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Brief of Resondents

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL H. SHEPPARD,

Petitioner

vs.

E. L. MAXWELL, WARDEN,
State of Ohio, ex rel.,

Respondents

No. 6640

BRIEF OF RESPONDENTS

FILED

JUN 2 1964

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL H. SHEPPARD,)	
PETITIONER)	
vs.)	No. <u>6640</u>
E. L. MAXWELL, WARDEN,)	
STATE OF OHIO, ex rel.,)	
RESPONDENTS)	

BRIEF OF RESPONDENTS

I. DID THE PUBLICITY RELATING TO THE PETITIONER DEPRIVE
HIM OF A FAIR TRIAL?

There are two periods of time which must be examined to determine whether or not petitioner was prejudiced by the publicity involved in this case. Those two periods are: 1. the period of time between the discovery of the murder and the impanelling of the jury, and 2. the period of time between the impanelling of the jury and the return of its verdict of guilty.

A. BEFORE TRIAL

With respect to the period of time prior to the final impanelling of the jury, pages 20 and 21 of the petitioner's petition for a writ of certiorari to the Supreme Court of the State of Ohio set forth headlines appearing in Cleveland newspapers for approximately three weeks after the murder on July 4, 1954. Despite the alleged sensationalistic nature of the journalistic effort, the major thrust of the articles and editorials was to seek the arrest of the chief suspect, Dr. Samuel Sheppard. Further, these alleged prejudicial headlines occurred about ten weeks prior to

the commencement of the trial on October 18, 1954.

No one can doubt the effect of such a sustained and unremitting journalistic effort. Any incident which receives a disproportionate amount of publicity loses its footing in terms of evaluation within an objective context. Yet, this is not the issue to be decided. The objectivity of the press is not the standard. The guideline which has been laid down by the United States Supreme Court is:

"To hold that the mere existence of any pre-conceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (Irvin v. Dowd, 366 U.S. 717, 723 (1961)).

An examination of the Irvin case and the case of Rideau v. State of Louisiana, 373 U.S. 723, 83 S. Ct., 1417, 10 L. Ed. 2d, 663 (1963), (perhaps the two cases most favorable to petitioner's position) will reveal where the United States Supreme Court has drawn the boundaries for what constitutes a fair trial in the face of adverse publicity.

In the Irvin case, supra, the following characteristics are observed:

1. It was a small community (30,000);
2. There were six brutal murders in the vicinity;
3. There was vast coverage by news media;
4. There was never any expressions as to doubt concerning the defendant's guilt;
5. Prior criminal record of the accused was published;

6. A confession by the defendant was given wide play;
7. Ninety per cent of the 370 prospective jurors entertained some opinion as to guilt ranging from mere suspicion to absolute certainty;
8. Eight of the twelve jurors expressed the opinion that the defendant was guilty;
9. A pattern of deep and bitter prejudice existed throughout the community.

The factors surrounding the Rideau case are as follows:

1. It was a relatively small community (150,000);
2. Vast coverage by the news media;
3. Two of the jurors were law enforcement officials;
4. A television tape was run three times to audiences of 24,000, 53,000, and 29,000 which showed the defendant confessing in detail to the crimes;
5. At the time of the confession the defendant had no counsel.

Such a pattern of facts reveals the situation that caused the United States Supreme Court to reverse both convictions.

At page 666 of the Rideau case, supra, the Court characterized the television coverage prior to the trial as "Rideau's trial." Yet, the court is not necessarily condemning "publicity per se"; the court is condemning publicity of such a prejudicial nature that the entire area from which the venire will be drawn is so saturated with biased information concerning the offense and the past record of the petitioner that it can be said the defendant was "tried" and found guilty before he reached the courtroom.

The State of Ohio contends that such was not the case in the Sheppard case. Cleveland is not a town of thirty or one hundred and fifty thousand people. It was a cosmopolitan goliath of some 914,000

people according to the 1950 census. In the Sheppard case there had not been six brutal murders or several crimes. The entire community was not then convinced that Dr. Sheppard had done away with his wife. This is to be contrasted with the general community belief of guilt in the Irvin and Rideau cases. In the Irvin case, the fact that the accused had a criminal record was spread throughout the community. Here there is some parallel with the Sheppard case but it is far different for one to have been convicted of a crime than to have been accused of marital infidelity. The reports appearing in the papers were not one sided as in the Rideau and Irvin Cases, supra. As a matter of fact, reports appeared in the papers declaring the innocence of the petitioner. "The petitioner's 'own story' was headlined in unusually bold type on the front page of one Cleveland daily prior to trial." (Exhibit 1, page 10)

In both the Rideau and Irvin cases the invidious influence of a confession was involved. Whereas, Dr. Sheppard contended throughout the entire investigation and trial that he was innocent. The tremendous weight that a confession played in the prior cases is apparent.

"For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial -- at which he pleaded guilty to murder. Any subsequent court proceeding in a community so pervasively exposed to

such a spectacle could be but a hollow formality." Rideau, id., at page 665.

All of the above factors suggest that the deep-rooted prejudice that existed in the Rideau and Irvin cases did not exist in the Sheppard case.

This conclusion is borne out by the results that can be derived from an analysis of the voir dire examination. Counsel for the petitioner at the trial stage summed up the results of the voir dire examination by stating at page 1352 of the record:

"* * * All the people sitting on the jury with the exception of Mrs. Borke, Juror No. 2, have read about this case, a great many have heard radio and television, and we still maintain that even though they express no opinion, that human nature is such that they cannot help but be affected by the situation presented from the beginning of this -- the happening of this murder down to the present time." (Emphasis added)

Since the voir dire examination disclosed that there would be no deep-rooted prejudice prevalent in the community against him, the jurors did not have a fixed opinion as to guilt, and that petitioner cannot claim that the publicity his case received prior to the impanelling of the jury deprived him of a fair trial. The Supreme Court of the United States has suggested that if an accused is tried by a jury which has no fixed opinion as to the guilt of the accused, then such a jury far exceeds the standard established in the Irvin case, supra.

"Although most of the persons selected for the trial jury had been exposed to some of the publicity related above, each individual indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an

open mind disregarding anything he had read on the case.

"A study of the voir dire indicates clearly that each jurors' qualifications as to impartiality far exceeded the minimum standards this Court established in its earlier cases as well as in Irvin * * *," Beck v. Washington, 369 U.S. 541, 557, 8 L Ed 2d 98, 111, 82 S. Ct. 955 (1962).

The trial judge, exercising his discretion, went forward with the task of impanelling the jury. Rizzo v. U.S., 304 F. 2d 810, 815 (1962). No where in the record is it revealed that any of those who sat on the jury had formed a fixed opinion as to the guilt of the accused. After an examination of the relevant factors surrounding the Sheppard jury and the publicity in the community, respondent finds that it can merely repeat the words of the United States District Court in United States v. Kahaner, 204 F. Supp. 921, 924 (1962):

"Publicity, in and of itself does not, foreclose a fair trial. The courts do not function in a vacuum and jurors are not required to be totally ignorant of what goes on about them. * * *"

It is clear that the Supreme Court of Ohio used the same test set forth in the Beck case, supra, in order to ascertain whether petitioner could receive a fair trial. Quoting from Exhibit four, page three of the Ohio Supreme Court opinion:

"The examination of jurors in 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 opinion 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 over rule an application for a change of venue."

This statement has been supported by numerous federal cases.

"The only practical way to conduct a criminal trial with reasonable certainty that the jury will be uninfluenced by publicity is by careful examination of the jurors in the first instance, and a constant repetition of the admonition to the jurors not to receive any outside information about the case, followed by inquiry to insure that the instructions are obeyed." U.S. v. Kline, 205 F. Supp 776, 786 (1963).

"Whether or not the publicity has been of such a nature that the selection of a fair and impartial jury is foreclosed at this time can not be determined until the jurors are questioned on voir dire." U.S. v. Kahaner, 204 F. Supp 921 at 924 (1962).

Thus, we see in examining the period of time between the discovery of the murder and the impanelling of the jury, the publicity petitioner received did not deprive him of a fair trial.

A comment is deemed necessary at this time with respect to the issue petitioner raises relating to the publication of a list of veniremen thirty days in advance of trial, any possible prejudice resulting therefrom would have been disclosed during the voir dire examination and counsel for petitioner could have had such prospective juror removed from the case. Accordingly this issue has no merit.

Further, petitioner failed to raise this issue on appeal (Exhibit 1) and thus such issue is not properly before this Court.

B. DURING TRIAL

The petitioner has also asserted that during the period of time between the impanelling of the jury and the return of its verdict of guilty, he was deprived of a fair trial because of four incidents which occurred, to wit:

1) during the trial, newspaper pictures were taken inside the home of an alternate juror, showing how the family fared while the juror was at court;

2) a broadcast by Walter Winchell relating a story of a woman who claimed she was the mistress of petitioner and that he was responsible for the birth of a child;

3) a broadcast by Bob Considine who announced over the radio a comparison between Alger Hiss and the petitioner;

4) the appearance in the newspaper, November 24, 1954, of a double-column headline on the front page as follows:

"SAM CALLED A JEKYLL-HYDE BY MARILYN,
COUSIN TO TESTIFY"

In considering the above-mentioned complaints it is necessary to keep in mind the following legal principles:

The mere fact of unfavorable publicity does not of itself raise a presumption of prejudice but prejudice must manifest itself so as to corrupt due process. Dennis v. U.S., 302 F 2d 5 (1962). Mere exposure to adverse publicity does not necessarily result in bias, prejudgment or other disqualification. U.S. v. Applegarth, 206 F. Supp. 686, 687 (1962). The mere fact that a juror has read newspaper accounts relative to a criminal charge is not in itself sufficient grounds for excusing a jury. Blumenfield v. U.S., 284 F. 2d 46, 51 (1960).

With respect to the newspaper pictures taken inside the home of an alternate juror, respondent contends that the trial judge adequately disposed of this point when he stated in his memorandum on motion for a new trial, Exhibit 1, page 9:

'Whatever the legal or ethical considerations, the incident proved to be a nullity in this case. The juror (Mrs. Mancini) was an alternate juror; her services were not finally needed; she was discharged at the close of the presentation of the court's charge to the jury and took no part whatever in the jury's deliberations or the rendition of the verdict. There is not a suggestion that Mrs. Mancini was influenced in any manner, nor that she even knew of the matter at that time. It certainly cannot be claimed that the other jurors cared anything about it, nor is it even claimed that they knew of it.'

With regard to the broadcast by Walter Winchell relating the story of a woman who claimed to be the mistress of petitioner, respondent avers that this report could not have resulted in any substantial prejudice to petitioner. There had already been presented into evidence testimony to the effect that petitioner had been having extramarital relations with other women, Miss Susan Hayes in particular (page 4846 of the record). Further, the jury had been admonished not to consider any reports which they heard outside the courtroom. Also at page 5429 of the record it is indicated that only two of the jurors heard the broadcast and that both of those jurors stated it would not have any effect upon their judgment.

Bob Considine said that the denial of guilt by the petitioner to a police officer and the denial of Alger Hiss when he was confronted by Whittaker Chambers was in the same category.

This comparison did not convey to the jurors any information they did not receive in the trial. The police officer testified on

the witness stand about petitioner's denial of guilt. All that was related to the jury was a fact situation, presented in evidence, and Mr. Considine's inference therefrom. Merely because Mr. Considine drew a particular inference does not necessarily mean the juror's would draw the same inference. Surely, this one broadcast is not enough to affirmatively show petitioner was deprived of a fair trial by impartial jurors. The presumption would seem to be that jurors are far more likely to rely on testimony that takes place before their eyes than the inanities of this particular newscaster.

Petitioner has also claimed that a broadcast by Bob Considine who announced over the radio a comparison between Alger Hiss and the petitioner resulted in prejudice to him. Since the court did not question the jurors to see who had heard that report, respondent will assume the position that even if all the jurors heard that presentation, it did not result in prejudice to the petitioner.

Again, it must be kept in mind that the trial court had consistently admonished the jury not to consider out-of-court declarations relating to the case. In connection with this point it is important to note that our jury system is based upon the assumption that juries will endeavor to follow the Court's instructions. Delli Paoli v. United States, 352 U.S. 232, 242, 77 S. Ct. 294, 1 L. Ed 2d, 278 (1957). And as was stated in Holt v. United States, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed., 1021 (1910) at 251:

"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."

Petitioner has further claimed that the appearance in the newspaper of November 24, 1954, of a double-column headline asserting that a cousin was to testify that Sam was called a Jekyll-Hyde by Marilyn prejudiced him. Petitioner further asserts that no such testimony was presented at the trial in support of that allegation.

Page 4266 of the record discloses that the above newspaper article was presented to the Court in support of a motion for continuance of the case. It is important to note that counsel for the petitioner did not request the Court to examine the jurors to see if they had read or seen that particular article. Counsel only moved that a continuance of the case be granted. Since it is to be presumed that the juror's followed the Court's instructions, Delli Paoli, supra, and did not read any information relating to the case which was given outside the courtroom, it is clear that a reason for a continuance of the case was not existant. Only by an examination of the individual jurors would it be ascertained whether a juror had read the newspaper article. Since counsel for petitioner did not affirmatively show, either at the trial by requesting the Court to examine the jurors as to the prejudicial effect of the article or in this habeas corpus proceeding by an affidavit demonstrating the adverse effect of that article, respondent maintains that the petitioner has not sustained his burden of proving he was prejudiced at his trial.

Accordingly, respondent urges this Court to reject this particular claim of the petitioner as the United States Supreme Court rejected the claims of Stroble in the case of Stroble v. California, 343 U.S. 181, 195, 96 L. ed 872, 883, 72 S.Ct. 599 (1952) when they held:

"Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary findings of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberations of the jury."

It should be noted that there was a revival of publicity in the Stroble case, supra, as the trial commenced (343 U.S. at 193, 96 L. ed., at 882). Thus to that extent the Stroble case is on all fours with the case at bar.

In conclusion, respondent maintains that the petitioner has not affirmatively shown that he was deprived of a fair trial due to the publicity his case received both prior to and subsequent to the impanelling of the jury. It is clear that one who seeks to have a federal court set aside a state criminal conviction has "the burden of showing essential unfairness * * * not as a matter of speculation but as a demonstrable reality." United States, ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S.Ct. 965, 100 L. ed. 1331 (1956).

Further, it should be kept in mind that "the trial judge has a large discretion in ruling on the issue of prejudice from the reading by jurors of news articles concerning the trial." Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L. ed 2d 1250 (1959).

Also, while the Supreme Court has a supervisory power over federal judicial proceedings, it has stated there is "a duty of preference to the authority of the State over local administration of justice."

And finally, the question whether jurors are impartial in the constitutional sense is one of mixed law and fact as to which the challenger has the burden of persuasion, for: "Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * *." Reynolds v. United States, 98 U.S. 145, 157, 25 L.ed. 244, quoted with approval in Irvin v. Dowd, supra.

With reference to the fact the jurors were allowed to go to their homes each night during the trial and were not sequestered until after the Court's charge, it has been held that whether to keep the jury together in the trial of a capital case is discretionary, and that the trial court's action in that respect will not be reviewed, unless it appears affirmatively that prejudice resulted to the defendant. Wheeler v. U.S., 165 F. 2d 225 (1947), cert. denied. 68 S. Ct. 448, 333 U.S. 829, 92 L. ed 1115; Odel v. Hudspeth, 189 F. 2d 300 (1951). Further, petitioner has not shown that he requested that the jury be sequestered during the trial or that the jury was not properly instructed prior to separation.

II. WAS THE PETITIONER DEPRIVED OF A "PUBLIC" TRIAL?

The petitioner has asserted that the action of the trial court in setting aside the major portion of the courtroom for representatives of the news media was violative of his right to a "public" trial.

Respondent contends that the trial court was justified in its actions and that the Court's reasons as set forth in his memorandum on motion for new trial (Exhibit 1, pages 6 & 7) adequately explain his behavior:

"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 courtroom is small. The court assigned specific seats to individual correspondents in the rear of the courtroom 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 courtroom; that there was to be no passing back and forth through trial area and that all entries to and movings out of the courtroom be via the public doorway in the rear of the courtroom. 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 courtroom 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."

The size of the courtroom is 52 feet by 21 feet. In order to accomodate all classes of persons, the petitioner's family, the deceased's family, the press, and the general public, certain arrangements had to be made. At all times there were representatives from

each of the above classes present in the courtroom. Thus the trial was not, by the order of the trial court, rendered a secret trial, but was even more so a public trial than most trials are. The Court of Appeals held with respect to this issue:

"It is claimed also that the court arranged the courtroom to accomodate a great many representatives of the press, radio and television and other news-disseminating agencies, thus restricting accommodations available for others. The record shows that the defendant's family was provided for and that the defendant's brother Dr. Stephen Sheppard, although a witness, was permitted by order of the court to remain in the courtroom throughout the trial. The court in this case was presented with a very difficult matter because of the unusual amount of coverage attempted by the press, radio and television agencies. The arrangements made by the court were within its sound discretion. Certainly the defendant was afforded a public trial, and from a reading of the record, we cannot say that the court in seeking to maintain an orderly proceeding abused its discretion in directing the courtroom arrangements."
(Exhibit 2, page 36)

In connection with this issue it should be noted that the Sixth Amendment's guaranty of a "public" trial in criminal cases does not apply to trials in state criminal prosecutions. Gaines v. Washington, 277 U.S. 81, 72 L. ed 793, 48 S. Ct. 468 (1928); Phillips v. Nash, 311 F. 2d 513 (1962). And in Melanson v. O'Brien, 191 F. 2d 963 (1951) it was declared that in determining whether one convicted of a crime in a state court at a trial from which the public was excluded is denied due process of law under the Fourteenth Amendment, decisions of the federal courts dealing with the right to a public trial in a federal criminal prosecution are not controlling, as the question whether the exclusion of the general public from the courtroom is a violation of the specific guaranty of a "public trial" contained in the Sixth Amendment is different from the question of

whether such an exclusion is a violation of the more general guaranty of due process of law in the Fourteenth Amendment.

Further, in considering whether the petitioner was deprived of a "public" trial the case of Levine v. United States, 362 U.S. 610, 4 L. ed 2d 989, 80 S. Ct. 1038 (1960) should be noted wherein it was stated with reference to "public" trials that:

"This is not a case where it is or could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public scrutiny; nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result. Nor are we dealing with a situation where prejudice, attributable to secrecy is found to be sufficiently impressive to render irrelevant failure to make a timely objection at proceedings like these." 362 U.S. at 619, 4 L. ed 2d at 997.

Although the above-quote is referring to the Sixth Amendment guarantee of a "public" trial it shows that it is mandatory for petitioner to demonstrate evidence of prejudice in order to show the infringement of such a right. Petitioner has not done so. He has not shown that he was deprived at the trial of the presence, aid, or counsel of any person whose presence might have been of advantage to him.

Even though there is a specific guarantee of a "public" trial in the Sixth Amendment imposed in federal trials, as distinguished from the more general rights guaranteed by the due process clause of the Fourteenth Amendment, it is clear that even the Sixth Amendment's guarantee is subject to restriction. In Geise v. United States, 262 F. 2d 151, ret. den. 265 F. 2d, 659 (1958), cert. den. 361 U.S. 842, 4 L. ed 2d, 80, 80 S. Ct. 94, it was held that one convicted of rape

of an 8-year-old child could not claim that he had been denied the "public trial" which the Sixth Amendment guarantees, merely because all spectators were excluded except: (1) members of the press, (2) members of the bar, (3) relatives or close friends of the defendant, and (4) relatives or close friends of witnesses whose ages were, respectively, 7 years, 9 years, and 11 years. The court said that despite the exclusion the trial was a public trial.

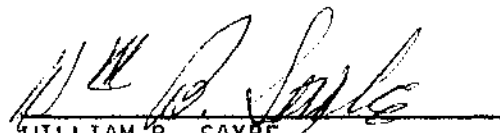
And in United States v. Kobli, 172 F 2d 919 (1949 CA 3, Pa.) it was held that the constitutional right to a public trial does not require that spectators having no immediate concern with the trial be admitted in such numbers as to overcrowd the courtroom.

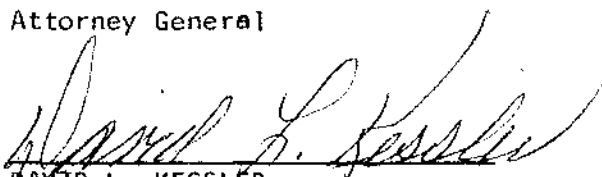
Since this is a State trial, petitioner will have to demonstrate that the Fourteenth Amendment's due process clause guarantees a "public" trial in state criminal prosecutions. Assuming he can so demonstrate, respondent contends that a "public" trial was given to the petitioner as there was no general exclusion of the public. Respondent further alleges that if this Court finds a "public" trial was not afforded to the petitioner, he waived such a right by not objecting to the Court's order when it was first implemented. Levine v. United States, 362 U.S. 610, 619, 4 L. ed 2d 989, 997, 80 S. Ct., 1038 (1960).

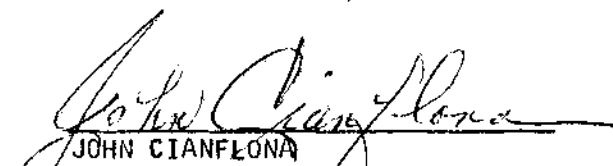
The respondent is aware that the petitioner is going to present statements to the effect that the trial judge expressed his belief in the guilt of the petitioner before the trial commenced. Accordingly, respondent invites the Court's attention to the recent case of Hendrix v. Hand, 312 F. 2d (1962) wherein the Court of

Appeals, in a habeas corpus proceeding held that the mere fact that a trial judge in a state criminal prosecution signed a statement in advance of trial relating to the judge's belief that the defendant was guilty of the crime charged did not establish any infringement of defendant's right to a fair trial.

Respectfully submitted,

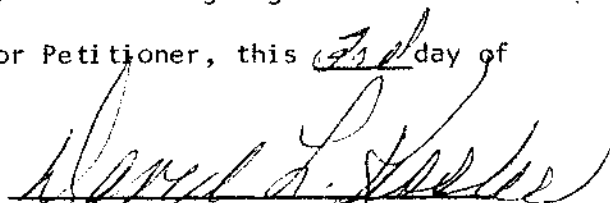

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Respondent was mailed to Attorneys for Petitioner, this 7th day of June, 1964.


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