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Plaintiff's Memorandum Regarding Inadmissibility of Improper Hearsay and Character Evidence

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I. Introduction

In 1954, Judge Blythin of this Court committed error by admitting tainted testimony into evidence at the trial of Dr. Samuel H. Sheppard. As more fully set forth in Sheppard v. Maxwell, 384 U.S. 333, 337 (1966), the Supreme Court adjudged the 1954 trial proceedings and the flagrant admission of tainted testimony as a "Roman holiday." Id. at 345-352.

This year, in an attempt to prevent the State of Ohio from repeating the past, Dr. Sheppard filed several motions in limine to prevent the State from proffering evidence that was tainted or otherwise inadmissible. The State argued vigorously against Dr. Sheppard's motions, claiming that the proffer of such evidence was relevant, admissible, and that the State would show how such evidence was relevant to the issues raised by the pleadings. As a result of the State's arguments, Dr. Sheppard's motions were denied and the State was given maximum cross-examinatory leeway.

After just one week of testimony, the court has now been confronted with what Dr. Sheppard warned -- that the State of Ohio would do its level best to improperly use tainted and inadmissible evidence to "defend" the allegations made by Dr. Sheppard. In point of fact, rather than defend the allegations made by Dr. Sheppard, the State is attempting to "prosecute" Dr. Sheppard *in absentia* by reenacting the same mistakes made by the prosecution at the 1954 trial.

The court has now requested memoranda from counsel to curtail the admission such inadmissible testimony.

II. Law and Argument

The State of Ohio has made clear their self-serving theme of the case. They suggest that the relationship between Dr. Sheppard and his wife, Marilyn Sheppard, was a "powder keg." They even go so far as to suggest, albeit without any support, that the powder keg was "ignited

by a match" on the evening of Mrs. Sheppard's murder. However, the State has admitted that they do not know what ignited this so-called powder keg. Instead, they have asked the court and the jury to make an incredible leap of faith and to infer from various irrelevant and unrelated circumstances that: 1) there existed a troubled marriage between Dr. and Mrs. Sheppard; 2) that the marriage was in such disarray that Dr. Sheppard would have the desire to kill his wife; 3) that Dr. Sheppard would have the ability to kill his wife; and 4) that Dr. Sheppard did, in fact, kill his wife. In what can only be described as "an inference, upon an inference, upon an inference, upon an inference," the State has once again attempted to use innuendo and character assassination to defend this case. By soliciting such testimony, over objection, the State of Ohio has committed reversible error and their self-serving "powder keg" has blown up in their face.

A. Inadmissible Hearsay

The State of Ohio has begun to solicit inadmissible hearsay and double-hearsay evidence in an attempt to show that Dr. Sheppard may have been involved in the crime charged against him in 1954, and for which he was acquitted. Confronting the baseline issue of hearsay, it requires a rudimentary definition:

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.

Evid.R. 801(C). Double hearsay exists when a statement, other than the one made by the declarant, is recorded in some form by one party, but recited at trial or a hearing by yet another party. State v. Taylor (Montgomery 1992), 82 Ohio App.3d 434, 612 N.E.2d 728. In either case, the testimony is absolutely inadmissible unless there exists a valid exception to the hearsay rule. Id. To date, the State has attempted to avoid the hearsay rule of exclusion by raising the "present sense impression" and "state of mind" exceptions to the hearsay rule.

The present sense impression exception applies only to "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Evid.R. 803(1). This narrow exception to the hearsay rule of exclusion is *only applicable* when the subject statement was made at a time and under circumstances in which the person *to whom* the statement was made would be in a position to verify the statement. Evid. R. 803(1), Staff Notes, 1980. Clearly, this exception requires not only that the statement be observed or recorded at or near the time it was made *but also that the person to whom the statement was made could confirm or deny the truth and veracity of the statement.* Id.

The state of mind exception, also known as *res gestae* exception, only applies to "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition [sic] *but not including a statement of memory or belief to prove the fact remembered or believed.*" Evid.R. 803(3)[emphasis supplied]. This exception is a restatement of traditional common law exceptions pertaining to bodily and emotional conditions, as more fully described in the seminal case on the exception, Mutual Life Ins. Co. of New York v. Hillmon, 145 U.S. 285 (1892). For instance, a person, other than the declarant, recalling that the declarant said, "I feel sick," is admissible under the state of mind exception. Whereas, a person recalling the declarant to say, "I believe John Smith is a nice person," *does not* fall under the state of mind exception because it does not describe a feeling of physical or emotional import. Id. The mechanical application of this narrow hearsay exception is simply improper as a means to put before the court any and all statements of belief or memory. In point of fact, it is absolutely improper.

The State attempts to argue that Dr. Sheppard's statements are not hearsay for a variety of reasons. It first argues that since the State is offering the statements of Dr. Sheppard in order to

show their falsity, and that they are therefore not offered for the "truth" of the matters asserted therein. The cases cited by the State do not support this theory: State v. Williams (1988), 38 Ohio St. 3d 346, 528 N.E.2d 910, involved a situation where a written statement to police was admitted solely to impeach a witness who denied speaking to the police; State v. Workman (1984), 14 Ohio App. 3d 385, 471 N.E.2d 853, 14 Ohio B.Rep. 490, involved a witness who testified simply that another witness had told him something different before trial than what the witness had related on the witness stand. Neither of these cases stands for the proposition that matters offered to prove their falsity are not being offered for the truth of the matter asserted; in fact, Workman, in a separate portion of the opinion, indicates correctly that previous inconsistent statements may only be introduced in cross-examination against a witness on the stand, and may not be elicited through direct examination.

The State also argues that previous hearsay statements of Dr. Sheppard have been admitted, allowing Ohio R.Evid. 806 to justify the admission of further hearsay; however, any such statements were admitted on cross-examination over Plaintiff's objection. The State's argument that it "is entitled to demonstrate to the jury that Samuel H. Sheppard told inconsistent versions" is unsupported by any applicable law.

Perhaps the most ludicrous argument made by the State to justify the admissibility of Dr. Sheppard's statements is that Plaintiff here, Dr. Sheppard's estate, has "certainly manifested its adoption and/or belief of the truth of Samuel H. Sheppard's statements relative to his claim of innocence and wrongful imprisonment." State's Brief at 7. The State argues that since 801(D)(2)(b) has been used to admit statements against parties who have expressly manifested belief in those statements, "it is no huge leap to hold that the rule was also intended to place an estate in a survivorship action squarely in the shoes of the decedent by holding the estate to the

statements of the decedent." Id. In fact, this *is* a huge leap, and would destroy the notion of privacy which this Court has already held to prevent the use of 801(D)(2)(a) to justify the admission of Dr. Sheppard's statements. Were this Court to adopt the State's position on 801(D)(2)(b), every estate that filed a lawsuit to protect the rights of its decedent would somehow be automatically adopting every statement made by the decedent. Instead, this Court should follow the common-sense understanding of 801(D)(2)(b): where a party to lawsuit *expressly manifests* his adoption of another person's statement as his own, it may be admitted against him. As to the State's argument that "Samuel Reese Sheppard has manifested his belief in his father's innocence and his father's version of events in numerable ways," only two points need be made: first, Mr. Sheppard is not a party to this lawsuit and is permitted to sit at the trial table only through the courtesy of this Court; second, Mr. Sheppard's personal opinions and beliefs about his father's story are not evidence in this proceeding.

Further, the State of Ohio recently revealed the name of Robert Bailey as a potential witness. The only connection that Mr. Bailey has to this matter is having been allegedly present during a conversation between his wife, Donna Bailey, and Marilyn Sheppard. According to a police report generated by Patrick Bureau of the Cleveland Police Department, Mrs. Sheppard made a statement to Donna Bailey that she, Mrs. Sheppard, was going to "drag Dr. Sheppard's name through the mud." According to the report, Mr. Bailey was present to overhear Mrs. Sheppard's statement. For numerous reasons, this exchange is inadmissible. However, in just the context of the hearsay rule of exclusion, it is inadmissible.

Foremost, it is presumed that the State of Ohio will attempt to solicit the content of Mrs. Sheppard's statement through their recently disclosed witness, Robert Bailey. To the extent that the statement is being related at trial by a person other than the declarant, it falls under the

hearsay rule of exclusion. Therefore, an inquiry then needs to be made into whether it falls under one of the narrow exceptions to the hearsay rule that the State would otherwise mechanically apply. As for present sense impression, there exists no content of the communication by Mrs. Sheppard that describes an event or condition. That is, she is not describing a burning house, a car accident, or any other event upon which she could relate her "present sense impression." Moreover, the statement was not related at or near the time of any event or condition. In particular, according to the police report, the statement was made at a cocktail reception long after any fact or circumstance that gave rise to Mrs. Sheppard's statement. There again, the statement would not fall under the present sense exception. Lastly, the person to whom the statement was made, Donna Bailey, could not confirm or deny the truth or veracity of the statements contained therein. That is, Mrs. Bailey was unable then and there to confirm whether or not Mrs. Sheppard would "drag his name through the mud." That speculative statement was simply unverifiable. To the extent that the State attempts to solicit the statement through Mr. Bailey, there exist the same insurmountable hurdles that are in place should the state choose to utilize Mrs. Bailey as a conduit for the inadmissible testimony. Furthermore, Mr. Bailey was not the person to whom the statement was directed and therefore, cannot in any way act as a conduit for the admission of the objectionable testimony.

As for the state of mind exception, an attempt to use that narrow exception as grounds for the admission of Mrs. Sheppard's statement falls flat. In suggesting that Marilyn Sheppard was going to drag Dr. Sheppard's name through the mud, the focus of the statement was speculative at best and unconfirmed and supported with even the best of hindsight at worst. At no time does the gravamen of the statement suggest a feeling that Mrs. Sheppard was currently experiencing -- such as pain in her leg. The statement is simply classic hearsay and the State of Ohio is clearly

attempting to mechanically apply what has become a generically used exception to the hearsay rule of exclusion. However, with just a cursory review of the hearsay rules, it is evident that the statement is inadmissible in any event.¹

B. Inadmissible Character Evidence

Evidence Rule 404 states quite clearly that, "evidence of a person's character or a trait of his character is *not admissible* for the purpose of proving that he acted in conformity therewith on a particular occasion...." Evid.R. 404(A)[emphasis supplied]. Exceptions to this rule exist only in criminal cases when the defendant first offers such character evidence. Evid.R. 404(A)(1),(2).

Under the same general evidence rule it states, "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B). In a general sense, past acts of wrongdoing are not admissible at all to show that a person acted in a similar manner on a different occasion. The second clause of the section, however, is often bastardized by prosecutors to suggest that prior bad acts are admissible, so long as the prosecution "announces" that the purpose of the proffer is to suggest motive or intent. This is simply not the case and the State of Ohio should be prevented from abusing the rule.

As indicated above, character evidence is inadmissible to prove conduct on a particular occasion. For instance, evidence that a person is careless is not admissible to prove, or even suggest, that the person was negligent while driving a vehicle. See Hatsio v. Red Cab Co., 77

¹ Although the focus of this argument is on just one proffered statement, the same law holds true to for all attempts by the State of Ohio to proffer hearsay statements that fail to fall under the true definition of either the present sense impression or the state of mind exception.

Ohio App. 301 (1945). Unless a defendant in a criminal matter offers proof of his "good character" in defense of the charges alleged, the prosecution may not utilize character evidence to suggest otherwise. With this limited exception, character evidence is strictly inadmissible.² Nonetheless, the State of Ohio has chosen to pursue a course of presenting character evidence, not prior bad acts to be described below, to show that Dr. Sheppard may have been involved in the killing of his wife. This type of pursuit is strictly proscribed by rule and rises to the level of reversible error. See State v. Johnson, 71 Ohio St.3d 332, 643 N.E.2d 1098 (1995) (holding that evidence of accused's character, such as referring to women as "whores" and the accused's past sexual history, was inadmissible to suggest that the accused acted in conformity therewith by killing his sister).

As for prior acts, those acts may not fall into the category of "any prior acts." Rather, there are specific prerequisites for their admission. Foremost, they must specifically relate to the offense charged. State v. Wogenstahl, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996). Because Evid.R. 404(B) codifies an exception to the common law, it must be strictly construed *against* admissibility. State v. Coleman, 45 Ohio St.3d 298, 544 N.E.2d 622 (1989). Moreover, the acts described or proffered must be not only closely related in nature to the act at issue, but the prior acts must be close in time and place to the act at issue. State v. Goines, 111 Ohio St.3d 840, 677 N.E.2d 412 (1996). Further, it is incumbent for a trial court to determine the exact reason for which the prior act evidence is being offered and the court must determine the relevancy of such

² Of course, the State of Ohio has previously taken the position that these proceedings are civil in nature and therefore neither exception under Evid.R. 404(A)(1) or (2) would apply since those exceptions are limited to criminal actions. To the extent that the State attempts to apply either exception, this court should revisit each and every motion in limine filed by Dr. Sheppard in which the State replied with, "this is not a criminal case and therefore criminal rules do not apply." Nonetheless, Dr. Sheppard maintains that the general constitutional mandates raised in his motions in limine apply regardless of the context and that Dr. Sheppard did not first offer evidence of his character at trial, therefore neither exception would apply in any event.

evidence and to which of the specific exceptions to evidence would be offered, i.e., *modus operandi*, opportunity, lack of mistake. State v. McCronell, 91 Ohio App.3d 141, 631 N.E.2d 1110 (1993). For instance, the prior theft of a telephone may be irrelevant and inadmissible for any purpose in a trial for manslaughter. But, the prior theft of a telephone would be admissible to show the absence of mistake if a person claims that he ran from the scene of a crime because he was unable to call for help since he did not know what a telephone looked like.

To the extent that the State of Ohio tries to offer any statement or prior act pertaining to Dr. Sheppard's character, the evidence is inadmissible as a matter of law. To the extent that any evidence is proffered as to prior acts, the evidence should be proscribed because no prior "act" of Dr. Sheppard can be retold that has any bearing, relevance or similarity to the crime charged in 1954.³

The State also argues that Plaintiff has "opened the door" to character evidence of Dr. Sheppard by presenting "through the testimony of numerous witnesses evidence that Samuel H. Sheppard was supposed a good, even-tempered man with a happy and satisfying marriage." State's Brief at 8. Two points rebut this argument: first, Plaintiff has introduced no evidence of character, only of professional reputation; second, it was the State's cross-examination of Mr. Bailey that raised the *issue* of Dr. Sheppard's character, but no evidence was in fact offered regarding character.

The State's final argument regarding Ohio R.Evid. 404(B) exposes the inconsistency (and unworkability) of the State's position: after arguing that Mr. Eberling's other acts were prevented by 404(B), the State now argues that Dr. Sheppard's other acts are "independently admissible . . .

³ As a matter of completeness, it should always be determined by the court what constitutes a "prior bad act." "Statements" are not "acts." "Walking" to and from a hospital are not prior "bad" acts.

for the purpose of establishing the reasons and motives actuating Samuel H. Sheppard's conduct" in spite of 404(B). State's Brief at 8-9. As the State has noted in arguing previous motions in this case, the fact that some evidence may be critical or important to establishing a party's case is irrelevant in determining its admissibility. Regardless of how much the State wants to prove that Dr. Sheppard committed this crime by relying on some similarity to alleged prior "bad acts," such evidence is prohibited by Ohio R.Evid. 404(B).

C. Improper Use of Testimony for the Purpose of Establishing an Inference Upon an Inference

Perhaps the most disturbing of all tactics gestated by the State of Ohio is their attempt to prove their self-serving theme of the case by way stacking inferences upon inferences. Ohio still adheres to the prohibition of stacked inferences. Donaldson v. Northern Trading Co., 82 Ohio App.3d 476 (1992). Although the law is slightly more restricted in Ohio than in other jurisdictions, it is still impermissible to "draw [sic] one inference solely and entirely from another inference...." Id. at 481. At almost every turn, the State of Ohio has asked the jury, and this court, to draw an inference from an inference. For instance, the State relies upon scant evidence to allege that Dr. and Mrs. Sheppard had a troubled marriage. Even assuming this to be true, the state would have the jury infer that because of the troubled marriage, Dr. Sheppard had the desire to end the marriage. Without any further supporting facts or circumstances, the State would have the jury infer from that inference that Dr. Sheppard had the desire to kill his wife -- an enormous leap of faith. From that inference, the State would have a jury infer that Dr. Sheppard formed the intent to kill his wife. From that inference, the State would have a jury infer that Dr. Sheppard had the opportunity to kill his wife. Thereafter, one would have to infer that Dr. Sheppard did, in fact, kill his wife. These impermissible "stacked inferences" gestate

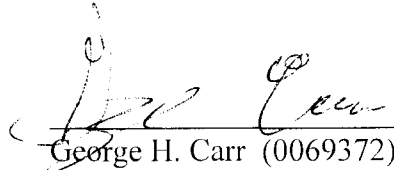
from scant hearsay and impermissible character evidence offered by the State. To proscribe the State's inappropriate desire to have a jury stack inferences, the proffered evidence that sets the chain of inferences in motion should be prohibited.

III. Conclusion

Wherefore, Plaintiff respectfully requests this court to prohibit the introduction of any character evidence of Dr. Sheppard and Marilyn Sheppard, and to prohibit any hearsay evidence that is not being offered under a properly applied exception, and which this court knows to be offered by the State for the purpose of proving the truth of the matter contained therein.

Certificate of Service

The undersigned certifies that the foregoing Plaintiff's Memorandum Regarding Inadmissibility of Improper Character and Hearsay Evidence has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this ^{12th}12 day of February, 2000.


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