SUPREME COURT OF FLORIDA

CASE NO. 71,646

KRISHNA MAHARAJ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

On Direct Appeal From the Circuit Court
For the Eleventh Judicial Circuit,
In and For Dade County, Florida

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INTRODUCTION

This appeal is based upon the conviction and sentencing of KRISHNA MAHARAJ, for the double murder of Duane and Derrick Moo Young. Pursuant to a jury's recommendation, the trial court pronounced a sentence of death for the murder of Duane Moo Young and life imprisonment for the murder of Derrick Moo Young.

Throughout this INITIAL BRIEF, the parties will be referred to as follows:

KRISHNA MAHARAJ shall be referred to either as the DEFENDANT/APPELLANT or by proper name.

The STATE OF FLORIDA shall be referred to as the STATE.

All references to the Record on Appeal shall be by the designation "R-" and references to the trial transcript shall be by the designation "TR-".

All emphasis is supplied unless otherwise indicated.

TABLE OF CITATIONS OF AUTHORITY

ISSUES ON APPEAL

WHETHER THE TRIAL JUDGE ERRED IN EXCLUDING EVIDENCE OF THE STATE'S WITNESS FAILING HIS POLYGRAPH EXAMINATION WHEN SUCH EVIDENCE DIRECTLY RELATED TO THE CREDIBILITY OF SAID WITNESS WHO TESTIFIED AT TRIAL THAT HIS REVISED TESTIMONY WAS MADE SOLELY FOR THE BENEFIT OF A "CLEAN CONSCIENCE".

XI

THE TRIAL JUDGE ERRED IN EXCLUDING EVIDENCE OF THE STATE'S WITNESS FAILING HIS POLYGRAPH EXAMINATION WHEN SUCH EVIDENCE DIRECTLY RELATED TO THE CREDIBILITY OF SAID WITNESS WHO TESTIFIED AT TRIAL THAT HIS REVISED TESTIMONY WAS MADE SOLELY FOR THE BENEFIT OF A "CLEAN CONSCIENCE".

As previously stated, Neville Butler, the accuser of KRISHNA MAHARAJ and alleged "eyewitness" to the murders of Duane and Derrick Moo Young, was ordered to undergo a polygraph examination by the trial court. (R 187) Mr. Butler failed his polygraph examination and then changed his testimony regarding the circumstances of the alleged murders from both an original deposition given to counsel for the defense, as well as an original statement made to the arresting officer. (R 852).

The Court, upon motion of the STATE, would not permit mention of any polygraph examination (TR 2837). As a result of the inability of defense counsel to cross-examine Mr. Butler upon his original change of testimony and upon his original failure to pass a lie detector test, the following colloquy was held between Mr. Butler and the STATE:

> Q: (By Mr. Kastrenakes):
> "You have been quite candid of what you have told the jury of your own involvement of criminal activity that you were involved in the shakedown, what you thought to be a shakedown of Derrick Moo Young. Has anybody from the State Attorney's Office or the Police Department promised you anything to make you say anything of that nature?"
> A: "Nobody promised me anything."
> Q: "Have you been promised any immunity whatever for your own involvement in this case?"
> A: "Absolutely none."
> Q: "Do you have any guarantees from either the Police Department or from Mr. Ridge or myself that you will not be arrested for being a co-conspirator to some of the events that occurred?"
> A: "No I haven't."
> Q: "Has either Mr. Ridge or myself told you about the

possibility of being charged with your responsibility in this case?"
A: "I have been warned by both of you that I can still be charged with my involvement."
Q: "How is it that you have decided to tell the truth about your own involvement in early March of 1987?"
A: "My consideration was the main factor is that I felt I was holding back when I shouldn't be and I remember that I called to come down to speak with you with your office and before I was able to start telling you, you started telling me that I had to ask for an appointment and then I came to tell you and as it happened, you started to question me and tell me that I had lied and I just told you the whole story, it is my consideration and you all persisted with your inquiry."
Q: "Concerning your own involvement?"
A: "Concerning my own involvement."
Q: "Are you being truthful about your involvement in this case to the jury?"
A: "Yes everything that I have said today." (TR 2839,2840).

Upon cross-examination, and upon giving an explanation of why his stories had changed, Butler concluded as follows:

The Witness: "I had lied to the State Attorney in telling you one thing and have been told the State Attorney something else would make it very obvious. So when I did decide on or when I did get in touch with the State Attorney and decided to come clean and explain everything to them, I think I corrected everything on the Record that you are now questioning me about, Sir." (TR 3062,3063).

Further, the Defendant upon additional cross-examination summarized as follows:

A: "Again, I did, on my own, get in touch with the State Attorney to correct all the things that I said that was incorrect. Regardless of what the consequences were, I was prepared to abide by it because I felt I was wrong. I did a few things that were wrong and having come to the State Attorney and told him that I was wrong, I was prepared to abide by whatever the consequences." (TR 3863, 3864)...
"I am not in law. I don't know the circumstances, but when my conscience pricked me, eventually I said I have to speak to the State Attorney and tell them the truth as I saw it and that's what I did. I think it was in March." (TR 3098).

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Upon re-direct examination, the prosecution attempted to elicit the fact that the witness, Neville Butler, was now being truthful on the witness stand. In response to the State's questioning, Butler again responded as follows:

> A: "Yes, sir. I admitted it open and as I said before, I came to your office and told you that I had not been truthful about a number of things and was prepared to abide by whatever the consequences were." (TR 31, 32).

Yet, Neville Butler's explanation of his coming clean was far from the truth. Much more accurate is the fact that the State "threatened" Mr. Butler to change his testimony after Butler failed the test. This was brought out to the Court prior to cross-examination.

> "Mr. Kastrenakes: ... he did, in fact, take a polygraph at that point of time and was threatened in March and then at that point in time, he came clean concerning his involvement." (TR 2837)

There is no question that, as a general proposition, test results of a lie detector are not admissible in evidence unless by stipulation. Kaminski v. State, 63 So.2d 339 (Fla. 1952); Codie v. State, 313 So.2d 754 (Fla. 1975). Yet, sub judice, the trial judge's admonition to defense counsel that no reference to a polygraph examination would be proper, significantly impeded the defense from cross-examining the sole eyewitness to the murders, Neville Butler, regarding the basis for his change in testimony.

Butler, who admittedly lied on numerous occasions, came forward on the day of the trial and was clothed with the halo of a saint by the STATE. Repeatedly during his direct and re-direct examination, the STATE referenced the "truthfulness" of Butler's

testimony and the "coming clean" of Butler's final version of the facts on the date in question.

The jury was never able to hear that the basis for Butler's "final version" of his story was his failure to pass a polygraph test administered by the STATE on certain relevant portions of his testimony. Only after confrontation with the STATE did Butler "change" his testimony to the "truth" as advanced by the STATE. Effectively, the trial court's limitation on this right to cross-examine Mr. Butler regarding his failed polygraph was a serious constitutional limitation on the right to confront witnesses which has been recognized by several courts.

Keeping in mind that the results of the polygraph test were not really an issue and that the basis for introducing the failed polygraph of Neville Butler was to contradict his testimony of why he decided to change his testimony, it would seem quite evident that the trial judge erred in limiting the ability to impeach an important State witness with this piece of evidence. In Green v. Bock Laundry Machine Co., 109 S.Ct. 1981, (1981), the Supreme Court opined that a Defendant ought to be permitted the widest of latitudes in the utilization of impeaching evidence which is detrimental to the prosecution in a criminal case and that the admissibility of such impeaching evidence should be judged without the necessity of a balancing of the probative versus prejudicial effects on such testimony. The usual basis for not admitting polygraph testimony is that such testimony has not been established as reliable from a scientific standpoint and thus its prejudicial effect outweighs its probative value.

Nevertheless, the Supreme Court, in the Green decision supra, would have permitted such testimony when used merely to impeach a witness.

The Green decision would seem to be more applicable, sub judice, in light of the fact that the results of the polygraph tests weren't important, but rather, the fact that Mr. Butler lied before the jury as to the reason for his third version of the incidents of the murders. (The first version came in the statement to Detective Buhrmaster, while the second version came in the first deposition of Butler).

At least one Federal District Court has permitted the results of a polygraph examination when a government witness lies before a jury. In U.S. v. Grant, 473 F. Supp. 720 (D.C.S.C. 1979), the Court opined that impeachment evidence of a failed polygraph examination by a government witness, constitutes exculpatory evidence and can be used for the purposes of impeachment.

Similarly, in U.S. v. Kampiles, 609 F.2d 1233 (7th Cir. 1979), cert. den. 100 S.Ct. 2923, 446 U.S. 954, 64 L.Ed.2d 812 (1980), the Seventh Circuit opined that the circumstances surrounding a polygraph test may be admissible, although its results may not be admissible as direct evidence in an action to rebut a Defendant's charge that a confession was not voluntarily rendered. Recently, the Eleventh Circuit, en banc, determined that the results of a polygraph could be utilized to impeach or corroborate a witness. United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989), after remand 729 F. Supp. 1336 (S.D. Fla.

1990).

In sum, Appellant's counsel was constrained on his cross-examination of the State's star witness by virtue of the Court's Order forbidding counsel to mention anything involving a polygraph examination. As a result of this Order, Neville Butler was permitted to testify about circumstances surrounding his recantation and new found truthful testimony which was not truthful. Combined with the STATE'S bolstering of the credibility of its witness (also impermissible), the result was that Butler's version of the truth could not be challenged in an appropriate manner and the STATE'S witness was able to expound before the jury without the full right of cross-examination by Appellant's counsel on the highly critical and extremely important issue of the basis for Mr. Butler's change in his testimony.

Clearly, the constitutional safeguards for a criminal defendant to cross-examine his accuser fully and without limitation was severely hindered by the Court's Order and, in truth and fact, permitted Mr. Butler to testify to further lies without the ability of the defense to cross-examine him effectively. For this reason, the Defendant, KRISHNA MAHARAJ, should be entitled to a new trial where his counsel would be permitted the full range of cross-examination guaranteed any Defendant in a criminal prosecution.

Respectfully submitted,
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the SUPPLEMENTAL BRIEF was mailed this 6th day of September, 1990, to: The Office of the Attorney General, Atten: Michael N. Neimand, Esq., 401 N.W. Second Avenue, Suite N921, Miami, Florida 33128.

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