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Motion for Evidentiary Hearing Regarding Items Destroyed or Lost by Defendant

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Gilbert, Terry H. and Carr, George H., "Motion for Evidentiary Hearing Regarding Items Destroyed or Lost by Defendant" (2000). *1995-2002 Court Filings*. 96.
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IN THE COURT OF COMMON PLEAS
2000 JAN 28 P 4: 12 CUYAHOGA COUNTY, OHIO

2000 JAN 28 P 4: 10

CUYAHOGA COUNTY
PROSECUTING ATTORNEY

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

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

) Judge Ronald Suster

) Case No. 312322

vs.

) MOTION FOR EVIDENTIARY
) HEARING REGARDING ITEMS
) DESTROYED OR LOST BY
) DEFENDANT

STATE OF OHIO

) Defendant
)
)
)
)
)

Plaintiff hereby moves this court for an evidentiary hearing to investigate the present whereabouts of items destroyed or lost by the State of Ohio and its local agencies. The reasons and authorities for granting this motion are as follows.

Immediately after the murder of Marilyn Sheppard, the Sheppard home and its curtilage were taken into "protective custody." *Sheppard v. Maxwell*, 384 U.S. 333, 337 (1966). During the course of the investigation of the crime scene, several items were taken by State authorities as evidence. Among these items were a green tool bag, the wristwatches of Dr. Sheppard and his wife, Dr. Sheppard's keychain, several T-shirts, the pillow and bedclothes of the murder room, Dr. Sam Sheppard's pants, shoes, and belt, Dr. Sheppard's medical bag and its contents, Dr. Sheppard's athletic trophies, and the contents of Dr. Sheppard's desk drawers, which were strewn about his study, as well as the desk drawers themselves. Over the next few weeks, additional items, were recovered or seized by police and investigators, and were stored as evidence.

After Dr. Sheppard's trial, modestly described as a "Roman Holiday," *State v. Sheppard*, 165 Ohio St. 293, 294 (1956), and conviction, this evidence was presumably held during the pendency of Dr. Sheppard's appeals. After the U.S. Supreme Court's ruling in *Sheppard v. Maxwell*, that Dr. Sheppard "did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment," *id.* at 335, Dr. Sheppard was retried for second-degree murder, and the second trial resulted in acquittal and Dr. Sheppard's release. The murder of Mrs. Sheppard remained, and still remains, an open investigation.

However, the State has foregone any serious pursuit of the attacker who killed Mrs. Sheppard and injured Dr. Sheppard. In the process of abandoning its investigation, the State has destroyed, allowed to be destroyed, and/or lost much of the evidence in its possession, which could exculpate Dr. Sheppard and permit him to support its case against the State.

Generally, when a party to an action destroys or loses evidence, courts are presented with various options, which may overlap: 1) an adverse inference jury instruction, 2) issue preclusion, 3) dismissal of claims or defenses raised by the party committing the spoliation, or 4) summary judgment against the spoliator. *See generally Hubbard v. The Cleveland, Columbus & Cincinnati Highway, Inc.*, 81 Ohio App. 445, 451, 50 Ohio L.Abs. 78, 37 Ohio Op. 279, 76 N.E.2d 721 (1947); C.J.S. EVIDENCE §164; *Sullivan v. General Motors Corp.*, 772 F. Supp. 358, 360-65 (N.D. Ohio 1991).

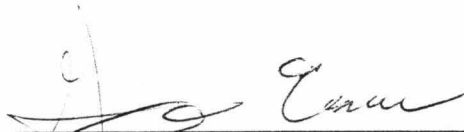
The proper course of action for the Court depends heavily on the intentions and state of mind of the party which has spoliated the evidence. *See generally Sullivan v. General Motors Corp.*, 772 F. Supp. 358, 360-65 (N.D. Ohio 1991); *Cleveland Concession Co. v. City of Cleveland*, 84 Ohio App. 1, 9 (1948); *State ex rel. Raydel v. Raible*, 117 N.E. 2d 480, 486 (1954); *United States v. Kessler*, 364 F. Supp. 66, 70 n. 7 (S.D. Ohio 1973) (noting that Ohio

follows the common law view of requiring unfavorable inferences from the government's failure to produce relevant evidence within its exclusive control).

In order for this Court to determine whether the various responses to spoliation are warranted, or whether sanctions are appropriate, evidentiary hearings are necessary to determine whether bad faith, intentional misconduct, gross neglect, negligence, or any improper procedures were the cause of the loss of this key evidence. Once this has been determined, this Court can appropriately respond to the spoliation of this evidence.

Therefore, Plaintiffs move this Court to hold evidentiary hearings on the evidence in the State's control, to determine what procedures or acts resulted in its destruction or loss.

Respectfully submitted,



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Certificate of Service

The undersigned certifies that the foregoing Motion For Evidentiary Hearing Regarding Items Lost or Destroyed by Defendant has been served by hand-delivery upon William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 28th day of January, 2000.


George H. Carr (0069372)
Attorney for Plaintiff