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Motion in Limine to Exclude Plaintiff's Proposed Exhibits (#3, 4, 8...)

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15

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

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

Plaintiff

vs.

THE STATE OF OHIO

Defendant

Judge Ronald J. Suster 29 4:28

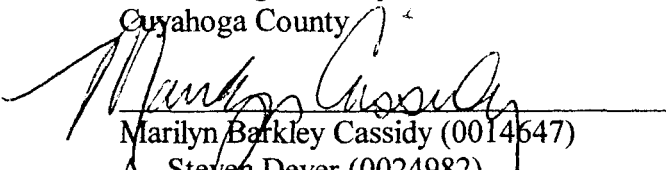
Case No. 312322

MOTION IN LIMINE TO
EXCLUDE PLAINTIFF'S
PROPOSED EXHIBITS
(EVID. R. 401-404)

Defendant, State of Ohio, by and through counsel, William D. Mason,
Prosecuting Attorney for Cuyahoga County, Assistant Prosecutor Marilyn Barkley
Cassidy, and Assistant Prosecutor A. Steven Dever, moves this Honorable Court to
exclude Plaintiff's proposed Exhibits numbered: 3, 4, 8, 9, 10, 68, 69, 70, 71, 72, 73, 74,
75, 76, 88, and 89 for the reasons set forth fully in the following brief.

Respectfully Submitted,

WILLIAM D. MASON
Prosecuting Attorney
Cuyahoga County


Marilyn Barkley Cassidy (0014647)
A. Steven Dever (0024982)
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(216) 443-5870
Attorneys for Defendant

BRIEF

Facts and Introduction

The current Plaintiff's Exhibit List contains numerous items as proposed exhibits. Those exhibits are numbered on the current Plaintiff's Exhibit List as follows: 3, 4, 8, 9, 10, 68, 69, 70, 71, 72, 73, 74, 75, 76, 88, and 89. These exhibits include numerous documents relating to the deaths of George E. Eberling, Barbara Kinzel, Myrtle Fray, Sara Belle Farrow, and Ruth McNeil. Under Evid. R. 401 – 404, these exhibits are not admissible for the following reasons.

Law and Argument

Evid. R. 401 & Evid. R. 402

Evid. R. 401 defines “relevant evidence” as being any “evidence having any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence.” See also Brown v. City of Cleveland, (1981), 66 Ohio St.2d 93. The Plaintiff's proposed exhibits listed above do not meet this definition. The conduct of Richard Eberling that is to be inferred by the introduction of these exhibits do not make the existence of any fact more or less probable than without the introduction of the evidence.

Richard Eberling was never arrested or indicted for the deaths of his father, George E. Eberling, Barbara Kinzel, Myrtle Fray, Sara Belle Farrow, or Ruth McNeil. Any evidence concerning the deaths of these people is not relevant to the determination of whether Samuel H. Sheppard is innocent of his wife's murder on July 4, 1954. It is

sheer speculation to implicate Richard Eberling in the deaths of these individuals. Speculation and empty inferences certainly will not make it more probable or less probable that Samuel H. Sheppard murdered his wife. If Eberling's involvement in their deaths was so strong, he certainly would have been arrested and charged accordingly. He was not.

Another problem with the use of this evidence is that it quite unfairly condemns Richard Eberling as the murderer of several individuals. Richard Eberling is entitled to defend himself against unfounded charges of homicide. Our legal system affords every person their day in court. He is entitled to present a defense and any alibi evidence. His death precludes this. The situation would be different had Eberling been charged with these crimes but he was not. Therefore, the proposed exhibits should not be admitted since they are not relevant under Evid. R. 402.

Evid. R. 403(A)

Furthermore, the evidence is not admissible under Evid. R. 403(A) because "its probative value is substantially outweighed by the danger of . . . confusion of the issues, or of misleading the jury." The issue at trial is whether Sam H. Sheppard is innocent of murdering his wife. The interjection of several unsubstantiated murder allegations into this case will do nothing more than confuse the issue and mislead the jury. The jury is facing substantial amounts of legal, factual, and scientific information, and to interject the notion that Richard Eberling killed several other individuals would strain the focus of this already complex trial. If the jury is forced to decide on Richard Eberling's guilt regarding these other murder claims, the jury will be confused on what issue they are supposed to be deciding. The jury will also be misled as to what is the actual issue to be

determined at trial. The use of this evidence will not aid the jury in its factfinding role, and should therefore be excluded under Evid. R. 403(A).

Evid. R. 403(B)

Moreover, the evidence “may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.” Evid. R. 403(B). Forcing the jury to decide on Richard Eberling’s guilt regarding these unsubstantiated murder allegations will result in both undue delay and a needless presentation of evidence. The jury will have enough complex issues to decipher, and must not be burdened with deciding whether Richard Eberling murdered these other individuals. The time the jury would have to spend on such an issue would hinder the jury in determining the proper question: whether Samuel H. Sheppard is innocent of murdering his wife. The presentation of evidence would lengthen what is anticipated to be a protracted trial. Judicial resources will be strained enough in light of the complexity of the issues and the notoriety of this case and requires that this evidence be excluded. Therefore, the evidence should be excluded.

Evid. R. 404(B)

Finally, assuming *arguendo* that the evidence is relevant, the evidence “is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” Evid. R. 404(B).

The rule and statute governing admission of other acts evidence codify common law respecting evidence of other acts of wrongdoing, and are construed *against* admissibility. State v. Lowe, (1994), 69 Ohio St.3d 527(emphasis added). The standard for determining admissibility is strict. State v. Coleman, (1989), 45 Ohio St.3d 298.

The evidence being introduced is being offered to prove that Richard Eberling murdered his father, George E. Eberling, Barbara Kinzel, Myrtle Fray, Sara Belle Farrow, and Ruth McNeil. These claims are unsubstantiated and pure speculation. More importantly though, the main purpose of introducing this evidence is to show that Richard Eberling also murdered Marilyn Sheppard, since he supposedly murdered those individuals as well. Evid. R. 404(B) prohibits exactly this. See State v. Goines, (8th Dist. 1996), 111 Ohio App.3d 840 (stating that evidence of prior acts may not be used to prove inference that, in committing alleged crime, defendant acted in conformity with his other acts or that he has propensity to act in such a manner).

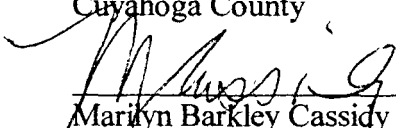
The use of such evidence can be used to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” as enumerated in the Evid. R. 404(B). Id. Plaintiff’s use of this evidence is not for one of these enumerated purposes. It is for the sole purpose of showing that Richard Eberling allegedly killed these people, for which he was never arrested or charged, and by extrapolation must have murdered Marilyn Sheppard on July 4, 1954, a murder which he was never arrested or charged. Therefore, Plaintiff’s proposed exhibits 3, 4, 8, 9, 10, 68, 69, 70, 71, 72, 73, 74, 75, 76, 88, and 89 should be excluded from this trial pursuant to Evid. R. 404(B).

Conclusion

For the reasons above, the State of Ohio respectfully requests the court exclude plaintiff’s proposed exhibits 3, 4, 8, 9, 10, 68, 69, 70, 71, 72, 73, 74, 75, 76, 88, and 89 from this trial.

Respectfully Submitted,


WILLIAM D. MASON
Prosecuting Attorney
Cuyahoga County



Marilyn Barkley Cassidy (0014647)
A. Steven Dever (0024982)
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1200 Ontario St.
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Attorneys for Defendant

CERTIFICATE OF SERVICE

The foregoing Motion to Exclude Plaintiff's Exhibits was served upon
plaintiff's counsel Terry Gilbert at 1370 Ontario Street, 17th Floor, Cleveland, Ohio
44113 this 29 day of December, 1999 by regular U.S. Mail.



Marilyn Barkley Cassidy (0014647)