IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1525

J. H. ROSE, Warden, Tennessee
State Penitentiary,

Petitioner,

v.

JAMES EARL RAY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is reported at 491 F. 2d 285.

JURISDICTION

Petitioner has stated that jurisdiction is based on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does Ray's habeas corpus petition allege facts sufficient to mandate an evidentiary hearing under the standards laid down by this Court in Townsend v. Sain, 372 U. S. 293(1963)?

STATEMENT OF THE CASE

James Earl Ray was indicted on May 7, 1968, for the murder of Dr. Martin Luther King. A month later Ray was arrested in London and proceedings to extradite him were initiated in the Bow Street Magistrate's Court.

At his extradition hearing Ray denied knowing Dr. King personally or having any kind of grudge against him. Ray specifically stated to the Court: "I did not kill Dr. Martin Luther King."[1] Nearly all the evidence submitted at the extradition hearing was

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[1]Petitioner Rose states, at page four of the Petition for a Writ of Certiorari, that: "Nowhere does [Ray] allege that he is innocent." This is not true. Ray's habeas corpus pleadings repeatedly assert that Ray is innocent and that he was framed and convicted of a crime he did not commit. The Memorandum of Facts which was incorporated into Ray's Petition for a Writ of Habeas Corpus states on its first page that it was written to help the Court understand "how Ray, though innocent of the charge of having murdered Dr. King, was coerced into pleading guilty to that charge." [The Memorandum of Facts is attached hereto as Appendix A] Ray has stated his innocence under oath. In a deposition which Ray gave on November 22, 1969, and which petitioner Rose filed as an exhibit in the habeas corpus proceedings before the District Court, Ray was cross-examined by John J. Hooker, Jr., attorney for William Bradford Huie and Percy Foreman in a civil action which Ray had filed against Huie, Foreman, and Arthur Hanes. At page eighty-six of the deposition, the following testimony is reported:

> HOOKER: I will put it this way: Did you or not, on April 4, 1968, fire a shot that fatally wounded and killed Dr. Martin Luther King?
>
> RAY: No, Sir.
>
> HOOKER: You deny that you fired any such shot into the head or some part of the body of Dr. Martin Luther King on that particular date or any other date?
>
> RAY: Yes, sir. That's right.

in the form of affidavits and thus not subject to cross-examination.[2] Ray was extradited to Memphis on July 19, 1968. For the next eight months Ray was kept in solitary confinement and subjected to personal, T.V. and electronic surveillance around-the-clock. Lights burned in his cell twenty-four hours a day.

Ray was originally scheduled to stand trial on November 12, 1968, but that was postponed by the entry of Percy Foreman into the case and the discharge of Ray's previous attorney, Arthur Hanes, Sr., on November 10, 1968. The trial was reset for March 3, 1969, but this, too, was postponed after Foreman told the Court on February 14, 1969, that he needed time to investigate the case and had only just, for the first time, received information upon which to base such an investigation. Accordingly, trial was again reset, this time for April 7, 1969. The trial was aborted, however, when, on Friday, March 7, Foreman informed Judge Battle that he had obtained Ray's agreement to plead guilty and requested that the plea be entered on the next available court date, Monday, March 10, 1969.

Immediately after the guilty plea Ray wrote Judge Battle two letters, dated March 13 and March 26, 1969, asking for a trial and the appointment of counsel to assist him. Judge Battle died on

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[2]Percy Foreman, Ray's attorney from November 10, 1968, until the March 10, 1969, guilty plea, never obtained these extradition documents. Even after Ray's guilty plea, the Department of State and the Department of Justice refused to give Ray copies of these public records. Author Harold Weisberg, having been denied access to these court documents on the grounds that they were exempt from disclosure as "investigatory files compiled for law enforcement purposes," filed suit under the Freedom of Information Act and was eventually awarded summary judgment. [Weisberg v. Department of Justice, Civil Action No. 718-70, District Court for the District of Columbia] When finally obtained, more than a year after Ray's guilty plea, the London affidavits were found to contain exculpatory evidence directly contradicting representations made by the prosecution at the March 10, 1969, minitrial.

March 31, 1969, without having taken action on the two letters.

After having exhausted his state remedies, Ray filed this habeas corpus action in the United States District Court for the Middle District of Tennessee-Nashville Division, on December 4, 1972. Ray's habeas corpus petition was accompanied by a lengthy Memorandum of Facts and some 300 pages of supporting affidavits and other exhibits. [The Memorandum and a few of the exhibits are found in the Appendix to this brief]

The District Court dismissed Ray's petition. On appeal the Sixth Circuit reversed and remanded, stating that:

> The entire record reeks with ethical, moral and professional irregularities, demanding a full-scale judicial inquiry. Without such a hearing, the record leaves no alternative to the conclusion that Ray's attorneys were more interested in capitalizing on a notorious case than in representing the best interest of their client. [Ray v. Rose, 491 F. 2d 285, 291, fn. 4]

The Court of Appeals summarized "some of the most pertinent" of Ray's long list of factual allegations:

> (1) Hanes had apparently authorized Huie to conduct the investigation of Ray's case. When Ray requested that a professional investigator be hired, Hanes refused.
>
> (2) Ray felt that at trial it would be necessary for him to take the stand in his own defense so that he could explain his actions on the day of the murder. Hanes rejected the idea saying, "Why give testimony away when we can sell it?"[2]
>
> (3) Ray urged Hanes to seek a continuance because of substantial, adverse pretrial publicity. Hanes refused because the contract with Huie provided that they must go to trial within a certain number of days.
>
> (4) When Foreman replaced Hanes as counsel, Ray asked him to hire a Tennessee lawyer to assist in the case. Foreman said that he would retain John J. Hooker, Sr., but he never did.
>
> (5) Despite the urgings of Ray, Foreman refused to take any action to halt adverse, pretrial publicity.

> (6) On February 13, 1969, Foreman brought a document to the jail which he urged Ray to sign. Included therein was an authorization for Foreman to negotiate a guilty plea and also a waiver of any claim against either Huie or Look magazine for damaging Ray's chances for a fair trial. Ray signed the document but gave Foreman a two-page letter listing reasons why he should not plead guilty. Foreman said that it would be in Ray's interest to plead guilty even if he had not committed the crime: First, Ray stood to benefit financially. Second, John J. Hooker[3] would be the next governor of Tennessee, and he would give Ray a pardon within two or three years. Third, the prosecution was prepared to bribe a key witness to testify against Ray. Fourth, Foreman indicated to Ray that if he refused to plead guilty, Foreman would exercise less than his best efforts at trial. Finally, he told Ray that he would not withdraw from the case and that Judge Battle would not allow Ray to change attorneys.
>
> (7) Neither Foreman nor Hanes made any active investigation of the case against Ray.
>
> (8) By letter of March 9, 1969, Foreman agreed to advance $500 to Ray's brother Jerry "contingent upon the plea of guilty and sentence going through on March 10, 1969, without any unseemly conduct on your part in court."
>
> (9) By a different letter of March 9, 1969, Foreman agreed to assign to Ray all income in excess of $165,000 which Foreman would receive from Huie's work. The assignment would take place when "the plea is entered and the sentence accepted and no embarrassing circumstances take place in the court room . . . ."

[Ray v. Rose, supra, at 287-288] This summary focused only upon those allegations relating to ineffective assistence of counsel. The habeas corpus petition also alleged, inter alia, that exculpatory evidence was withheld from the defense and that Ray's capacity to resist the coercive pressures of his attorney was vitiated by his incarceration in solitary confinement under continuous light twenty-four hours a day for the eight months prior to his plea of guilty. Yet on the basis of this summary the Court of Appeals concluded that:

> The allegations we have recited above, if true, would support a finding that Ray's attorneys de-

> liberately compromised their client's interests in order to further the financial success of Huie's works in which they themselves had a substantial interest. Such conduct would constitute an outrageous abrogation of the standards which the legal profession sets for itself and upon which its clients have a right to rely. Clearly, these examples of misrepresentation, coercion and refusal to prepare for trial or protect the petitioner cannot be said to be within the acceptable range of competence of an attorney. Instead, if petitioner's assertions are correct, the actions of his attorneys made his defense "a farce and mockery of justice that would be shocking to the conscience of the Court." . . . . If the allegations of the petitioner are correct, the trier of 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. [Ray v. Rose, supra, at 289]

Respondent now petitions this Court to review the judgment of the Court of Appeals, relying primarily on the grounds that the record in the case conclusively shows that Ray's plea was voluntarily and intelligently made.

ARGUMENT

The Petition for a Writ of Certiorari should be denied for the following reasons:

First. The respondent seeks review of an interlocutory order. Beebe v. Russell, 19 Howard 283, 284-285. This Court has stated: "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." Cobbledick v. United States, 309 U. S. 323, 324-325. "The standards of finality to which the Court has adhered in habeas

corpus proceedings have been no less exacting." Andrews v. United States, 373 U.S. 334, 340, citing Collins v. Miller, 252 U.S. 364, 370. This Court "should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of a cause." American Construction Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372, 384. Petitioner has not claimed that review should be granted in this case to prevent "extraordinary inconvenience and embarrassment," and it is apparent that granting review would be extremely prejudicial to Ray. Ray has been kept in solitary confinement four out of the past five years and the last 21 months straight. Each day of continued confinement in isolation decreases his chances of testifying effectively at his evidentiary hearing. In addition, the death of witnesses makes it increasingly difficult to ensure that Ray will get the full and fair evidentiary hearing he deserves. Two important witnesses are already dead: Judge Battle died shortly after the guilty plea and Public Defender Hugh Stanton, Sr. passed away within the past several weeks. A third important witness, Percy Foreman, remains vigorous but he is also 71 years old.

Second. The Court of Appeals correctly decided this case in accordance with the decision of this Court in Townsend v. Sain, 372 U.S. 293. Ray's habeas corpus petition alleges a multitude of facts in support of the constitutional violations it asserts. Because many of these facts were not before the trial court when Ray's guilty plea was entered, the record made at the time that plea was entered cannot possibly "conclusively show that the plea was voluntary and intelligently made." Petitioner himself concedes that "A full submission hearing will not automatically elim-

inate the need for later fact-finding procedures in every instance." [Petition, p. 5] Where, as here, most of the alleged facts are dehors the record, they cannot be judged "on the merits" without an evidentiary hearing.

Third. The Sixth Circuit decision does not present an important question of federal law for decision by this Court. The decision below is based on sound and well-established principles of constitutional law. Rather than presenting novel and important questions of law, the decision below really turns upon the particular and highly unusual factual allegations contained in Ray's habeas corpus pleadings and exhibits. The proper forum for the resolution of these factual issues is the District Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, James Earl Ray, who is now held in the Tennessee State Penitentiary at Nashville, asks leave to file the attached Brief For Respondent In Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The United States District Court for the Middle District of Tennessee granted Ray's motion to proceed in this cause in forma pauperis. A copy of Ray's affidavit in support of that motion is attached hereto.

Counsel for Ray are not appointed but have in fact represented him since 1970 in all actions instituted to overturn his conviction, both in state and in federal courts.

JAMES HIRAM LESAR
BERNARD FENSTERWALD, JR.
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Counsel for Respondent

APPENDIX

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