



1-31-2000

## Defendant's Motion in Limine re Inadmissible Hearsay and Regarding Certain Irrelevant Testimony

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IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY

ALAN DAVIS, Special Administrator of the Estate of Samuel H. Shepard,	:	CASE NO. 312322
	:	
Plaintiff,	:	JUDGE SUSTER
	:	
v.	:	<u>DEFENDANT'S MOTION</u>
	:	<u>IN LIMINE RE INADMISSABLE</u>
STATE OF OHIO,	:	<u>HEARSAY AND REGARDING</u>
	:	<u>CERTAIN IRRELEVANT</u>
Defendant.	:	<u>TESTIMONY</u>
	:	

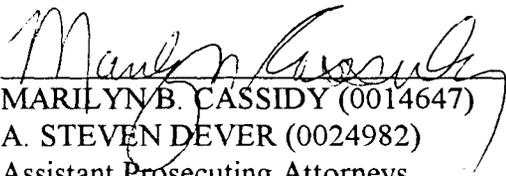
Defendant hereby moves the Court to enter an order excluding from the trial of this case any argument by counsel, question by counsel, and testimony by any and all witnesses regarding inadmissible hearsay evidence and certain evidence which is irrelevant.

Alternatively, in the event the Court determines that ruling on some of these matters should be deferred until later in the course of the trial, defendant request that there be no mention of these matters during voir dire of the jury or opening statements and that counsel be instructed to provide advance notice to the Court and opposing counsel, out of the hearing of the jury, prior to any reference to the matters.

The specific items of evidence addressed by this motion and the reasons to support granting this motion are set forth in the attached brief in support.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney  
of Cuyahoga County, Ohio

  
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ATTORNEYS FOR DEFENDANT

## **BRIEF IN SUPPORT**

Some of the evidence which defendant anticipates plaintiff will try to offer in this trial is so clearly irrelevant, so plainly inadmissible as hearsay, or are otherwise defective that the Court should rule on their exclusion now (subject to reconsideration during the trial if a proper foundation or basis is established). Alternatively, and because much of the evidence is so confusing, prejudicial, and misleading as to the proper focus of this case, this Court should enter an order excluding any reference to the matters during voir dire, opening statement, or otherwise, and require counsel to alter opposing counsel and the Court, out of the hearing of the jury and in advance of the anticipated use of such testimony, so that appropriate rulings can be made without the jury already having been prejudiced or surprised by premature reference to the matters.

### **I. LIMITATIONS ON TESTIMONY OF SAM REESE SHEPPARD**

Sam Reese Sheppard was seven years old when his mother was murdered. He professes to have no first hand knowledge of the events of her murder. Thus, it is difficult to imagine what if any relevant, admissible testimony he has to provide.

Based upon his deposition testimony and numerous interviews provided to the media and others, it is expected that plaintiff's counsel will attempt to elicit from Sam Reese Sheppard testimony that is completely irrelevant to this case such as the effect that the death of his mother, the exhumation of her remains, and/or the incarceration of his father and other such events have had on his life, the life of other family members, etc. Also, his observations or impressions of what impact

incarceration, the criminal process, etc. had on Sam Sheppard is not relevant.

This is not a damages proceeding. Moreover, the scope of permissible damages does not include hardship to Sam Reese Sheppard. Such testimony has no relevance to this proceeding except to improperly confuse the issues and interject passion and prejudice against defendant.

**II. WITNESSES WHO SHOULD BE PRECLUDED FROM TESTIFYING IN TOTO**

**A. Pauline Eskins and Marty Eskins:**

The deposition testimony of Mr. and Mrs. Eskins demonstrates that they have no personal knowledge of any facts relevant to the issue at bar. They were acquainted with Mr. Vern Lund who was an associate of Richard Eberling. Mr. Lund is dead. The Eskins have no relevant, probative evidence to provide in this case.

**B. Judith Zaczkowski :**

Zaczkowski is a relative of Myrtle Frey and Ethel Durken. She alleges that Eberling killed Myrtle Frey. She does not claim to have witnessed the murder. Nor does she claim to have any other relevant, probative evidence. Her testimony is speculative, prejudicial and inadmissible. Furthermore, as detailed by defendant in a separate motion specifically addressing the question of other deaths, such testimony is violative of Ev.R. 404.

**C. Dr. David Bing:**

Dr. Bing's report states that Dr. Tahir's report is correct. Accordingly, Bing's testimony is repetitive, cumulative and is inadmissible.

**D. Dr. Laber:**

Dr. Laber is an associate of Dr. Bart Epstein. Laber is precluded from testifying as he failed to submit an expert report. Furthermore, any testimony that Laber would give is a repetition of the Epstein testimony, is redundant and cumulative, and therefore, inadmissible.

**E. Alan Gore:**

Mr. Gore was an investigator associated with AMSEC International. His deposition testimony reveals that he interviewed an individual alleged to be an associate of Richard Eberling named Ed Wilbert. Gore interviewed Wilbert and his friend, Mallick. Gore's conclusion is that Wilbert knew of the cellar entrance to the Sheppard home. Additionally, Gore's testimony would include hearsay evidence consisting of statements made by Richard Eberling to Wilbert.

**F. Cynthia Cooper:**

Ms. Cooper's involvement as a "witness" in this case is well documented. In addition to numerous television appearances to promote the book, *Mockery of Justice*, co-authored by Cooper and Samuel Reese Sheppard, Cooper has claimed to have reinvestigated the Sheppard murder with a team. She also appeared at a hearing in 1996 and addressed this court with regard to her investigation and findings. At deposition in New York, Ms. Cooper was uncooperative and failed to answer the large majority of questions posed to her. Inasmuch as she has failed to provide her complete deposition, she should not be permitted to testify.

**G. Carmen Marino:**

Mr. Marino's opinions with regard to this case are irrelevant and not evidence, just as are the opinions of all other the attorneys working for both law offices representing parties in this case. Counsel for plaintiff has disseminated opinions publicly that he would seek to have excluded as evidence for the same reason. The rule should be equally applied.

**H. John Wilson:**

This is not a damages phase of the proceeding. Dr. Wilson's testimony as to alleged harm caused to Sheppard in prison is not relevant to the issue before the court.

**III. TANGIBLE ITEMS WHICH SHOULD BE EXCLUDED IN WHOLE**

**A. "Mockery of Justice":**

The book authored by Samuel Reese Sheppard and Cooper constitutes hearsay. Plaintiffs attempt to introduce the book to prove the truth of the matters asserted in the book (Sam Sheppard's innocence and Richard Eberling's guilt) is classic inadmissible hearsay except for isolated passages which may be appropriate impeachment of a testifying witness. Those matters must be introduced by the testimony of the individuals from whom information was derived.

**B. "AMSEC Investigation Report":**

Report compiled by so-called private investigators constitute hearsay. Any relevant facts or observations acquired first hand by AMSEC investigators must be attested to by the investigator.

**C. Nova and other broadcast or written presentations.**

Like Items II(A)(B), these presentations constitute hearsay and should not be presented to the jury, with the exception of isolated clips or passages which may be appropriate impeachment of a testifying witness.

**D. Wood chip:**

A party seeking to introduce at trial evidence such as the purported wood chip from the basement stair, must authenticate the wood chip by proper testimony pursuant to Evid.R. 901(a). The court, pursuant to Evid. R. 104, will determine as a preliminary matter whether the condition of authentication has been satisfied before admitting the

wood chip into evidence. With specific regard to the wood chip, Ms. Cynthia Cooper was allegedly in possession of this exhibit for a period of time. She has, however, refused to testify in this regard at deposition and has failed to provide any information to the State of Ohio about the wood chip.

**E. Blood Stain from the Wardrobe Door:**

Defendant submits that the same legal arguments concerning authenticity and chain of custody apply to the exhibit purporting to be a blood stain taken from the wardrobe door in the Sheppard home.

**IV. HEARSAY ISSUES**

Based upon what the parties have disclosed in pretrial statements regarding the potential character of the case they plan on presenting and the discovery which has occurred in this case, it is expected that numerous hearsay issues involving significant matters will arise in the trial of this case. The State of Ohio recognizes that, in some instances, context may determine whether a party's claim of hearsay exception is accurate. However, certain hearsay evidence, if not preliminarily addressed at this stage, could result in the introduction of prejudicial and confusing matters for which there is no effective cure later. Examples include, in addition to items listed above:

**A. Cooper Affidavits**

Plaintiffs have included certain affidavits on its exhibit list. Plaintiff's exhibits 17, 37, 42, 41-48.

Each contains multiple levels of hearsay. Also, as explained above, Cynthia Cooper has refused to make herself available for a complete deposition.

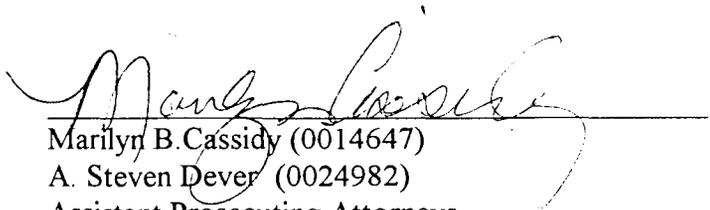
**B. Vern Lund Materials**

All testimony and exhibits related to Vern Lund should be excluded, including plaintiff's

exhibits 24-29, and 32-36. Mr. Lund is deceased. None of the statements or affidavits or other materials attributed to him fall within any hearsay exception

Respectfully submitted,

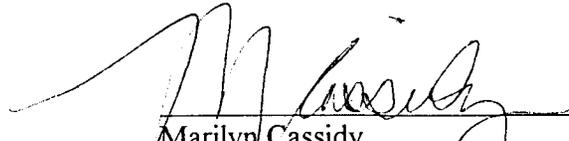
WILLIAM D. MASON, Prosecuting Attorney of  
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1200 Ontario Street  
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(216) 443-7785  
ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion in Limine Re Hearsay Testimony was served upon Terry Gilbert and George Carr, attorneys for plaintiff, this 31 day of January, 2000, via ordinary U.S. mail and by facsimile transmission to 1370 Ontario Street, Suite 1700, Cleveland, Ohio 44113.

  
Marilyn Cassidy  
Assistant Prosecuting Attorney