IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

JAMES EARL RAY Petitioner	
v.	COURT OF CRIMINAL APPEALS OF TENNESSEE
STATE OF TENNESSEE Respondent	SHELBY COUNTY CRIMINAL COURT

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REPLY OF STATE TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

A petition for certiorari in this cause has been filed seeking a review of the judgment of the Court of Criminal Appeals dismissing a petition for certiorari asking that court to review the record in the criminal proceeding denying the motion for a new trial in a judgment of the Criminal Court of Shelby County,

Tennessee, in which petitioner was sentenced to ninety-nine (99) years in the State Penitentiary for the death of the Reverend Martin Luther King.

In reply to this petition, counsel for the State submits the following portion of his reply to the petition for certiorari before the Court of Criminal Appeals:

"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 are 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 statute 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."

(NOTE: The letters written to the trial judge and the amended motion for a new trial are attached to the petition for certiorari to this Court rather than

made exhibits to the memorandum of authorities as was true in the case before the Court of Criminal Appeals. See p. 3 of this brief.)

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

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing reply have been mailed to:

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on this the 12 day of October, 1969.

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