IN THE SUPREME COURT OF FLORIDA
Case No. 79-494
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JAMES HUDSON SAVAGE

Appellant

vs.

STATE OF FLORIDA

Appellee

BRIEF OF AMICUS CURIÆ
THE NATIONAL ABORIGINAL AND ISLANDER LEGAL SERVICES SECRETARIAT INC.
IN SUPPORT OF THE APPELLANT

TERENCE JAMES MALONE
Barrister & Solicitor of
The Supreme Court of
Western Australia
17 Forrest Street
Geraldton, West Australia 6530

STEVEN GOLDSTEIN
Fla. Bar No. 151312
1012 Shalimar Drive,
Tallahassee,
Florida 32306.

Counsel for Amicus Curiæ

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BRIEF OF AMICUS CURIAE

Amicus respectfully submits the following brief in support of Appellant, James Hudson Savage, in his challenge to his conviction and sentence of death.

INTEREST OF AMICUS

The *NATIONAL ABORIGINAL & ISLANDER LEGAL SERVICES SECRETARIAT, INC. (NAILSS)*[1] is the national organization of the Aboriginal Legal Services (ALS) offices which are spread around the Australian continent. The ALS offices are comprised of lawyers and support staff whose duties include the representation of the indigenous people of Australia in courts of law. There are a total of eighteen ALS offices in Australia.

1. *Hereinafter referred to as NAILSS, or Amicus. As a Non-Governmental Organization (NGO), Amicus has Category 2 affiliation status with the Economic and Social Council (ECOSCOC) of the United Nations Organization. Amicus has international jurisdiction with respect to the human rights of the indigenous people of Australia.*

Appellant was born Russell Moore,[2] on January 31, 1963. He is Aboriginal. *Amicus* believes that this Court would benefit from a discussion of the implications of his background.

For various reasons, Russell Moore's predicament is of concern to all Australians. In a very real sense, as detailed below, the indigenous people of Australia have been the victims of cultural genocide. Historically, this resulted in the literal slaughter of entire populations of indigenous people. Later, Victoria was one of the states which adopted a policy of assimilation designed to force Aboriginal people to accept the customs and lifestyle of the white Australian. The coerced adoption of Russell Moore into the Savage family was part of this effort to destroy the identity of the Aboriginal community.

The tragedy of Russell's name change to James Savage, rearing in a non-Aboriginal family, cultural alienation and unauthorized removal beyond Australian Territories was part of a wider national tragedy of mass removals of Aboriginal children from their natural families. *Amicus* views Russell Moore's case as a clear example of the appalling human cost of the policy of cultural genocide perpetrated against the indigenous people of Australia.

The case has even greater significance for the indigenous people of Australia. According to Aboriginal custom, Russell Moore is considered a "Brother" and "Son" throughout the wider Aboriginal community. Great community concern for a lost relative

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2. Throughout this brief, Appellant will be referred to as Russell Moore, the name he was given at birth, rather than his adoptive name, James Savage. Quite apart from the quirk of fate which would inflict a name such as James Savage on an indigenous Australian, Mr. Moore has expressed the preference to be called by his original name. The use of his original name is consistent with Amicus' belief that the government's policies of assimilation were mistaken.

is keenly felt in the tragic circumstances of this case. *Amicus* therefore seeks permission to represent this wider family affiliation before this Court.[3]

SUMMARY OF ARGUMENT

The terrible treatment which Russell Moore received as a young child was the unfortunate consequence of the inexcusable policy of assimilation which was widely applied in Australia at the time of his birth. It is *Amicus'* contention that any crime which may be attributable to Russell Moore is the direct product of this policy. Perhaps, had he remained in Australia, Russell would ultimately have found support in the Aboriginal community from which he was forcibly and illegally taken. In the United States, where there is no such cultural network, Russell had no chance to overcome his dislocation. Australia is finally seeking to redress the effects of prior, appalling racial policies. Russell Moore should not be the only person, alone on Death Row in the United States, who does not benefit from Australia's belated recognition of past misdeeds.

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3. All Australian states have abolished the death penalty. Russell Moore was removed from Australia to the United States without authorization by his natural parents, the Aboriginal community (who, according to Aboriginal Law, should have been accorded rights of locus parenti in the absence of competent natural parents), or any competent Australian government agency. Therefore, Russell Moore's present risk of judicial execution arises solely as a result of negligence on the part of the Australian Government in its pursuit of a policy of assimilation. It is the view of Amicus that in the event that Russell Moore is sentenced to any criminal penalty overseas, he should be offered extradition to Australia to serve his prison sentence in an Australian prison. He would there be allowed appropriate access to his Aboriginal family.

ARGUMENT

Much of the public interest surrounding this case was created by the anomaly of an Australian Aboriginal on trial for his life in the United States. The jury eventually voted for life by an overwhelming eleven-to-one vote.

It is no secret why the jurors thought that Russell Moore deserved mercy. They heard some, although not all, of the shocking circumstances of Russell's adoption into a white family.

Russell Moore was born in Victoria, which is one of the Australian states, on January 31, 1963. Because Russell Moore's Aboriginal parents were not yet married,[4] a white officer of the "Aboriginal Welfare Board" threatened his mother, Beverly Moore Whyman, with prosecution for adultery if she did not give up her new-born son for adoption.

At that time, the government of Victoria had a policy of forcing Aboriginal children into the wider, generally white, community.[5] Russell was therefore adopted into a white family. Fate then chose to torment the baby with the new name of James Savage, acquired from his adoptive parents, Reverend Graeme and Nesta Savage.

Russell bore this name to the United States at the age of six, when his parents moved. If a defenseless minority is more likely than average to bear the burden of

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4. They were married shortly after being required to give their first son up for adoption. Subsequently, Mr. & Mrs. Whyman have raised four other children.

5. This was effectuated by the Victorian Adoption of Children Act of 1957, which allowed for great abuse of the Aboriginal people. The government's plan was to assure the total extinction of the customs and lifestyle of the indigenous Aboriginal race, which had occupied Australia for thousands of years prior to the British occupation and settlement in 1787.

discrimination, Russell became a minority of one in the State of Florida. Even his own adoptive father -- put on the stand as a witness by the prosecution at the penalty phase -- apparently called him "Nigger," and beat him for adolescent misdeeds committed by his white siblings.

The history of Russell's youth continued as a tribute to the aphorism that truth is sometimes stranger than fiction. Rev. Savage then became a minister for inmates, including those on Death Row, at the Florida State Prison where Russell now resides under sentence of death.

While the family lived here, Russell met discrimination in the local church, in school and in every walk of life. His private escape from the age of eleven on, uncurbed by his adoptive parents, was to turn to the bottle. While the white members of Russell's adoptive family went back to Australia, he later returned to Starke as a prisoner, where he learned still more destructive forms of addiction. It was when he came out of this experience that James Savage was allegedly involved in the crime charged in this case. At the time, his whole life revolved around his next "fix" of crack cocaine.

The jurors' vote for life came after the trial court denied them the opportunity to hear still more devastating evidence.[6] The trial judge ruled that the jury should not be told of the plight of the Aboriginals.[7] The sad history of the mistreatment of Aboriginal

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6. The exclusion of this evidence must be viewed in light of the fact that, while the history of the abuse of the Aboriginal people is well known in Australia, few Americans know anything about it. One should bear in mind that the first defense exhibit at the penalty phase was a map of Australia, for few jurors had more than a superficial knowledge of the country's location, let alone its history.

7. The defense had called the Hon. John Wooten, a former Justice on the Supreme Court of New South Wales, who had extensive expertise in the historical and current plight of Aboriginals in his country. The trial court excluded his evidence. (Tr. 2492) For other reasons, the jury also did not hear the evidence of Dr. Peter Read (Tr. 2506-35) and Dr. Burnard Healey (Tr. 2550-75).

people was hidden from the public consciousness for too long. *Amicus* strongly believes that the information was critical to the trial court's understanding of who Russell Moore really is. Almost an identical question was discussed in Regina v. Herbert, Sampson & Wurrawilya, 8 Crim. L. J. 58 (1984), where the court did agree to consider similar evidence, and reduced the defendants' sentences from life imprisonment to twelve years. When placed in the context of Russell's forced separation from his cultural roots, it is the sad truth that "the murder occurred as 'a natural climax to the kind of life [he was] leading.'" Id. at 59.

A. A BRIEF REVIEW OF THE HISTORY OF THE ABUSE OF THE ABORIGINAL PEOPLE OF AUSTRALIA ILLUMINATES THE NATURE OF RUSSELL MOORE'S PLIGHT.

Russell Moore was forcibly adopted at a time when Australian governmental policies sought to assimilate Aboriginals into the white community. These policies, which were objectionable enough, flowed naturally from a history of racial discrimination perhaps even more depraved than the experience of slavery in the United States.

When the white man came to Australia, the Aboriginal people had already been here for forty thousand (40,000) years.[8] However, the colonial invaders, as well -- paradoxically -- as the white convicts who were imported into the country, viewed the Aboriginal as the most "debased race on the face of the earth, . . . the connecting link between man and the monkey tribes."[9]

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8. See, e.g., Nettheim, *Developing Aboriginal Rights, 19 V.U.W.L.R. 403, 403 (1989).*

9. *Stevens, BLACK AUSTRALIA, 7 (Aura, 1981) (hereinafter cited as "Black Australia").*

Indeed, a commentator before the turn of the century described the white man's approach to the indigenous Australians as follows:[10]

> There is hardly a [white] man in North Queensland whose motto is not "see a nigger and 'pot' him." The blacks have been murdered by the thousands. . . . [There is] wholesale massacre of human beings; a relentless violation of women. [I have] seen the brains of an infant dashed out against a tree after a mother had been murdered. This is not fiction but the statement of one who, not three years ago, saw in a Queensland scrub the sunburnt corpses of men, women and children who had been murdered by officers of "justice" and left for the crows.

The white man even bought and sold hunting licenses to pursue to "sport" of "potting niggers." One of the few "complete acts of genocide ever achieved by the human race" was the extermination of <u>every single</u> Aboriginal in the State of Tasmania in the last century.[11]

It is only in this historical context that it is possible truly to understand the forces behind Russell Moore's compulsory adoption. Once genocide became less than socially acceptable, many white Australians turned to forced assimilation. As a Member of Parliament put the theory behind assimilation less than thirty years ago:[12]

> [The Aboriginals'] future lies in association with us, and they must either associate with us on standards that will give them the full opportunity to live worthily and happily or be reduced to the social status of pariahs and outcasts. . . .

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10. Black Australia, at 7.

11. Black Australia, at 6.

12. Black Australia at 13 (quoting Native Welfare in Australia, speeches by the Hon. Paul Hasluck, Member of Parliament, at 5 (Perth 1953)).

If one must look for a happier side of such appalling discrimination, it was the solidifying effect that it had on the Aboriginal people. In the face of tremendous discrimination, the indigenous people who lived in Aboriginal communities were able to lend each other support, and go some distance towards overcoming the invidious effects of discrimination. As Dr. Read would have told the jury:

> It's hard . . . perhaps for an American to appreciate just how difficult is has been for [A]boriginal people in Australia. Very, very racist society particularly in 1960. Aboriginal people simply could not function as individuals. And that's what adopted people are. Aborigin[als] could, however, function within their own society. They were socialized into leaning how to survive. And if they were called something very insulting, like a Boom or an Abo, that's a very insulting word. They could be told by an [A]boriginal mother, don't worry about those Gabas, white people. Don't worry about this. They don't need them.

(Tr. 2522)

Russell Moore began life as the sole Aboriginal in his community in Australia. In this respect, his first six years were as difficult as the formative years of any Aboriginal child who was taken from his own community and forced to live in an all-white community.[13]

In Australia, as Aboriginal children who were adopted into white families grew up, they often returned to their own communities and found the support they needed. However, at the age of six, Russell Moore was completely removed from Australia. He

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13. Case histories of young Aboriginals removed from their cultural roots reflect problems similar to those experienced by Russell Moore. This is documented by Dr. Peter Reed and Coral Edwards in their work, "The Lost Children." The social and cultural dislocation resulting from this has led ninety percent of forcibly adopted Aboriginals to commit a crime of some sort. (Tr. 2607) Russell's experiences were far worse than those of many Aboriginal children who remained in Australia.

therefore lost the opportunity to benefit from such a homecoming. Indeed, he was totally divorced from the Aboriginal moral and cultural support network, and placed in an environment where few people knew anything about his heritage:

> Absolute cultural isolation is not knowing anything about himself as an Aboriginal person here. He has said that he could not relate to the black community because he was not a black American. He could not relate to the native American communities because he was not a native American.

(Tr. 2611-12) By the same token he could not relate to the white community because of his lack of white roots. To be different is to be feared or despised. To be a minority of one is to be the object of perpetual discrimination. Shorn from his cultural heritage, Russell Moore had nobody there when he encountered harassment from people who viewed him as "different."

Russell therefore became a person who suffered from deep-seated insecurity and lack of self-identification. (Tr. 2523) Had Russell been raised in Australia, he might have been able to overcome the bitter fruits of our sad history of discrimination, especially now that the government is beginning to make efforts to redress past injustices. Instead, he must be seen as a victim of the former policies of cultural genocide, with a paradoxical *dénouement*: The act of killing him is be carried out by a foreign government.

B. THE EVIDENCE OF APPELLANT'S CULTURAL DEPRIVATION WHICH WAS EXCLUDED BY THE TRIAL COURT WAS RELEVANT TO APPELLANT'S CHARACTER DEVELOPMENT.

This evidence of Russell's cultural deprivation was deemed to be irrelevant by the trial judge in this case. It may be said on the trial judge's behalf that he faced decisions

concerning the "unique" status of Aboriginal people which had never been encountered before in the United States. The Australian courts, however, encounter the same problems every day. Consequently, those courts have adopted particular rules for the protection of Aboriginal persons, rules which reflect the unique cultural situation of Australia's indigenous people.[14]

Special procedures are followed by law enforcement officials in Australia regarding the representation of Aboriginal people in the courts of law. These protections are designed to account for their cultural heritage, and the alienation which Aboriginal children feel when removed from their natural homes. *Amicus* plays a major role in the creation of this law, and members of the Aboriginal Legal Services are experts in the conduct of trials on behalf of Aboriginal people.

In Regina v. Herbert, Sampson & Wurrawilya, 42 A.L.R. 631 (1982), the Federal Court of Australia reversed the murder convictions of three Aboriginal women. When the women were convicted again on retrial, the question arose as to the appropriate scope of evidence in mitigation of sentence.

Judge O'Leary held that the sentencer should consider evidence of "the background and history of the Aboriginal concerned, the extent to which he has or has not

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14. For example, the Northern Territory Supreme Court has noted that special care must be taken in exacting statements from an Aboriginal suspect. Aboriginal people are naturally polite and will answer questions the way they believe the examiner would like. Indeed, the officers in this case noted that Russell Moore was "completely" cooperative. (Tr. 1776, 1759) When reacting to questions by a policeman, an authority figure, "their action is probably a combination of natural politeness and their attitude to someone in authority. Some Aboriginal people find the standard caution quite bewildering, even if they do understand that they do not have to answer questions, because if they do not have to answer questions, then why are the questions being asked?" Regina v. Anunga, 11 A.L.R. 412, 414 (1975).

adopted white ways or manners, the degree to which his Aboriginal inheritance predominates and any problems of a transcultural nature that he may have experienced."[15]

Judge O'Leary therefore permitted the defense in Wurrawilya to present the testimony of an anthropologist, a clinical psychologist and a forensic psychiatrist on the effects of transcultural dislocation. His comprehensive review of the history leading up to the homicide began to explain why the women had failed to prosper in the white community, and had been unable to reenter the Aboriginal society from which they had been removed.

Like Russell Moore, who still functions at the level of a fourteen year old (Tr. 2775), all the defendants had received little schooling. This, Judge O'Leary found, made a transcultural transition all the more difficult. Essentially, the women found themselves in a cultural limbo:

> Their lives revolve mainly around the excessive use of alcohol, and the formation of casual relationships with males to obtain money for the purpose of drinking. They find themselves in a violent and degrading situation. . . . They have a feeling of helplessness, hopelessness, and purposelessness. Their whole sense of themselves becomes so abused that they lose that natural dignity that Aboriginal women have.

Id. at 59.

In contrast, the trial court in Appellant's case excluded similar evidence. To say that the evidence of Russell Moore's cultural and societal dislocation is irrelevant is clearly wrong. Indeed, this is highlighted by the fact that the trial court accepted expert evidence from Dr. Robert Phillips. Dr. Phillips testified that Russell suffers from a schizoid

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15. Regina v. Herbert, Sampson & Wurrawilya, 8 Cr. L. J. 58, 59 (1984).

personality disorder and an organic brain syndrome that significantly diminished his mental capacity at the time of the crime. (Tr. 2771) Russell's schizoid personality reflects an inability to relate to people around him. Thus, the mental illness found by Dr. Phillips was directly attributable to Russell's cultural dislocation.

It really goes without saying that cultural deprivation contributes to the character, and therefore the actions, of the abused individual. As with the Wurrawilya defendants, when one considers the appalling conditions of Russell Moore's youth, the terrible crime for which he stands convicted must ultimately be considered the sad but "natural climax" of his life. Id. at 59.

Obviously, the decisions of our Australian courts are not binding on this Court. However, the Australian experience with the unique problems of Aboriginals should inform this Court's decision. The same considerations which led Judge O'Leary to reduce a sentence of life imprisonment to twelve years in Wurrawilya should have led the trial judge to impose no more than a life sentence on Russell Moore. With all due respect, he was completely incorrect in dismissing the totality of Russell Moore's up-bringing as unworthy of "any significant weight." (Tr. 3102).

CONCLUSION

For these reasons, *Amicus* respectfully urges this Court to reverse the death sentence[16] imposed upon Russell Moore.

Respectfully submitted,

TERENCE JAMES MALONE
Barrister & Solicitor of the
Supreme Court of Western
Australia
17 Forrest Street
Geraldton
Western Australia 6530

STEVEN GOLDSTEIN
Fla. Bar No. 151312
1012 Shalimar Drive
Tallahassee, Florida 32306

Attorneys for *Amicus Curiae*
The National Aboriginal &
Islander Legal Secretariat, Inc.

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16. By limiting this request for relief, Amicus does not mean to telegraph any agreement with the conviction for first degree murder. Cf. Soering v. United Kingdom, 1/1989/161/217, at ¶ 109 (Eur. Ct. Hum. Rts. 1989) (failure of the law of Virginia to fully take into account diminished capacity may result in a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). However, Amicus files this brief more specifically to address the humanitarian concerns which militate against Russell Moore being be executed under the circumstances of this case.

Certificate of Service

I hereby certify that a copy of the foregoing document has been served by first class mail on the Hon. Robert Butterworth, 210 N. Ridgewood Avenue, Daytona Beach, Fl. 32114, this the 8th day of October, 1990.

Terence Malone
PD-LAP1.