

any marks on the beach. The story he told is refuted there.

Patrolman Drenkhan said he looked down there. There were no marks on the beach.

Then, of course, we have the various stories told by Sam Sheppard to various people at various times, and they all vary.

These stories are consistent with only one thing, they are consistent with guilt, they are consistent with the fact that on the 4th day of July, 1954, Sam Sheppard purposely and maliciously killed Marilyn Sheppard.

Thank you.

MR. BAILEY: May we approach the bench, your Honor?

THE COURT: Yes.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury, as follows:)

MR. BAILEY: The record will reflect that on each of several occasions, when referring to an interrogation which the evidence showed involved only one person, that is, the witness and the defendant Sam Sheppard, the prosecutor persisted in using the term "unrefuted."

There is a string of cases that holds this is a comment on the failure to take the witness stand of the defendant, and I think it is grounds for a mistrial, and I so move.

THE COURT: Overruled.

MR. BAILEY: The prosecutor told the jury that there was evidence that the defendant had admitted to infidelity. There was no such evidence.

Patrolman Drenkhan tried to volunteer it and I objected and the question was stricken out.

There is nothing in the written statement about it.

It is horribly prejudicial. I objected when the remarks were made, and I think that, too, is grounds for a mistrial, and I so move.

THE COURT: Overruled.

MR. BAILEY: I ask that a special instruction be given as to the lack of evidence as to any indication of infidelity, and the jury be told that it has no part in this case.

THE COURT: Overruled.

MR. BAILEY: My rights are saved to each. Is the Court going to permit the prosecutor to continue to use the word "refused"? Because I

should like to get authorities. That is a Federal Constitutional violation.

THE COURT: I am interested in any authority you have, Mr. Bailey. But right now we will hear the opening argument from the defense, and at that time perhaps we will --

MR. SHERMAN: I will only take about fifteen minutes at the most, your Honor.

THE COURT: All right.

(Thereupon proceedings were resumed within the hearing of the jury, as follows:)

THE COURT: Ladies and gentlemen of the jury, for purposes of opening argument for and on behalf of the defendant, the Court will call counselor Sherman. Counselor Sherman, please.

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