IN THE SUPREME COURT OF FLORIDA
No. 85,439

KRISHNA N. MAHARAJ, Appellant

v.

STATE OF FLORIDA, Appellee

BRIEF OF AMICUS CURIAE
THE BAR OF ENGLAND AND WALES
HUMAN RIGHTS COMMITTEE IN SUPPORT OF PETITIONER

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Amicus respectfully submits the following brief in support of Appellant, Krishna Maharaj, in his challenge to his conviction and sentence of death:

INTEREST OF AMICUS

The Human Rights Committee of the Bar of England and Wales appears on behalf of persons whose human rights are endangered. Whether domestic tribunals will receive our amicus curiae depends on their domestic rules. It is respectfully submitted that this Court should admit this brief in support of the instant Petition since:

1. Krishna Maharaj was born on January 26th, 1939, in Trinidad when it was a British Possession. He owes allegiance to Her Majesty the Queen and retains all the rights and benefits of a British National whilst in the United States. He moved permanently to England in 1960, and lived there exclusively until 1985. In that year, he began to spend time in Florida. However, he maintained solely British nationality. He was not a citizen of the United States at the time of his arrest on these charges in Miami, Florida, on October 16th, 1986. He remains a foreign national, subject to all the rights and benefits of a British national abroad.

2. The comity of the common law nations makes the experience of each persuasive to the other.

3. The United States Government has ratified the International Covenant on Civil and Political Rights, effective June 8, 1992, evincing a sincere concern to comply with norms of international law.

GROUNDS PRESENTED IN THE BRIEF

A. Whether the trial of the petitioner complied with internationally acceptable norms, and whether from an objective viewpoint justice therein appeared to be done in the light of the patent judicial misconduct inherent both in the arrest of Judge Gross on the fourth day of trial, and the refusal to hold a hearing on evidence of prosecutorial misconduct by Judge Glick who had himself been a prosecutor overseeing the trial prosecutors at the time of trial?

B. Whether the denial of an evidentiary hearing on evidence of innocence may be countenanced if, as a result of inordinate delay not attributed to his own conduct, the condemned inmate is likely to be forced to endure more than a decade on death row without ever being allowed to present this evidence?

SUMMARY OF ARGUMENT

With respect to the role of the judge in this matter, it is of particular importance to *Amicus* that justice, which must always be the aim of any civilized legal system, should also satisfy the appearance of justice. This cannot be the case when one judge is arrested in mid-trial, and another judge denies a hearing on the alleged misconduct of prosecutors who, at the time of the trial, were being supervised by the judge in the State's Attorney's Office.

It is also the submission of *Amicus* that to deny Mr. Maharaj a hearing on evidence of his potential innocence for almost a decade violates the norms of international law.

ARGUMENT

Amicus respectfully urges the following points to the attention of this Court:

I. PERCEPTIONS OF JUDICIAL IMPROPRIETY MANDATE THAT A HEARING BE HELD BEFORE A JUDGE WHOSE PARTIALITY CANNOT BE QUESTIONED

The sequence of judges in this case is, from the experience of *Amicus* in courts across the world, virtually unique. First, it is respectfully submitted that profound judicial misconduct occurred when Judge Gross was arrested on the fourth day of Mr. Maharaj's trial. The Record reflects that jurors stated the following:

> Transcript p.2916 (14th October, 1987): ". . . All of a sudden this guy looked familiar on t.v. being led away in handcuffs and it was Judge Gross."
>
> Transcript p.2938 (14th October, 1987): ". . . They said that Judge Gross had been arrested on attempted bribery charges and one of the channels mentioned that he had been presiding over this case."
>
> Transcript p.2941 (14th October, 1987): ". . . most of us were shocked to find out. . . ."

Subsequently, the role of Judge Gross was taken over by Judge Solomon. He commenced sitting on the Thirteenth day of October, 1987. Thus, although he was ultimately the one to pass sentence on Mr. Maharaj, he did not have the benefit of hearing the testimony of Neville Butler, who was allegedly the prosecution eye-witness to the crime. Indeed, Judge Solomon sat after missing all or some of the testimony of the two most important people in the case, Tino Geddes and Neville Butler. On the First of December 1987 (Transcript p. 4563), Judge Solomon proceeded to sentence the Petitioner as follows:

> "Mr Maharaj, the court has carefully considered all the evidence presented, the aggravating circumstances, and has taken into consideration everything you have presented and the State has presented, and has given great weight to the advisory opinion of the jury, which was seven to five, sentence of death.
>
> . . . it is therefore the judgement and the sentence of this court that, as to first degree murder of Duane Moo Young, you be adjudicated guilty of murder and you be sentenced to the death penalty for that murder. The court further orders that you be taken by the proper authorities to the Florida State Prison and their be put in custody and may God have mercy on your soul, Mr. Maharaj."

Particularly in view of the questions that have come to light regarding Mr. Butler's credibility, this adds to the appearance that Mr. Maharaj did not benefit from a fully-informed judge when the ultimate penalty of death was imposed.

Third, the role played by Judge Glick has been very troubling. This case is in its current procedural posture--on appeal to this Court--because the lower court judge, Leonard Glick, denied an evidentiary hearing on Mr. Maharaj's 3.850 motion, challenging his conviction and sentence. Judge Glick was asked to allow a hearing on new evidence of innocence--evidence that might be considered particularly embarrassing to the office that prosecuted Mr. Maharaj in light of the fact that it was allegedly suppressed by the two trial prosecutors. Judge Glick not only was a prosecutor with the State's Attorney's Office at the time of Mr. Maharaj's trial, but he was apparently the senior supervising attorney to the two prosecutors who tried the case. At least the perception that the hearing was denied for improper motives is inescapable.

BRITISH AND EUROPEAN JURISPRUDENCE

Article 6 (1) of the **European Convention on Human Rights** states, *inter alia*, as follows;

> "In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time **by an independent and impartial tribunal established by law.**"

This article is consistent with article 10 of the **United Nations Universal Declaration of Human Rights** which declares that;

> "Everyone is entitled in full equality to a fair and public hearing **by an independent and impartial tribunal**, in the determination of his rights and obligations and of any criminal charge against him."

Third, the English Bar Committee respectfully submits that Article 14 of the International Covenant is particularly relevant to this case:

> "All persons shall be equal before the Courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . ."

There are, therefore, two themes in international law that are important to the resolution of this case. First, it is respectfully submitted that to deny Mr. Maharaj a hearing on evidence that might prove his innocence, while he awaits his death for the best part of a decade, clearly violates this principle of international law. This will be discussed in greater detail in Section II of this submission.[1]

Second, however, the jurisprudence of the European Court attaches great importance to the principle that justice must not only be done, but must also be **seen to be done**. This maxim is derived from the jurisprudence of the English courts, in particular the judgement of Lord Hewart, the Lord Chief Justice, in R v. Sussex Justices ex parte McCarthey [1924] 1 KB 256. In that case a clerk, who was a member of a firm of lawyers engaged in related civil proceedings, retired with the justices for discussion. Lord Hewart said:

> "It is said, and, no doubt, truly, that when that gentleman retired with the justices, taking with him the notes of evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is **of fundamental importance that justice should not only be done, but should manifestly be seen to be done.**"

The great English Jurist, Lord Denning M.R., in Metropolitan Properties Co v. Lannon [1969] 1 QB 577, said in following the Sussex Justices judgement:-

> ". . . it brings home this point: in considering whether there was a real likelihood of bias the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as he could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. . . ."

In an analogous situation, the House of Lords, the highest Court in England and Wales, held in R v. Gough [1993] AC 646 HL, that if the court is considering the possibility of bias then the court,

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1. Moreover article 13 of the **European Convention on Human Rights** provides that everyone whose rights and freedoms as set forth in the Convention have been violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. The European Court of Human Rights takes the view that the requirements imposed by article 13 are less strict than those imposed by article 6 (1) and that therefore if a violation of article 6(1) is found it is not necessary to investigate article 13.

personifying as it does the reasonable person, must ask itself whether there is a real danger of bias. Lord Goff said in that case:

> "I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. . . ."

European jurisprudence is summarised in Borgers v. Belgium, 15 EHRR 92. In Borgers, the appellant complained that the advocate general at the Court de Cassation had attended the deliberations of that court. That is to say that a person who was effectively the prosecutor had been permitted to take part in deciding upon the verdict. The European Court of Human Rights, distinguishing its decision in Delcourt v. Belgium, 1 EHHR 355, noted that it would be contrary to justice to give a restrictive interpretation to the right to a fair trial in a democratic society. Anything less than a complete observance of the fundamental principle of impartiality would not be consonant with the object and purpose of the European Convention. The Court held that the definition of a fair trial had "undergone considerable evolution in the Court's case law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice." The Court concluded that, having regard to the requirements of the rights of the defence, and the role of appearances in determining whether they have been compiled with, there was a violation of article 6 (1) of the Convention.

The case law alluded to in the Borgers case is exemplified by De Cubber v. Belgium (1985) 7 EHRR 236, in which the appellant complained that one of the judges who had convicted him had previously acted as investigating judge in the same case. The Court held that there could not be a purely subjective test when it came to assessing the need to disqualify a judge. The Court said that:

> "Even appearances may be important, in the words of the English maxim quoted in for example, the Delcourt judgement justice must not only be done: it must be seen to be done. . . . What is at stake is the confidence which courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused."

Elaborating upon this principle, we come upon a case that is legally indistinguishable from Mr. Maharaj's, where Judge Glick was first the supervising prosecutor in the State's Attorney's Office, and then sat in judgement over Mr. Maharaj's request for an appeal. In Piersack v. Belgium (1983) 5 EHRR 169, the applicant was convicted of murder in a court where the presiding judge had previously been a senior deputy procureur, and had been in charge of the department which decided to prosecute the appellant. The applicant complained that the trial court had not acted as an independent and impartial tribunal. The European Court of Human Rights held unanimously that the trial court lacked the appearance of impartiality and that this was a violation of article 6 (1).

It follows that as far as European law is concerned the judgement against the appellant, Krishna Maharaj, by the lower court ought not to stand because justice was neither seen to be done at the trial, where the judge was led away in handcuffs, nor at his sentencing, where Judge Solomon had missed large parts of the testimony, nor at the hearing before Judge Glick, who to all appearances was biased by reason of his having had a part in the prosecution team at the time of trial.

II. THE EXTRAORDINARY DELAY IN THE PROCEEDINGS HAS DENIED KRISHNA MAHARAJ DUE PROCESS OF LAW: THIS COURT SHOULD CONDEMN THE LONG DELAY IN ALLOWING A HEARING TO EVALUATE THE EVIDENCE, SOME OF WHICH WAS SUPPRESSED BY THE PROSECUTION AT TRIAL, THAT SUGGESTS THAT MR. MAHARAJ MAY HAVE BEEN A VICTIM OF A MISCARRIAGE OF JUSTICE IN THIS CASE

It should be stressed that while the phenomenon of delays in executions has caused great debate, and evolving condemnation in international law, it is not necessary for this Court to reach that broader question in condemning the delay in this case. Krishna Maharaj has consistently sought his day in Court. Mr. Maharaj pressed for a speedy trial from his arrest--on October 16, 1986--through to the conclusion of his trial on October 21, 1987. Some months were wasted because the trial court would not, until ordered to do so, allow the indigent Mr. Maharaj a copy of his transcript without prepayment of costs. On October 31, 1989, before a briefing schedule was set in the case, and as soon as he discovered that the prosecution had allegedly suppressed exculpatory material,[2] he moved this Court to stay appellate proceedings and relinquish jurisdiction for filing a Writ of Error Coram Nobis. On January 8, 1990, this Court allowed ninety days for a hearing. On February 8, 1990, Mr. Maharaj's former attorney moved to have him appointed counsel, since he was indigent. In open court the next day, Judge Solomon appointed the Public Defender. On February 12, 1990, Judge Solomon entered a written order to that effect, but this was "withdrawn" the same day. No notice of this was given to Mr. Maharaj, who was incarcerated. The ninety days therefore expired without the lower court providing Mr. Maharaj with his constitutional right to counsel.

Again, seeking to have the issues expeditiously resolved, Mr. Maharaj filed his 3.850 petition on December 2nd, 1993, which was "more than a year before that date [of the statute of limitations]. . . ." (Record on Appeal, at 19) It took the state until July 8th, 1994, to respond. In the meantime, the state sought and obtained repeated continuances from April 8th to July 8th, 1994. Thus, when Judge Glick denied a hearing on November 21st, 1994, Mr. Maharaj had been incarcerated on Death Row or under its gloomy shadow for eight years. It is now nine years. He has still not had a hearing on the merits of his newly-discovered evidence.

International law now unequivocally provides the principle that justice delayed is justice denied. Some thirteen years ago, the authors of a minority judgement of the Judicial Committee of the Privy Council (Lord Scarman and Lord Brightman) perceived that a delay in the process that is intended to lead to an execution can have devastating effects on the condemned man. They held that while a period of anguish and suffering was an inevitable consequence of a sentence of death, a prolongation of it beyond the time necessary for appeal and consideration of reprieve can amount to the

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2. It would seem from the evidence that has been developed (but never presented live to a court) that the Moo Youngs were heavily into drugs, with Central and South American contacts. Any prosecutor would know that this would provide a strong motive for someone other than Mr. Maharaj to have committed the murders. Indeed, if Mr. Maharaj were framed for these crimes, it would almost necessarily have been done by someone with significant power and influence. Unknown to the defense at the time of trial--and apparently suppressed by the prosecution--one of the Moo Youngs and Shaula Nagel had been in Panama shortly before the murders. There, they had conducted an illegal "business" deal (which could reasonably be assumed to have been linked to drug dealings) with a $100 million fraudulent banker's letter of credit.

imposition of cruel and unusual punishment on the condemned man. See Riley v Attorney-General of Jamaica (delivered on 28th June 1982).

Their's was, for a while, the equivalent of a dissent in an American Court. Soon it was to become a powerful expression of international law. As was once said;

> "Read some of the great dissents and feel after the cooling off time of the better part of the century, the flow and fire of a faith that was content to bide the hour. The prophet and the martyr do not see the hooting throng; their eyes are fixed on the eternities."

Thus has the opinion of Lord Scarman and Lord Brightman overcome the earlier majority.

Indeed, on the Second of November 1993 the Judicial Committee of the Privy Council (Lords Griffiths, Lane, Ackner, Goff of Chieveley, Lowry, Slynn of Hadley and Woolf) delivered a far reaching and landmark judgement in the case of Earl Pratt & Ivan Morgan - v - The Attorney General for Jamaica et al. The Judicial Committee had not sat en banc as a board of 7 since the 1940's; but this was an exceptional constitutional challenge to the legality of hanging Commonwealth prisoners who had been kept on death row for more than five years with appeals unsettled, and without good cause shown for the delay. Lord Griffiths stated:

> "Appellate procedures that echo down the years are not compatible with capital punishment. . . . The death row phenomenon must not become established as a part of our jurisprudence."

In Pratt & Morgan, their Lordships held that "[t]he total period of delay in this case is shocking. . . ." Likewise, it is shocking that there has been a delay of several years between the time that this Court initially ordered a hearing on Mr. Maharaj's *Writ of Error Coram Nobis*, the denial of a hearing by Judge Glick, and this ultimate request for a remand to hold such a hearing.[3]

This Court should, it is respectfully submitted, condemn this delay and order that a hearing be held in the lower court.

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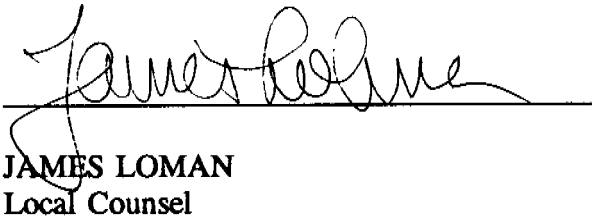
3. Indeed, this principle is one that has been shared by the Anglo-American tradition of law since before the Independence of the United States. Their Lordships said that in capital cases "there is a formidable case for suggesting that . . . inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in section 10 of the Bill of Rights, 1689. . . ." The 1689 Bill of Rights was part of the English legislation in force in 1727 at the commencement of the reign of George II and applied in and to the colonies at that time, as well as at the time of the War for Independence. Indeed, the common law custom and practice of speedy review of capital cases, and executing convicted murderers without delay, may be traced back at least as far as 1752, when **"An Act for better preventing the horrid Crime of Murder" (25 Geo. 2, c 37)** provided that all persons convicted of murder should be executed on the next day (unless convicted on a Friday in which case execution took place on the Monday). **Blackstone's Commentaries (1795 ed.)** contain an important passage. The first appears on pages 201-02 of chapter 14 ("Homicide"), Book IV, where Blackstone referred to the "short but awful interval between sentence and execution [of the death sentence]." Thus, even from the perspective of an English jurist in the Eighteenth Century--who approved of such things as burning women at the stake for certain offences--delay in the procedures against a condemned person were considered "cruel".

CONCLUSION

For these reasons, *Amicus* respectfully urges this Court to reverse the lower court, and order that an evidentiary hearing be held to air the various challenges to the conviction and death sentence[4] imposed upon Krishna Maharaj.

Respectfully submitted,



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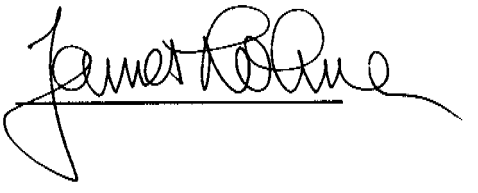
Certificate of Service

I hereby certify that a copy of the foregoing document has been served by first class mail on the Hon. Robert Butterworth, Attorney General for the State of Florida, this 3rd day of October, 1995.



4. *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 para. 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'* purpose in filing this brief relates more to the humanitarian belief that Mr. Maharaj should not be executed under the circumstances of this case, given the lengthy denial of the right to a hearing.