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Brief of Plaintiff-Appellee, State of Ohio, State v. Sheppard, Eighth District Court of Appeals Case No. 23551

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

STATE OF OHIO,

Plaintiff-Appellee,

vs.

SAM H. SHEPPARD

Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE

FRANK T. CULLITAN,
Prosecuting Attorney of Cuyahoga County.

SAUL S. DANACEAU,
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STATEMENT

The proceedings with reference to the motion for new trial on the ground of newly discovered evidence are set out in the Memorandum and findings of the Trial Court, attached to and made a part of the Bill of Exceptions.

The Trial Court not only makes his findings but discusses the law applicable thereto, and we invite the Court's attention thereto.

As stated by the Trial Court, applications for a new trial on the ground of newly discovered evidence are not favored by the courts and should always be subjected to the closest scrutiny. State ex rel. Robinson v. Hightower, 153 O. S. 93, 90 N.E. (2d) 849; Taylor v. Ross,

150 O. S. 448, 83 N.E. (2d) 222.

Newly discovered evidence which will warrant granting of new trial "is evidence other than that which might have been known before termination of a trial had due diligence been used." State ex rel. Robinson v. Hightower, supra; Domanski v. Woda, 132 O. S. 208, 6 N.E. (2d) 601. And it must be shown that the "new evidence" discloses a strong probability that it will change the result if a new trial is granted.

The rule is stated in 20 R. C. L., 289, Section 72:

"While newly discovered evidence, material to the party applying, which he could not with reasonable diligence have discovered and produced at the trial, is ground for a new trial, applications on this ground are not favored by the courts, and in order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequence of an adverse verdict, such applications should always be subjected to the closest scrutiny by the court, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. The matter is largely discretionary with the Trial Court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse. This is also true in criminal cases, where new trials may be granted on this ground, which is not the case in some jurisdictions."

The defense cite Koenig v. State, 121 O. S. 147, in which a new trial was granted because of newly discovered evidence. In the Koenig case the defendant was charged with issuing a check upon a bank in which he had not sufficient funds to meet the check. The State had in its possession documentary evidence forming part of the assets and files of the bank which had been closed and taken possession of by the State, which evidence tended to establish the entire good faith of the

accused and the want of intent on the part of the accused when issuing the check on the bank in which he did not then have to his credit sufficient funds to meet the check, and the State was unable to find and produce such evidence for use at the trial, but such documentary evidence was found and made available after trial and conviction, and was offered by the defendant in support of his motion for a new trial on the ground of newly discovered evidence. All of the requirements of newly discovered evidence were clearly met by the defendant. There was due diligence, the evidence was material and significant and undoubtedly would have changed the result.

In State v. Petro, 148 O. S. 505, the syllabus reads:

"To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (State v. Lopa, 96 O. S. 410, approved and followed.)"

In the opinion, per Turner, J., the pronouncement of this court in State v. Lopa, 96 O. S. 410, is quoted with approval as follows: (R. 507-508):

"The law on this subject is set forth in the per curiam opinion in the case of State v. Lopa, 96 O. S. 410, 117 N.E. 319, where at page 411 it is said:

"The granting of a motion for a new trial upon the ground named (newly discovered evidence) is necessarily committed to the wise discretion of the Court, and a court of error cannot reverse unless there has been a gross abuse of that discretion. And whether that discretion has been

1 abused must be disclosed from the entire record. The
2 rule of procedure in this regard has been frequently
3 announced by this court. The new testimony proffered
4 must neither be impeaching nor cumulative in character.
5 Were the rule otherwise, the defendant could often
6 easily avail himself of a new trial upon the ground claimed.
7 Unless the Trial Court or court of error, in view of the
8 testimony presented to the Court and jury, finds that
9 there is a strong probability that the newly discovered
10 evidence will result in a different verdict, a new trial
11 should be refused. "

12 Judge Turner also distinguished the case of Koenig v. State,
13 121 O. S. 147, 167 N. E. 385, saying (R. 509):

14 "The case of Koenig v. State, 121 Ohio St. 147, 167 N. E.
15 385, is inapplicable here and is in no wise a limitation
16 of the doctrine announced in the Lopa case. "

17 It is also the rule that the decision of a Trial Court on a
18 motion for new trial on the ground of newly discovered evidence is
19 addressed to the sound discretion of the Trial Court, and that such deci-
20 sion is not reviewable except upon a showing of a gross or manifest
21 abuse of discretion. State v. Lopa, 96 O. S. 410, 411.

22 I

23 THE "AFFIDAVIT" OF DR. KIRK
24 (Defendant's Ex. N. D. E. 7.)

25 In the instant case, reliance is had on the so-called affi-
davit of one Dr. Paul L. Kirk of Berkeley, California, who has arrogated
to himself the authority of a reviewing court in the analysis and weighing
of the evidence received on the trial, and who acts as a sort of thirteenth
juror in the consideration and treatment of such evidence. His self-
assumed pose of objectivity is so utterly absurd from a mere examination
of the affidavit, its self-serving declarations, theories, speculations,

arguments, conclusions, and misstatements and misrepresentations of the facts, as we shall hereinafter set forth.

Judge Blythin quoted from the so-called affidavit in his Memorandum, to illustrate the nature of this instrument. We direct the attention of this Court also to the many items of evidence contained in the record, briefed and orally argued before this Court but totally disregarded by Dr. Kirk; and to the many other instances in which items of evidence have been distorted or misinterpreted in order to reach his predilections or set conclusions.

For example, at page 6 Dr. Kirk says:

"Detailed analysis of the blood pattern in the bedroom in which Marilyn Sheppard was murdered constituted the bulk of the analysis of physical evidence. It is in this room and only here that the story of the actual murder is written." (Emphasis ours)

It may well be that Marilyn was murdered in this room, but to state that it is only here that the story of the actual murder is written is preposterous. The evidence submitted on what occurred and what was found downstairs, on the stairways to the second floor and to the basement, and on the defendant's journey to and in the lake is significant. Also significant is the green bag found on the slope of the bank.

At page 7, Dr. Kirk states:

"Only the autopsy and pathology findings are really pertinent to the case." With two minor exceptions, it shows no circumstantial value whatever. These are

- (a) Water under defendant's wrist watch crystal
- (b) Loss of T-shirt. "

To limit the proof to the autopsy and pathology findings is absurd on its

face. His assertion that the technical evidence presented by the prosecution shows no circumstantial value whatever with two minor exceptions simply parrots the opinions of defense counsel urged in their brief and answered by the State in writing and by oral argument before this Court.

At page 10, Dr. Kirk states:

"Clearly, the presence of blood on the green bag is not indicative in any way of the guilt or innocence of any accused person, ***"

The fact of the matter is that the significant evidence was the absence of blood rather than the presence of blood on the green bag. The record discloses that the entire bag, both inside and outside, was examined by Mary Cowan of the Coroner's office, by the use of a stereomicroscope and that no blood was found, and she made a further chemical test of a portion cut from the bag and no blood was found.

This evidence is valuable in that it shows that the blood on the defendant's wrist watch had dried before the watch was put into the bag, otherwise there would have been a blood smear.

Dr. Kirk's assertion at page 10 that "it must be accepted that the murderer stripped from both the victim and the defendant the items in the bag" is wholly unwarranted since none of the items found in the bag belonged to Marilyn.

As to Dr. Kirk's statement at page 10 that "it may be presumed to have been put there by the murderer regardless of who he may have been," he ignores entirely the absurdity of any claim that a real burglar or intruder would have taken these few small objects, gotten the green bag out of a desk in the defendant's den, placed these objects, and

only these objects, in the green bag, and then threw the bag with its contents away.

At page 22 of his "affidavit," Dr. Kirk says:

"The only reasonable article would be the attacker's hand, possibly placed over the mouth to prevent an outcry -- which is consistent with defendant's story, and the fact that nobody heard such an outcry, including Chip in the next room." (Emphasis ours)

He ignores entirely the defendant's story, repeated on many occasions, that he heard Marilyn scream and that her screams awakened him.

Dr. Kirk ignores entirely the marital difficulties of Marilyn and the defendant; his affairs with other women and Marilyn's knowledge of such affairs; the defendant's own testimony that Marilyn was sexually non-aggressive. He ignores entirely the recriminations that may result from this background of marital difficulty. Dr. Kirk, at page 33, states:

"10. The type of crime is completely out of character for a husband bent on murdering his wife. In such instances, the murder does not start out as a sex attack with the single exception of an unfulfilled and frustrated husband, which is completely contrary to the indications of this event."

and his statement that this "is completely contrary to the indications of this event" is not consistent with the evidence presented by the State on this subject matter.

As to his various theories, conclusions and interpretations of the evidence, there is no point in our discussing these matters in this brief as they are fully covered in the original brief of the State and have no place whatever on a hearing on a motion for new trial on the ground of

newly discovered evidence.

The record is replete with testimony of witnesses and exhibits showing all of the blood spots to which reference is made in the brief of appellant; to the various places about the room where these blood spots landed; to the places where there was an absence of blood; to the size, shape and appearance of the blood spots, and to their direction and velocity. The record will also disclose that counsel for the defense used a blackboard to emphasize the points he wished to make with reference to these blood spots. All of the pertinent blood spots were in the evidence.

Dr. Kirk's assertions (Appellant's Br., p. 9):

- "1. That during the beating the attacker stood close to the bottom of the bed on the east side and balanced himself with one knee on the bed.
2. That Mrs. Sheppard was struck with low angular blows.
3. The kind of weapon which was used.
4. That the weapon swung to one and one-half feet from the wardrobe door during the striking of the blows.
5. That Marilyn's head was on the sheet during most if not all of the beating.
- * * *
7. That the blows were struck by a left-handed person.
8. That the largest spot of blood on the wardrobe door could not have come from impact spatter or back throw of the weapon."

are merely his theories and speculations. They do not constitute newly discovered evidence. His assertion that "Marilyn's slacks had been partially removed from her before the murder"(App. Br., p. 9) is also

1 mere speculation except for the fact that when found, the slacks were off
2 the left leg only. This fact was in the evidence and is certainly not newly
3 discovered.

4 As to the kind of weapon which was used, whatever it was,
5 the defendant is not excluded. Sam Sheppard used whatever weapon was
6 used and speculation as to the kind of weapon is no proof that he did not
7 wield the murder weapon.

8 In his speculations on the large blood spot found on the
9 wardrobe door, Dr. Kirk sloughs over the likelihood that the weapon used
10 may have had jagged or other irregular surfaces where blood would col-
11 lect and would land as a large spot on the door. He also ignores the
12 likelihood that a substantial quantity of blood might have collected on the
13 hands of the murderer and might have been similarly thrown onto the
14 door.

15 Dr. Kirk concedes that some of the wounds on the victim's
16 head are consistent with right-handed blows only if her head were turned
17 sharply to her left. He follows this with the statement that this latter
18 idea is inconsistent with her final position and with some of the injuries,
19 notably those on the right of her head; but by what possible reasoning
20 process does he conclude that her head, throughout the struggle and
21 throughout the period of time in which some 35 blows were rained upon
22 her head and body, was in the precise position in which it was finally
23 found? The injuries on her hands surely indicate that she tried to pro-
24 tect herself, and there is every reason to believe that she did move her
25 head in an attempt to avert these savage blows.

1 We invite the Court's attention to the exhibits which clearly
2 show the deep lacerations on both the left and right side of her head and
3 face and on the top of her head. But, whether wielded by the right hand
4 or left hand, or by both hands, certainly Sam Sheppard, the defendant, is
5 not excluded. This has already been presented to this Court in the briefs
6 of both the appellant and the State.

7 This defendant, Dr. Sam Sheppard, was physically strong.
8 He had played football. He was a good swimmer and water skier. He
9 drove cars in races. He played basketball and tennis. He practiced
10 bowling and had a punching bag in the basement of his home. Such athlet-
11 ic activities develop skill in both right and left hands and arms. He was
12 also a practicing surgeon and must have been necessarily adept with
13 either hand. A man of his physical strength and attainments could very
14 readily rain blows on the head and face of Marilyn Sheppard with downward
15 strokes, strokes from the right to the left or left to right, and backhand
16 strokes as well, tennis style.

17 There were lacerations on both sides of Marilyn's head
18 and on the top of her head. There were blows on her face and on her
19 hands. This defendant was physically able to rain these savage blows on
20 his victim with either the right hand or the left, or from time to time with
21 both hands. The evidence discloses that the defendant did on occasions
22 actually use his left hand. He stated that when he was in the bedroom he
23 took his wife's pulse at the neck, and that is his explanation for the blood
24 on his wrist watch, which he wore on his left wrist.

25 Much ado is made of a large blood spot on the wardrobe

1 door. More than a month after the conclusion of the trial, after the
2 Sheppard residence had been turned over, keys and all, to the Sheppard
3 family, Dr. Kirk arrived from California and proceeded to make, what
4 he and counsel for the defense termed a strictly impersonal investiga-
5 tion, examination and research. He was here during the period from
6 January 22nd to January 26, 1955, and, according to his own report,
7 made a thorough study of the blood spots on the walls, doors, etc. He
8 did not at that time remove this or any other blood spot. About three
9 weeks later, Dr. Stephen Sheppard and Dr. Richard Sheppard, buttressed
10 by the presence of Reverend Scully and Dr. Haws, entered the Sheppard
11 home. These gentlemen proceeded to remove the blood spots in question,
12 had the material placed in vials and mailed to Dr. Kirk, who received
13 them in California on February 18, 1955. Materials from these vials
14 were, according to Dr. Kirk, subjected to certain tests and he found
15 that the blood spot in question was Type O, the same as Marilyn. If
16 anything at all about the tests thus made is significant, this is it. The
17 type is the same.

18 As the Trial Court stated:

19 "It is not claimed by anyone that any of the blood mentioned
20 came from the defendant." (Memo. p. 11)

21 The important fact is, whether or not the blood type is the same as that
22 of Marilyn (Type O). On this important matter, Dr. Kirk found that it
23 was Type O. However, Dr. Kirk states that he proceeded to make further
24 tests as to solubility and agglutination and reported that the blood from
25 the very large spot was less soluble than that from the smaller spot,

1 or from controls from the mattress; and that similarly, the agglutination
2 was much slower and less certain than the controls. He concedes that
3 there was agglutination of the blood from the very large spot but says
4 that it was slower and less certain. From that he concludes that the
5 "blood of the large spot had a different individual origin from most of the
6 blood in the bedroom." (P. 21, N.D.E. Ex. 7)

7 We must bear in mind that the Sheppard home was in the
8 exclusive possession of the Sheppard family for almost two months be-
9 fore the blood spots were removed and we cannot concede that no one was
10 in that house and in that bedroom during that long interval of time. Bear
11 also in mind that between July 4th and December 23, 1954, scores of
12 people were in and out of that bedroom and that the walls and doors were
13 subjected to fingerprint dusting powders, ultra-violet light, dust and the
14 elements. Bear in mind also that a possible admixture of soap, detergent,
15 paint from the painted door where the stain was removed, luminal reagent,
16 hand or body oils and perspiration or other substances of human origin
17 could easily influence the reactions even qualitatively. (See affidavit of
18 Dr. Roger W. Marsters, State's Exhibit N.D.E. - D).

19 Bear in mind also that the interior of a large drop of
20 blood would undoubtedly dry less rapidly than would the interior of a
21 smaller drop, and that Dr. Kirk apparently excluded the possibility that
22 there may have been differences in bacterial, biological or chemical
23 contamination of the various blood drops after they were shed. One of the
24 most important of the factors that may affect the solubility of a dry blood
25 smear is the rate at which the blood dried. Other things being equal, a

1 large mass of blood tends to dry less rapidly than a small mass. Because
2 of this fact, a large mass of contaminated blood is more likely to support
3 bacterial growth during the period of its drying than does a small mass.
4 Bacterial growth of shed blood may alter its characteristics in many
5 ways, including its solubility and the activity of its agglutinins and
6 agglutinogens. Exposure to ultra-violet light or differences in chemical
7 contamination may likewise alter the solubility and immune properties
8 of blood. Certainly, no person experienced in the performance of tests
9 on blood that has dried under uncontrolled conditions would be justified
10 in assuming that two blood samples having the same basic group charac-
11 teristics must have come from two different individuals because of differ-
12 ences in solubility or rate of agglutination activity. This statement is
13 fully supported by the affidavit of the most competent specialist on
14 blood grouping, in this part of the country, Dr. Roger W. Marsters.
15 (State's Exhibit N.D.E. - D).

16 Dr. Marsters has been in charge of the Maternity Rh
17 Laboratory, which is a clinical laboratory at the University Hospitals
18 of Cleveland, for the last eight years. During that time over 50,000
19 blood specimens have been blood grouped under his supervision and
20 over 10,000 antibody titration tests have been either performed by him
21 or under his supervision; and for the past two and one-half years he has
22 been in charge of the main blood bank of University Hospitals, where over
23 15,000 cross matches for blood compatibility have been performed under
24 his supervision; and for the past five years he has been blood group
25 referee for the Cuyahoga County Juvenile and Common Pleas Courts, dur-

1 ing which time he has personally performed over 200 blood grouping
2 studies in cases of putative paternity. His wide experience, training
3 and numerous scientific papers are set forth in his affidavit.

4 He has examined those portions of Dr. Kirk's affidavit
5 dealing with the grouping of two large blood stains on the wardrobe door
6 and in his affidavit Dr. Marsters states:

7 "Apparently, Dr. Kirk has observed a difference in
8 solubility and also a 'much slower and less certain'
9 reaction with one of these two particular stains. On
10 this basis he concluded that although both stains were
Type O, the larger stain had a different individual
origin and was therefore from someone other than
the victim.

11 "Under ideal conditions, from time to time variability
12 occurs in the routine performance of blood grouping
13 and antibody titration tests. These individual vari-
14 ations in a particular reaction are often impossible
15 to reproduce on re-running the same reaction under
apparently the same conditions. These variables are
almost always quantitative differences rather than
qualitative ones, however.

16 "The grouping of dried blood by the inhibition tech-
17 nique is complicated by the fact that intact red cells
18 are no longer present for conventional agglutination
19 procedures. Antiserum must first be exposed to the
20 stain and finally residual activity determined by means
21 of a secondary system employing fresh intact cells
added later. Under such conditions reaction speeds
may not be uniform due to the many variables intro-
duced. In the first place, the antiserum used is
deliberately diluted so that even slight inhibition will
not be missed due to remaining residual activity.

22 "The exact quantity of blood stain introduced into such
23 a test is difficult to control, and the 'lowered solubil-
24 ity' observed by Dr. Kirk may be simply a reflection
25 of the increased time necessary to dissolve a larger
stain than a smaller one. For that matter, the pre-
sumption of individual differences of blood origin on
the basis of a difference in solubility is certainly
unwarranted.

1 "Furthermore, since Dr. Kirk dissolved the stains in
2 distilled water, the final concentration of protein and
3 salts would depend directly on the exact weight of stain
4 employed for each test. These variables could also in-
5 fluence the speed of reaction.

6 "A further very important variable which could easily
7 influence the reactions even qualitatively is the possible
8 admixture of soap, detergent, paint from the painted
9 door where the stain was removed, luminal reagent,
10 fingerprint dusting powder, hand or body oils and per-
11 spiration or other substances of human origin. In
12 addition, such blood spots may have been altered
13 by exposure to ultra-violet light so as to interfere with
14 the subsequent reactions and solubility. In all tests
15 of this type it is absolutely essential that controls in
16 addition to the antiserum-cells control be taken in an
17 identical manner from the same general area as the
18 stain so that the particular effect of the background
19 material on the stain can be properly evaluated.
20 This type of background control was apparently not
21 performed and represents a serious oversight.

22 "Dr. Kirk is postulating different qualities of Type O
23 blood characteristic. Even under ideal conditions
24 of fresh blood reactions, subgroups of Type O are
25 unknown. Therefore, to assume the existence of
another quality of Type O and especially another
individual source on the basis of some quantitative
difference in reaction and solubility employing an
admittedly complex technique cannot be justified."

(State's Ex. N.D.E. - D, pp. 2-3.)

Dr. Kirk cannot ignore the effect of contaminants but he
very blithely states that the blood drops were "free of contaminating sub-
stances, fingerprint powder, physiological matter other than blood, and
any visible contaminants whatever." (Defendant's Exhibit N.D.E.-8, p.3).
This certainly does not exclude the possibility that one of the drops was
superimposed on, or contaminated by, a film of perspiration or saliva, a
fleck of detergent, a residue of soap or any one of a dozen other invisible
but potentially important substances. Certainly there may be differences

1 in Group O blood but no expert would accept the differences described
2 by Dr. Kirk as being indicative of blood samples of different origin.

3 The so-called additional facts developed by Dr. Kirk are
4 merely his theories, speculations, conjectures, interpretations and argu-
5 ments and certainly do not constitute newly discovered evidence. Many
6 of these arguments were made to the jury, to the Trial Court and to this
7 Court at the hearing before this Court on the original appeal.

8 In the main, Dr. Kirk simply parrots the theories and
9 opinions of counsel for the defense and his affidavit is designed to justify
10 their position. One would indeed have to be naive to accept his affidavit
11 as being the result of a strictly impersonal investigation or having any
12 of the attributes of objectivity.

13 II

14 THE APPELLANT COULD WITH REASONABLE DILIGENCE
15 HAVE DISCOVERED AND PRODUCED THE "NEWLY
16 DISCOVERED EVIDENCE" AT THE TRIAL.

17 Because the prosecutor refused to order the keys to the
18 Sheppard home turned over to counsel for the defendant, it is suggested
19 that the defense did not have adequate means to inspect or examine the
20 home or the blood spots in the bedroom.

21 Neither the defendant nor his counsel were ever denied a
22 request to make any such inspection or examination. On the contrary,
23 they were expressly told that they could do so at any time, and that the
24 premises would be made available to them for such purposes. (See
25 affidavit of Saul Danaceau, State's Exhibit N.D.E. - A.) Of course, as a

1 precautionary measure, an officer would have had to be in attendance.
2 Had there ever been such a request and the defense denied an opportunity
3 to enter the premises for such purposes, recourse could have been had
4 to the Trial Court or the presiding judge.

5 The attitude of the State is illustrated by the readiness
6 with which the physical evidence in the office of the Coroner was made
7 available to counsel for the defense and to Dr. Anthony J. Kazlauckas,
8 a former Deputy County Coroner, who was engaged to investigate and
9 otherwise assist the defense. (See State's Exhibits N.D.E. - B and C.)

10 At the trial of this case the defense tried to create the
11 impression that they were denied access to the home, but this was spe-
12 cifically refuted by the testimony of Chief John Eaton, as follows:

13 "Q Chief, since you have had that key -- you got it some
14 time in November, the key to the house; is that right?

15 A Yes, sir.

16 Q From that time down to date has the house been access-
17 ible to the Sheppard family?

18 A Yes, it has.

19 Q And have they been in the house during that period of time?

20 A Once, on one occasion, at least.

21 Q To take care of the heat, and so forth, and water, and
22 all of those things?

23 A Yes.

24 Q Is that right?

25 A Yes.

Q Have they ever been denied at any time the right to go
into that house since you have had possession of the keys?

1 A They have not. " (R. 6076)

2 "By Mr. Corrigan:

3 Q And the order that Sam Sheppard could not go into his
4 home, where did that come from?

5 A Pardon me. Will you repeat that?

6 MR. DANACEAU: We object to that. We
7 know of no such order.

8 Q Did you make that order?

9 MR. DANACEAU: Just a minute.

10 MR. MAHON: Was there such an order?

11 THE COURT: Let him tell what the
12 situation was.

13 MR. MAHON: There is no evidence there
14 ever was such an order.

15 THE COURT: No, there isn't any evi-
16 dence about an order, but he is the Chief of Police. Let
17 him answer if there was.

18 A I didn't understand the question, I'm sorry.

19 THE COURT: Will you restate your
20 question, Mr. Corrigan? The Chief doesn't understand it.
21 Or let the reporter repeat it.

22 (Question read by the reporter.)

23 A There was no order he could not go in his home.

24 Q The order that Sam Sheppard could not go into his home
25 except in the custody of a policeman or with a policeman,
how did that originate?

A That was suggested, I believe, by the prosecutor's office."
(R. 6077-6078.)

The statement of Mr. Danaceau to defense counsel that
the premises would be available to them at "any and all times for purposes

1 of inspection and examination" was made in the presence of newspaper
2 men, as is shown by the published stories they wrote. Jim Flanagan of
3 the Cleveland News was present and on November 9, 1954, the News wrote:

4 "At the afternoon recess today Assistant County Prosecutor
5 Saul Danaceau told Dr. Stephen A. Sheppard that he could
6 remove clothing, books and Dr. Sam Sheppard's car from
7 the West Lake Road home of Dr. Sam Sheppard any time
8 he desired. He said he could also inspect the premises
9 any time he desired."

10 The following morning the Cleveland Plain Dealer published a story by
11 Sanford Watzman, which read in part as follows:

12 "Dr. Stephen A. Sheppard, brother of the murder defen-
13 dant, requested the keys yesterday from the prosecutor's
14 office. He was told he could carry clothing out and
15 otherwise have freedom of the home, but under the stipu-
16 lated conditions.

17 "Arthur E. Petersilge, attorney for the Sheppard family,
18 said access to the premises 'doesn't mean anything in
19 defending this case because the clues are cold by now.'"

20 As stated by the Trial Court:

21 "There is no evidence whatever of denial of access to the
22 premises provided such access was had in the presence of
23 a police officer. It borders on the ridiculous to say
24 that the examination and investigation made by Dr. Kirk
25 within the dwelling could not have been made with pre-
cisely the same ease and effect in the presence of a
police officer as was the case without him. Had the
prosecutor at any time during the pendency of the case
assumed an unreasonable attitude on the matter of the
right of defendant to examine house, clothing or other
property or material likely to produce, or which might
produce, valuable evidence in the case, the presiding
judge in the criminal division of this court would certainly
have solved that problem upon being requested to do so.

"On the matter of diligence, the Court must hold that, as
a matter of fact, the defense was not denied access to
the Sheppard home during the pendency of this cause and
that under the circumstances disclosed by the record, the
condition of entry imposed -- that a police officer be

1 present -- was normal, natural and reasonable, and
2 that no showing has been made as to how or why any
3 such presence would in the slightest degree prevent,
4 impede or affect the investigator in his search for
5 facts which, in his judgment, could or might aid the
6 defense.

7 "The Court finds that the tendered matter is not matter
8 or evidence that could not, with reasonable and most
9 ordinary diligence, have been found long prior to the
10 trial and, therefore, fails to come within the clear
11 requirement of the law in that regard. " (Memo, p. 10)

12 It might also be well to note that the defendant and defen-
13 dant's counsel did on several occasions, and particularly on July 9th,
14 examine the premises, including the house and that thereafter they were
15 permitted to remove not only articles of clothing, books, etc., but also
16 the defendant's medical bag and the three motor vehicles from the garage.

17 Neither the record of the trial nor the affidavits in support
18 of this motion disclose a single instance of a denial of access to the
19 premises for purposes of examination or inspection by the defense.

20 It is also to be noted that the premises were available for
21 such inspection or examination from July 4th until the middle of December
22 when the cause was finally submitted to the jury; that Dr. Kirk did not
23 make his investigation until January 22nd to January 26th, 1955, a month
24 after the Sheppard family had not only the keys but complete possession
25 of the premises; that Dr. Kirk did not himself make the scrapings of the
blood spots at that time, and that some three weeks later, Drs. Stephen
Sheppard and Richard Sheppard, accompanied by Reverend Scully and Dr.
Haws, went to the Sheppard home where the scrapings were made, placed
into small bottles and mailed to Dr. Kirk of Berkeley, California, on

1 February 14, 1955. Before these blood spots were scraped off the door,
2 they had been there for more than seven months, and there is no reason-
3 able explanation of why the presence of a police officer would have pre-
4 vented the testing of any particular blood spots from July to December,
5 1954. Of a certainty, no request by the defense to have such a blood spot
6 tested was ever made.

7 8 III

9 THEORY OF SEX ATTACK IS JUST A THEORY AND 10 IS NOT "NEWLY DISCOVERED" EVIDENCE

11 The sex attack theory was thoroughly discussed during
12 oral argument and in the brief of the State on the original appeal.

13 Whatever may be said to support such a theory does not
14 exclude the defendant.

15 CONCLUSION

16 There is neither a strong probability nor a probability
17 that the so-called newly discovered evidence would have changed the ver-
18 dict.

19 As stated in State v. Petro, 148 O. S. 505, one of the
20 essential requisites for the granting of a motion for a new trial in a
21 criminal case based on the ground of newly discovered evidence is that
22 "it must be shown that the new evidence discloses a strong probability
23 that it will change the result if a new trial is granted." The Trial Court
24 is best able to make this judgment and determination. Judge Blythin has
25 discussed the purported newly discovered evidence in his Memorandum

1 and he said, in part:

2 "It is not reasonable to believe that production of the
3 testimony of Dr. Kirk at the trial, and the counter-
4 testimony of Dr. Marsters, would have made the slight-
5 est difference in the total evidence, and certainly not
6 resulted in a different conclusion by the jury. "
7 (Memo., p. 12)

8 The final findings of the Trial Court are also set forth in
9 this Memorandum and follow: :

10 "After careful review of the authorities, a thorough
11 examination of the proffered evidence and considera-
12 tion of presentations of counsel, the Court is forced
13 to the conclusion that what is offered has been avail-
14 able from the time of the murder and could easily
15 have been secured in ample time for presentation at
16 the trial; that it is neither of the type nor quality of
17 evidence required to justify the granting of a new
18 trial and that it is definitely not of such a character
19 as to lead the Court to believe that its presentation
20 upon trial would produce a different result. "
21 (Memo., p. 16)

22 The allowance of a motion for new trial on the ground of
23 newly discovered evidence is addressed to the sound discretion of the
24 Trial Court and its rulings thereon cannot be assigned as error unless
25 there has been a gross or manifest abuse of discretion.

On this motion the defense fall far short of showing any
error whatever, much less a gross or manifest abuse of discretion.

Respectfully submitted,

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Assistant Prosecuting Attorneys,
Attorneys for Plaintiff-Appellee.

1 Receipt of copy of the foregoing Brief of Appellee is here-
2 by acknowledged this _____ day of June, 1955.

3
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5 _____
6 Attorneys for Defendant-Appellant.
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