Dear Jim, 2/28/75

I have a few ideas on what we should now do on the Ray case and on other problems.

First I think we have to estimate what our most serious errors were and then try to figure how to simplify the considerable work that lies ahead.

Long ago I lost any personal satisfaction from being proven right when there were disagreements on what should and should not be done. I look back on the period beginning before the evidentiary hearing joylessly although I am now satisfied that on every issue I was right and despite the decision do feel that had we done what I felt we had to there would have been a different decision.

There is more than enough blame to go around. My own faults are clear to me. Others may feel I was too contentious. My most serious error was not fighting hard enough for what my own experience told me was required, the very obvious need. I can't excuse this to myself now by saying I had to contend with the realities or Bud and Bob. The night I forced the real row and kept them from copping out more than they thereafter did I should have insisted on more, regardless of what Bud would have done.

I can blame myself in other, similar ways. I should have forced issues sooner, been less intimidated by the urgency of the money Bud provided, without which we could not have done all we did.

And I know I was intimidated by the enormity of the load you had to carry. It would have been too much for a Kunstler.

I go into these things to make clear that blame is not now relevant. We both worked hard and well and better than I think could have been expected of most under the circumstances and we have no need to recriminate. If we now do this will be a further self-castration. The one good we can get from review of the past is if we can use that knowledge to influence the future.

Bud ruined us. But if we dwell on that we'll ruin ourselves. We can't build on ashes.

It should now be clear that any consideration for the judge is self-defeating. He has, as reading the decision does not require, given us proof that if he has options he'll exercise them against us. His decision has to be an outrage even if, as I suspect, he has built in grounds for reversal.

Of course I've also had no time to think this through and I do lack almost any knowledge of his decision.

You will remember my uneasiness when we discussed how he would rule once we knew he had finished drafting his decision. I said my emotions were mixed and I was not certain where their influence and reasoning began and ended.

I tend toward simple solutions, simple explanations, to try to avoid the complicated in my thinking if it does not appear that way in my expression. Here it was that he needed little time and few words to find for us within the 6th circuit's mandate. The longer he took the more uneasy I became because the more I feared that he required this time to justify what he knew can t be.

Without reading the decision I now am more convinced of this and the more I do believe that the apporach for which I pressed all along is now the essence of our doctrine in the appeal. It cannot now be merely what we say. It must also be how we say it. I do hope this is what you meant when you said yesterday that the time had come for a J'Accuse. That is a different formulation of what I think. My disagreement would be over "noew." It was beginning with the 6th circuit's decision and out failure comes from not having been doing that ever since.

You can do this and you can do it very well. You will have a few problems and I think this time you will have to take them head on. One will be what you think Bud will stand for and the other is escaping the capitivity of the system of the practise of law

with which all law students are indoctrinated. You will have to do what you will know will offend Bud and Ehlke. You will have to be your own kind of Kunsteler. Not by copiying him but by doing what he does your way. If you are not in keeping withmx your own nature you will fail. You'll have to be natural about it.

To illustrate I recall what I told you only a couple of days ago, what Ed Kabak said of my writing in Post Mortem. You know his living comes from reading the most Establishmentarian and conformist of writing. He said he found the sense of horror I had built in effective and he also liked it. I suggest this as your tone.

In its simplest expression I think our doctrine should be that McRae failed to heed the mandate of the 6th circuit and instead set about doing all he felt he could get away with to frustrate it. We have to lock horns with him on this central issue. Any skirting around it will make the situation of the sixth circuit too difficult. We can't depend on their good disposition. We have to make their finding for us not only possible but easiest and natural. We can do this by taking their final footnote as our gospel and belaboring McRae with his deviltry. I am not suggesting, of course, that we merely flail the copout. I am suggesting that with outrage, with a sense of horror and with many,many specifics we make a case against him as well as the case itself and all in terms of a) this mandate and b) the real consitutional and legal issues. It is here that you much preach the gospel of the end of the meaning of law and justice when all these unprecedented proofsmare tossed aside to perpeutate an also-unprecedented corruption of the entire system. In all of this, which may seem harsh and farout, you also must and will appearm to be he who alone speaks for the system, its vigorous and virile lone champion. We get this away from Ray and onto everyone else in these issues.

From the news accounts it appears that McRae has centered on the Constitutional questions. That could not be better for us because we can then take him up and itck off hos personal failings on that, beginning with what we were supposed to file on the irremedial violations of which he knew.

I would suggest that as you can you make notes of those things you think you want for sure in the record you'll be building. My own view is that we must be overwhelming and eliminate as little as possible. Pump so great a load on the circuit that it can t move around it. I think that if we can sit and talk about these things you'll remember more with least work.

In going after McRae - and strongly as you do t is it will not be improper - you also must go after Haile for his abuses and excesses. His continuing of mail interception can t be excused. His earlier behavior must be condemned.

And I do think that all of this should be in terms of a pro bono defense that centered on two men without means, known to the State which they set about doing all it could to make a defense imposible and outside the law and the courtroom to nullify the orders and decisions and doctrine of the courts as well as justice. Haile has to be hit hard because justice requires it but that should not be unwelcome to the curcuit, which had its own experiences with him.

I do mean that we should sit together and talk together on the issues we'll have to have as a minimum and I do mean the two of us alone. Your appeal will have to have an internal unity. You can test it with the stereotyped views you'll get from Ehlke and others if you want later but this can't be carried off if it is not entirely consistent and entirely honest and passionate, as close as your character will let you get to an emotional defense not of Ray but of the law and our entire system of laws and the viability of the Constitution. McRae has broadened it all for us and given us the pulpit.

Martin Waldron once told me of his growing and increasing admiration for Kunstler as he observed him. I'll encapsulate what he said. Kunstler appears to do the most outrageous, iconoclast things, even to the faces of the most conservative of judges. But he prepares and presents so cogent an argument that he persuades them and in this is and

in the end he is not the radical but the genuine upholder of the law and the system.

Don't even think of any extensive law research. Perhaps not of any at all.

That footnote, that mandate, is all the law you need.

From here on we must deal with fact, with the actualities, with all those endless horros and corruptions of the law and we must inveigh against men of comfort in their personal lives siting back and playing a fairies and needles game with the most basic of rights, with the meaning of the law and its capability of having meaning (with a side mention of what this has meant to and for Ray and us.

You must have the transcript. But you also must not go crasy in time-consuming rehashing of it. You can prepare most of what you'll want to say without it and then fill in with citations.

There must be serious new charges. How McRae screwed us on discovery is one. How he then violated his own rulings to order an untimely discovery against us and crippled our ability to defend ought be in, with the illegal seizure from Ray within his jurisdiction and when Ray was under his protection. Roar like a lion that he tolerated this.

Refusing to rule hostile witnesses were hostile witnesses. Slash at his presumption that Ray had not been framed by those he held not hostile and prove he had been. Illustrate with what we got on our inhibited discovery and then given them a dose of the overt perjury with which we were saddled by this dreamland law, Francisco. We have an airtight case and here we'll need the transcript for exact quotes. We can then go into the pictures we were clearly entitled to and lay another error on McRae. I can get around the lack of thosepictures. (Frank discovery denied essential here because he had those pictures we were denied.) Descrive thosepictures and you and I execute affidavits on Carlisle's refusal to even identify them properly and Oreo's deception of McRae in open court and McRae's ignoring your (unfortinately too low-keyed) telling him he was being deceived and we were being abused.

Here we do try the case in fact and within the successful parrtern I conceived. We did confront all the evidence alleged against Ray, we did present it for cross-examination, and there was not even pro forma cross examination and no pretense at rebuttal. Frazier hid his face, with all thoseothers who dared not show. So we made a record of Ray's innocence, it was not contested and this judge plays games with what at best is a technicality when he has before him unquestooned proof of innocence and of a conspiracy to violate all of Ray's consttitutional rights? He should have done something about these groessest and most deliberate of Constitutional violations, all committed within his jurisdiction, all laid out on the record and tested as the system tests but instead he sanctified them in overt contempt for the curcuit's mandate. We have to lay the proof of innocence before the circuit hard point atop hard point, uninhibitedly and eloquently.

To do these things successfully you can't get bogged down in the transcript and ought not wait for it. You will do it best if you do not wait for the anger and outrage you now feel to stifle itself.

Lay on, Emile! Be Zola!

On Patchen and civil suits: agreed in general but it will require more, beginning with an iron-clad agreement from Ray that also must be completely voluntary on his part.

There has not been time to think this through but considering our circumstances I'm inclined to think we'll have to do it once only, meaning now completely. Everybody. Cowles, Huie, Frank, McMillan, Canale, Rhodes, Dwyer, Foreman, Francisco, Sheriff, Frazier, etc.

I think, back to the appeal, that we should include the Battle story. My notes plus Bubba's incredible account plus what I have from Ryan on tape. I think I can now give this to Martin safely. My work is my own and the rest is in the record now. It might make him a Sunday magazine piece. Best,