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Brief in Opposition to Petition for a Writ of Certiorari, Sheppard v. Ohio, Supreme Court of U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 352.

611

SAMUEL H. SHEPPARD,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OBJECTIONS TO JURISDICTION.

The State court has not decided a federal question of substance not theretofore determined by this Court, nor has the State court decided any question in a way not in accord with applicable decisions of this Court. No real nor substantial federal question is involved herein.

The claims of petitioner that he was denied his constitutional rights are based entirely on faulty assumptions or wild assertions, or on misstatements made pertaining to the proceedings and to the evidence. When the same misstatements were made on the motion for new trial, the trial court found it necessary to state:

> "The court has deemed this memorandum necessary due to some statements made by counsel for the defense during trial and repeated or enlarged in said motion. Some are not factually true and some others

create or tend to create impressions not representative of the true situation." (Pet. App., pp. 1a-2a.)

We readily concede that there was widespread publicity, all of which was noted by the trial and reviewing courts. But the claims that either the jury or judge were influenced in the trial of the case by news media or by anything other than the evidence received in open court are groundless and unsupported by the record. And a fair and objective examination of the record will disclose that the news media did not slant their stories to prejudice or to convict the petitioner.

Counsel for the petitioner refer to certain newspaper articles and headlines which were later submitted as Exhibit No. 1 on the motion for new trial. Neither the newspapers nor the headlines were evidence in the trial of the case and counsel's assertion that during the trial the jury were reading these newspapers is nowhere supported in the record. In various places in the petitioner's brief, reference is made to newspaper articles and headlines, none of which were received in evidence on the trial of this cause. The fact that they were offered and received in evidence before and after trial on the various motions made by counsel for the petitioner does not make them evidence considered by the jury in the trial.

Of a certainty, there is in the record no proof, no "demonstrable reality" that either the jury or the judge were influenced in the trial of this case by anything except the evidence presented in open court and the law applicable thereto. The petitioner was tried by a fair and impartial jury who were properly instructed at all times by the court and rendered their verdict after careful and conscientious deliberations. The petitioner was fairly tried and properly convicted.

Counsel for the petitioner not only conducted a searching voir dire examination, and did not exhaust his peremptory challenges, but stated to the jury in argument:

> "May I take this opportunity—as I started to say, may I take this opportunity to congratulate you on the splendid attention, the tireless effort you have displayed during these nine weeks. You have been deprived, probably, of many comforts that you ordinarily enjoyed in and around your home with your family because of the admonitions that you have received throughout the trial by his Honor, Judge Blythin.
>
> "The purpose, ladies and gentlemen, of those admonitions was that we could come to this point in the lawsuit where your minds would be free, your minds would be open, and that you could take into consideration all the facts and all the testimony that has been submitted to you *without any outside influence,* and I am sure, and I say this to you sincerely, because I have had the opportunity of observation during this entire period, *that you have done just that.*" (R. 5371-72.)*

During the impaneling of the jury, the progress of the trial, the instructions of the court and the summations of the attorneys, the jurors were repeatedly told that this cause was to be decided solely on the basis of the evidence presented in open court and on the law given them by the judge, and on nothing else. Each juror agreed that he or she would disregard everything other than the evidence and would, in conformity with the instructions of the court, render a fair and impartial verdict. It is to be noted that a fair and impartial jury was impaneled and that the defense did not exhaust their peremptory challenges. The jurors took the oath required by law and there is not a

* Typewritten record. Original Bill of Exceptions filed in Washington.

shred of evidence in the record that each and every juror did not fully and completely abide by the oath so taken.

There is not a particle of evidence in the record to show that the jury was in any way influenced by reports or stories in newspapers, over the radio, or on television; or that the jury or any juror was biased or prejudiced by any such stories or broadcasts.

The laws of the State of Ohio provide for a motion for new trial and upon the hearing of that motion, the affidavits and testimony of the jurors may be received. *Emmert v. State,* 127 O. S. 235; *State v. Joseph,* 90 O. A. 433. Although several jurors were subpoenaed and were thoroughly interrogated by defense counsel on the hearing on the motion for new trial, not a word of testimony was produced to justify the defense claim that the jurors were influenced by anything other than the evidence produced in open court in reaching their verdict. The claim that they were influenced by news stories or any other outside influence is merely the assertion of counsel. It is not supported by the record.

The trial and proceedings on review were had in accordance with the provisions of the statutes and Constitution of the State of Ohio and in full conformance with the provisions of the Federal Constitution.

STATEMENT OF THE CASE.

The extraordinary excursions in petitioner's brief to newspaper stories and editorials published before, during and after the trial, as though they were before the jury as evidence in the case, and the omission by the petitioner of almost all of the pertinent evidence presented by the State in this case, necessitates our directing the attention of this Court to an objective statement of much of the evidence as set forth in the opinion of the Court of Appeals of Cuyahoga County, appearing at pages 41a to 67a of the Appendix to the Petition.

The State proved by direct and circumstantial evidence that Marilyn Sheppard was brutally murdered in her bedroom sometime between 3 and 4 A. M. on the morning of July 4, 1954; that at the time she was murdered the only person in that home, except a six year old son, was her husband, the petitioner. It was conclusive from the evidence that there was a simulated burglary and that nobody but the petitioner had the time and the opportunity to fake such a burglary to divert suspicion from himself. The fantastic stories told by the petitioner were so unreasonable and absurd as to be, in the opinion of the jury, unworthy of credence.

After giving "a summary of much of the evidence dealing with many of the physical facts and conditions of the premises as found on July 4th and of the declarations and actions of the parties involved as testified to by the public authorities and other witnesses, together with what the defendant said to others and in his testimony upon trial in relation to the events of the morning" (66a of the Appendix to the Petition), the Court of Appeals then continued:

"The testimony of the defendant, in dealing with the events that took place in his presence or the things that he did, was characterized by the State as vague, indefinite, uncertain or factually highly improbable. During the time he was under cross-examination the defendant gave evasive answers such as 'I can't recall' or 'I can't remember,' approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence material to the issues in the case.

"The jury, under the instruction of the court, was presented with but one question or issue of fact and that was, had the State shown beyond reasonable doubt that the defendant purposely killed Marilyn Sheppard?

"The State's case is based in part on circumstantial evidence. The law of Ohio on this subject requires that the facts and circumstances upon which the theory of guilt is based must be established beyond reasonable doubt and the facts so established must be entirely irreconcilable with any claim or theory of innocence and admit of no other hypothesis than the guilt of the accused. *Carter vs. State,* 4 Oh. App. 193.

"If, therefore, the jury, after careful deliberation, found that there was any possible hypothesis of innocence, after a consideration of all of the evidence, then the defendant would be legally entitled to be discharged, but if the jury found, after full deliberation, there was no possible hypothesis of innocence based on the facts as they found them to be and that the facts found are such as to be irreconcilable with any other reasonable hypothesis, than the guilt of the accused, then a verdict was required.

"This was a jury question and *we hold that there was sufficient evidence to support the verdict of guilty as found by the jury.*" (Appendix to the Petition 66a-67a.)

ARGUMENT.

PUBLICITY DID NOT DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS.

I and II.

Publicity did not prevent the petitioner from having a fair trial.

No matter when or where tried, the Sheppard case would have attracted widespread publicity. This was inherent in the very nature of the case itself. The right to grant a change of venue lies in the sound discretion of the trial court. The trial court stated on the motion for new trial in ruling on the denial of the motion for change of venue and for a continuance:

> "(3) Denial of change of venue requested by defendant. The request, when made, was based upon the claim that the extraordinary public attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury in this county impossible. It is a matter of common knowledge that the case commanded that same attention throughout Ohio and the United States of America. It commanded very much attention throughout the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.
>
> "Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communica-

tion the same precise stories were simultaneously published in every city and county in the State and it certainly will not be denied that Cuyahoga County is the most liberal county in the State and, as a result, the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature. *It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like, was involved —what actually was involved was a mere mystery— a 'whodunit.'* The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The court reserved ruling on the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon that being accomplished the court overruled the motion and believes such action was not error. Section 2945.06 Revised Code of Ohio provides that a person charged in a case such as this may waive trial by jury and elect to be tried by a panel of three judges. While not challenging the right of a defendant, in a proper case, to a change of venue it does seem that the lack of confidence in any jury anywhere, coupled with the failure to elect to be tried by a panel of three judges, smacks of objection to any trial at all.

"(4) Error in denying application for continuance. The crime charged in the indictment occurred on July 4. Trial started October 18. Defendant's counsel had been engaged and active from a time within hours following the crime and long before defendant's arrest. Seventy-five prospective jurors had been summoned with full knowledge of all counsel long before any application for continuance was filed. The only ground stated for a continuance was 'to permit the extraordinary publicity to quiet down.' It was not claimed that counsel were not prepared for trial nor was any suggestion made as to who was going to 'quiet down' the publicity, nor when nor how." (Pet. App. pp. 2a-4a.)

In the opinion of the Supreme Court of Ohio, Judge Bell stated:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." (Pet. App., pp. 85a-86a.)

The reference by the Ohio Supreme Court to the words "Roman holiday" merely describes the widespread publicity furnished by the news media to the public at large and had no reference to the conduct of the trial itself, nor to the proceedings in the courtroom. The expression is also used to mean a "good time" or "field day." It by no means follows that the news media slanted the news or even tried to do so to prejudice or to convict the petitioner. As clearly indicated by Judge Bell in his opinion, it was a case involving "murder and mystery, society, sex and suspense." The curiosity of the public, excessive though it may have been, necessarily brought about the widespread publicity. The news media were interested in stories for the public and cared not whether such stories favored the State or the defense. A fair and objective analysis of their

stories to the public will disclose that they made no effort to slant the stories, certainly not to influence the jury in arriving at their verdict.

The defense have submitted a wholly distorted picture of the arrangements made by the court before trial to govern the news media which were to "cover" the trial. (Pet. Br. pp. 38-40.) (Pet. App. pp. 171a-172a.) For a fair and objective statement pertaining to such arrangements, we direct the attention of this Court to the words of the trial judge in his memorandum on the motion for new trial.

Regardless of what action was taken by the trial court, it was certain that all of these newspaper reporters were to be present and that demands would inevitably be made upon the trial court by all types of news media. The trial Judge stated, in ruling upon the motion for new trial:

> "Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully 'cover' the trial, and having requests for space from many of them, the Court decided to make proper arrangements before trial and to control the situation so as to minimize and, if possible, eliminate confusion during the trial. The court room is small.
>
> "The Court assigned specific seats to individual correspondents in the rear of the court room and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the court room; that there was to be no passing back and forth through the trial area and that all entries to and movings out of the court room be via the public doorway in the rear of the court room. Members of the defendant's family were accommodated with seats at all times during the trial. The same was accorded

members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the court room and a scheme of rotation was established so that many persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.

"Rules were prescribed for photographers and representatives of radio and television stations. They were cautioned that no cameras were to be permitted in the court room excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken in the court room at any time excepting with his consent or that of his counsel.

"The Court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to overenthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the Court. A very large number of pictures of the defendant, his family, counsel and friends were taken in the court room (outside of court session periods) with their permission and without complaint. Counsel for the defense held press conferences in the court room with cameras clicking; all to the apparent delight of counsel for the defense, and, naturally, without protest.

"Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

"Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special im-

portance when undertaking a signal public service. Not a single complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or the defendant, but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest.

"Some space outside of the court room which could be spared for the moment without interference with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:

'The Assignment Room, where cases are assigned for other causes to court rooms, was assigned by the Court to reporters and telegraphers.'

"Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate court room area. They were out of the corridors leading to the court room and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity." (Pet. App., pp. 7a-9a.)

It is pertinent to ask: What caused the publicity, and who brought it about?

Marilyn Sheppard was murdered—there could be no doubt about that—and it became the duty of law enforce-

ment officers to thoroughly investigate and to bring to justice the person who murdered her. A protective shield was immediately thrown around the petitioner. The officials of Bay Village, close personal friends of the petitioner who was their police surgeon, sat on their hands and were getting nowhere. It was inevitable that there would be publicity concerning the petitioner's unwillingness to be interrogated, save on his own terms and conditions, and that the public officials would be criticized, such criticism of public officials not being the exclusive prerogative of defense counsel. These incidents occurred in July and the trial did not begin until the 18th of October.

There was no assurance that the publicity would not continue if a motion for a continuance was granted. Further, the trial court was not required to speculate as to whether a trial at a later date would result in more or less publicity. The Constitution provides that the defendant in a criminal case is entitled to a speedy and public trial. As it was, the petitioner was not brought to trial until three and a half months after the crime was committed, and the trial court was not required, in view of the Constitutional provision, to delay the trial indefinitely, otherwise the petitioner could be heard to complain that his constitutional right to a speedy and public trial was violated.

It is not within our province to explain or defend anything that appears in any newspaper, favorable or unfavorable. That there was a tremendous amount of interest in this case, not only throughout our own community, but throughout the state and nation, and in other parts of the world, is not in dispute. It does not follow, however, from the mere fact that this murder mystery fascinated so many people, that the petitioner was prevented from having a fair trial or that any of the petitioner's constitutional rights were violated.

Petitioner has seen fit to set forth what purport to be newspaper headlines. (Pet. Br. pp. 20, 21.) Selected were certain headlines, which, by and large, merely reflected the great interest of the public in the murder mystery and, of course, deliberately omitted were particular headlines that tend to contradict his assertions. Petitioner does not set forth the headline on the front page story in the Cleveland News of July 9, 1954, by Severino P. Severino, News Staff Writer, who, as he states, was granted permission to question Dr. Sam in the presence of his father, Dr. Richard A. Sheppard, and his attorneys, William J. Corrigan and Arthur Petersilge. The headline in large type reads:

"EXCLUSIVE! 'I LOVED MY WIFE—SHE LOVED ME,' SHEPPARD TELLS NEWS REPORTER."

Nor does he list the headline in the Cleveland Press of August 18, 1954, reading:

"DR. SAM WRITES HIS OWN STORY."

Under the headline appeared the text of a statement by Dr. Samuel H. Sheppard, furnished the Press by a member of his family, and above the headline is an enlarged photograph of the last paragraph of the statement, followed by the signature of the petitioner, and reading:

"I AM NOT GUILTY OF THE MURDER OF MY WIFE, MARILYN. HOW COULD I, WHO HAVE BEEN TRAINED TO HELP PEOPLE AND DEVOTED MY LIFE TO SAVING LIFE, COMMIT SUCH A TERRIBLE AND REVOLTING CRIME?"

Nor does petitioner list the headlines of the statements issued by Attorneys William J. Corrigan and Fred W. Garmone, such as the one appearing in the Cleveland Press of August 27, 1954, reading:

"SHEPPARD LAWYERS HIT STORIES ON MURDER"

followed by the text of the long statement so issued.

The defense also might have included other headlines as follows:

July 8, 1954, The Cleveland Press:

"DR. SHEPPARD'S STATEMENT ISSUED TO ANSWER GOSSIP"

July 8, 1954, The Cleveland Plain Dealer:

"BAY DOCTOR TALKS TO REPORTER"

July 8, 1954, The Cleveland Press:

"HUSBAND PUTS $10,000 UP FOR SLAYER"

July 9, 1954, The Cleveland Plain Dealer:

"TEXT OF DOCTOR'S STATEMENT ON HIS OFFER OF REWARD"

July 9, 1954, The Cleveland Plain Dealer:

"DOCTOR WILL HELP IN HUNT FOR DEATH WEAPON TODAY"

July 10, 1954, The Cleveland News:

"HONORED ATHLETE AT HEIGHTS HIGH"

July 12, 1954, The Cleveland Press:

"DR. SHEPPARD RETURNS TO BAY VIEW HOSPITAL TO TREAT HIS PATIENTS"

July 15, 1954, The Cleveland News:

"DRUNK 'CONFESSES' BUT STORY FIZZLES"

July 17, 1954, The Cleveland Press:

"DR. SHEPPARD TELLS PRESS 'KILLER WILL BE CAUGHT' "

(Then follows responses to 11 questions.)

July 31, 1954, The Cleveland Press:

"TEXT OF STATEMENT BY CORRIGAN AFTER ARREST OF CLIENT, DR. SAM"

July 31, 1954, The Cleveland News:

"POLICE CORDIAL, POLITE AS THEY TAKE SHEPPARD"

August 13, 1954, The Cleveland Plain Dealer:

"FAMILY POINTS TO BAY MAN AS NEW SUSPECT AS HOVERSTEN TALKS"

August 19, 1954, The Cleveland Press:

"DR. SAM IS ANXIOUS TO TAKE STAND, HIS BROTHER SAYS"

September 14, 1954, The Cleveland News:

"BATTLES PROWLER IN BAY. CORRIGAN LINKS BOY'S STORY WITH SHEPPARD CASE"

September 17, 1954, The Cleveland News:

"DR. STEVE HITS 'RED HERRING' ACCUSATION"

October 19, 1954, The Cleveland Press:

"WRITER FINDS DR. SAM'S LOOKS BIG ASSET FOR ACTOR CORRIGAN"

October 21, 1954, The Cleveland Press:

"DR. SAM JUST LIKE A BROTHER, 2 SISTERS-IN-LAW SAY AT TRIAL"

October 22, 1954, The Cleveland Plain Dealer:

"CORRIGAN RATED SECOND DARROW"

October 25, 1954, The Cleveland Plain Dealer:

" 'OTHER SIDE' OF CORRIGAN LIES IN POETRY"

(With picture of W. J. Corrigan and his writer daughter.)

October 26, 1954, The Cleveland Plain Dealer:

"COURT PSYCHOLOGISTS SEE TRIAL CROWD AS NORMALLY CURIOUS"

October 26, The Cleveland Press:

"SAM, WOMAN JUROR SOB IN COURT"

October 27, 1954, The Cleveland Press:

"CITY CHEMIST AIDS DEFENSE OF DR. SAM"

October 28, 1954, The Cleveland Press:

"JUROR OUT, ADMITS SHE WAS FOR SAM"

November 4, 1954, The Cleveland News:

"LETTERS WRITTEN IN JAIL BARE SHEPPARD FEELINGS"

November 5, 1954, The Cleveland Press:

"DR. SAM SAYS AUTOPSY BUNGLED"

November 9, 1954, The Cleveland Plain Dealer:

"CORRIGAN MUSES ON TRIAL'S DRAMA"

November 10, 1954, The Cleveland Press:

"GARMONE QUIZZING WILTS MAYOR HOUK"

November 11, 1954, The Cleveland News:

"HOUKS HELP DR. SAM AS MUCH AS THEY HURT"

November 11, 1954, The Cleveland News:

"DEATH HOME OPENED TO DR. SAM'S KIN"

November 13, 1954, The Cleveland News:

"CORRIGAN'S STRATEGY SCORES"

November 15, 1954, The Cleveland News:

"CORRIGAN HAMMERS AT DRENKHAN"

November 16, 1954, The Cleveland News:

"CORONER IS VILLAIN OF CORRIGAN PIECE"

November 17, 1954, The Cleveland News:

"DR. STEVE HITS PRINT THEORY; SAYS BLOOD FLOWED INTO FOLD"

November 17, 1954, The Cleveland Press:
"DR. SAM WRITES TO HIS SON"
(Photo of Letter.)

November 18, 1954, The Cleveland News:
"DR. SAM DISPLAYS NO-WEAPON THEORY"
(With picture demonstration.)

November 19, 1954, The Cleveland Plain Dealer:
"DR. STEVE'S TIP IS EX-PATIENT"

November 19, 1954, The Cleveland News:
"ORDERED HOVERSTEN OUT, DR. STEVE SAYS"

November 19, 1954, The Cleveland Press:
"SEEK STEVE'S 'SUSPECT' IN DETROIT"

November 20, 1954, The Cleveland Press:
"SCHOTTKE AIDED SAM: DR. STEVE"

November 22, 1954, The Cleveland Plain Dealer:
"PROBE NEW BAY TIP; DETROIT MAN CLEAR"

November 22, 1954, The Cleveland News:
"SLAYING 'SUSPECT' IS WRITTEN OFF"

December 2, 1954, The Cleveland News:
"EVIDENCE CHANGED: DR. STEVE"

December 4, 1954, The Cleveland News:
"CHIP PAYS CALL ON STORE SANTA"

December 7, 1954, The Cleveland News:
"DR. SAM THANKS REPORTER"

During the trial most of the publicity was given out by the defense. As a former newspaper man, defense counsel knew very well how to get favorable stories in the public press, and he was quite successful. He held press

conferences daily, and frequently more than once each day; and, with his client, posed for hundreds of pictures which, together with favorable personal stories, appeared in all types of news media. The amount of publicity so put out by the defense was enormous, and far outshadowed the attention given the State. Defense counsel found that by continually denouncing the newspapers and public officials, he could get an even greater amount of publicity. Mr. Corrigan's skill in the art of publicity is demonstrated by the innumerable stories that appeared, emanating from the petitioner, his counsel, his relatives and his friends. Dr. Steve Sheppard, petitioner's brother, and a prospective witness, so persisted in trying to have the petitioner's case tried in the newspapers that the trial court was required to admonish him that if he did not desist he, being a witness, would be excluded from the courtroom. The bales of newspapers offered by the defense in support of their motions show these favorable personal stories and the innumerable photographs for which the petitioner and his counsel posed.

Mr. Corrigan also demonstrated his accomplishments as an actor by pretending to object to the pictures and reading his objection into the record. The photographs themselves, and the stories which accompanied them, show complete acquiescence and pleasure. That the objection made for the record was without justification and mere pretense is proved by the testimony of Julian Wilson during the hearing on the motion for new trial. Mr. Wilson was a photographer for the Associated Press, assigned to this trial, and testified that he made many pictures of Dr. Sam Sheppard and considerably over a hundred of Mr. Corrigan (R. 7088). His testimony speaks for itself:

"Q. Now, did you take any pictures in this court room while the court was in session?
A. No, sir, I did not.

Q. Now, while the court was not in session, during recess or after adjournment, did you take pictures in this court room and around this building?

A. Many times.

Q. Did you take pictures of Mr. Corrigan?

A. Yes, sir.

Q. About how many times?

A. Roughly—it would run considerably over a hundred negatives.

Q. About a hundred negatives. And of Dr. Sam Sheppard?

A. I made many pictures of him.

Q. And Mr. Garmone?

A. He, too, I have made many pictures of.

Q. Now, did Mr. Corrigan ever object to your taking of any of these pictures?

A. A few times he has objected.

Q. When was that?

A. About the middle of the trial or towards the end of it, Mr. Corrigan—we were instructed that Mr. Corrigan didn't want any pictures made of himself, the defense, or the defendant.

Q. How many pictures had you taken without his objection before you received those instructions?

A. Oh, many.

Q. More than 50?

A. I'd think so.

Q. And after you received the instructions, did you stop taking pictures?

A. Yes, sir.

O. And how long did that continue?

A. About a week and a half, two weeks.

Q. Then what occurred?

A. We asked Mr. Corrigan's permission.

Q. And did you get it?

A. Yes, sir.

Q. And then resumed taking pictures?

A. Yes.

Q. How many pictures did you resume taking—did you take after you resumed taking those pictures?

A. I'd say not as many as before because we didn't need as many pictures.

Q. More than 20 or 25?

A. About that.

Q. Now, with respect to the defendant, Dr. Sam Sheppard, is the number of pictures that you took before the objection by Mr. Corrigan about the same as what you took of Mr. Corrigan?

A. About, yes.

Q. You took about 50 before. Then there was this period when you didn't take any pictures because of the objection, is that correct?

A. That's true, sir.

Q. And then did you later resume?

A. Yes, sir.

Q. With whose permission?

A. Well, when we got Mr. Corrigan's permission, we resumed taking pictures.

Q. And about how many did you take after you got permission?

A. Somewhere around 15, 20, 25.

* * * * *

Q. Did you ever take a picture of either Dr. Sam Sheppard or any of his counsel over their objection?

A. No, sir.

* * * * *

The Court: May I have just one question? Were you present at the conference which the Court had with photographers prior to the opening of the case?

The Witness: Yes, sir, I was.

The Court: And at which the Court stated what the rule would be as to taking pictures during the trial?

The Witness: I was.

The Court: Do you recall what that was as to taking pictures within the court room and of the defendant and his counsel?

The Witness: Yes, I do recall.

The Court: All right. State it.

The Witness: Your ruling, sir, was that no pictures would be made at any time when the court was in session, and you also requested that we make no pictures of the defendant or the defense or anyone without their permission. I believe that is the gist of the thing.

The Court: That's correct." (R. 7087-7091.)

It is obvious from the record that Mr. Corrigan's objections, if any, were quite pro forma and mere pretense.

Counsel for the petitioner applied for a continuance of the trial to "permit the extraordinary publicity to quiet down." The trial did not start until October 18th and counsel for the petitioner had been engaged in the case within hours following the crime on the 4th of July. It was not claimed that they were not prepared for trial and, as the Trial Court stated: "nor was any suggestion made as to who was going to quiet down the publicity, nor when, nor how." (Pet. App. p. 4a.) This application was therefore properly overruled.

There is no question but that there was a great deal of public interest in this case. It should not be necessary to point out that newspapers have a constitutional right to report events in the community and to criticize what appears to them to be laxity on the part of public officials. Defense counsel have seen fit to devote a considerable portion of their brief to criticism of public officials; surely, the newspapers have an equal right. The Trial Court put it very succinctly when he stated in ruling upon the motion for new trial:

"It is to be noted that not a single person or agency connected with the investigation of, or prosecution, for the crime involved escapes the anathema of the defense. These include the police, the Coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the Grand Jury, its foreman, the trial jury, the public, the bailiffs and the Court. The sense of search for truth and the declaration of justice seems to have vanished from a whole community as if by magic and overnight.

The news agencies of every kind and character are thrown in for good measure. In spite of all the charges made, not a single specific item is cited in support of the claims made. Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did." (Pet. App. pp. 15a-16a.)

There is a comparatively recent decision of the Supreme Court of the United States which states succinctly the right of the people. In *Craig v. Harney,* 331 U. S. 367, 374, the Court said:

"A trial is a public event. What transpires in the courtroom is public property * * * Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government to suppress, edit or censor events which transpire in proceedings before it."

The right of the people in this respect was recognized more recently in the opinion of Mr. Justice Frankfurter, in *Maryland v. Baltimore Radio Show,* 338 U. S. 912, 920:

"One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."

The only question with respect to the motion for change of venue was, could a fair and impartial jury be impaneled in this community, where the offense occurred? The question was answered by the impaneling of the jury. A fair and impartial jury was impaneled, even though the defense did not exhaust their peremptory challenges, either as to the first 12 jurors or as to the alternate jurors.

As stated in the opinion of the Supreme Court of Ohio in this case:

"At the outset of the trial, in response to defendant's motion for change of venue, the trial court said:

'The motion for change of venue will be held in abeyance, and we will proceed at 1:15 this afternoon in an effort to determine whether or not we can secure a fair and impartial jury. If we are not able to do that, there will be no question in this court's mind at all but what this case ought to go out of Cuyahoga County, whatever may be the effect of that.'

"At the conclusion of the impaneling of 12 jurors, the motion for change of venue was renewed (for the third time), at which time, in overruling the motion, the trial court said:

'That the best evidence in the world is the effort to select a jury, and what we get here in a picture that has taken almost two weeks of time. The court is thoroughly satisfied that we have here a fair and impartial group of people to try this case, and I doubt if under any conditions at any time anywhere in this state you could have a better looking group of people, as a whole, to try a case of this kind, and the court is thoroughly satisfied that they are a group of fair and impartial people who can properly try this case under the guidance of the court, and I hope we will be able to give them that in the manner that it ought to be given.'

"The same motion, advanced for the same reason, was renewed on five other occasions during the trial, and the trial court in each instance overruled the motion.

"We believe the trial court was justified in those rulings. In Townsend v. State, 17 C. C. (N. S.), 380, 25 C. D. 408, affirmed without written opinion in 88 Ohio St. 584, 106 N. E. 1083, it is said:

'The examination of jurors on their voir dire affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue.'

"For example, in Richards v. State, 43 Ohio App. 212, 183 N. E. 36, it was held that the exercise of the right to order a change of venue lies in the trial court's discretion, and that a refusal to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled is not an abuse of discretion. See also, Dorger v. State, 40 Ohio App. 415, 179 N. E. 143; State v. Stemen, 90 Ohio App. 309, 106 N. E. (2d) 662; State v. Deem, 154 Ohio St. 576, 97 N. E. (2d) 13.

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and

without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this Court cannot say that the denial of a change of venue by the trial judge constituted an abuse of discretion." (Pet. App. pp. 87a-89a.)

The process of impaneling the jury demonstrated the wisdom of the foregoing rules and there was no unusual difficulty in securing a fair and impartial jury. The analysis of this process is briefly stated in the opinion of the Court of Appeals as follows:

"The record in this case discloses that a special venire was called for the trial of this defendant as provided by Sec. 2945.18 R. C. Seventy-five names were drawn from the jury box. Of this number, 11 were immediately excused for justifiable reasons or were not found, and counld not be summoned (three in number) by the sheriff. Of the remaining 64, 13 were excused because they had formed a firm opinion as to the guilt or innocence of the accused and 10 were likewise excused because they were opposed to capital punishment. Sixteen others were excused for cause.

"The State used four peremptory challenges and the defendant five. As is provided in Sec. 2945.21 the State in a homicide case where there is but one defendant, is entitled to six such peremptory challenges and the defendant a like number so that when the jury was sworn, the defendant left the right to one peremptory challenge unused. From the foregoing

analysis of the venire of 75 electors called in this case, four of those called were not needed in impaneling a jury of 12. Such jury was selected as provided by law and sworn and accepted by the defendant to well and truly try and true deliverance make between the State and the defendant.

"The parties agreed to select two alternate jurors as provided by Sec. 2313.37 R. C. The four remaining jurors of the original list, together with an additional venire of 24 summoned as provided by law, were used for this purpose. Of the 24 summoned, eight were called and questioned together with the four from the original venire, in impaneling the two alternate jurors. Of those examined, three were excused for holding a firm opinion of the guilt or innocence of the accused, four were excused as being against capital punishment, one was excused on challenge for cause and each side used one peremptory challenge. (Each side had the right to excuse two prospective alternate jurors peremptorily under the provisions of Sec. 2313.37 R. C.)

"The analysis of the impaneling of the jury in this case where but 16 prospective jurors out of 72 examined could not sit because they had prejudged the guilt or innocence of the accused, clearly shows that there was no difficulty whatever in impaneling a fair and impartial jury.

"The jury having been impaneled as provided by law and sworn to afford the defendant a fair and impartial trial, and to come to its verdict by a consideration of the evidence submitted in open court without any outside influence or consideration, and where there is no claim of misconduct on the part of any member of such jury during the trial, there can be no ground to claim a mistrial because of continued publicity, publicizing the events of the trial, and other related matters." (Pet. App. pp. 34a-36a.)

In their discussion on publicity and the fact that a number of jurors had read about the case before their voir dire examination, Juror Barrish is mentioned (Pet. Br. p. 35) together with the reason he gave for having read about the case.

The further extended examination of Juror Barrish by both parties is omitted from the petition and the defense omit to state that they accepted Juror Barrish by passing him for cause (R. 115) and that they had peremptory challenges which they chose not to exercise.

The fact that prospective jurors had read something about the case before they were sworn as jurors did not necessarily disqualify them. We know of no principle of law which excludes such jurors from service merely because they had previously read or heard something about the case. The persons who could hear the evidence without bias or prejudice and could decide the issues fairly and impartially were seated. Those who could not, were excused.

The defense try to make capital out of the efforts to solve this murder, especially in the weeks following July 4th. Naturally, the public authorities would check out every tip, good or bad. The same may be said for the newspapers, and if the petitioner and his lawyers pursued a course of conduct that was not in accord with protestations of innocence, comment by newspapers and others was inevitable.

The mere suggestion that the petitioner, who was protesting his innocence, submit himself to certain tests (Pet. Br. pp. 22, 23) deprived him of no constitutional right nor prevented him from having a fair trial. He was not forced to take any test and he did not submit to any test. Also discussed by petitioner under the subject matter of publicity is the evidence received with respect to the conversations had with the petitioner on the question of the lie detector test.

When the subject of the lie detector was first presented in the questioning of Officer Schottke and he related the conversation he had had with the petitioner pertaining to the lie detector, no objection was made to the admission of those conversations (R. 3590).

The trial court instructed the jury that a person is not compelled to take a lie detector test (R. 3852). The petitioner himself on direct examination in response to questions asked by his counsel, Mr. Corrigan, related his conversations with Officers Schottke and Gareau pertaining to the lie detector test (R. 6298-6299).

In the argument to the jury, defense counsel said:

> "And then during the course of that conversation he (Officer Schottke) says, 'Are you willing to take a lie detector test?'
>
> "And what was the answer that this man gave? He says, 'I am.'" (Record, pp. 5376-77.)*

Such a claim in the argument was, of course, wholly unjustified in the light of the testimony of Officer Schottke and Deputy Sheriff Rossbach, who were continually put off by the petitioner and the petitioner never did take the test. The statement of petitioner in the brief that there was objection to these conversations is entirely untrue (R. 3590).

The police and other public authorities are severely criticized for trying to obtain a "confession" from the petitioner. (Pet. Br. pp. 29-31.) What is unconstitutional about the police endeavoring to secure a confession? No

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* Typewritten Record. Original Bill of Exceptions filed in Washington.

one laid a hand on the petitioner and the most that can be claimed is that some officer used some bad words.

Much is made of the use of the words "third degree" in a newspaper editorial, but it should be remembered that that expression is frequently applied to a thorough interrogation and does not at all necessarily mean the use of force or violence. In any event, there was no force or violence used. Defense counsel must have been fearful that a confession might have been obtained. How else can they explain the extraordinary effort they made to prevent the petitioner from being interrogated except by friendly officers under stipulated conditions? How else can they explain their "sit down strike" in the county jail on Sunday, August 1st, 1954, when counsel appeared at approximately 8:15 o'clock in the morning and, by alternating one with the other, remained with the petitioner until afternoon, to prevent the interrogation of their client by the officers who were obliged to cool their heels downstairs during the entire period of time? And when the sheriff, noting that counsel was merely reading a newspaper, requested the attorneys to leave, the defense bitterly assailed him, charging him with violations of law and of the constitution. They even saw fit to make charges against the sheriff to the Bar Association and at a subsequent hearing thereon before the bar committee, counsel who made the charge did not even extend to them the courtesy of an appearance.

We should also note that later that same Sunday, after some police officers had futilely interrogated the petitioner, they were asked to leave by the sheriff in order that he be revisited by Messrs. Corrigan and Petersilge. The officers got nowhere in trying to question the petitioner and no confession was obtained. So what point is there in dwelling upon the subject matter of "confession"?

The defense also dwell on newspaper editorials critical of the progress that was being made in the solution of this horrible crime (Pet. Br. p. 24). It must be remembered that the Mayor of Bay Village was a close personal friend of the defendant, as were the police officers in Bay Village for whom he was the police surgeon; that he was whisked off to Bay View Hospital by his brothers without permission before the Coroner or any of the Cleveland police officers arrived; that a protective shield was thrown around him and that the defendant and his counsel would permit no interrogation except under their own terms and by designated friendly officers; and that the defendant and his counsel were obstructing the public authorities in what should be the normal investigation of a murder. It seemed, at least to the newspaper editors, that certain public officials were "sitting on their hands" and were fearful, for one reason or another, of proceeding vigorously in the investigation as they would in any other case. Certainly, these newspapers have a right to criticize what they deem to be laxity on the part of public officials. It is a right given them by the same constitution which assures the defendant a fair trial by jury. Whether we or defense counsel agree or disagree with the opinions expressed by the newspaper editors is entirely beside the point.

The defense refer to the inquest held in the school auditorium in Bay Village and again proceed to distort the nature of the proceedings and what occurred (Pet. Br. pp. 24-26). Ignored entirely is the testimony of Dr. Gerber that he had made arrangements for the inquest and had actually issued subpoenas before the Press editorial appeared, and that the reason it was held in Bay Village was that most of the witnesses lived there and it would be convenient for them. Also untold is the fact that the hearing

was in perfect order during the testimony of the petitioner, his parents, his brothers, the doctors, Don Ahern and Nancy Ahern, Mayor and Mrs. Houk and the Bay Village officers. There was no disorder until the last few minutes of the last day of the public hearing when Dorothy Sheppard was recalled to testify further. It was brought about by Mr. Corrigan, counsel for petitioner, who sought to direct the reporter to insert certain matter into the record. Mr. Corrigan was told not to do so and was cautioned that if he persisted, he would be asked to leave. He not only persisted, but ordered the reporter to make the insertions in the record, refused to desist when so requested, refused to sit down when so requested and challenged the authority of the Coroner to put him out. The Coroner had no alternative and was obliged to have Mr. Corrigan removed from the hearing room. This occurred within a few minutes before the close of the hearing. Furthermore, the inquest was held on July 22nd, 23rd and 26th and there was at that time no indictment of the petitioner. The indictment came later, and the trial did not start until October 18th. The disturbance at the inquest which Mr. Corrigan created has no possible bearing on the trial of this case, nor did it prevent the defendant from having a fair trial.

The petitioner states that he was taken from the jail and subjected to personal indignities (Pet. Br. p. 31). This is completely without foundation in fact. The defendant had complained of injuries and he was taken to the Cleveland City Hospital where he was given a complete and thorough physical examination. Nowhere in the testimony of the petitioner himself does he assert that he was abused by the doctors. The procedure of "pricking a patient with a pin" is merely to test the patient's reflexes and there is nothing abusive in this practice, so commonly used.

The petitioner dwells on various matters (Pet. Br. pp. 32, 34) preliminary to this trial, including his own applications for writs of prohibition, habeas corpus, etc., all of which have no bearing whatever on the trial of this cause.

On page 34 of the petitioner's brief, it is asserted that the indictment was the result of pressure on the Grand Jury. This statement is based solely on an expression of the foreman, Mr. Winston, that "pressure on us has been enormous." The complete answer of the foreman explaining the "pressure" was as follows:

> "Q. What was the pressure that was placed on you?
>
> A. *Only curious people who wanted to know what we knew on the Grand Jury.*" (Emphasis ours.)

The pressure was for information and not, as suggested by defense counsel, to indict the petitioner.

Complaint is made (Pet. Br., pp. 40-41) relative to the part taken by the Trial Court in a Fabian television program on the steps of the Court House. The trial judge, on one morning, walked toward the Court House steps as usual, and there saw Robert Fabian (a retired Superintendent of Scotland Yard) with a very small contraption in his hand. Mr. Fabian said, "Good morning, Judge Blythin, nice morning." The judge said, "Good morning, Mr. Fabian." (Pet. App., pp. 13a-14a.) There was no conversation of any kind about the case on trial or any other subject.

At pages 41-42 of the petition, the defense recount the incident of a newspaper reporter visiting the home of Lois Mancini, an interview with Mrs. Mancini's mother, husband and children, and of the pictures taken of the members of the family, together with a story of the difficulties of the family while the mother was serving on the

jury. There may be some question as to the good taste of such a story, but in any event it did not favor one side or the other and was entirely without prejudice to the defendant. Furthermore, Lois Mancini was not present during the visit of the reporter and did not participate in the interview. We wish to also note that she was merely an alternate juror and did not participate in the deliberations or the verdict.

It is urged that during the trial there was a broadcast by Walter Winchell (Pet. Br. p. 42), in which he related the story of a woman in New York who claimed she had been a mistress of Sam Sheppard. At the request of defense counsel the court inquired of the jurors whether they had heard this Winchell broadcast and two jurors responded that they had. The jurors had no knowledge that Mr. Winchell was to broadcast anything at all pertaining to the Sheppard case or to Sam Sheppard. The two jurors who heard the broadcast were asked by the Court: "Would that have any effect on your judgment?" Both answered, "No." The Court stated:

> "I do hope, ladies—I would like to ask if any of you know if any members of your families heard the broadcast?
>
> "Have any of you, other than these two ladies, heard anything about that broadcast last night? And I wish to ask you two ladies in particular, and all of you in general, to pay no attention whatever to that kind of scavenging. It has no place, in my judgment, on the air at all, but that is not for me to determine, but surely it has no place whatever in our thinking or considerations or thoughts in any way, shape or manner in this case. *Let's confine ourselves to this court room, if you please.*" (R. 5429-30.)

Urged for the first time in the Supreme Court of Ohio as error was the refusal of the trial court on motion for

continuance in the 5th week of trial to ask the jurors if they heard a broadcast by Bob Considine over Station WHK in which there was something said about the testimony in the Sheppard case (Pet. Br. p. 41). This matter was brought up in the court's chambers and neither the court nor the prosecutors had any knowledge whatsoever of the alleged broadcast. Mr. Corrigan, counsel for the petitioner, complained that Bob Considine had paralleled a denial of the petitioner as set forth by Officer Schottke with a denial of Alger Hiss when he was confronted by Whittaker Chambers, without stating that Dr. Sheppard was in bed in the hospital at the time of his denial, while Mr. Hiss was strong, mentally and physically.

Apart from this assertion of counsel, no proof whatever was submitted to the court as to the exact nature of the broadcast, although Mr. Considine was available, it being conceded by the defense that he was in daily attendance at the trial. When the court stated: "We are not going to harass the jury every morning," Mr. Corrigan then responded, "I can't help it, Judge. If you don't, that's all right with me. I make my exception." (R. 3725.)

Upon the hearing on the motion for new trial and even though several of the jurors had been subpoenaed, the defense produced not a word of testimony to support their present claim that the jurors heard this broadcast. There is in the record not one particle of evidence that any of the jurors were influenced by this broadcast or the so-called Winchell broadcast or by anything else other than the evidence produced in open court.

That it was not error for the court to refuse to interrogate or poll the jurors during the trial as to whether they had read a newspaper article or heard a radio broadcast such as the Considine broadcast, is affirmed by the annotation in 15 *A. L. R.* (2) 1152, wherein it is stated:

"The present annotation is concerned with the question of whether, during a criminal trial, the jurors may be interrogated or polled as to whether they have read newspaper articles pertaining to the alleged crime or the trial. As the title indicates, the annotation involves the propriety of interrogation or polling after impanelment, as distinguished from that which occurs on voir dire examination.

"The few cases that involve this specific point all uphold the trial court where it refuses to interrogate, or refuses to let a party interrogate, the jurors as to the reading of newspaper articles relating to the trial or the crime. The decisions generally turn on the fact that the trial court had instructed the jury not to read the articles or that there had been no showing by the moving party that the jurors had in fact read them."

Complaint is made that the jurors were photographed on several occasions and "during deliberations" (Pet. Br., p. 44). It is, of course, not the fact that they were photographed during deliberations.

On the motion for new trial, the trial court stated:

"Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service. Not a single complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or defendant but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest." (Pet. App., pp. 8a-9a.)

The Trial Court stated further on the hearing on the motion for new trial:

"While this Court would not for the world minimize the importance of guarding this jury—or the jury in any other case—from annoyance or influence, he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.

"The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note—and indeed decisive in this Court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them, it is now pertinent to halt and ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.

"It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed. Foreman Bird and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a 'separation' is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.

"The Court had complete confidence in the jury in this case; it was protected at all times from any pos-

sible approach, and its every movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it." (Pet. App. 12a-13a.)

Much is made at pages 45-46 of the petitioner's brief of "Disorder During the Trial." Counsel complains that there were instances of disorder, noise and laughter in the court room. It should be remembered that this trial continued for some nine weeks and that necessarily there are times when people are required, for one reason or another, to leave the court room. A few of these occurrences caused the Court to admonish the spectators to the end that there be no interruption of the trial proceedings. There are, of course, the inevitable traffic noises on East 21st Street in Cleveland which result in short delays or repetition of the questions.

As to the incident of the laughter to which Mr. Corrigan refers (Pet. Br., p. 46), it resulted from Mr. Corrigan's remark, "Well, I don't care what the conversation was," after he had asked the witness what the substance of a conversation was, and the witness had given his answer.

Counsel complains of the presence and conduct of unnamed persons in and about the court room and corridors during the five days in which the jury was deliberating in their jury room (Pet. Br., p. 49). If the unnamed persons interested in the outcome of the trial, whether they be newspaper men, counsel for the defendant, the defendant's brothers, Dr. Steve Sheppard and Dr. Richard Sheppard, their respective wives and friends or other spectators, milled around during the five days, or if some of them played cards during the long wait, we fail to see

how that in any way influenced the jury in its deliberations or had any bearing on the verdict. There is not a scintilla of evidence in the record that the jury was disturbed or influenced by any of the activities in the court room or in the corridors while they were in their jury room during their deliberations.

Petitioner has presented nothing by way of affirmative evidence to show that the court or jury had been improperly influenced by publicity or anything else. The burden is upon them to do so. Section 2945.83 of the Revised Code of Ohio, governing the state courts on review, provides:

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> * * *
>
> "(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;
>
> * * *
>
> "(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

This rule in Ohio is in conformity with the ruling of this Court as expressed in *United States v. Handy,* 351 U. S. 454:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'

"See also, Adams v. United States, 317 U. S. 269, 281, 87 L. Ed. 268, 276, 63 S. Ct. 236, 143 ALR 435; Buchalter v. New York, 319 U. S. 427, 431, 87 L. Ed. 1492, 1496, 63 S. Ct. 1129; Stroble v. California, 343 U. S. 181, 198, 96 L. Ed. 872, 885, 72 S. Ct. 599."

This Court pointed out in the *Handy* case that Justice Holmes, speaking for a unanimous Court in *Holt v. United States,* 218 U. S. 245, 251, 54 L. Ed. 1021, 1029, 31 S. Ct. 2, 20 Ann. Cas. 1138, cautioned that:

"If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

OTHER MATTERS SET FORTH IN APPLICATION OF PETITIONER DID NOT DEPRIVE HIM OF DUE PROCESS OF LAW, NOR, WHEN THE FACTS AND PROCEEDINGS ARE CORRECTLY STATED, WAS THERE ANY ERROR IN THE RULINGS OF THE COURT.

III.

As to Juror Manning (Pet. Br. pp. 50-52) and his replacement by the alternate juror.

After Juror Manning was seated and sworn as a juror, a young man came to the Criminal Courts Building, talked to counsel for the defendant first and later to the Prosecutor, and informed them that Juror Manning had been arrested and convicted of a morals offense relating to a young man. The matter was also brought to the attention of the Court. Manning neglected to make this conviction known when he was asked on the voir dire examination whether or not he had ever appeared as a witness in any case. The matter became known generally and received considerable publicity. A meeting was held in chambers and by common consent the matter was continued over

the weekend. Counsel for the defense thereafter proposed that he would consent to the discharge of Juror Manning if the entire panel was discharged and we would proceed to re-impanel the jury. This proposal was declined by the State.

After the alternate jurors were impaneled, Juror Manning addressed himself to the Court in open court and stated:

"Juror Manning: Right now, I mean from what is going on, when I came down here for jury duty I thought I was doing what a public spirited citizen of this country would do. That's the only idea I had when I came down. It interfered with my work, my earning a living. I didn't give a second thought to that. I came down here, and if I was chosen, I would serve and serve in the way I spoke, absolutely unbiasedly. And I was—I tried to run myself from the heart and mind together and be absolutely unbiased and unprejudiced in thinking and talking with other people, even speaking outside this jury. But after what has happened, I would not be able to sit in that box with the other jurors, be able to listen to the case and be unbiased, unprejudiced or—unemotional is what I am trying to drive at mostly; that if this keeps up, if I am kept on the jury, I think I will be a subheadline as long as the trial goes on. I will definitely have a nervous breakdown in a very short time and, in fact, I feel I am just about ready for one right now." (R. 1600-1601)

The Trial Court excused Juror Manning on the ground that he was both disabled and disqualified.

Revised Code Section 2945.29 (13443-13) provides:

"Jurors becoming unable to perform duties. If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the

Court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the Court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

Revised Code Section 2313.37 (11419-47) provides in part:

"If before the final submission of the case to the jury a juror becomes incapacitated or disqualified, he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror."

The defense contend that they had one challenge left when Juror Manning was excused and his place taken by alternate Juror Hanson (Pet. Br., p. 51). As the Court of Appeals stated:

"The defendant entered his exception to the procedure used by the Court in discharging Juror Manning and demanded the right to exercise his remaining peremptory challenge when the first alternate juror was seated in the panel after Manning was discharged, which request was refused.

"After a jury is sworn and charged with the delivery of the defendant, the trial is commenced and unused peremptory challenges cannot thereafter be used and where an alternate juror has been selected and sworn as provided by law, he must be seated in the place of the discharged juror by order of the Court." (Pet. App., 38a-39a)

In any event, there is here no federal question.

The prospective jurors were questioned at very great length by both counsel for the State and the defense, and the Court. In fact, there are three volumes of the Bill of Exceptions, totaling hundreds of pages, setting forth such detailed examination. Except for Juror Manning who was discharged, the 13 jurors who sat and heard this case, and the 12 jurors who decided this case, were all competent and qualified jurors, without prejudice or bias, and the record discloses that they gave most careful and adequate consideration to the case.

IV.

Conduct of the bailiffs in permitting jurors to telephone members of their families between deliberations (Pet. Br., pp. 52-54).

We wish to point out, at the outset, that the matters complained of took place in the hotel room when some of the jurors called their husbands or children on the telephone, and not in the jury room during the deliberations (Petitioner's Brief, pp. 52-53). The jurors deliberated in a room above the court room in the Criminal Courts Building and there is absolutely no evidence in the record showing any misconduct of the jury or of the officers in charge.

The telephone calls to the husbands and children of the jurors, all made in the presence of the bailiff, were not made during the deliberations of the jury. They were made from the hotel room to which they had been taken from the jury room and there is no evidence whatsoever that the case was even discussed in these telephone calls, much less anything said prejudicial to the petitioner.

There is no evidence whatsoever of telephone conversations with strangers, as suggested in the brief of the petitioner. The testimony of Bailiff Edgar Francis follows:

"Q. Do you know, of your own knowledge, whether there was any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?

A. Their phones were cut out, Mr. Garmone.

Q. By whose request?

A. Mr. Steenstra arranged that.

Q. And were there any telephone calls made from the room that you occupied?

A. Yes, sir.

Q. Did you make the calls, or did the jury make the calls?

A. No. The jury made the calls, and I sat in the chair right alongside the telephone.

* * *

Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * *

A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

Q. Was there any conversation whatsoever about this case or their deliberations?

A. Not one word, Mr. Parrino." (R. 7084-7085.)

The defense saw fit to call certain jurors to the witness stand on their motion for new trial and if they wished to pursue this matter further, they had the right and opportunity so to do. They chose not to do so and there is nothing in the record whatever of anything having been said or done either by the bailiffs or by or to the jurors prejudicial to the defendant.

The trial court stated when a supplemental motion for new trial was filed:

> "The court named Simon Steenstra, permanent criminal jury bailiff and Edgar Francis his own courtroom bailiff as the persons to have charge of the jury

in their movements during the period of deliberation. They were named in open court in the presence of all interested parties. Both were well known to all parties, with the possible exception of defendant, and not a word of objection was voiced by anyone. Furthermore, one of counsel for the defense saw the court in chambers prior to the selection of said bailiffs and inquired of the court who he intended to appoint to take charge of the jury during the deliberation period. Upon being informed that the court would name Bailiffs Steenstra and Francis he expressed his whole-hearted approval." (Pet. App., pp. 16a-17a).

The Supreme Court of Ohio in the opinion states:

"Defendant contends that he was prejudiced in this case by the actions of two officers of the court, in whose charge the jury was committed during its deliberations, in permitting some members of the jury to make unmonitored telephone calls in violation of Section 2945.33, Revised Code, which reads as follows:

> 'When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. * * *'

"It is conceded that no authorization for such telephone calls was given by the court.

"At the conclusion of each day's deliberation, the members of this jury were housed in the Carter Hotel, under the supervision of two court bailiffs. The record reveals that the telephones in the hotel rooms occupied by individual jurors had been 'cut

out.' However, some of them were permitted to make calls on the telephone in the room of one of the bailiffs.

"In connection with a motion for a new trial, the record discloses the following cross-examination of one of the bailiffs by counsel for defendant:

'Q. Did you make the calls, or did the jury make the calls?

A. No. The jury made the calls, and I sat in the chair right alongside the telephone.'

"On redirect examination, the testimony was as follows:

'Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * *

A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

Q. Was there any conversation whatsoever about this case or their deliberations?

A. Not one word, Mr. Parrino.'

"Counsel for defendant rely upon State v. Adams, 141 Ohio St., 423, 48 N. E. (2d) 861, 146 A. L. R. 509, as authority for their contention that the action of the bailiff in permitting these telephone calls constituted error prejudicial to the defendant. They cite the third paragraph of the syllabus of that case, which reads:

'The violation by a court officer in charge of a jury of Section 13448-1, General Code (Section 2945.33, Revised Code), to the effect that he shall not communicate with a jury in his charge or custody except to inquire whether it has reached a verdict, will be presumed to be prejudicial to a defendant against whom, after such communication, a verdict is returned by such jury.'

"A mere reading of the following fourth paragraph

of the syllabus of the Adams case should be sufficient to distinguish that case from the present one:

'Where a court bailiff, on being informed by the jury during its deliberations that it could not agree, stated to it: 'You can't do that. You must reach a decision if you have to stay here for three months,' there is a violation of the statute which is prejudicial to a defendant against whom, following such declaration, a verdict is returned by the jury.'

"The case of Emmert v. State, 127 Ohio St., 235, 187 N. E. 862, 90 A. L. R. 242, although not cited by defendant, might also be authority for the proposition that misconduct of a bailiff is ground for reversal. That case, however, is also readily distinguishable from the present one. In the Emmert case the officer in charge of the jury, at a time when it was not actually in its deliberative sessions, said to certain members of the jury: 'My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad.' Other remarks of a similar nature to the effect that the jury had to reach a verdict were made by the bailiff.

"In situations such as those in the Adams and Emmert cases, it is easy to presume prejudice to the defendant as a result of the conduct of the bailiff. Can the same be said of the conduct of the bailiffs here in permitting jurors, who for several days and nights had been sequestered and unable to see or hear from their husbands, wives or children, to telephone those members of their families? We do not think so. There is, on the contrary, every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors' minds as to personal matters and would make them better, more conscientious jurors. Time after time, the members of this jury were instructed by the court not to communicate with anyone concerning this case or permit anyone to

communicate with them about it. We must assume they followed the court's instructions. No complaint is made that they disregarded these instructions every night for some seven weeks that they were allowed to go home at the close of each day's session of the trial. It is difficult to visualize a juror who will follow a court's instruction during the many hours he spends each evening and week end with his family and then deliberately disregard that instruction in a few brief moments he speaks to a member of his family on the telephone in the presence of a bailiff.

"The law in Ohio is that no judgment of conviction shall be reversed in any court for any cause unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. Section 2945.83, Revised Code. There is no such affirmative showing of prejudice here, and this Court will not presume a prejudice as a matter of law from the fact that some of the jurors made telephone calls to members of their immediate families." (Pet. App., pp. 89a-92a.)

V.

On the claim that the authorities seized the home of the petitioner (Pet. Br., pp. 54-56).

The defense make reference to matters concerning the possession of the home (Pet. Br., pp. 55, 62) which they made an issue on the motion for new trial on the ground of newly discovered evidence, which motion was denied by the trial court, affirmed by the Court of Appeals of Cuyahoga County in 100 Ohio Appeals 399 and dismissed on appeal by the Supreme Court of Ohio in 164 O. St. 428. No appeal has been taken from the final action of the Supreme Court of Ohio and the judgment of our State courts thereon is now final. Notwithstanding the

finality of this judgment, the defense again drag into their petition for a writ of certiorari the unfounded claim that they were prevented from examining the premises. The Court of Appeals, in a well reasoned and extended opinion, have completely answered this claim in 100 Ohio Appeals at pages 406-407:

"During the trial the defendant subpoenaed the keys into court through Chief Eaton and demanded the right to retain them. The trial judge, however, ruled that they must remain in the possession of the police of Bay Village, which order was carried out until December 23, 1954, when complete possession of the house was given the defendant. *There is no evidence that any request to enter the house for the purpose of investigation and inspection was ever made by the defendant, nor does the record show any formal application to the court at any time for a like purpose.* Dr. A. J. Kazlauckas, a physician and expert who had spent many years as a deputy coroner of Cuyahoga County, was in the employ of the defendant. He examined all the articles of property pertaining to this case in the possession of the county coroner, together with the autopsy report, conclusions of laboratory findings and X-rays of Marilyn Sheppard, and yet made no effort to make any scientific examination of the premises. He was not even presented as a witness during the trial. Assistant Prosecuting Attorney Saul S. Danaceau deposes in his affidavit that he informed Arthur E. Petersilge, of counsel for the defendant, and the brother of the defendant, Dr. Stephen Sheppard, in early November, 'that the said house was available to the defendant at any and all times to inspect or conduct investigations therein.' It seems, however, that it was understood that on all occasions a police officer would have to accompany the defendant or any representative of his when visiting the home."

The record of this case shows the extreme importance of numerous articles of property within the home and a number of such articles appear as exhibits in the evidence. It was also necessary to continue the examination and search in and about the house for possible clews and particularly for the still missing T-shirt and weapon. The record will disclose the continuous examination of the premises for blood spots, fingerprints, etc., by the scientific unit of the Cleveland Police Department and by members of the staff of the county coroner. As stated by the trial court, the prosecutor "could very well have been subject to just criticism" had he directed Chief Eaton to act otherwise.

Further complaint is made that the Court erred in not ordering the keys to the house turned over to Mr. Corrigan during the testimony of Chief Eaton. This episode occurred during the closing days of the trial when a subpoena was issued to Chief Eaton, requesting the Chief to bring with him the keys to the house. As a matter of fact, the defendant, counsel for the defense, and the members of the defendant's family had never been denied an opportunity to enter the premises or any part thereof, or to make an examination or investigation therein. Also, as a matter of fact, the defendant, counsel, and defendant's family had visited the premises and at no time had they been denied access thereto.

The cross examination of Chief Eaton at that time, by Mr. Mahon, was as follows:

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

A. Yes, sir.

Q. From that time down to date has the house been accessible to the Sheppard family?

A. Yes, it has.

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

A. Once, on one occasion, at least.

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

A. Yes.

Q. Is that right?

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?

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

"By Mr. Corrigan:

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

A. Pardon me. Will you repeat that?

Mr. Danaceau: We object to that. We know of no such order.

Q. Did you make that order?

Mr. Danaceau: Just a minute.

Mr. Mahon: Was there such an order?

The Court: Let him tell what the situation was.

Mr. Mahon: There is no evidence there ever was such an order.

The Court: No, there isn't any evidence about an order, but he is the Chief of Police. Let him answer if there was.

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

The Court: Will you restate your question, Mr. Corrigan? The Chief doesn't understand it. Or let the reporter repeat it.

(Question read by the reporter.)

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

Q. The order that Sam Sheppard could not go into his home 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.)

Obviously, the whole episode in the closing days of the trial, and the demand for the keys in the presence of the jury was a grandstand play and show, and nothing else.

In the meantime, the defendant and his counsel had, on more than one occasion, visited the home and, as previously pointed out, went through all the rooms and examined the house, both inside and outside. The defendant was permitted to remove his medical bags and the contents. He and the members of his family were also permitted to remove his clothing, Chip's clothing, and various other articles. Also removed were his automobiles, consisting of a Jaguar, a Lincoln Continental and a jeep. Except for the Lincoln Continental, all of these articles of property were removed within a week or two following the murder of Marilyn Sheppard and became unavailable for further examination by the scientific unit of the Cleveland Police Department when, at a later date, the case was turned over to them for further investigation. Also made available to the defense for their inspection were all of the articles in the possession of the county coroner and such articles were examined by Fred Garmone, counsel for the defense, and by Dr. Anthony J. Kazlauckas, a former deputy coroner of the county, on behalf of the defense (100 Ohio Appeals p. 403).

In the words of the trial court (Opinion overruling motion for new trial on newly discovered evidence):

"Seldom indeed does the entire interior of a home become as important as the interior of this home seemed to be in the period in question and while complete

exclusion of the representatives of the defense would not be justified, it is only rational to believe that the Prosecuting Attorney was fully justified in preserving the scene in status quo pending trial and its outcome. The two affidavits last mentioned and the statements of all counsel in open court clearly indicate that the prosecution had no desire to conceal anything and must lead the Court to the conclusion that there existed neither concealment nor hindrance and that the condition imposed, already mentioned, was merely precautionary. It is not unlikely that failure to take possession of the property and failure to take the precaution taken could very well have been subject to just criticism."

VI.

All of the claimed violations of the petitioner's constitutional rights to a fair trial were passed upon by the Supreme Court.

In the Supreme Court of Ohio it was claimed that the petitioner was denied due process of law, but apart from quotations from "Annals of the American Academy of Political and Social Science" and several cases, nothing specific was shown wherein the petitioner was denied due process of law, in any one of the claimed errors.

The Supreme Court, in its opinion, discusses at great length the matter of publicity and the various motions for a change of venue. In its opinion at page 87a of the Appendix to the Petition, it is said:

"It should be borne in mind, however, that the legal question presented to us is whether the defendant was accorded a fair constitutional trial by an impartial jury which could decide the issues of fact solely upon the consideration of the evidence in the light of the law given it by the court. That question is not to be decided on the volume of the publicity or the

tendency such publicity may have had in influencing the public mind generally as to the defendant's guilt or innocence."

After further discussion, the Supreme Court in its opinion at page 88a of the Appendix continues:

"The same motion, advanced for the same reason, was renewed on five other occasions during the trial, and the trial court in each instance overruled the motion.

"We believe the trial court was justified in those rulings."

Continuing, the Supreme Court said at pages 88a-89a:

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this Court cannot say that the denial of a change of venue by the trial judge constituted an abuse of discretion."

Then, the Supreme Court said further, at page 94a:

"The facts were presented to 12 qualified jurors sworn to well and truly try the issues between the State of Ohio and Sam H. Sheppard. In what was obviously a careful, complete and correct charge, Judge Blythin instructed that jury as to the law applicable to those facts. In such a situation, the following words

of Mr. Justice Holmes, in Aikens v. State of Wisconsin, 195 U. S. 194, 206, 49 L. Ed. 154, 25 S. Ct. 3, are appropriate:

'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved."

At the conclusion of its opinion, the Supreme Court said, at pp. 94a-95a:

"We have carefully examined the other errors assigned and find none, either in the admission or rejection of evidence or in the instructions of the court, prejudicial to the defendant."

VII.

The petitioner claims that the Supreme Court of Ohio was an illegally constituted court at the time the court heard this case.

This is just another example of the numerous frivolous claims made by the defense. It was at their instance, and without informing the prosecution of their intention, that the Chief Justice disqualified himself and appointed another judge. No objection was made prior to the hearing on this case in the Supreme Court and it was not until after the court as constituted made its decision adverse to the defense, that they first raised the issue.

An analysis of Article IV, Section 2 of the Ohio Constitution (Pet. Br. p. 59) will disclose that if any of the judges shall be unable, by reason of "illness, disability or disqualification" to hear, consider and decide a cause or causes, the Chief Justice may direct a judge of the Court of Appeals to sit in the place of such judge on the Supreme Court, but that only in the case of absence or disability of the Chief Justice (not mere disqualification) is the judge having the longest period of service upon the Supreme

Court authorized to direct an appellate judge to sit. Where the Chief Justice merely disqualifies himself and is not absent or disabled, it is the Chief Justice who directs the appellate judge to sit with the judges of the Supreme Court.

The defense raised this issue on rehearing before the Supreme Court of Ohio and their application for rehearing was denied. This is purely a State constitutional question, decided by the highest court of the State of Ohio adversely to the defense and there is involved therein no Federal constitutional question.

SUMMATION.

Essentially, the petition before this Court is based on the publicity. Much of the publicity complained of occurred long before the trial took place. The trial judge was thoroughly familiar with the treatment given the murder mystery by the news media and was certainly in the best position to determine whether or not the petitioner would receive a fair trial. Much of the newspaper publicity in this case was inspired by the lack of cooperation of the petitioner with the authorities beginning immediately after the murder of his wife was committed, by the protective shield thrown around him, and by the strategy of his counsel. None of the publicity was deliberately promoted by the prosecution. To hold that publicity in and of itself is a denial of due process of law is to fetter the State in the prosecution of crime and in bringing to justice the person responsible for such crime. Any sensational murder such as this brings forth publicity, some more, some less, but in the circumstances of each case, the issue before the trial court is whether a fair and impartial jury can be obtained. The jurors who sat in the trial of this case were all thoroughly examined and

definitely stated that they would give to the defendant the benefit of the presumption of innocence. They were fully examined so far as defense counsel desired as to any knowledge or information they might have of the case. At no stage of the proceedings did the petitioner offer any evidence to prove that any juror was in fact prejudiced by the publicity, and, moreover, a period of two months and a half intervened between the day of the petitioner's arrest and the beginning of the trial.

The presumption is that the jurors followed the instructions of the court. A distrust of the jury without any affirmative showing that they were not to be trusted in following out the court's instructions is what counsel for the petitioner urges upon this Court.

The defense repeatedly assert that the newspapers were hostile to the petitioner and sought his conviction. Though this unsupported claim is constantly repeated and grows in vehemence each time it is so repeated, it is simply not the fact. News agencies such as newspapers and the radio were greatly interested in the case, as they would be in any similar case. The news stories and broadcasts giving their respective versions of the testimony in the case and of the other proceedings had, may not at all times have been agreeable or pleasing to either the State or the defense. Certainly, the court has no control over what the newspapers shall print or what the radio stations shall broadcast. As far as the jurors were concerned, they were repeatedly instructed to disregard all such stories and broadcasts and to decide the case solely on the basis of the evidence presented in open court and on the law given to them by the judge.

The claims of the defense that the jury and the officers in charge of the jury during its deliberations were guilty of misconduct to the prejudice of the petitioner is

based on the mere assertion and argument of counsel. There is no evidence that the petitioner was prejudiced. On the contrary, the jurors deliberated patiently, carefully and thoughtfully for a period of five days, and reached a verdict which responded to the evidence.

Petitioner has seen fit to place in the Appendix to the petition for a writ of certiorari the opinions expressed in some scattered newspaper articles that he did not have a fair trial. Surely, such opinions are not evidence in this case and should not be received as a substitute for evidence, nor as a substitute for the well-reasoned opinions of the trial and reviewing state courts based upon the record. Again, we have the situation where it is the defense and not the State that is dragging the newspapers into this case.

A complete and fair analysis of the record discloses no foundation in fact for the claims advanced for the allowance of a writ of certiorari. Nor has the state supreme court or the trial or appellate state court decided a federal question of substance not theretofore determined by this Court, nor in a way not in accord with applicable decisions of this Court.

On the record there is no real or substantial Federal question involved herein and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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