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Memorandum of Petitioner

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

SAMUEL H. SHEPPARD Petitioner	)	
-v-	)	CIVIL ACTION
E. L. MAXWELL, Warden Respondent	)	No. 6640

MEMORANDUM OF PETITIONER

1. Preliminary Statement:

The Court has asked for a memorandum addressed to the question outlined below, and such authority as has been found is presented therein. In view of the flood of habeas corpus petitions which annually inundate the District Courts, many of which are frivolous but nonetheless take the valuable time of overburdened Judges, several comments on this particular case seem appropriate. For as Mr. Justice Jackson has stated, concurring in Brown v. Allen, 344 U.S. 443, 536-37:

> "This Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of lower courts and swell our own. . . It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

Whereas state prisoners acting pro se may be disposed to file petitions notwithstanding the fact that they have been accorded every ounce of due process which the law contemplates in the course of state proceedings, and whereas it is no doubt the pro se petitions which cause the flood of the dockets, the situation is quite different where responsible counsel are concerned. This is not to say that cases wherein lawyers are involved should be given any sort of special treatment for that reason; indeed, lawyers may be guilty of bringing groundless petitions just as prisoners act-

ing pro se may bring petitions which have merit. But it ought at least to be assumed that an attorney will not be so irresponsible as to ask a District Judge to undertake what is admittedly the heavy burden of reviewing a record so substantial as is the one in the instant case without some just cause for doing so, at least until the contrary clearly appears.

The Sheppard case has been a raging controversy ever since the day of the homicide, some nine years ago. It continues to be "unsettled" in the public mind, and desperately needs resolution in some fashion. It is contended by petitioner that its result is wrong, not only legally but factually; that is, Sheppard did not receive a fair trial, in the first instance, which is alone sufficient to warrant action by this court in his favor, but in addition is not the murderer which the judgment of conviction asserts him to be. As was said by Professor Paul Bator, in his recent and exhaustive article on Federal Habeas Corpus (Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harvard L. Rev. 441, 509):

> "In fact the result of the rather wooden differentiation we now make between constitutional and nonconstitutional questions is not without its ironies. Why is it, for instance, that we go so far to allow relitigation of constitutional questions (even where the particular issue is closely balanced and technical) and yet do not allow any relitigation of factual questions of the guilt or innocence of the accused? If a state prisoner claims that he confessed after he was interrogated for six hours, not (as the state court found) for four, the law says he may relitigate the issue, and, perhaps, gain release as a consequence, even though the evidence of guilt may be overwhelming. But if a defendant is convicted of murder, and ten years later another person confesses to the crime, so that we can be absolutely certain that the defendant was innocent all the time, the law says he must rely on executive clemency. Why? Why should we pay so little attention to finality with respect to constitutional questions when, in general, the law is so unbending with respect to other questions which, nevertheless, may bear as crucially on justice as any constitutional issue in the case?"

And, as it was put by the Supreme Court of the United States in Rogers v. Richmond, 365 U.S. 534:

> "Indeed, many of the cases in which the command of the due process clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence has left little doubt of the truth of what the defendant confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement . . . (and) his conviction failed to afford him that due process of law which the Fourteenth Amendment guarantees."

While it is well that Judges should be so disciplined as to be able to adhere to basic principles in favor of the individual, instead of yielding to the temptation to do rough justice and leave the defendant where he obviously belongs, it is believed that in this area the element of judicial discretion has its most essential application. A litigant who seeks relief on valid but technical grounds, in the face of undeniable evidence of guilt, may well be entitled to less discretionary benefit than one who approaches the Court with an open heart and asserts not only a substantive or procedural flaw, but factual innocence. Such is the petitioner in this case.

Many of those who reside in the several correctional institutions no doubt assert their innocence, and of those many it is likely that only a few are sincere. However, because this Court will exercise discretion not once but many times in the handling of this petition, the special, even unique, circumstances of the case at bar should be mentioned.

When the Supreme Court of Ohio affirmed petitioner's conviction, in a sharply divided opinion, there was recorded perhaps the strongest dissent on guilt in the history of the criminal law. Judge Taft, joined by Judge Hart, after stating emphatically that the evidence was insufficient to sustain the conviction, then went so far as to say that the state had by its own evidence excluded every reasonable hypothesis other than petitioner's innocence. (165 O.S. 293)

This Court in the course of oral argument at the time the petition was filed mentioned the denial of certiorari by the Supreme Court of the United States as a factor perhaps reflecting the soundness of the state record. But that Court has said many times that the denial of certiorari is not to be taken as any indication whatsoever that the merits had been passed upon or even considered. Brown v. Allen, 344 U.S. 443. And in the case at bar, all doubt has been specifically erased by Mr. Justice Frankfurter, who filed a memorandum opinion when certiorari was denied. Sheppard v. Ohio, 352 U.S. 910:

> "Such denial of his petition in no wise implies that this Court approves the decision of the Supreme Court of Ohio."

Without question this could be regarded as an invitation sub silentio by Mr. Justice Frankfurter to this petitioner to seek relief in the Federal District Court. And, curiously, when a state conviction was unanimously reversed because of pretrial publicity (Irvin v. Dowd, 366 U.S. 717), Mr. Justice Frankfurter filed a concurring opinion indicating that upon occasions in the past the Court had been obliged to refuse review of similar cases, even though it appeared from the petitions that constitutional violations occasioned by newspaper trials had taken place; reading between the lines, and having in mind the very unusual memorandum opinion described above, one cannot help but feel that Justice Frankfurter was talking about this case.

Beyond these circumstances, there is one other of no little significance. This action could, of course, have been instituted some time ago. It has long been urged by many eminent members of the legal profession. But because habeas corpus is essentially an equitable proceeding, petitioner has sought to show to the greatest extent possible "clean hands:" That is,

a willingness to do all that he is able to carry the burden of proof of his own innocence.

He has sought to produce evidence favorable to him by submitting to a polygraph test, participated in by the state, and to hypnosis, to restore a memory which the record clearly shows to be vague with respect to events occurring on the night of the murder. Polygraph tests are not without judicial approval (State v. Valdez 371 P. 2d 894, (Ariz. 1962), and the right to the aid of a hypnotist has been established by sound authority (Cornell v. Superior Court, 52 Cal. 2d 99, 338 P. 2d 447, (1959)). Ohio administrative officials refused to let petitioner use these methods, and mandamus was sought in the Ohio Supreme Court. It was held that the matter rested in the absolute discretion of the said administrative officials, and that the court would be powerless to permit or prevent such measures. (174 O. S. 120) This ruling has been taken to the Supreme Court of the United States by petition for certiorari, which is pending.

Meanwhile, whereas it is plain that Ohio does not <u>want</u> any further factual development of the case, for one reason and another, petitioner has at least demonstrated his willingness to exhaust all possibilities of shedding new light on the situation. That willingness continues.

Thus, then, stands the Sheppard case. It should be indicated here that petitioner is not unaware of the serious burden placed upon this Court by the review required under the law, and is more than willing to do all that he can to alleviate the task. Any and all legal points upon which the Court desires illumination in the course of the proceedings instant hereto will be exhaustively briefed and submitted promptly upon the Court's request.

2. Question Presented:

To what extent does this Court have discretion with respect to the issuance of the writ?

3. Legal Authority:

Anyone undertaking to crystallize the state of the law respecting Federal Habeas Corpus these days does so at his peril, so rapidly are new developments emerging. Several helpful law review articles recently published have been rendered all but obsolescent by the rash of Supreme Court Decisi ons since the turn of the year.

The duties of the District Judge, once a petition for Habeas Corpus has been filed, are delineated initially in 28 U. S. C. A. s. 2243, which reads, in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or the person detained is not entitled thereto."

Thus it is mandatory that the Court do one of three things:

(a) Determine by examination of the application that the applicant is entitled to no relief because he either (1) fails to allege constitutional violations or (2) has not exhausted state remedies.
(b) Issue the writ, or
(c) Issue an order directing respondent to show cause why the writ should not issue.

If the Court dismisses the petition without examining the record, reviewing courts must assume the truth of the allegations in passing upon the correctness of the dismissal. In Jennings v. Ragen, 358 U. S. 276, in a per curiam opinion, the Supreme Court said:

"It appears from the record before us that the District Court dismissed petitioner's application without making any examination of the record of proceedings in the state courts, and instead simply relied on the facts and conclusions stated in the opinion of the Supreme Court of Illinois. We think that the District Court erred in dismissing the petition without first satisfying itself, without an appropriate examination of the state court record, that this was a proper case for the dismissal of the petitioner's application without a hearing, in accordance with the principles set forth in Brown v. Allen, 344 U.S. 443, 463-465, 506. See also Rogers v. Richmond, 357 U.S. 220."

The same principle is enunciated in Massey v. Moore, 348 U.S. 105, and Chessman v. Teets, 350 U.S. 3.

The petition in the instant case clearly sets forth in its allegations of constitutional violations according to present authority. Denial of counsel (House v. Mayo, 324 U.S. 42) and prejudicial pretrial publicity, where changes of venue and continuances are denied (Irvin v. Dowd, 366 U.S. 717) have been expressly so held. In House v. Mayo, the Court said: (P. 44)

"It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him."

Extended citation of the principles to be applied by District Courts in the disposition of habeas corpus petitions has been for all practical purposes obviated by the recent case of Townsend v. Sain, 83 S. Ct. 745. In that case the Supreme Court has expressly undertaken to lay down with as much clarity as is possible the rules and procedures necessary to proper handling of these petitions, in syllabus form. To paraphrase this language here would be to presume too much, and of dubious value to the Court. Pages 754-760 of that decision are no doubt intended to clear up the confusion and variance which has heretofore existed in habeas proceedings, and must be read in their entirety to be completely understood. The decision reaches not only to the instant problem, but also extends firm guidelines for the decision as to whether a plenary hearing is necessary,

a problem with which we are not now but may in the future be confronted.

Although we feel obliged to defer to Chief Justice Warren (Townsend, above) in phrasing the applicable rules and principles, there is one of these especially relevant to that initial problem confronting this Court:

> "Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its finding of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas." (p. 760)

Thus it is clear that at a minimum, there must be a review of the record and judgments upon that record.

Should there be further questions which confront the Court, petitioner will be happy to furnish such assistance as may be desired or required.

Respectfully submitted,

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