TO THE JUSTICES OF THE
TENNESSEE COURT OF CRIMINAL APPEALS
HOLDING COURT AT KNOXVILLE

JAMES EARL RAY

VS.

STATE OF TENNESSEE

ANCILLARY

PETITION FOR CERTIORARI

The merits of this appeal involve matters which have previously been addressed to the Honorable Arthur C. Faquin, Judge by interchange of the Criminal Court of Shelby County Tennessee, Division III.

Your petitioner urges that Justice Faquin was in error in refusing to either grant or even acknowledge the existence of a motion for a new trial when asked for and for denying your petitioner all rights of appeal from his findings.

More specifically, your petitioner would point out to the Court that the petitioner, James Earl Ray, was charged with the murder of Dr. Martin Luther King, said murder being in the first degree. The trial on this matter was had upon March 10, 1969, in which a jury was empaneled; and the jury apparently approved a 99 year sentence (which, it is claimed, was agreed upon). However, on March 31, 1969, Judge Battle died.

On March 13 and March 26, the petitioner James Earl Ray, wrote Judge Battle requesting an appeal. Upon May 26, a hearing was had upon a motion for a new trial and the State's Motion To Strike. The State urged that petitioner's motion should be entitled "Motion For a New Trial" for, as the State claims, there was never a trial in the first place; and without a trial, there could be no motion for a new one, or an appeal from one. The Court obviously accepted this "logic" and stated that it was hearing the State's motion upon two theories: 1) that there is no

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motion for a new trial from a guilty plea; and 2) that the defendant waived any right he had to a motion for a new trial and an appeal. Upon page 4 of his memorandum opinion, the Judge states, "I do not, as a successor Judge, have the right to hear a Motion for a new trial or approve and sign the Bill of Exceptions." (Citations omitted) Your petitioner urges that though Judge Faquin is quite right that he did not have the authority to approve or sign the Bill of Exceptions, he did have both a right and a duty to hear and act upon a Motion for a New Trial; his acts being superscribed by T.C.A. 17-117 and the fact that he was unable to approve another Judge's Bill of Exceptions (a sine qua non for appeal).

The defense is unable to fully follow the logic of Judge Faquin's sixteen-page opinion of June 6, 1969, but it is evident in reading therefrom that the Honorable Judge Faquin against precedent of laws and in direct contravention of T.C.A. 17-117 held that: 1) The Court found as a matter of fact that the alleged guilty plea had the factual and legal prerequisites to make it valid; and 2) that Ray voluntarily entered a guilty plea (which is not true), and that such plea constituted then and there such waiver as would forever preclude a motion for a new trial, a hearing for a new trial, or an appeal. (See opinion hereto attached, page 16.) Petitioner, of course, excepts to all of the Judge's holdings.

The Court states that the petitioner is not using habeas corpus or post conviction process. This is absolutely true, for the motion as brought before Judge Faquin was brought as a Motion for a New Trial and under no other procedure. Though the petitioner has adequate grounds to show that his plea and/or waiver were involuntarily made (i.e. the petitioner's statement made in open court May 10, 1969) and further documentary proof, such evidence could not be addressed to Judge Faquin in view of the fact that he was not the presiding Judge and was, therefore, not able to hear such proof or sign the Bill of Exceptions.

As stated above, the Court found "as a matter of fact" that Ray had the prerequisite knowledge. It indeed states that

it finds this opinion after "a full evidentiary hearing on this matter." The Judge, in fact, denotes his opinion as "Memorandum Finding of Facts and Conclusions of Law."

Your petitioner presented no proof whatsoever and did, in fact, object to each and every element of proof brought before the Court. The logic of not allowing one Judge to sign another's minutes and Bill of Exceptions is directed to just such a case as this. The only Judge who could have a legal opinion as to whether the alleged confession was voluntary or not would be the Judge who heard the same.

It is therefore urged that the Honorable Arthur Faquin erred in disallowing Ray a motion for a new trial and also erred in refusing him an appeal. (See T.C.A. 17-117) This is evident from the matters herein stated and the Judge's opinion hereto attached.

WHEREFORE, PETITIONER PRAYS:

1. For Writ of Certiorari reviewing said actions of the Court as evidenced in its Memorandum Finding of Facts and Conclusions of Law.

2. That petitioner's motion be held to be a Motion for a New Trial, as captioned.

3. That the Judge's decision refusing to hear such a motion be overruled.

4. That the hearing of May 26 be construed as a hearing determinative of petitioner's Motion for a New Trial.

5. That the Judge's finding that the petitioner exhausted his right to move for a new trial or appeal when he plead guilty on March 10 be overruled.

6. That this, the Criminal Court of Appeals, find that the petitioner is indeed eligible for a new trial as a matter of law.

7. That this matter be remanded to the Criminal Court of Shelby County for a new trial on the merits.

Robert W. Hall

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

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Respondent

SHELBY COUNTY CRIMINAL COURT

NO. _____

REPLY TO PETITION FOR CERTIORARI

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REPLY TO PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

A petition for certiorari has been filed before this Court seeking a review of a judgment from the Criminal Court of Shelby County, Tennessee, striking petitioner's motion for a new trial.

In the petition, eight (8) grounds are set out to justify the granting of the writ of certiorari. The substance

of these grounds is (1) the trial judge erroneously permitted the introduction of testimony by the clerk of the court reciting pertinent portions of the proceedings in the criminal cause; (2) the trial judge erroneously held that two (2) letters written to the trial judge prior to the trial judge's death did not constitute a motion for a new trial; and, (3) the trial judge erroneously held that the entering of a plea of guilty by the petitioner in the criminal proceeding effected a waiver of his right to a motion for a new trial and for an appeal.

In the memorandum of authorities in support of the petition for certiorari, it is insisted (1) that petitioner is entitled to a new trial because of Section 17-117, Tennessee Code Annotated, which is as follows:

> "Whenever a vacancy in the office of trial judge shall exist by reason of the death of the incumbent thereof, or permanent insanity, evidenced by adjudication, after verdict but prior to the hearing of the motion for new trial, a new trial shall be granted the losing party if motion therefor shall have been filed within the time provided by rule of the court and be undisposed of at the time of such death or adjudication."

and, (2) that the plea of guilty does not forfeit or waive petitioner's right to a new trial, appeal, etc.

Before discussing the grounds set out by the petitioner, it may be that this Court is concerned about its authority to

grant writs of certiorari to the criminal courts of this State. This question, the State submits, has been determined by the Supreme Court in the case of Tragle v. Burdette, ___ Tenn. ___, 438 S.W.2d 736. An excerpt from that case, at page 737, is as follows:

> "The petition must be denied for a second reason which is, that it should have been addressed to the Court of Criminal Appeals. The petition erroneously assumes that if the case is habeas corpus, appeal must be to this Court. T.C.A. § 23-1836 provides that appeal in habeas corpus shall be ' * * * to the proper appellate court * * *.' This can only mean that an appeal in cases essentially civil in that they do not involve detention because of an alleged criminal act, shall be made to the Court of Appeals; and that cases which are essentially criminal in that they involve detention for the commission of a crime, shall be to the Court of Criminal Appeals. By T.C.A. § 16-448, the Court of Criminal Appeals is given appellate jurisdiction of all criminal cases. Consistent with this Statute, it is the settled practice for habeas corpus appeals to be made to the Court of Criminal Appeals."

This view is supported by an earlier opinion of the Supreme Court, Hayden v. Memphis, 100 Tenn. 581, 585, in the following language:

> "Not content, however, with leaving the right to the writ of certiorari to depend upon the principles of the common law, as they had been liberally applied in modern jurisprudence, it was guaranteed to the citizens of this State by the Constitution of 1834, and again by the present Constitution. In addition, the Legis-

> lature has sought to make effectual this constitutional right in Code (Shann.), Secs. 4853, 4854, so that now it is well established in this State that 'the writ of certiorari will lie upon sufficient cause shown, where no appeal is given, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally when, in the judgment of the Court, there is no other plain, speedy, or adequate remedy.' Tomlinson v. Board of Equalization, 4 Pickle, 1, 12 S. W. 414."

(NOTE: Sections 4853 and 4854, recited in the foregoing excerpt, are what are now Sections 27-801 and 27-802, Tennessee Code Annotated, often referred to by the judges and lawyers of this State as the common law and statutory writ of certiorari, respectively.)

Article VI, Section 10 of the Constitution of Tennessee, as this Court well knows, only provides for the writ of certiorari in civil cases but the Supreme Court has held that the remedy by writ of certiorari in criminal cases was so clearly established before the adoption of the Constitution it was the purpose of this provision to extend the writ to civil cases since that had been questioned by the courts of our mother state, North Carolina. State v. Solomons, 14 Tenn. 359. The Solomons case, of course, was written prior to the present Constitution but by Article XI, Section 1, all laws in force in this State at the adoption of the present Constitution shall remain in force until they expire or are changed by the Legislature. There is nothing in

the Code which deprives this Court of the authority to grant the writ of certiorari. Finally, with deference to this Court, as a practical matter it is not of great significance because if this Court does not have the right to grant the writ of certiorari, the Supreme Court has such a right and has exercised it in criminal cases too numerous to require that any be cited and mentioned. There is little doubt but that this case will finally be determined by that Court either on certiorari from this Court or the trial court. The State insists that the question for this Court to determine is whether or not it should grant the writ.

In determining whether or not the writ should be granted, it should be kept in mind that it has become well-established law in this State that the writ of certiorari is not granted as a matter of right but it is a matter that addresses itself to the discretion of the Court. State ex rel. Karr v. Taxing District of Shelby County, 84 Tenn. 240; Ashcroft v. Goodman, 139 Tenn. 625; Gaylor v. Miller, 166 Tenn. 45; Biggs v. Memphis Loan and Thrift Co., Inc., 215 Tenn. 294; and, Boyce v. Williams, 215 Tenn. 704.

Applying the foregoing rule, it is insisted that the trial judge properly struck the motion for a new trial. It is not alleged in the petition that petitioner's plea of guilty in

the criminal proceeding was irregular in any respect or that it was not made freely and willingly after knowing the consequences of such a plea. Nothing is alleged in the petition to support the complaints made. There are no factual allegations to show why the trial judge erroneously admitted the testimony relative to the petitioner's confession. The letters written by the petitioner to the trial judge in the criminal proceeding and the amended motion for a new trial are not attached to the petition but are made exhibits to the memorandum of authorities in support of the petition, but these documents add no factual allegations to the petition. The first letter is to the effect that the petitioner "wanted to go the thirty day appeal route." The other letter was similar and the amended motion for a new trial remaining after withdrawing by counsel for petitioner all of it except the conclusion petitioner was entitled to a new trial because of Section 17-117, Tennessee Code Annotated, states no relevant circumstances. Two (2) pages of the proceeding on the motion to strike the motion for a new trial are attached hereto to show the Court the portion of the motion for a new trial withdrawn by counsel for the petitioner. So, really, the only questions remaining are whether or not petitioner is entitled to a new trial as an abstract proposition of law because the judge who sat during the criminal proceeding became deceased prior to hearing the motion for a new

trial and whether or not the entering of a guilty plea amounted to a waiver of a motion for a new trial and appellate remedies.

Section 17-117, Tennessee Code Annotated, referred to above, was never intended to apply to this type of case. That section of the Code was intended to apply in cases where errors are insisted upon which occurred during the criminal proceeding. In such cases, the trial judge is the thirteenth juror and is in better position to determine the truth of the testimony and the fairness of the trial than a successor judge since he heard the witnesses testify, noted their demeanor and was in a position to be familiar with many details of the case that a successor judge could not be. In the present case, there were no proceedings before the trial judge other than a guilty plea and, if it was intended to be alleged or was alleged in the motion for a new trial that the petitioner's plea of guilty resulted from pressure by his privately retained counsel, a successor judge is in as good a position to determine that fact as the judge who sat in the criminal proceeding.

Counsel for the petitioner cites and discusses a number of cases in support of his position. Perhaps the nearest one is Swang v. State, 42 Tenn. 212. In that case, it apparently was alleged and proven that the defendant pleaded guilty under a total misapprehension of the law. Thus, his agreement to plead

guilty was based upon a condition contrary to the law. For this reason, it is insisted that the Swang case is not applicable in the present case because there are no allegations in what is contended to be the motion for a new trial, the petition or the brief. Only a naked proposition of law is asserted in the present case.

It may be that the petitioner would have this Court believe he was pressured into pleading guilty by his privately retained counsel although there is nothing to that effect before this Court; but even if that were true, there would still be no grounds to justify the granting of the writ in this cause.

The Supreme Court of this State has recently held in the case of State ex rel. Richmond v. Henderson, ___ Tenn. ___, 439 S.W.2d 263, 264, as follows:

> "This rule has been applied to any number of situations arising in a criminal case, including that situation involving the advice or urging of defense counsel for the defendant to enter a plea of guilty. In cases in which this exercise of judgment by counsel (that of urging a defendant to enter a plea of guilty) has been attacked, it has uniformly been held that this is not a ground for invalidating the judgment. Davis v. Bomar, 344 F.2d 84 (6th Cir.), cert. denied 382 U.S. 883, 86 S.Ct. 177, 15 L.Ed.2d 124 (1965); Application of Hodge, 262 F.2d 778 (9th Cir. 1958); Shepherd v. Hunter, 163 F.2d 872 (10th Cir. 1947); Crum v. Hunter, 151 F.2d 359 (10th Cir. 1945), cert. denied, 328 U.S. 850, 66 S.Ct. 1117, 90 L.Ed. 1623; Diggs v. Welch, 80 U.S.App.D.C. 5, 148 F.2d 667, cert. denied, 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002."

The Supreme Court in McInturff v. State, 207 Tenn. 102, 106, made the following statement with respect to an appeal from a plea of guilty:

> "Now, we think it is axiomatic that the defendant, having confessed judgment for the fine and costs, had no right of appeal, nor did the court have the power to grant such an appeal, because no one can appeal either in a criminal or a civil case from a verdict on a plea of guilty or a judgment based upon confession of liability."

There is nothing about the McInturff case to indicate that it is not to be taken literally nor is the foregoing excerpt a matter of dicta. It was one of the grounds justifying the trial judge's refusal to grant the defendant in that case a new trial.

It may be that the Supreme Court of this State will make some additional explanations of this portion of the McInturff case when such a matter is presented to it but until that is done, it is submitted that the question is foreclosed to this Court.

Perhaps the basis for the decision is that once the Defendant waives a right to trial by pleading guilty after having been properly advised of his rights, there is nothing to appeal from, as suggested above. This would be a good place to apply Sections 27-116 and 27-117, Tennessee Code Annotated, except the Supreme Court in Hickerson v. State, 141 Tenn. 502, has held that those statutes only apply when the Court can look at the whole

case. However, those statutes represent what the practice was prior to their enactment, Munson v. State, 141 Tenn. 522, and this does not suggest that something similar to the harmless error doctrine is precluded from consideration by an appellate court, and since the granting of a new trial, an appeal, etc., would be such a frivolous procedure, the State insists that it should not be done. It would seem that the law never should require courts to do frivolous things.

In view of the foregoing, the State insists that the petition for writ of certiorari in this case should be denied.

RESPECTFULLY SUBMITTED,

Thomas E. Fox

THOMAS E. FOX
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to Petition for Certiorari were handed to Honorable Richard J. Ryan, Attorney at Law, Falls Building, Memphis, Tennessee, and Honorable Robert W. Hill, Jr., Attorney at Law, Suite 418, Pioneer Building, Chattanooga, Tennessee, on this the 15th day of July, 1969.

Thomas E. Fox

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