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Memorandum in Support Of Presenting Redacted Testimony from Previous Trials

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2-21-00

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

CHARLES MURRAY, Administrator
of the Estate of
SAMUEL H. SHEPPARD

Plaintiff

vs.

STATE OF OHIO

Defendant

Judge Ronald Suster

Case No. 312322

**MEMORANDUM IN SUPPORT
OF PRESENTING REDACTED
TESTIMONY FROM PREVIOUS
TRIALS**

At the close of court on Friday, February 18, Plaintiff proposed the introduction into evidence of the redacted testimony of Robert Schottke, a Cleveland Police Detective who investigated the homicide of Marilyn Sheppard. The State objected to the introduction of this redacted testimony, arguing that the historical testimony should be presented in its entirety. For the following reasons, Plaintiff should be permitted to introduce redacted testimony.

It is settled law that a wrongful-imprisonment suit is a trial *de novo* on the issue of whether the plaintiff actually committed the crime for which they were imprisoned. *Walden v. State*, 47 Ohio St. 3d 47, 52, 547 N.E.2d 962, 967 (1989). One of the central reasons for hearing the matter *de novo* is that the State often is prevented from appealing errors in criminal prosecutions: "because of this prohibition, the state has not had a fair opportunity to litigate the issue of . . . innocence because it cannot seek correction of errors by the trial court which might

have led to erroneous acquittals.” *Id.* Thus, the parties are permitted, as in any other *de novo* proceeding, to rectify errors made in prior proceedings.

In the matter now under consideration, Officer Schottke was permitted to testify to impermissible hearsay matters. He was permitted to relate both sides of his interviews with Dr. Sam Sheppard, and was permitted to read portions of a written statement containing not only his questions, but also Dr. Sheppard’s answers. Although this was permitted in the trial for reasons unknown, it should not be permitted here, as those statements of Dr. Sheppard are hearsay.

Black-letter law defines hearsay:

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Ohio R.Evid. 801(C). Officer Schottke’s testimony is admissible under an exception to the hearsay rule, contained in Ohio R.Evid. 804(B)(1): testimony given under cross-examination in a prior proceeding. However, although hearsay within hearsay is not *per se* inadmissible, each level of hearsay must satisfy an independent exception to the hearsay rule. Ohio R.Evid. 805.

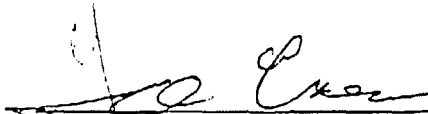
Therefore, although Officer Schottke’s statements are admissible, statements made to Officer Schottke are not covered by any exception to the hearsay rule, and must be redacted. In similar case, *Sanders v. Hairston*, 51 Ohio App. 3d 63, 64-65, 554 N.E.2d 951, 953-54 (1988), the Eighth District Court of Appeals affirmed a trial court that admitted only portions of a police report containing an officer’s direct observations, and redacted portions containing statements made by others. See also *State v. Vinson*, 70 Ohio App. 3d 391, 399, 591 N.E.2d 337, 343 (1990) (affirming trial court’s refusal to admit police report containing hearsay statements where each part of the statements did not fit into an exception to the hearsay rule); *State v. Turvey*, 84

Ohio App. 3d 724, 745-46, 618 N.E.2d 214, 228-29 (1992) (reversing trial court where double hearsay admitted without applicable exception to hearsay rule).

In short, Officer Schottke's statements regarding his actions and observations are hearsay that is admissible under Ohio R.Evid. 804(B)(1); his statements regarding statements made to him by others must be admissible under some other exception to the hearsay rule, which they are not. The State may argue that Dr. Sheppard's recounting of the events of the night of July 4, 1954 is a statement against interest under Ohio R.Evid. 804(B)(3), but such statements must be "so far contrary to the declarant's" interests that no reasonable person would have made them without their being true. This rationale cannot apply to Dr. Sheppard's statements: slight variations between retellings of the events of the murder night are not "so far against his interest" that he would not have made them at the time if they were not true. In fact, Dr. Sheppard probably believed that each of his statements supported his interests, rather than harmed them. The State has offered no support for its theory that inconsistent statements are automatically against interest; in fact, case law refutes this theory. In *Williamson v. United States*, 512 U.S. 594 (1994), the Court ruled that Fed. R.Evid. 804(b)(3) should be construed narrowly as to allow only statements that are directly and clearly inculpatory, and not to include collateral or non-inculpatory statements.

Therefore, Plaintiff should be permitted to present the testimony of Officer Schottke in a redacted form, to remove hearsay statements contained within his prior testimony.

Respectfully submitted,



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Certificate of Service

The undersigned certifies that the foregoing Memorandum in Support of Presenting Redacted Testimony from Previous Trials has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 22nd day of February, 2000.



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