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## Memorandum Opinion Regarding Admission of Testimony from 1954 Trial

Judge Ronald Suster  
*Cuyahoga County Court of Common Pleas*

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2-7-00

STATE OF OHIO ) IN THE COURT COMMON PLEAS  
 ) SS.  
CUYAHOGA COUNTY ) CASE NO. 312322

ALAN DAVIS, et al., )  
 )  
Plaintiff, )  
 )  
v. ) **MEMORANDUM OPINION**  
 ) **REGARDING ADMISSION OF**  
STATE OF OHIO, ) **TESTIMONY FROM 1954 TRIAL**  
 )  
Defendant. )

Plaintiff, the Estate of Samuel H. Sheppard, has moved this Court, *in limine*, to preclude Defendant, the State of Ohio, from introducing into evidence at trial any testimony of unavailable witnesses given at the 1954 trial of *State v. Sheppard*. For the reasons set forth below, as well as those stated at bar,<sup>1</sup> the motion is DENIED.

### Background

In 1966 the United States Supreme Court, in *Sheppard v. Maxwell* (1966), 384 U.S. 333, held that Samuel H. Sheppard's original trial in 1954 constituted a denial of due process as a result of pervasive publicity which infected the trial proceedings. Plaintiff now argues that the Supreme Court's holding also requires this Court to exclude any of the testimony from that trial in the case *sub judice*. Plaintiff argues that the "fruit of the poisonous tree" doctrine, *see generally, Wong Sun v. United States* (1963), 371 U.S. 471, compels such a decision.

The State contends that the testimony is admissible hearsay of unavailable declarants and thus

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<sup>1</sup> The Court's ruling was announced in open court on February 4, 2000. A ruling on a motion *in limine* is necessarily provisional. The Court believes it appropriate to provide this additional insight into its rationale in order to enable the parties to fully address the Court's concerns should, as the Court expects, the motion be revisited at trial.

admissible pursuant to Oh. R. Evid. 804(B)(1). The State further contends that the exclusionary rule and the fruit of the poisonous tree doctrine are inapplicable in civil cases.

### **Analysis**

#### **1. Rule of Evidence 804(B)(1)**

There is no dispute that the 1954 testimony which Defendant intends to offer is, at least to some extent, relevant.<sup>2</sup> Because the testimony constitutes out of court statements being offered, in at least some instances, for the truth of the matters asserted, and because the testimony does not fall under Evidence Rule 801(D)'s definition of statements which are not hearsay,<sup>3</sup> some or all of the anticipated testimony is hearsay. Evidence Rule 804(B)(1) provides for the admission of prior testimony at a proceeding of a now unavailable witness when:

the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

When the testimony was taken at the 1954 trial, Samuel H. Sheppard had the opportunity to cross examine the witnesses and a motive similar to Plaintiff's motive in the instant case -- to put forth evidence that Samuel H. Sheppard did not kill Marilyn Sheppard. Accordingly, the dictates of Rule 804(B)(1) have been met.

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<sup>2</sup> As discussed, *infra*, the Court will consider particular objections to relevance or to the potential for unfair prejudice that particular testimony may carry.

<sup>3</sup> Samuel H. Sheppard testified at the 1954 trial. However, because the Ohio Rules of Evidence do not except "privy admissions" from the definition of hearsay, Dr. Sheppard's testimony, to the extent it is being offered for its truth, is also hearsay. *See*, this Court's Memorandum Opinion of February 12, 2000 in the instant case (holding *in limine* that Dr. Sheppard's "privy admissions" at the 1954 Coroner's Inquest are hearsay).

## 2. Constitutional Considerations

With respect to the Plaintiff's argument about the exclusionary rule and the fruit of the poisonous tree doctrine, these principles do not compel the exclusion of the 1954 trial testimony. "Generally, the exclusionary rule has not been applied in civil cases. *State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals* (1992), 63 Ohio State 3d 354, 364.

Moreover, the errors in the 1954 trial on which *Sheppard v. Maxwell* focused, and which Plaintiff argues should cause the exclusion of testimony from that trial, were errors made, in whole or in part, part, by the trial judge, not by the prosecutors. Normally the exclusionary rule does not apply to judicial errors. *See generally, United States v. Leon* (1984), 468 US 897, 916 ("the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates"). Accordingly, the Court declines Plaintiff's invitation to expand the exclusionary rule to the facts of this case.

## 3. Scope of the Court's Ruling

While Plaintiff's sweeping motion *in limine* to exclude *any and all* testimony from the 1954 trial on the constitutional grounds enunciated *supra* is denied, this ruling *in limine* in no way addresses Plaintiff's ability to move the Court to limit testimony from the 1954 trial on additional evidentiary grounds. Such objections will be addressed as they are raised, on either a witness by witness, or question by question basis.

2.14.2000

Date

Ronald Suster  
Judge Ronald Suster