IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAMES EARL RAY, Petitioner, v. J. H. ROSE, Warden, Respondent	No. C-74-166

PETITIONER'S MEMORANDUM

On March 10, 1969, James Earl Ray entered a plea of guilty to the assassination of Dr. Martin Luther King. He was sentenced to a term of 99 years. However, immediately after the guilty plea hearing Ray renounced his plea and instituted steps to have it withdrawn. Nearly five years later the United States Court of Appeals for the Sixth Circuit remanded Ray's habeas corpus petition to the district court with instructions to hold a "full-scale judicial inquiry." Ray v. Rose, 491 F. 2d 285 [1974].

Ray's habeas corpus petition presents two primary legal issues: Did he receive the effective assistance of counsel? Was his plea of guilty involuntarily entered? In this particular case these two independent grounds for relief are deeply intertwined. Nonetheless, to the extent possible, they are here separately discussed.

I. DENIAL OF RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

It is well-established that the right to counsel contemplated by the Sixth Amendment is the right to effective, competent and adequate representation, and that the denial of this right in a state trial violates the due process clause of the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 [1932]; Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed. 61 [1945]; Craig v. United States, 217 F. 2d 355 [6th Cir. 1954]; Schaber v. Maxwell, 348 F. 2d 664 [6th Cir. 1965]; Coolvin v. Cardwell, 432 F. 2d 521 [6th Cir. 1970]; Spegal v. Black, No. 71-1748 [6th Cir. June 2, 1972]; Venable v. Neil, 463 F. 2d 1167, cert. denied 409 U.S. 1079.

In holding that the right to effective assistance of counsel is encompassed within the Fourteenth Amendment's due process clause, the Supreme Court has called attention to the critical nature of this right:

> The fact that the right involved is of such character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (Hebert v. Louisiana, 272 U.S. 312, 316) is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution. Powell, supra, at 67.

Because of its importance the right to effective assistance of counsel guaranteed by the Sixth Amendment is mandated not only in trials before a judge or jury but in the case of guilty pleas as well. As the Supreme Court has stated:

> A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. See Williams v. Kaiser, 323 U.S. 471, 475.

> Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Von Moltke v. Gillies, 332 U.S. 708, 721 [1948]

Ray's habeas corpus petition asserts that he was deprived of this fundamental right to have the effective assistance of counsel in several different ways. These include conflict of interest on the part of his attorneys, failure to adequately investigate his case and prepare for trial, and intrusion into his right to confer privately with his attorneys. Some of the more salient facts upon which these assertions are based and the legal standards by which these denials are to be judged are set forth in the sections which follow.

A. CONFLICT OF INTEREST

James Earl Ray was arrested in London on June 8, 1968. Two days later he wrote attorney Arthur Hanes of Birmingham, Alabama, and inquired whether Hanes would consider representing him when he was extradited to the United States. Ray also requested that "[i]n the event you cannot practice in Memphis would you contact an attorney there who would," [Trial Exhibit 131]

Hanes flew to London on June 19, 1968. Before he left the United States, Hanes was contacted by author William Bradford Huie. Knowing that Hanes would need money to finance a trial, Huie suggested that Hanes persuade Ray to give Huie exclusive rights to Ray's "story." In return Huie proposed to pay Hanes up to $40,000. Hanes agreed and Huie notified his publishers, who met Hanes in London and arranged for his hotel room during the busy Ascot week festivities.

When British authorities refused to allow him to confer with Ray, Hanes returned to the United States. Two weeks later Hanes flew back to London. He brought with him two contractual agreements for Ray to sign. At their first meeting, on July 5, 1968, Hanes presented these agreements to Ray and advised him to sign them.

Essentially these agreements provided as follows:

1. Ray gave Hanes a complete power of attorney. [Trial Exhibit 1]

2. Ray assigned to Hanes 40% of all monies that Ray would receive under the terms of a subsequent agreement between Hanes, Huie, and Ray.[1] [Trial Exhibit 2]

3. Hanes was to act as "exclusive agent and attorney" for Ray "in the handling of his affairs, contracts, negotiations, and sale of any and all rights to information or privacy which he may have in and to his life or particular events therein to persons, groups or corporations for the purpose of writing, publishing, filming or telecasting in any form whatever." [Trial Exhibit 2]

After a second brief meeting with Ray, Hanes returned to the United States. He and William Bradford Huie then executed a tripartite contract which obligated Ray and Hanes to supply Huie with information on ". . . the assassination of Martin Luther King, Jr., the alleged participation of Ray therein, and the life and activities of Ray . . . ." Huie, in return, agreed to pay Hanes and Ray each 30% of the gross receipts from the sale of Huie's work in the

---

[1]Ray testified Huie's name was not on this contract when he signed it on July 5, 1968. This is supported by internal evidence which indicates that the names of Hanes and Huie were inserted into a blank on the July 5, 1968, agreement at the time that Hanes and Huie executed the tripartite July 8, 1968, agreement.

form of "magazine, book, dramatic, motion picture, television and/or other adaptations of every kind." By virtue of this contract Huie specifically acquired "the sole and exclusive right to make motion pictures and television pictures of all kinds based in whole or in part [Huie's] work and/or containing characters of [Huie's] work . . . ." [Trial Exhibit 3]

This July 8 contract was purportedly signed by Hanes and Huie on July 8, 1968, at a time when Ray was still in a London prison. Ray signed it after he was extradited to the United States.[2] One clause in this contract provided that Ray and Hanes "hereby irrevocably appoint" Huie as their "true and lawful attorney" so that Huie could negotiate and execute, in their names, contracts for the sale of Huie's book, magazine, television, movie and other rights in the James Earl Ray story.[3]

---

[2]Ray testified that Hanes presented this contract and the July 8 Letter Agreement [Trial Exhibit 4] to him at Hanes' second visit to the Shelby County Jail after Ray was extradited. According to the Visitors' Log [Trial Exhibit 44], that would have been on July 21, 1968. Ray testified that at that time he suggested another method of financing the trial, but six to eight days later he signed them after deciding that it was the only choice he had and he should follow the advice of counsel. The copy of this contract which is signed by Ray [Trial Exhibit 3-B] is notarized by Arthur Hanes, Jr., and states that Ray personally appeared before him on August 1, 1968, and acknowledged that he had executed the instrument. Ray testified that he was uncertain as to what date he signed these two contracts. "I don't know what day I signed them. It may have been August 1st or some other day." The Visitors' Log reflects no visit to the Shelby County Jail by Arthur Hanes, Jr. between July 21 and August 15, 1968, and no visit by either Arthur Hanes, Sr. or Arthur Hanes, Jr. between July 27 and August 7, 1968.

[3]Huie did enter into other such contracts, including those with Cowles Communications, Inc. and Dell Publishing Company, Inc. Under the terms of the July 8 contract with Hanes and Ray, Huie's agent, Ned Brown, was obligated to furnish Ray and Hanes copies of any and all contracts entered into by Huie within 10 days of their completion. This provision was not honored, nor were others, including one for an accounting to Ray at quarterly intervals of income received under these contracts.

Hanes and Huie also executed a second agreement while Ray was still in London. This one took the form of a Letter Agreement, also dated July 8, 1968. The July 8 Letter Agreement [Trial Exhibit 4] set forth a schedule of payments which Huie agreed to make to Ray and Hanes. Huie agreed to pay a sum total of $35,000. The initial $10,000 of this sum was to be paid "[o]n the signing of the first, or book contract." The remaining $25,000 was to be paid in monthly installments of $5,000 each. However, these monthly installments would not begin until "the first day after Ray has been lodged in a jail in the United States." This meant that the remaining $25,000 to be paid Hanes was contingent upon upon Ray's extradition to the United States.

On July 13, 1968, two days after he signed the first book contract with Cowles Communications, Inc. [Exhibit 5], Huie paid Hanes $10,000. [The receipts for this and other monies paid Hanes and Foreman are contained in Trial Exhibit 49] Thus, before Ray ever saw the July 6 contracts, Hanes had already received $10,000.

Ray testified that Hanes advised him to drop his appeal of the Bow Street Magistrate's Court's extradition ruling. Ray did waive his extradition appeal. He made that decision without having seen the July 8 Letter Agreement which tied Huie's payments to Hanes to Ray's extradition.

Arthur Hanes, Sr., testified that he had researched the law of extradition and knew that if Ray was given a full and fair hearing in the London court he could not be extradited under the provisions of the Anglo-American Extradition Treaty of 1931. Yet under the terms of his contracts with Huie, Hanes had a vested financial interest in Ray's speedy return to the United States.

The Hanes-Huie contracts created an even more fundamental conflict of interest. The value of Huie's literary work on the Ray case and any other, especially movie, adaptation of it, lay in his exclusive rights to the information imparted to him by Ray and Ray's lawyers. Huie's claim to an exclusive was his selling point and he used it. It is emblazoned on the cover of the November 26, 1968, issue of Look Magazine: "EXCLUSIVE: MORE ON THE PLOT TO MURDER MARTIN LUTHER KING". [Trial Exhibit 74]

Huie himself affirmed the importance of his exclusive rights in his testimony before the Shelby County Grand Jury on February 7, 1969:

> . . . I am not a detective and I am not in competition with the FBI so I have not pretended at any time to have any advantage or information other than that furnished to me by James Earl Ray which may or may not be true. * * * The only advantage that I have and the only information I have is that I am the only man who has received Ray's handwritten story, all of it, something like twenty or twenty-five thousand words. I have nothing to go on whatsoever except what Ray has told me and what I can divine, guess, and assume . . . [Emphasis added. Trial Exhibit 119, pp. 3-4]

This exclusivity feature was so basic and important to the value of Huie's work that his publishers wrote it into their contract with him. Thus, the October 7, 1968, Memorandum of Agreement between Huie and Cowles Communications, Inc. required that:

> 11. Author agrees that until a completion of the exercise of United States and foreign publication rights hereunder, or March 1, 1969, whichever is the earlier date, he will not reveal any of the details of the manuscript, preliminary or final articles, to any person, firm or corporation, including any local, state or Federal Government official.[4] [Trial Exhibit 6]

---

[4]Unless Huie had Look's approval, his testimony before the Shelby County Grand Jury on February 7, 1969, would seem to have been in violation of this provision.

When the respondent's own expert, Victor Temkin, a Vice-President of Bantam Books, was apprised of Huie's Grand Jury testimony stating that Ray was his only source of information, he conceded that the value of Huie's contracts would be hurt if Ray took the stand in his own defense and testified publicly to what he had written Huie privately.

The Hanes-Huie contracts suffered from another and concommitant conflict of interest, equally blatant, equally fundamental. The purported purpose of these contracts was to raise money for Ray's defense. Hanes thought so. Ray thought so.[5] From the very first Huie assured Ray's guilt. "I never had any doubt from the beginning that Ray was the murderer himself," Huie states, "but the question was in my mind whether Ray himself made the decision to kill." [Huie Deposition, November 11, 1969, p. 29]

In his writings to Huie, Ray denied shooting Dr. King or having any prior knowledge that he was going to be shot:

> I don't know when, where, the time or why King was Killed.
>
> I was under the impression I was to be paid in Mexico but no mention was ever made of murder of King or anyone else.
>
> I wouldn't say I hated King. I do think most preachers are a little phony but I wouldn't consider shooting them.

[Each of these statements is excerpted from one of Ray's writings to Huie. It and some twenty other letters and writings by Ray to Huie were filed as Collective Exhibit No. 7 to Huie's September 20, 1974, Deposition. Because these writings are not separately numbered, there is no other means of identifying them.]

---

[5]Not until his evidentiary hearing did Ray learn that Huie's contract with Dell Publishing Company, Inc. had a special clause stating that: "[Huie] agrees that none of his proceeds from this contract shall directly or indirectly go to or for the benefit of James Earl Ray." [Emphasis added. Trial Exhibit 7]

Nothing Ray wrote Huie could dissuade Huie from his presumption of Ray's guilt. As he testified before the Shelby County Grand Jury:

> I have one objective to use this guilty man as a source of information. Anyone who has any information about this case is obviously a guilty man. It hasn't been easy because I haven't seen the man myself. [Emphasis added. Trial Exhibit 119, p. 9]

Huie's assumption of Ray's guilt was built into his contracts Hanes, Foreman, and his publishers. Huie's contract with Cowles called for him to prepare a manuscript which would detail "how, why, and by whom Dr. Martin Luther King was assassinated [and] Ray's part in it."[6] [Trial Exhibit 6, p. 3, ¶5] If Ray did not shoot Dr. King and could not tell Huie who did, Huie's manuscript would be worthless. Therefore, Huie had to presume Ray's guilt.

Of course, this assumption conflicted with Ray's right to be presumed innocent until proven guilty. Hanes and Foreman were being paid by Huie allegedly to defend that right, but the very terms of their contracts with Huie required them to traduce it.

As a corollary, Huie also assumed that Ray would never take the witness stand. He so stated in his testimony before the Shelby County Grand Jury:

> I know that information must be gotten from guilty men; you gentlemen understand that. James Earl Ray would never give information to any part of the law, never testify . . . [Emphasis added. Trial Exhibit 119, p. 1]

Again, Huie's assumption was based on necessity. If Ray did testify, what he testified to became public knowledge and Huie had no exclusive. This inherent conflict of interest became the

---

[6] Ray was unaware of Huie's October 7, 1969, contract with Cowles Communications, Inc. until it was obtained on discovery shortly before his evidentiary hearing.

reality.

As the November 12, 1968, trial date approached, whether Ray would take the stand in his own defense became an issue between Ray and Hanes. While the versions differ, there is no doubt that Ray wanted to take the stand and that he discussed this with Hanes. Hanes also testified that Huie did inquire of him whether Ray was going to take the stand.

Although there was a conflict of sorts between Hanes and Ray over the witness stand issue, Ray was still ready to go to trial with Hanes on November 12. However, on November 1, 1968, Jerry Ray, James Earl Ray's brother, flew to Huntsville, Alabama to meet with Huie. His expenses were paid by Huie. Huie told Jerry Ray that if James Earl Ray took the witness stand, it would ruin his book. He offered to pay Jerry Ray or any member of the Ray family $12,000 if Jerry would persuade his brother James not to take the witness stand.

After Jerry Ray's meeting with Huie, he went to Memphis to give a report on it to his brother James. He told James that his lawyer was representing Huie, not James, and he urged James to get a new lawyer. Ray refused, however, saying it was too late to change lawyers. But Jerry Ray decided to contact a lawyer anyway. Jerry persuaded Percy Foreman to fly to Memphis on November 10, 1968, just two days before the trial. After meeting two hours with Foreman, Ray fired Hanes and retained Foreman as his new attorney.

In persuading Ray to fire Hanes, Foreman strongly criticized the Hanes-Huie contracts. He told Ray that Hanes and Huie were long-time friends and that if he stuck by them he would "barbecue."

He assured Ray that he would not get involved in any literary contracts until after the trial was over and that there would not be any pretrial publicity. He promised Ray he would engage Tennessee counsel. He set his fee for taking the case at $150,000. As a retainer he got Ray to assign to him the Mustang and rifle purportedly used in the crime.

In court Foreman repeated his criticism of the Hanes-Huie contracts. On December 18, 1968, he told the court that he wouldn't have taken the case except for the fact that when he came into it, "it was only two days before [Ray] was about to go to trial and he was about to go to trial, your Honor, not because this case was ready to go to trial but to meet a publication [date] and I stepped in because it was my responsibility to do it . . ." [Trial Exhibit 83, p. 33] As late as February 7, 1969, Foreman again condemned the Hanes-Huie contracts in court:

> I cannot believe that anyone--this isn't a contract, your Honor, that I thought up. I never would have, never have and never would have gone into any such contract. [Trial Exhibit 85, pp. 68-69]

Yet just two weeks after he entered the case, Foreman met with Huie in Texas. Then, according to Huie, Foreman flew into Huntsville, Alabama, on January 24, 1969, to try to get Huie "to put up more money," allegedly so Foreman could hire a lawyer in Memphis to do leg work for him. [Huie Deposition, September 20, 1969, p. 62]

Foreman did not get any money from Huie until January 29th, which is after the date when Foreman says the guilty plea had already been agreed upon.[7] On that date, Foreman got $5,000 from

---

[7] In his November 11, 1969, Deposition, Foreman testified: "At the time, we had already decided and agreed to the final disposition of this case before I ever went to [illegible] on the 24th of January." [Emphasis added. Foreman Deposition, November 11, 1969, p. 17]

Huie. [The receipt is contained in Trial Exhibit 49] That same day an Amendatory Agreement was executed releasing Arthur Hanes from his contracts with Ray and Huie.[8] A notation on the Amendatory Agreement stated that it was "approved as to form and content by Percy Foreman." [Trial Exhibit 9] This Amendatory Agreement served as the vehicle whereby Hanes' 42% interest in Huie's works on the Ray case was transferred to James Earl Ray. Added to the 18% interest in Huie's works which Ray held under the existing contracts, this gave Ray a 60% interest in all revenues earned by Huie.[9]

The Amendatory Agreement, however, was merely preparatory to a second agreement, executed on February 3, 1969, whereby Ray assigned his entire 60% interest to Percy Foreman in consideration for Foreman's representing him "in the trials of cases" pending before the Shelby County Criminal Court.[10]

---

[8]Both the Visitors' Logs and the Daily Logs show no visit by Foreman to James Earl Ray on January 29th, thus indicating that Ray did not sign the Amendatory Agreement on that date. Foreman did visit Ray on January 27th, for three hours and 25 minutes, and January 31st, for six minutes.

[9]This was, of course illusory, and Huie knew it. Under Huie's secret November 20, 1969, contract with Dell, none of the proceeds from that contract could be used either directly or indirectly for the benefit of James Earl Ray. This, in effect barred Ray from any further prospect of income under the contracts. The contract covered not only the proceeds from Huie's book, but also those from the most profitable adaptations of it. Under it, Huie would get 90% of any movie rights and Dell would get 10%. This was the form in which Huie's "sole and exclusive" rights could bring him large sums of money--money which, under the secret special clause in the Dell contract, could not be passed on to Ray either directly or indirectly.

[10]In his book He Slew The Dreamer, pp. 192-193, Huie states that at their November 27, 1968, meeting in Texas he and Foreman discussed getting Hanes out of the contracts so Foreman could get in. "Mr. Foreman liked my three-way contract with Ray. All he wanted was for Mr. Hanes to get out so he could have what Mr. Hanes had had. 'I like the idea of owning 60 percent of one of your

This February 3, 1969, contract [Trial Exhibit 10], formalized the conflict of interest which Foreman had assumed on November 27, 1968, when he struck a deal with Huie to get Hanes removed from the contracts and himself inserted with a larger, 60 percent interest. [See fn. 10, pp. 12-13]

The day after Foreman was assigned his 60 percent interest in Huie's works, Huie was subpoenaed to testify before the Shelby County Grand Jury on February 7, 1969. Foreman made no attempt to stop his appearance. Huie went before the Grand Jury and testified that Ray and Ray alone killed Dr. King.

On February 12, 1969, District Attorney General Phil M. Canale wrote Foreman a letter stating that Huie would be called as a State witness at Ray's trial. The following day, February 13th, Foreman began to employ the trickery and pressure which ended a month later in Ray's coerced guilty plea.

On these facts it is clear that both Hanes and Foreman had an obvious and irreconcilable conflict of interest which deprived

---

(fn. 10 cont.) books,' he said, 'while you own only 40 percent. So you get Hanes out and let me in, then, goddam it, get to work and write us a good book and make us a good movie and make us some money.'" Huie agreed to this deal but insisted that Foreman's client meet his "obligations" and tell Huie "how, why, and when he decided to kill Dr. King." In his April 3 Deposition, Foreman denied that this conversation ever took place. He went even further: "I had no idea that I would ever have anything to do with a book contract until January 29, and did not discuss a book with Huie then." [Foreman Deposition, April 3, 1974, pp. 113-115] The internal evidence indicates the January 29, 1969, Amendatory Agreement was typed up in December, 1968, most likely on December 6, 1968, the week following Huie's November 27 meeting with Foreman in Texas. [Each page of the Amendatory Agreement has a typed notation at the top: "JJS ak 12/6/68" These are probably the initials of Jay Stein, a lawyer for Huie's agent, Ned Brown, followed by those of his typist and the date of typing] Whoever typed up the Amendatory Agreement in December, 1968, also typed on it: "APPROVED AS TO FORM AND CONTENT: Percy Foreman, Attorney for James Earl Ray" This gives the lie to Foreman's claim that he did not get involved in these contracts until after the guilty plea had already been decided upon.

James Earl Ray of his right to the effective assistance of counsel. Disciplinary Rule 5-104(B) of the American Bar Association's Code of Professional Responsibility forbids contracts of the kind which Hanes and Foreman entered into with Huie:

> Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

Under this kind of a prohibitory guideline, the Hanes-Huie-Foreman contracts must be considered suspect on their face. In his dissenting opinion in Ray v. Foreman, 441 F. 2d 1266 [6th Cir. 1971], a civil suit over these same contracts [excepting those between Huie and Dell and Coulee Communications], Judge William E. Miller concluded that they are:

> That the contracts now under consideration are "suspect" on their face is obvious from an examination of them. Indeed, under such contracts, it is difficult to see how an attorney could represent his client with that degree of detachment and objectivity required by the high standards of his profession and particularly by the standards imposed by Tennessee law. The contracts are strongly suggestive of an inherent conflict of interest on the part of the defendant attorney. Ray v. Foreman, supra, at 1270, fn. 1.

The leading case on conflict of interest as it affects the effective assistance of counsel is Glasser v. United States, 315 U.S. 60 [1941], which held that the right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. [See also Craig v. United States, 217 F. 2d 355 [6th Cir. 1954] and Wilson v. Rhend, 417 F. 2d 1197 [7th Cir. 1969]]

In conflict of interest situations it is not necessary to demonstrate the degree of prejudice to the defendant in order to

establish a violation of Sixth Amendment rights. As the Supreme Court said in Glasser:

> To determine the precise degree of prejudice sustained by Glasser . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [Emphasis added] Glasser, supra, at 75-76]

In United States ex rel. Hart v. Davenport, 478 F. 2d 203 [3rd Cir. 1973], the United States Court of Appeals was, if anything, even more explicit:

> We have not yet held that the coincidence of joint representation and a silent record is alone enough to require relief. * * * On the other hand, we have rejected the approach that before relief will be considered the defendant must show some specific prejudice. * * * Instead, we have held that upon a showing of a possible conflict of interest or prejudice, however remote, we will reverse joint representation as constitutionally ineffective. Walker v. United States, 422 F. 2d (3d Cir.), cert. denied, 399 U.S. 915, 90 S. Ct. 2219, 26 L. Ed. 2d 573 (1970). * * * The Walker test of possible conflict of interest or prejudice, however remote, must be applied, moreover, in light of the normal competency standard for adequacy of representation by counsel adopted in this circuit. United States ex rel. Green v. Rundle, 434 F. 1113 (3d Cir. 1970); Moore v. United States, 432 F. 2d 730 (3d Cir. 1970). Normal competency includes, we think, such adherence to ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar. United States ex rel. Hart v. Davenport, supra, at 210.

In the instant case, the conflicts of interest on the part of Ray's attorneys were not just remotely possible. They were realized. The massive prejudice suffered by James Earl Ray as a result included:

1. Failure to take action against adverse pretrial publicity. This is graphically illustrated by Ray's September 12, 1968, letter

to Judge Battle [Trial Exhibit 30], in which Ray protested several instances of adverse publicity, including an article by William Bradford Huie which appeared in the Memphis Commercial Appeal that same day. Ray concluded his letter to Judge Battle by stating: "I realize that Mr. Hanes should bring this up but I think under the circumstances I had to. I am also writing him today about this matter." [For a somewhat analogous case, one where the defendant's attorney owned the local newspaper but failed to take any action to halt prejudicial publicity or move for a change of venue or a continuance, see Wilson v. Phend, 417 F. 2d 1197 [7th Cir. 1969]

2. Interference with Ray's right to testify. The American Bar Association's minimum standards provide that certain decisions are ultimately for the accused to make. Included in this category is "whether to testify in his own behalf." [Section 5.2 of the ABA's Standards Relating to the Defense Function, Approved Draft, 1971]

It is clear that Hanes intended to make that decision himself, and that William Bradford Huie, who paid Hanes' fee, offered a large bribe in order to keep Ray from testifying.

3. Failure to investigate the case. Because of its special importance, this is discussed separately below.

4. Coercion of guilty plea. The conflict of interest assumed by Foreman ultimately led to Ray's coerced guilty plea. Because of its overriding importance, this is discussed separately in the section on "Voluntariness of the Guilty Plea" below.

Under the law Ray is not required to show prejudice once he has demonstrated that a possible conflict of interest might have impaired the effective assistance of counsel. However, from these examples it is clear that Ray has shown that he suffered massive prejudice.

B. FAILURE TO INVESTIGATE.

In a letter dated February 13, 1969, Percy Foreman advised his client, James Earl Ray, as follows:

> I have spent several weeks reviewing the nature of the case the State of Tennessee has against you. I have surveyed jury sentiment in this county and jury verdicts in other recent cases. And I have come to this conclusion:
>
> In my opinion, there is a little more than a 99% chance of your receiving a death penalty verdict if your case goes to trial. Furthermore, there is a 100% chance of a guilty verdict. Neither I nor any other lawyer can change the overwhelming evidence that has been assembled against you. The above analysis of your chances would still obtain even without the LOOK articles. [Emphasis added. Trial Exhibit 40]

This "overwhelming evidence" never existed. It was manufactured by law enforcement officials and then exploited by publicists and others, among them Percy Foreman and William Bradford Huie, Ray's "defenders." This vicious myth of overwhelming evidence was demolished at Ray's evidentiary hearing.

The facts adduced in open court at that hearing show that State had no eyewitness who could place James Earl Ray at the scene of the crime when it was committed. The only alleged eyewitness was so dead drunk fifteen minutes before the crime was committed that he couldn't get out of bed to catch a cab. His testimony could have been thoroughly impeached on several other grounds, as well, including a strong motive to obtain the reward money posted and perhaps an equally strong one to avoid possible prosecution for an assault on a woman who later died.

Not only was there no credible eyewitness placing James Earl Ray at the scene of the crime, but there was also no ballis-

tics evidence connecting the rifle placed in front of Canipe's to the remnant of a bullet removed from Dr. King. Given these two facts alone a jury could easily conclude that there is a reasonable doubt that Ray shot Dr. King.

However, these were not the only facts helpful to Ray. Any competent investigation of the scene of the crime has to have uncovered much evidence capable of destroying the State's case beyond repair. The shot which killed Dr. King was allegedly fired from a bathroom window. Part of the State's mythical "overwhelming evidence" rested on a claim that the rifle was linked to that window by microscopic markings traceable to the rifle's barrel which were imprinted on a dent in the windowsill which was made when the rifle recoiled after firing. But the unrefuted testimony of criminalistics expert Professor Herbert Leon MacDonnell establishes that this is fraudulent.

In fact, much of the State's evidence was simply laughable. The part of the windowsill removed is the inside part, the part with the dent allegedly made when the shot was fired. But that makes it impossible to fire the shot at a downward angle as required by the State's claim that the shot was fired from that site to the Lorraine Motel below.

Indeed, as Professor MacDonell testified, simple physical measurements show there was not enough room for the rifle to have been fired from where the State says it was fired.

Most importantly, both Arthur Hanes, Sr. and Professor MacDonnell testified that they believe that the projectile removed from Dr. King can be traced to a particular rifle. This, of course, disputes the affidavit of FBI ballistics expert Robert A. Frazier. If Hanes and MacDonell are correct and the remnant of a bullet

removed from Dr. King traces to a particular rifle other than the one found in front of Canipe's the obvious implication is that someone framed Ray by planting near the scene of the crime a bundle containing his belongings and a rifle bought by him. Although it would have been immensely helpful to Ray's defense to establish this, particularly so since it would also discredit the FBI's ballistics expert, neither Hanes nor Foreman had an independent ballistics examination made.

Ray believed that some of the information which Hanes gave Huie, Huie then passed on to the FBI. Ray also knew that Huie was not a professional investigator. For these reasons Ray wanted to hire his own professional investigator. [See Trial Exhibit 13, Affidavit of James Earl Ray, ¶13-14] To this end Ray sought to obtain $1,250 by amending the July 5, 1968 Agreement he had with Hanes.

Ray's testimony on this is fully corroborated by his October 16, 1968, letter to Huie, introduced into evidence by the respondent. [Trial Exhibit 126] This letter explains that he wants to hire a local lawyer and a private detective, the latter to investigate his case. The letter outlines how Ray wanted to obtain the $1,250 he wanted for these purposes by amending his contract with Hanes. Ray also notes that he had attempted to explain his reasons for making this request to Hanes but "without success."[11] Although Ray's contract with Hanes was amended [See Trial Exhibit 2-B], Ray never received this $1,250 or any other money from Huie.

The only investigator employed by Hanes was Ronfro Hays. Hays, an unlicensed Memphis investigator, apparently contacted Hanes about the case. He was paid only a small sum by Hanes, far

---

[11] The Outgoing Mail Log [Trial Exhibit 46], does not record any letter going out by any means on October 16. This indicates that Hanes personally delivered or mailed Ray's October 16 letter to Huie.

less than the proper investigation of the case warranted, far less than Hanes could afford under his contracts with Huie.

When Foreman became attorney of record for James Earl Ray on November 12, 1968, he talked about making an extensive investigation. He estimated it would take 90 working days working 8 hours a day just to interview the 360 witnesses which the State said it might call. He maintained that as defense counsel he had an affirmative duty to attempt to interview all prosecution witnesses:

> Now, the law of the United States Supreme Court . . . and I am sure that of the State of Tennessee [is] . . . that it is not only the right of the defense counsel to interview all the witnesses of the prosecution but that it is his duty to do that or at least attempt to do that. [Trial Exhibit 140, pp. 18-19]

Foreman also stated that he interviews all prosecution witnesses who will talk with him before he starts interviewing defense witnesses. On December 18, 1968, he told Judge Battle:

> I work alone. I have no investigators. When I ever use investigators, I never use an investigator more than once and it's usually a college senior. [Trial Exhibit 83, p. 4]

The record indicates, however, that Foreman himself did almost nothing to investigate the case. The prison Visitors' Log shows that between November 12, 1968, when Foreman became Ray's attorney of record, and January 20, 1969, the first 70 days he was on the case, Foreman spent a grand total of 1 hour and 53 minutes conferring with his client!

Nor by that date had he accomplished anything else investigatively. Foreman made no effort to obtain the files of attorney Russell X. Thompson on the Ray case, though he had no objection to Thompson's giving them to author Gerold Frank. Both Arthur Hanes, Sr. and Arthur Hanes, Jr. testified that Foreman made no real effort to obtain the product of their investigative endeavors.

On February 14, 1969, Foreman filed a Motion For Continuance [Trial Exhibit 79] in which he stated that:

> Approximately seven to ten days ago, through the intervention and offices of William Bradford Huie, a writer, and friend of Arthfur [sic] J. Hanes, Sr., the said Percy Foreman was able to obtain an additional 150 pages, more or less of investigatory effort, which, for the first time, was [sic] furnished information upon which to base an investigation. [emphasis added]

Foreman also stated in his Motion For Continuance that he had not yet obtained the "depositions, affidavits, exhibits, and statements, made the basis for the extradition of Defendant from London, England . . ." Although Foreman stated that "a proper preparation of this case" requires those documents, he never obtained them.

Although the Public Defender of Shelby County was appointed to represent Ray on December 13, 1968, and instructed to investigate the case, it did not begin its investigation until the end of January, 1969. This was after Foreman states the guilty plea had already been decided upon.

The Public Defender's investigation was directed by Hugh Stanton, Jr., who testified that this investigation was never completed, and that Ray's defense was not prepared to go to trial on the date which had been set.

The duty of a defense attorney to conduct a prompt and thorough investigation of the case is well recognized. The American Bar Association has laid down what it considers to be the minimum standards for such an investigation:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law

> enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty. [§4.1, Standards Relating to the Defense Function, Approved Draft, 1971]

At least two Circuits have asserted that defense counsel should be guided by these ABA standards: McQueen v. Swenson, 498 F. 2d 207, 216 [8th Cir. 1974]; and United States v. DeCoster, 487 F. 2d 1197, 1203 [D.C. Cir. 1973].

Coles v. Peyton, 389 F. 2d 224, 226 [4th Cir. 1968] annunciated similar standards:

> Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

Some other cases finding a denial of the right to effective assistance of counsel because the defendant's attorney failed to investigate his case adequately are: Herring v. Estelle, 491 F. 2d 125 [5th Cir. 1974]; Moore v. United States, 432 F. 2d 730 [3rd Cir. 1970]; King v. Beto, 429 F. 2d 221 [5th Cir. 1970]; Cross v. United States, 392 F. 2d 360 [8th Cir. 1968]; Goodwin v. Swenson, 287 F. Supp. 168 [W.D. Mo. 1968]; and Smotherman v. Beto, 276 F. Supp. 579 [N.D. Tex. 1967].

The Supreme Court has stated that an attorney must make an independant examination of the facts, circumstances, pleadings and law involved before he offers his opinion as to what plea should be entered. Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S. Ct. 316, 92 L. Ed. 309 [1948]. As Judge Merhige said in McMullin v. Boyster, 345 F. Supp. 387, 390, [E.D. Va. 1972]:

> Where a defendant convicts himself in open court the Constitution recognizes that the critical stage of the adjudication has proceeded for the most part outside the courtroom. That process contemplates the pursuit by counsel of factual and legal theories in order to reach a conclusion as to whether a contest would best serve the attorney's client's interest. In short, effective representation when a guilty plea is contemplated to a great extent entails affirmative action on the part of counsel. The facts adduced before this court demonstrate more than a possibility that investigation by counsel might well have unearthed favorable evidence. Such possibility, standing alone, is a sufficient showing of prejudice. [Emphasis added]

In the present case the evidence shows that the guilty plea was carried out before the Public Defender's investigation of the case had been completed; in fact, long before it could have been completed. The attorney in the Public Defender's Office who was in charge of that investigation was not even aware there was going to be a guilty plea until three days before it was entered, and then he learned it from the Sheriff rather than his co-counsel! At the time the plea was entered none of the attorneys representing James Earl Ray had yet obtained the London Extradition Documents which included the most basic evidence in the case and which offered defendant the opportunity of impeaching the State's most important witnesses on the basis of their own affidavits.

Three days after this case was remanded to the district court for an evidentiary hearing the Sixth Circuit issued its decision in Beasley v. United States, 491 F. 2d 687 [6th Cir. 1974], in which it abandoned the old "farce and mockery of justice" test in favor of a standard requiring "counsel reasonably likely to render and rendering reasonably effective assistance." In expounding upon this new standard, the court in Beasley declared:

> It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. [Citations omitted] Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations. [Citations omitted] Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. [Citations omitted] Beasley, supra, at 696.

Under these criteria there can be no doubt but that James Earl Ray was denied the effective assistance of counsel. No lawyer conscientiously protecting Ray's interests could spend less than two hours conferring with him during his first 70 days on the case; nor could he allow more than three months to slip by without obtaining the all-important London Extradition Documents; nor could he even allow, much less advise Ray to plead guilty without having thoroughly and completely investigated the case first.

Finally, no lawyer with ordinary skill and training in criminal law could competently advise Ray that "there is a little more than a 99% chance of your receiving a death penalty verdict if your case goes to trial [and] there is a 100% chance of a guilty verdict." Not only was the evidence against Ray anything but "overwhelming," but the chances of execution were slim even in the event of conviction. As Judge Battle himself stated:

> The State has made out a case of first degree murder by lying in wait. And the question might arise in many minds, "Why accept any plea at all? Why not try him, try to give him the electric chair?"
>
> Well, I have been a Judge since 1959, and I myself have sentenced at least seven men to the electric chair, maybe a few more. My fellow

> Judges in this County have sentenced several others to execution.
>
> There has been no execution of any prisoners from Shelby County in this State since I took the Bench in 1959.
>
> All the trends in this country are in the direction of doing away with capital punishment altogether. [Trial Exhibit 100, pp. 102-103]

C. SURVEILLANCE AND INFRINGEMENT UPON RIGHT TO CONFIDENTIAL COMMUNICATIONS

After surveying the existing case law on interference with attorney-client communications in Coplon v. United States, 191 F. 2d 749 [D.C. Cir. 1951], the United States Court of Appeals for the District of Columbia Circuit stated the basic principle governing this area of American Constitutional law:

> It is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him. Coplon, supra, at 757.

Citing a long string of cases in support of this principle, the Court in Coplon further asserted:

> These cases unequivocally establish the principle that the [Fifth and Sixth] Amendments guarantee to persons accused of crime the right privately to consult with counsel both before and during trial. This is a fundamental right which cannot be curtailed, interfered with, or infringed upon in any manner. [Emphasis added. Coplon, supra, at 759]

Accordingly, Coplon specifically held that the right of private consultation with an attorney free from the prying eyes or of the prosecution is "so fundamental and absolute that its denial invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial. [Emphasis added. Coplon, supra, at 759]

As Coplon noted, this view is supported by Glasser v. United States, 315 U.S. 60, 76 [1941], where the Supreme Court held that:

> The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Many decisions dealing with interception of privileged attorney-client communications rely upon Coplon. See, for example, Caldwell v. United States, 205 F. 2d 879 [D.C. Cir. 1953]; Black v. United States, 385 U.S. 26 [1966]; Morales v. Turman, 326 F. Supp. 677 [E.D. Tex. 1971]. In Hoffa v. United States, 385 U.S. 293, 307 [1966], the Supreme Court stated, "We may assume that the Coplon and Caldwell cases were rightly decided . . ."

In the Caldwell case, the District of Columbia Circuit recognized that a case might arise in which a showing could be made that the violation of attorney-client confidentiality constituted "prejudice to the defense of such a nature as would necessarily render a subsequent trial unfair to the accused." Caldwell, supra, at 881-882, n. 11. The Supreme Court expressed the same opinion in Hoffa:

> It is possible to imagine a case in which the prosecution might so pervasively insinuate itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment. Hoffa, supra, at 308.

The James Earl Ray case is such a case. The prosecution insinuated itself not only into the councils of the defense but also into every aspect of the life and thoughts of its totally isolated prisoner, James Earl Ray. The violations of Ray's right to confidential communications were gross, pervasive, methodical, and sinister. They are antithetical to an adversary system of justice, so much so that fairness and due process dictate not only that Ray's

conviction must be overturned, but that the murder charge against him must be entirely dismissed.

Dismissal of all charges against Ray is the only course which can be followed in light of the following facts which describe an unprecedented intrusion into a defendant's right to confidential communications:

1. Constant Surveillance. During the eight months he was incarcerated prior to his guilty plea proceeding, Ray was surveilled 24 hours a day by two television cameras. One camera was mounted six to eight feet from the entrance to the cell in which Ray slept. [Trial Exhibit 88, p. 4] In order for this camera to film Ray, even during his sleeping hours, the lights in his cell block were kept on 24 hours a day. This light, when measured inside Ray's cell by a light meter pointed against the far wall away from the lights, proved stronger than the light in Judge Battle's courtroom. [Trial Exhibit 88, p. 23]

There were two T.V. monitors. One set was located in the Sheriff's office, the other in the quarters of the officers who guarded Ray.

In addition to this T.V. surveillance, there was also a microphone in Ray's cell. The mere presence of this microphone inhibited Ray's free and open communication with his attorneys. A distance of only 23-25 feet separated these guards from the table where Ray and his attorney conferred. When Ray's attorney left the cell, any notes or writing which Ray gave his attorney were inspected by the guards.

2. Mail Interception. In accordance with Policy Statement No. 11 of the Sheriff's Manual of Rules and Procedures to be followed with respect to the incarceration of James Earl Ray, all of Ray's

correspondence was censored, read, and delivered to the prosecution. Specifically, Policy Statement No. 11 [Trial Exhibit 26] required that:

> All mail will be opened by Internal Security Section personnel and personally taken to Mr. Lloyd Rhoades, in the Attorney General's office. Mr. Rhoades will make photostats of all letters and their envelopes. The mail is returned to the Internal Security personnel and the photostats are filed in the Attorney General's Office.

Policy Statement No. 11 was drafted ~~was drafted~~ by Inspector [then Captain] B. J. Smith. As the officer who supervised the men assigned to guard Ray, Smith was also in charge of seeing that Policy Statement No. 11 was implemented. Inspector Smith testified that the Sheriff's Department fully complied with this directive.[12]

Trial Exhibits 63, 65, 66, and 72 are copies of letters exchanged between Ray and the members of his immediate family. They were obtained on discovery from the files of the District Attorney General of Shelby County. Each letter does contain some confidential remarks pertaining to Ray's legal situation.

Trial Exhibit 64 is a copy of a letter from James Earl Ray to Mr. J. B. Stoner. The address on the envelope clearly identifies Mr. Stoner as "attorney at law." The contents of this letter are clearly protected by attorney-client confidentiality since they pertain to Ray's attempt to get Mr. Stoner to represent him in some libel actions directly related to the murder charge against him. This letter, too, was obtained from the files of the District Attorney General of Shelby County.

Trial Exhibit 35 is a copy of a letter which Ray wrote to Mr. Hugh Stanton, Sr., the then Public Defender of Shelby County and attorney of record for James Earl Ray. This copy was obtained on

---

[12] Policy Statement No. 11 is clearly unconstitutional under the decision of the United States Supreme Court in Procunier v. Martinez, 94 S. Ct. 1800 [1974]. [See also Wolff v. McDonnell, 94 S. Ct. 2963 [1974]. The District Attorney General acted as the Sheriff's legal advisor.

discovery from the files of the Public Defender of Shelby County. [The discovery order on the District Attorney General did not cover correspondence between James Earl Ray and Hugh Stanton, Sr.] Three initials appear underneath the envelope flap. This is in accordance with the directive in Policy Statement No. 11 which instructs that initials be placed under the envelope flap after Ray's outgoing mail had been censored.

Trial Exhibit 30-B is a copy of a letter from James Earl Ray to Trial Judge W. Preston Battle. This copy of this letter was obtained on discovery from the files of the District Attorney General. This copy of the letter bears no postmark or cancellation of the postage stamp. Although it is marked registered, it does not contain a registered receipt number on it. Another copy of this same letter shows that the letter was in fact mailed by registered mail and the stamp cancelled. This means that the copy of this letter in the files of the District Attorney General was xeroxed before the letter was delivered to Judge Battle. Again, it is obvious that this was done in accordance with the practice of taking all of Ray's mail to the prosecution for xeroxing before it was mailed.[13]

There are other examples of interference with Ray's mail. On September 19, 1968, Ray wrote a letter to Michael Dresden, the solicitor who had represented him in London. The envelope was addressed in Ray's hand. On October 24, 1968, that letter was returned to Ray undelivered. It was returned, however, in a different envelope with a typewritten address on it!

On September 30, 1968, Judge Battle held a hearing on the questions of Ray's confinement conditions and the surveillance on

---

[13]The original of this letter to Judge Battle has not been located. The Clerk's copy of this letter is less complete than that obtained from the District Attorney General's files, the top line of the third page having been cut off.

him. Testimony was heard from Sheriff Morris and Captain B. J. Smith. Neither witness breathed a word about Policy Statement No. 11 or the delivery of Ray's mail to the prosecution. Nor did the prosecution mention it. Judge Battle ruled that the guards could inspect Ray's mail for security purposes but could not read it. [Trial Exhibit 88, p. 34]

Judge Battle was obviously badly deceived about the true facts, which included the copying by the prosecution of his own mail.

3. Notes Stolen. The files of the prosecution also contained other notes, papers, and writings belonging to Ray. Two of these are of particular importance. The first is Trial Exhibit 69, a page of notes Ray made while preparing to discuss his case with Arthur Hanes. These notes contain information about preparations for trial, including some information which a defense attorney would want kept confidential. Yet the second page of Exhibit 69 states that this page of notes was taken from the trash can by Patrolman Miller of the Memphis Police Department at approximately 12:45 a.m. on October 18, 1968, and then delivered to Assistant District Attorney E. L. Hutton, Jr., at 9:00 a.m. that same morning.[14] This delivery of Ray's confidential communications with his attorney to the prosecution constitutes a clear and outrageous violation of Ray's Sixth Amendment right to confer privately with his attorney.

A second example of this, one which is even more gross, is found in Trial Exhibit 43, a page of Ray's notes which was delivered to District Attorney General Phil M. Canale, Jr. by Captain B. J. Smith of the Sheriff's Department at 3:55 p.m. on February 14,

---

[14]The Daily Logs of Ray's activities kept by the men who guarded Ray show that he was asleep at the time those notes were allegedly taken from his trash can. He was also when the Memphis searched his cell block shortly before midnight. [Trial Exhibit 162]

1969. [Trial Exhibit 43 is a xerox copy. The original is found in Trial Exhibit 114]

It would be hard to overestimate the importance of this document. Delivered into the hands of the prosecution at the very moment Percy Foreman began to pressure Ray to plead guilty, this document is in effect a proclamation of innocence. It gives a plausible explanation of why somebody placed the bundle containing the alleged murder weapon and assorted items in front of the doorway to Canipe's Amusement Center: "reason threw bag down, car gone."

It also does much more. It makes inquiries about Foreman's work on the case: "Like to see witness list, have you seen it, given to Hanes about two weeks before trial. Most names I suppose resulted from Huie's story. Did you get list?" It contains important observations intended to direct his attorney's attention to matters which might materially assist the investigation and preparation of the case: "Seems funny none of police on witness list who was at scene of crime. (Suppress evidence on statements?)" A note in the upper lefthand margin contains the name of a guard who told Ray that he ought to ask for statements made by policemen in the vicinity of the crime at the time Dr. King was shot.

In short, this is a very important, very confidential communication between Ray and his attorney at a particularly critical point a few weeks before his trial was to have taken place. Nobody other than Ray and his attorney had any business even looking at it, much less handing it over to the prosecution. Yet it was delivered to the prosecutor, read by the prosecutor, and kept by the prosecutor! The note written by the prosecutor at the time he received this document from Captain Smith makes it clear that he

thought Ray had probably thrown it away by mistake. Yet the prosecutor never returned it to Ray or his attorney! This amounts to more than a violation of Ray's right to confer in private with his counsel. It constitutes an active and deliberate attempt to obstruct the effective assistance of counsel.

4. Ray's Physician. Nothing better illustrates the measures used to insure that Ray could not get a fair trial than the selection of the physician who attended Ray while he was imprisoned in the Shelby County Jail. That physician, Dr. McCarthy Demere, is the brother-in-law of one of Ray's prosecutors. Dr. Demere testified that the Sheriff instructed him not to keep any records on his medical examinations of Ray. This insured that there would be no objective means of checking his accuracy or veracity. Dr. Demere also testified that he baited Ray to see if he would make racist remarks. Dr. Demere could have been used as a witness against Ray at his trial, just as he was used as a witness against him at the evidentiary hearing. This is precisely the point which justifiably disturbed the Supreme Court of California in In re Jordan [Crim. No. 15734 September 15, 1972]:

> In short, the mailroom guard could probably be required to testify, over the inmate's objection, to the contents of lawyer-client letters he had read. Respondent asserts that such evidence could be excluded by motion to suppress on the grounds that it had been improperly obtained. But that objection would be sustained only if the guard's interception and perusal were wrongful . . . and, of course, the Attorney General argues that it would not be. Thus, if the guard is permitted by law to read attorney-client mail, he cannot be prevented from testifying to its contents. * * *
>
> It would obviously be contrary to the most fundamental considerations of fairness to permit forced disclosure of a litigant's confidential communications to his adversary when the inmate is engaged in some state of criminal proceedings, or when the Department of Corrections or its agent

> is the actual or potential defendant in a case involving the legality of some condition of the inmate's confinement. [In re Jordan, supra, pp. 18-19]

On the facts set forth above it is clear that Ray's Sixth Amendment right to communicate privately with his attorneys and others about his case was egregiously violated and that his conviction must be set aside on this ground alone.

II. VOLUNTARINESS OF GUILTY PLEA

The dire nature of a guilty plea has long been recognized by the Supreme Court. Thus, in an early case the Court commented:

> A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but to give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 [1927]

In his concurring opinion in Dukes v. Warden, 406 U.S. 250, 258, [1972], Mr. Justice Stewart referred to a guilty plea as "perhaps the most devastating waiver possible under our Constitution." The Supreme Court described the nature of this waiver in Brady v. United States, 397 U.S. 742, 748 [1970]:

> That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so--hence the [illegible] requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial--a waiver of his right

> to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. [Emphasis added]

Because it is all-important that the decision to plead guilty is the free and voluntary choice of the defendant, "It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly." Herring v. Estelle, 491 F. 2d 125, 128 [5th Cir. 1974], citing Lamb v. Beto, 423 F. 2d 85, 87 [5th Cir. 1970], cert. denied, 400 U.S. 846.

The voluntariness of a guilty plea cannot be judged by the trial court record alone, nor by consideration of isolated factors bearing upon voluntariness, but only according to "the totality of the circumstances." Brady, supra. See also Rigby v. Russell, 287 F. Supp. 325, 331 [E.D. Tenn. 1968]; Kennedy v. United States, 397 F. 2d 16 [6th Cir. 1968].

The totality of the circumstances in this case shows beyond the slightest doubt that James Earl Ray's guilty plea was not the "voluntary expression of his own choice." Nor did Ray's attorney, Percy Foreman, ascertain that Ray's plea was entered voluntarily and knowingly. In fact, the evidence shows that Foreman pressured, bribed, and wrongly advised Ray to plead guilty, and that Foreman did so because he knew that Ray would not plead guilty of his own free will.

The evidence shows that Ray was ready to go to trial with Arthur Hanes on November 12, 1968, even though he was dissatisfied with Hanes in some respects. Nothing ever changed Ray's willingness to go to trial; nothing, that is, except Percy Foreman's outrageously wrongful and unethical behavious towards him.

Both Arthur Hanes, Sr. and Arthur Hanes, Jr. testified that Ray refused to even discuss the possibility of a guilty plea. Ray

wanted to go to trial, and he tried to help his attorneys get ready for trial. But the first 70 days Foreman was in the case he conferred with Ray a total of one hour and 53 minutes! When Foreman finally appeared at the Shelby County Jail on January 21, 1969, it was only after his client had telephoned him from the jail to ask when he was going to start working on his case.

In his letter to Hugh Stanton, Sr. [Trial Exhibit 35], written the same day he phoned Foreman, Ray expressed his confidence in Foreman and said of Foreman:

> He is still and will remain Chief Counsel as far as I am concerned regardless of what the Court, Attorney General, or press has to say, or what Mr. Huie may desire through the Attorney General's Office.

Ray in this letter also denied reports that he intended to fire his attorneys just before the trial date. He added:

> I think the Attorney General knows it, but the main reason I ask Mr. Canes to withdraw was that he was working for Mr. Huie to my detriment and Mr. Huie from his statements had ceased to be an impartial reporter but intends to aid the state to convict me.

No sooner had Ray written this than Foreman flew to Huntsville, Alabama, to meet with Huie and collaborate with him on their deal to insert Foreman into the Canes-Huie contracts. They began to implement this scheme a few days later when Foreman took a $5,000 check from Huie and got Ray to endorse it on the promise that it would be used to hire Tennessee counsel for the trial, as Ray had desired and as Foreman had told the court he would.

On February 3, 1969, Foreman acquired a 60 percent interest in the contracts. On February 7th Huie went before the Shelby County Grand Jury to testify against Ray. On February 13, 1969, Foreman took the first of a series of actions designed to con-

vince Ray that, like Hanes, he was working on Huie's behalf, not Ray's. On that date he wrote Ray a letter advising him that he had a 99 percent chance of being executed and a 100 percent chance of being found guilty if he went to trial. This letter also contained language which Ray interpreted as being intended by Foreman to get Huie and his publishers off the hook for the Look Magazine articles Huie had written.

On February 18th Foreman took his next step. He insisted Ray sign a letter authorizing him to negotiate a guilty plea. That same day Huie gave Foreman a second check for $5,000.

Foreman's visit with Ray on February 18th lasted one hour and 50 minutes. Ray did sign the letter authorizing Foreman to negotiate a guilty plea. But he also told Foreman he still intended to go to trial. And he gave Foreman a list of reasons why he should not plead guilty. At 11:40 a.m the guards brought in Ray's lunch. Foreman left then. Some of the log entries for that date show Ray's reactions to Foreman's visit:

12:00 noon	Notified supervisor all O.K. Ray pacing back & forth in cell block. Ray has not eaten lunch.
12:30 p.m.	Notified supervisor all O.K. Ray pacing around cell block.
2:30 p.m.	Notified supervisor all O.K. Ray took 2 Empirin & walking.
9:30 p.m.	Supervisor notified all O.K. Ray laying in bed again. Appears restless.

The logs for that night show Ray in bed from 1:00 a.m. to 4:30 a.m. Not until 5:00 a.m. do they show him sleeping.

Rather than going to the District Attorney General the next day to negotiate the guilty plea, Foreman flew instead to St. Louis. There he met with members of Ray's family and tried to get them to persuade Ray to plead guilty. He had with him the list of reasons Ray had written out stating why he should not plead guilty.

A passage in Ray's February 24, 1969, letter to Huie shows that on that date he still hoped to go to trial:

> . . . but there would be no advantage for the State to bring this out as they, the State, would probably think it to their advantage not to show that I didn't arrive in Memphis until April 3.

[Ray's February 24, 1969, letter to Huie is contained in Collective Exhibit 7 to Huie's September 20, 1974, Deposition]

Foreman kept giving Ray spurious reasons for pleading guilty. Ultimately Foreman succeeded in convincing Ray that he dare not go to trial with him. Ray offered to let Foreman resign from the case. But Foreman refused! And Foreman reminded Ray that Judge Battle had warned him that he could not change attorneys again.

By this time Ray realized he was boxed in. He gave in to Foreman. On March 7, 1969, Foreman arranged for the guilty plea hearing on March 10th. That same day Huie wrote Ray to tell him how much money had been earned under the contracts and to inform him that he was negotiating with Carlo Ponti over the film rights. He did not tell Ray that under the Dell contract Ray could not receive a cent of this.

Foreman visited with Ray for 5 minutes on March 7th. Some of the log entries for that afternoon are:

4:00 p.m.	Supervisor Ballard and Capt. J. Brown . . . brought in supper. . . . Ray said he was not hungry now. Lewis give him 2 Empirins, logged them in Medication Book. Seems very quiet.
4:30 p.m.	Notified Supervisor all O.K. Ray did not eat supper. Very restless.
5:30 p.m.	Notified Supervisor all O.K. Ray watching news. Very quiet.

At 6:00 a.m. the next morning the guard noted in the log book:

6:00 a.m.	Notified Supervisor all O.K. Ray sleeping. Ray have been very restless in his sleeping.

On March 8th Ray had a single visitor, his brother John. He told John that he couldn't decide whether or not to fire Foreman, that he would fire him except for the fact that Judge Battle had told him he couldn't have anymore lawyers.

Even on the morning of the guilty plea proceeding Foreman himself was worried that Ray might fire him. But on Sunday, March 9th, he had agreed on a deal with Ray. A guilty plea would save Foreman a lot of valuable time. In consideration of that, Foreman would "adjust" his fee so that if Huie's works earned Foreman more than $165,000, Ray would get any monies due Foreman in excess of that. But Foreman would do this only "if the plea is entered and the sentence accepted and no embarrassing circumstances take place in the court room . . ." By a second letter that same day Foreman also agreed to pay Ray's brother, Jerry Ray, $500. He stipulated that "this advance, also, is contingent upon the plea of guilty and sentence going through on March 10, 1969, without any unseemly conduct on your part in court."

This deal amounted to bribery and coercion of the crudest sort. It was successful. On March 10th Ray entered his plea of guilty, reading from a prepared script. Ray did not know at the time that Huie and Foreman (and also Hanes) had a vested financial interest in his guilty plea. That was part of the silent script, the part written on Madison Avenue. It said:

> The obligations undertaken by Cowles herein to publish the articles and make the payments set forth shall be conditional upon (a) Ray's plea of guilty during the week of March 10 . . . [Trial Exhibit 8]

In remanding this case to the district court the Sixth Circuit said:

> If the allegations of the petitioner are correct, the trier of the facts might easily infer that Ray in entering his plea of guilty before Judge Battle and in acknowledging his guilt and the voluntariness of his plea, was acting because of

> the wrongful conduct and pressure of his attorneys--amounting to intimidation and coercion on their part. It would be difficult to conjure up a more flagrant violation of an attorney's duty to his client or one more likely to prejudice him in the defense of his case.

With respect to the specific issue of voluntariness, the Sixth Circuit said:

> . . . in light of the total circumstances preceding his sentencing . . . Ray could easily have believed that he had no other choice. He could follow the scenario prescribed by Foreman in his letter of March 9, 1969--enter the plea and accept sentence without creating any 'embarrassing circumstances . . . in the court room'--or he could have gone to trial with the reasonable belief, if the contentions are accurate, that a fair hearing would be impossible.

Ray has demonstrated that he did believe that he had no other choice but to plead guilty. More than that, he has demonstrated that had he gone to trial he would have been represented by an attorney he could not trust and who was unprepared to represent his best interests, indeed, unwilling to represent his best interests. On these facts, it is clear that Ray's plea was not freely and voluntarily entered.

Respectfully submitted,

JAMES HIRAM LESAR
1231 Fourth Street, S. W.
Washington, D. C. 20024

BERNARD FENSTERWALD, JR.
910 16th Street, N. W.
Washington, D. C. 20006

ROBERT I. LIVINGSTON
910 Commerce Title Bldg.
Memphis, Tennessee 38103

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of November, 1974, mailed a copy of the foregoing Petitioner's Memorandum to Mr. W. Henry Haile, Esq., Assistant Attorney General for the State of Tennessee, 420 Supreme Court Building, Nashville, Tennessee 37219.

JAMES HIRAM LESAR