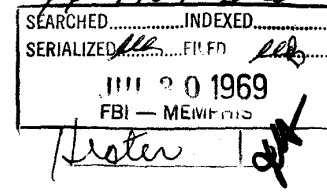
44-1987-Sub-M-635



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.

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 Houston Att. Jerry Daugherty 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 him working my legal cases unless there is his consent behalf.

Sincerely
James Earl Ray

FILED 4-1-69 2 00 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 a timely notice to have previous sentence set aside. That is the appeal route to which I alluded the court.

I also would like to bring to the attention of the honorable court, that Mr. Percy Foreman, the attorney who was supposed to be representing me on this charge, acted in open court.

One, That since he "Mr. Foreman" was receiving no funds to help purpose cover 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 costs. 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. Percy Foreman statement to the press that he had a contract from me and Mr. William B. Hurley "representation" to the tune of $1-00.00, and that he was to receive $150.000. refused by to read the above two (2) Mr. Foreman told the court.

Exhibit #2.

There is, James E. Ray in fact, have not personally received a card from Mr. William 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 Hwy 3
Nashville, Tenn. 37203.

FILED 4-1-69 2 P.M.
J. A. BLACKWELL, CLERK
BY J. A. Blackwell D. C.

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

MOTION FOR A NEW TRIAL

Comes now JAMES EARL RAY, the defendant in the above styled cause, through his attorneys ~~Percy Foreman~~, J. B. Stoner, Richard J. Ryan, and Robert W. Hill, Jr., and respectfully 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 improperly misled into entering a plea of guilty at ~~which time~~ evidenced by Exhibits #1, 2, 3, 4, 5, 6 and 7, attached.

2. That the defendant's plea of guilty and subsequent conviction were 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 improperly accepted pay from William Bradford Huie, thus depriving defendant of any constitutional or legal defense.

3. That this Court's rules of secrecy were 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

ROBERT W. HILL, JR.

RICHARD J. RYAN

EXHIBIT NO. 3

STATE OF TENNESSEE

COUNTY OF DAVIDSON

Comes now the affiant, JAMES EARL RAY, and maekes 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 everyd statement and implication.

JAMES EARL RAY

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20TH DAY OF MARCH, 1969

NOTARY PUBLIC

My commission expires:

44-1987-Sub-M-637

Hester

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

PETITION OF JAMES EARL RAY FOR
WRIT OF CERTIORARI

Your petitioner would respectfully show to the Court that he is much aggrieved by the judgment of the Criminal Court Division II of Shelby County, Tennessee, the Honorable Arthur C. Faquin, Judge, presiding, said judgment being rendered on the 26th day of May, 1969, and sustaining the State of Tennessee's Motion to Strike the petitioner's Motion for a New Trial.

YOUR PETITIONER STATES:

1. That the Court erred in the hearing of May 26, 1969, in allowing the introduction of testimony by Mr. A. A. Blackwell, Clerk of the Criminal Court of Shelby County, Tennessee, and the introduction of other evidence by Mr. Blackwell to show that the confession of James Earl Ray, petitioner, was freely and voluntarily given at a prior hearing.

44-1987-Sub-M-636

SEARCHED.....INDEXED.....
SERIALIZED.....FILED.....
JUN 20 1969
FBI — ME

STATE OF TENNESSEE
VS
JAMES EARL RAY

IN THE CRIMINAL COURT OF APPEALS
AT
JACKSON, TENNESSEE

N O T I C E

TO THE HONORABLE PHIL M. CANALE, ATTORNEY GENERAL
and
HONORABLE LLOYD A. RHODES, ASSISTANT ATTORNEY GENERAL:

You and each of you are hereby notified that James Earl Ray, by and through his Attorneys of Record, will on the 25th day of June, 1969, present to the Criminal Court of Appeals at Jackson, Tennessee, or to one of the Judges thereof, his Petition for Writ of Certiorari, seeking to have his case reviewed, and to have reviewed also the judgment of May 26, 1969, of the Criminal Court, Division II, of Shelby County, Tennessee, the Honorable Arthur C. Faquin presiding, said judgment consisting of sustaining the State's Motion to Strike your petitioner's Motion for a New Trial. This action will seek to have the Motion for a New Trial sustained and the cause remanded for further handling by the Criminal Court of Shelby County, Tennessee.

This the 20th day of June, 1969.

Richard J. Ryan

J. B. Stoner by R.J. Ryan

We acknowledge service of the foregoing Notice and receipt of a copy of the Petition for Writ of Certiorari and assignment of errors and brief in support thereof, more than five days prior to the date set in the foregoing notice for presenting said Petition to the Criminal Court of Appeals, or one of the Judges thereof.

This the 20th day of June, 1969.

Phil M. Canale Jr.

PHIL M. CANALE,
ATTORNEY GENERAL

LLOYD A. RHODES,
ASSISTANT ATTORNEY GENERAL

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. Faquin

JUDGE

May 26, 1969 NUNC PRO TUNC

by interchange

Jesse Clyde Mason

Assistant attorney General

3. That petitioner have all such other, further, and different relief to which he is entitled, and he prays for general relief.

THIS IS THE FIRST APPLICATION FOR A WRIT OF CERTIORARI IN THIS CAUSE.

STATE OF TENNESSEE
COUNTY OF SHELBY

RICHARD J. RYAN, who being first duly sworn, states that he is one of the attorneys for the petitioner, James Earl Ray; that he is familiar with the facts set forth in the foregoing Petition for Certiorari, and that the statements contained herein are true, except those made as upon information and belief, and these he believes to be true.

Subscribed and sworn to before me this the 19 day of June, 1969.

Bessie Lee Turner
NOTARY PUBLIC

My commission expires:
10-7-71

2. That the Court erred in not sustaining the objections to testimony of Mr. Blackwell and the introduction of documents in this cause on May 26, 1969.

3. That the Court erred in not holding that the letters and amendments as presented by petitioner-defendant do not constitute a Motion for a New Trial

4. That the Court erred in holding that the petitioner, James Earl Ray, waived his right to a Motion for a New Trial and an appeal.

5. That the Court erred in holding that a guilty plea precludes the petitioner from filing for a Motion for a New Trial.

6. That the Court erred in holding that the petitioner-defendant, James Earl Ray, knowingly, intelligently, and voluntarily expressly waived any right he might have to a Motion for a New Trial and/or Appeal.

7. That on June 16, 1969, the Court ruled erroneously in denying petitioner-defendant's prayer for leave or permission to file an appeal holding (a) that your defendant had waived his right of appeal, (b) that the sustaining of the State of Tennessee's Motion to Strike your defendant's Motion for a New Trial was an Interlocutory Order, and that, therefore, there was no appeal from the same. That he has no other remedy of speedy available appeal

To all of the above citations of error the petitioner-defendant has heretofore reserved his exceptions.

8. That the Court erred in not granting your defendant's Motion for a New Trial pursuant to and in accordance with Code Section 17-117 of the Tennessee Code Annotated.

Petitioner would state that notice was served on the Attorney General of Shelby County, Tennessee, more than five (5) days before the filing of the Petition for

Certiorari; and that the Petition would be presented to the Criminal Court of Appeals Western Division of Jackson, Tennessee, or one of the Judges thereof on June 25, 1969; and that a copy of the Petition was presented to the Attorney General of Shelby County, Tennessee, as well as a copy of the Brief filed herein; a copy of the Notice and receipt thereof is attached hereto.

PREMISES CONSIDERED, PETITIONER PRAYS:

1. That a Writ of Certiorari issue by this Honorable Court to the Criminal Court Division II of Shelby County, Tennessee, directing that Court and the Clerk thereof to certify and transmit to this Court the entire record and proceding in this cause including the opinion and judgment of the Trial Judges, consisting of the late Honorable Judge Preston W.Battle and the Honorable Judge Arthur C. Faquin, Judge of Division II of the Criminal Court of Shelby County, Tennessee.

2. That the judgment of the Criminal Court Division II in sustaining the State of Tennessee's Motion to Strike the Motion for a New Trial be reviewed and error complained of corrected; that your petitioner be granted a new trial and this cause remanded to the Courts of Shelby County, Tennessee, for a new trial and for further handling.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON

JAMES EARL RAY
Petitioner

v.

STATE OF TENNESSEE
Respondent

Shelby County Criminal Court
No._____

ORDER

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

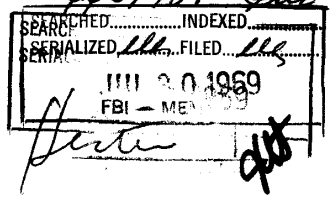
W. Wayne Oliver, Judge

Oris D. Hyder, Judge

John A. Mitchell, Judge

William S. Russell, Judge

HQ-1987-Sub-M-639



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

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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

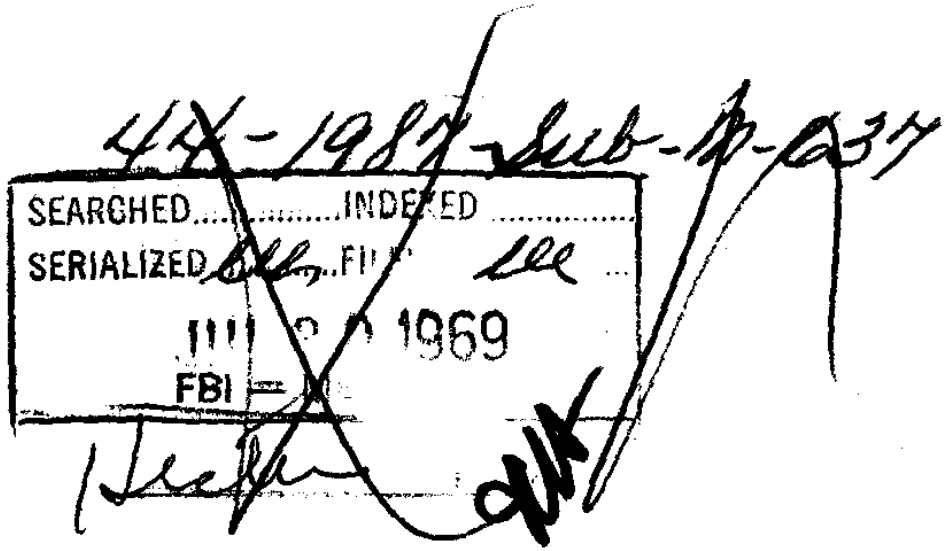
THOMAS E. FOX
Deputy Attorney General

IN THE 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

DIRECTOR, FBI (44-38861) 7/29/69

SAC, KNOXVILLE (44-696) (P)

MURKIN

Re Knoxville teletype to Bureau, dated 7/15/69.

As set forth in referenced teletype, a Petition for Certiorari in the case of the State of Tennessee versus JAMES EARL RAY was filed in the Court of Criminal Appeals, Knoxville, Tennessee, 7/9/69. This petition was heard before the court at Knoxville, Tennessee, on 7/15/69, and certiorari was denied as not well taken.

There are enclosed herewith for the Bureau and Memphis one copy each of the following petitions and accompanying papers filed in connection with this appeal, to witt:

(1) Ancillary Petition For Certiorari
(2) Petition For Writ of Certiorari
(3) Defendant's Brief
(4) Reply To Petition ForCertiorari
(5) Order of the Court Denying Certiorari

2 - Bureau (Encls. 5)
2 - Memphis (Encls. 5)
2 - Knoxville
JDJ/tsw
(6)

44-1987-Sub-M-640

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : SAC, MEMPHIS (44-1987) DATE: 7/31/69

FROM : ~~SAC,~~ ATLANTA (44-2386) (RUC)

SUBJECT: MURKIN

Re Memphis letter to Atlanta dated 6/20/69.

There are no current outstanding leads for Atlanta, in captioned matter. Inasmuch as it appears prosecution of subject has been completed, and no investigation remains in Atlanta, the matter is being referred upon completion to Memphis. In the event information comes to the attention of Atlanta which has a bearing on this matter, the case will be re-opened and appropriate action taken.

2-Memphis
2-Atlanta
ORH:bjc
(4)

44-1987-Sub-M-64

SEARCHED ... INDEXED ... SERIALIZED ... FILED ...

5010-108-02

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FD-36 (Rev. 5-22-64)

FBI

Date: 7/30/69

Transmit the following in _____ (Type in plaintext or code)

Via AIRTEL AIR MAIL (Priority)

TO: SAC, MEMPHIS (44-1987)

FROM: SAC, LOS ANGELES (44-1574)(RUC)

SUBJECT: MURKIN

Mr. CURTIS WILLIAMS, 650 West 106th Street, Los Angeles, California, and a sales representative, American Telephone and Telegraph Company, Room 1250, 727 West 7th Street, Los Angeles, California, furnished the following information on 7/28/69.

WILLIAMS served on the Los Angeles Police Department (LAPD) as a patrolman for approximately twenty months, terminating that employment approximately one year ago.

WILLIAMS stated he recently returned from a visit with his mother, Mrs. MARY WILLIAMS, Route 1, Box 139B, Somerville, Tennessee (phone 465-25530-party line). On the last day of his visit, his mother furnished him the following information:

A personal friend of Mrs. WILLIAMS, DOLL COE, a domestic, had been employed by a white family in Somerville for over 12 years. COE was a respected and trusted employee of this family (name unknown to CURTIS WILLIAMS). About two days prior to the assassination of MARTIN LUTHER KING, and during the evening hours, a Mr. PARSONS, a white Somerville businessman, came to COE's employer's residence in company with another white man, never before seen by COE.

2 - Memphis
1 - Los Angles

TJA/gja
(3)

EDNA COE/also DOLL COE/ located at Somerville. She denies any knowledge of this and states she has never seen subject at any place.

44-1987-Sub-M-642

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

The three men sat around a table in conversation. Whenever COE would come within voice range, they would cease their conversation, which was unusual behavior at that residence. At one point, the stranger left the house for a few minutes and returned with a box. The box was later opened, and Mrs. COE observed a gun, not further described, and a gun scope. When the three men became aware of Mrs. COE's presence in the room, they concealed the gun.

Mrs. COE thought the behavior of the three men unusual and strange. Prior to her returning to her residence that evening, Mrs. COE retrieved the box in which the gun had been contained from the trash and removed it to her residence. She continues to have custody of the box which is concealed in the attic of her home.

Mrs. WILLIAMS advised her son that after JAMES EARL RAY was apprehended and his photograph appeared in the newspapers, Mrs. COE felt that the unknown male who appeared at her employer's home earlier in April was JAMES EARL RAY.

According to CURTIS WILLIAMS, Mrs. COE is not hostile toward white people but is afraid of them. Because of this fear, she never furnished the foregoing information to anyone except Mrs. WILLIAMS. She has not furnished it to any law enforcement agency and has never been interviewed by any agency regarding MURKIN. CURTIS WILLIAMS stated that according to his mother, Mrs. COE terminated her employment subsequent to the above incident, but he does not know when or under what circumstances.

DOLL COE resides north of Somerville on Highway 19. Her son, MICKEY COE, is presently serving a 12-year sentence for murder, having previously served time for burglary.

CURTIS WILLIAMS stated his mother would be cooperative during interview with the FBI, and that if requested, she could arrange for interview with Mrs. COE.

By way of identification, DOLL COE and the WILLIAMS are all of the Negro race. WILLIAMS' father is an employee of Selby County.

CURTIS WILLIAMS advised his mother that he would furnish this information to the proper authority upon his return to Los Angeles.

Memphis should arrange interview with Mrs. COE through MARY WILLIAMS to determine first-hand information in Mrs. COE's possession regarding JAMES EARL RAY's presence at her employer's home several days prior to the assassination of MARTIN LUTHER KING.

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : SAC, MEMPHIS (44-1987) DATE: 7/31/69

FROM: SAC, KANSAS CITY (44-760) P

SUBJECT: MURKIN

Re Indianapolis letter to Kansas City, 4/30/69.

On 5/21/69, FRED ALEXANDER MICHELSON, Inmate, U. S. Penitentiary, Leavenworth, Kansas, #85514-L, advised SA WALTER A. WITSCHARD that he had been in the Missouri State Penitentiary, Jefferson City, Missouri, at the same time as JAMES EARL RAY. He stated that in order to tell his knowledge of RAY it would take an exceptionally long amount of time. He further advised that he is currently attempting to obtain a furlough from the prison to visit his ill mother in Liberty, Missouri. If the furlough is granted, he would talk to FBI Agents while he was in Liberty, Missouri, visiting his sick mother.

On 5/29/69, CARL F. ZARTER, Administrative Assistant, U. S. Penitentiary, furnished the following record for MICHELSON:

Name	FRED ALEXANDER MICHELSON
USP #	85514-L
FBI #	2914E

It is noted that the case worker's analysis indicates that MICHELSON has a tendency to exaggerate his abilities and that he was for one year in a mental institution and that he had a "sociopathic personality with alcoholism." The record stated that MICHELSON is not insane or mentally incompetent, but tends to exaggerate very greatly. He claimed to have three years of college, but investigation revealed that he has had only one night course. He talks at length and claims to have written a book about history with a "mathematics theory in conjunction with it."

44-1987-Sub-M-643

In view of the apparent attempt of MICHELSON to use the FBI to obtain a furlough and his questionable mental competence, it is recommended that no further contacts be made with him.

SEARCHED ..... INDEXED .....
SERIALIZED ..... FILED .....
AUG - 4 1969
FBI — MEMPHIS

(2) - Memphis
2 - Kansas City
RBH:clc
(4)

5010-108-01

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

0-9 (Rev. 5-22-64)

FBI

Date: August 4, 1969

Transmit the following in _____
(Type in plaintext or code)

Via AIRTEL _____
(Priority)

To: SAC, Memphis (44-1987)

From: Director, FBI (44-38861)

MURKIN

ReMEairtel 7-24-69.

Information set forth in referenced airtel was brought to the attention of the Department. The Department has advised that it will no longer be necessary to retain the three twenty dollar bills obtained from Mrs. Brewer. Make appropriate disposition of the bills in accordance with your letter of 6-19-69.

44-1987-Sub-M-644

Tolson
Hester

Sent Via _____ M Per _____