IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CURTIS CHAMPION GREEN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL NO, 86,983

CASE NO. CF-95-0909-A2-XX

On Appeal from the Circuit Court
Tenth Judicial Circuit, Polk County, Florida

APPELLANT'S INITIAL BRIEF

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The prosecutor's continuous references to "prostitute" and "pimp" were part of a deliberate effort to inflame the jury. Commencing in the voir dire and only concluding with the final argument in the penalty phase. Mr. Alcott's conduct was so egregious that it was error for the court not to declare a mistrial.

Accordingly, the trial court should be reversed and the case be remanded for new trial.

POINT II

II. **DID THE TRIAL JUDGE AND THE PREVIOUS JUDGE ERR BY ALLOWING THE TRIAL TO PROCEED IN THE FACE OF THE UNWILLINGNESS OF DEFENSE COUNSEL TO DEPOSE THE STATE'S WITNESSES.**

It was error to allow the trial to proceed without defense counsel first deposing the State's witnesses. The State Attorney urged that argument on Judge Andrews prior to trial and, in fact, argued that any such approach was inherently wrong.

Accordingly, the trial court should be reversed and the case be remanded for new trial.

POINT III

III. DID THE TRIAL JUDGE FAIL TO MAINTAIN AN ATMOSPHERE WHICH WOULD INSURE A FAIR AND OBJECTIVE EXAMINATION OF THE EVIDENCE BY THE JURY.

Court personnel prejudiced defendant's opportunity for a fair trial, ab initio, by parading him in handcuffs through the main hall and denying him the opportunity to have fresh clothes and look presentable.

Accordingly, the trial court should be reversed and the case be remanded for new trial.

POINT IV

IV. IS THE PROCESS BY WHICH THE JURY WAS SELECTED SO FLAWED, BIASED, AND TAINTED WITH RESPECT TO THE JURY RECOMMENDATION OF DEATH AS TO ABSOLUTELY PRECLUDE A CONSTITUTIONAL DECISION WITH RESPECT TO THAT QUESTION.

Florida's bifurcated guilt and penalty procedure in first degree murder trials is inherently unfair, unconstitutional, and strongly biased against defendants. The exclusion of that segment of the population with reservations about capital punishment coupled with the jury's ability, by mere majority, to recommend death creates a fatally flawed process.

Florida Statute 921.141, with respect to the creation of the mechanism by which a jury can recommend death by mere majority vote, should be declared unconstitutional.

POINT V

V. DID THE COURT ERR IN FAILING TO GRANT DEFENDANT'S MOTION FOR MISTRIAL WHEN IT BECAME OBVIOUS THAT THE JURY WAS DEADLOCKED AND A VERDICT COULD ONLY BE OBTAINED BY APPLYING PRESSURE ON THE PANEL.

Florida Standard Jury Instruction 3.06 was given in the morning of the last day of trial, after the jury announced it was deadlocked, and several hours later, after the jury had requested the testimony of several witnesses, a verdict was obtained. The time allowed was too long and it permitted what in essence anted to a new, partial trial.

Accordingly, the trial court should be reversed and the case be remanded for new trial.

POINT VI

VI. IN LIGHT OF DEFENDANT'S MENTAL CONDITION AND ABILITIES, DID THE COURT ERR IN ALLOWING HIM TO SPEAK TO THE JURY DURING THE PENALTY PHASE.

It was error for the court to permit Curtis Green to address the jury in the penalty phase and ask for death, because he was mentally impaired and unable to make that decision,

Accordingly, the trial court should be reversed and the case be remanded for new trial.

POINT VII

VII. DID THE COURT ERR IN ALLOWING DETECTIVE LARRY ASHLEY TO TESTIFY AS TO THE SUSPECTS HE HAD DEVELOPED, BARNEY FRANKLIN AND CURTIS GREEN.

Detective Larry Ashley should not have been allowed to testify as to who his primary suspects were. The only purpose of that testimony was to highlight the accused.

Accordingly, the trial court should be reversed and the case be remanded for new trial.

POINT VIII

VIII-DID THE COURT ERR IN ALLOWING DEPUTY SHERIFF DON CORBITT TO TESTIFY THAT HE HAD NOTICED THAT BARNEY FRANKLIN AND CURTIS GREEN HAD GIVEN EACH OTHER ALIBIS FOR THE NIGHT OF THE MURDER.

Deputy Sheriff Don Corbitt should not have been allowed to link the alibis of Barney Franklin and Curtis Green in his testimony.

Accordingly, the trial court should be reversed and the case be remanded a new trial.

STATEMENT OF THE CASE

Karen Kulick was murdered on May 22, 1988. Curtis Green was indicted for first degree murder by the grand jury on February 21, 1995. He made his first appearance before the Honorable J. Dale Durrance on March 4, 1995. Roger Alcott, Esquire, was appointed to represent Curtis Green by the Honorable Daniel True Andrews on April 24, 1995, upon the withdrawal of the Public Defender and upon the rescinding of the previous appointment of William Cea. The trial commenced on August 28, 1995, and the first phase concluded on September 14, 1995, with a verdict of murder in the first degree. Defense counsel moved to withdraw and moved for a new trial on September 22, 1995. On October 18, 1995, the jury by a ten (10) to two (2) vote returned a verdict calling for the defendant's execution. The State's sentencing memorandum was filed on October 20, 1995 and defendant's sentencing memorandum was filed on October 27, 1995. The Court filed its sentencing memorandum on November 9, 1995. Judgment and sentencing, together with sentencing order, took place on the date of the sentencing memorandum. Notice of Appeal was filed on November 22, 1995. Statement of Judicial Acts to be Reviewed, Designation to the Court Reporter, and Directions to the Clerk of the Court were filed on November 30, 1995.

STATEMENT OF THE FACTS

The victim, Karen Kulick, was murdered sometime in the early morning hours of May 22, 1988. Her body, bearing evidence of multiple wounds and traumas, was found naked, with the exception of her tennis shoes, in the center of Masterpiece Gardens Road in Polk County, Florida, a short time after it had been deposited in that location. The initial investigation of the crime was fruitless.

Crime scene technicians and other police officers were dispatched to investigate the Masterpiece Gardens Road crime scene. Subsequently, Dr. Alexander Melamud, the medical examiner, thoroughly examined the corpse. He found, inter alia, that the victim had a high blood alcohol content and, despite a comprehensive medical examination, there was no evidence that she had been sexually molested.

Ms. Kulick had been arrested by the Bartow Police Department on the preceding night as a result of a confrontation and subsequent trespass at the bail bond and delicatessen business of her former boyfriend Randy Gulledge. Their relationship and her employment at the delicatessen had previously been terminated and Ms. Kulick had visited Mr. Gulledge's property to confront him. He called 911 and the Bartow Police investigated. When the police officer was unable to get Ms. Kulick to cooperate in a satisfactory manner, she was arrested and jailed. Later, she was released by the Polk County Sheriff's Department despite the fact

that she was inebriated.

Earlier on the day of her arrest, Ms. Kulick had been drinking with Barney Franklin. Defendant Curtis Green lived with Barney Franklin and his wife in a trailer in Bartow. Mr. Franklin had first asked Mr. Green to pick up Ms. Kulick and transport her to his trailer, but Mr. Green and a relation of Mr. Franklin were chased from Ms. Kulick's residence by her father with a firearm. Subsequently, Ms. Kulick was picked up by Mr. Franklin and the two of them drank together, as previously mentioned, until shortly before Mr. Franklin's wife returned from work. That drinking session was the reason why Ms. Kulick was intoxicated later that night.

Ms. Kulick attempted to secure transportation home, both during the confrontation at Mr. Gulledge's business and later from the Polk County Jail, but she was unsuccessful. Nevertheless, the Sheriff's Department released her in an intoxicated state in the early morning hours and she walked away from the jail. At the time she disappeared into the night, the officer knew her to be not only intoxicated, but also in an argumentative and confrontational mood.

This case attracted a great deal of attention in Polk County because of the nudity of the victim, her discovery in the middle of the public highway, and the shocking evidence of physical abuse. Her release by the Polk County Sheriff's Department in an intoxicated and angry state was a matter of

concern to the authorities and a public relations nightmare. There was a significant amount of pressure on all of the agencies of law enforcement to solve this case.

Years after the homicide, law enforcement developed Barney Franklin and Curtis Green as prime suspects. Although both individuals and others associated with them had been questioned shortly after the murder, their reciprocal alibis, and evidence suggesting that Ms. Kulick might have been picked up by a trucker, apparently encouraged law enforcement to ignore them and to pursue other leads. Both individuals were arrested early in 1995 and Mr. Franklin incriminated Mr. Green, but exculpated himself. Later, almost on the eve of trial, Angelo Gay, an inmate in the Polk County Jail, who had previously been a "snitch" in another high profile case, claimed that Curtis Green had incriminated himself to him during a period of a few hours when they were sharing the same cell.

POINT I

I. DID THE FREQUENT REFERENCES OF THE PROSECUTION DURING VOIR DIRE TO KAREN KULICK'S ALLEGED PROSTITUTION AND CURTIS C. GREEN'S ALLEGED PIMPING PRECLUDE A FAIR TRIAL OF THE DEFENDANT AND DID THE TRIAL JUDGE ERR IN FAILING TO FIRMLY ASSERT HIS AUTHORITY IN THAT REGARD.

"Prostitute" and "pimp" were words deliberately and outrageously employed by the prosecution in the examination of prospective jurors. They were designed to inflame and engage the jury on the most elemental level.

Clearly the prosecutor planted those words in the jurors' minds to serve as a fulcrum around which to base his construction of a motive. It is equally clear from the record that the testimony concerning Dawn George was irrelevant and the testimony about the prostitution of the victim and the connection of the defendant to that prostitution was limited to one instance in which the defendant played no active role. (T 1616-1618, 1619 & 1626)

The prosecutor knew this possible motive to be inflammatory and spurious, This makes the prosecutor's early, frequent poisoning of the jurors' minds an outrageous example of prosecutorial misconduct.

The instant case was based on circumstantial evidence coupled with the self-serving testimonies of a co-defendant and a "jailhouse snitch" and the record reflects that the jury agonized for two days before returning a verdict of guilty. A few grains of sand one way or the other could

easily have tipped the balance. Words like "prostitute" and "pimp " are more than mere grains of sand. In fact, the word "pimp " screams the motive that the State was never able to support with any testimony or other evidence. The prosecutor's argument in the penalty phase makes it crystal clear that he intended to exploit sex to the great prejudice of the defendant and in the absence of any supporting evidence. (T 2627 & 2653) He argued that the victim had been sexually assaulted even though his own witness, the medical examiner, found no evidence of sexual activity after an extensive examination of the victim and he totally misconstrued the testimony of his witness Gay to invent a sexual element out of whole cloth. Gay never testified to a sexual element and Mr. Aguero's fabrication was extremely prejudicial. He deliberately waved a non-existent "bloody shirt" from the very beginning of the trial to the very end. See Hall v. Wainwright, 733 F2d 766 (11th US CCA 1984), rehearing denied 749 F2d 733, cert. denied 105 S Ct 2344, 471 U.S. 1107, 85 L. Ed. 2d 858 cert. denied 105 S Ct 2346, 471 U.S. 1111, 85 L. Ed. 862; and Garron v. State, 528 So. 2d 353 (Fla 1988).

POINT II

II. DID THE TRIAL JUDGE AND THE PREVIOUS JUDGE ERR BY ALLOWING THE TRIAL TO PROCEED IN THE FACE OF THE UNWILLINGNESS OF DEFENSE COUNSEL TO DEPOSE THE STATE'S WITNESSES.

It is a commonplace and understood by most defendants

that the defense attorney and the defendant should function as a team. The defendant's strategy was obviously to force the pace in order to put the State at a disadvantage. With that in mind, the defense was willing to sacrifice such conventional tools as depositions. That decision was certainly a controversial decision and in some judicial quarters would be considered an inheritanly bad one.

Defendant was in no position to weigh the merits of his counsel's strategy. He had only very limited intelligence, was obviously under great emotional strain, and had no legal training. The prosecutor, before trial, specifically warned the judge of how inappropriate it was to proceed in that fashion. (R 54) Moreover, Judge Andrews was the only one in a position to insist that the defendant's rights be protected, and he failed to do so. This was a situation which called for real insight and not some meaningless litany of stock questions addressed to an obviously uncomprehending defendant.

Mr. Green belatedly realized the consequences of his blind support of the defense attorney. The defense attorney then filed his Motion to Withdraw. (R 259-260) Unfortunately, the cow was by then long out of the barn and the issue of depositions was moot except in this forum. See Cappeta v. Wainwright 433 F2d 1027 (5th U.S. CCA 1970).

POINT III

III. DID THE TRIAL JUDGE FAIL TO MAINTAIN AN ATMOSPHERE WHICH WOULD INSURE A FAIR AND OBJECTIVE EXAMINATION OF THE EVIDENCE BY THE JURY.

Early in the course of the trial the defendant was paraded, in handcuffs, through the crowded confines of the main hallway at the temporary courthouse. Somewhat later it appeared that he was unable to communicate with his relatives to obtain fresh clothes. When he requested the use of the phone for that purpose, he was threatened with punishment by his jailers. These two events are cumulative and form a pattern which, while seemingly trivial, tended to deprive him of his humanity and cast him in the apparent role of a felon. (T 218-223)

The judge addressed both concerns and promptly set matters right with respect to future conduct, but that is evidence of the merit of defendant's grievance. Nothing meaningful was done to address the existing dangerous impressions which might have become lodged in the minds of the prospective jurors. It is to easy to ignore the prejudicial impact of impressions and the actions of court personnel and jailers. However, the damage they do can be just as harmful as a ruling by the court. (T 646-647) See Rockett v. State, 262 S 2d 242 (Fla. 2DCA 1972).

POINT IV

IV. IS THE PROCESS BY WHICH THE JURY WAS SELECTED SO FLAWED, BIASED, AND TAINTED WITH RESPECT TO THE JURY RECOMMENDATION OF DEATH AS TO ABSOLUTELY PRECLUDE A CONSTITUTIONAL DECISION WITH RESPECT TO THAT QUESTION.

Capital punishment in Florida seems to be applied in an evenhanded fashion, because people opposed to its application and people clamoring for its application are equally subject to exclusion. The truth is somewhat different. Florida's bifurcated procedure inescapably weighs the scales in favor of death. Exclusion of the two previously mentioned classes of prospective jurors does not pose such a sharp threat to due process in the first phase, but in the penalty phase the consequences are dreadful and totally unnecessary.

The verdict in the first phase of a first degree murder trial requires unanimity on the part of the jury which works to thwart extreme sentiments. However, the rule of the majority during the penalty phase favors the extreme sanction. How can it be otherwise when a prosecutor such as Mr. Aguero systematically excludes anyone with the faintest reservations about the death penalty. Only those jurors ready and willing to consider death are permitted to play any role on the jury. Conversely, there is no real safeguard, other than scarce peremptory challenges, against the very real possibility that the bloodthirsty and zealous will mask or mute their feelings and find their way onto the jury. Under

such a system, the playing field is tilted implacably in the direction of death.

Allowing a simple majority to decide for death, when all opponents are systematically excluded, violates elementary concepts of justice and due process. The defense made multiple objections during the course of the trial to this procedure. The obvious answer to the problem would be to require a unanimous recommendation for death from the jury. It is so obvious, one wonders why such a fatally flawed mechanism has been allowed to linger when the remedy is so simple,

The courts, of course, have the ability and the duty to withstand the harsh winds of political passion and correct this problem. Conversely, imposing the death penalty is a heavy burden for some members of the judiciary, whose moral convictions make them uncomfortable. It is far easier to await a recommendation from the jury rather than make that decision unsupported. The system also provides the judiciary with some protection from the political passions of the electorate. Conveniently, the judicial conscience is afforded some protection from the responsibility for the decision and, additionally, the onus for the decision can be borne by the jury. It is a very useful system for judges, but somewhat less satisfactory for defendants.

It would appear that the real reason for the easier decision making process in the penalty phase is to facilitate

the judiciary's role as ultimate arbiter, while providing as much cover for them as possible. Either the recommendation for death should be unanimous or a broader cross section of society should be allowed to decide. Our present system gives the trial judge power without true responsibility.

The convenience of the judiciary and the coddling of political passions are not weighty enough considerations to support a system which amounts to a stacked deck. Extreme supporters of the ultimate sanction are permitted to dominate events in the penalty phase through overrepresentation on the panel and the unwillingness of politically sensitive judges to challenge public opinion by overruling popular jury decisions. This is such a case.

Lochart v. McCree, 476 US 162, 106 S Ct 1758, 90 L. Ed. 2d 137 (1986), is a leading case in this area, but the majority only addressed jury composition in the guilt phase. It distinguished, but did not overrule, Witherspoon v. Illinois, 391 us 510, 88 s Ct 1770, 20 L Ed 2d 776 (1968), and Adams v. Texas, 448 US 38, 100 S Ct 2521, 65 L Ed 2d 581 (1980), which involved sentencing and afforded relief to the defendants involved. Further, Lochart's rationale was strained, implausible, and totally at odds with all of the academic studies, as argued in Justice Marshall's dissent. In the face of such evidence and the constant challenges, it is obvious that the bias built into statutory schemes like Florida's is by design.

Alvord v. State, 322 So, 2d 533 (Fla, 1975), is the

progenitor of a line of Florida cases which uphold without discussion its support for majority decisions in the penalty phase. However, the Court in Alvord faced a critically different statutory scheme. The jury recommendation under the old statute was for mercy and not death. A situation totally at odds with the instant case. Chief Justice Adkins specifically notes that such a recommendation by majority vote, rather than unanimous vote, is beneficial to defendants. It is past time to give some attention to FS 921.141.

POINT V

V. DID THE COURT ERR IN FAILING TO GRANT DEFENDANT'S MOTION FOR MISTRIAL WHEN IT BECAME OBVIOUS THAT THE JURY WAS DEADLOCKED AND A VERDICT COULD ONLY BE OBTAINED BY APPLYING PRESSURE ON THE PANEL.

The jury announced it was deadlocked in the morning, before lunch, of the last day of trial. Judge Prince as a consequence of the jury's announcement gave the deadlock instruction, 3.06. Several hours later, after the jury had requested that the testimony of several witnesses be read back to them, defense moved for a mistrial based on the fact that pressure was being applied to the jury. The judge did not grant the motion. (T 2435-2439)

The defense raised the issue of the long time delay subsequent to the announced deadlock and argued that in a case which was "so close" any verdict would be the result of

pressure and therefore suspect. Obviously, the underlying rationale of the deadlock rule is to encourage the jury to go back and rethink the case. In the instant case, the jury actually devoted its time to rehearing selected portions of the testimony. Such a procedure did not constitute rethinking, but was actually retrial by faulty and incomplete means. The defense was concerned that the process had gone too far and that any verdict would be fatally flawed.

Like most of us, courts prefer to get on with the job and to finish what they start. That human tendency coupled with the deadlock rule sometimes works to prevent a proper decision. Deadlocks are bad, but coercion of the jury and the encouragement of dangerous practices are worse. Unfortunately, the urge to accomplish something is generally too strong for the judge and the jury. The judge must, consequently, guard against the temptation to allow just a little more time and just a little more latitude in an attempt to avoid a mistrial. That was not done in this case.

POINT VI

VI. IN LIGHT OF DEFENDANT'S MENTAL CONDITION AND ABILITIES, DID THE COURT ERR IN ALLOWING HIM TO SPEAK TO THE JURY DURING THE PENALTY PHASE.

The defendant possesess limited intelligence and suffers from serious psychiatric disabilities. The court was well aware of defendant's limitations, but permitted him to

address the jury during the penalty phase and request death. Defense counsel objected vehemently to such testimony on the grounds that it was suicidal and improper for an individual with defendant's diminished capacity to be allowed to throw himself on his sword. (T 2446-2447 and T 2467-2472)

The court in overruling the objection was concerned with defendant's right to exercise free speech, but that right has never been absolute, This situation is analogous to all those instances when the courts feel themselves obliged, before a defendant takes some serious action, to inquire whether he is on drugs or suffers from some other disability. Yet in the supreme moment of Curtis Green's life, Judge Prince permitted him to take a step which every lawyer in the courtroom realized was fatal.

It is clearly proper to permit someone with normal abilities to arrogate for himself the role of attorney. Defense counsel argued, however, that it was improper for someone with such diminished faculties. It is on the same footing with the concern that law shows for infants and incompetents. The court erred when it failed to weigh free speech against defendant's disabilities.

Any such statement must be voluntary. See Moore v Michigan, 78 S Ct 191; 355 U.S. 155 (1957). 2 L. Ed. 2d 167; and Calloway v Wainwright, 409 F2d 562, (5th US CCA 1968). The penalty phase of a first degree murder trial is obviously a "critical" stage of the proceedings and, conse-

quently, the bar is higher. Implicit in the normal practice of addressing questions testing competence to defendants is the need to insure the voluntary nature of their acts or statements.

POINT VII

VII. DID THE COURT ERR IN ALLOWING DETECTIVE LARRY ASHLEY TO TESTIFY AS TO THE SUSPECTS HE HAD DEVELOPED, BARNEY FRANKLIN AND CURTIS GREEN.

The prosecutor used his witness, Detective Larry Ashley, to show that a trained law enforcement officer had developed Barney Franklin and Curtis Green as the prime suspects. This was meant to highlight the two individuals in the jurors' minds and legitimize the suspicion with which all defendants are viewed. It is the kind of subjective testimony that experts are allowed to give, but is improper in the mouths of other witnesses. Detective Ashley was not qualified and tendered as an expert. (T 1942)

Defense counsel objected and the testimony was allowed to stand on the record. It was improper because it represented nothing more and nothing less than one man's subjective opinion. He should have limited himself to factual testimony which would have allowed the jury the opportunity to reach an independent conclusion.

This testimony was part of a rather comprehensive effort on the part of the prosecutor to make, without supporting evidence, Curtis Green appear as a pimp, suspect, and

murderer. It is only a short step from a detective's suspect to guilty of the crime as charged. The prosecutor should not have been allowed to take this step on the basis of opinion testimony, but should have been required to prove his case. See Garron v. State, 528 So. 2d 353 (Fla. 1988).

POINT VIII

VIII. DID THE COURT ERR IN ALLOWING DEPUTY SHERIFF DON CORBITT TO TESTIFY THAT HE HAD NOTICED THAT BARNEY FRANKLIN AND CURTIS GREEN HAD GIVEN EACH OTHER ALIBIS FOR THE NIGHT OF THE MURDER.

Admission of the testimony of Deputy Sheriff Don Corbitt that Barney Franklin and Curtis Green had given each other alibis does not seem so egregious until the total design of the prosecutor's multifaceted effort to poison the wells is considered. It is cumulative to the testimony of detective Larry Ashley and the prosecutor is again singling out the two defendants for his spotlight. Testimony could have easily been elicited that Barney Franklin was Curtis Green's alibi, but the prosecutor preferred to link them together and cast the shadow of doubt on both of them. His purpose was not to bring the source of the alibi to the jurors' attention, but rather to make the two defendants seem guilty by the mere fact of there association. (T 1885)

This testimony is rendered more injurious for the very reason that it is part of a concerted and coordinated effort based on pejorative language, injurious characterizations,

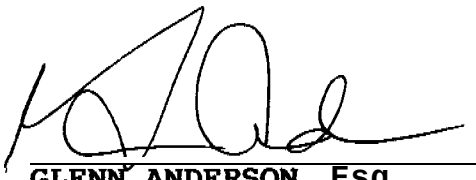
and ad hoc reasoning. Perhaps, if it were standing alone, it would not be so objectionable. Conversely, as part of the prosecutor's grand design, it is another cleverly constructed device to make the defendant seem guilty on the basis of association and the officers' preconceived scenario.

Such great emphasis on the alibis is disproportional at this stage of the proce-ss because events have moved beyond that point. The defense did not raise the issue. It was exclusively the prosecutor's vehicle to use this witness to point yet another respectable finger of suspicion at the defendant. The witness had no other purpose. See Garron v. State, 528 So.2d 353 (Fla. 1988).

CONCLUSION

The trial court erred in several instances by not declaring a mistrial and the procedure established by FS 921.141 is unconstitutional. The decision of the trial court should be reversed and the procedure established by FS 921.141 for a majority vote on the penalty phase declared unconstitutional.

Respectfully submitted this 16th day of September, 1996.



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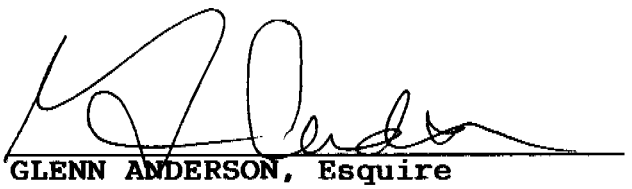
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to CANDANCE SABELLA, Esquire, Office of the Attorney General, Westwood Center, 7th Floor, 2002 North Lois Avenue, Tampa, Florida 33607 this 16th day of September, 1996.



GLENN ANDERSON, Esquire