IN THE SUPREME COURT OF THE
STATE OF FLORIDA
No. 91,854

KRISHNA MAHARAJ, Defendant-Appellant

v.

STATE OF FLORIDA, Plaintiff-Appellee

On Appeal from the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Criminal Division

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APPELLANT'S REPLY BRIEF ON APPEAL

BENEDICT P. KUEHNE
Fla. Bar No. 233293
Sale & Kuehne
NationsBank Tower #3550
100 S.E. 2nd Street
Miami, Fl. 33131-2154
(305) 789-5989

CLIVE A. STAFFORD SMITH
636 Baronne Street
New Orleans, La. 70113
(504) 558-9867

Certificate of Type Style and Font

It is hereby certified that the text of this brief is printed in Abadi MT Conde 14 point font, proportional spaced, in compliance with this Court's rules.

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APPELLANT'S REPLY BRIEF ON APPEAL

COMES NOW, KRISHNA MAHARAJ, by counsel, and files the following reply brief in response to the *Answer Brief of Appellee (hereinafter "State's Brief"*):

INTRODUCTION

Mr. Maharaj will not reiterate all of the new evidence again, but by copying verbatim this Court's rendition of the facts as they were believed to be in 1992, the first several pages of the State's pleading serve as a stark contrast to what is now known about the case. (*State's Brief, 4-11*)

ARGUMENT

There are many aspects of the *State's Brief* that call for no response. By dealing only with certain issues raised in the *State's Brief*, Mr. Maharaj does not mean to telegraph his agreement with other dubious positions taken. Instead he believes that such issues have been adequately addressed in his initial brief.

I THE COMBINED EFFECT OF JUDGE GROSS' SOLICITATION OF A BRIBE FROM MR. MAHARAJ, USING AN ASSISTANT STATE'S ATTORNEY AS A GO-BETWEEN, HIS BIAS AGAINST THE DEFENSE, AND BY HIS ARREST DURING THE TRIAL, SET IN THE SHADOW OF JUDGE SOLOMON ASKING THE STATE *EX PARTE* TO WRITE THE SENTENCING ORDER BEFORE THE JUDICIAL SENTENCING HEARING EVEN BEGAN, SHATTERS ALL CONFIDENCE IN THIS CONVICTION

There are several issues involved here. Each is so interrelated that one sub-section cannot be separated from another. For example, if Judge Gross should have recused himself prior to trial, it follows necessarily that he should have done so during trial as well. If counsel was ineffective for failing to investigate the pre-trial recusal issue, he was surely ineffective when he advised his client to waive the claim when Judge Gross was taken off mid-trial.

The State tells this Court to default the judicial misconduct issue because "Defendant did not raise his claim that a mistrial was required because of the initial trial judge's arrest midtrial below. . ." (*State's Brief, 37*)[1] This is pure nonsense. There was an entire section of his 3.850 petition devoted to the point. (*3.850 Clerk Tr. 6264-67* , *3.850 Petition at §XII, ¶¶875-83*)[2] Curiously, the State never replied to this issue, since its response petered

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[1] In support of this argument, the State cites Shere v. State, 1999 WL 419333 (Fla.) in which this Court held that Shere could not raise a claim on the insufficiency of the evidence in support of aggravator for the first time on appeal when, in his rule 3.850 motion, he had alleged only that the jury was improperly instructed with regard to that aggravator. This is hardly the same as the claim in this case, where Mr. Maharaj has devoted an entire section of his 3.850 petition to the plethora of judicial misconduct, and where he has alternately pled it as an ineffectiveness issue.

[2] Indeed, the State confesses in its introductory section that "[t]he Defendant asserted that his counsel was ineffective for . . . (14) failing to demand a mistrial when the trial judge was arrested midtrial." (*State's Brief, 13-14*)

out at issue XI, and went no further. (*3.850 Clerk Tr. 6429*) As the defense argued in the lower court (*3.850 Clerk Tr. 6465*) , the party that should be defaulted on this issue is the State.[3]

On the merits of the issue, the State contends that there was "no evidence linking Trinchet to the trial judge . . . [and] Defendant did not prove that Trinchet's approach was a solicitation of a bribe by the trial judge." (*State's Brief, 39*) It is hard to comprehend the State's insistence on the innocence of a corrupt, high-ranking, public official, whom it saw fit to prosecute for corruption. Indeed, for the State to launch a sting-operation against a judge it must have had reason to believe that he was in the business of selling justice and had taken bribes before. This argument is simply wrong. It was the State that made no effort to rebut the uncontradicted evidence that Judge Gross had solicited a bribe--evidence that came from Eric Hendon, and

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[3] Procedural rules have been applied with equal force against the prosecution as against the defense. See, e.g., Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984); Barrera v. Young, 794 F.2d 1264, 1267-68 (7th Cir. 1986); Merlo v. Bolden, 801 F.2d 252, 255 (6th Cir. 1986); Cole v. Young, 817 F.2d 412, 415 (7th Cir. 1987); Russell v. Rolfs, 893 F.2d 1033, 1038 (9th Cir. 1990); Francis v. Rison, 894 F.2d 353, 355 (9th Cir. 1990); Wilson v. O'Leary, 895 F.2d 378, 384 (7th Cir. 1990); Alerte v. McGinnis, 898 F.2d at 71-72; see also Hitchcock v. Dugger, 481 U.S. 393, 399, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987) (waiver of harmless error by failing to raise it).

was corroborated by the trial prosecutors.

The State ignores the fact that Mr. Maharaj made these allegations prior to trial (and prior to Judge Gross' arrest on other bribery charges), as was evidenced by the prosecutors' testimony as well as Mr. Hendon's. The State strains credulity when it argues that Mr. Hendon "merely thought she [Myra Trinchet] was trying to steal his client." (*State's Brief, 41*) Earlier, the State told us that Mr. Hendon advised Mr. Maharaj "that he believed that she was a prosecutor and that no bond would be granted." (*State's Brief, 16*)[4] If she was a prosecutor, then how could she simply be soliciting his client?[5] Indeed, in the very next line, the State contends that trial counsel "did not pursue the

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[4] Indeed, Mr. Hendon not only believed her to be a prosecutor, but that she had told Mr. Maharaj that she "had a relationship with Judge Gross and he would definitely be allowed to be released on bond" if Mr. Maharaj were to pay her $50,000. (*3.850 Tr. 224*)

[5] For example, Mr Hendon testified:

> A. . . . at the time, I was in a -- the position I was in was I had my client advising me that he had been approached by someone on behalf of the judge indicating that they could garner favors with the judge. My client was charged with first degree murder. My position at this time was well, certainly I was not about to let my client begin having conversations with the prosecutor himself. I think my actions in reporting it to the prosecutor, that was all I was going to do at this time in that regard.

(*3.850 Tr. 228*)

matter further because he did not wish to have the police in contact with Defendant." (*State's Brief, 41*) Why would he go to the police, rather than the Bar Association, if she were merely trying to steal his client?

The fact that Trinchet told Mr. Maharaj that she knew he had passed a polygraph, that she knew he was innocent, that double-homicide defendants don't generally make bond (never mind being guaranteed it), seems to have entirely escaped the State's attention. Certainly, we might expect Judge Gross to exercise a little subtlety in soliciting his bribes. It seems that Mr. Maharaj would only be able to satisfy the State if he had performed in his own sting operation prior to the one performed by the *FDLE*.[6]

A THE LAW MANDATED THE RECUSAL OF JUDGE GROSS LONG BEFORE ANY QUESTION OF A MISTRIAL

On this issue, if this were not so serious a case, the State's position would be humorous:

> Defendant appears to contend that the initial trial judge should have admitted to taking bribes and recused himself on this basis. However . . . this Court [has] held that a government official is not required to waive his privilege against self-incrimination to provide

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[6] Indeed, it is apparent that there is considerable evidence in the possession of the State of Florida that has still not come to light. How, for example, did the State know to conduct a sting operation on Judge Gross if there were not a strong suspicion that he had been soliciting bribes before?

> facts favorable to a defendant. Thus . . . the initial trial judge was not required to admit his criminal conduct to help Defendant.

(*State's Brief, 40*) Translated into English, the State argues that the Judge has a constitutional right to remain silent when he commits crimes on the bench, and the defendant must suffer the consequences.[7]

In a desperate attempt to provide legal founding for this astoundingly cynical argument, the State cites Breedlove v. State, 580 So.2d 605 (Fla. 1991). (*State's Brief, 40*) Breedlove claimed that two detectives, whom he alleged had coerced him into making a confession, who were themselves later convicted of drug conspiracies and using cocaine, were obliged to inform him under Brady of the crimes they were committing at the time of his trial. This Court held that the knowledge of these crimes could not be imputed to the prosecutors.

This is a far cry from the issue in Mr. Maharaj's case. Mr. Maharaj did not want evidence, nor even information, of the judge's wrong-doing; he merely wanted a fair trial before an impartial judge. If Judge Gross considered that his impartiality might reasonably be questioned, he was under an obligation

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[7] It is troubling that the State chooses to argue that Judge Gross should not have admitted to his crimes to 'help' Mr. Maharaj, as if Mr. Maharaj makes an outrageous demand when he requests a fair trial.

to disqualify himself *sua sponte*. Although the State is solicitous of his Fifth Amendment privilege, he did not need to give an explanation for his recusal. This is not just to protect litigants such as Mr. Maharaj, but to protect Justice itself.

B. TRIAL COUNSEL SHOULD HAVE ACTED TO PRESERVE HIS CLIENT'S RIGHTS LONG BEFORE TRIAL

The State further contends that "the only alleged bias after the Trinchet incident was that the trial judge would not accommodate defense counsel's schedule." (*State's Brief, 41; 16, 39*) As set out in the initial brief, this is not supported by the record. However, even were we to accept this as true, surely the State descends to absurdity by arguing that "trial counsel would not have had grounds to move to recuse the judge." (*State's Brief, 41*) Again, let us translate this to plain English: Solicitation of a bribe by a sitting judge to an accused to be tried before that judge is insufficient grounds to file a recusal motion. . . .[8]

In any event, the State misreads the record. Mr. Hendon testified that the

[8] The State cites Correll v. State, 698 So.2d 522, 524 (Fla. 1997), which stands for the proposition that a motion to recuse is only legally sufficient if it alleges facts that would put a reasonably prudent person in fear of not receiving a fair and impartial trial. Certainly a reasonably prudent person would fear not receiving a fair and impartial trial if they had just rebuffed the bribery offer of a corrupt judge.

judge became hostile to him after the rejection of the bribery solicitation.[9] Had counsel performed any investigation he would have uncovered further evidence of Judge Gross' corruption.[10] Whether that would have been the case or not, Mr. Hendon would have had sufficient grounds to recuse Gross on the bribery attempt alone, especially considering this as a very reasonable basis for fearing future bias at trial.

C. AS TO THE MISTRIAL ISSUE, TRIAL COUNSEL DID NOT INVESTIGATE THE FACTS AND THE LAW, AND FAILED TO COMMUNICATE EITHER TO HIS CLIENT, WHEN THE TRIAL JUDGE WAS ARRESTED IN THE MIDDLE OF THE TRIAL

In making the decision to 'waive' the mistrial, Mr. Maharaj stated: "I have been guided by my lawyer." (Tr. 2857) The question before this Court is whether that decision was knowing and intelligent (*i.e.*, did he know the complete circumstances in making it), and whether he received ineffective advice in making it.

The State says that counsel "fully informed the defendant of his right to

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[9] To be sure, the judge may not have ruled against the defense on substantive pre-trial motions, for the simple reason that Mr. Hendon never got around to filing one. However, the judge sat on the first three days of trial, including all of jury selection.

[10] See, e.g., State v. Paterno, 478 So.2d 420 (Fla. App. DCA3 1985) (reversal where Judge Gross illegally reduced bail in life felony cases).

move for a mistrial. . . ." (*State's Brief, 42*) Yet the State concedes that Mr. Hendon "did not consider the contact with Trinchet in giving this advice because he did not see a connection." (*State's Brief, 17*) How can Mr. Maharaj's decision have been "knowing and intelligent" if counsel did not even make the link? The least amount of thought--let alone investigation--would have allowed trial counsel to do so. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) ("case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."); Rose v. State, 675 So.2d 567, 573 (Fla. 1996) ("it appears to have been a choice directly arising from counsel's incompetency.")

The State also put great store on the fact that:

> Counsel also felt that the arrest of the judge midtrial might reenforce his trial theory, which was that the State's witnesses were lying.

(*State's Brief, 43; 17*) However, counsel made this decision before the jurors were even polled on whether they had seen Judge Gross' arrest. They had been instructed, ironically by Judge Gross himself, to avoid any media associated with the case:

> *The case must be tried by you only on the evidence presented*

> *during the trial in you presence and the presence of the defendant, the attorneys and the judge . . . you must not read nor listen to any reports about the case. . . . Curiosity has destroyed more cases around here. . . Only what takes place in this courtroom you should consider and that is very, very important.*

(*Tr. 2156-57*)(emphasis supplied) That Mr. Hendon was relying on serious juror misconduct, in direct disobedience to the instructions of the trial court, as part of his grand trial 'strategy' does not speak well of the quality of representation Mr. Maharaj received at trial. That the State now choose to rely on that same misconduct[11] in an attempt to deny Mr. Maharaj relief is an assault on the notion of *fairness* and *justice*.

Finally, as the State concedes, this "tactical choice" was also based on the fact that counsel "anticipated that some future state witnesses would contradict some of the testimony already elicited." (*State's Brief, 17*) This was another chimera, since counsel thought he could pit Prince Ellis against Eddie Dames, but the State never intended to call Dames and counsel never made arrangements to call him for the defense.

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[11] Indeed, if such misconduct were proven, generally that would be grounds for reversal. Young v. State, 720 So.2d 1101,1103 (Fla. DCA 1 1998) ("Once a party shows that a juror concealed information during questioning that is relevant and material to serving on that jury . . . inherent prejudice to the party is presumed, and the party is entitled to a new trial."); Lowery v. State, 705 So.2d 1367 (Fla. 1998) (same).

D. GIVEN JUDGE GROSS' CRIMINAL MISCONDUCT, THE FLAGRANT *EX PARTE* MISCONDUCT BY JUDGE SOLOMON, AND THE STILL MORE IMPROPER *EX PARTE* COMMUNICATIONS BY JUDGE GLICK, IT CANNOT BE SAID THAT MR. MAHARAJ "APPEARS" TO HAVE RECEIVED JUSTICE IN THIS CASE

It is hard to credit that the State would argue with respect to the third act of judicial misconduct in this case--Judge Glick's *ex parte* solicitation of an order denying relief on post-conviction--that Mr. Maharaj "presented no evidence to substantiate this claim below." (*State's Brief, 44 n.4*) As Mr. Maharaj stated in his initial brief, he attempted to introduce this at the rule 3.850 hearing, to show a pattern of misconduct, but the State objected and the lower court improperly limited the questioning. (*Initial Brief, at 21 n.24; see also 3.850 Tr. 592*) The evidence of his misconduct is nonetheless in Mr. Maharaj's appendix from the lower court. (*3.850 Clerk Tr. 1280-81*)

II. MR. MAHARAJ WAS FORCED TO PRESENT HIS CASE TO THE LOWER COURT WITHOUT ANY FUNDS WHATSOEVER IN CLEAR VIOLATION OF THE LAW

The State repeatedly tells this Court that the only reason that Mr. Maharaj did not receive funds was "because of Defendant's insistence on the timing of the proceedings below." (*State's Brief, 37, 45, 47*) Saying this often does not make it true. The simple and inescapable truth is that not one penny

was paid by the State to fund Mr. Maharaj's defense, leaving him with his hands tied. The mirage of funding rose and evaporated on several occasions in the months leading up to the hearing.[12] There was never any promise that funding would be available at a later date.

The 3.850 hearing was finally held in September 1997 after various delays caused by the State, and in patent violation of this Court's order that the "hearing shall commence within ninety days from the date this opinion becomes final." Maharaj v. State, 684 So.2d 726, 728 (Fla. 1996). This would have been March 10, 1997. Instead, the hearing commenced six months late,[13] on a date chosen by the State. (*3.850 Tr. 12*) Mr. Maharaj had been promised funds by July (*3,850 Tr. 23*), and therefore ultimately agreed to the September date. As the hearing approached, counsel were told that the chances of gaining funding from CCR were virtually non-existent and there was no assurance that a delay would resolve the issue.

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[12] The State may not be fully aware of the facts here, since they were detailed in Mr. Maharaj's *Ex Parte Notice of the Steps Taken by the Defense to Secure Funds for the Defense (filed 09/08/97)*, which was sealed by the trial court. Presumably, this was made a part of the record on appeal, but a copy has been forwarded to the Court under seal.

[13] In truth, since Mr. Maharaj had asked for this hearing in 1990, and it was denied solely because he was never given counsel for the *coram nobis* hearing that was ordered by this Court.

To blame Mr. Maharaj for this delay is not only wrong, but unconscionable. Mr. Maharaj is sixty years old. He has waited twelve years for his vindication. There is no reason for him to wait any longer. Indeed, this Court has made its dissatisfaction with such delays crystal clear:

> When this Court orders an evidentiary hearing, judicial economy and a sense of justice militate that the lower court act promptly on our instructions. Failure to act promptly deprives defendants of due process under the law and reflects poorly on our justice system.

Jones v. State, 1999 WL 395698, at *5 (Fla. 1999); see also Elledge v. Florida, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998) ("Not only has he, in prison, faced the threat of death for nearly a generation, but he has experienced that delay because of the State's own faulty procedures and not because of frivolous appeals on his own part.") (Breyer, J., dissenting from denial of *certiorari*) .

Even were the State correct that this was somehow Mr. Maharaj's choice, to condition his right to funds on his waiver of his right to a speedy proceeding would be an independent violation of Mr. Maharaj's due process rights. It is axiomatic that "the accused's constitutional rights . . . are 'co-equal' and that he cannot be coerced to sacrifice one in order to enjoy the other." State ex rel. Gentry v. Fitzpatrick, 327 So. 2d 46, 47 (Fla. DCA 1, 1976); see also Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106

(1965) (there can be no "penalty imposed by courts for exercising a constitutional privilege . . . [and the courts cannot] cut[] down on [a] privilege by making its assertion costly.").

However, it is abundantly clear that Mr. Maharaj never "waived" his right to funds by insisting upon expedition.[14] From day one, Mr. Maharaj sought the

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[14] Indeed, Mr. Maharaj himself told the lower court: "You cannot, in my humble opinion, you cannot judge this entire evidentiary hearing unless you have the whole truth; and what I believe is essential, as I said to him yesterday, is, we must have, even if it takes a little more time, we must have, or we should have, put it that way . . . all the expert witnesses." (*3.850 Tr. 976*) And, when questioned about his decision not to testify: "On the advice of my attorneys I made that decision in the absence of expert witness that should have been called." (*3.850 Tr. 1042*) Counsel for Mr. Maharaj also made it absolutely clear that the issue was not waived:

> But let the record reflect, should people judge this in hindsight, that we have advised him that the whole procedure is highly unsatisfactory. * * * [A]nd in giving Mr. Maharaj advice as to how we go about this, we did that in the context of not having any money and Mr. Maharaj has expressed to me and Mr. Kuehne yesterday, and I concur with him, that is a fundamental flaw in our capacity to do what we would want to do to feel effective.

(*3.850 Tr. 966*) Having heard counsel's proffer as to what evidence the defense would have submitted (*3.850 Tr. 966-73*), the lower court commented:

> I have listened to Mr. Smith give us a litany of different areas in which, due to lack of funds – and I am acutely aware of the issue relating to the funds and the monies that both Mr. Kuehne and Mr. Smith have requested from the Court in efforts to bring witnesses forward to have experts look at certain evidence and what have

funds he needed for his case. Contrary to the State's misrepresentation, counsel were *not* retained.[15] Counsel sought appointment (*Initial Brief, at 22 n.25*), as well as funds for various matters including investigation, for expert witnesses,[16] for the transportation of various witnesses from other states and from abroad,[17] and for other important issues. Not one cent in state funding

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you.

(*3.850 Tr. 974*)

[15] We are told that "Defendant privately retained . . . his present attorney. . . ." (*State's Brief, 45*) To the contrary, Mr. Kuehne had been retained for the previous appeal, but was not paid for the remand hearing. Mr. Stafford-Smith appeared without payment throughout.

[16] There were several requests for funding, discussed in the *Initial Brief, at 22-23*. The State helps prove the prejudice of the denial of these funds, blaming the defense for failing to "show that any of these [Moo Young financial] transactions were improper in the evidentiary hearing below." (*State's Brief, 54*) While the defense did make such a showing (what else could the Moo Youngs have been doing laundering $5 billion in funds if it was not illegal drug money), this is also hardly fair, since the defense repeatedly requested funds for an expert to examine the papers, and yet all funds were denied. Then, when a forensic accountant agreed to perform a preliminary review without charge, the State moved to strike her affidavit from the appeal.

[17] The State helps to make the defense case for funding by telling this Court that the defense failed to call either Tino Geddes at the hearing below, or "the two witnesses who could allegedly show that the weapons were not to be used to attack the victims." (*State's Brief, 76*) Mr. Geddes lived in Jamaica and the other witnesses live in Trinidad. Mr. Maharaj sought funds to investigate in both locations, and bring these witnesses to testify, but was denied this. Indeed, these were among the affidavits that the

was forthcoming.[18]

Where the funds should have come from is really not the point. It is not Mr. Maharaj's duty to come up with the funds, but the Court's. However, even here the State makes assertions that are not the case. The State tells this Court that Mr. Maharaj did not argue that the CCR had a conflict of interest in the lower court. (*State's Brief, 46*) This is wrong. The CCR letter refusing to resource the case and noting the potential conflict was attached as *Exhibit A*

State refused to accept for the hearing. Again, Mr. Maharaj notes that they have been omitted from the record on appeal, and are therefore included with his *Motion to Supplement* (including Exh. CH, CQ). The State also says that the defense did not intend to call Dames and Ellis at the hearing below. (*State's Brief, 88*) Where this comes from it is hard to tell, since there is no citation provided. It is certainly not true. The defense struggled long and hard to get evidence from them but had no funds either to depose them in the Bahamas, to bring them to the United States, or even to authenticate their British TV interviews. Indeed, the State concedes that defense was denied funds to authenticate the tapes that reflected Prince Ellis' recantation, as well as various inconsistent statements by Dames, the prosecutors and Det. Buhrmaster. (*State's Brief, 30*)

[18] The State implies that the defense had "a ballistics expert available at the evidentiary hearing." (*State's Brief, 74*) This is not the case. The State tried to make the same argument below, and the defense had made it clear in a proffer to the trial court that the expert (who had been paid a limited amount by defense counsel out of counsel's own funds) had not had sufficient resources to complete even the limited task that defense counsel had requested. (*3.850 Tr. 992-993*), and was certainly not "available at the hearing."

to the *Motion for Costs for the Defense*,[19] and was discussed in the record. (*3.850 Tr. 23*)[20]

The State is also wrong when it says that Mr. Maharaj "took no action to compel CCR to provide funding." (*State's Brief, 47*) Mr. Maharaj repeatedly asked the trial court to order each source (any source) to provide funding, for at least nine months, yet none was forthcoming:

> THE COURT: . . . I should tell you though that the possibility of getting funds [from CCR] do not look that great. So you need to consider that as relates to your preparation of this case.

(*3.850 Tr. 86*) Neither was there any promise of future payment: The trial court said, "[f]rankly, I'm not very optimistic for you to receive any substantial amount of money, if any monies at all." (*3.850 Tr. 102*)

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[19] Apparently, this was not included in the record, but has been provided with Mr. Maharaj's *Motion to Supplement* filed with this brief.

[20] The State is wrong when it represents that Mr. Maharaj tried to retain counsel for his original *coram nobis* hearing. (*State's Brief, 46*) Mr. Maharaj was not even allowed to be present for his hearing, and did not know he was not being represented. The State argues that under *Fla. Stat. §27.702(1989)* the CCR could not begin representing Mr. Maharaj until the direct appeal was complete. Be this as it may, someone should have taken his case, and CCR took the position that it had a potential conflict because the claim was made that CCR should have filled the breach in the unique situation of a post-conviction hearing prior to the disposition of the direct appeal.

Counsel remarked to the lower court, quite rightly it would seem, that the pursuit of funding to provide effective representation for Mr. Maharaj was like "squeezing water out of a rock." (*3.850 Tr. 23*) The rock never let any water out.

III. THE ACCUMULATION OF ERROR IN THIS CASE REQUIRES THAT THE INDICTMENT BE DISMISSED OR THAT A NEW TRIAL BE GRANTED

A. THE LAW REQUIRES THAT THIS COURT ASSESS THE CUMULATIVE IMPACT OF ALL THE "NEW FACTS" IN THIS CASE WHETHER THEY ARE NEWLY DISCOVERED, SUPPRESSED BY THE PROSECUTION, OR IGNORED DUE TO DEFENSE COUNSEL'S FAILINGS

The State does not even mention this Court's decision in State v. Gunsby, 670 So. 2d 920 (Fla. 1996), nor the theory underpinning it--that we must look to the aggregate effect of the inequities in a trial on the ultimate result. Instead, the State does precisely what Gunsby condemns: Seeks to divide each issue into a separate claim, and conquer them one by one. Even if the State would ignore this Court's pronouncements, others do not. See, e.g., Bradford v. State, 701 So.2d 899, 900 (Fla. DCA 4 1997) (citing *Gunsby* for requirement that courts look to "the cumulative effect of counsel's deficiencies"); Urquart v. State, 676 So.2d 64, 66 (Fla. DCA 1 1996) ("the cumulative effect of numerous errors or omissions in counsel's performance

may constitute prejudice").

B. THE "FACTS" AS THE JURY AND THIS COURT HEARD THEM AT THE TIME OF TRIAL ARE VERY DIFFERENT FROM THE TRUE FACTS AS WE KNOW THEM TODAY

a. The million dollar life insurance policies would have led the defense to probe to learn why the victims would have thought them necessary

The State's argument that the prosecutors did not know about the insurance litigation is nothing more than pure advocacy:

> Ridge acknowledged that the State's Attorney's office received, on July 15, 1987, a copy of an objection to a request for production filed by the victims' family in their suit against William Penn Life Insurance. * * * Ridge stated that he did not infer that the victims had life insurance from the objections.

(*State's Brief, 25*) This is, with all due respect, a good illustration of the State's attitude to this case: Deny, deny, deny at all costs, and let equity be damned. What on earth did Mr. Ridge believe the suit against William Penn *Life Insurance* to be about unless it was the victims' *life insurance*?

After pretending that the prosecution did not know about the insurance, the State pretends that the defense should have asked Shaula Nagel during her deposition. (*State's Brief, 50*) Yet why should the defense have known to do this?

The argument that Mr. Maharaj was aware of the Moo Youngs' business dealings because he had once been their partner (*State's Brief, 28, 51*) is more pure advocacy. Mr. Maharaj proved in the court below that he was being ripped off by the Moo Youngs in many ways that he never knew. He had been separated from them for several months, and given that they were lying about him in the *Caribbean Echo* it is hardly likely that they would be sharing their financial dealings with him in private. Indeed, the State argues that the victims' own daughter, Shaula Nagel, who was a principal in various of their companies, did not know of their illegitimate dealings. (*State's Brief, 56, 57*)

The State says that the insurance policies were only relevant to show that "the victims were in fear for their lives." (*State's Brief, 50*) To the extent that this was a reason, it was probably the least significant one. First, and perhaps most important, it would have led the defense to speak with counsel for William Penn, and this would have led directly to the gold mine of information that the defense now has. Second, it was a key man policy, that would have led to investigation into the businesses in which the Moo Youngs were "key men" -- Cargil International and AMER Enterprises.

b. The Moo Young briefcase contained a plethora of evidence of the illegal activities of the victims that would have provided a strong motive for someone

else to kill them

The briefcase papers would also have led the defense to much of the exculpatory evidence. The State confesses that Det. Buhrmaster told the defense investigator that the contents of the briefcase "had been returned to the victims' family." (*State's Brief, 52; 31*) Nonetheless, we are told that the Defense should have compelled its production at the time of trial.

This is unfair.[21] From Det. Buhrmaster's representation, the defense could deduce (1) that the State did not have the documents and could not therefore produce them; and (2) that they seemed to be of no evidentiary value.[22] Both "facts" were false. Even if we assume--charitably--that the documents had actually been returned, the moment Buhrmaster got them back he was under an obligation to notify the defense.

Indeed, the United States Supreme Court has recently decided a case

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[21] Also, this argument does not actually advance the State's cause: This would merely make the entire issue one of ineffective assistance of counsel, rather than the suppression of evidence.

[22] It is ridiculous to say that the defense should have raised the issue on direct appeal, given that the defense did not know of the contents of the briefcase. It is notable, however, that as soon as Mr. Maharaj was told some of the issues involved (when he was deposed by William Penn Life Insurance), he immediately sought and was granted a *coram nobis* hearing.

precisely on point. In Strickler v. Greene, 119 S.Ct. 1936 (1999), the State likewise tried to blame the accused for the fact that the State had suppressed evidence. The Supreme Court begged to differ:

> . . . it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination. . . .

Id. at 1949. Indeed, in Strickler as here, "[t]here is no suggestion that tactical considerations played any role in petitioner's failure to raise his *Brady* claim. . . ." Id. at 1952. The defense justifiably relied on Det. Buhrmaster's representation that the materials had been returned to the Moo Young family.

On the issue of the passports (that reflected more than a dozen flights all around the Caribbean on the Moo Youngs' illegitimate business), the State contends that Shaula Nagel testified about some of the victims' travels. (*State's Brief, 53*) The State provides to record citation to support this. The passports show that she lied. The only travel that Ms. Nagel mentioned in her deposition was a family trip to London. (*3.850 Clerk Tr. 229*) She clearly knew about the other travels, since she went on at least one trip herself, and must have known when her father and brother were abroad.

The State then tries to say that this evidence does not prove any

wrongdoing anyway. The State argues:

> Defendant was unable to show an [*sic*] improprieties after an investigation into the victims' finances. Further, Defendant did not show that any of these transactions were improper in the evidentiary hearing below.

(*State's Brief, 54*) As discussed above, the defense was denied funds to analyze the contents of the briefcase, and the State objected to the supplementation of the record when a forensic accountant performed the work *pro bono* after the 3.850 hearing was completed.

However, even without funding it is clear that there was no possible, legitimate way that the Moo Youngs--on combined incomes of roughly $20,000 per year--should have been laundering **five billion dollars** around the Caribbean. What could it have been but drug money, or a vast fraud, either of which would have garnered a plethora of dissatisfied customers with motives to kill the Moo Youngs?

In any event the State cannot keep its story straight. In one breath, we are told that there is no evidence linking Hosein to the case, and to drug trafficking. (*State's Brief, 85*)[23] The State says that even if Adam Hosein was

[23] The State simply cannot explain the telephone call from Hosein to Room 1215 at the Dupont, and therefore speculates vainly that he was calling Mr. Maharaj! (*State's Brief, 86 n.8*) The entire State case was built on the fact that the murder was a secret rendezvous known only to Mr.

friends with convicted drug trafficker Nigel Bowe, and if the Moo Youngs' business, *Cargil International*, had its office address at Bowe's law office in the Bahamas, there was no evidence at all that "Hosein was a drug dealer." (*State's Brief, 88*) Fifty-four pages earlier, the State takes the position that "[George] Bell pled guilty to drug trafficking charges involving Nigel Bowe and Adam Hosein. . . ." (*State's Brief, 34*) Which way does the State want it?

There were many other critical facts available in the briefcase papers. Shaula Nagel knew about the calls from Dames to her father. (*State's Brief, 57*) The State knew about the references to ED (Eddie Dames) and his Bahamian phone number in the briefcase.[24] To say that "all the comment shows is that someone using the name Dam[e]s never reached the victims"

Maharaj and Neville Butler. Now we are told that folk around South Florida were checking in with Mr. Maharaj.

[24] The State does make a half-hearted effort to pretend that these calls were from someone other than Eddie Dames, citing a record page for the "fact" that this was not Dames' number. (*State's Brief, 62 n.6*) (citing Tr. 2295) This cite proves nothing of the kind. This is Prince Ellis' testimony that he "knows" that Dames' office number is "7718 something." After further prompting he concedes it might be "327781." (*Tr. 2295*) Ellis then claimed that 809-3285157 "sounds like" Dames' home number. *(Tr. 2295*) This is evidence of nothing, given that Dames had many businesses and numbers in the Bahamas. On the other hand, the "ED" note was contemporaneous, Shaula Nagel has admitted that Dames called, and there is no reasonable hypothesis that this could have been anyone *but* Dames.

(*State's Brief, 63*) is an extraordinary effort to hide the obvious: This is devastating to the entire State case, since Neville Butler insisted that Mr. Dames was not involved in the murder, and knew nothing about it. The whole arrangement was meant to be a scam to entice the Moo Youngs into a meeting with Mr. Maharaj. This single fact puts paid to the lie, since Mr. Dames was making his own arrangements to meet the Moo Youngs.

c. Shaula Nagel's deposition was replete with perjured evidence and further misled the defense

The State's main position with respect to Shaula Nagel seems to be that Mr. Maharaj cannot prove that the State knew it when Nagel committed perjury. While the State had daily access to Ms. Nagel, and surely knew as much as William Penn Life Insurance (her adversary in the civil suit), it does not advance the State's cause to say that Ms. Nagel lied, but the State did not know about it. As this Court made clear in Gunsby, the issue then becomes one of newly-discovered evidence.

The State seems willing to accept[25] that Nagel lied under oath when she claimed she had never heard the name of Eddie Dames prior to her

[25] There are various ways in which the State is wrong about Nagel's testimony. For example, with respect to their real business dealings, Nagel only mentioned that the victims were involved in the sporadic export of toilet seats to Trinidad. (*Tr. 227*)

deposition, but argues that the State did not know it to be a lie. (*State's Brief, 57*) However, the State did have constructive knowledge of it, from the contents of the briefcase. Elsewhere, the State says that "the basis of the claim that the State knew about prior contact with Dam[e]s is a letter between the insurance investigator and his supervisor" (*State's Brief, 62*) and that "[n]one of the comments in the letter are attributed to Buhrmaster or any other state representative." (*State's Brief, 63*) The State would do well to read the letter from the investigator, because on the first page he writes:

> I returned to homicide, and Buhrmaster had returned. I then spent approximately three hours talking with him, and his associate, Detective David Rivero. They feel they have a good case against Mr. Maharaj. What they described is as follows.

(*3.850 Clerk Tr. 2445-46*)[26] As an agent of the State, Buhrmaster therefore clearly knew that Dames made the calls, and thus had a duty to turn this evidence over to the defense.

When it comes to Nagel's lie denying knowledge of business deals

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[26] The State criticizes Mr. Maharaj for his failure to call Nagel "to identify Dam[e]s as the caller." (*State's Brief, 63*) Why should he? Mr. Maharaj proved his point by showing that she had made the earlier statement to the William Penn investigator and the police. If the statement were not true, presumably the State would have called her as a witness. She was in attendance every day of the evidentiary hearing.

between her father and Adam Hosein, the State says:

> With regard to Hosein, Nagel testified that she only learned the name Amer Enterprises in April of 1987, after her February 1987 criminal deposition. . . .

(*State's Brief, 57*) This is a sufficient concession. Had the defense been told about this (as part of the continuing duty of disclosure) the defense could have joined the dots. Mr. Maharaj knew that Adam Hosein's middle name was "Amer" and would then have known that Hosein was in some business with the Moo Youngs. This would have precipitated a defense investigation.

2. THERE WAS PERVASIVE UNFAIRNESS WITH RESPECT TO "THE PRIMARY WITNESS FOR THE STATE . . . NEVILLE BUTLER," Maharaj I at 787

a. The State suppressed evidence and suborned perjury with respect to Butler's polygraph

With respect to the polygraph, we need not pause with respect to the State's argument that this was all decided on direct appeal. (*State's Brief, 58*) The defense did not know what had happened then, and the State affirmatively *lied* to this Court in its representations:

> Even if the point [about Butler's polygraph test] was preserved, error still did not occur since the record reflects that **Butler first decided to tell the truth and the polygraph was given to determine if his second statement was the truth**. At no time

did Butler fail a polygraph and then tell the truth.

(*Brief of Appellee (Supplemental Argument) at 1 (Sept. 19, 1990)*) (emphasis supplied).[27]

The State says the defense could have found this out at trial, since "Hendon did know who the polygrapher was." (*State's Brief, 18*) (*citing 3.850 Tr. 457*) This mis-cites the record. Mr. Hendon said he knew the polygrapher was "a gentleman out of Tampa." *(3.850 Tr. 457*; see also *3.850 Tr. 1016-17*) However, even had counsel been told the name, the State's argument is disingenuous. First, Mr. Hendon had the right to rely on the State's representation that Butler had passed. Strickler v. Greene. Second, the polygrapher, at the State's urging, refused to divulge *anything* to the defense as late as 1997, and had to be brought to Miami under subpoena before the State finally let him speak.[28]

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[27] As a result, this Court did not even discuss the issue. Maharaj v. State, 597 So.2d 786, 790 (Fla. 1992). As Mr. Maharaj has now shown, the issue has merit, had counsel at trial only known the facts.

[28] Indeed, the State's conduct with respect to Mr. Dickson was reprehensible. Although Mr. Maharaj was desperate for funds, the State would not allow Mr. Dickson even to talk to counsel prior to the hearing (*3.850 Tr. 476-80*), and required that he be present as a witness merely to authenticate the crucial polygraph report. Denied state funds, counsel was forced to spend $1,000 of his own money to fly Mr. Dickson to the hearing, only for the State to finally stipulate to the report. (*3.850 Tr. 486-7*)

Underlying the State's entire justification for the covering up of these statements is its basic misunderstanding of the major issues in question. The crucial aspect of this claim is not whether a polygraph is generally admissible, but whether Neville Butler could flagrantly and repeatedly perjure himself about *why* he changed his story and not be subject to impeachment. We know that the State understood this issue at trial, since there is a memo in Det. Buhrmaster's handwriting reflecting their efforts to concoct an explanation.[29] This was devastating evidence that the State was up to monkey business.

The State tries to say that Butler's change of heart was "voluntary" because he "was not subpoenaed to testify at the meeting where the change occurred." (*State's Brief, 26*) This is, quite frankly, ridiculous. It does not change the fact that Butler altered his testimony *after* taking the test and being confronted by some of the lies he had told. He did not voluntarily come forward to get it off his chest. Indeed, the State cannot even be consistent when trying to argue this point, and concedes at one point that "[ASA] Ridge admitted that *after* the test Butler was confronted about the inconsistencies in his testimony in some areas. (T. 503-04)" (*State's Brief, 24*) (emphasis

[29] The State concedes that "Buhrmaster did admit that certain notes regarding why Butler had changed his statements were in his handwriting but did not recall why he wrote the notes." (*State's Brief, 32-33*)

supplied) Elsewhere, the State confesses that a "letter . . . informed [defense] counsel that as a result of questioning *before and after* the polygraph, Butler's testimony had changed regarding the evidence before and after the murder." (*State's Brief, 59*) (emphasis supplied)

On another aspect of the issue, the polygraph was discoverable because of the inconsistent statements made by Butler during the interview. The State cites Wood v. Bartholomew, 516 U.S. 1 (1995), but does not point out that in Wood,

> The answers of both witnesses to the questions asked by the polygraph examiner *were consistent with their testimony at trial*.

Id. at 4 (emphasis supplied) The opposite is true with regard to Neville Butler, and that is why his statements were discoverable.

b. Defense counsel failed effectively to utilize the first Butler statement that contained endless impeachment evidence and was known by the State to be replete with falsehoods

The State argues that Butler admitted that everything in the first statement "but the account of the murder" was a lie and, as such, any further attempt to use the statement was cumulative. (*State's Brief, 62*)[30] The State,

[30] Butler himself said that "[a]ll of these statements prior to my statement in March, everything I said about what happened in the room stands. I stand by it. Difference in the testimony you would find has to do

however, seem to ignore the impeachment evidence concerning what happened in the room--*i.e.*, the account of the murder--which differed radically from the statement to his trial testimony. Consider, for example, the use of the heating cords (*3.850 Clerk Tr. 1452*), the conversation Butler said he had with an elderly white maid cleaning the room (*3.850 Clerk Tr. 1458*), the "yelling and screaming" that lasted "about 15, 18 minutes" (*3.850 Clerk Tr. 1452*), the two separate conversations Mr. Maharaj allegedly had with hotel security staff (*3.850 Clerk Tr. 1454*), and Mr. Maharaj supposedly locking Duane Moo Young in the room upstairs that had no lock (*3.850 Clerk Tr. 1455*). In fact, in his initial brief Mr. Maharaj cited *only* Mr. Hendon's failure to impeach Butler on the account of the murder. (See *Initial Brief, 55-57*) Consequently, the State offers no meaningful explanation to this assignment of error.

c. The State had evidence that proved it was false to say that "Butler arranged this meeting . . . using the pretext of a business meeting with . . . Dames and Ellis." Maharaj I, at 787

We have already discussed the evidence that proves that Eddie Dames made contact with the Moo Youngs. The State contends that "the fact that

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with circumstances that led up to the Moo Youngs arriving there and circumstances after the homicide." (*Tr. 3102*)

Dam[e]s called does not change the fact that Dam[e]s had an alibi for the time of the murders." (*State's Brief, 63*) However, this roundly contradicts the central thesis of the State's theory, and it becomes easy to comprehend why, as Prince Ellis now admits, Dames needed to create a false alibi for himself.

3. ESLEE CARBERRY'S HIGHLY PREJUDICIAL SIDESHOWS REGARDING THE *CARIBBEAN ECHO*, Maharaj I at 787, 788, SHOULD CLEARLY HAVE BEEN EXCLUDED

The State argues that the question of the highly prejudicial *Echo* articles used against Mr. Maharaj was dealt with on direct appeal. (*State's Brief, 68*) However, the issue then was barred because of no objection at trial. Maharaj I, at 790. Now the record has been supplemented with overwhelming evidence that proves that counsel was either ineffective, or blindsided by suppressed evidence, in his dealing with the issue.

a. Had the prosecution not suppressed evidence, and had the defense meaningfully contested the issue, these articles would have been proven false and excluded

The State contends that the articles were admitted to prove motive,[31] and

[31] To be sure, in the alternative this Court held that "the articles were relevant to show Maharaj's motivation in harming Derrick Moo Young." Maharaj I, at 790. The question is whether defense counsel could have either proved pre-trial that the probative value was clearly outweighed by the

"their truthfulness was not really relevant. . . ."(*State's Brief, 65*) But not all relevant evidence is admissible: There must be a showing that the probative value outweighs the prejudicial impact.[32] Counsel was ineffective because he did not litigate the admissibility of the articles pre-trial, and show the articles to be wholly false, seriously altering the balancing test of prejudicial impact against probative value. Counsel could also have shown that the articles provided no motive for murder: Mr. Maharaj bought his own newspaper, the *Times*, and chose not to respond in kind, but rather refused to allow mention of this tabloid nonsense to appear in the pages of his publication.

Every practicing lawyer knows it to be a fiction that a jury can consider highly prejudicial evidence for any reason other than its truth.[33] In this case the State went to some length to suggest that they were true.[34] By proving the

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articles' falsehood, or blunted their effect at trial.

[32] Steverson v. State, 695 So.2d 687 (Fla. 1997) (prejudicial evidence of collateral crime outweighed its probative value and error in admitting it was not harmless).

[33] As Justice Scalia has written, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Cruz v. New York, 481 U.S. 186, 190, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987).

[34] To the contrary, the State solicited many references to the supposed 'investigation' Carberry did before publishing these articles, in an

articles to be false, counsel could at least have blunted the impact of the articles.

The State seems to acknowledge that counsel should have done this. Of the eight false allegations made by Eslee Carberry against Mr. Maharaj at trial (*Initial Brief, 60-63*), the State responds that five of these could have been proved to be false through the exercise of due diligence. (*State's Brief, 65, 66, 67, 68*) By arguing (albeit without factual basis) that the evidence was not suppressed by the State, then the State is telling us that defense counsel was ineffective.

However, the State is wrong on at least four of the five issues. First, the State says that Carberry testified that the victims' registration of Mr. Maharaj's paper was improper. (*State's Brief, 65*) This appears to be a mistake, and there is no citation to back up this assertion. The record reflects the opposite. At trial, Derrick Moo Young was described as "the rightful owner of the paper." (*Tr. 2367-68*)

The second argument made by the State is a non-sequitur. The State says that it is irrelevant that the State suppressed evidence that would have

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attempt to bolster the credibility of the articles. (See e.g. *Tr. 2359, 2360, 2365*)

shown that the Moo Youngs were the ones who illegally shipped printing equipment into Trinidad because the *Echo* represented that it was both the Moo Youngs and Mr. Maharaj. (*State's Brief, 65*) This proves nothing. The evidence was false as to Mr. Maharaj, and the State knew it.

Third, the article that spoke of Mr. Persad (not Persaud) paying a bribe implied that Mr. Maharaj was involved. *(Tr. 2373*) The suppressed evidence proved that the Moo Youngs were the ones who received it. The State argues that this is somehow not relevant. (*State's Brief, 65-66*)

Fourth, the State concedes that the State, through Det. Waldman, had concluded that the Moo Youngs' litigation was without foundation. Yet the State says that the defense should have found this out because counsel "could easily have called Waldman." (*State's Brief, 66-67*) This is unfair to defense counsel, since he had no way of knowing that Waldman was conducting an investigation, so how could he have called her?

b. But for counsel's failure to prove some or all of these allegations false, counsel would not have advised Mr. Maharaj not to testify at the first phase of trial, but to testify at the penalty phase where his innocence was no longer relevant

Supposedly, the articles by Mr. Carberry were the reason why counsel

advised his client not to testify. (*State's Brief, 71*) Another issue in the newspapers was the allegation that Mr. Maharaj was wanted in the United Kingdom. The failure to prove this false therefore had the effect of depriving Mr. Maharaj of his fundamental right to testify.

Indeed, the State makes clear counsel's ineffectiveness in this regard in graphic terms:

> "Hendon was unaware of the status of certain British warrants for Defendant. (T. 415) Hendon thought the warrants may have been for fraud and homicide. (T. 452-53)"

(*State's Brief, 20*) That counsel would base his advise on this kind of mistake is unconscionable.

However, the State says that the "telex substantiates the article that Defendant was still wanted but that England was not seeking extradition." (*State's Brief, 68*) (citing S.R. 7) In this, the State misunderstands the record below.[35] The "telex" cited by the State is not the one that was referred to in the hearing below, but an earlier one that was superceded. Indeed, surely the

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[35] This is not the State's fault, but undersigned counsel's. The previous defense motion to supplement the record included only one of the telexes (not the one referred to during the hearing). The other (Defense Exhibit IBT in the lower court) has been included in the Motion filed with this brief. It provides in pertinent part: "Reference Your . . . Message Dated 4/7/87 Concerning Maharaj First Name Krishna 26/1/36. By Telex Dated 4/27/[8]7 Interpol London Provided the Following Information: 'Maharaj Is No Longer Wanted by the Metropolitan Police.'" (*Exh. IBT*)

State would have noted the error, since earlier in the brief the State conceded that,

> "Buhrmaster admitted that he had seen a telex from Interpol . . . that Defendant had been arrested for dealing in stolen property but was not longer wanted by the London Police."

(*State's Brief, 33*)

c. When "[t]he State . . . presented Eslee Carberry, the Publisher of The Caribbean Echo," Maharaj I, at 788, the prosecution suppressed highly favorable evidence that would have shown Carberry up as a liar

There seems to be no doubt that the police memo detailing some of the criminal conduct of Carberry (*3.850 Clerk Tr. 2081*) was discoverable, and the State does not argue otherwise. Instead, the State contends that without a conviction the evidence of fraud in it would have been inadmissible. (*State's Brief, 70*) This is not the law. If the State knew about crimes committed by a witness and took no action, this would clearly be admissible in impeachment to show that the State was providing benefits to the witness.[36] The same is

[36] For example, in McKinzy v. Wainwright, 719 F.2d 1525 (11th Cir. 1983), the court reversed a trial court's refusal to allow the defendant to cross examine a state's witness on unrelated pending juvenile charges. Noting the important function of cross examination in exposing witness bias, the court held:

> If [the witness] was subject to state influence, then the cross

true of Mr. Carberry's illegal status: The issue is not whether the State could have deported him, but why the State did not report his status to the INS. Indeed, while this memo would have impeached Mr. Carberry, it would have impeached the methods used by the State far more. It was crucial evidence of the State's approach to Mr. Maharaj's case: Look the other way whenever a State witness commits an offense, in an effort to secure a conviction at all costs.

Alternatively, the State contends that this evidence was cumulative. (*State's Brief, 69*)[37] The State points to the opinion of Tino Geddes that Mr. Carberry was not held in high regard. Yet this does not address the core of

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examination should have been allowed.

Id. at 1528, 1529-30 (citations omitted); State v. Nash, 475 So.2d 752, 755-56 (La. 1985) ("A witness's bias or interest may arise from arrests or pending criminal charges, or the prospect of prosecution, even when he has made no agreements with the state regarding his conduct.").

[37] The State appears to misunderstand the nature of the claim:

> As such, further impeachment on this subject would have been cumulative, and counsel was not ineffective for failing to present it.

(*State's Brief, 69*) This is not an issue of trial counsel being ineffective for failing to impeach Carberry, since he never had the memo since the State suppressed it.

the impeachment value of the memo: That the State knew that Mr. Carberry had committed criminal acts, and took no steps to bring him to justice.

4. THE PROSECUTION SUPPRESSED EVIDENCE THAT WOULD HAVE DISPROVED THE CRITICAL FACT "THAT MAHARAJ OWNED A SMITH & WESSON NINE-MILLIMETER PISTOL" SIMILAR TO THE ONE APPARENTLY USED IN THE CRIME, Maharaj I at 789

The State makes the argument that as long at the defense knew something (that Mr. Maharaj claimed that the gun was stolen) it cannot be *Brady* for the State to suppress evidence that the State knew the same thing. (*State's Brief, 73*) To the contrary, this was crucial evidence that Mr. Maharaj had consistently made this point to the police as well as to defense counsel.

5. THE DEFENSE FAILED TO DEMONSTRATE THE ABSURDITY OF TINO GEDDES' TESTIMONY ABOUT THE SUPPOSED HOMICIDAL PRACTICE SESSIONS, Maharaj I at 788

When the State says that Mr. Geddes did not remember the rooms where the alleged "dry run" took place (*State's Brief, 77*), this is apparently an intentional obfuscation of the point. Mr. Geddes said that this was a room rented for Roopnarine Singh, and the defense proved which rooms Mr. Singh was in--and they did not have a connecting door. This proved the whole story

a fabrication.

6. DEFENSE COUNSEL SIMPLY FAILED TO PRESENT AVAILABLE EVIDENCE THAT WOULD HAVE NEUTRALIZED THE INCRIMINATING FINGERPRINTS, Maharaj I at 789, AND THE "FALSE DENIAL."

We are told that

> "Hendon testified that he made a strategic decision not to move to suppress Defendant's statement to Detective Buhrmaster pretrial. (T. 410) Hendon felt that it was better to argue the issue to the judge and jury at trial. (T. 409-10) In making this decision, Hendon claimed to be unaware that Defendant may have invoked his right to counsel and did not recall seeing any notations in police reports indicating that Defendant had done so. (T. 445-51, R. 2021, 2034)

(*State's Brief, 22*) This is no "tactic". There is absolutely no reason not to challenge the statement pre-trial and then again at trial. If the first succeeded, the second would not be necessary.

The truth is that Mr. Hendon should have filed a suppression motion based on his client's insistence that he had been denied counsel. However, it is ridiculous to say that there cannot be a *Brady* violation where the State fails to turn over evidence that the accused asserted his rights, because the accused knows that he did so. (*State's Brief, 79*) The evidence in the State's hands was the smoking gun that proved that Det. Buhrmaster was not telling

the truth. Any innocent defendant knows that the witnesses against him are not telling the truth. The key is to be able to prove it.

Indeed, it is clear that Mr. Hendon would have moved to suppress the statements had the State not, in turn, suppressed the evidence that his client had asserted his rights and provided him with the "smoking gun":

> [ERIC HENDON]: Yes. And again, this is not only information that he had invoked his rights to remain silent. This is documentation of that. So it definitely would have played a major role in my decision as to whether or not to pursue a motion.

(*3.850 Tr. 449*) Counsel agreed that such evidence "is a rare thing to have. So I definitely would have followed up on that." (*3.850 Tr. 450*)

Likewise, to pretend that the prosecution prepared Buhrmaster's testimony by making notes that Mr. Maharaj said, "That's all I have to say about today's activities," and then deleted the phrase because it "was never made" (*State's Brief, 80*) strains credulity. Clearly, the prosecutor and the witness got together and agreed that they had better leave that out.

Even if the State were correct to say that the notes reflect an assertion of rights after the statement was concluded (*State's Brief, 80*), it would still be relevant, since it would show (1) that the State had got together with its witness to lie, and (2) that the witness had, indeed, lied. However, the State

is wrong in this assertion, since there were two separate documents that proved two separate constitutional violations. (*See 3.850 Clerk Tr. 2021 & 2034*)

7. DEFENSE COUNSEL FAILED TO FILE OTHER CRITICAL MOTIONS, INCLUDING A CHALLENGE TO THE IDENTIFICATION EVIDENCE

Some of the supposedly "strategic decisions" for counsel's failure to file a single pre-trial motion are ridiculous, even as dressed up in the State's brief. We are told that counsel chose to "argue the validity of the witnesses' identification of Defendant to the jury rather than moving to suppress the identifications." (*State's Brief, 22*) Why not do both?

8. DEFENSE COUNSEL FAILED TO INVESTIGATE OR PRESENT MR. MAHARAJ'S POWERFUL DEFENSE OF ALIBI

It is not sufficient to say that after Mr. Hendon's testimony that he chose not to present the alibi witnesses the defense failed to rebut his "reasons." (*State's Brief, 83*) First, Mr. Hendon was not being candid when he said he found the witnesses. He never did anything. His predecessor counsel located them before he was retained.[38] Second, in making his ill-informed decision,

[38] The State alleges that "[a]fter Defendant provided Hendon with a list of witnesses, Hendon had an investigator speak to the witnesses and obtain affidavits from them." (*State's Brief, 2*) The dates on the affidavits confirm

counsel did not talk to some of them. Third, once Mr. Geddes changed his story, this did not license counsel to lie down and play dead. Now, it became all the more important to show that Geddes was lying, and that other alibi witnesses continued to tell the truth. The witnesses called at the 3.850 hearing were credible, and had not been interviewed by Mr. Hendon either prior to or after his "decision."

IV. THE STATE OF FLORIDA STILL HAS NOT COMPLIED WITH ITS OBLIGATIONS TO MR. MAHARAJ, A BRITISH CITIZEN, UNDER INTERNATIONAL LAW

The State alleges that "only the contracting governments have standing to claim of violations of the treaties." (*State's Brief, 92*) Whilst Mr. Maharaj acknowledges that the law on this point is currently unclear, there is a growing amount of caselaw that favors an interpretation of the rights conferred by Article 36 of the Vienna Convention as being enforceable by individuals. In United States v. Hongla-Yamche, 1999 WL 497409 (D. Mass.) it was noted that:

> Based on the language of the Article, and in light of this elephantine body of authority, this Court finds that Article 36 of the Vienna Convention does confer an

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the investigator's testimony that they were all obtained before Mr. Hendon became involved in the case. (*3.850 Clerk Tr. 106, 110, 115, 120, 128; 3.850 Tr. 1037*)

> individual right to consular notification, and that Hongla-Yamche has, therefore, standing to contest the alleged violation of that right.

Id. at *4.

V. THIS COURT SHOULD NOT MERELY REVERSE, BUT SHOULD ORDER THAT THE INDICTMENT BE DISMISSED

The State makes no meaningful response to this issue. Certainly, based on the overwhelming evidence of misconduct, delay and bad faith that has characterized this case, at the very least this Court should consider barring the State from continuing to seek the death penalty, even if the Court does not bar reprosecution altogether.

CONCLUSION

WHEREFORE, for the reasons set forth above as well as such others as many appear to this Court, Mr. Maharaj respectfully moves that this Court grant him a new trial, or dismiss the case against him.

Respectfully submitted,
COUNSEL FOR KRISHNA MAHARAJ

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CLIVE A. STAFFORD SMITH
636 Baronne Street
New Orleans, La. 70113
(504) 558-9867

BENEDICT P. KUEHNE
Sale & Kuehne
NationsBank Tower #3550
100 S.E. 2nd Street
Miami, Fla. 33131-2154
(305) 789-5989

Certificate of Service

I hereby certify that I have served a copy of the foregoing document upon Sandra S. Jaggard, Assistant Attorney General, Rivergate Plaza Suite 950, 444 Brickell Avenue, Miami, Florida 33131, this ____ day of September, 1999.

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