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ADDENDUM: COMMENTS ON *Sheppard v. Maxwell*,
384 U.S. 333 (1966)

BY ROBERT B. MCKAY AND FRED GRAHAM

THE SYMPOSIUM on "A Free Press and a Fair Trial" that is here reported was held on April 16, 1966, several weeks after the Supreme Court of the United States had heard argument in behalf of Dr. Samuel H. Sheppard who sought to overturn his conviction for the murder of his wife on July 4, 1954. The Supreme Court decision in that case on June 6, 1966, is so important to the issue of free press and fair trial that we thought this symposium would be incomplete without a brief statement of that holding.

Dr. Sheppard, who at all times denied his guilt, was convicted in 1955 of second degree murder and given a life sentence. After serving more than nine years in prison, his petition for a writ of habeas corpus was granted and he was released by Judge Carl Weinman of the United States District Court for the Southern District of Ohio.¹ Judge Weinman held that Dr. Sheppard had not been afforded a fair trial because of the failure of the trial judge to protect Sheppard sufficiently from the massive, pervasive, and prejudicial publicity that attended the prosecution. The United States Court of Appeals for the Sixth Circuit reversed by a divided vote.² That judgment was in turn reversed when the Supreme Court of the United States concluded that Sheppard had not received a fair trial consistent with the due process clause of the fourteenth amendment.

The opinion of the Court by Mr. Justice Clark (Mr. Justice Black dissented without opinion) is significant for its acknowledgment that identifiable prejudice to the accused need not be proved in order to establish a denial of due process. Lack of due process can be demonstrated, Clark said, where "the totality of circumstances" raises "such a probability that prejudice will result that it is deemed inherently lacking in due process."³ The prejudicial circumstances surrounding the Sheppard conviction, as enumerated by the Court, began with prejudicial publicity long before the trial — even before Sheppard's arrest — and continued through the trial itself.

After Dr. Sheppard's wife was bludgeoned to death, he told those who first investigated the crime that he had seen and grappled with a "form" which he believed to be that of the murderer. Since

1. 231 F. Supp. 37 (S.D. Ohio 1964).

2. 346 F.2d 707 (6th Cir. 1965).

3. Quoting with approval from *Estes v. Texas*, 381 U.S. 532, 542-43 (1965).

no one else identified the alleged intruder, it was natural that inquiry should begin with Dr. Sheppard. What was not proper, however, was the newspaper coverage of subsequent events.

On the day of the funeral of the victim, a newspaper story appeared in which the assistant county attorney, who was later the chief prosecutor of Sheppard, criticized the Sheppard family's refusal to permit immediate questioning. Subsequent newspaper stories stressed Sheppard's lack of cooperation with the police when he refused to take a lie detector test or an injection of truth serum. According to the press, it would seem, the most serious evidence of his noncooperation lay in his failure to confess the murder.

About two weeks after the murder, an "editorial artillery" was commenced, suggesting that the coroner's inquest was being delayed because of friendships in high places. After two days of editorials the inquest was convened, and Sheppard was questioned at length, although his attorneys were not permitted to participate; his chief counsel was at one point "forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience."⁴

When Sheppard was not arrested immediately after the conclusion of the inquest, the press reported evidence that tended to incriminate Sheppard, including statements attributed to a detective relating "findings" that were never introduced at the trial. The newspapers also named a number of women with whom Sheppard had allegedly been involved in extra-marital affairs, but at the trial evidence was introduced of only one affair.

Following editorials of July 28 and July 30, Sheppard was arrested on a charge of murder after which the publicity grew in intensity until his indictment on August 17. The matter was scarcely forgotten by press or public in the interval preceding the trial set for two weeks before the November general election at which the chief prosecutor was a candidate for municipal judge and the presiding judge was a candidate to succeed himself. Twenty-five days before the case was set, seventy-five veniremen were called as prospective jurors. When all three Cleveland newspapers published the names and addresses of the veniremen, all the jurors received a number of calls — many anonymous — about the case.

At the trial itself, a long temporary table was set up inside the bar, immediately behind the single counsel table, with one end less than three feet from the jury box. The court assigned seats to approximately twenty representatives of newspapers and wire services at this

4. 384 U.S. at 340.

table. In addition, several other rooms in the courthouse were assigned to the press and for radio and television coverage, including the room adjacent to the one in which the jury recessed during the trial and in which it deliberated.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were used to take pictures of judge, jurors, witnesses, and defendant, and some interviews were conducted there. The taking of pictures in the courtroom was permitted during recesses.

During the trial the cluster of reporters inside the bar of the small courtroom made confidential communication between lawyer and client difficult and sometimes impossible. Discussion between counsel and judge, intended to be out of the jury's hearing, was conducted in the judge's chambers; but the reporters often managed to learn and to report in the press what had been discussed.

The jurors themselves were constantly exposed to the news media; all except one testified at voir dire to reading or hearing broadcasts about the trial during its nine-week course. Numerous pictures of the jury and of individual jurors appeared in the Cleveland papers, including pictures taken at a jury viewing of the Sheppard home.

During the trial newspaper reporters on a radio show asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Defense counsel's objections brought no relief from that or later episodes. When Sheppard was likened in a broadcast to a perjurer and compared to Alger Hiss, the court refused a continuance and refused to ask how many jurors had heard the broadcast. Similarly, when other prejudicial statements were made in the press or on the air, the court denied motions for change of venue, continuance, and mistrial. When the jury viewed the scene of the murder, one news media representative accompanied the jury while a helicopter flew over the house taking pictures. After the case was submitted to the jury, the jurors were placed in a hotel, but were allowed to place unmonitored telephone calls.

Mr. Justice Clark observed that the news media have always been allowed considerable latitude in reporting events that interest the public, "even though we sometimes deplored its sensationalism." However, as earlier pointed out in *Bridges v. California*,⁵ "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."⁶

5. 314 U.S. 252 (1941).

6. *Id.* at 271.

Much of the blame for the lack of fairness in the trial was attributed to the trial judge who failed to grant change of venue, continuance, or even sequestration of the jury. The Supreme Court condemned the conduct of the trial in these words :

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." *Estes v. Texas, supra*, at 536. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.⁷

The judge was further criticized for his failure to consider ways available to him to reduce the flow of prejudicial material and to protect the jury from outside influence. The Court said⁸ the following procedures should have been adopted :

7. *Sheppard v. Maxwell*, 384 U.S. 333, 354-55 (1966).

8. *Id.* at 358-63.

(1) The number of press representatives should have been limited; their location inside the bar should have been forbidden; and their conduct should have been more closely regulated.

(2) The court should have insulated the witnesses.

(3) The court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and counsel for both sides.

(4) The court should have considered on its own the possibility of change of venue, continuance, sequestration of jurors, or even a new trial.

The opinion included a cautionary note for the future:

[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.⁹

The case was remanded to the federal district court to issue the writ and to release Dr. Sheppard, "unless the State puts him to its charges again within a reasonable time." Before the end of June the prosecutor announced that Dr. Sheppard would be tried again.

9. *Id.* at 363.