IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE,	)	
	)	
Appellant,	)	
	)	SHELBY COUNTY
v.	)	C.C.A. NO.
	)	02C01-9703-CR-00107
JAMES EARL RAY,	)	
	)	
Appellee.	)	

ON APPEAL BY PERMISSION FROM AN ORDER
OF THE SHELBY COUNTY CRIMINAL COURT

APPLICATION FOR EXTRAORDINARY APPEAL
AND EMERGENCY STAY PURSUANT TO T.R.A.P. 10

JOHN KNOX WALKUP
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

KATHY MORANTE
Deputy Attorney General
425 Fifth Avenue North
2d Floor, Cordell Hull Building
Nashville, Tennessee 37243-0493
615-741-6439
B.P.R.No. 9616

The State of Tennessee makes application, pursuant to Rule 10, Tennessee Rules of Appellate Procedure, for permission for extraordinary appeal and a stay of two orders issued by the lower courts. First, the State seeks extraordinary appeal and a stay of an order entered on August 18, 1997, by the Honorable John P. Colton, Jr., Judge of Division III of the Criminal Court of Shelby County. In that order, Judge Colton asserts that he has "original jurisdiction" in the case and that he has received information that there are individuals who "claim to have evidence of a conspiracy to kill Dr. Martin Luther King, Jr." The order grants Mike Roberts, a law professor and Special Master, the power to issue subpoenas and take testimony "concerning allegations of a conspiracy to kill Dr. King by any person, whether a defendant, co-defendant, or indicted person." The order also provides that the testimony shall be taken *ex parte* before a court reporter, that such testimony shall be sealed and filed with the clerk of the court and that this court "shall not see the testimony taken." (Addendum A)

In addition, the State seeks extraordinary appeal and a stay of an order entered by the Honorable Joe B. Brown, Judge of Division IX of the Criminal Court for Shelby County on August 11, 1997. That order required the District Attorney General to make a claim for evidence in the possession of the Federal Bureau of Investigation and further requires that the State appear

on August 19, 1997, at 11:00 a.m., at which time it must be "prepared to present the Court with expedited proposals" for further testing. (Addendum B) The State would show as follows:

1. On April 9, 1997, this Court entered an order providing that Ray's request to reopen his prior post-conviction petition was premature and therefore should be denied. The Court further held that the "trial court has discretionary, plenary authority over physical evidence in its possession." The State did not seek review of that order in the Supreme Court.

2. Since the entry of that order, there have been numerous hearings before Judge Brown. The rifle has been test-fired and the experts appointed by the court concluded that the results were inconclusive, the same conclusion reached by the FBI some 28 years ago.

3. Additional hearings were held after the tests were conducted. Judge Brown requested that counsel for the State and Ray attempt to locate the bullet that killed the Rev. Dr. Martin Luther King, Jr. It was subsequently determined that the bullet is in possession of the FBI in Washington, DC.

4. On August 11, 1997, Judge Brown entered an order providing in part:

> THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that John Hancock, Special Agent in charge of the Memphis office of the Federal Bureau of Investigation (FBI) to [sic]

> request that these items, the test-fired bullets, and the laboratory bench notes, from his Washington headquarters and be produced in this Court on August 19, @ 11 am 1997, for inspection by all parties in this cause. Furthermore, this Court orders the District Attorney-General [sic] for the 30th Judicial District to make its legitimate claim for these items, as the 1968-69 prosecution team from this office would have been legally obligated to obtain these evidentiary materials and produce them in court had the murder trial of Petitioner JAMES EARL RAY had [sic] gone to trial as originally intended. (Addendum 2).

5. While these proceedings were occurring in Division IX, Judge Colton in Division III appointed a Special Master to investigate why the matters relating to the Ray case were being heard by Judge Brown. (Addendum C). Based upon information received from the Special Master, Judge Colton entered an order requiring that the Ray file be returned by Judge Brown to the clerk. (Addendum D).

6. On August 18, 1997, Judge Colton entered an order appointing Special Master Roberts to issue subpoenas and take *ex parte* statements on whether there was a conspiracy to kill Dr. Martin Luther King, Jr.

7. Both Judge Colton and Judge Brown quite clearly lack any legal authority to enter the orders they have entered. This Court held in its April 9, 1997, order that "the request to reopen the petition for post-

conviction relief is premature and, therefore [is] denied." The only "action" currently pending in the lower courts is a motion pending in Division IX filed by Ray for testing and a motion to dismiss filed by the State. No actions are currently pending in Division III.

8. Further, even if Ray were to file a motion to reopen his prior post-conviction petition, this Court correctly held in its April 9 order that a motion to reopen is not a "discovery device" and, accordingly, Ray's "attempt to proceed via the post-conviction statute to obtain physical evidence for testing must fail." (Order at p. 3). Judge Brown appears cognizant of the fact that no proper legal action is pending before him since he has asserted orally and in his order, that "it" [the ongoing Ray action] is a "fact-finding and not adversarial process." But Judge Brown does not set out what authority he has to operate as "fact-finder" separate and apart from a pending case. There is, of course, no authority in Tennessee for a court to act as an historical fact finding commission whenever it feels it would like to gather evidence on a particular subject.

9. Similarly, Judge Colton has no authority to appoint a special master, grant subpoena power and order *ex parte* testimony to be taken when there is no case pending before him. There is no legal procedure in Tennessee to support such an action.

10. This Court held in its April 3 order that a trial court could order testing of evidence in its possession. This Court concluded that the real issue at that point was the "trial court's discretionary authority to control exhibits or evidence in custody of the court or the clerk's office." The Court concluded that a trial court has the "discretionary, plenary authority to determine whether a party can obtain custody of *evidence in the clerk's office.*" (Order at p. 5, emphasis added).

11. The "plenary, inherent" authority of a trial court to control evidence in its possession does not and cannot extend to "evidence" that is not in its possession. Further, a trial court has no authority to order a member of a federal agency to do anything when there is no properly pending case before it. Similarly, Judge Brown has no authority to order the State of Tennessee to obtain the bullets or any other piece of alleged "evidence" when no case is pending before it.

12. To permit either division of the Shelby County Criminal Court to engage in some sort of "non-adversarial fact-finding" process or procedure to determine if there was a conspiracy does substantial harm to the system of justice. There is no legal authority for such a procedure. Further, no matter what label is placed upon the actions of the lower court, these actions quite clearly violate the intent and plain requirements of the Post-Conviction

Procedure Act. The Act does not allow a prisoner, some 28 years after pleading guilty, to engage the courts of this State in a "non-adversarial, fact-finding process" to try to prove that he should have a new trial. The orders of Judges Brown and Colton ignore the post-conviction statute and, if permitted to stand, would create a new process cut out of whole cloth for setting aside convictions that are long since final.

13. Finally, the actions of the lower court as reflected in the orders of Judges Brown and Colton, are doing harm to the justice system because of the confusion they have engendered. The public can have no confidence in the reliability of any decisions which may eventually be entered in the wake of these orders. This Court should intervene to halt both proceedings since they lack any legal authority whatsoever and are doing a serious disservice to the system of criminal justice in this State. The State will suffer substantial and irreparable harm if these proceedings are not halted.

The State therefore requests as follows:

1. That the Court grant an immediate stay of all proceedings in Divisions III and IX of the Shelby County Criminal Court relating to James Earl Ray, including the hearing set for August 19, 1997, at 11:00 a.m.

2. That the Court enter an order clarifying that neither division of the Shelby County Criminal Court has the authority to enter on a fact

finding mission when there is no case before it that would legally permit such an investigation and hearing.

3. That the Court instruct the Shelby County Criminal Court that no further proceedings are appropriate in this matter unless and until Mr. Ray files a Motion to Reopen properly supported in compliance with the requirements of the Post-Conviction Procedure Act.

4. For entry of such other orders the Court deems appropriate.

Respectfully submitted,

JOHN KNOX WALKUP
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

KATHY MORANTE
Deputy Attorney General
Criminal Justice Division
425 Fifth Avenue North
Second Floor, Cordell Hull Building
Nashville, Tennessee 37243-0493
(615) 741-6439
B.P.R. No. 9616

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by fax and first class mail, postage paid, to Dr. William Pepper, 125 Finsbury Pavement, London, England, EC2A1PA United Kingdom, 01441716381190; James McNeill, 147 Jefferson Avenue, Memphis, Tennessee 38103; Wayne Chastain, 66 Monroe No. 8004, Memphis, Tennessee 38103, and Mike Roberts, 195 South Goodlett, Memphis, Tennessee 38103, on this the 18th day of August, 1997.

KATHY MORANTE
Deputy Attorney General

IN THE CRIMINAL COURTS OF TENNESSEE FOR THE 30th JUDICIAL DISTRICT SITTING AT MEMPHIS, SHELBY COUNTY DIVISION IX

JAMES EARL RAY,
Petitioner,

v. P - 12434

STATE OF TENNESSEE

PRELIMINARY FINDINGS OF FACT AND INTERIM ORDER

This matter comes before this court as the petitioner's seventh petition for post conviction relief. After various appellate proceedings had upon this matter and his subsequent petition to re-open his initially denied petition, on April 0, 1997, The Court of Criminal Appeals issued an order directing this court to allow testing of the weapon belonging to the petitioner that is alleged to have killed the late Dr. Martin Luther King, Jr. On April 22, 1997, the state's application for extraordinary appeal pursuant to T.R.A.P. 10 and for clarification of the assignment of this matter to this court was denied.

This patience of this court has been very sorely tried by the actions of both the petitioner and the state. The court's tolerance of further delay is at an end and this matter will move forward with alacrity. This is a fact finding and not adversarial process at this point and this court will expect counsel for all parties to concentrate their efforts as officers of the judicial system to the ends of advancing a more through and accurate understanding of the facts relative to the question of whether or not the petitioner's rifle is or is not the murder weapon.

From the pleadings, evidence and testimony; statements, remarks and arguments of counsel, and from the record as a whole, this court makes the following preliminary findings of fact:

1) A very brief and unsupported report submitted by the F.B.I. approximately twenty-eight years ago purporting to be an analysis conducted for the state of the ballistic material and evidence in this case appears to contend that:

a) The death bullet removed from Dr. King's body was too badly mutilated to permit ballistic analysis and match with the alleged murder weapon.

b) A basal metallurgical analysis of the death bullet revealed that it was not of the same lot as the bullets in the five unfired cartridges found associated with the alleged murder weapon.

e) A spent cartridge case found in association with the alleged murder weapon was fired from the weapon. Further, this case appeared to have been of the same lot as the cases of the five unfired cartridges that were analyzed.

2. As the practice of ammunition companies is to load all cartridges in the same lot of ammunition with uniform lots of both cases and bullets, the alleged deviation of the death bullet from the bullets loaded in the cartridges in the rest of the ammunition in question taken in conjunction with the spent cartridge case raises very troubling inferences.

3. The recent expert testimony in this cause directly contradicts the F.B.I. assertions and contends that the death bullet in this case appears to be in excellent condition for ballistic analysis and comparison.

4. Analysis following the recent firing of the rifle reveals:

a) Of eighteen (18) test bullets fired, twelve (12) bullets have a common characteristic denoted as a reference point:

b) This characteristic is not present on the death bullet:

c) This characteristic is due to either a flaw or feature of the petitioner's rifle or to metal fouling in the bore of the rifle. Further:

d) The rifle appears to be badly fouled. Further:

e) If this characteristic is due to a flaw or feature of the petitioner's rifle, it may be the result of feature that was present at the time of the killing of the later Dr. King or the result of damage that the rifle has suffered since.

5. Cleaning of the rifle in an appropriate fashion will not damage the weapon nor impact the imparted characteristics of the bore upon any future sample bullets fired through it.

6. A device known as *Foul Out* marketed by a company known as Outers works on a reverse electroplating process and would not harm the bore in the process of a thorough cleaning.

Further:

7. Expert testimony offered by the petitioner and the state contends that a modern analysis of the test bullets fired by the F.B.I. in their initial procedures would be helpful in reaching a conclusion as to weather or not the petitioner's rifle is the murder weapon.

8. The court is advised that the four (4) sample bullets fired by the F.B.I. in their initial round of tests have been discovered in a storage room at F.B.I. facilities.

9. The best way to authenticate these samples would be by comparison with known samples from recent tests.

Further:

10. The expense incurred during the course of these proceedings is relatively minor. The sum of money involved is approximately that of a retainer for the defense of a mid-level felony case; the fee in a middle-class contested divorce proceeding; or a small fraction of the cost of a network television camera lens.

Further:

11. Allowing the Honorable Jack McNeil to withdraw as substitute counsel for the Honorable Wayne Chastine appears likely to alleviate problems the petitioner has been having with prosecuting his case.

12. The state appears singularly opposed to vigorously proceeding to ascertain the true facts of this case and by specific remarks and arguments, appears to be further opposed to recognizing let alone protecting the interests of the family of the victim, the late Dr. Martin Luther King, Jr.: Pursuant to relevant statute and case law, it may be appropriate to appoint either a Master or Special Prosecutor to achieve a neutral, detached and vigorous pursuit of the facts in this case.

13. All papers, documents, pleadings, and reports in this cause were filed with the Office of the Clerk of the Criminal Court, the Honorable William Key up until the beginning of July 1997 when this court ordered that all further matters pertaining to the written report of the tests of the rifle ordered by this court were to be filed directly with the court to prevent piecemeal release of the purported facts. That order has been subsequently dissolved and it would appear that no more than approximately ten (10) filings were made with the court pursuant to its order Further, it would appear that the entire file was in the custody and control of the office of the Clerk and provided to Division VIII of these courts, the Honorable Cris Craft presiding, on or about April 15, 1997.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that on August 19, 1997, at 11:00 a.m., counsel for the parties to be heard and prepared to present the court with expedited proposals to implement such of the finding set forth above as may be found appropriate by the court.

Joseph B.Brown, Jr.,Judge Division IX

7/9/97

Date

FILED 8-11-97
WILLIAM R. KEY, CLERK
BY Cwalls D.C.

ADDENDUM C

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

DIVISION III

STATE OF TENNESSEE

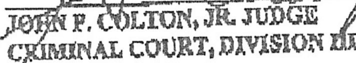
VS. : INDICTMENT NO: 02C01-9406-CR-00119
P-9963

JAMES EARL RAY

ORDER APPOINTING SPECIAL MASTER

This Court having original jurisdiction in this cause appoints Mike Roberts, a Professor of Law, to advise the Court on matters of proceedings in this cause.

Professor Roberts shall act at the direction of this Court and report promptly to this Court on such matters as this Court deems appropriate.



JOHN P. COLTON, JR. JUDGE
CRIMINAL COURT, DIVISION III

7-28-97
DATE

FILED 7-24-97
WILLIAM R. KEY, CLERK - ...
BY ... D.C.

ADDENDUM D

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

DIVISION III

STATE OF TENNESSEE

VS. INDICTMENT NO: 02C01-9406-CR-00119
P-9963

JAMES EARL RAY

ORDER TO CLERK OF THE COURT

This Court having original jurisdiction in this cause and having appointed as Special Master, Mike Roberts, a Professor of Law, to advise the Court and report on such questions as this Court deems appropriate and having read the August 5, 1997, Emergency and Partial Preliminary Report of the Special Master, a copy of which is attached hereto and incorporated herein by reference, finds that the Record in this cause is not being kept by the Clerk in compliance with Local Rule 6.09 and hereby Orders the Clerk to immediately collect, assemble and maintain in the Office of the Clerk the entire Record in this proceeding, including all documents and evidence presently at whatever location.

IT IS SO ORDERED.

JOHN P. COLTON, JR., JUDGE
CRIMINAL COURT, DIVISION III

DATE: 8-5-97