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Reply Brief of Defendant-Appellant, State v. Sheppard, Eighth District Court of Appeals Case No. 23400

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IN THE COURT OF APPEALS
Eighth Judicial District of Ohio
Cuyahoga County

STATE OF OHIO,

Plaintiff-Appellee,

vs.

SAMUEL H. SHEPPARD

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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No. 23400

IN THE COURT OF APPEALS

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REPLY BRIEF OF DEFENDANT -APPELLANT

The Brief of the Plaintiff-Appellee, who will be referred to here as the "State", is incomplete, misleading and incorrect. The Brief makes references to only 49 places or pages of the Record, which consists of 7,391 pages.

While many authorities are cited by the Defendant-Appellant, who will be hereafter referred to as the "Appellant", none are criticized or challenged.

I

THAT THERE WAS NO ERROR OF THE COURT
IN THE DEMAND FOR CHANGE OF VENUE

On the Appellant's claimed error of the Court in the matter of venue, one authority cited by the State at length is the opinion of the Trial Judge, (State's Brief, p. 37, 38 & 39). Inasmuch as the plaintiff's claim of error is against the Trial Judge, his opinion is not appealing as

an authority to sustain his own error.

Reference is made to the case of the State v. Richards,
43 O. A. 212. That case holds:

Syl. (1) "Right to order a change of venue lies in the trial court's discretion."

However, in Baxter v. State, 94 Ohio St. 167, at p. 169,
the Supreme Court in a per curium decision held that:

"While the question of change of venue in a criminal case is within the sound discretion of the trial court, yet it is a substantial right of the defendant to be tried by a fair and impartial jury."

"The State, to defeat the motion, should negative the grounds upon which the change of venue is sought. Denial should not be made merely by affirmatively stating that a fair trial can be had." 12 Ohio Jurisprudence, paragraph 100, page 133.

The State's position is epitomized in the statement of the Assistant Prosecutor, Mr. Mahon, who was in charge of the case for the State:

"As I have said before, there is no question but what it has received a large amount of publicity, not confined strictly to this community but all over the state, all over the nation, and if you moved this case to any other community in the State of Ohio, they have had publicity in those counties comparable to the publicity that you have had here in this county."

II

THAT THERE WAS NO ERROR IN THE IMPANELLING OF THE JURY

On the claimed errors in impanelling of the jury, the State's Brief cites State v. Hoffman, 86 Ohio St. 229 (State's Brief, p. 44 and 45).

III

The claimed error of the Court in failing to charge on assault and battery and assault is dismissed with reference to the case of Bandy v. State, 102 Ohio St. p. 384 (State's Brief, p. 67). This case has no application here as the Court will very quickly determine. Bandy was indicted for murder in the first degree under Section 12400 General Code, now 2901.01 Ohio Revised Code, which provides that whoever purposely and in the perpetration of a robbery kills another is guilty of murder in the first degree. The Court held that in the trial of an indictment charging murder in the first degree in the perpetration of a robbery, if there was no evidence to support a charge of murder in the second degree or manslaughter, that the defendant was not entitled to a charge on the included offenses.

IV

THAT THERE WAS NO ERROR IN THE CHARGE OF
THE COURT AS TO HOW THE JURY SHOULD
CONSIDER CHARACTER EVIDENCE

Three cases are cited in opposition to the claimed error of the Court in its charge on the manner in which the jury should consider character evidence. They support the claim of the defendant. Cited is Harrington v. State, 19 Ohio St. 264, and a small part of a paragraph in the Opinion is quoted from page 269. This quote is not the language of the Supreme Court of the State of Ohio but is the adoption by that court of the language in State v. Henry, 5 Jones, (N.C.) Rep. 66. The language of the Supreme Court of Ohio is found in the same paragraph on page 269 and precedes the quote in the State's Brief:

Page 269:

"The reasonable effect of proof of good character is to raise a presumption that the accused was not likely to have committed the crime with which he is charged. The force of this presumption depends upon the strength of the opposing evidence to produce conviction of the truth of the charge. If the evidence establishing the charge is of such a nature as not, upon principles of reason and good sense, to be overcome by the fact of good character, the latter will, of course, be unavailing and immaterial. But the same will be true of any other fact or circumstance in evidence, which, after receiving its due weight, does not alter the conclusion to be drawn from the other evidence in the case. Good character is certainly no excuse for crime; but it is a circumstance bearing indirectly on the question of the guilt of the accused, which the jury are to consider in ascertaining the truth of the charge."

The syllabus of the case is as follows:

"In a criminal case, it is error to charge the jury that proof of the prisoner's good character is entitled to less weight where the question is one of great and atrocious criminality, than upon accusations of a lower grade. The presumption of innocence which it raises varies in force with the circumstances, but not with the grade of the crime

1 charged. "

2 The State's Brief on Page 66 refers to Stewart vs. State,
3 22 Ohio St. p. 477. This case approves the case of Harrington vs. State,
4 19 Ohio St. 268, syllabus (4):

5 "In a criminal case it is error to instruct the jury that
6 evidence of the defendant's good character is not to be
7 considered by the jury, or made available to the defendant,
except in doubtful cases; the true and proper rule being to
leave the weight and bearing of such evidence to the jury. "

8 The third case cited by the State is State vs. Wayne Neal,
9 97 O. App. 339, at p. 351. The quote from that case is entirely mis-
10 leading. The Court of Appeals followed the rules set forth in Harrington
11 vs. State and Stewart vs. State that are referred to above. In discussing
12 the charge on character the Court of Appeals for Cuyahoga County had
13 this to say:

14 State vs. Neal, 97 Chap. O. App. 339, at p. 356.

15 "The charge in the case now before us on the subject of
16 character evidence does not take from the jury the right
to consider the character evidence in determining the guilt
or innocence of the defendant. The jury was told to consider
17 all the evidence, including character evidence, in coming
to its verdict, but if after considering all the evidence
18 it concludes that his guilt has been established beyond a
reasonable doubt, the fact that there is evidence of good
19 character should not avail to acquit. "

20 The charge on the weight to be given to character evidence
21 in the three cases cited by the State gave the proper effect to such
22 evidence and properly instructed the jury as to how such evidence was to
23 be considered and the weight that was to be given to it. The charge of
24 the Court in said cases bears no relation to the charge of the Court in
25 this case where the jury was instructed, "that such evidence, if believed,

1 may be of some help to you in your consideration of the total evidence
2 and the situation as a whole." (Appellant's Brief, p. 340.)

3 V

4 THAT THE INDIANA CASE CITED ON PAGE 88
5 IS PARALLEL TO THIS CASE

6 The final case cited in the State's Brief is Hinshaw vs.
7 State, 47 N.H. 157, (State's Brief, p. 88), and it is claimed that it is
8 "a case in point and which closely parallels the instant case." When
9 the facts in the Hinshaw case are known, it will be readily seen that the
10 case bears no relation to the case that is now being considered by this
11 Court. Briefly, they are as follows: -

12 Defendant and his wife retired. Later in the evening
13 neighbors heard shots and saw the defendant outside in
14 the light, shouting "murder". His wife was found dead
15 from a bullet wound in the head. She was lying near the
16 door of their home. Defendant was shot once through the
fleshy part of his chest and had numerous superficial
wounds, which it was determined later came from a razor
owned by him. The murder weapon, a revolver, was found
in the defendant's house. It was the property of the defend-
ant.

17 Defendant said that he and his wife were awakened by the
18 presence of two men in their bedroom. One of them
thereupon shot his wife and he began to struggle with him.
19 His wife stood up and watched the fight. The struggle
continued through every room in the house and out into a
20 lane. During this time he said he was cut numerous times
by a razor in the possession of one of the robbers. Some
21 place up the lane he was shot. After he lost consciousness
he claimed to have seen the two departing towards the
22 south.

23 This happened during a snow spell. There was no tracks
24 of any kind of anyone other than the defendant. There was
no sign of any struggle in the house although the defendant
described a violent fight in each room of the house. The
evidence showed that the wound sustained by defendant's
25 wife would cause her immediate death although she was

1 found in the doorway. She was shot in such a way that
2 the murderer would have to lean over the defendant while
3 they both lay in bed and shoot her. The razor wounds
4 sustained by the defendant were scratches; the shot wound
5 was not serious; the defendant did not take the stand.

6 The general rule on circumstantial evidence is as follows:

7 20 American Jurisprudence. Evidence paragraph 1217, at
8 page 1069 and 1070:

9 "Where circumstantial evidence is relied upon in a
10 criminal prosecution, proof of a few facts or a multitude
11 of facts all consistent with the supposition of guilt is not
12 sufficient to warrant a verdict of guilty. In order to con-
13 vict a person upon circumstantial evidence, it is necessary
14 not only that the circumstances all concur to show that the
15 prisoner committed the crime and be consistent with the
16 hypothesis of guilt, since that is to be compared with all
17 the facts proved, but that they be inconsistent with any
18 other rational conclusion and exclude every other reason-
19 able theory or hypothesis except that of guilt. The facts
20 proved must be consistent with each other and with the
21 main fact sought to be proved. A reasonable doubt must be
22 resolved in favor of the accused where a fact or circum-
23 stance is susceptible of two interpretations. If the circum-
24 stances tending to show the guilt of the accused are as
25 consistent with his innocence as with his guilt, they are
insufficient. In order to convict a person of a crime, the
facts must be inconsistent with, or such as to exclude,
every reasonable hypothesis or theory of innocence. Of
course, if any of the facts or circumstances established
are absolutely inconsistent with the hypothesis of guilt,
that hypothesis cannot be true."

The Ohio rule is as follows:

12 Ohio Jurisprudence, paragraph 460, at p. 479:

"In order to convict in a criminal case upon circumstantial
evidence, each of the several circumstances relied upon
to prove any essential element of the crime must be proven
by direct testimony beyond a reasonable doubt; each, when
all are taken together, must be consistent with all the
others, and not inconsistent with any other established
fact, and all, taken together, must point surely and unerringly
to the guilt of the defendant, and must be inconsistent with
any other rational supposition than that the defendant is
guilty of the offense charged. Circumstantial evidence
requires great skill and judgment on the part of a jury in
considering it, in order to warrant a conviction."

The case of Hinshaw vs State, 147 Ind. 334, which is cited in the State's Brief at Pages 88-89, recognizes these principles. However, in the Hinshaw case the Supreme Court of Indiana found, (Page 361 of the Opinion), that the circumstances which were proved were consistent only with the hypothesis of the appellant's guilt, and that they were absolutely inconsistent and irreconcilable with any other supposition; and further stated that there was no circumstances which it was even claimed by appellant's counsel was inconsistent with the hypothesis that no human being was present, when the homicide was committed, except the appellant and his wife.

The Hinshaw case is therefore entirely different than the present case, because as we have shown in our original Brief and have shown herein, the facts and circumstances upon which the State of Ohio relied for the conviction of Dr. Samuel Sheppard are entirely consistent with his innocence, and in several respects the circumstances are inconsistent and irreconcilable with any hypothesis of his guilt.

VI

NO AUTHORITY CITED IN SUPPORT OF ANY OTHER
CLAIM IN STATE'S BRIEF

The other Assignments of Error in the Brief of the Appellant are brushed aside with the statement that they are of no importance. There is no supporting authority for the conclusions drawn by the State. The paucity of authority cited by the State, none of which supports the State's position, is astonishing. The Brief of the State follows the general pattern adopted by the authorities almost immediately

after arriving on the scene of the murder July 4th. It is argued that the appellant, other than Chip, was the only person in this house between the departure of the Aherns and the arrival of the Houks.

"No human being other than the defendant had the exclusive opportunity to do the deed." (State's Brief p. 73)

"Who other than the defendant would simulate a burglary; who other than the defendant would have reason so to do; who other than the defendant had the time and the exclusive opportunity to set up this evidence of burglary?" (State's Brief, p. 73)

"No one but the defendant had the exclusive opportunity and time to kill this woman in the manner that she was murdered." (State's Brief, p. 76 and 77.)

"After the departure of the Aherns from the Sheppard home, there were three living persons remaining there, Marilyn, Chip, and the defendant. At the time of the arrival of Mr. and Mrs. Houk, the first persons to appear on the scene that morning, two of the persons, Chip and the defendant, were still alive, and Marilyn was dead. Chip was sound asleep." (State's Brief, p. 77.)

The foregoing is submitted to the Court among the reasons for sustaining the verdict. It is not argument but the expression of the suspicion that immediately became the basis for the charge against the appellant. It is the advancement of a premise that violates the rule that it is the obligation of the State to prove guilt beyond a reasonable doubt and that the defendant is not obligated to produce proof of his innocence. It is carrying out the same idea advanced by Dr. Gerber (See Appellant's Brief, p. 106) and Officer Schottke (Appellant's Brief, p. 111). The conclusions of Schottke and Gareau were accepted on the morning of July 4th by Chief of Police Eaton. The fact that a proper investigation was not made and was practically abandoned on the morning of July 4th after the conclusions of Dr. Gerber and Officers Schottke and Gareau were voiced is shown by the testimony at page 2874 of the Record, Witness

1 Eaton:

2 Q And in the morning, before you made your trip with
3 Schottke and Gareau, you were informed by Schottke and
4 Gareau that Dr. Sheppard was the man and you needn't
5 look any farther?

6 A That was not exactly the way it was -- happened, Mr.
7 Corrigan.

8 Q Well, was such information given to you by these two
9 men that at least parallels that question that I have asked
10 you?

11 (R. 2875)

12 A They informed me that the physical evidence pointed very
13 strongly to Dr. Sam.

14 Q And what was the physical evidence that you had at that time?

15 A Mostly the fact that his story -- we could not find anything
16 to substantiate his story.

17 Q The only thing that you could find was that he was in the
18 house and his wife was dead, that was the physical evidence,
19 wasn't it?

20 A And there was no evidence of anybody else being there.

21 Likewise, Officer Drenkhan, the first Bay Village police
22 officer on the scene, was diverted from making any investigation that
23 would tend towards establishing the real perpetrator of the crime.

24 On July 5th there were four law enforcing agencies working
25 on the case, Bay Village, County Sheriff's office, the Cleveland Police,
all led by Dr. Gerber, (R. 2672), who on the morning of July 4th had
determined that the Appellant had killed his wife. The direction of the
investigation consequently and continuously up to the time of trial and
through it was to secure evidence that would justify the conclusion that
has been arrived at on the morning of July 4th.

1 On July 5th, Officer Drenkhan was directed by Dr. Gerber
2 to begin to obtain statements and at that time it was stated to him that the
3 Appellant had committed the murder. This statement was made by either
4 Detective Schottke or Detective Gareau, (R. 2672). So it is not surprising
5 to see in the State's Brief the repetition of the conclusion that the author-
6 ities fixed in their minds on themorning of July 4th, which was that be-
7 cause the Appellant was the only person in the house outside of Chip he
8 must have committed the murder. The only statements as to what
9 happened in the defendant's home on the morning of July 4th are the
10 statements made by the Appellant. It was repeated by him over and over
11 again to many persons and appears in the record many times. From the
12 beginning to the end, the statement, with slight unimportant variations,
13 was the same.

14 Q Well, was there anything different in substantial difference
15 in any of the statements made by Dr. Sheppard?

16 A No, sir.
17 (State's Witness, Carl Rossbach, R. p. 3909).

18 The statements of the Appellant is accorded the following
19 treatment in the Brief of the State, (P. 77-79): -

20 "a fantastic and incredible story",

21 "too unreasonable for belief",

22 "his story defies common sense",

23 "glaring in its absurdity",

24 "improbable and unreasonable",

25 "the jurors' minds must have recoiled", (it must have been
a very slow recoil; it took them five days and four nights

1 to return a verdict).

2 Such extravagant statements prove nothing and can be of no
3 assistance to the Court in determining this case.

4 What the Appellant had to say about the happenings on the
5 morning of July 4th is put into the record by State witnesses, Schottke,
6 Houk, Gareau, Drenkhan, Eaton, Rossbach and Gerber, to all of whom
7 at different times he related his impressions of what had occurred. It
8 was also put in the record by the defendant himself.

9 The characterization of his remarks in the State's Brief
10 as outlined above has no basis in fact. The defendant is an intelligent,
11 educated person; he is fairly adapt at composition, has written and
12 delivered, before critical audiences, scientific papers, (R. p. 6191).
13 If he was falsifying, the statements would be complete in all details. The
14 very fact that the recollection of events in some instances is vague is the
15 strongest indication that the statements are true. When all the facts and
16 circumstances are taken into consideration, a true account would have to
17 be exactly like the account given by the Appellant. The emotional reaction,
18 the mental and physical shock that would occur to any normal human being
19 awakened from a sound sleep by the scream of his wife, would militate
20 against making the same observations that a person would make in calm
21 surroundings, and because the observations were not made by the Appel-
22 lant that would be made by a person wholly calm and collected and uninter-
23 rupted by any sudden and unusual happening, his recollection is character-
24 ized as "fantastic", "incredible", etc. The Appellant did the very thing
25 that an intelligent, normal human being would do. A person so startled

1 from sleep, instinctively and reflexively would rush immediately to his
2 wife and he would think of nothing except to get to her just as rapidly as
3 possible. The confusion of suddenly awakening, the fright, the mental
4 and physical shock, the concern for his wife, those are the things that
5 were occupying the mind of the appellant as he ran to his wife's assistance,
6 with never a thought in his mind that there was an assailant in her bed-
7 room. The thought that he had in his mind was that she was suffering a
8 convulsion, a condition that had occurred before (R. 6289). Can anyone
9 imagine the mental reactions that occurred in the mind of Dr. Sheppard,
10 when under the circumstances related in this case, he encountered a
11 person in his wife's bedroom, suddenly, without warning and without
12 a thought that such an event could happen? He suffered severe in-
13 juries, was rendered unconscious, and awoke to view a most startling
14 and horrible sight. Can anyone who has even the most sketchy knowledge
15 of the mental and physical reactions that flooded upon this appellant
16 require that he recollect in detail every incident, every movement that he
17 made, why he didn't do this, or why he didn't do that? No person is
18 capable of understanding the response of the mind and the body of the
19 appellant on the morning of July 4th except a person of equal intelligence
20 and training who has had the same experience as the appellant. Such a
21 person, and such a person alone, would have the right to state whether or
22 not the recollection of the appellant is as characterized in the State's
23 Brief. He suffered a dislocation of the vertebra, injuries to his head
24 and face, his teeth were loosened, and twice he was knocked unconscious.
25 He suffered a terrific shock, both mental and physical. It is not necessary

1 to repeat what we have already set forth in our Brief concerning his
2 injuries. The evidence is (R. 5265) that unconsciousness such as suf-
3 fered by appellant interferes with memory and often it is days or weeks
4 before memory returns, and sometimes it never returns.

5 VII

6 CIRCUMSTANTIAL EVIDENCE INTRODUCED BY THE 7 STATE, WHICH IS CLAIMED SUPPORTS TO DEGREE OF PROOF REQUIRED

8 The circumstantial evidence which the State claims admits
9 of no other hypothesis except the defendant's guilt beyond a reasonable
10 doubt is collected and summed up on pages 85 to 89 of the State's Brief.

11 1. What About Blood on Defendant's Wrist Watch?

12 This evidence is discussed at page 81 and 82 of the
13 State's Brief, where it is argued that the defendant's wrist watch was
14 found with blood on it in a green bag that had no blood on it; that the defen-
15 dant explained the blood on the watch by claiming he must have gotten it
16 on the watch at the time he took his wife's pulse; that because there was
17 no blood on the green bag the blood on the watch would have to be dry
18 at the time it was placed in the bag; that the defendant took his wife's
19 pulse with his left hand.

20 There are a number of misstatements regarding this
21 watch, the green bag and the taking of the pulse. There is no evidence
22 in the record whether the defendant took the pulse with his right or with
23 his left hand.

24 Dr. Gerber (R. 3123):
25

1 Q To refresh your recollection, did you ask him
2 whether or not he had examined or felt the pulse
3 of Marilyn Sheppard after he returned from the
4 beach?

5 A Yes, sir.

6 Q And what was his answer?

7 A He says he felt her pulse and felt her neck and felt
8 her face.

9 State's witness Schottke (R. 3596):

10 Q Now, you stated further at one point the defendant
11 stated he took his wife's pulse, is that correct?

12 A Yes, sir.

13 Q Did the defendant state how he took his wife's
14 pulse?

15 A He stated that he had taken her pulse at the neck.

16 Q And did he state when he took his wife's pulse?

17 A The first time he told us -- he told us that two
18 different occasions. The first time he told us
19 that was on the first interview, when he regained
20 consciousness on the beach that he went upstairs
21 and took his wife's pulse at the neck, and felt that
22 she was gone, and the second time he told us that
23 was at the second interview when we asked him how
24 the blood got on the wrist watch band, and he stated
25 at that time that he remembered when he regained
consciousness in the bedroom that he felt his wife's
pulse at the neck and that is how the blood must have
got on the wrist watch.

State's witness Rossbach (R. 38, 42):

"He then got up and went to his son's room. He
said he does not know whether he returned from
his wife's bedroom or not, but he thought that
he might have to take her pulse and while doing
that he ran downstairs after hearing a noise."

From the foregoing it is clear that the statement on page

1 82 of the State's Brief that the appellant took his wife's pulse with his
2 left hand is incorrect and that the only information as to how the blood
3 got on the watch comes from the answer Detective Schottke states that
4 appellant made on the morning of July 4th, which certainly is not a
5 clear statement of fact as to how the blood got on the watch but is a
6 conclusion arrived at by the appellant, who upon looking at the watch
7 endeavored to reconstruct in his mind how the blood got there.

8 There is no proof in the record that the appellant had the
9 watch on his wrist after he recovered consciousness in the bedroom.
10 There is no proof as to whose blood is on the watch. It is argued that
11 the watch was put into the green bag after the blood on the watch was dry.
12 There is no proof who put the watch into the bag.

13 If the appellant had gone to the lake to wash blood off
14 his clothes and person, as suggested but supported by no proof (State's
15 Brief p. 54), the blood on the watch would have been removed.

16 The next circumstance advanced by the State that we will
17 consider is (State's Brief p. 85):

18 2. What of the Fact that There Was No Blood Stain
19 on the Green Cloth Bag in Which the Defendant's
20 Blood Stained Watch Was Placed -- Indicating
That The Watch Was Put in the Bag After the
Blood Had Dried.

21 The green bag was found by Larry Houk at 1:30 in the
22 afternoon. This was after the grounds had been searched thoroughly by
23 a great number of people. He claimed that he found it on the side of the
24 hill leading down to the lake, picked it up, opened it and poured the
25 contents halfway out of the bag into his hand (R. 2946, 2947). It was given

1 to Officer Gareau by Larry Houk (R. 4091) and examined by State's
2 witness Cowan to determine if there was blood on the bag. This was on
3 July 5th. She did not examine the bag but she (R. 4725) cut a piece from
4 the bag about half an inch by half an inch (R. 4726), and determined that
5 that small piece of the bag contained no blood stains.

6 Q Now, of course, what you would get from that would
7 be a very minute solution of anything that was on
there?

8 A Well, that would depend upon the concentration of
the material on there.

9 Q Well, you tell me the concentration on it?

10 A It would be small, because it wasn't apparent -- there
11 was no apparent blood, shall we say, and so, there-
12 fore, the amount would be very slight.

13 Q Now, there are some other spots on this green bag,
notably this one here. Do you know what that is?

14 A I can't see it, sir.

15 Q May I hold it over so the jury can see it?

16 A No, sir, I do not,

17 which shows that the statement that there was no blood on the green bag
18 is not accurate because it was never properly examined, and even if
19 there was or was not blood on the green bag, it would be in no way indica-
20 tive of guilt of the appellant because it may be presumed to have been put
21 there by the murderer, and this is equally true of all the contents of
22 the bag.

23 3. What About the Blood on Marilyn's Wrist Watch,
24 the Place Where It Was Found, and the Fact That
25 It Was Removed from Her Wrist after the Blood
Had Dried? Who Removed It from Her Wrist?

Beginning from 5:50 a. m. until 8:00 a. m., Mr. and Mrs.

1 Houk, Eaton, Drenkhan, Callahan, Summers and several other people
2 were in and out of the den. The disorder in the den was right before
3 them but no one saw the wrist watch until eight o'clock in the morning.
4 If it was there during that time, it was in plain view, as shown by State's
5 Exhibit 19. How it got there or when it was placed there, nobody knows.
6 (R. 2560) Although Officer Drenkhan says he took a picture at eight
7 o'clock in the morning, he further states (R. 2716) that the lady's wrist
8 watch was called to his attention by Sergeant Hubach at approximately
9 5:00 in the afternoon; that at that time Hubach had it in his hands and
10 handed it to him.

11 Dr. Gerber testified (R. 3080) that when he examined the
12 body of Marilyn Sheppard around 8:00 a. m., July 4th, he observed some
13 dried blood that had the impressions of the bracelet of a watch on the
14 left wrist, and the inferences that are attempted to be drawn is that this
15 marking on the left wrist comes from the band of Mrs. Sheppard's wrist
16 watch, and that the watch was removed after the blood had dried. If
17 Dr. Gerber had made such an observation, he did not reveal it to anyone
18 on the 4th of July. After making this observation he came downstairs
19 and went to the den and claims that at that time he noticed the watch lying
20 on the floor. He did nothing about it at that time. The only inference
21 that can be drawn is that he let it lay there because, as we have been
22 shown, it was handed to Drenkhan by Hubach at five o'clock in the after-
23 noon, when both Drenkhan and Hubach were standing in the den (R. 2716).
24 There was no attempt on July the 4th or any time to determine the relation
25 between the marks on the wrist and the wrist watch band, although Dr.

1 Gerber claimed to be an experienced investigator and a writer and a
2 lecturer of what should be done in the investigation of a murder
3 (R. 3309).

4 4. How About the Impression of an Instrument on the
5 Pillow and the Removal of the Instrument after the
6 Blood Had Dried?

7 Notwithstanding the fact that the evidence clearly shows
8 that the weapon was not identified and that the only testimony about the
9 impression of an instrument resembling a surgical tool was by the wit-
10 ness, Coroner Gerber, which was later withdrawn (See pages 353-357,
11 Appellant's Brief), the State still keeps suggesting that it was a surgical
12 instrument or something similar to a surgical instrument (State's Brief
13 p. 19).

14 In regard to this assertion by the Coroner, we are almost
15 tempted to use some of the extravagant phrases found in the Brief of the
16 State, such as "incredible, " "fantastic, " etc., but we will be satisfied
17 in pointing out that if the Coroner on July 4th discovered such an im-
18 pression on the pillow, why he never did anything about it or why it was
19 never revealed even at the meeting of July 16th, when all the law enforce-
20 ment agencies were gathered in his office.

21 The Cleveland Police Department had taken charge of the
22 investigation and between July 23rd and August 4th the Scientific Depart-
23 ment of the Cleveland Police Department were conducting researches,
24 they were working in conjunction with the Coroner's office and endeavor-
25 ing to determine what the weapon was and examined a great number of
possible weapons, some of which are in evidence. Some of them were

1 picked up by the members of the various enforcement agencies working
2 on the case and some were sent to the Police Department by the Coroner's
3 office. None of them bear any resemblance to a surgical instrument;
4 and on August 16th, Mr. Dombrowski of the Scientific Bureau of the Cleve-
5 land Police Department was examining golf clubs that were submitted to
6 him by Sergeant Lockwood (R. 4390, 4391).

7 The Court, when it examines the pillow (State's Exhibit
8 32), will find that there are solid regions of blood on both sides of the
9 pillow case and that blood splatters from the blows themselves show that
10 the side opposite to the alleged instrument mark was upward during the
11 beating. Certainly, the murderer did not turn the pillow over so he could
12 lay an instrument down on it and let it lie there until the blood dried.
13 The mark on the pillow comes from the handling and folding of a pillow
14 on which there was a considerable amount of wet blood, and if the Court
15 will closely examine the pillow it will find other impressions that can
16 be interpreted in as many different ways as different persons observe
17 them.

18 5. What About Blood on the Stairway and the Basement ?

19 It was a strange investigation that was carried on by the
20 authorities. They investigated for blood in all parts of the house except
21 the blood spots in the room where the murder occurred. Other than look-
22 ing at the blood spots there was no attempt to relate them to the manner in
23 which the murder occurred or where the murderer stood.

24 Testimony of Witness Dombrowski, in charge of the
25 Scientific Investigation by the Cleveland Police
Department (R. 4374):

1 Q Did you ever cover the room in which Marilyn was
2 murdered?

3 A Not for detailed test.

4 Q Well, why did you avoid that particular room?

5 A It was our opinion that, just from the appearance of
6 blood in the room, that it would add nothing to the
7 investigation.

8 Although he knew that an examination of that room and of the
9 blood spots in the room would give exacting information as to where the
10 assailant stood, the position he was in, when the blows were struck, and
11 the position of the victim's body during the assault. The most important
12 evidence to be found in the blood distribution was in the murder room.
13 The authorities disregarded this room and turned to other parts of the
14 house (R. 3309).

15 The Scientific Bureau started their investigation and con-
16 tinued their investigation without knowing anything of the history of the
17 house, of the activities of the family or the history of the families that
18 had lived in the house (R. 4156, 4299). They were informed (R. 4300) that
19 there was a dog connected with the house but they never told the sex and
20 they never investigated to find out what the sex was, although the evidence
21 discloses that the dog was a female, in heat at various times and dropped
22 blood all over the house and the garage. See the testimony of State's
23 witness Ellnora Helms (R. 3977 et seq.).

24 In addition to the Cleveland Police Department, Miss Mary
25 Cowan of the Coroner's office made a number of investigations. Both of
the investigations disclosed that in various parts of the house they got

1 reactions from chemicals that indicated that certain spots might possibly
2 be blood (R. 4703), or might possibly be something else (R. 4556). The
3 Cleveland Police investigation revealed that they had come to the conclu-
4 sion that the spots in the house might be blood and it might be something
5 else, with the exception of one spot on the basement stairs, and even if
6 it was blood, they were unable to determine whether it was human blood
7 or dog blood (R. 4559, 4560).

8 Miss Cowan (R. 4703) got reaction for human blood from
9 five blood spots, three on the cellar steps and two on the kitchen steps.
10 All the other results she got in her investigation was that the stains
11 that she examined might possibly be blood with the exception of these
12 five. The length of time that these stains were present in the house, she
13 does not know (R. 4703-4706).

14 The so-called "blood trails, " of course, all have an
15 alternate explanation, as we have set forth in the main Brief (p. 208-213).
16 There is nothing in the evidence to connect the appellant with these blood
17 stains.

18 6. How About His Neatly Folded Corduroy Jacket
19 Found on the Couch Dry, Without Blood Stains ?

20 It is difficult to analyze wherein this jacket is a connecting
21 link to prove the murder of Marilyn Sheppard by the defendant, but inas-
22 much as it is referred to and set forth as of importance, we wish to call
23 the attention of the Court to what the record shows in regard to this
24 jacket.

25 The Houks were the first to arrive. Mrs. Houk did not

1 notice the jacket and Mr. Houk saw it late in the morning, around eight
2 o'clock. Drenkhan arrived and stated that he saw the jacket when he ran
3 upstairs the first time, about 6:02. Steve Sheppard arrived shortly
4 after him, walked through the living room, saw the jacket on the floor
5 and stepped over it, and when he came down he stepped over it again
6 (R. 5056). This was at least 10 minutes before Chief Eaton saw the
7 jacket on the couch at 6:25.

8 The defendant told Officer Schottke that some time during
9 the night he remembered waking up and being too warm and taking the
10 jacket off and either placing it on the floor or on the couch and going
11 back to sleep (R. 3589).

12 State's witness Drenkhan testified (R. 2483) that he was
13 well acquainted with the appellant and Mrs. Sheppard and he received the
14 call that she had been murdered and immediately went to the house, and
15 as he was going upstairs (R. 2491) he observed the jacket on the couch,
16 and the next time he saw it was about eight o'clock in the morning. That
17 was the first time he was in that part of the room. He testified, however,
18 on cross examination that when he arrived at the house he didn't know
19 where Mrs. Sheppard was; that he met Mrs. Houk in the hall, and that
20 she preceded him through the kitchen and directed him up the stairway
21 (R. 2577, 2580); that he proceeded hurriedly. Schottke testified that it
22 was necessary in order to see the couch to lean over the stairway and
23 look down on it (R. 3557-8, 3669).

24 Drenkhan (R. 2586):

25 Q You don't mean to infer to the jury that as you

1 were directed to this murder scene, that you looked
2 over the railing and looked at that coat on the couch,
 do you?

3 A No.

4 Q In fact, this picture that has been introduced as Ex-
5 hibit No. 8, which shows the couch and the coat lying
6 on there, that was taken by the Cleveland Police De-
 partment, wasn't it?

7 A That was.

8 Q And can you tell me about what time that was taken by
 the Cleveland Police Department?

9 A Some time between eight and nine that morning.

10 Q And as you hurried up that stairway to the point where
11 you later discovered Mrs. Marilyn Sheppard lay mur-
12 dered in her bed, you didn't stop nor hesitate to look
 over a rail to see if there was a coat on a couch,
 did you?

13 A No, I didn't.

14 The other testimony about the coat and the couch comes
15 from State's witness Schottke (R. 3667):

16 Q What was the first time that morning you observed
17 that coat?

18 A It was shortly after nine o'clock, when we arrived.

19 Schottke also established that a person had to lean over
20 the stair-rail in order to see what was on the couch. (R. 3557):

21 Q Now, immediately to the west of that staircase there,
22 will you describe what, if any, objects are placed on
 the floor?

23 (R. 3558)

24 A Immediately to the west of that staircase is part of the
25 living room, and if you would lean over the bannister,
 you could see a couch that was up against the wall.

(R. 3669):

Q Mr. Parrino asked you a question on direct examination and your answer was that you would have to lean over the rail to see the couch. That was the correct answer, wasn't it?

A Could I clarify that answer now?

Q Well, was that your answer to Mr. Parrino, that you had to lean over the rail to see the couch? Was it or was it not?

THE COURT: The question is: Did you say that in answer to Mr. Parrino.

MR. GARMONE: I would like to have a yes or no answer.

A I recall that that's what I said.

7. Why Was the Defendant Whisked Away by his Brother, Stephen Sheppard, without Consulting the Police, or the Mayor, and Without Using the Stretcher and the Ambulance Available in the Light of the Claimed Serious Injuries?

The stretcher and the ambulance were there for the purpose of conveying Mrs. Sheppard and no orders of any kind were issued to the ambulance men to convey anybody else away in that ambulance. The police were waiting for the arrival of the Coroner. The defendant was seriously injured. He was not whisked away but was assisted out of the house by his brother, Dr. Stephen Sheppard, and Dr. Carver, in the presence of the Chief of Police, the Mayor of the City and the other officers that were there. No protest of any kind was registered (R. 2617, 2618, 2619).

8. And if Marilyn Screamed, as the Defendant Claims She Did, Why Was Not Chip Awakened, and if There Was Some Intruder in the House, Why Did Not the Dog, Koko, Bark?

We shall take these two specifications separately.

First, as to Chip, why he was not awakened.

Anyone who has the least experience as a father with a healthy six year old boy knows how difficult it is to arouse such a child from a sound sleep. Children nowadays are not aroused by noises. Their reactions to noises are entirely different than the reactions of the writers of the Brief probably were when they were children. Chip lived on a heavily traveled road, where the noise of the traffic is constant. There was both radio and television in the house, and children now are inured to the most violent types of noise, wars, massacres, wrecks, zooming airplanes, all flit across the screen with accompanying noises; the child will look at it, will not be startled, and if he is not interested, lets it pass on and plays with his toys.

There was considerable confusion in that house that morning after the murder of Marilyn Sheppard was discovered; there was no carpet on the stairs; policemen and firemen were running up and down the stairs; Mr. and Mrs. Houk, Dr. Richard and Dr. Stephen Sheppard were running up and down the stairs; the ambulance men carried a stretcher up the stairs, rolled it into Marilyn's room and then rolled it out along the hallway in front of Chip's room. The door of his room was open and directly next to the room of his mother. Mrs. Houk stated that she checked Chip twice and on both occasions found he was asleep (R. 2450).

Q When you went up the second occasion to check Chip, you ran up the stairs on that occasion, didn't you?

A Yes.

After determining Chip was asleep, she had a conversation about Chip and then she and Dr. Richard Sheppard went into Chip's room and she got his clothes together. There was a conversation somewhere

1 along the line that had to do with getting Chip out of the house and when
2 she went in again, Chip was still asleep. "He seemed very groggy until
3 we got out into the yard and he saw the ambulance."

4 Q You said he still was groggy when you got him out
into the yard? (R. 2456)

5 A Well, he seemed half asleep.

6 Q Half asleep at the time you got him into the yard?

7 A He had not noticed or commented on anything until
8 he got out into the yard (R. 2459).

9 Richard Sommer, one of the ambulance men, testified
10 that he moved the stretcher into the room and backed it out and rolled
11 it down the hall, and that while he was doing this he saw Chip in the
12 next room, and he was asleep (R. 3944-3955).

13 We desire the Court to notice that with very few exceptions
14 in these answers to the questions of the State, that we are basing our an-
15 swers entirely on the testimony of the State.

16 Now, why did not the dog, Koko, bark?

17 There is very little testimony in the record about the dog
18 Koko from which any conclusions can be drawn. State's witness Mrs.
19 Ahern was asked about the dog Koko. Her testimony is as follows:

20 (R. 2193)

21 Q And the dog, Koko, did you see him?

22 A I don't remember.

23 Q Did you see the dog, Koko, around there then?

24 A I don't recall Koko.

25 State's witness Mrs. Houk (R. 3407):

1 Q When you first came to the Sheppard home on the morning
2 of July 4th and came into the Lake Road side through
that door, did you see the dog, Koko?

3 A I remember seeing the dog go out the door. I don't
4 recall whether it was when we first opened the door
or when it was opened later. I don't recall seeing
5 the dog except when he went out the front door.

6 Q Did he later come back in the house?

7 A Yes, I saw him lying on a rug in the kitchen.

8 The front door referred to is the door onto the screened
9 porch. Both that door and the screen door was open when Mrs. Houk
10 arrived and some time after her arrival she saw the dog, Koko.

11 State's witness Eaton (R.2805):

12 Q By the way, did you see the dog around there that
morning?

13 A The dog was there for a while after I arrived, then
14 he disappeared -- she disappeared. I don't know
where she went.

15 State's witness Dr. Gerber (R.3431):

16 Q Now then, did you examine the dog that belonged to
17 the Sheppards?

18 A No, I never saw the dog.

19 State's witness, Ellnora Helms (R.4000):

20 Q The dog was a friendly dog, wasn't she, Mrs. Helms?

21 A Yes, she was friendly.

22 The foregoing is what the record shows about the dog,
23 Koko. The dog was a friendly dog that apparently didn't bother anybody.

24 There is absolutely no proof that the dog was in the house
25 at the time Mrs. Sheppard was murdered.

- 1 9. Consider Also the Spontaneous Utterance of Dr.
2 Richard Sheppard to the Defendant when He Stated,
3 'Did You Do This, ' or, 'Did You Have Anything
4 To Do With This ?'

5 Whether that is the statement that Dr. Richard made on
6 that morning, which he states he did not make (R. 5721), is open to ques-
7 tion. It was testified (R. 2279) by State's witness Houk, that he heard
8 Dr. Richard Sheppard after he came down from Marilyn's room say,
9 "She's gone, Sam, " or words to that effect. The addition of words,
10 "to that effect, " to the statement that was made by Richard to Sam indi-
11 cates that the witness Houk is not sure of what Dr. Richard did say.
12 He then proceeds in the same hesitating way to relate, "I then heard
13 Dr. Richard say either, 'Did you do this' or 'Did you have anything to
14 do with it ?' Again there is hesitancy as to what was really said. When
15 questioned as to whether there was anything else said, he answered, "I
16 can't say whether there was anything else said or not. "

17 It certainly is very weak evidence and cannot be classified
18 as a circumstance that would indicate the guilt of the appellant. Dr.
19 Richard's questions in no way could bind the appellant.

- 20 10. Consider Also the Exaggeration of the Injuries
21 to the Defendant, the Claim of a Broken Neck,
22 a Final X-ray Showing No Fracture Whatsoever
23 and the Activities of the Appellant in the Pursuit
24 of His Practice as a Doctor Within a Few Days
25 Thereafter.

26 That is a statement entirely unsupported by the record.
27 See Appellant's Brief, pages 81 to 95. Even to make such a statement
28 disregards even the testimony of the State's own witness, Dr. Hexter,
29 who found on examination the afternoon of July 4th that there was marked

1 and painful swelling over the right cheek (R. 4443); that his left eye
2 was black and swollen; he moved his head with difficulty; he had pain
3 on palpitation of the back and base of the skull, abrasions inside his
4 mouth and reflexes were absent.

5 11. Consider Also the Faked Burglary.

6 Because the crime has never been solved it is classified
7 as a "faked burglary." Even if it were so, there is nothing that connects
8 the defendant with the disorder that existed in the house.

9 A. The Billfold of the Defendant Was
10 Not Taken.

11 As proof of a faked burglary it is claimed that the billfold
12 of the defendant was not taken. However, there was money taken from
13 the billfold of the defendant (R. 6406).

14 Whether Marilyn was wearing her wrist watch in her bed,
15 no one knows. How it got into the den, no one knows. It was not seen
16 until eight o'clock in the morning and not picked up until five o'clock in
17 the afternoon.

18 B. Compartments in the Defendant's Upturned
19 Medical Kit Undisturbed.

20 That statement is quite contrary to the facts. State's
21 witness Houk (R. 2271) states that the first thing that attracted his atten-
22 tion was the doctor's grip that was setting on end in the hallway. It was
23 open and some of the contents strewn around.

24 State's witness Drenkhan (R. 2521): "The contents were
25 spilled out. The bag set on its end. There are two compartments on
either wing. There is a compartment on either wing and neither one of

1 those were open or the contents spilled out. The contents from the center
2 of the bag were spilled. "

3 State's witness Schottke (R. 3556):

4 "The grip was overturned with the contents spilled out,
5 which consisted of a stethoscope, a few instruments,
6 bandage gauze, several bottles, vials, and a small
7 black leather grip.

8 Q Now will you describe the grip, please?

9 A The physician's grip consisted of a large compartment
10 and on the two sides there were two other compartments
11 which had covers over the top of them. One of the
12 covers was snapped shut and the other cover was partly
13 open. "

14 The observation of Mr. Schottke and Mr. Drenkhan is in
15 conflict.

16 C. The Drawers of the Drop Leaf Desk
17 Pulled Out But Contents Undisturbed.

18 State's witness Drenkhan testified (R. 2522):

19 "There is a secretarial-type desk on the north wall * * *.
20 The secretarial-type desk was open. The three lower drawers
21 were pulled out. In front of the desk there were papers, tax
22 stamps, and so forth, strewn about the floor. "

23 Officer Schottke testified (R. 3564):

24 "In the living room against the north wall was a writing desk.
25 This writing desk had the cover resting upon an easy chair.
26 There were two small drawers on the top of this writing
27 desk. The contents had been overturned and were on the lid
28 and the top portion of the writing desk. The writing desk
29 had four drawers underneath the lid, the top drawer was
30 closed and the bottom three drawers were pulled about halfway
31 out.

32 In front of the writing desk was scattered envelopes, writing
33 paper, check book, sales tax stamps. "

34 State's witness Grabowski (R. 4013):

1 "Q There was a quantity of objects there lying on the
2 floor right in front of that leaf desk, is that correct?

3 A That is right. "

4 D. The Drawers in the Desk in Defendant's
5 Den Neatly Stacked Beside the Desk.

6 Witness Houk's testimony in regard to the den is:

7 "Well, there were some drawers out of the desk and
8 were lying on the floor. I can't be certain, but I
9 believe there were two on the floor and one lying
10 crossway on the top. " (R. 2273)

11 State's witness Drenkhan (R. 2525):

12 "In the den -- a desk and the drawers were sitting
13 out on the floor. There was a small statue that sets
14 on a bookcase laying on the floor broken.

15 There were two drawers behind the desk, there were
16 three drawers between the desk and a door that leads
17 to the lavatory in the study. "

18 (R. 2526):

19 "Behind the desk there is a -- the third drawer on
20 the desk was in, the next top two drawers were out.
21 They set upon each other in the corner. There was
22 a green box, fishing tackle type box. "

23 State's witness Schottke (R. 3567):

24 "In the den was five drawers on the floor. The contents
25 of one drawer had been spilled on the floor. Three of
the drawers were to the west of the desk, the other
two drawers were one piled on top of another in the
southeast corner. The sixth drawer remained in the
desk. On top of the desk was medical books, pipes,
papers, things of that nature. "

State's witness Grabowski (R. 4020):

"In the den I saw a desk and a chair. The desk con-
tained six drawers. One drawer was inside the desk,
two drawers were piled on, facing the north, on the
eastern part of the desk, and the three other drawers
were strewn on the western part closer to the wall. "

1 State's witness Gareau (R. 4088):

2 "Immediately upon entering the den, I saw a red
3 overstuffed chair. To the right of the chair was a
4 desk. Behind this desk and to the east were two
5 drawers, one piled upon the other. "

6 A confusing picture to say the least, which certainly does
7 not justify the statement made on page 86 that the drawers were neatly
8 stacked beside the desk.

9 E. The Absence of Fingerprints Due to
10 Wiping by Rough Cloth.

11 The evidence is that Michael S. Grabowski, a fingerprint
12 expert, arrived at the home about eight o'clock in the morning. We have
13 discussed in our main Brief, pages 95-99, the inadequacy of the investiga-
14 tion that he made. The claim that fingerprints were absent due to wiping
15 by a rough cloth is entirely unsupported by the evidence.

16 Grabowski testified (R. 4014), in his examination he noticed
17 very peculiar lines throughout the desk, on the drop leaf and the front of
18 the drawers, "like if I had a very rough, sandy hand and I just ran my
19 hand through it. "

20 Q And these lines that you saw there on that leaf desk,
21 how wide were those lines apart?

22 A They were not very much apart. I think it would
23 have to take a very, very minute measuring instru-
24 ment to measure the lines.

25 (R. 4022):

A One metal box was located in front of the desk, that
is the sitting part -- if I was sitting at the desk, on
my right side of the floor.

A The marks are like the same -- like it was before
somebody took a fine piece of sandpaper and just ran
through them, and you was able to see those scratches
in there.

1 Q Could marks of that kind be, in your opinion, sir,
2 created with a cloth?

3 A That's right.

4 That is what the record says as to the absence of finger-
5 prints in the house. How the marks got on there, no one knows, or when
6 they were placed there.

7 F. Relatively Inconsequential Articles Placed
8 in a Green Bag and the Bag Then Thrown Away.

9 It will never be known why it was thrown away until the
10 murderer of Marilyn Sheppard is apprehended.

11 The evidence disclosed that Marilyn Sheppard's purse on
12 the morning of July 4th was in the kitchen, open and looted (R. 5613)..
13 The Chief of Police was asked to bring it to court and testified (R. 6069)
14 that he didn't know where it was.

15 G. No Evidence of Forcible Entry.

16 The back door of the house was kept unlocked. (See
17 Appellant's Brief, pages 35 and 37). The mere lifting of the latch is a
18 forcible entry.

19 H. Consider Also the Fact that Defendant's
20 Watch When Found was Stopped at 4:15 and, According
21 to the Coroner, the Time of Death was Between 3:00
22 and 4:00 A. M. (State's Brief, p. 87).

23 Time Defendant's Watch Stopped

24 The watch was found and handled by State witness Larry
25 Houk (R. 2947). The record is silent as to what time the watch showed
when it came into the possession of the Coroner. The Coroner claimed
when he first saw the watch it was stopped at 4:15. However, the Coroner
ordered a photograph of the watch made by Mr. Johnson, of his staff, and

1 that photograph is State's Exhibit 36 and shows the watch stopped at
2 five o'clock.

3 Time of Death

4 Dr. Gerber fixed the time of death (1) on the face of his
5 observation of the body; (2) on the report of Mr. and Mrs. Ahern at the
6 inquest; (3) and on the autopsy report (R. 3044).

7 Dr. Gerber arrived in the room about 8:00 a. m. (R. 2968).
8 He remained there about three minutes (R. 2972). He made no examina-
9 tion (R. 3152). The body was removed at 10:30 a.m. (R. 2993). He asked
10 the undertaker and his attendants to pull the body back onto the bed be-
11 cause the feet were hanging "over the bed." What was the purpose? "So
12 they could move the body onto the stretcher, into the basket."

13 Q The examination that you made was when the men from
14 the funeral parlor arrived to take the body away?

15 A Yes, sir. (R. 3177).

16 All the Coroner determined in that examination was the
17 fact that there was rigor mortis and the wounds (R. 3046). The witness'
18 testimony discounts any determination of the time of death from this ob-
19 servation.

20 His further determination of the time of death was based
21 on the testimony of Mr. and Mrs. Ahern at the inquest. Accordingly, he
22 was depending upon statements made 17 days after the death. They knew
23 nothing about the time Mrs. Sheppard died, but they knew what they had
24 eaten on the night of July 3rd. The record is not clear as to whether
25 Mrs. Sheppard ate the same portion and the same food that they did, but

1 the Coroner, after the inquest, assumed that they did.

2 The hour of the meal is not clear. It was probably 9:00
3 p. m. (R. 2134). On direct testimony (R. 3046), he stated that from an
4 examination of the autopsy report he determined there was complete
5 digestion, and, without knowing the kind of food or the amount of food
6 that Mrs. Sheppard had eaten, he determined that she had digested this
7 unknown food within five hours (R. 3046). On cross examination it was
8 shown that at the time of death, digestion was still in progress (R. 3403-6).

9 We claim that the statement of Mr. and Mrs. Ahern does
10 not help in determining time of death. And digressing for the moment,
11 if digestion was complete, as claimed by the State, it puts at odds the
12 unsupported statement of the Prosecutor (Appellant's Brief p. 50), "that
13 the defendant and Marilyn were quarreling," because emotional or physi-
14 cal upheaval retards digestion (R. 3406).

15 The examination of stomach contents is of little value in
16 determining the ^{Time}(cause) of death.

17 "While it may be possible from the contents of the
18 stomach to reach fairly accurate conclusions as to how
19 much time must have elapsed since the food was taken
20 into the stomach, it would be impossible to tell exactly
21 when death occurred, as the gastric juice, which may be
22 contained in the stomach at the moment when death
23 took place, would continue to digest the food in the
24 same manner as if it were acting in a living body. Then,
25 too, the condition of the digestive action of the deceased
at the time of death would have to be taken into considera-
tion, and this being unknown, the results from the exam-
ination of the stomach contents, while valuable in
other respects, would be of very slight value for the
purpose of determining the exact time of death." Medical
Jurisprudence, by Alfred W. Herzog, Ph. B., A. M. M. D.
(Published by Bobbs-Merrill Company), Paragraph 35,
page 32.

1 The third reason for determining the cause of death was
2 the autopsy report. There is nothing in the autopsy report (Defendant's
3 Exhibit C-1 - C-9) that fixes the time of death.

4 Dr. Richard Sheppard, a practicing physician and special-
5 ist in surgery for 14 years, and a member of the Bay View Hospital,
6 (R. 5634 et seq.) examined the body of Marilyn Sheppard shortly after
7 6:00 a. m. on July 4th, two hours before Dr. Gerber made his three-
8 minute observation. Dr. Richard Sheppard stated the determination of
9 how long Mrs. Sheppard was dead would be rather a wild guess but his
10 opinion was that she could have been dead for anywhere from 18 minutes
11 to two hours (R. 5718).

12 "If a physician has not been present at a person's
13 death, so as to be able to note with exactitude the
14 time of cessation of the functioning of the heart,
15 respiration and central nervous system, the time
16 which may have elapsed since a person died can be
17 ascertained only approximately, and the longer a
18 person has been dead, the less exact will such an
19 approximation be.

20 'How long has this person been dead' is a question
21 difficult to answer at any time, whether death has
22 occurred a few minutes before or weeks or months
23 before." Medical Jurisprudence, by Alfred W.
24 Herzog, paragraph 34, page 31.

25 I. Why Did the Defendant Fail to Call for
Help Immediately with a Telephone Available in That
Bedroom ?

The appellant testified:

"I became or thought that I was disoriented and the
victim of a bizarre dream, and I believe I paced
in and out of the room, and possibly into one of
the other rooms. I may have re-examined her,
finally realizing this was true. I went downstairs.
I believe I went through the kitchen into my study,

1 searching for a name, a number or what to do. A
2 number came to my mind and I called, believing this
3 number was Mr. Houk's. I don't remember what I
4 said to Mr. Houk. "

5 (From the defendant's statement to State's
6 witness Schottke at the County Jail, July
7 10, 1954 (R. 3624).)

8 J. What About His Incredible and Fantastic
9 Story of Encounters with 'Forms' ?

10 What can be determined on entering a dark bedroom at
11 night even when there is reflection from street lights or reflection from
12 lights from other rooms ? How incredible and fantastic was it for the
13 appellant to describe what he saw in the room was a "form" ?

14 On July 11th, State's witness Drenkhan, with his father,
15 who is a police officer, and Sergeant Hubach conducted an experiment in
16 the appellant's home. At 1:00 a. m., all the lights in the house were
17 turned off except the light in the dressing room, which was on when Mrs.
18 Sheppard was murdered. The light was turned to 100 watts. The room and
19 curtains were arranged the same as on the morning of July 4th when
20 Drenkhan arrived. Sergeant Hubach stood in the bedroom wearing a
21 white shirt (R. 2771). Drenkhan then proceeded to determine what could be
22 seen in the room by a person going up the stairs. The appellant did not
23 know there was a stranger in his wife's bedroom when he went up the
24 stairs on July 4th and was not looking for such a person. Drenkhan, when
25 he started to ascend the stairs, knew Hubach was in the bedroom (R. 2715),
and was looking for him. "The hall was lit, " (R. 2665).

Testimony of State's witness Drenkhan:

Q And what could you see ?

1 A From halfway up the stairs, or from the bottom of
2 the stairs you could see a man in a white shirt
3 standing down toward the end of the bed, but you
4 could not see a man in a dark shirt.

5 Q You couldn't --

6 A I mean an outline, a form.

7 Q That is if you were coming up the stairs you could
8 only see a white shirt --

9 A A form.

10 Q That is if you were looking for it?

11 A That's correct.

12 But if a person had a covering over the white shirt he
13 could not be seen (R. 2686).

14 K. Why Should This Form Use a Deadly
15 Weapon to Kill Defenseless Mrs. Sheppard and Not
16 Use the Same Instrument on the Defendant, Who
17 Could Be a Witness if There was in Fact Such a
18 Form Present?

19 Such a question does not pose a discussion of the facts. It
20 leads into the realm of conjecture and speculation.

21 "There is no question about him being injured." Closing
22 Argument of Prosecutor Mahon (R. 6957).

23 L. What of the Fact that Mrs. Doris Bender
24 Drove Past the Sheppard Home Between 2:15 and 2:30
25 A. M. and Saw the Lights on Both Up and Downstairs?

26 Mrs. Bender states that she was in an automobile with her
27 husband and drove by the Sheppard home between 2:15 and 2:30 in the
28 morning at a rate of speed estimated between 40 and 60 miles an hour.
29 She is on the gossipy side (R. 4185, 4188, 4189). She states she saw a
30 light upstairs in the center of the house and a light downstairs in the east

1 part of the house. It is a fact that there was a light in the dressing room,
2 which is in the center of the upstairs. That was a night light and was lit
3 when the officers arrived in the morning. Whether she saw a light in
4 the east part of the downstairs is open to question, but even if she did,
5 how does it form a link in a chain of circumstantial evidence?

6 M. Consider Also the Instrument Used to
7 Murder Marilyn Sheppard as well as Defendant's T-
8 Shirt Have Disappeared and Neither Have Ever Been
9 Found.

10 Weapon

11 What was the weapon that killed Mrs. Sheppard?

12 If the weapon could be found, the murder would be solved.
13 Intensive search was made for the weapon. A dredging company searched
14 the lake; frog men were enlisted; the home and grounds were searched
15 many times by many officers; nothing was overlooked. An Army mine
16 detector was engaged that went over the entire ground (R. 2812, 2813,
17 2814). From July 5th to July 9th a group of city employees under the
18 direction of the Bay police searched everything and everywhere, 5000
19 yards on all sides of the Sheppard home, and the weapon was not found
20 (R. 3958).

21 T-Shirt

22 A T-shirt was found caught on a wire two or three feet
23 underwater 20 feet off the beach at the east side of the pier that adjoins
24 the west end of the Sheppard beach (R. 3973). It was found July 14th
25 (R. 3961). It was discovered by Jack Furr and handed to Patrolman Lipaj,
who was present, and he gave it to Patrolman Smith, who took it to the

1 Coroner's office (R. 3959). It was never shown to the defendant, nor was
2 it submitted to the Scientific Department of the Cleveland Police Depart-
3 ment that was in charge of the case. In fact, none of the evidence that
4 was gathered by the police or the Coroner was submitted to this Scientific
5 Department, who were then engaged in what has been represented to be a
6 scientific investigation of the crime.

7 State's witness Dombrowski, in charge of this scientific
8 investigation, stated:

9 Q Did you ever make an examination of the articles in
10 the Coroner's office?

11 A No.

12 Q Were they ever brought from the Coroner's office
13 to the Cleveland Police Department's Scientific
14 Bureau?

15 A No. (R. 4390, 4391)

16 And likewise the T-shirt reposed with the other evidence
17 in the Coroner's office until it was produced in court on the demand of
18 the appellant and marked "Defendant's Exhibit DD, " (R. 3960).

19 N. And What of the Fact that Ellnora Helms,
20 the Maid, Found Nothing Missing in the Bedroom, and
21 Defense Concedes in their Brief that the Weapon was
22 Brought into the Bedroom?

23 The defendant was prevented by the authorities from making
24 a search of his home. He was permitted in his home on two occasions,
25 before his arrest on July 6th, to answer the questions of the authorities,
and on July 11th, to remove some clothes. He was the person who should
have been given the opportunity to determine whether anything was miss-
ing and not the maid. The maid had not been in the Sheppard home since

1 June 23rd (R. 3979, 3982, 3983), and what was in the room during the
2 period from June 23rd to July 3rd she had no way of knowing.

3 O. He Had the Physical Attainments

4 The next question (P. 87) deals with the physical ability
5 of the appellant to strike the blows that killed his wife. This certainly
6 is no proof of the guilt of the appellant.

7 P. Consider the Fact that the Defendant's
8 Thumb Print was Found on the North Side or Front Side
9 of the Back Board of Marilyn's Bed and the Complete
Absence of any other Thumb or Fingerprint in that
Bedroom (State's Brief, p. 88)

10 We are at a loss to understand how the imprint of a hus-
11 band's thumb print on the headboard of his wife's bed and in his own bed-
12 room can in any way be considered as a link in a chain of circumstantial
13 evidence.

14 On July 23rd, Officer Poelking, Scientific Investigator
15 of the Cleveland Police Department (R. 4156), examined the bedroom and
16 found fingerprints of detectives but none of Chip or Marilyn, or the appel-
17 lant, except this thumb print. When it was placed there, he does not know,
18 (R. 4162). He investigated but found no bloody fingerprints of the appel-
19 lant (R. 4160).

20 Q. The Next Question Deals with the
21 Appellant's Affairs with Susan Hayes and Other Women

22 Those affairs have been discussed at length in the main
23 Brief and we refer the Court to appellant's Brief, pages 185, 186, 214-
24 216, and 309-311.
25

1 R. Consider Also the Behavior and Conduct
2 of the Defendant Since the Murder of Marilyn Sheppard
and the Protective Shield Thrown About Him.

3 We have discussed at length in the main Brief the conduct
4 of the appellant with the officials, his willingness to talk to anybody, and
5 his attempt to cooperate with them, but apparently it has had no effect
6 upon the thinking of the Prosecutor. So we will add a few items in
7 support of what we have already said.

8 State witness Houk testified that he saw Sam Sheppard at
9 the Bay View Hospital on the night of July 4th and again on the 6th or 7th,
10 he saw him on several different occasions, and it was hard for him to
11 remember which came first. On July 9th the appellant was at his home,
12 (R.2310, 2311). He saw him in the City Hall on two occasions several
13 days after Marilyn's death (R.2320); that he had frequent conversations
14 with him over the telephone (R.2330).

15 State's witness Drenkhan: During the time that he was on
16 guard, or any of the officers that were on guard, there was nobody who
17 prevented them from talking to Sam Sheppard (R.2677).

18 Q Nobody said to you you can't talk to him ?

19 A No, sir.

20 "I talked to him on July 8th for three and one-half
21 hours. " (R.2679)

22 On July 9th Sam went to the house and went over it with
23 this witness, Rossbach and Yettra for two and one-half hours (R.2692).

24 Between the 10th and 16th of July he talked to him on the
25 phone and at his father's home (R.2696).

1 From the day the survey of the house was made with the
2 appellant until the appellant was arrested July 17th, he remembers ques-
3 tioning him three times (R. 2695).

4 At no time was there any attempt to evade any questioning,
5 (R. 2695).

6 State's witness Eaton stated there was a police guard put
7 in front of the appellant's room and remained there as long as he was in
8 the hospital (R. 2872). He testified that he had no difficulty going into the
9 room and that no one interfered with his entrance into the room (R. 2871).

10 State's witness Gerber:

11 Q When you arrived you had no difficulty getting in to see
12 Dr. Sam Sheppard, did you?

13 A No, sir.

14 Q You talked to him as long as you wanted to talk to him,
15 didn't you?

16 A Yes, sir.

17 Q You accomplished whatever mission you had in your mind
18 that morning, did you not?

19 A Yes, sir. (R. 3153)

20 State's witness Hoversten: He visited him between 5:00
21 and 6:00 p. m., July 5th (R. 3800).

22 State's witness Rossbach (R. 3882):

23 Q And didn't he further say that he would go anywhere with
24 you and that he wanted to help you in any way he could?

25 A Yes, sir.

 State's witness Schottke:

 A We arrived in the hospital about 11 o'clock.

1 Q And the first person you saw was the receptionist?

2 A Yes, sir (R. 3570).

3 Q And she referred you to a nurse?

4 A Yes, sir.

5 Q And the nurse pointed out the room that Sam Sheppard
was in?

6 A Yes, sir.

7 Q Did you go into that room?

8 A Yes, we did.

9 Q And was he alone at that time?

10 A Yes, he was.

11 Q Did you have some conversation with him?

12 A Yes, we did. (R. 3571)

13 He then testified that he went back to the hospital with
14 Gareau and Chief Eaton at three o'clock (R. 3585).

15 Q Did you speak to anyone else before you went into that
16 room?

17 A Just the nurse, to where Dr. Sheppard had been moved.

18 Q Then you did go into the room, is that correct?

19 A Yes, sir.

20 State's witness Dr. Richard Hexter was engaged by Coroner
21 Gerber to make an examination of the defendant on the afternoon of July
22 4th. He went to Bay View Hospital. Dr. Stephen Sheppard and the appel-
23 lant was informed of the purpose of the examination and for whom it was
24 being made. He arrived without any equipment and all the necessary
25 equipment for making the examination was supplied by the doctors and

1 nurses at Bay View Hospital. (R. 4464)

2 State's witness Lipaj: He testified (R. 3961) that he would
3 work an eight-hour shift on guard at the appellant's hospital door.

4 "Someone was at the door at all times. "

5 State's witness Worth E. Munn:

6 "We walked in the main entrance and looked for some
7 attendant on the floor and finally found a stairway
8 and walked down and found the girl at the telephone
9 booth. "

10 Q And what happened following that ?

11 A Finally Dr. Richard Sheppard interviewed us..

12 Q Well, did you see Sam following that ?

13 A Directly, within about 15 minutes we saw Sam.

14 Q Where did you see him ?

15 A Saw him in the hospital room. (R. 4808)

16 VIII

17 OTHER ARGUMENTS ADVANCED IN STATE'S BRIEF

18 A. It is claimed that Officer Drenkhan went to the
19 beach and there was no indication of anyone having been on the beach
20 (State's Brief p. 11). Drenkhan never went down on the beach. He stood
21 in the middle of the platform, which is ten feet above the beach, examined
22 the beach from that point -- "a matter of a minute, " (R. 2612) and then
23 went back to the house.

24 State's witness Esther Houk said appellant's clothes were
25 soaked and she saw wet footsteps leading upstairs to Marilyn's room
(R. 2461-62).

1 State's witness Sommer stated he saw water on the steps
2 of the porch, which is on the lake side (R. 3951). There was sand in
3 appellant's shoes, socks and the pockets of his trousers.

4 Defense witnesses Stawicki and Knitter are dismissed
5 (State's Brief p. 43) because they did not come forward until there was
6 an offer of a \$10,000 reward, because Officer Drenkhan patrolled the road
7 and didn't see any hitchhikers. Their statements were disregarded, be-
8 cause what they had to say conflicted with the accusations made by the
9 authorities on the morning of July 4th. Every move made by the authori-
10 ties, with the exception of Deputy Sheriff Rossbach, was to find evidence
11 against the appellant. They were interested in nothing else. They ex-
12 pected that the defendant would eventually confess.

13 Both Knitter and Stawicki are reliable citizens. It could
14 not be held against them if they furnished information to obtain a reward.
15 The very purpose of a reward is to have persons come forth with infor-
16 mation. Truly this is a strange reason for a law enforcing agency to
17 reject testimony. But neither man went to the police because of the
18 offered reward.

19 Knitter testified he didn't recall reading about a reward
20 and it was not the reason for his going to the police and telling them what
21 he saw (R. 6124-25).

22 Stawicki stated when questioned about the reward by the
23 Prosecutor: "The reward don't interest me. I got money of my own."
24 (R. 6060)

25 Drenkhan was not in the road constantly during the period

1 between midnight and 5:00 a.m. When he received the call, he was in
2 the jail station on Cahoon Road (R.2486). He returned to the police
3 station twice (R.2575). Huntington Park, just east of the Sheppard home,
4 was not checked by him during the night. It has a number of entrances
5 from Lake Road (R.2577-80), and he did not see the individual described
6 by Knitter and Stawicki.

7 B. The cross examination of the appellant (Appellant's
8 Brief page 310) referred to in State's Brief, page 54, is justified by the
9 State because Officer Schottke stated that was what the appellant said to
10 him. What is set out on page 54, State's Brief, is not what appellant
11 said to him, even if it is accepted that Schottke is reporting accurately
12 what appellant said.

13 Schottke's testimony is as follows:

14 "He pursued the form down the steps, and when he got
15 to the landing of the boat house, he does not know if
16 he jumped over the railing or ran down the steps,
but he half tackled this form on the beach." (R. 3572)

17 C. "As to tear on the trousers there is no satisfactory
18 explanation by the defendant." (State's Brief 69)

19 There is a tear in appellant's trousers (State's Exhibit 25).
20 His key chain was ripped off. The tear is downward from the bottom
21 right side of pocket, which is strong evidence that it was torn from his
22 person. If the appellant had torn his key chain from his trousers, the
23 movement of his hand would be upward and outward, not downward as
required to cause the tear that is in the appellant's trousers.

24 D. The absence of blood on the defendant's trousers
25 may be accounted for to the State (Brief p. 69) by
(1) the direction of the blood spurts from the weapon;
(2) the covering of the upper portion of the trousers
by the T-shirt, or (3) washing in cold lake water.

1 All this is purely speculative, not proof. There was no
2 study made of the blood spots in the room. There was no evidence that
3 he was wearing his T-shirt outside his trousers. The evidence is to the
4 contrary. And if he were, it would have to be a T-shirt that went down
5 over his shoes because there is no blood other than the one spot on his
6 knee. There was no blood spatters on the trousers, belt, shoes, socks,
7 or his handkerchief that was in the pocket, nor is there any blood specks
8 on his underwear. That blood on the trousers would soak through to the
9 underwear is shown by the fact that the blood smear on the knee soaked
10 through.

11 E. Her skull and body were beaten with some 35 blows
12 (State's Brief, p. 72).

13 It was widely circulated that the victim was struck by 35
14 blows. The State, having made the claim, although it was developed
15 that it was wrong, still persists in error. Wounds 1 to 15 may be accepted
16 as the results of blows -- whether they were delivered singly or several
17 wounds were received at one time is open to question. Wounds 1 to 7 are
18 one inch apart, and some have the same measurements. Wound 16 is a
19 very small wound, 5/16 x 1/8. It may or may not be the result of a blow.
20 Injuries 17 to 35 are not the results of blows. See analysis of wounds
21 (Appellant's Brief, p. 126 to 137).

22 F. The evidence shows the lake door had been locked
23 by Mrs. Ahern (State's Brief, p. 72) (R. 2137).

24 Mrs. Ahern stated she locked the door to the porch. After
25 that Mrs. Ahern knows that the appellant left the house. Whether he went
out the front door or the back door she was not able to state.

1 G. Pages 51, 52, 53 of State's Brief are devoted
2 to a discussion; that the questions about Mrs.
3 Lossman, Miss Kauzer and Susan Hayes were
4 to show that the Appellant and Mrs. Sheppard
5 were not happy.

6 This is contrary to what appears in the record. On the
7 evening of July 3rd they showed evidence of being very happy.

8 "Mrs. Sheppard seemed very much in love."
9 "They were sitting in the same chair with their bodies
10 close together." (Testimony of Mrs. Ahern) (R. 2166-
11 2167)

12 H. The State argues (Brief p. 72) that an Intruder
13 would not have run down the stairway to the beach,
14 because that was the only way the intruder could
15 not get away. He would have to go into the water.

16 This statement is in conflict with the statement on page 11,
17 State's Brief, where it is stated Drenkhan saw five feet of beach in front
18 of the bath house.

19 State's witnesses Eaton, Houk, Sommers, Schottke, Gareau
20 and Grabowski walked the beach, some as far as Huntington Park. Detec-
21 tive Grabowski was on the beach taking pictures of footprints. One was
22 the footprint of a woman's bare foot. They were photographed, never
23 identified, and filed away (R. 4076-7). The evidence discloses this.
24 There was plenty of beach on which to escape, east or west, from the
25 Sheppard beach.

26 I. When it comes to a discussion of the injuries of
27 the appellant, we are met with the same vague,
28 indefinite and unsupported statement that have
29 been present in this case from its inception.

30 "The wounds the defendant claimed he had were self-
31 inflicted"

32 "Or inflicted by Marilyn." (State's Brief p. 76)

1 "Could not his actual injury resulted from a jump
2 or fall" (Page 83 - State's Brief.)

3 "You either fell on those stairs or jumped off the
4 platform down there and out to the beach, and there
5 obtained your injuries." (State's Brief p. 54)

6 J. "It was significant when Houks arrived the
7 defendant was offered and refused a drink
8 of whiskey, because 'he wanted to keep his
9 senses.' For what? So that he would not
10 get confused on the story that he had con-
11 cocted before the Houks arrived as to how
12 he would explain the murder?" (State's
13 Brief p. 77)

14 The foregoing quote does not appear in the record.

15 State's witness, Esther Houk (R.2415), noted his condition.
16 She at that time was a friend. She noticed a condition that caused her
17 concern (R.2447). He was complaining of pain in the neck (R.2448).
18 She went to the kitchen, with which she was familiar, and got a glass of
19 whiskey and brought it to the den. He said he did not want it, "that he
20 was trying to think and the whiskey wouldn't do him any good." Whiskey
21 is an intoxicant, and, appellant being a doctor, knew that an intoxicant
22 is not a remedy for an injured vertebra.

23 K. "Other than the appearance of the victim, there was
24 no sign of any struggle having taken place in that
25 room with an intruder." (State's Brief p. 80)

26 In addition to what we have said in the main Brief, there
27 are many signs of a struggle. The body itself showed many signs of
28 struggle. Two pieces of leatherette were picked up in the room and are
29 not in any way identified or in any way associated with the appellant or
30 anything connected with the household or the victim.

31 State's witness, Chief Eaton, states (R.2884) that on

1 July 4th Officer Drenkhan brought in a piece of paint and a small piece
2 of leather and that he turned them over to the Coroner. These articles
3 were never brought to the court room or identified.

4 On July 5th another piece of leather or leatherette was
5 found and a piece of nail polish (Mrs. Sheppard had no nail polish on her
6 fingernails) (R. 3053). This piece of leather and the nail polish was
7 picked up by Officer Nichol, of the Bay Police Department, who turned
8 them over to Schottke and Gareau, who in turn delivered them to the
9 Coroner (R. 3054). The Coroner and the other officers were in the bed-
10 room at the time. This leather piece was not identified with the defen-
11 dant, the household or the victim.

12 The Coroner's records and the records of Miss Cowan, the
13 technician, are confused. She states that she examined Exhibit 43 and
14 it was the leather piece picked up by Officer Drenkhan July 4th (R. 3257),
15 and identified it as Exhibit 43, while Exhibit 43 brought to court by the
16 Coroner is the piece of leather picked up by Officer Nichol July 5th.

17 These two pieces of leather -- what became of the other
18 one ?

19 There were wool fibers found under the fingernails of Mrs.
20 Sheppard. They were never identified with the defendant, or the victim,
21 or anything in the house. (See Appellant's Brief, pages 144-146) They
22 were filed away in the Coroner's office -- brought to court on the demand
23 of the defendant.

24 The bed clothes were in disarray (R. 2726) and in disorder,
25 (R. 2859). The statement that there was no sign of struggle is not borne

1 out by the record.

2 L. "There was no evidence that she was sexually
3 attacked." (State's Brief, p. 80)

4 Sex Attack

5 We have set forth in the main Brief a situation that
6 existed on the morning of July 4th which made a sex attack possible and
7 probable. It is general knowledge that peepers and sex deviates depend
8 upon the inside lighting and they know all the handy bushes, tree shades
9 and darkened spots where they can conceal themselves. They are not
10 always adults. They are sneaky and cunning. They build up love
11 fetishes that very often turn into a fixation for a particular person. If
12 contact with a woman happens to be overly friendly, it is mistaken as
13 desire on the part of the woman. Such an individual could very easily
14 locate himself in a position where he could watch the inside of the
15 Sheppard home. He could see the guests departing, and he knew they
16 would not return, especially if he was acquainted with Mr. and Mrs. Ahern,
17 He could see Mrs. Sheppard moving around the house, going upstairs
18 alone, going to the bathroom and to her own room, and no sign or pres-
19 ence of the appellant, because he was in a deep sleep on the couch and
20 concealed from outside view. If he was from the neighborhood, he knew
21 that the appellant went out on calls at night and sometimes was away the
22 entire night. As we have illustrated, the habits of this couple were known
23 to many, many people. Many people knew the interior of the house and
24 how to go in and how to go out. In the darkened house he could have gone
25 upstairs without noticing that Dr. Sheppard was sleeping on the couch.

1 It was possible to enter the kitchen door without anybody in the living
2 room seeing the person enter (R. 2091).

3 It is general knowledge that somewhere in the sex instinct
4 when a murder happens, as they frequently do, there is no premedita-
5 tion to murder. The intruder probably didn't enter the house to kill,
6 or rob, or to burglarize it, but the sex urge came suddenly to life.
7 He was not a sadist, otherwise there would be mutilation of the sex
8 organs or the breasts. The person who killed Marilyn Sheppard had a
9 sex complex coupled with a romantic desire. The refusal to meet his
10 sex desire would cause a hate complex to take over and it is general
11 knowledge that in such a person an uncontrollable temper would surge up
12 that would cause temporary insanity.

13 There are many confessions in case histories of crimes
14 similar to this. They generally follow the same pattern. When the emo-
15 tions gain complete control, such individuals smash and pound until their
16 emotion runs down and as the emotion runs down, so does their sex
17 desire.

18 While we were engaged in the trial of this case an exact
19 duplicate of the crime was committed in Arkansas. The husband was
20 asleep on the couch; a stranger entered, went upstairs and murdered his
21 wife, and then escaped. The husband was awakened by the fall of his
22 wife's body and ran upstairs, but the murderer had gone out. Probably
23 that husband, like Dr. Sheppard, if the same investigation was conducted
24 as was conducted in this case, would be charged with his wife's murder
25 but for the fact that a newsboy saw the murderer running from the house.

1 This case has been widely publicized.

2 As we have indicated in the main Brief, the fact of sex
3 attack was never considered by the doctor performing the autopsy.
4 Everyone's attention was diverted to the appellant. He was the only one
5 in the house, therefore he did it.

6 The examination of the sexual parts of Mrs. Sheppard
7 consisted in inserting a cotton swab into her vagina and as a result it
8 was reported that there was a moderate amount of creamy white exudate
9 within the vagina (Defendant's Exhibit C-8). This exudate was not
10 described nor determined.

11 In Defendant's Exhibit C-9, the autopsy report, there is a
12 description of the microscopic examination that was made by the Cor-
13 oner's office. It is as follows: "Vaginal smear: abundant epithelial
14 cells and bacteria." Such a description gives no scientific information.

15 State's witness, Dr. Adelson, said that when he inserted
16 the cotton swab into the vagina he collected some material, that was pre-
17 sent there, on the cotton swab, and streaked the swab on a small glass
18 slide and permitted it to dry, and then examined the slide under a micro-
19 scope, but that no chemical examination was made to determine the pres-
20 ence of any seminal fluid in the vagina of Mrs. Sheppard or around her
21 female parts.

22 The sperm is in the seminal fluid and, to some extent,
23 the presence of the sperm can be detected under a microscope (R.1887).
24 In order to finally determine whether there is seminal fluid, it should
25 be submitted to a chemical test, and that was not done. All that was

1 submitted to a chemical test (R.1882) was blood for the purpose of deter-
2 mining whether there was present any alcohol or barbiturates.

3 A very important reason for making a chemical examina-
4 tion is because acid phosphate is present in male seminal fluid (R.1974).
5 And because Marilyn Sheppard was married and living with her husband,
6 there was a probability that they might have had intercourse within 48
7 hours, and for that reason, so says this pathologist, he made no scien-
8 tific examination (R. 1974).

9 There was no examination of the bed sheets, or the bed
10 clothing, or the pajamas of Mrs. Sheppard to detect the presence of
11 seminal fluid (R.1888), and, as we have heretofore pointed out, the mur-
12 der room was entirely neglected, except to search for the fingerprints of
13 the appellant.

14 Respectfully submitted,

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