FILED

JUN 25 1969

BESSIE BUFFALOE, Clerk

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE

VS

JAMES EARL RAY,

Defendant

NO. 16645

ORDER

This matter came on to be heard upon the motion of the Honorable J. B. Stoner moving this Honorable Court that the defendant James Earl Ray be rendered an indigent person;

AND IT APPEARING TO THE COURT that an Order has heretofore been entered in this cause declaring the defendant to be an indigent person, and it further appearing to the Court that this Order should continue to have full force and effect.

IT IS THEREFORE ORDERED:

That the Order previously entered continue to have full force and effect as to the indigency of the defendant James Earl Ray.

Arthur C. Faq
JUDGE
May 26, 1969 NUNC PRO TUNC
by interlineation

Jesse Clyde Mason
Assistant Attorney General

IN THE CRIMINAL COURT OF APPEALS WESTERN DIVISION
OF THE STATE OF TENNESSEE

STATE OF TENNESSEE

VS

JAMES EARL RAY

DEFENDANT'S BRIEF

RICHARD J. RYAN,
523 FALLS BUILDING
MEMPHIS, TENNESSEE
527-4715

TO THE HONORABLE CRIMINAL COURT OF APPEALS WESTERN DIVISION OF THE STATE OF TENNESSEE, SITTING AT JACKSON, TENNESSEE, OR TO ANY OF THE JUDGES THEREOF:

STATE OF TENNESSEE	FROM THE CRIMINAL COURT
VS	OF
JAMES EARL RAY	SHELBY COUNTY, TENNESSEE

STATEMENT OF CASE
AND
MEMORANDUM OF AUTHORITIES
RELIED UPON IN SUPPORT OF
PETITION FOR CERTIORARI

Statement of Facts:

On March 10, 1969, in Division III of the Criminal Court of Shelby County, Tennessee, before the Honorable Judge Preston W. Battle the defendant, James Earl Ray, entered a Plea of Guilty to the charge of Murder in the First Degree of one Dr. Martin Luther King and was sentenced to the term of ninety-nine (99) years to be served in the State Penitentiary in Nashville, Tennessee. Three (3) days later on March 13, 1969, the defendant wrote to Judge Preston Battle of his intention to file in the near future a post conviction hearing. See Exhibit marked No. 1 attached hereto.

On the 26tn day of March, 1969, at the request of the defendant, James Earl Ray, his attorney, Richard J. Ryan, along with co-counsel, Jr B. Stoner and Robert W. Hill,Jr., attempted to gain entrance in the State Penitentiary in order to confer with the defendant, James Earl Ray, but were refused;

that a document was prepared entitled "Motion for a New Trial" (See Exhibit No. 3). This document was given to the Warden who made a copy of the same and later presented it to James Earl Ray, the defendant; that he refused to sign the same without advice of counsel; that same day James Earl Ray wrote another letter to the Honorable Preseton W. Battle (See Exhibit No. 2), and this time stated that he wanted to go the thirty day appeal route.

On March 31, 1969, Judge Battle returned to Memphis from a short vacation period and was met at 9 A.M. of that day by one of the attorneys for James Earl Ray, the defendant herein. On that day Judge Battle exhibited the two letters he had received from James Earl Ray. Shortly thereafter in mid-afternoon of March 31, 1969, Judge Battle died of a heart attack. Shortly thereafter an Amended and Supplemental Motion was filed on behalf of James Earl Ray setting out the death of Judge Battle, and among other things, that the Plea of Guilty extended to Judge Battle was not one of a voluntary nature.

Subsequent to this the State of Tennessee filed a Motion to Strike the Motion for New Trial of the defendant-petitioner. On May 26, 1969, upon a hearing of this cause before the Honorable Arthur C. Faquin, Judge of Division II of the Criminal Court of Shelby County, Tennessee, the Honorable Judge Arthur C. Faquin found for the State of Tennessee and sustained their Motion to Strike.

Subsequent to this defendant-petitioner filed a Prayer for Appeal asking for permission and leave to file his appeal from this ruling, and this was denied by the Honorable Judge Arthur C. Faquin on June 16, 1969.

MEMORANDUM OF AUTHORITIES:

Defendant would allege that at the time the letters of record were written (heretofore exhibited) there was in effect in the State of Tennessee a statute, namely:

T.C.A. Sec.27-201.

> Motion for Rehearing or New Trial. - A rehearing or motion for new trial can only be applied for within thirty (30) days from the decree, verdict or judgment sought to be affected, subject, however, to the rules of court prescribing the length of time in which the application is to be made, but such rules in no case shall allow less than ten (10) days for such application. The expiration of a term of court during said period shall not shorten the time allowed.

Life and Casualty Ins vs Bradley

In Life & Casualty Ins. Co. vs Bradley 178 Tenn. Page 531 it was found "Any motion to set aside a verdict is in legal effect a motion for a new trial".

Defendant would further allege that at the time of Judge Battle's demise there was a certain Statute in effect in the State of Tennessee, namely:

T.C.A. Sec.17-117

> New Trial after Death or Insanity. - Whenever a vacancy in the office of trial judge shall exist by reason of the death of the incumbent thereof, or permanent insanity, evidenced by adjudication, after verdict but prior to the hearing of the motion for new trial, a new trial shall be granted the losing party if motion therefor shall have been filed within the time provided by rule of the court and be undisposed of at the time of such death or adjudication.

Jackson vs Handel

Defendant would state that the demise of the trial judge was within the contemplation of the above statute and cites further, "Decisions long acquiesced in upon which important rights are based, should not be disturbed, in the absences of cogent reasons to the contrary, as it is of the utmost importance that our organic and statute law be of certain meaning and fixed interpretation, Jackson vs Handel 327 SW2d 55, citing Pitts vs Nashville Baseball Club 127 Tenn. 292 and Monday vs Millsaps 197 Tenn. 295, and 46 C.J.286 cited in Life & Casualty Ins. Co. vs Bradley 178 Tenn. Page 530.

State vs McClain

Defendant further cites under said statute, "Only authority who may approve verdict and overrule motion for new trial by signing the minutes is the judge who heard the evidence and actually tried the case. State vs McClain, 210 S.W.2d 680, 186 Tenn. 401.

Louisville & N.R. Co. vs Ray

Also cites, "Motion for new trial must be acted on by the trial court, before the appellate court will consider it, because such action is indispensable for the purpose of enabling the appellate court to say whether the trial court acted correctly, under this statute, in granting a new trial", Louisville & N.R.Co. v Ray, 124 Tenn. 16, 134 S.W. 858, Ann Cas. 1912 D. 910.

Dennis vs State

O'Quinn vs Baptist Memorial Hosp.

Also cites, "The only authority to approve the verdict and overrule the first motion for a new trial by signing the minutes, was the Judge who heard the evidence and actually tried the case", Dennis v. State, 137 Tenn. 543 and O'Quinn v. Baptist Memorial Hospital, 183 Tenn. 558.

Howard vs. State

Also cites, "This situation has given the Court grave concern; and has led us to an assiduous re-examination of what we believe to be all of the case and statutory authority in Tennessee bearing upon the question of whether the above-mentioned minutes of the Court's actions are valid and efficacious - without authentication by the signature of the Trial Judge. If not, it seems to inescapably follow that (1) there is no valid and effective judgment on the verdict of the jury; and (2) there is no valid and efficacious ruling of the Court on defendant's motion for new trial", Howard v. State, 399 S.W.2d, 739.

Walker vs Graham

Defendant would allege that springing from the Motion for a New Trial, if it were denied in the ordinary course, is the Bill of Exceptions, and defendant cites, "In the absence of a properly authenticated bill of exceptions the admission of evidence cannot be reviewed by the Supreme Court", Walker v. Graham 18 Tenn. 231, cited in Dennis v. State, 137 Tenn. 543.

Carpenter vs Wright

Also cites, "The right to a bill of exceptions is made dependent upon motion for a new trial in Circuit and Criminal Courts", Carpenter vs. Wright, 158 Tenn. 289.

Dennis vs State

Defendant also cites, "It seems to be well established as a general rule that, where a party has lost the benefit of his exceptions from causes beyond his control, a new trial is properly awarded. That rule has been recognized and applied more frequently perhaps in cases where the loss of

the exceptions has occurred through death or illness of the judge, whereby the perfection of a bill of exceptions has been prevented", Dennis vs State, 137 Tenn. 554.

That the Plea of Guilty of itself does not forfeit the Motion for a New Trial, and he cites, "By the Constitution of the State (Article I, Sec. 9), the accused, in all cases, has a right to a "speedy public trial by an impartial jury of the county or district in which the crime shall have been committed', and this right cannot be defeated by any deceit or device whatever. The courts would be slow to disregard the solemn admissions of guilt of the accused made in open court, by plea, or otherwise; but when it appears they were made under a total misapprehension of the prisoner's rights, through official misrepresentation, fear or fraud, it is the duty of the Court to allow the plea of guilty, and the submission, to be withdrawn, and to grant to the prisoner a fair trial, by an impartial jury", Swang vs. State, 42 Tenn.212.

Swang vs State

Defendant would further cite Jake Knowles vs. The State, 155 Tenn. Page 181, in which the Court states as follows:

Knowles vs State

> The bill of exceptions shows that when the case was first called for trial on the 22nd of September, a continuance was had upon the agreement that unless settlement should be made before October 2nd following a plea of guilty would be entered. It appears that both the presiding judge and Attorneey General understood it to be agreed also that a sentence of from five to twenty years would be accepted, but

upon the calling of the case on October 2nd, counsel for the defendant disclaimed having so understood the agreement and insisted that the determination of the punishment should be submitted to the jury. Thereupon the plea of guilty was entered and counsel for the State and the defendant addressed and the judge charged the jury. Some discussion was had before the jury of the disagreement as to the term of punishment, but the judge properly charged that they were to disregard this matter.

However, as before stated, no evidence was introduced. The jury after hearing the charge returned their verdict assessing the punishment.

Shannon's Code, Section 7174, is as follows:

'Plea of guilty.--Upon the plea of guilty, when the punishment is confinement in the penitentiary, a jury shall be impaneled to hear the evidence and fix the time of confinement, unless otherwise expressly provided by this Code.'

We have no reported case deciding the question thus presented, but the provision that upon a plea of guilty a jury shall be impaneled to hear the evidence and fix the time of confinement in felony cases seems clearly to indicate a purpose to vest in the jury the power to exercise a sound discretion impossible of intelligent exercise without a hearing of at least such of the evidence as might reasonably affect the judgment of the jury as to the proper degree and extent of the punishment. And especially is this true under the maximum (1923) sentence law applicable to this case.

> While loathe to reverse and remand in a case of such obvious and admitted guilt, we find it necessary to do so for the reasons indicated. It becomes unnecessary to consider other assignments of error."

Defendant denies that he waived a right that was available to him, and cites:

> "Waiver - Existence of Right - To constitute a waiver, the right or privilege alleged to have been waived must have been in existence at the time of the alleged waiver", 56 Am.Jr.13,Page 113. "Thus, one accepting dividends declared by a receiver in bankruptcy without demanding interest on the amount due does not waive his right to interest, where no right to demand interest at the time of dividend payment existed", 56 Am.Jr.13,Page 114, citing State ex rel, McConnell v.Park Bank & T.Co. 151 Tenn.195.

State ex rel. McConnell v. Park Bank &T.

In an unreported opinion the Court of Criminal Appeals of Tennessee in the cause of State of Tennessee, ex rel. Hermon R. Owens vs. Lake F. Russell, No. 49 Hamilton County, Honorable Campbell Carden, Judge, it was stated:

State vs Russell

> "Without in any way criticizing the content and use of these forms for preserving a formal record of guilty pleas of defendants, we hold that execution of these forms by the petitioner and his attorneys, and the trial court's acceptance of the petitioner's plea of guilty upon that basis, does not and cannot forever preclude the petitioner from raising any question about the voluntariness of his guilty plea. Surely it cannot be said that

State ex rel Owens

such a procedure permanently forecloses the issue of voluntariness and prevents the accused from ever asserting that his guilty plea was induced by promises of lenient treatment or threats or misrepresentation or fraud, if such was the fact.

"This is true for the plain and simple reason that a conviction based upon an involuntary plea of guilty is void, and, therefore, the question of the voluntariness of a plea of guilty is never foreclosed while any part of the resulting sentence remains unexecuted. The law is no longer open to debate or question that a guilty plea is involuntary nad void if induced by promises of preferential treatment or threats or intimidation or total misapprehension of his rights, through official misrepresentation, fear or fraud. Henderson v. State ex rel. Lance, 419 S.W.2d 176: Machibroda v.United States, 368 U.S.487, 82 S.Ct.510, 7 L.Ed2d 473; Olive v. united States, 327 F2d 646 (6th Cir., 1964), cert den., 377 U.S. 971, 84 S.Ct. 1653,12LEd2d 740; Scott v. United States 349 F2d 641 (6th Cir.1965)." Said opinion was concurred in by the Honorable Mark A. Walker and was written by W. Wayne Oliver, Judge of the Criminal Court of Appeals. Honorable Judge Galbreath did not participate in this cause.

Boyd v. State

"The voluntary or involuntary character of the confession is a question of law to be determined by the trial judge from the adduced facts", WHARTON ON CRIMINAL EVIDENCE Vol.2, Page 38, citing Boyd v. State, 21 Tenn. 39.

People v. Ramos

Requiring a waiver of right to appeal was held improper in People v. Ramos, 282 N.Y.State 2d 938 (2nd Dept.1968).

Defendant states that he has lost the benefit of the thirteenth juror through the death of the trial judge. "Trial judge is charged by law to act as the thirteenth juror, and if he is dissatisfied with verdict of jury, it is his duty to grant a new trial", London v. Step, 405 SW2d 598, 34 Tenn. L.R.713. "Federal district court does not sit as thirteenth juror as do Tennessee state trial judges", Sifton v.Clements, 257 F.Supp.63

London v. Step

Sifton v. Clements

Respectfully submitted,

ATTORNEYS FOR THE DEFENDANT:

Richard J. Ryan
RICHARD J. RYAN

J. B. Stoner by R.J. Ryan
J. B. STONER

3-13-69

Dear Sir!

I wish to inform the honorable court that that James Hunter and Jerry Caulkins is no longer representing me in any capacity. My reason for writing this letter is that I intend to file for a post conviction hearing in the very near future and don't want them serving any legal papers unless they is for my behalf.

Sincerely
James Earl Ray

FILED 4-1-69 2:15 P.M.
J. A. BLACKWELL, CLERK
BY [signature] D. C.

Exhibit No. 1

3-26-69

Hon. Judge W. Preston Battle
Judge of the Criminal Court
Memphis, Tennessee.

I would respectfully request this court to treat this letter as a legal notice, of an intent to ask for a reversal of the 99 year sentence petitioner received in aforementioned court. I understand on one avenue of appeal, I have only 30 days in which to file written notice, to have previous sentence set aside. That is the appeal route to which I address the court.

I also would like to bring to the attention of the honorable Court, That Mr. Perry Foreman, The Attorney who was supposed to be representing me on this charge, acted in open court.

On, That since he "Mr. Foreman" was receiving no funds to help prepare case for trial, and he did not feel he should be required to use his own funds, he requested court to appoint counsel to help defray cost. The court appointed public defender to investigate case and assist Mr. Foreman.

Two, Mr. Foreman said in open court he did not want, or expect to receive, a cent for his efforts.

I think from Mr. Perry Foreman statement to the press that he had a contract from me and Mr. William B. Huey "representing" the case for $1-00.00, and that he was now to receive $150.000. retained by to rest the above that Mr. Foreman told the court.

Exhibit # 2.

There is, I, James E. Ray in turn, have not personally received a court from Mr. Wilbur B. Hicks.

My only reason for bringing the aforementioned facts to the attention of the court is that I would respectfully move that the court appoint an attorney, or the public defender to assist me in the proceedings, I have no stocks, bonds, nor have I received any funds from any source to engage counsel.

petitioner uses the word "assist", as I hereby request the court, that I be personally present at the hearing and to assist court appointed counsel so that there be no repetition of Mr. Percy Foreman actions.

Respectfully,

James Earl Ray
Station A-West
777 S B Hi on 3
Nashville, Tenn. 37203.

FILED 4-1-69
J. A. BLACKWELL, CLERK
BY [signature] D. C.

56
2 8:11.

I, JAMES A. BLACKWELL, HEREBY CERTIFY THAT THE DATE WHICH APPEARS AT THE TOP OF THIS LETTER, ON THE FIRST PAGE, WHICH HAS BEEN OBLITERATED BY PUNCHING THE HOLE FOR INSERTION OF THIS LETTER IN THE JACKET, IS 3-26-69.

J. A. BLACKWELL, CRIMINAL COURT CLERK

WITNESS

WITNESS

DATE

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE

VS NO._____

JAMES EARL RAY

MOTIONFOR A NEW TRIAL

Comes now JAMES EARL RAY, the defendant in the above styled cause, through his attorneys ~~[illegible]~~, J. B. Stoner, Richard J. Ryan, and Robert W. Hill, Jr., and resptectfully moves the Court:

To set aside his plea of guilty, to set aside his conviction, and grant him a new trial on the following:

1. He was ~~[illegible]~~ improperly misled into entering a plea of guilty ~~[illegible]~~ evidenced by Exhibits 1, 2, 3, 4, 5, 6 and 7, attached.

2. That the defendant's plea of guilty and subsequent conviction were ~~[illegible]~~ violative of the 14th and 6th Amendments to the United States Constitution in that they deprived him of any effective legal counsel as evidenced by defendant's Exhibits 1, 2, 3, 4, 5, 6 and 7, which among other things clearly show that defendant's two previous attorneys of record ~~[illegible]~~ improperly accepted pay from William Bradford Hule, ~~[illegible]~~ thus depriving defendant of any constitutional or legal defense.

3. That this Court's rules of secrecy were ~~[illegible]~~ improperly violated by defendant's two previous attorneys as evidenced by attached Exhibits 1, 2, 3, 4, 5, 6, and 7. Defendant specifically request that he be allowed an oral hearing and allowed to put on corroborative proof

The attorneys filing this Motion furnished the information in the Motion and the exhibits on the basis of information furnished by the defendant.

J. B. Stoner
J. B. STONER

Robert W. Hill
ROBERT W. HILL, JR.

Richard J. Ryan
RICHARD J. RYAN

EXHIBIT No. 3

STATE OF TENNESSEE

COUNTY OF DAVIDSON

Comes now the affiant, JAMES EARL RAY, and makes oath as follows:

The Motion for a New Trial hereto attached has been carefully read by me and each and every fact stated therein is true and correct in each and every statement and implication.

JAMES EARL RAY

SUBSCRIBED AND SWORN TO BEFORE ME THIS 26TH DAY OF MARCH, 1969

NOTARY PUBLIC

My commission expires:

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JAMES EARL RAY Petitioner	)	
v.	)	SHELBY COUNTY CRIMINAL COURT NO. _____
STATE OF TENNESSEE Respondent	)	

REPLY TO PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

A petition for certiorari has been filed before this Court seeking a review of a judgment from the Criminal Court of Shelby County, Tennessee, striking petitioner's motion for a new trial.

In the petition, eight (8) grounds are set out to justify the granting of the writ of certiorari. The substance

of these grounds is (1) the trial judge erroneously permitted the introduction of testimony by the clerk of the court reciting pertinent portions of the proceedings in the criminal cause; (2) the trial judge erroneously held that two (2) letters written to the trial judge prior to the trial judge's death did not constitute a motion for a new trial; and, (3) the trial judge erroneously held that the entering of a plea of guilty by the petitioner in the criminal proceeding effected a waiver of his right to a motion for a new trial and for an appeal.

In the memorandum of authorities in support of the petition for certiorari, it is insisted (1) that petitioner is entitled to a new trial because of Section 17-117, Tennessee Code Annotated, which is as follows:

> "Whenever a vacancy in the office of trial judge shall exist by reason of the death of the incumbent thereof, or permanent insanity, evidenced by adjudication, after verdict but prior to the hearing of the motion for new trial, a new trial shall be granted the losing party if motion therefor shall have been filed within the time provided by rule of the court and be undisposed of at the time of such death or adjudication."

and, (2) that the plea of guilty does not forfeit or waive petitioner's right to a new trial, appeal, etc.

Before discussing the grounds set out by the petitioner, it may be that this Court is concerned about its authority to

grant writs of certiorari to the criminal courts of this State. This question, the State submits, has been determined by the Supreme Court in the case of Tragle v. Burdette, ___ Tenn. ___, 438 S.W.2d 736. An excerpt from that case, at page 737, is as follows:

> "The petition must be denied for a second reason which is, that it should have been addressed to the Court of Criminal Appeals. The petition erroneously assumes that if the case is habeas corpus, appeal must be to this Court. T.C.A. § 23-1836 provides that appeal in habeas corpus shall be ' * * * to the proper appellate court * * *.' This can only mean that an appeal in cases essentially civil in that they do not involve detention because of an alleged criminal act, shall be made to the Court of Appeals; and that cases which are essentially criminal in that they involve detention for the commission of a crime, shall be to the Court of Criminal Appeals. By T.C.A. § 16-448, the Court of Criminal Appeals is given appellate jurisdiction of all criminal cases. Consistent with this Statute, it is the settled practice for habeas corpus appeals to be made to the Court of Criminal Appeals."

This view is supported by an earlier opinion of the Supreme Court, Hayden v. Memphis, 100 Tenn. 581, 585, in the following language:

> "Not content, however, with leaving the right to the writ of certiorari to depend upon the principles of the common law, as they had been liberally applied in modern jurisprudence, it was guaranteed to the citizens of this State by the Constitution of 1834, and again by the present Constitution. In addition, the Legis-

> lature has sought to make effectual this constitutional right in Code (Shann.), Secs. 4853, 4854, so that now it is well established in this State that 'the writ of certiorari will lie upon sufficient cause shown, where no appeal is given, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally when, in the judgment of the Court, there is no other plain, speedy, or adequate remedy.' Tomlinson v. Board of Equalization, 4 Pickle, 1, 12 S. W. 414."

(NOTE: Sections 4853 and 4854, recited in the foregoing excerpt, are what are now Sections 27-801 and 27-802, Tennessee Code Annotated, often referred to by the judges and lawyers of this State as the common law and statutory writ of certiorari, respectively.)

Article VI, Section 10 of the Constitution of Tennessee, as this Court well knows, only provides for the writ of certiorari in civil cases but the Supreme Court has held that the remedy by writ of certiorari in criminal cases was so clearly established before the adoption of the Constitution it was the purpose of this provision to extend the writ to civil cases since that had been questioned by the courts of our mother state, North Carolina. State v. Solomons, 14 Tenn. 359. The Solomons case, of course, was written prior to the present Constitution but by Article XI, Section 1, all laws in force in this State at the adoption of the present Constitution shall remain in force until they expire or are changed by the Legislature. There is nothing in

the Code which deprives this Court of the authority to grant the writ of certiorari. Finally, with deference to this Court, as a practical matter it is not of great significance because if this Court does not have the right to grant the writ of certiorari, the Supreme Court has such a right and has exercised it in criminal cases too numerous to require that any be cited and mentioned. There is little doubt but that this case will finally be determined by that Court either on certiorari from this Court or the trial court. The State insists that the question for this Court to determine is whether or not it should grant the writ.

In determining whether or not the writ should be granted, it should be kept in mind that it has become well-established law in this State that the writ of certiorari is not granted as a matter of right but it is a matter that addresses itself to the discretion of the Court. State ex rel. Karr v. Taxing District of Shelby County, 84 Tenn. 240; Ashcroft v. Goodman, 139 Tenn. 625; Gaylor v. Miller, 166 Tenn. 45; Biggs v. Memphis Loan and Thrift Co., Inc., 215 Tenn. 294; and, Boyce v. Williams, 215 Tenn. 704.

Applying the foregoing rule, it is insisted that the trial judge properly struck the motion for a new trial. It is not alleged in the petition that petitioner's plea of guilty in

the criminal proceeding was irregular in any respect or that it was not made freely and willingly after knowing the consequences of such a plea. Nothing is alleged in the petition to support the complaints made. There are no factual allegations to show why the trial judge erroneously admitted the testimony relative to the petitioner's confession. The letters written by the petitioner to the trial judge in the criminal proceeding and the amended motion for a new trial are not attached to the petition but are made exhibits to the memorandum of authorities in support of the petition, but these documents add no factual allegations to the petition. The first letter is to the effect that the petitioner "wanted to go the thirty day appeal route." The other letter was similar and the amended motion for a new trial remaining after withdrawing by counsel for petitioner all of it except the conclusion petitioner was entitled to a new trial because of Section 17-117, Tennessee Code Annotated, states no relevant circumstances. Two (2) pages of the proceeding on the motion to strike the motion for a new trial are attached hereto to show the Court the portion of the motion for a new trial withdrawn by counsel for the petitioner. So, really, the only questions remaining are whether or not petitioner is entitled to a new trial as an abstract proposition of law because the judge who sat during the criminal proceeding became deceased prior to hearing the motion for a new

trial and whether or not the entering of a guilty plea amounted to a waiver of a motion for a new trial and appellate remedies.

Section 17-117, Tennessee Code Annotated, referred to above, was never intended to apply to this type of case. That section of the Code was intended to apply in cases where errors are insisted upon which occurred during the criminal proceeding. In such cases, the trial judge is the thirteenth juror and is in better position to determine the truth of the testimony and the fairness of the trial than a successor judge since he heard the witnesses testify, noted their demeanor and was in a position to be familiar with many details of the case that a successor judge could not be. In the present case, there were no proceedings before the trial judge other than a guilty plea and, if it was intended to be alleged or was alleged in the motion for a new trial that the petitioner's plea of guilty resulted from pressure by his privately retained counsel, a successor judge is in as good a position to determine that fact as the judge who sat in the criminal proceeding.

Counsel for the petitioner cites and discusses a number of cases in support of his position. Perhaps the nearest one is Swang v. State, 42 Tenn. 212. In that case, it apparently was alleged and proven that the defendant pleaded guilty under a total misapprehension of the law. Thus, his agreement to plead

guilty was based upon a condition contrary to the law. For this reason, it is insisted that the Swang case is not applicable in the present case because there are no allegations in what is contended to be the motion for a new trial, the petition or the brief. Only a naked proposition of law is asserted in the present case.

It may be that the petitioner would have this Court believe he was pressured into pleading guilty by his privately retained counsel although there is nothing to that effect before this Court; but even if that were true, there would still be no grounds to justify the granting of the writ in this cause.

The Supreme Court of this State has recently held in the case of State ex rel. Richmond v. Henderson, ___ Tenn. ___, 439 S.W.2d 263, 264, as follows:

> "This rule has been applied to any number of situations arising in a criminal case, including that situation involving the advice or urging of defense counsel for the defendant to enter a plea of guilty. In cases in which this exercise of judgment by counsel (that of urging a defendant to enter a plea of guilty) has been attacked, it has uniformly been held that this is not a ground for invalidating the judgment. Davis v. Bomar, 344 F.2d 84 (6th Cir.), cert. denied 382 U.S. 883, 86 S.Ct. 177, 15 L.Ed.2d 124 (1965); Application of Hodge, 262 F.2d 778 (9th Cir. 1958); Shepherd v. Hunter, 163 F.2d 872 (10th Cir. 1947); Crum v. Hunter, 151 F.2d 359 (10th Cir. 1945), cert. denied, 328 U.S. 850, 66 S.Ct. 1117, 90 L.Ed. 1623; Diggs v. Welch, 80 U.S.App.D.C. 5, 148 F.2d 667, cert. denied, 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002."

The Supreme Court in McInturff v. State, 207 Tenn. 102, 106, made the following statement with respect to an appeal from a plea of guilty:

> "Now, we think it is axiomatic that the defendant, having confessed judgment for the fine and costs, had no right of appeal, nor did the court have the power to grant such an appeal, because no one can appeal either in a criminal or a civil case from a verdict on a plea of guilty or a judgment based upon confession of liability."

There is nothing about the McInturff case to indicate that it is not to be taken literally nor is the foregoing excerpt a matter of dicta. It was one of the grounds justifying the trial judge's refusal to grant the defendant in that case a new trial.

It may be that the Supreme Court of this State will make some additional explanations of this portion of the McInturff case when such a matter is presented to it but until that is done, it is submitted that the question is foreclosed to this Court.

Perhaps the basis for the decision is that once the Defendant waives a right to trial by pleading guilty after having been properly advised of his rights, there is nothing to appeal from, as suggested above. This would be a good place to apply Sections 27-116 and 27-117, Tennessee Code Annotated, except the Supreme Court in Hickerson v. State, 141 Tenn. 502, has held that those statutes only apply when the Court can look at the whole

case. However, those statutes represent what the practice was prior to their enactment, Munson v. State, 141 Tenn. 522, and this does not suggest that something similar to the harmless error doctrine is precluded from consideration by an appellate court, and since the granting of a new trial, an appeal, etc., would be such a frivolous procedure, the State insists that it should not be done. It would seem that the law never should require courts to do frivolous things.

In view of the foregoing, the State insists that the petition for writ of certiorari in this case should be denied.

RESPECTFULLY SUBMITTED,

Thomas E. Fox

THOMAS E. FOX
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to Petition for Certiorari were handed to Honorable Richard J. Ryan, Attorney at Law, Falls Building, Memphis, Tennessee, and Honorable Robert W. Hill, Jr., Attorney at Law, Suite 418, Pioneer Building, Chattanooga, Tennessee, on this the 15th day of July, 1969.

Thomas E. Fox

THOMAS E. FOX
Deputy Attorney General

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON

JAMES EARL RAY
Petitioner

v.

STATE OF TENNESSEE
Respondent

Shelby County Criminal Court

No._____

O R D E R

This cause came on to be heard before the Court at Knoxville, on this 15th day of July 1969, upon the petitioner's petition for the writ of certiorari, the briefs and arguments of counsel, upon consideration of all of which the Court is of opinion that the petition for certiorari is not well taken and should be denied.

IT IS, THEREFORE, ACCORDINGLY ORDERED, ADJUDGED AND DECREED BY THE COURT that the petition for the writ of certiorari in this case be and the same is hereby denied.

Enter this 15th day of July, 1969.

Mark A. Walker, Presiding Judge

W. Wayne Oliver, Judge

Oris D. Hyder, Judge

John A. Mitchell, Judge

William S. Russell, Judge

44-696-1A 18

TO THE JUSTICES OF THE
TENNESSEE COURT OF CRIMINAL APPEALS
HOLDING COURT AT KNOXVILLE

JAMES EARL RAY

VS.

STATE OF TENNESSEE

ANCILLARY

PETITION FOR CERTIORARI

The merits of this appeal involve matters which have previously been addressed to the Honorable Arthur C. Faquin, Judge by interchange of the Criminal Court of Shelby County Tennessee, Division III.

Your petitioner urges that Justice Faquin was in error in refusing to either grant or even acknowledge the existence of a motion for a new trial when asked for and for denying your petitioner all rights of appeal from his findings.

More specifically, your petitioner would point out to the Court that the petitioner, James Earl Ray, was charged with the murder of Dr. Martin Luther King, said murder being in the first degree. The trial on this matter was had upon March 10, 1969, in which a jury was empaneled; and the jury apparently approved a 99 year sentence (which, it is claimed, was agreed upon). However, on March 31, 1969, Judge Battle died.

On March 13 and March 26, the petitioner James Earl Ray, wrote Judge Battle requesting an appeal. Upon May 26, a hearing was had upon a motion for a new trial and the State's Motion To Strike. The State urged that petitioner's motion should be entitled "Motion For a New Trial" for, as the State claims, there was never a trial in the first place; and without a trial, there could be no motion for a new one, or an appeal from one. The Court obviously accepted this "logic" and stated that it was hearing the State's motion upon two theories: 1) that there is no

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motion for a new trial from a guilty plea; and 2) that the defendant waived any right he had to a motion for a new trial and an appeal. Upon page 4 of his memorandum opinion, the Judge states, "I do not, as a successor Judge, have the right to hear a Motion for a new trial or approve and sign the Bill of Exceptions." (Citations omitted) Your petitioner urges that though Judge Faquin is quite right that he did not have the authority to approve or sign the Bill of Exceptions, he did have both a right and a duty to hear and act upon a Motion for a New Trial; his acts being superscribed by T.C.A. 17-117 and the fact that he was unable to approve another Judge's Bill of Exceptions (a sine qua non for appeal).

The defense is unable to fully follow the logic of Judge Faquin's sixteen-page opinion of June 6, 1969, but it is evident in reading therefrom that the Honorable Judge Faquin against precedent of laws and in direct contravention of T.C.A. 17-117 held that: 1) The Court found as a matter of fact that the alleged guilty plea had the factual and legal prerequisites to make it valid; and 2) that Ray voluntarily entered a guilty plea (which is not true), and that such plea constituted then and there such waiver as would forever preclude a motion for a new trial, a hearing for a new trial, or an appeal. (See opinion hereto attached, page 16.) Petitioner, of course, excepts to all of the Judge's holdings.

The Court states that the petitioner is not using habeas corpus or post conviction process. This is absolutely true, for the motion as brought before Judge Faquin was brought as a Motion for a New Trial and under no other procedure. Though the petitioner has adequate grounds to show that his plea and/or waiver were involuntarily made (i.e. the petitioner's statement made in open court May 10, 1969) and further documentary proof, such evidence could not be addressed to Judge Faquin in view of the fact that he was not the presiding Judge and was, therefore, not able to hear such proof or sign the Bill of Exceptions.

As stated above, the Court found "as a matter of fact" that Ray had the prerequisite knowledge. It indeed states that

it finds this opinion after "a full evidentiary hearing on this matter." The Judge, in fact, denotes his opinion as "Memorandum Finding of Facts and Conclusions of Law."

Your petitioner presented no proof whatsoever and did, in fact, object to each and every element of proof brought before the Court. The logic of not allowing one Judge to sign another's minutes and Bill of Exceptions is directed to just such a case as this. The only Judge who could have a legal opinion as to whether the alleged confession was voluntary or not would be the Judge who heard the same.

It is therefore urged that the Honorable Arthur Faquin erred in disallowing Ray a motion for a new trial and also erred in refusing him an appeal. (See T.C.A. 17-117) This is evident from the matters herein stated and the Judge's opinion hereto attached.

WHEREFORE, PETITIONER PRAYS:

1. For Writ of Certiorari reviewing said actions of the Court as evidenced in its Memorandum Finding of Facts and Conclusions of Law.

2. That petitioner's motion be held to be a Motion for a New Trial, as captioned.

3. That the Judge's decision refusing to hear such a motion be overruled.

4. That the hearing of May 26 be construed as a hearing determinative of petitioner's Motion for a New Trial.

5. That the Judge's finding that the petitioner exhausted his right to move for a new trial or appeal when he plead guilty on March 10 be overruled.

6. That this, the Criminal Court of Appeals, find that the petitioner is indeed eligible for a new trial as a matter of law.

7. That this matter be remanded to the Criminal Court of Shelby County for a new trial on the merits.