IN THE SUPREME COURT OF FLORIDA

KRISHNA MAHARAJ **Appellant,** **v.** **STATE OF FLORIDA,** **Appellee.**	**CASE No. 91,854**

BRIEF OF *AD HOC* (THE BAR OF ENGLAND AND WALES HUMAN RIGHTS COMMITTEE) AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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

PHILIP SAPSFORD, Queen's Counsel
ZUBAIR AHMAD, Barrister
Temple
London EC4Y 7BL
011-44-171-353-6802

* DONALD R. WEST
Law Offices of
Donald R. West,
626 W. Yale Street
Orlando, FL 32804
(407) 425-9710
(407) 425-8287

Attorneys for *Amicus Curiae* * *Local Counsel*
Bar of England and Wales
Human Rights Committee

CERTIFICATE OF TYPE STYLE AND SIZE

This brief is typed in 12 points COURIER NEW proportional space font.

TABLE OF CONTENTS

TABLE OF CITATIONS

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 Brief *Amicus Curiae* depends on their domestic rules. Against this background, it is respectfully submitted that this Court should admit this brief in support of the Appellant for the following reasons:

1. Krishna Maharaj was born on January 26, 1939, in Trinidad when it was a British colony. He owes allegiance to Her Majesty the Queen and retains all the rights and benefits of the British national while 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 sole British nationality. He was not a citizen of the United States on October 16, 1986, the date of his arrest on these charges in Miami, Florida. He remains a foreign national, subject to all the rights and benefits of the British national abroad.
2. The comity of the common law nations makes the experience of each persuasive to the other; the courts of the United States and England have often looked to each other for guidance.
3. The United States Government has ratified the International

Covenant on Civil and Political Rights, effective on June 8, 1992, evincing a sincere concern to comply with norms of international law. President George Bush, in submitting his proposal for the ratification of the ICPR to the Senate for its advice and consent argued that ratification reflected the role that he envisaged for the Unites States as a leader among nations "at this moment in history would underscore our natural commitment to fostering democratic values through international law."

4. The International Covenant of Civil and Political Rights is neither inconsistent with nor superior to the U.S. Constitution but complements the tribunals.

5. There is a presumption that the State of Florida will comply with international obligations entered into by the United States of America.

GROUNDS PRESENTED IN THE BRIEF

A. Whether the trial of the Appellant complied with internationally acceptable norms, and whether from an objective viewpoint justice therein appeared to be done in light of the patent judicial misconduct.

B. Whether the execution of a death sentence constitutes cruel

and unusual punishment under the Eighth Amendment if, as a result of inordinate delay, not attributable to his own conduct, the condemned inmate is likely to be forced to endure more than decade on death row.

ARGUMENT

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

A. PERCEPTIONS OF JUDICIAL IMPROPRIETY

There are two disturbing and unique features of the trial. First, Judge Gross, using an intermediary, approached the Appellant and sought an inducement. It is significant that the intermediary was at the relevant time an employee of the State's Attorney's Office.

Second, it is respectfully submitted that profound judicial misconduct occurred when Judge Gross was arrested on the fourth day of Mr. Maharaj's trial. It is significant that the jury was never directed by Judge Solomon that the arrest of Judge Gross was unrelated to the trial of the Appellant and did not involve either the Appellant offering Judge Gross a bribe or Judge Gross accepting a bribe from the Appellant.

The Record reflects that on October 14, 1987 certain jurors

stated the following:

> "All of a sudden this guy looked familiar on TV being led away in handcuffs and it was Judge Gross." (Transcript, p. 2916)
>
> "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. 2938)
>
> "...most of us were shocked to find out...." (Transcript, p. 2941)

Subsequently, the role of Judge Gross was taken over by Judge Solomon on October 13, 1987. Thus, although he was ultimately the one to pass sentence on Mr. Maharaj, Judge Solomon did not have the benefit of hearing the testimony of Neville Butler, who was allegedly the prosecution's eyewitness to the murders. Indeed, Judge Solomon was not present much of the testimony of the most important person in the case, Neville Butler. On December 1, 1987 (Transcript, p. 4563), Judge Solomon proceeded to sentence the appellant 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 judgment 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 there 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.

This Court ordered an evidentiary hearing which was held in September, 1997 before Judge Gerald Bagley. In a reasoned judgment, Judge Bagley concluded that Judge Solomon, in *ex parte* communications, had permitted an employee of the State's Attorney's Office to write the sentencing Order before the judicial sentencing phase had even begun.

B. BRITISH AND EUROPEAN JURISPRUDENCE

The importance of the principle that justice must not only be done, but must also be seen to be done cannot be overstated in a criminal trial. The principle is enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms [1950], Universal Declaration of Human Rights [1948] and the International Covenant on Civil and Political Rights [1966].

Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms [1950] states, *inter alia*, the following:

> "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."

Article 10 of the Universal Declaration of Human Rights [1948] reads:

> "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."

Article 14 of the International Covenant on Civil and Political Rights [1966] reads:

> "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..."

The principle that justice must not only be done, but must also be seen to be done is derived from the jurisprudence of the English courts, in particular the judgment of Lord Hewart, the Lord Chief Justice, in R. v. Sussex Justices *ex parte* McCarthy [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 they 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 an undoubtedly be seen to be done."

The great English Jurist, Lord Denning M.R., in Metropolitan Property Co.(F.G.C.) Ltd. v. Lannon [1969] 1 QB 577, said in following the Sussex Justices judgment:

> "It brings home this point: in considering whether there was 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 real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."

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, 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 probability of

bias..."

European jurisprudence is summarized in Borgers v. Belgium, (15 E.H.R.R. 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 E.H.R.R. 355, noted that it would be contrary to justice to give restrictive interpretation of 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 defense, and the role of appearances in determining whether they have been complied 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 E.H.R.R. 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 held that:

> "Even appearances may be important, in the words of the English maxim quoted in for example, the Delcourt judgment justice must 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."

Following British and European jurisprudence, it is respectfully submitted that conviction of the Appellant by the lower court should not stand because it cannot be said that justice was done in all the circumstances of this case.

First, it cannot be said that justice was done where Judge Gross through an intermediary, employed by the States' Attorney's Office, offered an inducement to the Appellant in return for payment of money. Second, where Judge Gross was arrested for allegedly taking a bribe during the trial and seen to be led away in handcuffs. Third, at the sentencing phase, where Judge Solomon passed the death sentence upon the Appellant not having had the benefit of hearing substantial portions of the evidence; this is

particularly compelling in the light of the findings by Judge Bagley at the evidentiary hearing in September, 1997.

The jurisprudence outlined in the foregoing submissions has been scrutinized internationally most recently in the highest appellate tribunal of England. In the House of Lords *In re* Pinochet Ugarte [House of Lords - Judgment 18 January, 1999] General Pinochet, the former dictator and President of Chile asserted that as a former Head of State he had immunity from arrest in England and extradition to Spain for trial on human rights abuses he allegedly conspired in or counseled in Chile in the 1970's and early 1980's. The House of Lords had previously denied General Pinochet's contentions, but in a rare manoeuver, set aside its own judgment, when alleged bias against General Pinochet was perceived in one of the 5 Judges. In giving judgment, Lord Browne Wilkinson stated:

> "...in principle, it had to be that the House, as the ultimate Court of Appeal, had power to correct any injustice caused by an earlier order of the House....If the absolute impartiality of the judiciary was to be maintained, there had to be a rule which automatically disqualified a Judge who was involved....there was no room for fine distinctions if Lord Hewart's famous *dictum* in R. v. Sussex Justices *ex parte* McCarthy [1924] 1 KB 256 [*supra*] was to be observed...."

Lord Hope added:

> "Everyone whom the prosecutor sought to bring to justice was entitled to the protection of the law, however grave

> the offence with which he was being prosecuted. General Pinochet was entitled to the judgment of an impartial and independent tribunal on the question which had been raised as to his immunity. The connections which existed between [Lord Hoffman] and [Amnesty] were of such character...as to disqualify him on that ground...he could not be seen to be impartial. There had been no suggestion that he was actually biased."

Lord Hutton added:

> "...the links were so strong that public confidence in the integrity of the administration of justice would be shaken if [his] decision were allowed to stand."

C. EXTRAORDINARY DELAY, CRUEL AND UNUSUAL PUNISHMENT, DENIAL OF DUE PROCESS OF LAW

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. He 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 Krishna Maharaj a copy of his transcript without pre-payment 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,[1] 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 a ninety day continuance to prepare for a hearing. On February 8, 1990 Krishna Maharaj's former attorney moved to have him 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 Krishna Maharaj, who was incarcerated. The ninety days therefore expired without the lower court providing Krishna Maharaj with his constitutional right to counsel.

Again, seeking to have the issues expeditiously resolved, Krishna Maharaj filed his 3.850 petition on December 2, 1993, which was "more than a year before that date [of the statute of

[1] It would seem from the evidence that has been developed (but never presented live to the 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 those 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.

limitations]...” (Record on Appeal, at 19). It took the state until July 8, 1994 to respond. In the meantime, the state sought and obtained repeated continuances from April 8, 1994 to July 8, 1994. Thus, when Judge Glick denied a hearing on November 21, 1994, Krishna Maharaj had been incarcerated on Death Row for eight years.

International law now unequivocally provides the principle that justice delayed is justice denied. Some thirteen years ago, the authors of a minority judgment 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 imposition of cruel and unusual punishment on the condemned man. See Riley v. Attorney-General of Jamaica [1983] 1 A.C. 719.

Scarman and Brightman’s decision 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 art 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 November 2, 1993, the Judicial Committee of the Privy Council (Lords Griffiths, Lane, Ackner, Goff of Chieveley, Lowery, Slynn of Hadley and Woolf) delivered a far reaching and landmark judgment in the case of Earl Pratt & Uvan Morgan v. The Attorney-General for Jamaica [1994] 2 A.C. 1. 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:

> "The total period of delay in this case is shocking..."[2]

[2] 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

This jurisprudence is not unknown in the United States' Supreme Court. In Clarence Allen Lackey v. State of Texas [1995] No. 94-8262, Justice Stevens, in a rare memorandum denying certiorari states:

> "Petitioner raised the question whether...executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Though the importance and novelty of the question presented by this *certiorari* petition are sufficient to warrant review by this Court, those factors also provide a principled bases for postponing consideration of the issue until after it has been addressed by other courts. Though a novel, Petitioner's claim is not without foundation...the Court's denial of *certiorari* does not constitute a ruling on the merits...often a denial of *certiorari* on novel issue will permit the State and Federal Courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.' Petitioner's claim, with its legal complexity and its potential for

---

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 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 offenses) delay in the procedures against a condemned person were considered "cruel."

> far reaching consequences, seems an ideal example of one which would benefit from such further study."

Supreme Court Justice Breyer agreed with Justice Stevens that the issue is an important undecided one.

CONCLUSION

WHEREFORE, for the reasons set forth above as well as such others as may appear to this court, *amicus* respectfully moves this Court grant him a new trial.

Respectfully submitted this _____ day of March, 1999, at Orlando, Orange County, Florida.

PHILIP SAPSFORD, Queen's Counsel
ZUBAIR AHMAD, Barrister
Temple
London EC4Y 7BL
011-44-171-353-6802

DONALD R. WEST
LAW OFFICES OF
DONALD R. WEST,
626 W. Yale Street
Orlando, FL 32804
(407) 425-9710
(407) 425-8287

_____
DONALD R. WEST
Florida Bar No. 315941

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 1999, a true copy of the foregoing, with attached appendix, was furnished by United States Mail to Anita Gay, Assistant State Attorney, 1350 N.W. 12th Avenue, Miami, Fla. 33136-2111; to the Office of the Attorney General, Department of Legal Affairs, Rivergate Plaza Suite 950, 444 Brickell Avenue, Miami, Florida 33131; to Benedict P. Kuehne, Sale & Kuehne, Nationsbank Tower, Suite 3550, 100 S.E. 2nd Street, Miami, Florida 33131-2154; and to Clive A. Stafford Smith, Louisiana Crisis Assistance Center, 636 Baronne Street, New

Orleans, Louisiana 70113.

_____

DONALD R. WEST
Florida Bar No. 315941