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Defendant's Motion for Stay of Discovery, or, in the Alternative, Motion for Protective Order

Stephanie Tubbs Jones
Cuyahoga County Prosecutor

Marilyn B. Cassidy
Cuyahoga County Assistant Prosecutor

Patrick J. Murphy
Cuyahoga County Assistant Prosecutor

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED
1977 MAY -7 A 11:21
RONALD E. SUSTER
CLERK OF COURT
CUYAHOGA COUNTY, OHIO

ALAN DAVIS, ET. AL

Plaintiff

v.

STATE OF OHIO

Defendants

CASE NO. 312322

JUDGE: RONALD SUSTER

DEFENDANTS MOTION FOR
STAY OF DISCOVERY,
OR IN THE ALTERNATIVE
MOTION FOR PROTECTIVE ORDER

Defendants, by and through counsel, Stephanie Tubbs Jones, Prosecuting Attorney for Cuyahoga County, and Marilyn Barkley Cassidy and Patrick J. Murphy, Assistant Prosecuting Attorneys, move this honorable court for an order staying discovery. This motion is made upon the grounds that defendant has filed a dispositive motion. A favorable ruling upon the motion would eliminate the necessity of conducting discovery, which in this case is extensive and costly, which is set forth more fully in the memorandum attached hereto and incorporated herein by reference.

Respectfully Submitted,

STEPHANIE TUBBS JONES, PROSECUTING
ATTORNEY, CUYAHOGA COUNTY

Marilyn Barkley Cassidy

MARILYN BARKLEY CASSIDY (0014647)
PATRICK J. MURPHY (0002401)
Assistant Prosecuting Attorneys
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7785

ATTORNEYS FOR DEFENDANT

*5/7
Judge pleadings
have*

MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

Plaintiff, Alan Davis, has filed this action for wrongful imprisonment on behalf of the estate of Samuel Sheppard. Defendant has filed a motion for judgment on the pleadings. Inasmuch as matters of law could dispose of the case completely, it is both impractical and burdensome for the parties to endure the expense of discovery prior to a ruling upon the legal issues before the court.

LAW AND ARGUMENT

Ohio Civil Rule 26 (c) provides in pertinent part:

(C) Protective orders. Upon motion by any party or by the party from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;...

In construing Federal Rule 26 (C), upon which the Ohio Rule is based, it has been held that when a motion is pending which can determine the validity of a complaint, no reason exists to undertake the expense and inconvenience of further discovery until the disposition of such motion. See Klein v. Lionel Corp, 18 F.R.D. 184 (D. Del., 1955), wherein the court stated as follows:

In the present case if the plaintiff desires information from the defendant which is not useful to him on his motion . . . but will be of use to him upon the trial of the cause, then the acquisition of such information

should await the disposition of the pending motion . . .

There could be no reason to undergo the expense and inconvenience of long depositions for use at the trial until the disposition of the defendants' motions . . . , which might determine the validity of the complaint.

In Wood v. McEwen, 664 F.2d 797, 800 (9th Cir. 1981) (per curiam), cert. denied, 455 U.S. 942 (1982), the trial court judge "issued a protective order suspending discovery until he decided (defendants' motion to dismiss)." The Court of Appeals held that "[t]he [t]rial court did not abuse its discretion in issuing the protective order staying discovery." Id. at 802. See also, O'Brien v. Avco Corp., 309 F. Supp. 703, 705 (S.D.N.Y.), rev'd on other grounds, 425 F.2d 1030 (2 Cir. 1969). ('When, as here the determination of preliminary questions may dispose of the entire suit, applications for discovery may properly be deferred until the determination of such questions."); Billard v. Rockwell International Corp., 85 F.R.D. 622, 666 (S.D. N.Y. 1980).

In the instant case, plaintiff has provided defendant with an extensive list of witnesses, totalling thirty (copy attached as Exhibit A). At the most recent pretrial, the parties discussed the narrowing of the list, which defendant believes will eventually occur if the case moves to trial. Defendant, however, has not instituted its discovery proceedings. It is unreasonable and burdensome for defendant to attend large numbers of depositions, and to conduct extensive and costly discovery proceedings when the case may well be disposed of on jurisdictional or other legal grounds.

CONCLUSION

In light of the foregoing facts and principles of law, defendant State of Ohio respectfully requests that its motion for a stay of discovery, or in the alternative motion for protective order be granted.

Respectfully Submitted,

STEPHANIE TUBBS JONES, PROSECUTING
ATTORNEY, CUYAHOGA COUNTY

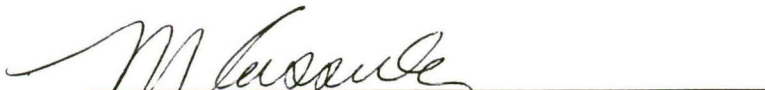


MARILYN BARKLEY CASSIDY
PATRICK J. MURPHY
Assistant Prosecuting Attorneys
1200 Ontario Street - 8th Floor
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(216) 443-7785

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Stay of Discovery has been sent by regular U.S. mail, postage prepaid, on this 7th day of May, 1997, to Terry Gilbert, 1700 Standard Building, 1370 Ontario Street, Cleveland, OH 44113.



MARILYN BARKLEY CASSIDY
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

ALAN J. DAVIS, Special Administrator)
of the Estate of SAMUEL H.)
SHEPPARD)

Plaintiff)

-vs-)

STATE OF OHIO)

Defendant)

CASE NO. 96-312322-CV

JUDGE RONALD SUSTER

**PLAINTIFF'S POTENTIAL
WITNESS AND EXHIBIT LIST**

The Plaintiff may call the following witnesses in the trial of this action, but reserves the right to call additional witnesses as they become known:

1. Henry E. Dombrowski 6016 Hillside Road, Seven Hills, OH

Former CPD SIU Unit; discovered fresh tool marks on cellar door.

2. Robert Leusch 16903 Fischer Road, Lakewood, OH 44107

Recent owner of Sheppard house before demolition; could describe layout; there was no crawl space.

3. Anne Leusch 28924 (West) Lake Street, Bay Village, OH

Recent owner of Sheppard house before demolition; could describe layout; there was no crawl space.

4. Fred Drenkhan Bay Village Police Department

First on scene - what was done, not done, etc.



5. Professor James Chapman (Criminalist)
Director, Criminal Justice Program &
Forensic Crime Laboratory
Corning College
115 Dermorent Parkway, Elmira, NY 14905

Expert - crime scene collection and identification of evidence; criminal behavior profile.

6. Dr. Muhammed Tahir 40 S. Alabama Street, Indianapolis, IN 46204

DNA expert.

7. Dr. Peter DeForest

Forensic scientist/criminalist - review forensic issues in case

8. Dr. Becky Reynolds Roche Molecular Systems

DNA expert

9. Jim Redinger

Young boy who was allowed to search grounds for evidence; found green bag.

10. Russell Sherman 333 3rd Street, Elyria, OH 44085

Sheppard lawyer, second trial, impact of concealed evidence.

11. William J. Corrigan, Jr. Cleveland, OH

Co-counsel with father in first trial.

12. Ronald DuPerow Bay Village Police Department

1959 arrest of Eberling - took statement.

13. George Jindra Rocky River Police Department
Arrested Eberling; found Marilyn's rings; knows about Eberling's arson.
14. Kathy Collins c/o Kelly Assisted Living
6620 S. Point Drive South
Jacksonville, FL 32216

2414 Seabury Place North
Jacksonville, FL 32246

Eberling confession; worked at Durkin home
15. Cindy Leise Reporter, Elyria Chronicle
Eberling confession
16. Beverly Scheidler 296 Ashwood Avenue, Elyria, OH 44035
Eberling confession
17. Dale Scheidler 296 Ashwood Avenue, Elyria, OH 44035
Eberling confession
18. Arlene Campbell Will provide address

Caretaker of Ethel Durkin; Eberling's temper and threats; present when Eberling attacked Myrtle Fray verbally.
19. Vincent Krempberger Detective, Lakewood Police Department
Investigated Eberling in Durkin murder - lack of interest in Eberling by Bay Village.

20. Vern Lund

Through videotape and Affidavit; he washed windows at Sheppard home, not Eberling.

21. Ed Wilbert 285 Via Bahai, Ft. Meyers Beach, FL

Worked for Eberling; Marilyn to come down against Eberling for stealing; use of basement door; Eberling's behavior.

22. Marty Eskins 209 5th Street, Elyria, OH

Friend of Vern Lund; got Lund job with Eberling.

23. Pauline Eskins 209 5th Street, Elyria, OH

Friend of Vern Lund; got Lund job with Eberling.

24. Virginia Heskett 5432 Adobe Falls, Unit 4, San Diego, CA 92120

Mother of Kathy Collins; also worked for Eberling at Durkin's.

25. Richard Eberling Orient Correctional Facility

26. Cynthia Cooper

Interviews and correspondence with Richard Eberling.

27. Judith Ulyss

Relative of Ethel Durkin; provide checks supporting employment of Kathy Collins.

28. John Eberling 4097 Bradley Road, Westlake, OH

Eberling wore hairpiece at time of murder.

29. Reverend Alan Davis
Plaintiff; knew Sheppard well.

30. AMSEC Investigators
Richard Pederson, John Burkholder,
Alan Gore, Andy Carraway

Respectfully submitted,



TERRY H. GILBERT (0021948)
Attorney for Plaintiff, Special Administrator
of the Estate of Samuel H. Sheppard
1700 Standard Building
1370 Ontario Street
Cleveland, OH 44113
(216) 241-1430

EXHIBIT INDEX

1. Birth Certificate Richard Lenardic (Eberling)
2. Children's Aid Society Documents - Richard Eberling
3. Death Certificate - George E. Eberling
4. Will - George E. Eberling
- 4A. Executor's Account - July 1, 1954 - July 1, 1955
- 4B. Executor's Account - July 1, 1955 - July 1, 1956
5. Change of Name - Richard Lenardic - Richard Eberling
6. High School Picture - Richard Eberling
7. Selective Service Documents - Richard Eberling
8. Accident Report - Kinzel/Eberling
9. Death Certificate - Barbara Kinzel
10. Newspaper Article - Kinzel/Eberling Accident
11. Corrigan File Notes - Barbara Kinzel/Sheppard
12. Cleveland Clinic/Dr. Louis J. Karnosh Letter/Re: Eberling
13. HCA Valley Hospital/Dr. Mark W. Peterson/Re: Eberling
14. Cynthia Cooper Affidavit Re: Interview with George Jinda
15. Richard Eberling Statement to Bay Village Police November 10, 1959 - Theft
16. Richard Eberling Statement to Bay Village Police November 10, 1959 - Marilyn Sheppard
- 16A. Bay Village Police Report Signed Ronald Perow November 12, 1959
17. Ohio State Bureau of C.I. & I - Polygraph Report Eberling November 20, 1959
18. Eaton Letter to Gerber - November 30, 1959
Eaton Letter to Gareau - November 30, 1959

19. Tompkins' Letter Dated March 21, 1989, Requesting Review of November 19, 1959, Polygraph Test
20. Bay Village Police Report Re: Richard Eberling September 1989
21. Morris E. Ragus, Polygraph, Qualifications
22. Pre-Polygraph Examination Report/ Richard Eberling
23. Richard Eberling Statement Re: Marilyn Sheppard Murder
24. Bay Village Police Report Re: Lund/Eberling August 17, 1989
25. Letter Lund to Sam Reese Sheppard
26. Lund Videotape
27. Lund Audio Cassette
28. Lund Transcript Video/Audio
29. Lund General Release
30. Lund Medical Release
31. Affidavit Julie Schofield
32. Affidavit Vern Lund
33. Photograph Lund - Video
34. Photograph Lund - Military
35. Lund Military Records
36. Lund Death Certificate
37. Lund Passport
38. Marty and Pauline Eskins/Cooper Affidavit
39. Marty Eskins Military Photograph
40. John Eberling/Burkholder Affidavit
41. John Eberling/Pedersen Affidavit

42. Edward Wilbert/Gore Affidavit
43. Richard Eberling/Cooper Affidavit Re: Interview September 17 and 18, 1994
44. Paul Leland Kirk Affidavit
45. Richard Eberling/Cooper Affidavit Re: Interview August 1991
46. Richard Eberling/Cooper Affidavit Re: Interview March 27 and 28, 1993
47. Richard Eberling/Cooper Letter Dated April 13, 1992
48. Richard Eberling/Cooper Letter Dated February 23, 1991
49. Coroner's Trace Evidence/Affidavit Cooper
50. Dr. A. J. Kazlauckas - Report to W. J. Corrigan
51. Peter R. DeForest - Curriculum Vitae
52. Eberling Letter/Description of Sam and Marilyn Sheppard's House
53. Bay Village Drawing of Sam and Marilyn Sheppard House and Drawings Made by Richard Eberling
54. Cleveland Police Department - Report Sgt. Lockwood July 23, 1954
55. Leo Stawicki - Witness - July 10, 1954
56. Richard and Betty Knitter - Witness - July 14, 1954
57. Police Artist Drawing of Individual Described by Knitters
58. Description Written by Office/Artist Adler (Knitters)
59. Police Drawing/Richard Eberling Drawing
60. Coroner's Verdict - Marilyn Sheppard
61. Autopsy Report - Marilyn Sheppard
62. Mary Cowan - Partial Transcript of Testimony
63. Marilyn Sheppard Blood Grouping Test
64. Richard Eberling - Cleveland Clinic Blood Test

65. Eberling/Durkin Murder News Articles
66. Ethel Durkin - Coroner's Verdict January 3, 1984
67. Ethel Durkin - Autopsy Report September 10, 1988
68. Myrtle Fray - Police Report May 10, 1962
69. Myrtle Fray - Death Certificate May 25, 1962
70. Myrtle Fray - News Articles
71. Myrtle Fray - Coroner's Verdict
72. Myrtle Fray - Autopsy Report
73. Sarah Belle Farrow - Death Certificate
74. Ruth McNeil - News Articles
75. Ruth McNeil Coroner's Verdict
76. Ruth McNeil Death Certificate
77. Higgins/Cooper Affidavit/Re: Ruth McNeil
78. Arlene Campbell/Cooper Affidavit
79. Cooper Affidavit Reference Eberling Letter December 2, 1991
80. Cooper Affidavit Interview With Kremperger March 9, 1994

ADDENDUM EXHIBITS

81. Statement of Dr. Stephen Sheppard, July 5, 1954 about injuries of Dr. Sam
82. Mary Cowan testimony regarding wood chip, Exhibit 84
83. Summary of testimony of Dr. Samuel Gerber regarding injuries to Dr. Sam Sheppard
84. Summary of testimony of Dr. Charles Elkins regarding injuries of Dr. Sam Sheppard
85. Summary of testimony of Bay Village officer Fred Drenkhan regarding injuries of Dr. Sam Sheppard
86. Report of Dr. Bashline regarding injuries of Dr. Sam Sheppard
87. Investigator notes of medical personnel regarding Dr. Sam Sheppard
88. Investigator notes of Barbara Kinzel, nurse at Sheppard hospital, later killed in car accident in car driven by Richard Eberling
89. Nurses' records of Bayview, including statements of Barbara Kinzel
90. Affidavit of Cynthia Cooper regarding report of Harry Dombrowski; Report of Henry Dombrowski
91. Affidavit of Sam Reese Sheppard regarding Exhibit 84
92. Affidavit of Cynthia Cooper regarding Exhibit 84
93. Affidavit of Cynthia Cooper regarding cellarway entrance to Sheppard home
94. Book, Mockery of Justice, The True Story of the Sheppard Murder Case

ADDENDUM TO EXHIBIT LIST

95. Paychecks to Katie Andrews (Kathy Collins)
96. Affidavit of Virginia Heskett
97. Letters and correspondence from Eberling to Cooper
98. Report of Dr. Tahir re: DNA
99. U.S. Supreme Court decision, Sheppard v. Maxwell
100. Police report dealing with discovery of flashlight
101. Crime scene photos
102. Forensic evidence photos
103. Trace Evidence reports
104. Trial transcripts