Dear Jim,   Ray- discovery: tactics   6/25/74

This is another of those case where I want to make a record I think will interest you. It has to do with how we won some of what we did win in Memphis a week ago.

Lesar has done a first-rate job of preparing motions for discovery. One of the shall I say subversive influences to which he is subject has him understanding that the impossible remains impossible until it is tried and precedents remain precedents until they are overturned. Or, he is not the captive of all the unlearning lawyers ought to do.

In proper legal form, polite language and unprecedented gall he presented the court with unheardof demands for evidence on discovery for the evidentiary hearing, not the trial. We have to get past this to have a trial and we are not now entitled to what we would be entitled to for trial. Nobody has ever asked for as much. It is more difficult because the area is fuzzy, neither really criminal nor really civil rules apply. But there should be no kind of law in which the basic principles of justice do not obtain.

We have tried enough together for Jim to see that often what seems hard is easy and what shouldn't work does. We only discussed what he would ask for. I had nothing to do with the drafting. In fact, until I had to read some, I read none of his stack of about an inch.

There was nothing unreasonable about our demands. There just was no case law to cite. Abe Fortas laid down a principle of sort in Harris v Nelson and it seemed to me that Nixon's Burger enunciated a principle in the tapes decision: the rights of the accused come first.

(Although the last thing we did together before left was his asking me how he could justify some, probably some I'd suggested and forgotten, I was entirely without uneasiness about Jim, for all his inexperience.)

The unknown worried me on many count, ranging from timidity to irrationality. The southern gentleman in Bud can be disastrous, as I had seen. It is one of the reasons for the spectre precedent. How to address this without giving offense and with prospect of success?

Lesar's reading of excerpts from the state's "brief" told me that it had no case, was really desperate and was willing to risk the wrath of the judge. This was enough signal. What Haile did should have offended any decent judge. The readings are that this is such. So, the day Haile was due in Bud's office, 6/16, I got there early and made a few suggestions, having already taken the initiative on the dirtyworks away from Haile with a prompt and specific letter that refuted everything alleged against me. I felt that were Haile to press conflict, the only real issue he permitted himself, he would get clobbered. Didn't know if he is that stupid. Bud felt correctly that the judge would prefer to ignore that nasty irrelevance. I asked Bud to consider the brief, which I had not yet read, and was it any more than personal attack and it hasn't been done before? This was the essence. So, I suggested that our position should be to defend nothing but to take, insist upon and persist in the initiative. Politely and firmly. Other-cheek stuff but no crap, either. Let Haile defend because when they are our motions and we have supplied a basis in writing for all, it is thenceforth his obligation to disprove our need and right. Don't attack, I said, just push straight and hard, southern-g'men style. He agreed, but he has done this often to my face and then done otherwise when alone. This time he didn't. Well, he didn't have to reach Bruce's record but he hit five times on the state extending an invitation to the reluctant former dragons, Foreman, Frank, Hume, etc. They can't subpena more than 100 miles. But they can invite. The fifth time was in chambers. Finally the judge turned to Haile and told him that if Ray takes the stand and testifies and this trio isn't there to refute the judge has no choice under the 6th circuit's madnate. But if these finks show up, there will be a real show and dramatic proof of what we allege. Or perjury that we can probably prove. It worked on this and it did in general. There is almost nothing we asked for that we have not been ordered to have. The state's options are limited. It is appealing to 6th circuit. But this judge has refused to certify it for appeal. He says he will neither oppose or assist, that his skin is tough and he has been reversed before. Haile was really desperate then.

He is limited to alleging error without certification and to the court that ruled so emphatically on conflict of interest and effectiveness of counsel. Jim too one of my arguments, that Foreman is great and didn't perform, and alleged ineffectiveness. (Could one alleged Foreman is incompetent?) One of the allegations of ineffectiveness is failure to investigate. This makes what was not investigated relevant as proof of ineffectuveness by showing what the investigation not made and required, we sayy, to have been made, would show. Or, a theory that entitles us to much of the evidence we'll also need for the trial. Meanwhile, I've also assumed that the Memphis louses have not levelled with the State AG and Foreman certainly didn't. So, as pracise has shown to be effective in FOI assassination cases (and getting while avaiding) this also serves to intimidate the State, which will now learn just how bad a case it has. Or has alr ady learned from Jim's fine filings (and I suggest a little from reading Frame-Up, still not paid for)

There really is nothing we have asked for that ought not be available. Precedent is another matter. However, the judge adopted our reasoning, that these requests were not other than required for a real defense and a real making of a case for the defendant. He has actually ordered what is without doubt the most extensive rights to discovery ever given a criminal defendant. So, by being nasty guys and not giving voluntarily what decent, honest men would and should, if he loses an appeal he has established a precedent that will make him the devil of prosecutors for years to come and a saint to defendants seeking records withheld from them. As one of my notes indicated, this thus becomes a boon to the ACLU, which sees it that way and will file amicus.

In essence the judge took the Burger line, the rights of the defendant are predominant. What he turned down was old, inconsequential and will have to be produced (says this barrister without consultation with his official lawyer) if the state produces the only other witnesses who can testify to them. Like we've got the windowsill that had been memory-holed simply because they did not dare say that what was sealed had been disposed of. But not the dents one it. Well, they were punk investigators. When they took the windowsill out (the wrong side, by the way), I went, took my own pictures having learned this from wire photos, and lo, some accommodating cop or agent left a piece for me. It is nice soft wood driftwood and the sworn statement is that it held "microscopic" markings from the rifle barrel. (Shooting the moon, no doubt!) What fun, what fun there will be!

We are getting Judge Battle's records, including diary, all we knew of. It turns out that there were two sealed cases! And that stupidity Haile let it slip that the widow blames the prosecution for his death. All are now agreed that my suspicion seems close, that the real reason the prosecutor was running back and forth to Battle's chambers- Beasley found Battle dead with his chest on Ray's demand for appeal and counsel - was to pressure him not to grant Ray the automatic new trial he is required to be given if he asked in 30 days of the sentencing judge. So, we expect that there will be some note indicating Battle's determination that Ray was entitled to and would be given a trial. What makes it even better is that the judge is going to examine these records in private in camera. He'll get a real headfull!

There is more but this indicates the magnitude of our accomplishment. It would have been impossible if Jim had been intimidated by his training or limited in his willingness to listen, learn and consider for himself. And, of course, without the thousands of hours of work invested. Really thousands. Ed Williams just got $750,000 for less time.

When the first discovery material is available I'll go with Jim to go over it. Haile will raise hell, but the state has recognized me as the official investigator and we'll go right to the court if he pulls it.

We'll never know, but I have a notion that the point by point refutation of Haile's stupid charges against me plus their earlier and rottener version in my letters attached, regardless of whether he liked the fact or the form, told the juuge all he had to know. He told Haile he had received my letter and Haile said nothing. That clinched it, I think. By then Haile had declined to question me after saying he wanted to, declined my offer to go into his jurisdiction and under oath, and he had never made any investigation before making those charges. The ludge pointed it all up when Haile complained that we would show the discovery material to Ray and Ray would then lie about it. Said the judge, I would never assume that Mr. Ray would perjure himself. He wongt. I have all the relevant on dated tapes, with the state having all the records of my coming and going (and I expense accounts).

Looks better than ever because we worked and we tried, including what hadn't been.