IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

JAMES EARL RAY, Petitioner, v. MR. J. H. ROSE, WARDEN, Tennessee State Penitentiary Nashville, Tennessee, Respondent	No._____

PETITION FOR A WRIT OF HABEAS CORPUS

1. Comes the petitioner, JAMES EARL RAY, by and through his attorneys, BERNARD FENSTERWALD, JR., ROBERT I. LIVINGSTON, and JAMES H. LESAR, and petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. 2254.

2. Petitioner is currently serving a sentence for 99 years for First Degree Murder imposed by Judge Preston W. Battle on March 10, 1969 in Division III of the Criminal Court of Shelby

County, Tennessee. (See Exhibit 1) Petitioner is confined in the Tennessee State Penitentiary at Nashville by the respondent who is warden of that institution.

3. Petitioner has exhausted his state remedies as required under 28 U.S.C. 2254(c). Petitioner pled guilty on March 10, 1969. Immediately thereafter, petitioner wrote the Trial Judge, the Honorable Preston W. Battle, two letters dated March 13 and March 26, 1969, asking for a trial and the appointment of counsel to assist him. (See Exhibit 2) In addition, Attorney Richard J. Ryan of Memphis, Tennessee, who had been engaged by petitioner's family, attempted to confer with petitioner so that he could properly prepare a motion for a new trial, but prison officials refused to allow him in to see petitioner.

Judge Battle died on March 31, 1969, without having taken any action on the two letters. On April 7, 1969, petitioner filed an Amended and Supplemental Motion for a New Trial which incorporated the two letters of March 13 and March 26 and added to them the claim that a new trial must be granted under the provisions of section 17-117 of the Tennessee Code. The successor judge, the Honorable Arthur Faquin, granted the State's Motion to Strike. Said judgment was appealed to the Court of Criminal Appeals and the Supreme Court of the State of Tennessee, affirmed by both, and the Petition to Rehear was denied.

On April 13, 1970, petitioner filed for relief pursuant to the Tennessee Post-Conviction Procedure Act. Then, on May 7, 1970, an Amended Petition for Post-Conviction Relief was filed; and, subsequently, on September 22, 1970, a Supplemental Petition was

also filed. On April 20, 1971, without having held an evidentiary hearing, Judge William A. Williams granted the State's Motion to Strike. Petitioner filed an appeal to the Court of Criminal Appeals at Jackson, Tennessee. The Court of Criminal Appeals sustained the trial court's decision, whereupon petitioner filed, on March 13, 1972, a Petition for a Writ of Certiorari with the Supreme Court of Tennessee, which Petition was denied.

4. Because of the complicated and highly unusual circumstances surrounding petitioner's plea, this Petition will first present in summary form the legal grounds which cause petitioner to assert that he is being detained in custody in violation of the Constitution of the United States. However, submitted with this Petition and incorporated in it is a Memorandum which lays out in greater detail some of the facts which substantiate petitioner's claim that his constitutional rights have been grossly violated.

5. In brief, petitioner avers that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution have been violated. Petitioner further avers that his guilty plea was involuntarily entered as a result of the following violations of his right to due process and equal treatment of the laws:

Exculpatory evidence was withheld from petitioner by the British and American governments and the State of Tennessee.

Cruel and unusual punishment was inflicted upon petitioner during his incarceration prior to trial, vitiating his capacity to freely and voluntarily enter a plea.

Irreconcilable conflicts of interest on the part of petitioner's attorneys engendered enormous prejudicial publicity and

caused his attorneys to pressure him not to take the witness stand in his own defense and instead to enter a plea of guilty against his will.

Petitioner's attorney entered into direct negotiation of the guilty plea with the Trial Judge.

By means of duress and bribery, petitioner's attorney coerced him into pleading guilty.

Petitioner's only alternative to the pressures upon him and the conflicts of interest which denied him the right to effective assistance of counsel was foreclosed because the Trial Judge denied him the right to change attorneys.

In addition to these factors bearing upon the voluntariness of his plea, petitioner also avers that the Trial Judge failed to inquire into the factual basis for the guilty plea and neglected to determine whether petitioner understood the nature of the charge against him. Further, petitioner avers that he was deprived of his right to have counsel assist him in the preparation of a motion for a new trial, and that extrajudicial influences intervened in the trial process to make it a sham, a fraud, and a mockery of justice.

6. The legal grounds which petitioner relies upon to establish these violations of his constitutional rights are elaborated upon below. Each of the legal grounds set forth below is sufficient in itself to require that an evidentiary hearing be held on the merits. In addition, however, the cummulative effect of each of these violations upon the voluntariness of petitioner's plea must also be weighed.

The legal grounds upon which petitioner relies to secure his release from unlawful detention are as follows:

I. PETITIONER WAS DENIED DUE PROCESS DURING EXTRADITION PROCEEDINGS IN LONDON, ENGLAND

1. Petitioner was denied the right to have American counsel represent him at his hearing before the Bow Street Magistrate's Court.

2. This denial of the assistance of American counsel impaired petitioner's capacity to prepare a defense to extradition.

3. Virtually all evidence presented against petitioner at the extradition hearings was in affidavit form and thus not subject to cross-examination. In addition, the essential witnesses, such as FBI ballistics expert Robert Frazier, were not made available for cross-examination.

4. Although some of the evidence which was submitted to the Bow Street Court was exculpatory in nature, such as the affidavit by ballistics expert Robert Frazier, which showed that the bullet removed from Dr. King could not be linked to the rifle allegedly and implausibly left by petitioner on the sidewalk in front of Canipe's Amusement Center on South Main Street, petitioner's court-appointed attorney did not discuss this evidence with him, nor did he make any attempt to use it in petitioner's defense.

5. The American Embassy exerted subtle pressure on petitioner not to hire Arthur Hanes as his attorney and offered to provide him with a lawyer.

6. The United States Government refused to permit petitioner's attorney to accompany him on the plane flight from London to Memphis.

7. These violations initiated a pattern of unremitting constitutional deprivations which ultimately culminated in petitioner's coerced plea.

II. PETITIONER WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

A. CONFLICT OF INTEREST ON PART OF ARTHUR HANES, SR.

Arthur Hanes, Sr. became petitioner's first American counsel. Even before Hanes made his first trip to England to see petitioner on June 19, 1968, he had already been guaranteed $40,000 by author William Bradford Huie. (See Exhibit 24 and pp. 153-154 of Exhibit 29) When Hanes was finally allowed in to see petitioner for the first time, on July 5, 1968, he induced petitioner to sign two agreements. One of these agreements gave Hanes a power of attorney to manage and sell all of Ray's property; the second agreement provided that Hanes would be petitioner's literary agent. Neither contract made <u>any</u> reference to defending Ray. (See Exhibits 6-A and 6-B)

In addition, Hanes, Ray, and Huie later entered into two other contracts. (See Exhibits 6-C and 6-D) As a result of these contracts, petitioner's attorney was primarily beholden not to his client but to the literary and financial interests of Huie, thus compelling Hanes to violate Ray's legal rights and interests.

In consequence of the irreconcilable conflicts of interest thus established, petitioner's defense was damaged in the following ways:

1. Petitioner's attorney persuaded him to renounce his plans to appeal the Bow Street Court's extradition ruling, thus getting him to waive his rights under the Anglo-American Extradition Treaty. Yet prior to this, Hanes had secretly entered into an agreement with Huie which made Huie's payments to Hanes conditional upon petitioner's speedy extradition to the United States and the signing of a book contract. (See Exhibit 6-D)

2. These Hanes-Huie contracts, which Hanes inveigled petitioner into signing after his extradition to the United States, were intrinsically in conflict with petitioner's right to be presumed innocent until found guilty because the salability of Huie's literary and movie rights depended upon either a confession by petitioner that he had committed the crime or an admission that he was in some way criminally involved in a conspiracy and thus had something significant to relate which Huie could sell.

3. With the assistance of Hanes, Huie's literary partner, Huie wrote a series of articles purportedly based on inside knowledge obtained from petitioner which resulted in widespread prejudicial publicity and claimed that petitioner was guilty of the assassination of Dr. King and involved him in other, uncharged, crimes as well. (See Exhibit 25)

4. The Hanes-Huie contracts required that Hanes deliver questions from Huie to petitioner. Although virtually all of

these questions were irrelevant to petitioner's defense, Hanes devoted much time to this enterprise. No matter how detrimental to petitioner's interests--and many of Huie's questions were impermissible--Hanes delivered the questions and allowed his client to answer them. (A small sample of these questions is contained in Exhibit 51)

5. Although petitioner specifically requested that Hanes hire a professional investigator to do investigative work in New Orleans, Hanes failed to do so.

6. The Hanes-Huie interest in the sale of literary and film rights also conflicted with petitioner's right to take the stand in his own defense. If petitioner took the stand there was nothing for Huie to sell and no enormous revenue, later estimated at up to $600,000, from which Hanes would take his cut. Consequently, both Hanes and Huie pressured petitioner not to take the witness stand and Huie offered to pay a bribe to petitioner or a member of his family if petitioner would not take the witness stand. (See affidavit of Jerry Ray, attached as Exhibit 5-A)

7. Any public proceeding other than a confession of guilt destroyed the commercial value of Huie's rights. Consequently, Huie pressured Ray to admit involvement in the assassination of Dr. King. In order to get petitioner's confession, Huie sought to erode his confidence in a trial. After trying to beguile petitioner by claiming that if he confessed to having killed Dr. King out of race hatred or for money he would have sympathizers, Huie then told petitioner: ". . . if you just

happened to stumble into all this, and you didn't know what the hell was going on, then no juror is going to give a damn about you." (See Exhibit 47-A at p. 3) Due to his conflict of interest, Hanes did not protect his client from these pressures but instead assisted Huie.

B. CONFLICT OF INTEREST ON THE PART OF ATTORNEY PERCY FOREMAN

Petitioner's second American counsel, Percy Foreman, assumed all the conflicts of interest which Hanes had by re-negotiating the Hanes-Huie-Ray contracts and inserting himself in place of Hanes, while insisting upon an even larger share of Huie's proceeds and all of Ray's. (See Exhibits 6-F and 6-G)

As a consequence of these irreconcilable conflicts of interest, petitioner's legal rights were violated in the following ways:

1. Foreman failed to make an adequate, if, indeed, any investigation of the case against petitioner. In fact, by Foreman's own admissions, he made no investigation of the case before deciding to plead his client guilty.

2. Foreman became Huie's new literary partner. Huie continued to work on his book and a third Look Magazine article. The enormous prejudicial publicity which resulted from Huie's Look articles--with a circulation of more than 7 million and a readership several times that size--was augmented by radio and T.V. coverage. This massive publicity prejudiced petitioner's Fifth, Sixth, and Fourteenth Amendment rights and his right to be presumed innocent until proven guilty.

3. In violation of petitioner's Fifth and Sixth Amendment rights, Huie also testified before the Shelby County Grand Jury as to what he had allegedly learned from and about petitioner. Attorney Foreman made no attempt to stop Huie from testifying before the Grand Jury.

4. Because an open and public trial conflicted with the Foreman-Huie interest in the commercial value of their exclusive literary and movie rights--which Foreman later publicly estimated as worth up to $600,000 (See Exhibit 7)--Foreman coerced petitioner's guilty plea by means of threats, bribery, guile, and intimidation.

C. ASSISTANCE OF COUNSEL WAS RENDERED INEFFECTIVE BY CONTINUOUS SURVEILLANCE

Petitioner avers that while incarcerated in Memphis prior to trial his cell was admittedly bugged by microphones and he was under continuous round-the-clock T.V. surveillance. In addition to the acknowledged bug, petitioner believes there were other, clandestine microphones. Furthermore, guards were present in petitioner's cell at all times and all written communications from petitioner to his lawyers were examined by guards before his attorneys left the prison. Petitioner's Motion to Grant Private Communication was denied by the trial judge. (See Exhibit 8)

Petitioner avers that these measures were neither necessary nor really intended for his security but did effectively violate his right to confide in private with his attorneys. In attempting to frustrate these bugs and T.V. cameras,

petitioner and his counsel, Arthur Hanes, were reduced to lying on the floor and whispering in each other's ear.

D. ATTORNEY FOREMAN FAILED TO INVESTIGATE THE CASE

Petitioner avers that attorney Foreman failed to make an investigation into the case against him. As a consequence, Foreman was both unprepared to go to trial and unable to properly advise his client on a plea, had he been so disposed. Specifically, petitioner asserts that:

1. Attorney Foreman never asked petitioner whether he fired a shot at Dr. King.

2. Foreman filed no motion for discovery. Although a police officer told petitioner that all police within four miles of the scene of the crime had been required to submit written statements, Foreman declined to move for discovery of these statements when petitioner asked him to do so.

3. Foreman made no attempt to obtain a ballistics or spectrographic or any other analysis of the "bullet", bullet fragments, and other items of evidence allegedly connected with the shooting.

4. By his own admissions, Foreman decided to plead petitioner guilty before his alleged investigation of the case even began.

5. Petitioner had reason to believe that certain investigations were essential to his defense, so he requested that Foreman make them. However, these investigations were never made.

E. ATTORNEY PERCY FOREMAN WAS PHYSICALLY AND EMOTIONALLY INCAPABLE OF RENDERING EFFECTIVE ASSISTANCE OF COUNSEL

A few months before Foreman entered the Ray case, the Court of Civil Appeals of Texas affirmed the decision of a lower court which awarded him $75,000 for injuries arising out of an automobile accident in which Foreman claimed he had suffered a whiplash injury. The court noted testimony that the injuries he suffered had affected his performance as a lawyer:

> (Foreman) testified that the lack of rest and the pain make him highly nervous and irritable to the extent that he is required to schedule important conferences for early in the mornings or not later than 10:00 o'clock in the morning. . . . In important cases he invariably engages some other lawyer to deal with his clients because of his nervous condition. (Emphasis added) (See Bluebonnet Express Inc. v. Foreman, 431 S.W. 2d 45 (1968), attached as Exhibit 9)

In addition, the court record shows that Foreman claimed he was sick and confined to bed from December 23, 1968, through January 20, 1969. This was about a third of the time which the court had allotted to him for preparation of the case.

F. WITNESSES CONCEALED OR ORDERED NOT TO TALK

Petitioner asserts that his assistance of counsel was also rendered ineffective by the fact that witnesses were concealed or ordered not to talk, as instanced below:

1. Although the State provided petitioner with a list of 360 potential witnesses, saying some 80 or 90 of them would be called at his trial, it would not disclose the witnesses it actually intended to call.

2. Officials ordered witnesses not to talk with defense attorneys, investigators, or anyone else.

3. One crucial witness, Mrs. Grace Stephens, was wrongfully and secretly incarcerated in the Western State Mental Hospital under her maiden name solely because she would have testified favorably to petitioner. Thus, by trickery the State immediately deprived the defense of the wife of the State's only claimed eyewitness, Charles Q. Stephens.

4. The prosecution also sequestered the State's only alleged eyewitness, Charles Quitman Stephens, and instructed him not to talk.

G. DISHONESTY OF COUNSEL

Petitioner asserts that his right to assistance of counsel was rendered ineffective by the dishonesty of Percy Foreman. Foreman's staggering record of dishonesty is detailed at greater length in the Memorandum submitted with this Petition. Here, however, petitioner charges that Foreman committed fraud on the court by stating to the Trial Judge that:

1. He had not and would not receive any fee for defending petitioner, when in fact he had already received a considerable sum of money at the time he made such statements, and expected to get much more later on; and

2. He was depositing money received in trust for petitioner, when in fact he had deposited said money in his own name.

III. PETITIONER WAS DENIED DUE PROCESS BY THE WITHHOLDING OF EXCULPATORY EVIDENCE

Petitioner avers that much exculpatory information was withheld from him. A few of the more crucial items include:

1. The plain fact that the FBI ballistics expert had found that: "Because of distortion due to mutilation and insufficient marks of value, I could draw no conclusion as to whether or not the submitted bullet was fired from the submitted rifle." (See affidavit of Robert Frazier, Exhibit 10)

2. That Dr. King suffered a second, officially hidden wound, thus proving either that the missile which struck him fragmented or that a second shot was fired.

3. That, immediately after the crime, the State's only alleged eyewitness, Charles Quitman Stephens, could not and did not identify petitioner as the killer. In fact, although the State claimed at the trial that Stephens saw petitioner in the hallway after the shooting, an artist's sketch disseminated by the FBI and based on Stephen's description resembled not James Earl Ray but the photographs of a man taken into custody in the vicinity of Dealey Plaza on November 22, 1963. (Copies of the photograph and artist's sketch are attached as Exhibit 11)

4. Police dusted a clear handprint belonging to someone other than James Earl Ray on the wall of the bathroom from which it alleges the shot which killed Dr. King was fired. (A photograph of this handprint is attached as Exhibit 12)

5. The fact that police officials had reason to believe petitioner was not at the scene at the time of the crime.

6. Some important exculpatory material, such as the affidavit by FBI ballistics expert Robert Frazier, was contained in the some 200-odd pages of affidavits and other documents presented to the Bow Street Magistrate's Court. These court records were confiscated and made unavailable to petitioner and his lawyers, although repeated requests for them were made to both the British and United States Governments. (Some of this correspondence is contained in Exhibit 13) Ultimately copies of these documents were obtained, but only after petitioner's alleged "trial" and as a result of a Freedom of Information Act lawsuit instituted by a private citizen. (Described in the factual Memorandum submitted along with this Petition)

IV. PETITIONER'S GUILTY PLEA WAS COERCED

A. INCARCERATION IN VIOLATION OF THE EIGHTH AMENDMENT

Petitioner avers that the cruel and unusual punishment to which he was subjected vitiated his ability to resist the improper pressures put upon him and caused him to plead guilty to a crime he did not commit. Specifically, petitioner avers that:

1. He was kept in isolation for 8 months under conditions which kept him from knowing whether it was night or day.

2. For eight months he was kept under bright lights and constant surveillance 24 hours a day. Guards were stationed at his cell around-the-clock. These guards constantly played their own radios and a T.V. set. In addition, petitioner was continuously surveilled by closed-circuit T.V. and microphones.

3. The Trial Judge denied a motion to correct these conditions.

4. As a result of these conditions, petitioner could not get proper rest. He became extremely nervous and suffered from chronic headaches and nosebleeds.

5. Because of this treatment and his own deteriorating physical and nervous condition, petitioner's resistance was eventually worn down and he was coerced into entering a guilty plea.

B. ATTORNEY FOREMAN COERCED GUILTY PLEA BY THREATS AND BRIBERY

Petitioner avers that his guilty plea was coerced by the threats and bribery of his own attorney, Percy Foreman. Specifically, petitioner avers that:

1. Foreman repeatedly threatened that if petitioner did not plead guilty he would be "barbecued". (See Exhibit 3) In writing Foreman advised petitioner that ". . . 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." (See Exhibit 14-A)

2. On February 18, 1969, petitioner handed Foreman a two-page handwritten letter listing the reasons why he did not want to plead guilty. Foreman immediately flew to St. Louis and read this letter to petitioner's family, who assembled at his demand. Foreman then attempted to pressure Ray's family to visit or write petitioner and urge him to plead guilty. (See Exhibits 5-A through 5-D and Exhibit 15)

3. Shortly before the scheduled trial date, petitioner offered to let Foreman withdraw from the case. However, Foreman refused and instead insisted upon a guilty plea. In return for a promise that petitioner would plead guilty the following day "without any unseemly conduct on your part in court", Foreman generously agreed to sign over to petitioner any income due Foreman under the contract with Huie which was in excess of $165,000. (See Exhibit 14-C) As Foreman estimated the revenue from the Huie contracts at up to $600,000 (See Exhibit 16), this amounted to a bribe of several hundred thousand dollars. This impression was buttressed by a letter sent by Huie which stated that additional earnings would be received shortly, and that he was negotiating with Carlo Ponti over film rights. (See Exhibit 17)

C. GUILTY PLEA WAS COERCED BY JUDGE'S STATEMENT THAT HE WOULD NOT ALLOW FURTHER CHANGES IN COUNSEL

Two actions taken by the Trial Judge added to the coercive pressures which forced petitioner to plead guilty. Ray had fired Hanes because Foreman and his brother Jerry had persuaded him that Hanes had a serious conflict of interest and was not running the defense himself. Thus, the firing of Hanes was not frivolous but dictated by the circumstances. But at the November 12, 1968 hearing at which Foreman formally entered the case, the Trial Judge, himself under pressure from the prosecution and business and civic leaders, made it clear that he would not countenance any further change of attorneys. (See Exhibit 18) Then, on January 17, 1969, without petitioner's approval

and against his desires, Judge Battle made the Memphis Public Defender, Hugh W. Stanton, co-counsel in the case and ordered him to be ready to take the case to trial if anything should happen to Foreman. Petitioner did not want Stanton as his attorney and refused even to talk with him on the one occasion when Stanton came to the jail.

Thus, petitioner found himself in this situation: on the one hand there was Foreman, unprepared to go to trial, refusing to withdraw from the case, and exerting extreme pressure on petitioner to get him to plead guilty. On the other hand, if petitioner fired Foreman, he then faced the threat of being forced to go to trial with Stanton, whose competence Foreman disparaged in caustic comments he made to petitioner's brothers. But not only was Stanton just as unprepared to go to trial as Foreman, he was also, petitioner believed, chiefly a specialist in guilty pleas rather than a trial lawyer. In fact, as soon as he was appointed to the case on December 18, 1968, the unwanted and unsolicited Stanton began to negotiate a guilty plea without petitioner's knowledge or consent. (See Exhibit 19)

V. DIRECT NEGOTIATION OF THE GUILTY PLEA WITH THE TRIAL JUDGE

Petitioner's attorney negotiated the guilty plea directly with the Trial Judge and Judge Battle himself personally dictated the terms of the deal. (See Exhibit 20) Section 3.3(a) of the American Bar Association's Standards Relating To Pleas of Guilty proscribes such conduct and petitioner contends that this direct negotiation of the guilty plea with Judge Battle violated

his right of due process. In addition, petitioner avers that Judge Battle's participation in the negotiation of the plea made it impossible for him to determine its voluntariness objectively.

VI. FAILURE OF TRIAL JUDGE TO ASCERTAIN FACTUAL BASIS FOR PLEA VIOLATED DUE PROCESS

Petitioner asserts that his rights under the Fourteenth Amendment were violated by the failure of the Trial Judge to ascertain whether or not there was a factual basis for the plea.

After petitioner pled guilty according to script, petitioner's attorney polled the jury to make certain in advance that each member seated would blindly ratify the guilty plea. After the prosecution and Foreman had accepted the jury, but before the jury was sworn, petitioner rose in open court to disagree with Foreman's gratuitous declaration that there was no conspiracy to assassinate Dr. King. (See Exhibits 21-A and 21-B) When petitioner thus demurred to Foreman's attempt to imply that he had fired the shot which killed Dr. King, Judge Battle should have brought the guilty plea proceedings to a swift halt. However, Judge Battle adhered to the deal he engineered with Foreman and sloughed off petitioner's dissent without the detailed inquiry it demanded.

VII. FAILURE OF TRIAL JUDGE TO DETERMINE WHETHER PETITIONER UNDERSTOOD THE NATURE OF THE CHARGE AGAINST HIM VIOLATED DUE PROCESS

Judge Battle failed to conduct an adequate inquiry into petitioner's understanding of the charge against him. The failure of the Trial Judge to ascertain personally that petitioner understood the elements of the crime violated petitioner's Fourteenth Amendment right of due process. The failure was particularly insidious in this case because petitioner's attorney was himself exerting coercive pressures for a guilty plea and thus could not be trusted to correctly represent the elements of the charge to his client.

VIII. PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT WERE VIOLATED BY EXTRAJUDICIAL INTERVENTIONS INTO THE TRIAL

Petitioner alleges that extrajudicial influences intervened in the trial process to deprive him of his rights of due process and equal protection of the law. Among these were:

1. Huie in conversation with Judge Battle persuaded him that the truth about the assassination of Dr. King would not come out at a trial. (See Exhibit 22, pp. 180-182) The result was that Judge Battle became convinced " . . . that the trial would have muddied our understanding of the substantial evidence which established Ray as the killer." (See Exhibit 23) Thus, Huie's unwarranted and improper intervention prejudiced Judge Battle to believe that petitioner was involved in a plot to assassinate Dr. King and actually did kill Dr. King. In turn, Huie's intervention influenced Judge Battle's improper guilty plea negotiations and affected his capacity to objectively determine whether petitioner's plea was voluntary.

2. Each time petitioner's trial date approached, Huie pressured him to confess guilt. (See Exhibits 47-A and 47-B) In trying to force a confession out of Ray, Huie subverted the judicial process:

A. Huie sought to erode petitioner's confidence in a jury trial by asserting that while a confession of race hatred and guilt would help him, " . . . if you just happened to stumble into all this, and you didn't know what the hell was going on, then no juror is going to give a damn about you." (See Exhibit 47-A)

B. In his February 11, 1969 letter to Ray, Huie quoted the Trial Judge's purported statement that Huie's pre-trial articles "made a fair trial almost impossible". (See Exhibit 47-B) This conveyed the message that the Trial Judge himself had already concluded that going through with a trial would be an exercise in futility. Obviously, then, as Huie expressly stated later on in this letter, petitioner's only course of action was to plead guilty and ask for leniency.

C. In his February 11th letter, Huie coupled offers of money and personal assistance--if petitioner would confess--with intimidating assertions that petitioner would get the electric chair or 99 years in prison if he persisted in going through with a trial. After asserting that petitioner had no hope from a jury and that the Trial Judge had already determined that a fair trial was almost impossible, Huie then held himself out as the only hope for petitioner. In reality, Huie's offer of help was a threat: "I might even help you get out of prison in 10 or 12 years, <u>depending on how much you cooperate with</u>

me." (Emphasis added) (See Exhibit 47-B) If petitioner did not "cooperate" by confessing guilt, then there would be no money, no help, and Huie would have to assume petitioner's guilt and proclaim it to the world.

3. Pervasive prejudicial publicity, much of it erroneous, distorted, and inspired by government leaks, made the proceedings against petitioner a sham, a fraud, and a mockery of justice. (A small sample of this publicity is contained in Exhibits 25 and 50) According to Huie, the Trial Judge had himself stated that Huie's Look magazine articles "made a fair trial almost impossible". (See Exhibit 47-B) As early as September 12, 1968, petitioner complained to the Trial Judge about the publicity by Huie and other writers, concluding: "I believe if these type of articles don't stop I might as well waive the trial and come over and get sentenced." (See Exhibit 46) In coercing petitioner's guilty plea, attorney Foreman relied heavily on the effect of this prejudicial publicity. (See Exhibit 3, pp. 8-9 and Exhibit 14-A)

4. The Federal Government preempted the State of Tennessee and conducted an investigation on the basis of a spurious conspiracy charge filed in Birmingham, Alabama. No alleged conspirator was ever arrested on this charge. However, in spite of the fact that the Government consistently maintained that petitioner was the lone assassin of Dr. King, this conspiracy charge remained hanging until petitioner moved for a speedy trial in late 1971, at which time the charge was dismissed when the Government failed to respond. (See Exhibit 44)

5. The United States Department of Justice intervened in a State of Tennessee trial to try and obtain approval of the guilty plea deal, even going so far as to pressure the family and associates of Dr. King to approve the guilty plea and accept it as a "solution" to the crime.

IX. PETITIONER WAS DENIED RIGHT TO COUNSEL IN FILING MOTION FOR NEW TRIAL

Petitioner alleges that obstruction by state officials prevented him from filing a motion for a new trial with the aid and assistance of an attorney retained by his family. Specifically, petitioner alleges that:

1. On March 26, 1969, the Warden at the State Penitentiary at Nashville, Lake F. Russell, denied petitioner access to Mr. Richard Ryan, a Memphis attorney whom petitioner's family had asked to represent him.

2. Prison officials also refused to grant petitioner access to law books so that he could determine the proper form for a motion for a new trial.

3. Delay in transmittting petitioner's letters of March 13 and March 26, 1969 and the refusal to allow petitioner's counsel in to consult with him prevented the Trial Judge from granting his motion for a new trial.

X. CONCLUSION

Because of the foregoing facts, petitioner is being

restrained of his liberty by the respondent in violation of the Constitution of the United States.

WHEREFORE, petitioner prays as follows:

1. That under 28 U.S.C. 2243, this Court issue an Order that the respondent show cause why this petition should not be granted and the petitioner discharged.

2. That this Court set out in the Order a return date of three days.

3. That this Court set the matter down for an evidentiary hearing within five days after the return.

4. That this Court grant such other relief as to the Court may seem just and proper.

Bernard Fensterwald, Jr.
Attorney for Petitioner
910 16th Street, N.W.
Washington, D. C. 20006

Dated:_____

James Hiram Lesar
Attorney for Petitioner
910 16th Street, N.W.
Washington, D. C. 20006

Robert I. Livingston
Attorney for Petitioner
910 Commerce Title Bldg.
Memphis, Tennessee

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner, James Earl Ray, was convicted on a plea of guilty to first degree murder and sentenced to a term of 99 years. Petitioner's application for a writ of habeas corpus sets forth several grounds for relief, each of which is itself a sufficiently substantial violation of constitutional due process as to independently require that petitioner's conviction be overturned.

However, at the heart of petitioner's claim is his assertion that his guilty plea was not made voluntarily. In fact, most of the grounds which independently require the reversal of petitioner's conviction also bear upon the voluntariness of his guilty plea. Consequently, the grounds elaborated upon in this Memorandum, though stated separately, must also be weighed for their cummulative effect on the voluntariness of petitioner's plea.

I. AN INVOLUNTARY GUILTY PLEA VIOLATES DUE PROCESS AND IS THEREFORE INVALID

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 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 a recent concurring opinion, Mr. Justice Stewart has referred to a guilty plea as "perhaps the most devastating waiver possible under our Constitution". Dukes v. Warden, 406 U.S. 250, 258, 92 S. Ct.1551, 32 L. Ed. 2d 45 (1972). In another recent case, the Supreme Court has expanded upon the nature of this waiver:

> 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 minimum 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. Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)

A. FACTORS IN DETERMINING VOLUNTARINESS

The Supreme Court has frequently alluded to the factors which typically bear on the voluntariness of a plea:

> A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. Machibroda v. United States, 368 U.S. 487, 493, (1962). See Rigby v. Russell, 287 F. Supp. 325, 331, (E.D. Tenn. 1968)
>
> Of course, the agents of the State may not produce a plea by actual or threatened physical

> harm or by mental coercion overbearing the will of the defendant. Brady v. United States, 397 U.S. 742, 749 (1970).

Obviously, the factors alluded to in these decisions do not exhaust the ways in which the voluntariness of a plea can be tainted. Probably it is impossible to do so. However, in Brady, supra, the Supreme Court tried to lay down some guidelines:

> The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:
>
> "(A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harrassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." (397 U.S. at 755)

B. THE TEST OF VOLUNTARINESS IS THE TOTALITY OF THE CIRCUMSTANCES

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 must be judged according to the totality of the circumstances. Thus, in Brady, the court declared:

> The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. (397 U.S. at 749) 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)

C. PETITIONER'S PLEA WAS INVOLUNTARY

Under the standards for determining voluntariness set forth above, petitioner's plea was clearly involuntary. In fact, the circumstances under which petitioner's plea was entered make it the quintessence of involuntariness, adding new variants of taint to those already enumerated by the Supreme Court. Petitioner was bribed to plead guilty; not, however, by the prosecution, but by his own attorney, who promised to pay him a sum of money estimated in excess of a hundred thousand dollars on the condition that "the plea is entered and the sentence accepted and no embarrassing circumstances take place in the courtroom." (See Exhibit 14-C) Petitioner's attorney also sought, by threats and cajolery, to induce petitioner's family to get him to plead guilty and, when they refused, misrepresented their attitude to petitioner.

Petitioner's plea was further coerced by a series of irreconcilable conflicts of interest which required that his attorneys ignore or even contravene his legal rights. The denial of his right to effective assistance of counsel and the failure of attorney Percy Foreman to investigate the case were coupled with Foreman's threat that, forced to go to trial, he would ruin petitioner in the courtroom. The compelling force of this threat was augmented by the Trial Judge's statement that he would not allow petitioner any further change of counsel, thus foreclosing petitioner's only alternative to a guilty plea.

These and other factors brought overwhelming pressures on petitioner to plead guilty, pressures which far exceeded what is

required to abrogate a guilty plea under the Supreme Court's standards. These factors are discussed in the sections which follow as a series of constitutional deprivations which, individually and cumulatively, reduced the judicial proceedings against petitioner to a sham, a farce, and a mockery of justice.

II. DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL VIOLATES DUE PROCESS

Petitioner's right to due process under the Fourteenth Amendment was violated because he lacked the effective assistance of counsel. Further, the failure to have effective assistance was a powerful and controlling consideration compelling petitioner to enter an involuntary plea of guilty. Petitioner had no other real course.

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); Goodwin v. Cardwell, 432 F. 2d 521 (6th Cir. 1970); Spegal v. Black, No. 71-1748 (6th Cir. June 2, 1972); Venable v. Neil, No. 71-1593 (6th Cir. June 30, 1972).

In holding that the right to effective assistance of counsel is encompassed within the Fourteenth Amendment's due process clause, the Supreme Court 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.

The right to 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)

In his Petition for a Writ of Habeas Corpus, petitioner has listed the several different ways in which he was deprived of the effective assistance of counsel. The legal criteria by which these denials of petitioner's right to effective assistance are to be judged are set forth in the sections which follow.

A. CONFLICTS OF INTEREST ON PART OF PETITIONER'S ATTORNEYS

Petitioner's attorneys had irreconcilable conflicts of interest which deprived him of the effective assistance of counsel. These conflicts and the manner in which they contributed

to petitioner's coerced plea are discussed in some detail in the Memorandum of Facts which accompanies the Petition. In brief, the conflicts existed because petitioner's attorneys signed contracts with a writer, William Bradford Huie, which gave Huie literary rights in their client. (See Exhibit 6) Under the terms of these contracts, petitioner's attorneys had a financial interest in Huie's literary rights. In effect, petitioner's attorneys contracted away petitioner's legal rights for the financial enrichment of Huie and themselves.

DR 5-104(B) of the American Bar Association's Code of Professional Responsibility forbids such contracts:

> 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.

There are sound reasons for this rule. Some of them were alluded to by the Court of Appeals for the Sixth Circuit in Ray v. Foreman, 441 F. 2d 1266 (1971), a civil suit growing out of these contracts between Huie and petitioner's attorneys. In his dissenting opinion in that case, Judge William E. Miller declared:

> In my view the attorney-client contracts involved here were pregnant with a potential conflict of interest * * * Indeed, the majority opinion itself recognizes in its closing paragraph that the contracts here involved may raise a serious question of conflict of interest between attorney and client and "create incentives to undermine the judicial process * * * because of the publicity value of sensational tactics and disruptions of trials. . ."

In a footnote to his dissent, Judge Miller commented:

> 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.

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. Phend, 417 F. 2d 1197 (7th Cir. 1969)

Ordinarily, a strong showing is required before the courts will uphold a claim of ineffective assistance of counsel. It is not enough to show only that the defense might have been better, or that the attorney could have done more, or that a better result might have been obtained if the case had been handled differently. The standard is different in cases involving a conflict of interest. Thus Glasser stated:

> Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser. (Emphasis added) (315 U.S. at 72)

In the instant case petitioner's claim is not merely that his representation "was not as effective as it might have been" but that his attorneys' conflicts required them to traduce his legal rights. Because of such conflicts, petitioner's attorneys conducted his "defense" not in petitioner's interest but in accordance with the literary and commercial needs of Huie. Hence, petitioner's attorneys insisted that he not take the witness stand in his own defense and later coerced him into waiving a jury trial and entering a plea of guilty. The ABA's minimum standards provide:

> Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf. (Section 5.2 of the American Bar Association's Standards Relating To the Defense Function, Approved Draft, 1971)

The fact that petitioner's attorneys violated all of the above standards shows that their irreconcilable conflicts caused them to annul petitioner's most fundamental legal rights. This was highly injurious to petitioner's defense. It contributed to the ultimate prejudice: petitioner was convicted of a crime he did not commit.

These violations alone establish that petitioner's legal rights were prejudiced by the conduct of his attorneys in a way that is more than sufficient to require a holding that

petitioner's right to the effective assistance of counsel was denied him. However, it must be emphasized that in conflict of interest situations it is not necessary to demonstrate the degree of prejudice in order to establish a violation of Sixth Amendment rights. As the Supreme Court stated 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. Glasser, supra, at 75-76.

Thus, the showing of prejudice which petitioner has made far exceeds the requirements laid down by the Supreme Court.

B. FAILURE TO MAKE AN ADEQUATE INVESTIGATION

The duty of a defense attorney to conduct a prompt and thorough investigation 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. (Section 4.1 of the Standards Relating to the Defense Function, Approved Draft, 1971)

These standards were flagrantly violated by Percy Foreman, the attorney who coerced petitioner's plea. Foreman never asked

petitioner whether he fired the shot which killed Dr. King. Foreman filed no motion for discovery, even when petitioner requested that he do so. He made no attempt to obtain a ballistics or spectrographic or any other analysis of the "bullet", bullet fragments, and other items of evidence allegedly connected with the shooting. He failed to obtain the extradition documents filed with the court in London, documents which, it turned out, contained potentially exculpatory material. Nor did Foremen obtain copies of potentially exculpatory police statements, even when petitioner requested it.

By Foreman's own admissions, the decision to plead petitioner guilty was reached before any investigation of the case was even begun. However, the Supreme Court has stated that an attorney must make an independent 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). Thus, even in cases where a guilty plea is contemplated, an attorney is obligated to investigate the circumstance surrounding the case. As Judge Merhighe recently remarked:

> When 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) McLaughlin v. Royster, 346 F. Supp. 297, 300 (E.D. Va. 1972). Citing as authority Stokes v. Peyton, 437 F 2d 131 (4th Cir. 1970).

In the present case we are not dealing with just the "possibility" that investigation by petitioner's counsel would have uncovered evidence favorable to his defense. Any investigation made by counsel Foreman had to have produced much favorable evidence. Enough, in fact, to raise a reasonable doubt as to petitioner's guilt. From the record the evidence is that Foreman made no investigation but rather chose from the outset to do petitioner "the courtesy" of assuming that he was guilty.

C. SURVEILLANCE

Petitioner's Fifth and Sixth Amendments rights to due process, a fair trial, and the effective assistance of counsel were violated by constant surveillance which interfered with the confidential attorney-client relationship. Petitioner's cell was monitored round-the-clock by two T.V. cameras, he was constantly watched by guards, and his cell was admittedly bugged by microphones. In an attempt to confer in private, petitioner and his attorney lay on the floor and whispered in each other's ears. A motion to grant private communication with his attorneys was denied by the Trial Judge (See Exhibit 8), thus abetting the chilling effect on lawyer-client communications imparted by the omnipresent electronic and personal surveillance.

The intimidating effect of such bugging and other surveillance on attorney-client communications is obvious. As one

court noted recently, "no lawyer, on any side of any case, would consider it salutary for his client that the opposition knew who was being interviewed and what was being said during such meetings". Discussing such surveillance in the context of pre-trial investigation and preparation, the same court summarized the law in this area:

> Because privacy is so vital to these preparatory efforts, the prosecution is forbidden to eavesdrop or plant agents to hear the councils of the defense. Coplon v. United States, 89 U.S. App. D.C. 103, 191 F. 2d 749 (1951), cert. denied, 342 U.S. 926, 72 S. Ct. 363, 96 L. Ed. 690 (1952); United States v. Andreadis, 284 F. Supp. 341, 345 (E.D.N.Y. 1964) . . . . It makes no difference whether the conversations unlawfully audited are solely between counsel and client and thus within the traditional, nonconstitutional privilege. The defendant has a right to prepare in secret, seeing and inviting those he deems loyal or those with whom he is willing to risk consultation. The prosecution's secret intrusion offends both the Fifth and Sixth Amendments. Caldwell v. United States, 92. U.S. App. D.C. 355, 205 F. 2d 879 (1953), cert. denied 349 U.S. 930, 75 S. Ct. 773 (1955). In Re Terkeltoub, 256 F. Supp. 683 (1966) at 685.

D. WITNESSES INSTRUCTED NOT TO TALK WITH THE DEFENSE TEAM

As amended, the American Bar Association's minimum standards provide:

3.1 Investigative function of prosecutor.

> (c) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which he has a right to give. (Standards Relating to The Prosecution Function and The Defense Function, Approved Draft, 1971, at p. 6)

In petitioner's case, numerous witnesses were instructed not to talk to members of the defense team and at least one witness was wrongfully incarcerated in a mental institution to keep her from the defense team. Petitioner contends that this conduct not only was unprofessional, as the ABA's standard makes clear, but that it also amounted to a denial of petitioner's right to effective assistance of counsel.

III. THE WITHHOLDING OF EXCULPATORY EVIDENCE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The withholding of evidence which is exculpatory or even potentially exculpatory violates the due process clause of the Fourteenth Amendment. Mooney v. Holohan, 294 U.S. 103 (1935). This is true whether the evidence is material either to guilt or to punishment, and irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 86 (1963). Thus, in United States ex. rel. Almeida v. Baldi, 195 F. 2d 815 (3d Cir. 1952), cert. denied, 345 U.S. 904, a denial of due process was found where the prosecution had suppressed the evidence of two bullets which could have demonstrated that the policeman was killed by another policeman rather than by the defendant, thereby increasing the likelihood of a life, rather than death, sentence. To the same effect are Alcorta v. Texas, 355 U.S. 28 (1957) and United States ex. rel. Butler v. Maroney, 319 F. 2d 622 (3d Cir. 1963)

In holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process", Brady grounded its decision on "fairness":

> The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to an accused. Society wins not only when the guilty are convicted but when criminal trials are fair. Brady, supra, at 87.

In the wake of Brady, many lower courts, relying on this "fairness" concept, extended its holding.[1] Thus, the courts have held that there is a duty to disclose exculpatory information even if the defense did not request it. United States ex. rel. Meers v. Wilkins, 326 F. 2d 135 (2nd Cir. 1964). As one court said:

> In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel. Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842, 846 (4th Cir. 1964)

The same court also held that it was immaterial whether the prosecutor himself had knowledge of the exculpatory evidence:

> Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The people are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. . . . "The cruelest lies are often told in silence." Barbee, supra, at 846.

In cases where there is substantial room for doubt, "the prosecution is not to decide for the court what is admissible or for the defense what is useful." Griffin v. United States, 183 F. 2d 990, 993 (D. C. Cir. 1950) Even where the evidence

---

[1] An excellent summary of the evolution of the law of exculpatory evidence is found in the Supplement to Law and Tactics in Federal Criminal Cases, edited by George W. Shadoan (Vienna, Va.: Coiner Publications, Ltd.). The summary appears in the 1968 pocket part at pages 34-52.

is inculpatory rather than exculpatory, the prosecution may be under a duty to disclose it if it is so inconsistent with another, also inculpatory, statement of a witness as to cast serious doubt on his veracity. United States v. LaVallee, 344 F. 2d 313, 315 (2nd Cir. 1965)

Under the law of exculpatory evidence stated by these decisions, petitioner was entitled to a great many items which were denied him. Some items now known to be exculpatory are listed in the Petition for a Writ of Habeas Corpus. More such items undoubtedly exist but are as yet unknown to petitioner.

However, the exculpatory evidence now known to petitioner is simply astounding. Suppressed from petitioner was the fact that the FBI's own ballistics expert was unable to identify the remnant of a bullet removed from Dr. King as having been fired from the rifle allegedly--and implausibly--dropped by petitioner on South Main Street. Not only was the exculpatory affidavit of FBI agent Robert Frazier withheld from petitioner, but the Trial Judge himself placed the imprimature of the court on the suppression of exculpatory evidence by denying the defense's motion to produce ballistics and weapons tests and reports thereof. (See Exhibit 22)

This evidence was of critical importance. It went to the very heart of the case against petitioner. Such evidence, taken by itself, could raise a reasonable doubt that petitioner had fired the shot which killed Dr. King.

But this evidence did not stand alone. Other evidence, also

exculpatory and also suppressed, showed that the State's only alleged eyewitness could not and did not identify petitoner as the man he claimed he saw in the hallway of the rooming house after the shot was fired.

The suppression of such evidence is a violation of the due process required by the Fourteenth Amendment. That, in itself, is sufficient to overturn petitioner's conviction. However, the failure of petitioner's attorney to obtain this evidence also reflected the lack of effective assistance, and this in turn contributed to petitioner's involuntary decision to enter a plea of guilty.

IV. DIRECT NEGOTIATION OF GUILTY PLEA WITH THE TRIAL JUDGE VIOLATES FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

Petitioner's attorney admitted under oath that he negotiated the guilty plea directly with the Trial Judge. (See Exhibit 20, pp. 16-17) Petitioner contends that the Trial Judge's participation in the negotiation of his guilty plea violated his right to due process under the Fourteenth Amendment.

The American Bar Association's minimum standards clearly proscribe the trial judge's participation in the plea negotiations. Thus, section 3.3(a) of the Standards Relating to Pleas of Guilty provides that: "The trial judge should not participate in plea discussions." (Approved Draft, 1968, at p. 11)

The commentary on this section cites a number of reasons for keeping the trial judge out of the plea discussions:

> (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and (4) the risk of not going along with the dispositions apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent. (Approved Draft, 1968, at p. 73)

The ABA's standards and the commentary on them was cited extensively by the court in Commonwealth v. Evans, 252 A. 2d 689 (S. Ct., Pa. 1969), which held:

> . . . we feel compelled to forbid any participation by the trial judge in the plea bargaining prior to the offering of a guilty plea. Commonwealth, supra, at 691.

Another court has addressed the trial judge's participation in plea bargaining in terms of the "fundamental fairness" which is the hallmark of Fourteenth Amendment due process:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)

In the present case the question of "fundamental fairness" is raised not only by the inherently unequal positions of the judge

and the accused but also by the specific conduct of the trial judge in this particular case. Under the grotesque circumstances of this case, petitioner's attorneys served as couriers for Huie, their paymaster. Huie tried feverishly to get petitioner to admit to involvement in the slaying of Dr. King. Failing in his efforts to extract a confession from petitioner, Huie then met with Judge Battle and told him that there was no point in having a trial because it would only establish what everyone already knew, that petitioner was guilty. Duly enlightened by Huie, Judge Battle then had a series of ex parte meetings with petitioner's attorney, Percy Foreman, during which they negotiated the guilty plea.

It is hard to imagine a set of circumstances which would better illustrate the wisdom of a rule precluding a trial judge from participating in plea discussions. The Trial Judge, his mind already biased by Huie and corrupted by community and political pressures at the time he sat down to negotiate the guilty plea, was incapable of objectively determining whether the guilty plea which he had personally negotiated was voluntarily entered. The truth of this was tragically borne out when the Trial Judge accepted the plea in open court without attempting to ascertain its factual basis, even after petitioner's courtroom statements made it imperative that he do so.

V. FAILURE OF RECORD TO AFFIRMATIVELY SHOW THAT PLEA WAS INTELLIGENTLY MADE VIOLATES FOURTEENTH AMENDMENT DUE PROCESS

In order to satisfy the requirements of due process, the record must affirmatively disclose that a plea of guilty was made

voluntarily and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Petitioner contends that the record does not affirmatively show that his plea was understandingly or intelligently made.

A. RECORD MUST SHOW THAT ACCUSED UNDERSTANDS THE NATURE OF THE CHARGES AGAINST HIM

The Supreme Court has held that for a guilty plea to be intelligently made, an accused must understand the nature of the charges against him. Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116, 76 S. Ct. 223, 100 L. Ed. 126 (1956); McCarthy v. United States, 394 U.S. 459, 89 S. C. 1166, 22 L. Ed. 2d 418 (1969); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

The reason for requiring that the record affirmatively show that the accused understands the nature of the charge against him is obvious. As the Court of Appeals for the Sixth Circuit explained it:

> When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided . . . Waddy v. Heer, 383 F. 2d 789, 794 (6th Cir. 1967)

The Supreme Court, after quoting this passage approvingly, concluded:

> There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him. (Emphasis in the original) McCarthy, supra, 394 U.S. at 470.

The Supreme Court has also indicated that, at least under some circumstances, this requires that the court personally address the defendant as to his understanding of the elements of the charge:

> . . . where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge. McCarthy, supra, at 467.

It is true that McCarthy ostensibly dealt only with Rule 11 of the Federal Rules of Criminal Procedure and did not reach a decision as to what was required by the due process clause of the Fourteenth Amendment. However, in his dissenting opinion in Boykin, Justice Harlan twice asserted:

> The Court thus in effect fastens upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure. 395 U. S. at 245.
>
> So far as one can make out from the Court's opinion, what is now in effect being held is that the prophylactic procedures of Criminal Rule 11 are substantially applicable to the States as a matter of federal constitutional due process. 395 U. S. at 247.

Petitioner contends that it is not necessary to agree with Justice Harlan's interpretation in order to reach the conclusion that the failure of the Trial Judge to ascertain whether petitioner understood the nature of the charges against him violated due process. The circumstances of petitioner's case are egregious. At his "trial", petitioner rose in court to disagree with his attorney's statements that there was "no conspiracy" involved in

the assassination of Dr. Martin Luther King. Foreman's gratuitous assertion that there was "no conspiracy" implied that petitioner, through his attorney, admitted he fired the shot which killed Dr. King. Petitioner's declaration that he disagreed with the "no conspiracy" statements negated that implication and unavoidably raised questions as to whether petitioners plea was voluntarily and understandingly entered.

If ever constitutional due process requires that a trial judge personally address the defendant and ascertain whether he understands the necessary elements of the charge against him, this was the occasion. And, as the Court of Appeals for the Sixth Circuit has noted, in all such inquiries, "(m)atters of reality, and not mere ritual, should be controlling." Kennedy v. United States, 397 F. 2d 16, 17 (6th Cir. 1968). Cited in McCarthy, supra, at 467.

However, the Trial Judge did not explain to petitioner the essential elements constituting the crime with which he was charged, although this was absolutely necessary in order to judge whether the plea was both understandingly and voluntarily entered.

Instead, the Trial Judge asked petitioner only one question in this regard:

> Are you pleading guilty to murder in the first degree in this case because you killed Dr. Martin Luther King under such circumstances that would make you legally guilty of murder in the first degree under the law as explained to you by your lawyers? (Otwell transcript, pp. 7-8. See Exhibit 21-A)

After petitioner rose in court to dispute Foreman's statements that he had fired the shot which killed Dr. King, Judge Battle did nothing more than repeat this question verbatim. (Otwell transcript, pp. 25-26) This was a meaningless inquiry because Judge Battle had no way of determining what Foreman had told petitioner or whether petitioner had understood what he had been told.

Yet as the Supreme Court has said:

> . . . if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. McCarthy, supra, at 467.

B. FAILURE OF TRIAL JUDGE TO ASCERTAIN THAT A FACTUAL BASIS FOR THE PLEA EXISTED

Section 1.6 of the American Bar Association's Standards Relating to Pleas of Guilty states:

> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea. ("Approved Draft, 1968", p. 30)

This standard is virtually identical with the provision in Rule 11 of the Federal Rules of Criminal Procedure that:

> The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

In McCarthy, the Supreme Court quoted the Notes of Advisory Committee on Criminal Rules to the effect that the judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an

offense included therein to which the defendant has plead guilty." McCarthy, supra, at 467. In petitioner's case, the Trial Judge made no attempt to inquire as to whether there was a factual basis for the plea.

Yet the circumstances cried out for just such an inquiry. When petitioner contradicted his attorney's assertion that there was no conspiracy, he denied the implication that he had fired the shot which killed Dr. King. Any disagreement between petitioner and his attorney at this point should have caused the Trial Judge to halt the proceedings and conduct an immediate and thorough inquiry into the factual basis for the plea. And this was not just any disagreement. In a previous letter to Judge Battle, petitioner had asserted: "I would like to say for the record both public and private, I don't know anyone to expose . . ." (See Exhibit 46) Taken together these statements had to raise disturbing but fundamental questions: Was petitioner pleading guilty voluntarily? Did the guilty plea have a factual basis? Or was petitioner in effect proclaiming innocence at the very moment he was being forced to plead guilty? Instead of exploring these questions carefully and at length, Judge Battle shunned all of them, including the most obvious one: Did you fire the shot which killed Dr. King?

Again, petitioner does not contend, and it is not essential to his case, that Justice Harlan was correct in stating that Boykin made the procedures set forth in Federal Criminal Rule 11 applicable to the states as a matter of federal constitutional due process. What petitioner does contend is that under the circumstances of his case, and especially after his comments in court negating his attorney's assertion that there was no con-

spiracy, it was a violation of due process for the Trial Judge not to have ascertained that a factual basis for the plea existed.

VI. BECAUSE OF EXTRAJUDICIAL INTERVENTIONS INTO THE TRIAL PROCESS, THE PUBLIC PROCEEDINGS AGAINST PETITIONER WERE NOTHING BUT A MASK FOR SECRET, EX PARTE CONSULTATIONS AND DECISIONS WHICH DEPRIVED PETITIONER OF HIS RIGHT TO DUE PROCESS OF LAW

The Supreme Court has repeatedly held that an accused is entitled to a public trial:

> We start with the proposition that it is a "public trial" that the Sixth Amendment guarantees to the "accused." The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. Estes v. Texas, 381 U.S. 532, 538-539, (1964)
>
> * * *
>
> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether or private talk or public print. Patterson v. Colorado, 205 U.S. 454, 462 (1907). Quoted in Sheppard v. Maxwell, 384 U.S. 333, 351 (1965).

In petitioner's case, there were numerous intrusions into the trial process by outside influences. These extrajudicial influences deprived the court of jurisdiction over the case in any constitutional sense. One such influence was prejudicial press publicity. This prejudicial press publicity was of mammoth proportions, especially when the T.V. and radio coverage which ensued every magazine story or press release is considered. A small sample of the magazine publicity only is found in Exhibit 25 and Exhibit 50.

This pre-trial publicity was a matter of constant concern to petitioner, who repeatedly wrote about it to his attorneys and the Trial Judge, all to no avail. (See Exhibit 46) Indeed, on September 12, 1968, petitioner wrote Judge Battle a letter which is worth quoting in extenso:

> I would like to respectfully call you Honor's attention to three articles written about me since you issued your order against publicity in the instant case. One article is in the August issue of the Reader's Digest by Mr. Jeremiah O'Leary. I am sure you will agree that this article could not have been written without the assistance of someone in the Justice Dept. The other is a picture of me in a late edition of a tabloid called the Inquirer. This is a typical picture which the law authorities have been releasing of me. In this instance the picture was taken and released by the Shelby County Sheriff's office. It shows me manacled up, a bullet proof vest on and looking like I just been pulled out of the river. The accompanying story does not relate to me. The third story came out in Wednesday's Commercial Appeal the 12th of Sept. by Mr. William Bradford Huie. I think almost anyone reading between the lines would interpret this article as meaning the only thing I am interested in is money and in my greed for it I am going to help expose someone or organization such as was mentioned in the newspaper article. I would like to say for the record both public and private, I don't know anyone to expose and I want to disassociate * * * * * * (illegible in xerox copy) * * relayed to Mr. Huie that I would tell him where I had been and what I had done and that's all, that I didn't care what he wrote but not to quote me. Also I certainly didn't ask for the article or any other pretrial statements from Mr. Huie. I realize your Honor does not have jurisdiction over national publications like the Digest, but I would think so in the picture release and the Huie release. I have said nothing since I arrived here thinking these stories would stop until after the trial but apparently they are not, therefore in the near future I am going to have an attorney file some libel suits, and contradict some of the outright lies. I am also sending these stories and pictures to the ethical committee of the A.B.A. I believe if these type of articles don't stop I might as well waive the trial and come

> over and get sentenced. 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.
> (Emphasis added. Spelling and punctuation corrected.)

Thus, as early as September 12, 1968, petitioner put the Trial Judge on notice that the enormous prejudicial publicity directed against him was affecting his belief that he could get a fair trial. Petitioner also noted that this publicity was government-assisted in one instance and promulgated by his attorney's paymaster, Mr. Huie, in another.

The effect of this extrajudicial influence upon petitioner's state of mind and the voluntariness of his plea cannot be disregarded. Ultimately, his own attorney, Percy Foreman, was to use the argument that he had already been convicted in the press as part of the successful attempt to intimidate and coerce petitioner into pleading guilty. (See Exhibits 3, 5, and 14-A)

A second extrajudicial influence corrupting the trial process beyond constitutional recognition was the direct pressure which author Huie brought to bear on petitioner and his attorneys. Huie served as paymaster for petitioner's attorneys. In turn, petitioner's attorneys spent vastly more time and effort ferreting out information for Huie's literary endeavors (and their financial enrichment) than they did preparing to defend petitioner. Indeed, most of the questions which Huie put to Ray through his attorneys were irrelevant to his defense and violated his legal rights in the most injurious manner imaginable. (See Exhibit 52) Huie also offered to pay a $12,000 bribe to petitioner or his brother if petitioner would not take the witness stand in his own defense.

Especially flagrant were the letters which Huie wrote to petitioner each time the trial date approached. In his letter of September 3, 1968, Huie demanded that petitioner confess his "INVOLVEMENT" in the King murder. (See Exhibit 47-A) In his letter of February 11, 1969, Huie varied his tactics. Having failed to obtain a confession from petitioner, Huie announced that he would have to assume what was going to happen at the trial. Huie's script for that drama was short but conclusive: "You are certain to be found guilty and sentenced either to death or to 99 years in prison." (See Exhibit 47-B) This threat that petitioner might go to the electric chair must be read in the context of Huie's letter. Important in this regard, is its second paragraph:

> The two stories I published in LOOK last Fall did nothing but present you as a "sympathetic character." And the judge therefore believes that these stories did "great damage" and "made a fair trial almost impossible."

Huie's message was clear. Judge Battle himself believed that it was almost impossible that petitioner would get a fair trial. By implication, therefore, petitioner might as well plead guilty. Huie, however, did not leave it to implication alone, but on the second page voiced the "hope", rather in the fashion of the carrot following the stick, that petitioner would plead guilty.

Unfortunately, these extrajudicial influences were not the only, nor even the worst, intrusions into the judicial process. More insidious by far was Huie's direct intercession with the Trial Judge, a shocking violation of judicial sanctity. Huie's meetings with Judge Battle rudely violated the most elemental

sense of fairness required by constitutional due process. Such meetings also violate the American Bar Association's proposed minimum standards:

> 1.6 Duty to prevent ex parte discussions of a pending case.
>
> The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with him ex parte, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice. Standards Relating to The Function of the Trial Judge, "Tentative Draft, June, 1972, p. 8.

According to Huie's account, he told Judge Battle that petitioner was guilty of having killed Dr. King. (See Exhibit 29, p. 181) As the man who had an exclusive line to petitioner through petitioner's own attorneys, Huie's words no doubt carried weight with the Trial Judge. Indeed, there is evidence that Huie's conversation with Judge Battle perverted the Judge's conception of his responsibilities as a trial judge. The last sentence of section 1.1(a) of the American Bar Associations' Standards Relating to the Function of the Trial Judge is particularly germane:

> The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose. "Tentative Draft, June, 1972", p. 7.

But Judge Battle's vision seems to have been blurred by Huie's interjection of "truth" as the issue confronting him. By Huie's account, Judge Battle agreed with him that a trial would not produce "the truth". This "truth" question, extraneous to his duty as the Trial Judge to see that the prosecution established the

guilt of the accused as required by law, became of paramount concern to Judge Battle. (See Exhibit 29, p. 181) After the trial, in an interview with Bernard Gavzer, Judge Battle stated that he was convinced that " . . . the trial would have muddied our understanding of the substantial evidence which established Ray as the killer." (See Exhibit 22) In fact, Judge Battle told Gavzer:

> . . . my conscience told me that it better served the ends of justice to accept the agreement. Had there been a trial, there could always have been the possibility, in such an emotionally charged case, of a hung jury. Or, though it may appear farfetched now, he could have perhaps been acquitted by a jury. (See Exhibit 22)

Augmenting the extrajudicial pressures sketched above were the political and community pressures which had acted upon the case from the day Dr. King was assassinated. These were the kind of pressures which made top government officials repeatedly declare that a lone assassin had killed Dr. King. Such pressures caused the FBI to attempt to get jurisdiction by instigating a baseless "conspiracy" warrant in Birmingham at the same time proclamations were issued declaring that they were looking for "one man on the lam". Such pressures caused the FBI's fingerprint expert, Mr. Bonebrake, to violate court guidelines by making public statements about his findings. These same pressures caused Memphis business and civic leaders to fear, however groundlessly, that blacks would burn down the city if petitioner got acquitted. These pressures caused the United States Government to refuse petitioner's reasonable request that his attorney be allowed to accompany him on his plane flight back to the United States. And these pressures also brought the United States Department of Justice and the members of

Dr. King's family into the negotiations to "ratify" petitioner's proposed plea of guilty.

In short, extrajudicial pressures and interventions and secret, ex parte meetings made the public proceedings against petitioner nothing but a mask for decisions arrived at in private and at the insistence of outside influences. In many ways, the closest legal parallel to petitioner's case is the situation dealt with by the Supreme Court in Moore v. Dempsey, 261 U.S. 86 (1923). In that case, the ground of the habeas corpus petition was:

> . . . that the proceedings in the State Court, although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law. Moore, supra, at 87.

It is true that petitioner's case does not involve "mob" domination in the same sense that Moore v. Dempsey did. In petitioner's case the "mob" was not a large crowd running through the streets or milling about the courthouse corridors. Sometimes the "mob" involved only Huie meeting secretly with the Trial Judge to tell him that petitioner was guilty and that a trial would only waste the State's money. Sometimes the "mob" was comprised of Huie and petitioner's attorneys as they worked to traduce petitioner's legal rights and to poison the public mind against petitioner in magazine articles and radio and T.V. broadcasts. Toward the end, the "mob" was chiefly two men, Percy Foreman and William Bradford Huie, working in concert and using every trick or inducement to coerce petitioner into pleading guilty.

No mob, however large, was ever more effective in thwarting

due process than this small band. Despite the differences in fact, the final judgment in petitioner's case must be substantially the same as that reached by the Supreme Court in Moore v. Dempsey:

> But if the case is that the whole proceeding is a mask--that counsel, jury and judge were swept to the fatal end by an irrestible wate of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights. Moore, supra, at 91.

Bernard Fensterwald, Jr.
Attorney for Petitioner
910 16th St., N.W.
Washington, D. C. 20006

Dated:_____

Robert I. Livingston
Attorney for Petitioner
910 Commerce Title Bldg.
Memphis, Tennessee 37203

James Hiram Lesar
Attorney for Petitioner
910 16th St., N.W.
Washington, D. C. 20006