UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Mohr

DATE: 9/5/69

FROM : J. J. Casper

SUBJECT: JAMES EARL RAY
IDENTIFICATION MATTER

In an addendum to a memorandum, same caption, of 9/2/69, Trotter to Mohr, suggesting preparation of an interesting identification write-up on captioned case, the statement is made that "the danger of prejudicing a case by publicity only applies prior to and during the actual trial of the case. Publicity cannot prejudice a case in the appeals stage since this stage is concerned only with matters of law rather than fact." The Director underlined this quoted statement and said: "Have we any legal support of this? H."

Strong support for the referenced statement is found in the records of convictions successfully attacked on the ground of prejudicial publicity. Our review of decisions in such cases, from the Supreme Court on down, reveals that the "prejudicial publicity" attack is confined to jury cases. We have not located a single case in which a conviction has been reversed for prejudicial publicity prior to or during a trial before a judge only, or prior to or during an appeal on the legal merits.

The record of the cases reviewed is consistent with constitutional theory. The Sixth Amendment gives the accused a right to trial by "an impartial jury." As the Supreme Court has said, this is a "requirement that the jury's verdict be based on evidence received in open court, not from outside sources." Sheppard v. Maxwell, 384 U. S. 333 (1966). Publicity that is prejudicial prevents the jury from being impartial.

The current campaign against prejudicial publicity seems directed entirely at the pretrial and trial phases, and to assume a jury trial. The controversy generated has been labeled "Fair Trial v. Free Press." Department of Justice restrictions on news release cover " a criminal offense until the proceeding has been terminated by trial or otherwise," forbids anything which might influence "the outcome of a defendant's trial" and adds that "because of the particular danger of prejudice resulting from statements in the period approaching and during trial,

1 - Mr. DeLoach
1 - Mr. Bishop
1 - Mr. Rosen
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REC-63

SEP 17 1969

(CONTINUED - OVER)

SEE ADDENDUM OF GENERAL INVESTIGATIVE DIVISION PAGE 3...

they ought strenuously to be avoided during that period." 28 Code of Federal Regulations 50.2. The American Bar Association Report on "Fair Trial and Free Press" is directed toward the problem existing in jury trial situations. At one point it suggests that in cases in which publicity may have created a problem an alternative would be for the defendant to waive trial by jury "on the theory that a judge is less likely to be susceptible to outside influences." Page 129. Further, in a published discussion between himself and Clifton Daniel of the New York Times, Justice Reardon (Supreme Court of Massachusetts), principal architect of the American Bar Association Report on "Free Trial and Free Press," said "If you will read our report you will see that we are not holding up the release of information until the case has come through the appellate court... The report proposes the withholding of that information until the conclusion of the trial and the sentence of the defendant." Source: "Fair Trial and Free Press," Rational Debate Seminars, American Enterprise Institute for Public Policy Research, Washington, D. C.

The decisions and the law review commentaries also assume the publicity problem to exist in jury trial cases only. The single exception that we found is in a Second Circuit Court of Appeals case in which Judge Clark said, in dictum having nothing to do with the decision, that "Chief Judge Lumbard and Judge Friendly authorize me to state that they agree with the writer that the publication by former special prosecutors of accounts and comments regarding this case and the appellants, while this appeal was pending, was improper." U. S. v. Bufalino, 285 F2d 408 (1960) (the Apalachin hoodlum case).

Conviction does not, of course, end all possibility of a jury trial. If the present conviction of Ray should be reversed and remanded by the Supreme Court, Ray could demand a jury trial the second time around. Prior publicity would then most likely become an issue in the case. But this possibility is not confined to the Ray case. It exists in all cases in which we issue interesting case write-ups, for so long as the convict is serving his term.

The legal problem on whether to issue the proposed publicity at this time boils down to speculation on whether Ray will or will not win a new

trial. If he does not, there is no legal objection to issuing the publicity at this time. If he does, this publicity will most likely be attacked at the trial as prejudicial.

RECOMMENDATION:

None. For information.

Suggest we go ahead and use the proposed Ray write-up.

J.P.Mohr
9/8/69

I Agree - before this case gets muddied up by journalistic vultures and King's supporters.

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D.

I think we should wait to see whether Ray gains a new trial

9/6

I concur.