IN THE SUPREME COURT OF FLORIDA

CURTIS CHAMPION GREEN,

Appellant,

vs. CASE NO. 86,983

STATE OF FLORIDA,

Appellee,

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No. 0134101
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Since appellant's statement seems somewhat incomplete, appellee submits the following supplement.

A. Guilt Phase

Appellant and Barney Franklin were charged with the first degree murder of Karen Kulick (R1-2). Trial by jury resulted in a verdict of guilty for Curtis Green (R174). At trial Chris Puckett testified that while driving home at 3:30 in the morning on May 22, 1988, he saw a body on the road at the intersection of St. Helena and Masterpiece Road. He drove home, informed his parents. They called the sheriff's office and authorities arrived at the scene in ten or fifteen minutes (TR1415-1425). His father Randy Maggard went to the scene after phoning 911, saw the body and shined a spotlight on it so that vehicles wouldn't run over it. No one disturbed the body (TR1431-35).

Former deputy sheriff Imig arrived at the scene at 4:14, eight minutes after receipt of the dispatch, observed no signs of life and secured the scene. He saw a trail or smudge of blood where it appeared the body had been dragged from the side of the road to the middle of the intersection (TR1436-40). Crime scene technician Lori Egan took photos at the scene and caused a video to be taken by another technician. The only apparel worn by the victim was a

pair of shoes (TR1448, 1484-85). Detective Mincey arrived at the scene and saw the totally nude victim laying in the middle of the road in a "displayed manner" with her legs spread apart. There was no identification (TR1509-10). Randy Gulledge subsequently identified photos of Karen Kulick and comparisons of the victim's fingerprints with those on file positively identified the victim as Kulick (TR1511). Mincey contacted Franklin and Green. Green said that he had been with Clyde at Karen's trailer on Highway 60 and her father chased them out with a gun; Green went to the S&P Mobile Home Park. Both Green and Franklin said the two of them were together since midnight and did not leave the trailer (TR1513-1514). Mincey later learned that the victim had been arrested at 11:30 P.M. Mincey testified that it took twenty-five minutes from Bartow to Masterpiece Gardens Road and St. Helena Road (TR1517). Mincey ran out of substantial leads in 1990 or 1991. He knew that Kulick had gotten out of jail at approximately two in the morning and that Green claimed he was with Franklin at home from midnight on (TR1541).

Associate medical examiner Dr. Alexander Melamud performed an autopsy on Karen Kulick May 23, 1988. There were two lacerations and an abrasion on the head; bruises and abrasions on the lower extremes (TR1559). There was a large abrasion on the left side

back of neck extending to the upper portion of the shoulder; there was a brushburn abrasion often associated with dragging (seen when a pedestrian is hit by a car) (TR1561). There was a stab wound between the ribs penetrating into the left lung (TR1562); abrasions and bruises on the back, forearm, left buttock and thigh (TR1563). The stab wound in the left chest didn't touch any internal organs and there was another superficial stab wound to the chest (TR1564). There were bruises on the right side of the neck, and recent bruises on the front lower aspect of the left thigh. A large bruise of the face extended to the neck, nine by six inches. Altogether, there were eight abrasions and lacerations under the chin (TR1565-66). There was massive hemorrhage into the muscles, a fractured hyoid bone, the thyroid cartilage was also fractured, a bruise to the right ear, three stab wound like injuries on the left side of the nose which would have been caused by a screwdriver type object. There was a laceration above the right eye resulting from blunt trauma (TR1567-69). He did not find skull fractures or brain hemorrhages. The torn ear was the result of blunt trauma (TR1570). Dr. Melamud opined that the victim died of manual strangulation (TR1571). The stab wounds were not immediately fatal but could be after a period of time without medical attention

(TR1572). There was no presence of sperm (TR1577). She did not have classical pedestrian injuries (TR1578).

Clyde Lee Price testified that on Saturday afternoon on May 21 he went to Kulick's house with Green because she had called needing a ride. At the door he saw a gun sticking out of the curtain and he and Green ran back to the car and drove away. When he told Barney Franklin about the incident he laughed (TR1599-1602).

After listening to a proffer of testimony of James Michael Franklin regarding prostitution activities involving Kulick in the presence of appellant, the trial court overruled the pretrial decision of Judge Andrews and ruled such testimony inadmissible (TR1638-43).

Lt. Alan Adams testified that Karen Kulick was arrested and booked in at the county jail at 12:34 A.M. for disorderly intoxication and resisting without violence, after she had failed to cooperate with the officer's request to leave Gulledge Bail Bonds (TR1649-1662). Steven Showers testified that Kulick was released from the jail at two in the morning pursuant to a policy of reducing overcrowding. To his knowledge no one picked her up (TR1664-66). Joe Burgess saw the victim walk away after her release from the jail (TR1675).

Barney Franklin agreed to testify (TR1690). He was currently serving a prison term for sexual battery and had four or five prior convictions for felonies or crimes involving dishonesty. He also is currently charged with the first degree murder of Karen Kulick (TR1696-97). He has known appellant Green for years and he understood that what he said in court could not be used against him but that the first degree murder charge remains in effect (TR1699). He knew the victim and would go out drinking with her (TR1700). Franklin testified that after the aborted effort of Green and Clyde Price to pick up Karen, appellant said he was going to kill her before the night was out. He was mad and repeated it several times (TR1705-1706). Green was gone when Franklin subsequently picked up Karen and drank vodka with her from 6 to 11 P.M., then drove her to the bondsman's office (TR1709). Franklin testified that his wife and Green arrived home close to midnight and appellant was still upset with Karen and said he was going to "Kill that bitch before the night was out" (TR1711). At about 1:30 A.M. Karen phoned; appellant Green was on the couch and answered the phone. Franklin got on the phone and Karen wanted him to pick her up. He told her to call her father, that his wife was home. Franklin went back to bed. He saw Green leave the trailer five minutes later and was driving down the road in his car (TR1713-14). The following

morning appellant was cleaning his car and when Franklin teased him that Karen was coming down the road, appellant responded, "you won't see that bitch coming down through there". He did a little dance. When Franklin asked appellant a couple of weeks later whether he killed Karen, Green answered "I took care of business" (TR1714-16). Subsequently Green packed his car and told Franklin "I'm getting the hell out of Dodge while the getting is good" (TR1718).

Franklin's wife Shirley testified that she heard Green who was very angry before the murder say "I'll get even with the bitch. I'll kill her" (TR1820). When she informed her husband that Karen was dead, he did not seem surprised (TR1822).

Randall Gulledge, deli owner and bail bondsman, had employed Karen and had a personal relationship with her which had ended, testified that she came to his office in an intoxicated state, that the police arrested her and when she had been gone a few days he contacted that prosecutor's office and identified her photo to Detective Mincey (TR1858-70). Deputy sheriff Corbitt assigned Detective Ashley to the unsolved case when he noticed from the case file that Franklin and Green had provided alibis for each other that night (TR1885).

Angelo Gay was in the county jail at the same time as Green. Green admitted to him that he was charged with murder, that they didn't have any new evidence against him, that he and his buddy picked up a girl and started doing things. He claimed "the bitch got crazy on us", that he and his buddy picked her up in front of the jail and they threw her out on Highway 60 naked except for shoes (TR1896). Green mispronounced the prosecutor's name, but Gay called the office and spoke to a secretary and was ultimately interviewed by a detective. Gay identified a photo of appellant who made the admission and was not told appellant's name (TR1902) .

Donna Snipes, Shirley Franklin's daughter, heard Green yell "I'll kill the bitch" before she learned of Karen's death (TR1931). Detective Ashley testified to his interview with Franklin and the admissions he made regarding Green's culpability. Franklin explained that after he first spoke to officers after the killing he later realized that appellant had left the trailer the night Karen was killed. He interviewed appellant who claimed he was being framed (TR1946-1966).

B. Penalty Phase

At penalty phase the prosecutor called Dr. Alexander Melamud to testify about the injuries sustained by the victim (TR2487-96) and fingerprint examiner Mary Beth Dalton who identified Green's

prints on Exhibit 51, appellant's prior judgment of conviction for aggravated assault and malicious threats (TR2500-01). The defense introduced a video deposition of Rosa Layton regarding appellant's background (TR2518) and elicited live testimony from mental health expert Dr. William Kremper (TR2521-2620). Appellant briefly addressed the jury (TR2620-21).

The jury recommended death by a vote of ten to two (TR2677). In his findings imposing the death sentence the trial court found two aggravating factors (R323-325):

> "AGGRAVATING FACTORS
>
> 1. The Defendant was previously convicted of another felony involving the use or threat of violence to some person.
>
> The Defendant was convicted in 1980 of the crimes of aggravated assault and threats/extortion, each of which was a felony offense. A certified copy of conviction and sentence was admitted into evidence as to both felonies. Both of these felonies involve the use of or threat of violence to another person, whom the Defendant threatened to kill if that person testified against the Defendant in Court. This aggravating factor was proved beyond a reasonable doubt.
>
> 2. The crime for which the Defendant to be sentenced was especially heinous, atrocious or cruel.
>
> Prior to death, the victim in this case, a young woman, received literally dozens of cuts, wounds, and assorted bruises. She was severely beaten in the face, blows the medical examiner opined were probably done by a fist; she was stabbed in the face, chin, chest and back with at least two different instruments,

one of which the medical examiner opined might have been a screwdriver; she was beaten on the head with a blunt object; she had a portion of one ear torn away; and she had numerous other cuts and bruises inflicted on her front torso, back, sides, feet, and legs. Following this severe beating, she was killed by manual strangulation, applied with sufficient force to break the hyoid bone and bruise her vocal cords. The victim's body was stripped of all clothing save her tennis shoes, dumped off on the side of a roadway and then drug across sand and pavement approximately eighty feet to be displayed legs apart and face up in the center of an intersection. While the testimony regarding the condition of the victim's body necessarily included certain post-mortem acts, this Court has considered the existence of the heinous, atrocious or cruel aggravator only as concerns the ante-mortem injuries and cause of death and not as to anything which was done to or with the victim's body beyond the time of de&h.

Several witnesses testified as to the Defendant's extreme anger and emotion while making threats to kill the victim on the day preceding the night of the murder. These threats resulted from the Defendant's being ordered away from the victim's home at gunpoint by the victim's father. A former cellmate testified that while awaiting trial for this offense the Defendant explained that he and his Co-Defendant "did some shit to the girl" and "the bitch went crazy on us". The extraordinarily large number and variety of ante-mortem bruises, cuts, and blunt trauma injuries received by the victim, literally from head to' foot, are physically corroborative of this testimony, as is the fact that the cause of death was manual strangulation, not merely with sufficient force to restrict the air supply, but with such excessive force that the hyoid bone was

broken and her vocal cords bruised. The victim, whom testimony established to be an individual whose own temerity had resulted in her arrest on the night of the murder after repeated refusals to obey police commands, whose displeasure at incarceration was voiced at a volume that was heard over a large portion of the jail facility, and whose last known words upon her early morning release from incarceration and very shortly before her murder were an epithet hurled at a police officer unconnected with either the jail facility or her arrest, was in mood and character shortly before her murder the type of victim likely to vehemently resist her own demise. Death in this case was neither simple nor swift. When, in the Defendant's own words, the victim reacted to "some shit" being done to her and "went crazy on us", she was beaten, bludgeoned, stabbed, and finally strangled as death was forced upon her. The killing was neither clean nor quick. Literally dozens of hard blows were struck to her face and torso, bludgeoned to her skull, stabbed in her back, her face, her chin, and her chest by at least two different instruments, all before life was finally strangled from her, a strangulation which the medical examiner opined would take several minutes as the neck was compressed with great force by a pair of hands. This is a killing which evinces extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. The Defendant's statements, the known mood and character of the victim, and the extraordinary extent of ante-mortem injuries establish that this crime was conscienceless, pitiless, and unnecessarily torturous to the victim. The crime for which the Defendant is to be sentenced was especially heinous, atrocious,

> or cruel. This aggravating factor has been proved beyond a reasonable doubt."

The trial court also found the presence of the statutory mental mitigator "under the influence of extreme mental or emotional disturbance" to which he gave significant weight (R325-326), the statutory mental mitigator of "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" which it gave only some weight (R326) and gave some weight to other enumerated nonstatutory mitigating factors (R326-330).

Green now appeals.

SUMMARY OF THE ARGUMENT

I. Appellant's complaints about prosecutorial remarks during voir dire regarding prostitution activities of the victim are not subject to appellate relief. The claim is barred for the failure to object at trial and it is meritless since the questioning properly focused on the voir dire examination whether jurors would be predisposed or biased against the victim because of her life style,

II. The lower court did not err in allowing trial to proceed despite defense counsel's decision not to depose witnesses. The lower court heard an extensive explanation by counsel regarding his preparation and readiness for trial, testimony of the defense investigator and appellant's agreement with defense counsel. Had the trial court ruled otherwise, murderer would have been entitled to a speedy trial discharge. Landry v. State, 666 So.2d 121 (Fla. 1995) .

III. The lower court did not fail to maintain an atmosphere to insure a fair trial. The episode during jury selection was resolved to the satisfaction of the defense team. No abuse of discretion has been established.

IV. A jury recommendation of death by a majority vote is permissible. Brown v. State, 565 So.2d 304 (Fla. 1990).

V. The lower court did not err in giving the jury Standard Jury Instruction 3.06 when they announced they were at an impasse. See Kelley v. State, 486 So.2d 578 (Fla. 1986). Subsequently, after another communication on another matter the jury reported they were not deadlocked and returned a verdict.

VI. The lower court did not commit error or abuse its discretion in permitting appellant to testify at penalty phase.

VII. The lower court did not err reversibly in sustaining trial counsel's objection in the examination of Detective Ashley and permitting him to testify as to his actions.

VIII. No *error* was committed in permitting Sheriff Corbitt's testimony; if there were, it was harmless.

POINT I

WHETHER FREQUENT REFERENCES BY THE PROSECUTOR IN VOIR DIRE TO THE VICTIM'S ALLEQED PROSTITUTION PRECLUDED A FAIR TRIAL.

While appellant does not specifically isolate the alleged error, appellee's review of the voir dire examination comprising Volumes 3 through 10 (TR3-1254) has discovered four brief references, none of which were objected to below or made the subject of defense requested relief from the trial court (TR268, 634, 1087, 1196-1200). In the first three instances the prosecutor briefly inquired whether the prospective jurors harbored an attitude that the victim -- if a prostitute -- got what she deserved or that her life was less important than other members of society. such inquiry was as proper as any other usually inquired about when determining the qualification of the jury to sit. Similarly, the inquiry at TR 1196 - 1202 concerned examining prospective jurors' views that a victim not living a stellar life was not relevant to proving first degree murder (TR1196-1197) and the prosecutor followed up on defense counsel's cited example of Hugh Grant and Divine Brown and whether prostitution was Ms. Brown's chosen profession (TR730-36) with an inquiry whether the jurors thought that some prostitution may be voluntary and some

prostitutes may be *pressured into it" (TR1200). The prosecutor reminded jurors that the state need not establish motive as an element of the crime (TR1200-1201).

Appellee notes that the trial court at a pretrial hearing had denied the defense motion to strike notice of intent or to rely on evidence of other crimes, wrongs or acts (R152) but that upon hearing a proffer of testimony at trial the trial court overruled Judge Andrews' prior ruling and held the testimony concerning Kulick's alleged prostitution activities with Green to be inadmissible (TR1638-43). The jury did not hear the proffered testimony of James Franklin regarding Dawn George, Kulick and appellant.

Appellant's claim must be rejected because: (A) it was not preserved for appellate review by objection below; see e.g., Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990) and (B) the claim is meritless.[1]

---

[1]Appellee notes that Green complains about the prosecutor's penalty phase argument. citing TR 2653 (Brief, p. 6) but that comment was made by trial defense counsel Alcott arguing as a nonstatutory mitigator that the victim had not been sexually assaulted.

POINT II

WHETHER THE LOWER COURT ERRED IN ALLOWING THE TRIAL TO PROCEED BECAUSE DEFENSE COUNSEL DECLINED TO DEPOSE STATE WITNESSES.

Appellant was indicted on February 1, 1995 (R1). On April 18 the Public Defender withdrew due to a conflict of interest (R4-5), and on April 24 the lower court appointed Roger Alcott (R7). At a hearing on June 2, 1995, counsel for co-defendant Barney Franklin moved for a continuance and represented that Mr. Alcott, counsel for appellant Green, had informed him that he thought he would be ready for trial. Mr. Alcott confirmed this (R19). On May 15, 1995, Mr. Alcott filed a motion for investigative expenses which was granted on June 3 (R14-15, 23). On June 20 counsel filed a motion to appoint mental health expert (R24-25) and the motion was granted on June 30 with the appointment of Dr. William Kremper (R41-42).

At a pre-trial hearing on June 20, 1995, trial counsel Alcott announced that he was demanding speedy trial, that his client had been in jail all this time and that they would be ready for trial before October 23; Green had been arrested on March 1 (R29).

A trial date of August 28 was set and the court granted an oral defense motion to sever from the co-defendant (R30-31).

At a hearing on June 30, 1995, the prosecutor advised the court that he would file a motion to strike the demand for speedy trial but that the state would be ready for trial within sixty days if the demand were not struck (R36). Defense counsel Alcott responded that previously a trial date of August 28 had been set and that neither he nor Curtis Green had any objections to that date (they might waive it a day or two either way) and denied the prosecutor's contention that the demand was spurious. Alcott claimed that they had completed all of their investigation and were ready for trial (R37). The court announced that August 28 looked good to the court (R39).

At a hearing on July 20, Mr. Alcott reiterated that August 28 was an acceptable trial for him and his client (R46). The prosecutor argued that the defense was not diligently prepared for trial and that no depositions had been taken (R48-56). Mr. Alcott responded that when he gets a case from the Public Defender's office he can get what they've already got (R57). He explained that he had received in this case from the Public Defender's office two expanding file folders containing all the police reports and statements and interviews of witnesses and transcribed statements and that he reviewed those (R57). Alcott added:

"And I obtained the services of a private investigator, and I had him review those. And I'll be happy to share with the Court my analysis of those in camera. I don't want to share them with Mr. Aguero. But I have them here, and I'll be happy to supply the Court my work products so the Court can see that we in fact have reviewed, analyzed, dissected and gone through.

I got the witness list from the State of Florida. And I compared the witness list with the offense reports to see what witnesses were listed as potential witnesses and what they would have to say. All the witnesses are named in the reports, the case agent did a fabulous job of synopsizing and reviewing and taking statements from all the witnesses that are listed and what they had to say. I've read them all. And I made the decision that there was no need to take any further depositions in the case.

Now I have the investigator that I've utilized present in court today. He'll be happy to answer any questions that the Court on an in-camera on the record basis that he's able to swear as I am that we have diligently investigated this case. And we're at the level where we believe we're prepared to proceed to trial.

Now we have listed as possible penalty phase, in the event we would ever get there, witnesses that were past employers of Mr. Green. I asked him have you got anybody that can come in and say something about your employment history. And I'm sure those witnesses when that time comes, that I'll have interviewed and talked with those people when I put them on the witness stand in the event we get to the penalty phase.

In the thought that we might arrive at a penalty phase, I also in fact submitted a motion for a mental health expert to be appointed to advise me of any mental health

situation if we ever got to that penalty phase, not in the guilt phase but in the penalty phase,.

I frankly checked with the State, it's a routine matter as the Court well knows in first degree cases to get a mental health expert appointed. The State had no objections to doing that. I submitted the motion with the proposed order, and Mr. Aguero points out that actually the order didn't get signed by Your Honor until like a day after I filed my demand.

I personally don't know whether I'll even follow up with the order to have any evaluation done. I certainly don't see any need to, but who knows. And I don't want to burden the county with the cost of experts that are not necessary and cannot add anything to the case.

Now in terms of standard motions and we get standard orders, I'm familiar with the practice. We send in a whole volume full of standard motions, and we end up with standard orders on motions. If there were in this particular case some important motion attacking the death penalty, the Constitutionality, et cetera, it's simply not in place in this case. I've elected not to do that. I've discussed it with my client. And we're not going to submit standard orders to get back -- or standard motions to get back standard orders.

It is not a cold, calculated and premeditated type of case. If it's anything, it's a heinous, atrocious and cruel. The Supreme Court has recently amended that jury instruction, and we have no objections to it.

In terms of testing memory of witnesses, they'll be tested when they take the witness stand. Depositions are not something which is Constitutionally mandated in all cases contrary to whatever other judges may have ruled.

The federal courts don't even us@ depositions. Thirty-eight or forty states throughout the union don't use depositions.

The State Attorneys of these states in Florida are vigorously opposed to depositions and every year go to the legislature and say, please, eliminate depositions, they're unnecessary, they're not required by law, they're burdensome, et cetera.

Now Mr. Aguero's in here saying, oh, my goodness, how can this man have a fair trial. If he wants to certify that you can't have a fair trial without taking depositions, then he can certainly do that, and I'll be happy to propose that to the legislature the next time they consider eliminating them.

But we have a bill up there right now, you know, trying to push through to eliminate depositions. I have, I said, interviewed -- or I mean, reviewed all the witnesses' statements, gone over what they're going to say. And we're ready to go to trial..

I've gone over them with Mr. Green. He not only has a strong desire to have a trial, but fully believes that we're ready to proceed and doesn't want to have any more delays where I call in witnesses, and they say what they said in their police reports a couple of months ago.

They were interviewed back in 1988 when this happened, they were reinterviewed again about 1933, they were reinterviewed again back in 1994 by ----

THE COURT: 1933?

MR. AGUERO: 1993.

MR. ALCOTT: '93, '93, and '94. They're basically the 'same, And we're ready to proceed. If the Court wants to review my work product, I'll be happy to submit it to the Court."

(R57-61).

* * *

"MR. ALCOTT: We were prepared at the time I filed the demand. I went over it with Mr. Green, and we were prepared to proceed on that day if the Court was to -- we'll proceed tomorrow, we'll proceed last week if you want to do it. I've already sent out subpoenas. I've got subpoenas served in other counties throughout the State of Florida. Witnesses have already called my office and said are we going to go on the 28th or what day do you need me. We were scheduling them for some day after the 28th. We've already got our subpoenas out and have them served.

In terms of ongoing investigation, I suspect I'm sort of in the position that the State is in. I'll go after the day of trial and probably after the jury is selected and going -- if there's something new that comes up, I'm going to reach up and grab for it or whatever.

I don't think any case, there's something you can't do to locate or look for or how you need to cover even as the case is in progress of trial."

(R62-63).

* • ✉

"MR. ALCOTT: Yeah. Well, all motions I intend to do after the jury is -- Your Honor, in all seriousness, I **have been** prosecuting and defending cases in the state of Florida in state **and federal courts for fifteen years** or longer, twenty years. I'm ready **for trial.** I've gone over it with Mr. Green, I've reviewed the police reports, I've seen the statements of all the witnesses.

There's no reason for Mr. Green to languish in jail. He didn't commit this crime. The State can't prove he committed

this crime. And the only way to do it is to get it in front of a jury, in front of a judge so we can get our direct verdict and get out of here."

(R66).

* * *

"MR. ALCOTT: I don't know what else I could do, Your Honor. If Your Honor is saying I must schedule eighty-five or even ten or five witnesses for deposition, interview them under oath and then come back and say, okay, now I'm ready. If I need to file a motion to attack the Constitutionality of the death penalty after it's been upheld by the Florida Supreme Court umpteenth thousand times, I submit that I'm not ineffective in not doing it, Your Honor.

THE COURT: Another thing, when I looked at all this and read these cases, it occurs to me that this might not be just a tactic on the Defense's side of, you know, just hoping that the State can't get ready for trial and ----

MR. ALCOTT: Absolutely not, it's not a tactic. It is in fact a good faith effort. I submit, Your Honor, I've reviewed the witness list, I've looked at what the witnesses have sworn to and what they've said, they don't have a case. We're ready to go to trial, we've got a very valid defense in this case. And we're ready to proceed. We're not going to languish over there in jail for the next umpteenth months for nothing."

(R66-67).

In addition, the lower court heard testimony from investigator Al Smith as to his preparation **(R69-73)** and

appellant Green concurred under oath (R73-76). Green knew what a deposition was, understood that lawyers normally take depositions (R74-75) and:

> "THE DEFENDANT: Yes, sir, I do. I feel that, you know, me and my lawyer have discussed that case, and we're ready for trial because I'm innocent. I want to prove my innocence. With my Father in heaven I have nothing to lose."
>
> (R76).

Both trial defense counsel and appellant agreed on the record to a trial on August 28 (R77-78). Alcott and Green stipulated to a tolling of speedy trial from fourteen days so the trial could begin on August 28 (R79-80).

When the State provided an additional witness, defense attorney Alcott initially attempted to file a motion to exclude and the court offered a continuance (R86-87, 107-108), but on August 17, 1995, Mr. Alcott informed the court that "there isn't any need to have any more time" and was not asking to extend the trial date (R118). The prior motion was withdrawn (R119).

Alcott and Green reiterated on August 18 that they were prepared for trial (R164). Voir dire proceedings commenced August 28, 1995 (TR3). The record reflects that defense counsel was able to call witnesses for the defense (Walker, Shakeshaft, Mincey,

Lantz, Sullivan, Butz, Spivack, McGarvey, O'Neal, Ashley, Lester, Maslanik, Baker and Smith -- TR 2004-2173). At penalty phase the defense utilized a video deposition of Rosa Layton (TR2518) and the testimony of mental health expert Dr. Kremper (TR2521-2559).

Appellant alludes to counsel's motion to withdraw on September 21, 1995 (R259). The record reflects some disagreement between defense counsel and Mr. Green, the latter desiring to tell the jury he would prefer to die. Green informed the court that counsel could present whatever mitigation he wanted but he wished to address the jury (R218-250). After determining that Green was competent (R266) defense counsel's motion to withdraw was denied (TR2471). It is misleading to suggest, as appellant's brief intimates (p. 7) that Green recognized his mistake in supporting defense counsel who was unprepared for trial; the reality is that at penalty phase Green simply chose to express his preference for a death sentence despite the mitigation presented by Mr. Alcott.

As the above recitation of facts demonstrates, Green's claim is without merit. Appellee gleefully relies on Landry v. State, 666 So.2d 121 (Fla. 1995) and if the lower court accepted the prosecutor's argument, Mr. Green would have been entitled to a speedy trial discharge as this Court mandated in Landry, supra. Trial counsel was prepared for trial and enforcement of appellant's

speedy trial was appropriate.

See also Curtis v. State, So.2d ___, 21 Florida Law Weekly S442 (Fla. 1996), wherein this Court opined:

> 'Curtis first claims that the court erred in granting a prompt trial. The State on April 26, 1994, told the court that Curtis had waived his right to a speedy trial and the State was requesting a June 6 trial date. Defense counsel told the court that he had discussed the matter with Curtis and that Curtis had insisted on an early date even though counsel would be ill-prepared, After the court inquired of Curtis at length and Curtis remained resolute in his desire for a prompt trial, the court denied defense counsel's motion for a continuance.
>
> At the pretrial conference June 3, defense counsel again moved for a continuance and the prosecutor opposed the motion, saying that it was his understanding that Curtis wanted to have his day in court and be over with it. The court inquired of Curtis and Curtis remained firm. The court denied the motion. Finally, on June 6 defense counsel renewed his motion for a continuance and after the court inquired of Curtis and he again was resolute the court denied the motion.
>
> Curtis now claims that the court erred in acceding to his demands and denying his lawyer's bid for a continuance. We disagree. The granting or denying of a continuance is within the sound discretion of the trial court and this Court will not set aside such a ruling absent an abuse of discretion, even in a capital case. *Williams v. State, 438 So.* 2d 781 (Fla. 1983). In the present case, the trial court discussed the matter extensively with Curtis on numerous occasions and disclosed in detail the consequences of a prompt trial. Curtis was adamant. Curtis's

decision was informed and knowing and was properly within his purview. See *generally 2* Wayne R. LaFave & Jerold *H.* Israel, *Criminal Procedure* § 11.6 (1984). We find no error."

POINT III

WHETHER THE TRIAL COURT FAILED TO MAINTAIN AN ATMOSPHERE TO ENSURE A FAIR AND OBJECTIVE EXAMINATION OF THE EVIDENCE BY THE JURY.

The only incident cited by appellant to support this meritless claim is reported at TR 218 - 223 where in the first day of jury selection the defense complained that prospective jurors may have seen Green being escorted in handcuffs in the hallway. Defense counsel could not represent that anyone in fact had seen his client in handcuffs (TR219). The defense did not want to strike the entire panel (TR222). The court solved the problem by moving to another courtroon for the following day (TR221) and all agreed that appellant could identify and inform his counsel of two jurors that he had seen so that they could be interrogated (TR221-223). Juror Norman denied seeing appellant in the hallway (TR286) and in any event was not finally selected to serve (TR1254). Juror Garrett did not recall seeing the defendant and did not serve on the jury (TR296, 1254). Juror Sackett did see appellant walking with the bailiff but the defense did not want to strike her (TR283, 285). Defense counsel decided the matter not be pursued since there wouid be testimony about a jailhouse conversation (TR285).

Appellant also refers to an incident where he was having difficulty making phone calls from the jail. The trial court

directed the bailiff to tell the jailers to allow phone calls (TR646-647). Appellant notes that these two events are 'seemingly trivial". (Brief, p. 8) Appellee submits that they are trivial.

POINT IV

WHETHER A MAJORITY RECOMMENDATION BY A JURY AT PENALTY PHASE IS PERMISSIBLE.

Appellant seems to take issue with the fact that the jury is permitted to make a recommendation of the penalty by a majority vote rather than being required to have unanimity. However desirable appellant's alternative may seem, the legislature has chosen otherwise and the courts have approved. See Alvord v. State, 322 So.2d 533 (Fla. 1975); James v. State, 453 So.2d 786 (Fla. 1984); Brown v. State, 565 So.2d 304 (Fla. 1990); Thompson v. State, 648 So.2d 692 (Fla. 1994).

POINT V

WHETHER THE LOWER COURT ERRED IN FAILING TO **GRANT** A **MOTION FOR MISTRIAL WHEN THE JURY BECAME** DEADLOCKED.

During the jury deliberations the court received a note expressing the view that they were deadlocked **(TR2410, R173).** The court informed both counsel that it would then give Florida Standard Jury Instruction 3.06. Neither side had any objection to the instruction to be given **(TR2410-2411).** The court then instructed the jury:

> "THE COURT: I know that all of you have worked hard to try to find a verdict in this case, it apparently has been impossible for you so far. Sometimes an early vote before discussion can make it hard to reach **an** agreement about the **case** later. The vote, not the discussion, might make it hard to see all sides of the case. We are all aware that it is legally permissible for **a** jury to **disagree.** There are two things **a** jury can lawfully do, agree on **a** verdict, or disagree on what the facts of the **case** may truly be. There is is nothing to disagree about on the law. The **law** is as I told you. If you have any disagreements about the law, I should clear them for you now. That should be my problem, not yours.
>
> If you disagree over what you believe the evidence showed, then only you can **resolve** that conflict, if it is to be resolved.
>
> I have only one request of you, by **law,** I cannot demand this of you, but I want you to go back into the jury room, then taking turns, tell each of the other jurors about any weakness of your own position. You should not

interrupt each other or comment on each other's views, until each of you has had a chance to talk.

After you have done that, if you simply cannot reach a verdict, then return to the courtroom and I will declare this case mistried and will discharge you with my sincere appreciation for your services. You may now retire to continue your deliberations."

(TR2417-19).

About an hour later the court permitted the jury to hear the court reporter read back the testimony of Angelo Gay, as the jury had requested (TR2425, 2432). When the jury requested additional testimony, the defense requested a mistrial which the court denied. The court proposed the following written communication to the jury which the prosecutor, defense counsel and Mr. Green agreed to:

"Let me propose to both sides this as a written communication. I tried to maintain the same form that I maintained in prior communications. Ladies and gentlemen of the jury, the entire or substantial portions thereof cannot be read back to you. Please respond by checking one of the following blanks. Blank, then we are deadlocked, period. Blank, then we are not deadlocked and we will communicate further with specific requests. Dick Prince, judge presiding.

MR. AGUERO: Fine with me.

MR. ALCOTT: Yes, Your Honor, we agree.

THE COURT: All right. I am noting an exception to the earlier ruling on the mistrial then, your acquiescence here is not in lieu thereof.

Mr. Green, noting the objection previously to the denial of the mistrial, are

you in agreement as far as the written communication in this form?

THE DEFENDANT: Yes.

THE COURT: Again, noting your objection to that and reserving that. All right. Let me type that document up, let me show it to counsel here then send it back in. I will note on this document I am intending, under that second choice then we are not deadlocked and will communicate further with specific requests, that there will be further communication form the jury. My reason for saying that is this will simply be given back to them, but I am expecting further communication from the jury.

If there exists not further communication and by chance there should come simply a verdict immediately in the wake thereof, I will then listen specifically to arguments of counsel. I am anticipating if they check the second box that there will be further communication.

MR. AGUERO: Right.

THE COURT: All right. Stand in short recess to have the document prepared."

(TR2438-39).

The court noted at 4:00 P.M. that the jury "has responded to the last communication by stating then we are not deadlocked and we'll communicate further with specific requests" (TR2440). The parties (prosecutor, defense counsel and appellant) agreed to an instruction pertaining to agency which was given to the jury at about five o'clock (TR2448-49) and forty-five minutes later the jury returned with a guilty verdict (TR2450-54).

In Kelley v. State, 486 So.2d 578 (Fla. 1986), this Court held that there was no error in giving the Standard Jury Instruction 3.06 when the jury announced it had reached an impasse; indeed, the Court encouraged trial judges not to deviate therefrom "for a trial judge walks a fine line indeed upon deciding to depart." Id. at 584.

There was nothing improper in the trial court's giving the Standard Jury Instruction. And in the later communication the jury reported back that they were not deadlocked (TR2440) and shortly thereafter returned a verdict. There was no coercion. Appellant's claim is meritless.

POINT VI

WHETHER THE LOWER COURT ERRED IN ALLOWING APPELLANT TO ADDRESS THE JURY AT PENALTY PHASE.

After conducting a competency evaluation in which the trial court reviewed evaluations of mental health experts and determining that Green was competent on September 22, 1995 (R190-258, 266), after conducting over forty pages of inquiry by the court with appellant as to his desire to address the jury (R213-255), and after appellant reiterated his desire at the sentencing phase on October 17 to address the jury (TR2467-72), the court permitted Green to testify:

> "Mr. Green, as this time, did you wish the opportunity to address the jurors?
>
> THE DEFENDANT: Yes, sir.
>
> TH COURT: All right, sir. If you will approach the clerk and be sworn, sir.
>
> CURTIS GREEN, appearing as a witness on behalf of himself, and after having been first duly sworn, testified as follows:
>
> THE COURT: Please speak loudly enough then so all the jurors can hear you.
>
> A I just like for everybody 'to understand I've been on medication throughout this whole trial for my nerves and I like to address all you, ladies and gentlemen of the jury. I like to ask -- to come before you asking you today in the name of God to have me, on my behalf, to sentence me to death. For I am innocent of my crime, my God in

> Heaven was innocent, he was killed for a crime he didn't do. I am being killed for a crime I didn't do.
>
> I feel that I was railroaded on behalf of Polk County, and this court, and these hearings, and I feel I stand a better chance on death row winning my case, proving my innocence that -- because there was nowhere in my case proven where I killed anybody. And that's all I have to say."

(TR2620-21).

Appellant is not the first capital defendant to express a view to the judge or jury of his preference for a death sentence rather than life imprisonment. See, generally Pettit v. State, 591 So.2d 618 (Fla. 1992); Hamblen v. State, 527 So.2d 800 (Fla. 1988); Klokol v. State, 589 So.2d 219 (Fla. 1991); Durocher v. State, 604 So.2d 810 (Fla. 1992); Farr v. State, 621 So.2d 1368 (Fla. 1993); Layman v. State, 652 So.2d 373, n. 2 (Fla. 1995); Farr v. State, 656 So.2d 448 (Fla. 1995); Allen v. State, 662 So.2d 323 (Fla. 1995). Since a competent defendant may permissibly disavow mitigation, the trial court did not err in the instant case. In any event the trial court found as mitigation that the capital felony **was** committed while under the influence of extreme mental or emotional disturbance and that the capacity to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law was substantially impaired, as well as some nonstatutory mitigation (R325-329). Allen, supra, at 330. The lower court did not err or abuse its discretion.

POINT VII

WHETHER **THE LOWER COURT ERRED IN ALLOWING DETECTIVE ASHLEY TO TESTIFY AS TO THE SUSPECTS HE DEVELOPED, CURTIS** GREEN AND BARNEY **FRANKLIN.**

The record reflects the following exchanges:

"Q Do you know Lieutenant Don Corbitt?

A Yes, I do.

Q What relationship existed between you and Lieutenant Corbitt at the time you were assigned to this case?

A He is the lieutenant in charge of investigations in the east region.

Q At the time that you became involved in the case in August of 1994, were there particular suspects developed?

A Yes. Barney Franklin and Curtis Green.

MR. ALCOTT: Objection -- go ahead.

THE COURT: You withdrawing the objection at this time?

MR. ALCOTT: No. I don't really. I move to strike.

MR. AGUERO: Judge, it only ties in with Lieutenant Corbitt's testimony. Lieutenant Corbitt already testified ---

THE COURT: Counsel approach.

(The attorneys and the defendant approached the bench and the following discussion was had and taken:

THE COURT: All right. It doesn't just tie in with Lieutenant Corbitt's testimony. The specific question asked that, I'm quoting, was, were there particular suspects developed. Now were you asked to examine particular suspects, were you ordered to do so. And frankly, it leaves some huge nebulous gap as to what underlies this. I mean, if

what you're trying to get to him, did Lieutenant Corbitt tell you to examine two particular people, that's different.

MR. ALCOTT: My objection is it's so brightened. He laid this predicate, here we got this well-trained, skilled detective that ferrets out crime and he says, did you develope a couple of suspects? Yeah, Barney and Curtis. I mean, it just ----

MR. AGUERO: Preliminary matters have got to be allowed. This happened yesterday, I continued. I understand, I try not to argue with the Court, but there's got to be a way to get into the subject area of a witness and this goes very rapidly.

THE COURT: Does your witness -- is your witness saying -- and again, I don't know. Is your witness saying the reason I looked at Curtis Green and Barney Franklin was the lieutenant told me to do that? Or is your witness saying I had independent information that came into otherwise.

MR. AGUERO: Okay. I'll change the question.

THE COURT: I mean, do you understand what I'm trying to ask?

MR. AGUERO: Yes, sir.

THE COURT: When you ask the question, did you develop those suspects, that leaves a whole host of an area. If what you're trying to ask this person is were you told to pick this file up and examine these two people by your lieutenant, that's a different question.

MR. AGUERO: Okay.

MR. ALCOTT: Well, I would even object to that, because he should just testify as to what he did. He got assigned the case, what did you do?

THE COURT: I'm intending to overrule that objection, if that's what the testimony is going to be. I think the state is entitled to show how he became involved in the case. However, I think the state **also** has the obligation to show precisely how he became involved.

MR. AGUERO: I understand.

THE COURT: All right.

(The attorneys and the defendant left the bench.)

THE COURT: I will sustain the objection at this time. Strike the last answer which was given. State may continue inquiry.

Q (By Mr. Aguero) Who assigned you to this case?

A. Lieutenant Corbitt.

Q Did Lieutenant Corbitt give you any particular direction in which to begin this investigation on your part?

A Yes, we did discuss some direction,

Q. What did you then do to begin investigating this case that by then is six years old?

A. First thing I did was to get with the State Attorney's Office, discuss the case and try to have some witnesses subpoenaed in for interviews.

(TR1942-1945).

Appellant characterizes this incident as an improper attempt to utilize Detective Ashley to provide an expert opinion when he **was** not qualified and tendered as an expert. If that is the argument it was not presented below and thus not preserved for appellate review. The defense objection **was** sustained **(TR1945).**

Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990).

Moreover, Ashley did not pose as an expert witness; he merely testified as to what he did in pursuit of the investigation (TR1945-1990).

Appellant's claim is meritless and should be rejected.

POINT VIII

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ALLOWING DEPUTY SHERIFF CORBITT TO **TESTIFY HE HAD NOTICED THAT FRANKLIN AND** GREEN **PROVIDED ALIBIS FOR EACH OTHER.**

During Deputy Sheriff Corbitt's testimony this colloquy ensued:

> "Q After you began to look at it, did you then assign a detective that works for you to work on this case again?
> A Yes, sir, I did.
> Q Who did you assign to the case?
> A Detective Larry Ashley.
> Q Was there something in particular from your review of this case that led you to assign a detective, rather than just reading it yourself and putting it down?
> MR. ALCOTT: Objection relevancy, Your Honor.
>
> **(TR1883).**

After argument by counsel, the court overruled the objection concluding that it was a relevant question as to why he assigned a detective to the case **(TR1884-1885).** Then, this query followed:

> "Q Lieutenant, was there something in particular when you read this case file that caused you to then assign a detective to this case?
> A Yes, sir.
> Q What was that?
> A I noticed that Barney Franklin and Curtis Green had given each other an alibi for that night.
>
> **(TR1885).**

The jury had previously heard from the initial investigating detective Ernest Mincey that Green had claimed he was at the S&P Mobile Home Park and did not see the victim after he was chased from the premises by the victim's father with a gun and that both Franklin and Green told him "they had been together since midnight and nobody had left that trailer after midnight" (TR1514).

Barney Franklin had testified that he was presently charged with the first degree murder of Karen Kulick (TR1696) and on cross-examination by the defense that a few days after the Kulick homicide he was interviewed by a detective and told him that both he and Green were at the trailer; he did not tell the detective Green had left (TR1726-27). Corbitt's testimony occurred prior to Ashley's and that the "prosecutor is again singling out the two defendants for his spotlight" (Brief, p. 16) is not surprising since a prosecutor is supposed to focus his attention on the defendant being prosecuted (and presumably any co-perpetrator). The jury was well aware from the unobjected-to prior testimony of the association of Franklin and Green before Corbitt testified. There is no error; if error is present, it is the type for which the harmless error doctrine was invented. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed,

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No.: 0134101
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to, Glenn Anderson, Esquire, 1128 First Street South, Winter Haven, Florida 33880, this 18th day of December, 1996.

COUNSEL FOR APPELLEE