know he is coming.

You know, ironically, that telephone that was up on the stand between Marilyn and Sam's bed is never used for any purpose.

Doctor Don never called and presumably he should have called, if nothing more than extending a courtesy to Doctor Sam to let him know he is going to come out.

Then we have the boy, the young boy, by the name of Redinger, and he pretty much corroborated the testimony of Larry Houk with regard to finding the green bag.

If you will recall the testimony of Redinger, he said specifically I went over and I looked at that watch, and I was careful with regard to how I held it, and how I looked at it.

But when Mr. Bailey reiterated that testimony, Mr. Bailey reiterated it in this manner, showing the thumb over the crystal of that watch.

We know that Mary Cowan had indicated that she examined that watch throughly under a

light, under a microscope, to determine whether or not there were any prints, and then thereafter she would call in the fingerprint man for the purposes of lifting the print; but she found no prints on it.

Incidentally, Redinger volunteered something that I don't think was anticipated. You will remember that he said that he went over to Doctor Richard's house the day after the 4th of July or at best two days later, and who did he see but Doctor Sam walking around.

This is the man that was so sick when Doctor Elkins went in. Doctor Elkins saw fit not to perform a neurological examination. We look at the hospital report, and on page 10, and this is in evidence and will be with you upstairs, and we find here that the report is at 6:35 a.m. on the morning of July 4th, eye grounds clear; pupils react, and we find further -- pupils react to light and dark; reflexes within normal limits.

This is at 6:35 a.m. on July 4th, from the hospital report that was made in connection with the admittance of Doctor Sheppard as a patient.

We will talk a little bit more about Doctor Elkins in just a moment.

The next witness that came on was the dentist that had testified with regard to the chipped teeth in Doctor Sam's mouth. We won't refute this.

I believe that the teeth were chipped, and I believe Sam was injured, and we won't refute the fact that he was injured, but I will tell you how he became injured.

He wasn't as injured as we were led to believe initially by Doctor Steve Sheppard when the first thing he said, "Sam's got a broken neck," and then Elkins came in; Elkins did not perform a neurological examination on the 4th of July.

Subsequently Doctor Elkins did on the 6th of July look at some X-rays, and then Doctor Elkins said that he had a chipped cervical vertebra, but he was in doubt, because he asked for additional X-rays to be taken, and when they were taken the additional X-rays did not show that which was seen allegedly on the first X-ray.

But the first X-ray, you will recall, had an artifact in it. This was testified to by Doctor Foster, or the other doctor whose name escapes me, the radiologist.

MR. SPELLACY: Flick.

MR. CORRIGAN: Doctor Flick. You re-

member his testimony was definitely that that had an artifact and it was something artifical, it was something that showed, but in fact was not really there.

At this point, nevertheless, Doctor Elkins had formulated an opinion that there was a contusion of the spinal cord, and this is on the 6th of July.

But in the middle of August, because of the rapid recovery of Doctor Sam, he had changed his opinion and said that he had a concussion of the spinal cord, which was a milder type injury.

We don't refute this injury to Doctor Sam. I don't agree with -- I don't disagree with the dentist who said that his teeth were chipped.

When Marilyn Sheppard met her death, she didn't lay there and permit her assailant to bludgeon her into Kingdom Come. Her arms were flailing, as is indicated by the defense wounds she had on her hands,and her legs were kicking.

And it was the assailant, Doctor Sam, who forced those legs down under that crossbar, and in the course of doing so he got clipped and he got clipped good. These are where the injuries and the chipped teeth came from.

Unfortunately, Doctor Sam Sheppard had

the opportunity, privilege if you want to call it that, of casting the last blow.

The statement was made that nobody saw fit to take the blood type of Doctor Sam. Do you remember the testimony of Doctor Gerber? Doctor Gerber said that Sam refused to give him his blood type, or to permit the taking of blood for typing purposes. This is in the evidence.

Now, let's talk about Doctor Kirk. Doctor Kirk, I think, established two things; one, that in his opinion the slayer had to be wielding this instrument with his left hand, and the other was that a blood spot found in the room came from a source other than all the other blood spots. How did he do that?

Well, in January of 1955 he went in and he looked these blood spots over, and he apparently made that determination at that time, in part. But he was sold on the idea, he never bothered to remove those blood spots from the door, but he went back out to California and a month later had somebody else remove them and send them out to him in California. That is how much Kirk thought about those blood spots.

He had indicated that in his opinion

it came from a different source because of the amount, because of the size, and blood in that size couldn't easily travel that distance.

You will recall he was asked whether or not the assailant might step back from the assault, and render the distance between the door and the instrument that he was wielding a lesser distance, so that the blood spatter would not have to travel very far, and he agreed to that.

Ladies and gentlemen, you don't have to be an expert to know that when you inflict blows of the type that were inflicted in this instance, 25 of them, that between the first blow and the last blow there is congealing of blood. Pure blood is one thing. But congealed blood cast off an instrument is quite another thing.

But the impression that he wants to leave with you is -- and it was so argued -- that this came off the finger of the assailant.

Well, Marilyn had some pretty bloody fingers, too, and we know that those arms were flailing. Did the blood come off Marilyn's fingers?

But he goes further in attempting to tell us that this blood came from another source, and he says that he -- he determines this because of

the rate of agglutination.

Now, in its simplest term, what is this agglutination all about? As I understand the testimony, when you take two bloods that are of the same sort, and you bring them together, they mix, the cells within the blood form a pattern, and the pattern remains constant and under a microscope they mix in every sense of the word.

But when you take two different kinds of blood, and bring them together, they do not mix, but there is a lumping, instead of being in proportion to one another, the cells adhere to one another and there is a lumping. This is what agglutination is.

So he determined in making the test with regard to these two spots, that the agglutination, that is, when you add a foreign blood to the blood that you are working with, the agglutination was slower in one instance than the other; and for that reason, this then in his opinion led to the conclusion that the blood come from a different subject.

This is unsupported by any other scientific findings anywhere in the United States. So it is just his thinking. It is nothing more

than conjecture.

But we heard Doctor Marsters testify that with whole blood the rate of agglutination has nothing to do whatever with the typing of the blood, and whole blood is much easier to work with than is dry blood.

But we don't even have to go to Doctor Marsters. We can go to the testimony of Doctor Kirk himself.

You will recall I asked him, "Doctor, do you know of any instance where the blood coming from the same subject, deposited upon a piece of fabric, and then a test is made from two different portions of that fabric, that the rate of agglutination is different?" and he said yes.

Now, he said with regard to the assailant being, using the left hand, he predicated this on the pattern of blood on the walls.

Now, if you will imagine, ladies and gentlemen, if this is the foot of the bed and Marilyn's feet are hanging over this bed under the bar here, and this is the head of the bed here, and the assailant is standing generally in this position here, with Marilyn pulled down half way on to the bed, the body of the assailant is going

to block the blood from going generally in this direction.

But if he is working her over in this fashion here, with his right hand, you are going to get blood here and blood here; and he is going to work her over with backhands as well as straight forward swings.

We know that these swings were low because there was no blood on the ceiling.

And we know, too, that the greatest number of blows were inflicted on the left side of her head, which would give an indication that this was where the blowscame from, rather than turning around this way, and if it was done with the left hand there would be blood in this pattern here.

I say that his pattern supports the theory that somebody did it with the right hand. But I don't care whether they did it with the right hand or the left hand.

In the course of inflicting this death upon Marilyn, there is no question but that she defended herself, her arms were flailing as well as her legs.

And when the assailant goes after her, he has got to hold those legs down, he has to hold

the arms down. He is using both arms, the right arm and the left arm, regardless of what he might naturally be.

Now, we have some testimony about the watch, and argument that the watch had to be broken by the assailant pulling the watch off.

I wonder if maybe Marilyn caught on to this watch while she was defending herself; she certainly could have, but we don't know whether or not this watch was broken a month before or a year before. There is no evidence, and nobody took this witness stand and testified --

MR. BAILEY: I object.
THE COURT: Overruled.
MR. CORRIGAN: --there is no evidence that this watch was broke, on that specific occasion.

Now, something was said about the key chain. Remember the testimony of Patrolman Gareau. Gareau said that when they went to the hospital they questioned Doctor Sam, and Doctor Sam said he was wearing this key chain.

If you have it in your pocket, like this, this isn't wearing it. How do you wear a key chain? You wear a key chain by either putting it on one of these loops that hold the belt, or by putting that on the loop within the belt itself.

And if somebody ripped this off of Doctor Sam, wouldn't they either rip the loop or rip the metal loop on the key chain? But you will find them all intact. Another part of the story that doesn't jibe.

While we are talking about the belt, the question is asked why no blood on the belt? When the assailant is working over Marilyn Sheppard, he of necessity is bent forward a little bit, you bend at the waist, and what happens to the belt when you bend at the waist? The shirt covers the belt. Quite obviously there would be no blood on the belt, because the blood doesn't stand out. It becomes covered.

And what do we find with regard to the pants? Mary Cowan had testified that there was reddish brown splatters in this area of the pants, and they showed up under the luminol test that was made, and because of the washing and the water, the benzidine test did not react positive for blood.

It is argued that why would Sam Sheppard wipe up the furnishings in his own home, because his fingerprints have a right to be all over the house.

This we will concede, except wouldn't it be strange, ladies and gentlemen, if we went to each one of those drawers and alongside of the drawers that were pulled out, we find Sam's prints on the first drawer, on the second drawer, on the third drawer, wouldn't it be peculiar if we found Sam's prints on the trophies, on the metal box, and on the furnishings? In these areas wherein there is some reason to suspect something.

And if we found Sam's and nobody else's, then the story about somebody else being in there would be a little bit difficult to buy, wouldn't it?

And as far as the wiping is concerned, I think there is no question about these things being wiped up.

It had occured to me that women sometimes when they go to bed in the evening, after entertaining guests, they will clean up the house, they will wipe up the dust, but they won't go into the den and wipe off trophies and they won't go into the den and wipe off their husband's tool box. That isn't reasonable.

Oh yes, look at the tear on the pants. It isn't the pocket that is torn. It is outside

the pocket that is torn. I submit no relationship to the key chain whatever, and the inference that you would draw from that that somebody pulled that off of Sam.

Ladies and gentlemen, things can be coincidental. Things can point in a direction and not be in the true direction once, maybe twice, maybe three times, maybe four times.

But when we think in terms of the T-shirt, when we think in terms of the watch, and the watch with splatters on it, and you don't need any expert to tell you that that watch was worn by the assailant that particular night, and that is the watch that the Aherns put on the wrist of Doctor Sam when he went to bed that night, on that cot, and that is the watch that Doctor Sam told us he had on when he took Marilyn's pulse at the neck.

The watch tells more than the time. The watch clearly tells who the murderer of Marilyn Sheppard is. And this is corroborated by the wiping. It is corroborated by the jacket, by the blood on the pants, by the tear in the pants, and it is corroborated, ladies and gentlemen, by the fact that this defendant here, in talking

to Mayor Houk, said to him something to the effect, and you will remember the testimony, "They are trying to pit us against one another; let's be careful."

What kind of an irrate husband is it, or a widower, whose wife has been bludgeoned to death, who goes to somebody and says, "They are trying to pit us against one another, let's be careful"?

If this isn't the fingerprint of guilt, I don't know what it is.

Ladies and gentlemen, I ask you, also, with regard to the question of motive which was brought up by Mr. Bailey in his argument, go to that written statement, State's Exhibit 27, I believe, read it, and you will find the motive for the slaying in that statement.

And I say to you ladies and gentlemen, bring back a verdict consistent with the facts in this case, a verdict that will tell Sam Sheppard that he can't hide from the truth, and the would-be Sam Sheppards that would be among our midsts in the future also cannot hide from the truth.

Thank you kindly for your attention.

Thank you.

THE COURT: May I see counselors, please?

(Thereupon court and counsel conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. CORRIGAN: The State will reserve five minutes for argument the first thing in the morning.

MR. BAILEY: Based on the statement of the prosecution, "No witness took the stand to say that the watch band was broken prior to its discovery in the green bag," I regard that as an allusion to the defendant's failure to testify, since he very obviously is the guy who would have to say it was broken.

That was the basis for my objection, and on that basis I move for a mistrial.

THE COURT: Overruled.

MR. CORRIGAN: There is testimony in the record, I might add, that this watch was taken to Halle's because it wasn't working properly.

MR. BAILEY: The second motion that I have relates to the reference just made byathe prosecutor to the motive being found in the written statement, which I believe is Exhibit 27, and this

reference necessarily goes to that page wherein the defendant is queried about Susan Hayes and denies any connection with Susan Hayes, which we have objected to previously, and I again ask and move that that portion of the statement be excised before it is handed to the jury.

THE COURT: Motion overruled, for the reasons already advanced on the record.

Anything further, gentlemen?

MR. BAILEY: No, I am ready to call it a day, your Honor.

THE COURT: Yes, I will indicate that we will charge the jury in the morning at 9:15, and I want to thank you gentlemen, each and every one of you, for the very competent and professional manner in which you have conducted yourselves, and truly that you may be proud to be a member of your profession, each of you.

MR. BAILEY: Thank you, your Honor.

(Thereupon proceedings were resumed within the hearing of the jury as follows:)

THE COURT: Ladies and gentlemen of the jury, it is seven minutes to four. We have had a long day, so the Court will not deliver its charge of law to you at this time. This

matter will be concluded tomorrow, when the Court will give you its charge on the law the first thing in the morning, about 9:15 or thereabouts.

And while you are away, ladies and gentlemen, on your overnight adjournment, bear in mind the instructions given you on each occasion when you have gone from this room, and that is you shall not discuss this case even now at this point, you shall not discuss it or what you have heard of it, amongst yourselves. You shall not permit anyone else to discuss it with you, nor shall you permit yourselves to overhear anything that relates to this cause, by any means of communication, having in mind the specific and detailed instructions given to you with reference to your being forbidden to read printed material, and listen to radio reports or television newscasts that relate to this case.

We will stand adjourned until 9:15 tomorrow morning.

(Thereupon an adjournment was taken to 9:15 a.m., Wednesday, November 16, 1966, at which time the following proceedings were had:)

Wednesday Morning Session, 9:15 a.m., November 16, 1966

(Thereupon counsel and the Court conferred in the Court's Chambers.)

(Thereupon proceedings were resumed in open court, at the Court's bench, out of the hearing of the jury, as follows:)

THE COURT: Mr. Corrigan?

MR. CORRIGAN: At this time I will waive further argument on behalf of the State.

THE COURT: Counselor Bailey?

MR. BAILEY: In case the record doesn't reflect it, I want a formal and unequivocal objection to the charge of manslaughter, on the ground that it is unsupported by any evidence in the record.

THE COURT: Objection is overruled.

(Thereupon proceedings were resumed within the presence and hearing of the jury, as follows:)

THE COURT: Good morning, ladies and gentlemen.

THE JURY: Good morning.

(Thereupon the Court charged the jury, as follows:)

CHARGE OF THE COURT

Ladies and gentlemen of the jury:

At this time it becomes the duty of the court to endeavor to correctly state the law which governs this case. A related and equally important obligation rests upon the jury, and that is to receive and accept the law as the court states the law to be, to adopt it as your guide throughout your entire deliberation, to apply it to the facts as you find the facts to be and then to render your verdict accordingly. This you are required to do independent and apart from any notions or opinions of any kind or nature which you may have ever possessed as to what the law is or what it ought to be concerning the facts of this particular case.

It also follows that in strict keeping with your oath, you will refuse absolutely to be moved or swayed or influenced by considerations such as sympathy for, or bias, or prejudice either against the State of Ohio or the defendant in this case.

In this case, the State of Ohio prosecutes the defendant, Sam H. Sheppard, upon the charge of

murder in the second degree.

The indictment constitutes the charge in this case.

While this indictment in express language charges the defendant with murder in the second degree, it also includes and embraces within its terms the lesser offense of manslaughter, first degree and in order to assist you there is a form of verdict which will be given to you to enable you to return a verdict under either degree of the offenses that you may find proper.

For the purpose of assisting you, if possible, in better understanding the issue which you are called upon to determine, the court will permit a copy of the indictment to go with you to your jury room.

At the very outset the jury will understand that the mere fact that the defendant has been indicted by the Grand Jury of this county raises no presumption of the guilt of the defendant. The indictment itself is simply the means created by law for the presenting in a formal way of a criminal charge, and you are instructed that you will not consider the fact that an indictment has been returned as in any way or manner constituting evidence of the guilt of the defendant.

At the very commencement of this trial, counsel for the State and counsel for the defendant addressed to the jury what we generally refer to as opening statements. In such statements both counsel sought to present an outline of what they believed the testimony and the evidence would disclose as the trial progressed.

When the presentation of all the evidence was completed counsel for the State and counsel for the defendant addressed to the jury what we have come to refer to as closing arguments and in those closing arguments they set forth and develop the inferences and the conclusions which they believe may be reasonably drawn from all the evidence in the case.

Such opening statements and closing arguments are permitted in an effort to assist the jury in understanding and reaching the conclusions as to the issue which the jury is called upon to decide. You are instructed that such opening statements and closing arguments do not constitute evidence in the case and will not be so considered by the jury.

Whenever reference is made to the evidence upon which this case is to be decided, the jury will understand that we mean the testimony as you have heard it from the mouths of the several witnesses

who have testified throughout this trial together with the exhibits which have been offered and received in evidence and which exhibits will go with you to your jury room together with any and all stipulations agreed to in open court between counsel for the State and counsel for the defendant.

By stipulations of counsel, the testimony of several witnesses as given upon a prior trial of this case, was read to you. Testimony of such witnesses constitutes part of the evidence in this case and will be considered by you the same as if such witnesses were personally present and testified from the witness stand.

To the indictment as returned by the Grand Jury and as read to you by the court, the defendant has entered a plea of not guilty.

By such plea, the defendant denies the existence of each and every element and ingredient which, as a matter of law, goes to make up or constitute the crime or offense charged in the indictment and the existence of each and every element and ingredient which, as a matter of law, goes to make up or constitute any other crime or offense which may be included in the crime or offense charged in the indictment.

The plea of not guilty as so tendered by the defendant has, as a matter of law, the effect of placing upon the shoulders of the State of Ohio the burden of proving beyond a reasonable doubt the existence of each and every material allegation and averment of the indictment.

The plea of not guilty entered by the defendant has as a matter of law a further effect. Such plea clothes the defendant with the legal presumption of innocence. This presumption is not a mere matter of form, but rather it is a shield which the law throws about the defendant. This presumption of innocence is to be accorded to the defendant throughout the entire trial and during the examination into every fact and proposition necessary to be proven by the state. The presumption of innocence is only overcome or overthrown when you as a jury find the proof is such as to exclude every reasonable doubt of the guilt of the defendant.

The Legislature of Ohio has been so concerned that a jury in a criminal case understand the correct legal meaning of the term "reasonable doubt" that it has by statute defined that term and enjoined upon the trial court the duty of reading that definition verbatim to the jury in a criminal case.

Ohio Revised Code, Section 2945.04, reads as follows:

"A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. This presumption of innocence places upon the state the burden of proving him guilty beyond a reasonable doubt."

"Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

We come now to a consideration of the elements and ingredients each and all of which, as a matter of law, must exist in order to constitute the crime of murder in the second degree. The indictment in this case is based upon the violation of Section 2901.05, Revised Code of Ohio, which reads as follows:

"No person shall purposely and maliciously kill another."

Then follows the penal provision of the section of the Code. I want to caution you at this time, members of the jury, that the question of punishment, in the event you should find the defendant guilty of the offense charged in this indictment or of the included offense, must not be considered by you in your jury room or in your determination of the facts in this case. The question of punishment is within the sole and exclusive province of the court.

The indictment in this case, which I have previously read to you, eliminating its caption and certain formalities, charges:

"That Sam H. Sheppard on or about the 4th day of July, 1954, at the County aforesaid unlawfully,

purposely and maliciously killed Marilyn Sheppard contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

The mention of "county aforesaid" in the indictment has reference to Cuyahoga County.

You will note that the charge in the indictment is based directly on the section of the Revised Code just quoted. You have been instructed that in order to arrive at a verdict of "guilty", it is essential that each and every element of the crime charged be proven beyond a reasonable doubt. It, therefore, becomes important to determine what those elements are. They must be found in the law itself without diminution or enlargement by any thoughts or notions entertained by us.

The elements, as they appear in the statute, are these:

(1) "No person"

That expression embraces the entire population. It singles out no particular person, and, for that reason, there must be, before guilt can be established, an identity of person. Only one

person is accused in the indictment in this case. That person is Sam H. Sheppard, and unless you are able, under the evidence in this case, to eliminate all other persons, and, further, to establish that Sam H. Sheppard is the person who committed the act charged, you need go no further and would be obligated to render your verdict in his favor.

(2) "Shall purposely"

This relates to killing. To do an act purposely is to do it intentionally and not by some mischance or accident. Intent is a state of mind and we have not yet found the means of peering into the mind and viewing within it an "intent" there formed. We must, therefore, resort to an appraisal of those things which generally become the form of expression of an intent. Hence, in determining "purpose" or "intent", you may look to all the surrounding circumstances; what was said or done at the time; the manner of inflicting the injuries; the force that was used and its tendency to cause the death of another and the place upon the body where the injuries were inflicted; and you must bear in mind the presumption of law, that everyone is presumed to intend the natural and probable consequence of his voluntary acts, unless the

circumstances are such as to indicate the absence of such intent.

(3) "and maliciously"

When we speak of malice in common parlance and in everyday affairs we usually refer to ill-will, bitterness, hatred, spite or jealousy. "Malice" relates to the moral qualities of a man's acts. Its general use in law is to express an act done without a sufficient reason or just cause, where the act is wrong in itself and designed and intended to injure another. It is an act expressive of a disregard of social duty and of a heart bent on mischief.

(4) "kill another"

There must be a killing. The mere fact that a death occurred does not, of course, mean that a murder has been committed. It must be shown that the death of the person claimed to have been killed was caused by the acts charged.

The jurisdiction of this court in criminal matters does not extend beyond the boundaries of Cuyahoga County so that before any verdict of guilt of any crime is rendered here, the offense involved must be found to have been committed in this county.

If, therefore, you find that Sam H. Sheppard

purposely and maliciously killed Marilyn Sheppard in Cuyahoga County it will be your duty to find him guilty of murder in the second degree.

While the indictment in this case charges only murder in the second degree it embraces and includes within its terms a crime of an inferior degree, namely:

"manslaughter, first degree".

It is, therefore, possible for you to find that the defendant in this case is not guilty of murder in the second degree, but that, nevertheless, the elements of manslaughter, first degree are present and that he is guilty of manslaughter, first degree.

Section 2901.06 of the Revised Code of Ohio provides that:

"No person shall unlawfully kill another."

Such an act is designated as manslaughter, first degree.

The words "first degree" in the section and in this connection are of no vital importance in this particular case. The legislature of our State undertook to divide the crime of manslaughter into two classes: one being manslaughter, first degree, being one in which no motor vehicle is involved; and manslaughter, second degree, being

one in which the operation of a motor vehicle is involved.

If you find that Sam H. Sheppard is not guilty of murder in the second degree on the basis of the evidence and the rules which I stated to you, it will be your duty to move a step further and to determine whether the elements of manslaughter, first degree, are present. We look to the law itself for those elements.

Again, we have:

(1) "No person"

I shall not repeat what I have said about the necessity of find that Sam H. Sheppard is the person. What was said in that connection within the requirements in the case of murder in the second degree has equal application here.

(2) "shall unlawfully kill another"

A killing is unlawful when it is without cause. It is an intentional or unintentional killing but without being prompted or motivated by malice of the character I have described to you. It is that killing which is done in the heat of passion due to some provocation, and takes place before enough time has elapsed to permit such passion to cool down and thereby avoid the killing.

If you find Sam H. Sheppard not guilty of murder in the second degree, but do find that he did unlawfully kill Marilyn Sheppard in Cuyahoga County under the conditions last recited to you, it will be your duty to find him guilty of manslaughter, first degree.

You are in no event to find Sam H. Sheppard guilty of any offense outlined to you unless each and every element of that particular offense is found by you to have been proven beyond a reasonable doubt. On the other hand, it is not your privilege to be generous by rendering your verdict finding him guilty of the lesser offense when and if in the judgment of the twelve of you the evidence discloses beyond a reasonable doubt he is guilty of the higher offense.

If you find that the evidence in this case does not, under the rules outlined to you, disclose Sam H. Sheppard guilty beyond a reasonable doubt of either of the offenses mentioned, it will be your duty to find him not guilty.

A portion of the evidence in this case is circumstantial in nature and character as distinguished from other evidence which is direct and positive in character. If a witness testified from his personal knowledge to the commission of an act to be proven

in order to establish an offense, that is called direct or positive evidence. It is not always possible to ascertain the truth by evidence of this character, hence the law permits the introduction and consideration of what is called circumstantial evidence. By circumstantial evidence is meant the proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind and which connected facts tend to show the guilt or innocence of the person charged with the commission of a crime.

You, as jurors, are the sole judges of the weight to be accorded to such circumstances and facts, and the sole judges of the credibility to be assigned to the witness or witnesses testifying to such facts and circumstances. When circumstantial evidence is of a nature and character that it satisfies and convinces the minds of the jury beyond a reasonable doubt then such circumstantial evidence, alone, is sufficient upon which to base a verdict of guilty.

However, to warrant you in finding the defendant guilty on circumstantial evidence alone, each material and important link in the chain of

circumstances relied upon for conviction must be proven to your satisfaction beyond a reasonable doubt.

Further, before you as a jury can return a verdict finding the defendant guilty, which verdict is based upon circumstantial evidence alone you must find that the circumstances are not only consistent with the defendant's guilt, but that such circumstances are inconsistent with any other reasonable conclusion and such as to leave no reasonable doubt in your minds as to the guilt of the defendant.

Further, you would not be warranted in basing a verdict of guilty on circumstantial evidence alone if you find the facts constituting the circumstantial are reconcilable with innocence, or if you find that the facts constituting such circumstantial evidence can be reconciled with either innocence or guilt. In either of these last two events the law requires that you give to the defendant the benefit of the doubt.

By process of reasoning or as a result of common experience you may conclude that when certain facts exist certain other facts usually co-ordinate therewith. A conclusion so deduced or drawn from a proven fact or facts is what we refer to as an

inference. In considering the evidence in this case, whether direct or circumstantial, you may draw inferences from proven facts. You are instructed, however, that you are not permitted to base one inference upon another inference. Each inference must be predicated or based upon a proven fact or facts; two or more inferences may be drawn from the same proven fact or from the same proven facts and additional facts in evidence.

The Law does not require the State to prove motive in this case. The presence or absence of motive shown by the evidence may be considered by you in determining intent, or its presence or absence in the mind of the defendant, Sam H. Sheppard, so that if you find beyond a reasonable doubt that the defendant is guilty of either offense under these instructions, then you should find him guilty whether or not a motive has been established.

In reaching your verdict it follows that you will be called upon to determine the degree or measure of credibility which you see fit to assign or ascribe to the various witnesses who have testified throughout this trial. In reaching a conclusion as to the latter purpose, you have a right to and should consider their candor or lack of candor if any was

manifested while testifying, their relationship, if any, to the outcome of this trial, the probability of their knowing the truth of the facts and circumstances concerning which they have testified and in fact every circumstance developing throughout the trial which enables you as a jury to determine the degree or measure of credibility which you see fit to assign or ascribe to the several witnesses who have testified throughout this trial.

As a matter of law, you may believe a portion of the testimony of a particular witness and disbelieve the rest of his testimony. You may believe all the testimony of a particular witness or you may disbelieve all the testimony of a particular witness.

In this case there was testimony received from a number of witnesses which we sometimes classify and title as "expert witnesses", that is, they follow a certain profession, vocation or line of work which, after years of practice, is supposed to make them skillful and learned in that line of work.

In addition to stating facts and findings, these so-called expert witnesses were permitted to state their opinions based upon certain findings, or alleged findings, which they claim to have made.

The mere fact that these witnesses may be following a vocation, trade, science or profession does not warrant the jury in giving more or less credence to their direct or opinion testimony but you should apply the same tests to their testimony that you apply to the testimony of the other witnesses and in the light of all the evidence decide what credence or weight you will give to such direct and opinion testimony.

The purpose of this testimony is to assist you in arriving at a just and correct verdict. You are instructed, however, that such testimony is not to supplant but rather to supplement your judgment.

The defendant has seen fit to exercise his constitutional right of not testifying from the stand in his own behalf. In making this decision he was within his legal rights.

The fact that the defendant did not testify must not be considered by you for any purpose in arriving at your verdict. You are not permitted to draw any inference from his failure to testify.

The State, in closing argument, referred to certain uncontradicted or unrefuted testimony presented by the State. I charge you as a matter of law that any intimation or inference in such argument attempting

to place the burden on the defendant himself to deny such testimony must be wiped from your mind and memory and disregarded by you in your deliberations.

Evidence has been offered in this case as to acts and statements of the defendant. It is the duty of the court to caution you that testimony as to statements or declarations made by the accused should be carefully examined and considered by you. In this class of testimony there is always the danger that the person making such declarations or statements may not fully understand and there is also danger that the witness who repeats it may not remember it all or exactly repeat it, but if you are satisfied that such statements or declarations were made and correctly understood by the witness and correctly repeated in court, then it is for you to say what effect is to be given to them, taking into consideration all the circumstances under which they were made, if they were made.

Numerous police officers have testified in this case. In determining the weight or credence to be given their testimony, you should apply the same rules that you apply in determining the weight and credibility of other witnesses. Merely because they are police officers does not warrant the jury in

giving their testimony more or less weight or credence than that of other witnesses.

When you retire to your jury room, you will have with a copy of the indictment in this case. The court again admonishes you that the indictment is not evidence and while you may read the indictment as often and as carefully as you like, the court cautions you that you are to bear in mind that neither the fact that the indictment has been voted by the Grand Jury nor the contents of the indictment itself are to be considered as any evidence of the guilt of the defendant and should not be considered in any manner against the defendant. The evidence in this case consists of the sworn testimony of the witnesses, all of the exhibits that have been admitted in evidence and which will be with you in the jury room, and any and all stipulations made by and between counsel during the trial of the case.

You were permitted to view the premises where the homicide is alleged to have occurred.

You were instructed that this was done for the single purpose alone of enabling you to understand and apply the evidence as you heard it detailed by the witnesses. What you saw on this view is not evidence, and must not be so regarded

by you. The view was for the sole purpose of giving you such a sense of relation as would enable you to better understand and apply the evidence.

This is a criminal case and under the law requires the concurrence or agreement of all twelve of your number. That is to say, that before you can consider that the jury has returned a verdict the entire twelve jurors must agree in and sign the verdict.

As you may have already gleaned from these instructions, any one of three verdicts may be returned in this case. Forms of verdict will go with you to your jury room and with a little study they should prove almost self-explanatory. You will, of course, employ and use the form which expresses your verdict. You are hereby instructed that you will attach no significance to the order in which the court will read forms of verdict.

The first form is one finding the defendant guilty of murder in the second degree as he stands charged in the indictment.

The second, is a verdict finding the defendant guilty of manslaughter, first degree.

The third, is a verdict finding the defendant not guilty.

You will have with you in your jury room a copy of the instructions which I have just read to you and you may refer to it for guidance if you should find it necessary to do so.

Upon your retirement you will immediately proceed to elect one of your number forman or forelady. When you have reached a verdict all twelve of you will sign the verdict.

During your deliberation and until you have reached a verdict or are otherwise discharged by the court, you will not be allowed to separate except for such temporary separation as circumstances may demand. If any such temporary separation becomes necessary, it will be permitted only under such rules as the court may prescribe.

If you desire to address any communication of any kind in reference to this case, or otherwise, to the court you will reduce such communication to writing, signed by your foreman or forelady, and cause it to be delivered to one of the court's sworn constables in whose exclusive charge and control you will be throughout your entire deliberation.

Ladies and gentlemen, you are here for one purpose and one purpose only, and that is to ascertain the truth, the whole truth, and nothing but the truth

in this case, and to so ascertain it as nearly as the truth in human affairs can be ascertained. As the court has already indicated, you will do this without sympathy for or bias or prejudice against either the State of Ohio or the defendant.

The law in constituting a jury of twelve jurors contemplates that each and every one of you shall give your individual consideration to and judgment upon the evidence. The rules of law which are explained to you in these instructions are binding upon the individual conscience and judgment of the members of the jury.

While you are deliberating each juror should give careful consideration to the views which his or her fellow jurors may have to present. A juror should not turn a deaf ear to his or her associate jurors and without listening to their reasons or arguments obstinately stand upon his or her own opinion regardless of what may be said by another juror or jurors. It must be the object of all of you to arrive at a common conclusion, and to that end you should deliberate together with calmness and in a dispassionate manner, being considerate of each other's views.

You should have in mind two propositions

of equal importance: first, that the laws are enacted for the benefit of all members of organized society; and when a jury is convinced beyond a reasonable doubt of a defendant's guilt the jury should so say in its verdict because no person found guilty of committing a criminal offense should be permitted to escape the punishment provided by law; and, second, that no defendant should be convicted of a crime when the jury is not convinced of such defendant's guilt beyond a reasonable doubt.

Having carefully weighed all the evidence in this case and applied the law as stated in these instructions, let your verdict be fair and impartial, thus assuring that you have been mindful of your oath to well and truly try and true deliverance make between the State of Ohio and Sam H. Sheppard, the defendant in this case.

Now, may I please have the attention of the alternate jurors, Mrs. Horndeski and Mrs. Pipoly. You have sat through the entire case in pursuance to the statute permitting the impaneling of alternate jurors and inasmuch as all of the jurors have been able to attend court regularly and are now here, Mrs. Horndeski and Mrs. Pipoly, you will be excused with the thanks and I am sure the sincere appreciation

of counsel for the parties and the court for attending the same as the other twelve. It is my duty, however, to instruct you as alternate jurors to refrain from any discussion of this case and from expressing any opinion relative to the merits of this case until the verdict of this jury has been returned in open court. Thank you.

Members of the jury, after you have reached a verdict, you will contact this room at which time you will be brought back into open court. You may now retire.

(Thereupon the jury retired to deliberate upon its verdict.)

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