IN THE SUPREME COURT OF FLORIDA

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MARK D. MIKENAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 64,317

BRIEF OF APPELLEE ON THE MERITS

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PRELIMINARY STATEMENT

Mark D. Mikenas was convicted of first degree murder and sentenced to death. He filed a motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure. This proceeding is an appeal from the denial of relief under that rule. Mikenas will be referred to in this brief as "Appellant" or "Defendant". The State of Florida will be referred to as "Appellee" or "State". The record of the 3.850 proceeding is contained in seven (7) volumes and will be referred to by the symbol "RE" followed by the appropriate page number.

STATEMENT OF THE CASE

The Defendant, MARK D. MIKENAS, was charged in a two-count indictment with the first degree murder of Anthony Williams and second-degree murder of Vito Mikenas. He pled guilty to the first-degree murder charge and nolo contendere to the second-degree murder of his brother, a co-perpetrator of a robbery. Defendant reserved the right to appeal the applicability of Section 782.04(3), Florida Statutes, 1975, the second-degree felony murder statute, to the facts of this case. The judge adjudicated him guilty, and a jury selected for the sole purpose of recommending sentence rendered an advisory recommendation of death. The trial judge entered an Order sentencing Mikenas to death.

On appeal to the Florida Supreme Court the following Issues were raised.

POINT ONE

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE TRIAL JUDGE'S IMPOSITION OF THE DEATH PENALTY.

POINT TWO

WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO RECUSE HIMSELF.

POINT THREE

WHETHER THE TRIAL JUDGE ERRED IN PERMITTING THE VICTIM'S WIDOW TO TESTIFY FROM A WHEELCHAIR.

POINT FOUR

WHETHER THE TRIAL JUDGE ERRED IN ALLOWING TESTIMONY OF OTHER AND UNRELATED CHARGES AND WARRANTS.

POINT FIVE

WHETHER THE TRIAL JUDGE ERRED IN DENIAL OF DEFENDANT'S MOTION TO DISMISS COUNT II CLAIMING FAILURE TO CHARGE AN OFFENSE BECAUSE OF UNCONSTITUTIONAL APPLICATION OF THE STATUTE.

The Court affirmed the defendant's conviction but remanded for resentencing without further jury deliberations, because the trial judge considered a nonstatutory aggravating factor. Mikenas v. State, 367 So.2d 606 (Fla. 1979) (Mikenas I).

Mikenas was again sentenced to death and he appealed on the following grounds:

I. WHETHER THE TRIAL COURT ERRED IN REFUSING TO IMPANEL A JURY TO RENDER AN ADVISORY SENTENCING?

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND WEIGH EVIDENCE OF STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES?

III. WHETHER THE TRIAL COURT ERRED IN FINDING AS APPLICABLE AGGRAVATING CIRCUMSTANCES THAT THE CAPITAL FELONY WAS COMMITTED BOTH FOR PECUNIARY GAIN AND IN PERPETRATION OF A ROBBERY?

IV. WHETHER THE TRIAL COURT ERRED IN FAILING TO STRIKE ALL OR PREJUDICIAL AND IRRELEVANT PORTIONS OF THE PRESENTENCE INVESTIGATION?

Both the judgment and sentence of death were affirmed. Mikenas v. State, 407 So.2d 892 (Fla. 1982) (Mikenas II).

Certiorari was sought in the United States Supreme Court on the issue of nonstatutory aggravating evidence being

presented. The petition was denied. Mikenas v. Florida, ___ U.S. ___, 101 S.Ct. 2307, 73 L.Ed. 2d 1308 (1982). The defendant appeared before the Clemency Board in January, 1983. The motion for post-conviction relief followed. An evidentiary hearing was held on June 22 and June 23, 1983. Relief was denied on August 30, 1983; this appeal followed.

STATEMENT OF THE FACTS

On November 3, 1975, the defendant, Mark Mikenas, his brother, Vito Mikenas, and a friend, Mark Rinaldi, robbed a convenience store in Tampa, Florida. During the robbery the defendant carred a .38 caliber revolver. There was no customers in the store during the robbery. Upon entering the store, the defendant and his co-felons forced the lone store clerk into a back room of the building. Unknown to the robbers, Gary Barker, an auxiliary deputy sheriff, observed the robbery from a hidden position in the store. When an automobile unexpectedly arrived at the front of the store, Appellant and his co-felons tried to exit through a back door. Barker, with drawn pistol, stopped them and placed them under arrest.

Seconds later, Anthony Williams, an off-duty Tampa policeman in civilian attire, came into the store through the front door. Barker called to Williams for help and informed him that a robbery was underway. Immediately thereafter, Defendant and Barker fired at each other with both missing. Barker later killed Vito and wounded the defendant as they ran towards the front of the store. As Defendant was falling to the floor, he shot and killed Anthony Williams, the Tampa police officer. Ann Williams the wife of Anthony Williams herself a police officer in uniform, arrested Defendant. Barker arrested Rinaldi.

The following facts were adduced at the 3.850 evidentiary hearing.

Mr. Robert Knight testified he was appointed in January of 1976 to represent the defendant (RE 805). He was admitted to the Bar of the District of Columbia in 1948, and worked for the FBI from 1949 to 1969 (RE 802). In 1969 he began the practice of law in Florida as an assistant in the Hillsborough County Solicitor's Office, Felony Division (RE. 802-803). In November 1971, Mr. Knight entered private law practice, specializing in criminal defense (RE. 803-804). Mr. Knight indicated he had handled three capital cases prior to this appointment and handled a fourth during the same time period.

Mr. Knight represented the defendant through the penalty phase and his original direct appeal (RE. 806-807). Between January and April 12, the date the Defendant originally pled guilty, Mr. Knight testified he conferred on a number of occasions with the Defendant and his parents. He obtained discovery, took depositions, filed motions, viewed the crime scene and discussed the possibility of a plea with both the prosecutor and his client. (RE 813)

The prosecutor offered not to seek the death penalty if the Defendant would plead guilty to both counts of the indictment with sentences to run consecutive (RE 814). After completing discovery in the case, Mr. Knight discussed the offer with Mikenas and recommended he consider same (RE 816, 818). The Defendant indicated he could not accept the bargain because he could not plead guilty to his brother's death. Additionally, Mikenas did not want to agree to consecutive sentences (RE 818). The State

attorney's office would not agree to less than a guilty plea and would not agree to concurrent sentences. On March 9, the plea offer was withdrawn (RE 818-820).

On April 9, a hearing was held on the defense motion attacking the constitutionality of the second degree felony murder statute. After the motion was denied, Mr. Knight asked the trial court about pleading nolo contendere to Count II to reserve the legal issue for appeal (RE 819-820). After the hearing, the matter was discussed with the defendant. Mikenas indicated he would plead on the 12th but wanted to talk with his parents first. The parents also talked with Mr. Knight on the following day (RE 821). This telephone conference with the parents is also indicated by the attorney's time records (RE 205).

Mr. Knight testified he felt the original offer where the state would not have sought the death penalty should have been accepted. In the absence of that he felt trial was the next best alternative (RE 834). However, since the Defendant did not want to go to trial and did not want to plead guilty to his brother's death, the plea of guilty to County I and nolo contendere to Court II was the only thing left (RE 823-824). The Defendant had indicated to counsel he did not want a trial where the details of his brother's death would be recounted along with photos of the bodies and autopsy reports (RE 823-824). He did not want to put his family through the trauma of a trial (RE 834-835).

On April 12, 1976, Mikenas appeared before the Honorable Robert W. Rawlings and withdrew his not guilty pleas and entered

a plea of guilty to Count I and nolo contendere to Count II. See(RE 184-196) for the plea colloguy. After the pleas were entered the defendant expressed some reservations; therefore, defense counsel filed a motion to inquire about the circumstances of the plea. The proceeding on the motion was to give the defendant the opportunity to withdraw or reaffirm the pleas. (RE 828) This was also an opportunity to have the defendant's parents present since they too had reservations (RE 829).

Prior to the second plea hearing, the defendant met with his parents and the co-defendant's attorney (RE 832-836). The parents had already spoken with Mr. Knight concerning pleading or proceed to trial. The parents were of the opinion that Mikenas would not want to go to trial (RE 832). After the conference everyone agreed to proceed with a plea (RE 836).

Once the defendant entered his plea, the attorneys and the trial judge discussed the penalty phase procedure (RE 836). The judge suggested the parties try to work out a stipulation of facts to be read to the jury (RE 836-837). However, no agreement could be reached (RE 837-838). And at the second plea hearing on May 3d. the Court indicated both the state and defense could present any witnesses they wanted (RE 181) (RE 914). Although witnesses for the state testified, the prosecutor agreed not to use the autopsy report or the pathologist and no photographs of the dead bodies (RE 839). The photographs actually used at the penalty phase were crime scene photos (RE 839).

In preparing for the penalty phase, Mr. Knight discussed possible witnesses with his client. He had the parents obtain letters from friends in Connecticut, and these letters were attached to the pre-sentence investigation report (RE 842, 856). Witnesses, including the neurosurgeon, were subpoened (RE 842, 848). Discussions were had concerning the Defendant testifying; it was determined that a final decision would be made after the State's case (RE 852-854). Mr. Knight further testified he was to use the defendant's parents as witnesses, but they decided not to testify (RE 857, 902). Louise Boutin, the girlfriend of the co-defendant was a potential witness to appear in Court, but a decision was made not to use her (RE 858). Mark Rinaldi, the co-defendant, was not considered as a witness for the defense since he had made statements contrary to Mikenas' interest (RE 859-860, 890-891).

Mr. Patrick Doherty, an attorney practicing in the State of Florida, was called as a witness for the defendant (RE 925). Mr. Doherty testified concerning his qualifications and practice in the field of criminal law (RE 925-927). He also stated he had testified as an expert in the case of Amos Lee King (RE 927). On cross-examination he admitted he was not sure if his testimony was actually accepted or just a proffer (RE. 929). After reading the appellate opinion in the King case which indicated Doherty's testimony was a proffer but not considered by the trial judge, Judge Graybill ruled his testimony could be proffered in this case but the Court would not consider it (RE. 935).

The Defendant, Mark Mikenas, testifed in his own behalf. He stated the circumstances surrounding the robbery and shootings up to the time he was shot (RE 957-959). Mikenas testified he has no memory of firing the gun causing Officer Williams death (RE 960).

Mikenas indicated Mr. Knight was appointed to represent him in January 1976. Between the date of appointment and the first plea hearing in April Mr. Knight had approximately three (3) face-to face meetings with him (RE 968). However, on cross-examination it was brought out that there were approximately seventeen conferences between the Defendant and Mr. Knight (RE 1019-1022).

The Defendant acknowledged he would not plead guilty, as offered, to the death of his brother (RE. 970). He also stated they did not discuss defenses as he wanted to work out a deal with the State (RE 974). Mikenas testified he discussed with Mr. Knight on April 9 entering a no contest plea on the death of his brother and guilty on the death of Officer Williams. However, it was his understanding that no live witnesses would testify at the penalty phase, i.e. there would be a stipulation of facts (RE 976). He later acknowledged the judge told him witnesses would be presented (RE. 1031-1032).

The Defendant stated he did not want his family to sit through a trial and relive the circumstances surrounding Vito's death (RE. 983, 1033-1034). He did not want graphic pictures of the body and wounds displayed (RE. 984).

Mikenas further stated he was told there would not be a stipulation of facts because an agreement on the facts could not

be reached (RE. 997). A discussion ensued concerning possible witnesses. The Defendant suggested Rinaldi and his girlfriend (RE. 997-998, 1007). They also discussed the defendant testifying in his own behalf (RE 999). Mr. Knight told him Dr. Whong would testify concerning the reflexive action (RE. 1002-1003).

On cross-examination Mikenas acknowledged Barker, with gun drawn, asked him and his fellow robbers to halt and he made a conscious decision to reach for the gun in his pocket and fire (RE. 1013-1014). He also acknowledged he could have stopped instead of attempting to escape and no one would have been killed (RE. 1015). Mikenas testified his hands were up as he approached the door (RE. 1016).

Also on cross-examination the defendant indicated his plea was not involuntary (RE, 1023). He was reasonably aware of what was going on at the time he pled (RE. 1023). It was brought out that the defendant was intelligent and had a prior experience with entering a plea (RE. 1028-1030).

Mrs. Mikenas, the defendant's mother, testified the defendant had some problems because of his father's drinking. (RE. 1042-1043). She stated Mark was intelligent but dropped out of school in his junior year (RE. 1044-1045). He started smoking pot and became uninterested in school (RE. 1045).

The Mikenas' talked with Mr. Knight shortly after he was appointed to represent Mark (RE. 1051). There was a face to face meeting with Mr. Knight in January, 1976; they discussed possible defenses including lack of intent (RE. 1052-1053).

The discussion also included the Florida procedure of two phases in murder cases (RE. 1054). The parties briefly discussed aggravating and mitigating circumstances (RE. 1055).

Mr. Knight explained the ramifications of the defendant pleading guilty (RE. 1060). Mrs. Mikenas stated the Defendant pled to spare himself and his faimily the trauma of a trial where Vito's death would be explored, including pictures of the body (RE. 1062-1063). Mr. Knight also discussed witnesses with Mrs. Mikenas; she suggested another expert to corroborate Dr. Whong (RE. 1065-1066). She also suggested the co-defendant and Louise Boutin (RE. 1069). Additionally, she also offered to testify (RE. 1070).

It was stipulated that Mr. Vito Mikenas would testify in the same manner as his wife (RE. 1078-1079).

ARGUMENT

There is a presumption of validity and regularity that attaches to a judgment of conviction and sentence. Nelson v. State, 208 So.2d 506 (Fla. 4th DCA 1968); Coleman v. State, 193 So.2d 699 (Fla. 1st DCA 1967). Thus, on petition to vacate or set aside judgment of conviction (3.850 Motion), the burden of proof is upon the Petitioner to prove his allegations, and such proof must overcome the presumption of validity which attends the judgment. Harris v. State, 177 So.2d 543 (Fla. 3rd DCA 1965). In order to prevail on a motion for post conviction relief the defendant must establish a recognized ground for relief by clearing and convincing evidence. State v. Gomez, 363 So.2d 624 (Fla. 3rd DCA 1978).

ISSUE I

THERE WAS NOT ERROR IN ACCEPTING APPELLANT'S GUILTY PLEA SINCE THE PLEA WAS VOLUNTARILY ENTERED.

Our Supreme Court has held the voluntariness of a plea a recognized ground for relief in a 3.850 proceeding. See Robinson v. State, 373 So.2d 898 (Fla. 1979). The defendant has the burden of showing his plea was not knowingly and voluntarily entered. State v. Gomez, supra. Appellant argues his plea was involuntary because of his physical and mental condition, he believed a plea bargain had been reached, he was not informed of the consequences of his plea and he received ineffective assistance of counsel. It is respectfully submitted that Appellant has

failed to demonstrate these allegations by clear and convincing evidence.

The first argument Appellant makes is his depression over the death of his brother, a participant in the attempted robbery, and the injuries he sustained from a gunshot wound so affected his physical and mental state that he could not enter a voluntary plea. While it is not suggested that Appellant did not love his brother, it must be remembered that his death occurred in November, 1975 and Appellant was shot in November also and discharged from the hospital the last week of November. Appellant pled guilty and nolo contendere to the two murder charges in April 1976 and May 1976.

At the evidentiary hearing both Appellant and his mother talked in general terms of Appellant being withdrawn and depressed as a result of his brother's death (RE. 966, 995, 1056). But at no time did either say Appellant, because of these feelings did not understand what was going on or was unable to assist in his own defense. Any such suggestion would have been negated by the fact that Appellant could and did talk intelligently with counsel about pleading, witnesses, photographs of the bodies, descriptions of the bodies, etc.

In State v. Brest, 421 So.2d 638 (Fla. 3rd DCA 1982) the district court was faced with a situation where a defendant via 3.850 argued his plea was involuntary because he was nervous and distressed when he entered the plea. The Brest court in addressing

the matter quoted the following language from Fluitt v. Superintendent, Green Haven Correctional Facility, 480 F. Supp. 81, 86 (U.S.D.C., S.D.N.Y. 1979):

> [D]istress without more, does not entitle one to a hearing. If that were the rule every defendant's application to withdraw a plea of guilty would automatically have to be granted. "Distress" and "nervousness" are the characteristics of most persons facing immediate trial under a criminal prosecution. To accept such a normal emotional reaction as a ground to vitiate a plea entered only after extensive questioning of a defendant to assure its constitutional validity, would make a shambles of the guilty plea procedure.

(Text at 421 So.2d p. 642) Depression over the death of ones brother is also a natural reaction.

There is nothing in the record to indicate Appellant's reactions to the death of his brother or the criminal incident as a whole was so extreme that he needed psychiatric help. It is apparent that defense counsel, Mr. Knight, at least explored the possibility. Counsel stated he discussed such an examination with the defendant (RE. 840). As a result of that discussion counsel sent for a report of some counseling Appellant received in 1971; that report did not contain any information suggesting the necessity of a psychiatric examination (RE. 898-900). There was no previous psychiatric history. Rodriquez v. State, 176 So.2d 516 (Fla. 3rd DCA 1965). The record is devoid of evidence which would require inquiry into the defendant's sanity. See Bryant v. State,

373 So.2d 380 (Fla. 1st DCA 1979); VanPoyck v. Wainwright, 595 F.2d 1083 (5th Cir. 1979); Pedrero v. Wainwright, 590 F.2d 1382 (5th Cir. 1979) and McNamara v. Riddle, 563 F.2d 125 (4th Cir. 1977).

Appellant testified after his release from the hospital he was on varying doses of medication during the time he was in the county jail (RE. 964). Mrs. Mikenas testified the defendant was on meidcation and in pain when she saw him in January, 1976 (RE. 1056). However, Mark Mikenas also stated he did not tell his counsel about the medications (RE. 966). In order to prevail on the issue of medication, Appellant must present substantial evidence that he was taking medication in such great quantities that it prevented him from having a full understanding of the consequences of his plea. Cf. Gunn v. State, 379 So.2d 431 (Fla. 2d DCA 1980). No such showing has been made in this case.

Appellant also argues his plea was involuntary because he believed there would be no live witnesses at the penalty phase, only an agreed upon stipulation of facts. It is well-settled law that a plea of guilty must be voluntarily made by one competent to know the consequences and must not be induced by promises, threats or coercion. Reddick v. State, 190 So.2d 340 (Fla. 2d DCA 1966); Young v. State, 216 So.2d 497 (Fla. 2d DCA 1968) and Hooper v. State, 232 So.2d 257 (Fla. 2d DCA 1970). Both Appellant and his mother indicated they believed there would be a stipulation of facts presented at the penalty phase.

Trial counsel acknowledged there had been some discussion of a possible stipulation. Mr. Knight testified the trial judge first asked the attorneys about the possibility of a stipulation. This occurred during a discussion of the penalty phase procedure, a discussion which occurred after Appellant pled on April 12th (RE. 836-837). The original plea could not have been the result of stipulation that had not been suggested. At the May 3rd plea hearing, the trial judge informed the defendant that witnesses would be called at the penalty trial (RE. 181). The defendant acknowledged at the evidentiary hearing he was so informed (RE. 1031-1032). The objective evidence in the record demonstrates the defendant knew the State could call live witnesses during the penalty phase.

Rule 3.172, Florida Rules of Criminal Procedure outlines the type of information that must be given to a criminal defendant before the court can accept his plea as being voluntary.[1] Appellee submits the April 12th plea hearing substantially complied with the requirements of this rule. The plea in this instance was taken in open court, and the prosecutor read the indictment which charged

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1/ Rule 3.172 was adopted in 1977, after the pleas were entered in this cause. In April and May 1976 the entering of pleas was governed by Rule 3.170(j), which reads:

> (j) Responsibility of Court on Pleas. No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, which means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.
>
> A complete record of the proceedings at which a defendant pleads shall be kept by the court.

Appellant with the first degree murder by premeditated design of Anthony Williams (RE. 185-186). It was explained that "premeditated design" included a murder committed during a robbery, felony murder. Appellant indicated he understood that count (RE. 186). He also stated he was pleading guilty to that charge (RE. 186).

The prosecutor next read count two charging Appellant with the second degree murder of Vito Mikenas, a co-perpetrator killed during the robbery or attempted robbery (RE. 186-187). The defendant expressed his understanding of the charge (RE. 187). His attorney, however, expressed his desire to enter a plea of nolo contendere preserving the right to appeal a question of law; Appellant stated that was his desire (RE. 187-188). Appellant expressed his understanding of the nature of the first degree murder charge, and his understanding that he could receive a death sentence (RE. 188). He also understood a life sentence would require a mandatory serving of 25 years (RE. 188). The court made it explicit that a life sentence was not being offered, but it was a possibility (RE. 189).

The Court also asked the defendant if he understood a jury would be impaneled to make a sentence recommendation of either life imprisonment or the electric chair. Appellant twice indicated his understanding (RE. 189). The court then added:

> THE COURT: Do you also understand that as you stand here now, you are entitled to a jury trial on all charges, and that you could hear the witnesses for the state testify on these charges, present any witnesses or defenses you may have, and let a jury decide your guilt or innocence of these charges?

THE DEFENDANT: Yes.

THE COURT: Do you understand by pleading guilty, that you will no longer be entitled to a jury trial and you waive your right to a jury trial under count one of the Indictment, which is the first degree murder charge, as far as guilt or innocence is concerned?

THE DEFENDANT: Yes.

THE COURT: And do you understand by pleading nolo contendere to the second count, that you are waiving your right to a jury trial and you will no longer be entitled to a jury trial on the second count?

THE DEFENDANT: Yes.

MR. KNIGHT: Do you understand that?

THE DEFENDANT: Yes.
(RE. 189-190).

The defendnat nodded negatively when asked if he had been threatened in any way or promised anything (RE. 190-191). And he said "yes" when asked if the pleas were being made freely and voluntarily(RE. 191). Mikenas was pleading guilty to count one because he was in fact guilty. Appellant indicated he had thoroughly discussed the case with his attorney and had no quarrel or fault with counsel (RE. 191). Thereafter the prosecutor recited a factual basis for the pleas (RE. 192-194).

Contrary to Appellant's assertion, this plea hearing was not superficial. The trial judge took pains to ask questions in such terms as the defendant would understand. And one must keep in mind that Appellant was not a stranger to a plea proceeding. He acknowledged he was aware of what was happening (RE. 1023, 1028-1030)

Not only did the court make sure Appellant knew what the charges were and the ramifications of pleading, defense counsel also assisted in the procedure.

Lastly, Appellant asserts his plea was involuntary because he had ineffective assistance of counsel. It is axiomatic that an attorney is obligated to inform his client of the alternatives available and to advise the client as to the course of action he deems appropriate under the circumstances. But, in the final analysis, it is the defendant who decides whether or not he will plead to a criminal offense. See Rule 3.171, Florida Rules of Criminal Procedure.

Sub judice, Appellant was offered a plea bargain by the State which called for pleas of guilty to the two counts of murder in exchange for life sentences. Defense Counsel freely admitted that he advised the defendant to think seriously about accepting this bargain. At this point depositions had been taken of key witnesses and counsel was familiar with the law relating to first and second degree felony murder. Appellant admitted this plea offer was communicated to him, but he did not and could not accept it. He did not want to plead guilty for the death of his brother nor would he agree to consecutive sentences. Attempts were made to bargain for concurrent sentences and nolo contendere on second degree murder charge; however, the prosecutor would not agree.

Mr. Knight testified he advised Appellant that, barring acceptance of the original plea offer, his best option was to

proceed to trial. However, Appellant did not want to subject his family to the trauma of a trial. Thus, counsel was left with little option; he had a defendant who would not accept a bargain which assured him of not receiving a death penalty, and a defendant who did not want to try the case. Under these circumstances the pleas of guilty and nolo contendere respectively were the only choice available.

Not only did counsel discuss the options with the defendant but also with his parents. And when counsel preceived there might be a problem with the plea as entered, he discharged his ethical obligation advising the court and asking for further inquiry. Cf. Robinson v. State, supra.

The record indicates Appellant entered his pleas knowingly and voluntarily with a full understanding of the consequences. As the district court said in State v. Pinto, 273 So.2d 408 (Fla. 3rd DCA 1973), cert. dismissed 283 So.2d 367 (Fla. 1973):

> [a] defendant often pleads guilty after consultation and advice from his attorney. Such a decision is a tactical one and may not be whimsically revoked at a later time. Belsky v. State, Fla. App. 1970, 231 So.2d 256; Simpson v. State, Fla. App. 1964, 164 So.2d 224. Where, as here, the guilty plea was entered upon advise of counsel and where the record shows a full examination by the court and the defendant's concurrence in the plea, the record clearly refutes the defendant's later assertion that the plea was not voluntary.

(Text at p. 411) Appellant in this instance has not established by clear and convincing evidence that his plea was involuntary for any one of the allegations made in his 3.850 petition.

ISSUE II

APPELLANT RECEIVED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant next asserts under this issue of the motion that his trial counsel was ineffective. The Supreme Court in Knight v. State, 394 So.2d 997 (Fla. 1981),set out the four-step process to be used in deterimining whether a defendant has been provided reasonably effective assistance of counsel. See also United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc). In evaluating these claims the Court must determine the following:

> (1) First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> (2) Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel.
>
> (3) Third, the defendant has the burden to show that specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a liklihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error.
>
> (4) Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the State still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact.
>
> (Text at 394 So.2d at 1001).

Recently in Armstrong v. State, 429 So.2d 287 (Fla. 1983) the court reaffirmed its Knight criteria while acknowledging the different standard outlined by the Fifth Circuit in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), cert. granted, ___ U.S. ___, 103 S.Ct. 2451, 77 L.Ed. 2d 1332 (1983).

The Federal standard in this circuit for constitutionally effective assistance of counsel is not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Herring v. Estelle, 491 F.2d 124, 127 (5th Cir. 1974); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). This standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance of counsel was rendered based upon the totality of circumstances in the entire record. Washington v. Estelle, 648 F.2d 276, 279 (5th Cir. 1981).

In Ford v. Strickland, 696 F.2d 804 (11th Cir.. 1983), the Eleventh Circuit Court of Appeal recently addressed the issue as follows:

> In reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. Washington v. Watkins, 655 F.2d at 1355; Easter v. Estelle, 609 F.2d 756, (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. See United States v. Guerra, 628 F.2d 410 (5th Cir. 1980), cert. den, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed. 2d 369 (1981); Bucklew v. United States, 575 F.2d 414 (5th Cir. 1978); United States v. Beasley, 479 F.2d 1124, 1129 (5th Cir.)

> cert. denied 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed. 2d 158 (1973); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. Baty v. Balkcom, 661 F.2d 391, 395 n. 8 (5th Cir. 1981) cert. denied, ___ U.S. ___, 102 S.Ct. 2307, 73 L.Ed. 2d 1303 (1982); Baldwin v. Blackburn, 653 F.2d 942, 946 (5th Cir. 1981).

See also Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) and United States v. Valenzuela-Bernal 31 Crim. L. 3162 (U.S.S.C. Case No. 81-40, opinion filed July 2, 1983). Only representations which are egregious and measurably below competent counsel should be condemned. United States v. DeCoster, supra.

In Florida, the burden of proof on one petitioning to set aside a judgment of conviction is to prove the facts relied upon by strong and convincing evidence, Meeks v. State, 382 So.2d 673 (Fla. 1980); Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied 41 U.S. 987, 93 S.Ct. 2276, 36 L.Ed. 2d 965 (1975); Russ v. State, 95 So.2d 594 (Fla. 1957). Likewise the Federal Courts have also placed a heavy burden of proof on the Petitioner. Hill v. Linahan, 697 F.2d 1032 (11th Cir. 1983); Henson v. Estelle, 641 F.2d 250 (5th Cir. 1981), cert denied 454 U.S. 1056, 102 S. Ct. 603, 70 L.Ed. 2d 593 (1981); Stanley v. Zant, supra. Applying either of the above standards to the instant facts, it is clear to the State that Petitioner's claim of ineffective assistance of counsel must ultimately fail.

Appellant has divided its claim into six subparts, Appellee will address each one but not in the order presented by

Appellant. One argument being made is that it is per se ineffective counsel to permit a defendant to plead without getting a sentencing benefit. There are a number of first degree murder cases where a guilty plea has been entered and the defendant had to go through the penalty phase and received a death sentence. See e.g., Quince v. State, 414 So.2d 185 (Fla. 1982); Holmes v. State, 374 So.2d 944 (Fla. 1979); Washington v. State, 362 So.2d 658 (Fla. 1978) and Elledge v. State, 346 So.2d 998 (Fla. 1977).

In two of these cases the defendants claimed on 3.850 ineffective assistance of counsel for allowing them to enter guilty pleas. Both were found to have rendered reasonably effective assistance of counsel. Holmes v. State, 429 So.2d 297 (Fla. 1983) and Washington v. State, 397 So.2d 285 (Fla. 1981). See also Jackson v. Estelle, 548 F.2d 617 (5th Cir. 1977). There is no per se rule concerning entry of pleas in first degree murder cases; as with other matters, the decision to plead guilty must be viewed in the context of the surrounding circumstances.

Appellee would submit while Appellant was not assured of a life sentence he did receive certain "benefits" from pleading. The most obvious benefit is that his sentencing jury had not sat through several days of testimony which detailed every aspect of the robbery, the shootings and the conditions of the body. This was exactly what Appellant wanted. Although he now argues his plea was based on there being a stipulation of fact, the record

does not support that assertion. Defense counsel was trying to get a stipulation but it was not a part of a plea agreement. Both the defendant and counsel stated Appellant did not want to go to trial because he did not want to subject his family to extensive testimony, including bloody photographs and autopsy reports, concerning his brother's death. Although there were live witnesses, this basic objective was realized when the autopsy, body photographs and other items were not used in the penalty phase.

The record of this case negates Appellant's assertion that trial counsel did not investigate and prepare his case. Depositions were taken of the key witnesses, including Gary Barker, the security guard at the store Petitioner attempted to rob. Counsel investigated the crime scene, the autopsies and other reports, one of which contained the co-defendant's statement. Counsel filed various motions including the one attacking the second degree felony murder statute. All of these items of discovery were discussed with the defendant (RE. 813). Mr. Knight indicated he did not advise Appellant to accept the original plea until discovery had been completed and the defendant had a chance to look at these reports and depositions (RE. 816).

In his efforts to investigate Appellant's case and fashion a defense, Mr. Knight discussed the theme of psychiatric treatment with the defendant (RE. 840). He wanted to know if Appellant ever had a psychiatric problem; Appellant denied same. However, the defendant's mother mentioned the fact that her son had counseling

in 1971. Mr. Knight followed this up by getting the reports involving this counseling. The reports did not indicate a psychological problem. Counsel cannot be faulted for continuing to pursue a course when there was no evidence of a problem. Pedrero v. Wainwright, supra.

The record also demonstrates Mr. Knight prepared for the penalty phase of the proceeding. Defendant and his mother acknowledged there was discussion with counsel concerning the penalty phase, including the calling of witnesses. Both suggested calling the co-defendant and his girlfriend. There was also some discussion about Dr. Whong's testimony and the possibility of the defendant's testifying. Mr. Knight testified a final decision on Appellant testifying would be made after the State's case. Counsel had read Dr. Whong's reports and knew he would say the shooting could have been a reflex. Mr. Knight did not want to get too deeply into the autoreflex theory since other more damaging testimony might come out.

Allegations concerning the failure to call witnesses impose a heavy burden on a defendant since the presentation of testimonial evidence is a matter of strategy and often statements of what a witness would have said are very misleading. United States v. Guerro, 628 F.2d 410, 413 (5th Cir. 1980). The calling of a particular witness is a matter of counsel's personal judgment. Mauldin v. State, 382 So.2d 844 (Fla. 1st DCA 1980) and Ferby v. State, 404 So.2d 407 (Fla. 5th DCA 1981).

Sub judice, Louise Boutin, the co-defendant's girl-friend, came to court at the request of defense counsel. After talking with her, counsel made a considered choice that she could not be helpful to the defense. Counsel stated he did not call Rinaldi, the co-defendant, because he had made statements previously which were not in the defendant's interest; he did not want those statements explored on cross-examination.

Appellant attempts to make much of the fact that counsel did not receive the State's witness list until two weeks before the penalty trial. As counsel explained, these were some of the same witnesses identified on the original witness list (RE. 843). Depositions had been taken; the substance of their testimony was known. Counsel also knew what the police officers from New York and Connecticut would testify to since Appellant's prior criminal record was made available (RE. 844).

Appellant seems to suggest that the Supreme Court's opinions in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d. 973(1978)and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982) require a defense counsel to offer non-statutory mitigating evidence. This is an erroneous interpretation. Both Lockett and Eddings simply require a trial court to consider any mitigating evidence offered whether statutory or not.

Although counsel believed he was limited to proof of those mitigating circumstances enumerated in the statute, he was

nonetheless prepared to have the defendant's parents testify concerning his character and childhood. Counsel, in fact, believed the mother and father would testify, but they changed their minds. In spite of this belief, character letters from hometown friends were presented to the trial court as attachments to the pre-sentence investigation report (PSI).

The argument concerning the failure to comply with Rule 3.230, Florida Rules of Criminal Procedure, suffers from the same deficiency as all of Appellant's other allegations. It has not been shown that there was a serious deficiency that affected the outcome of the proceedings. Knight v. State, supra. In Mikenas I this Court said:

> The Appellant also alleges that the trial judge should have recused himself because prior to the penalty proceedings in this case, while addressing Rinaldi, the trial judge stated:
>
> > Fortunately for you, son the only thing that probably saved you from a possible death sentence is the fact that when the officer told you to stop, you stopped, and secondly that you didn't have the firearm.
>
> These remarks took place while Rinaldi was being sentenced for murder in the second degree. We find no merit in the Appellant's contention that these remarks, made to his co-defendant at sentencing, indicated a bias on the part of the trial judge regarding the sentence Appellant should receive. The jury, unaware of this remark, recommended death.
> Text at 367 So.2d p. 608)

In essence this court has said the outcome was not affected.[2]

Appellant has failed to demonstrate any serious deficiencies by counsel which are likely to have affected the outcome of the proceedings. Knight v. State, supra.

ISSUE III

APPELLANT'S SENTENCE OF DEATH WAS NOT EXCESSIVE OF DISPROPORTIONATE.

The argument being made here is that Appellant's sentence of death for first-degree felony murder is excessive because he didn't have the intent to kill. Defendant goes on to suggest Enmund v. Florida, 458 U.S. 782, 101 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982) forbids imposition of a death sentence except for premeditated murder. This is an erroneous interpretation of Enmund. The case simply says death is not an appropriate sentence in the felony-murder context if the defendant does not actually kill, attempt to kill, intend to kill or know killing was contemplated.

Sub judice, defendant Mikenas did the actual killing; he was the perpetrator. He took the gun into the convenience store. When asked to stop, he made a conscious decision to take the gun out of his pocket and initiate gunfire. Enmund does not apply here.

2/ Appellant raised in a footnote the propriety of the court not receiving expert testimony on ineffective assistance of counsel. Generally, experts are called in areas outside of the expertise of the trier of fact. The trier of fact in this instance, the judge, is versed in the law and well-able to apply the applicable standard to the facts. The State could just as easily find an expert who will say counsel was reasonably effective. The result is another swearing contest. Such testimony has been rejected in other cases. King v. State, 407 So.2d 904, 905 (Fla. 1981).

ISSUE IV

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL.

Mikenas argues under the Florida statute a defendant convicted of felony murder is more likely to get a death sentence than one convicted of premeditated murder. This is an issue which should have been raised on direct appeal. Since it was not raised, it has been waived by procedural default. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). Procedural default precludes consideration of the point on motion for collateral relief. Hargrave v. State, 396 So.2d 1127 (Fla. 1981). Accord King v. Strickland, 714 F.2d 1481, 1491 (11th Cir. 1983).[3]

ISSUE V.

FLORIDA PROCEDURE ALLOWING REBUTTAL OF MITIGATING CIRCUMSTANCES DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

This issue, as Appellant concedes, was raised on direct appeal. Issues which have been raised on appeal are not appropriate matters for a collateral proceeding. See Duhart v. State, 383 So.2d 741 (Fla. 3rd DCA 1980); Sweet v. State, 377 So.2d 48 (Fla. 1st DCA 1979) and Christopher v. State, 416 So.2d 450 (Fla. 1982).

3/ In King the court noted the argument had been rejected on its merits in Adams v. Wainwright, 709 F.2d 1443, 1446-47 (11th Cir. 1983).

ISSUE VI

THE RESENTENCING OF APPELLANT HAS ALREADY BEEN LITIGATED.

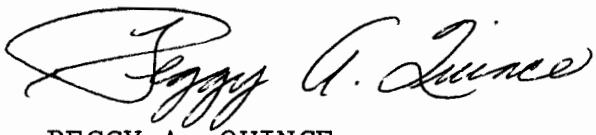
All of the subissues raised under this point are matters which could have been or were raised on direct appeal. Therefore, these matters are not reviewable on a motion pursuant to Rule 3.850. See e.g., Meeks v. State, 382 So.2d 673 (Fla. 1980); Adams v. State, 380 So.2d 423 (Fla. 1980); Henry v. State, 377 So.2d 692 (Fla. 1979); Sullivan v. State, 371 So.2d 938 (Fla. 1979); Spinkellink v. State, 350 So.2d 85 (Fla. 1977), cert. denied, 434 U.S. 960, 98 S.Ct. 492, 54 L.Ed. 2d 320 (1977); Wainwright v. Sykes, supra.; Palmes v. State, 425 So.2d 4 (Fla. 1983). The principle of res judicata precludes relitigation of these issues. McCluster v. Wainwright, 453 F.2d 162 (5th Cir. 1972) and Duhart v. State, supra. See Mikenas I and Mikenas II.

CONCLUSION

Based on the foregoing arguments and citations of authority the trial court's order denying the motion for post conviction relief should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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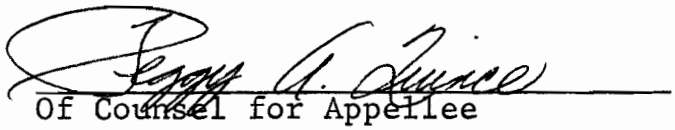
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Express Mail to the Law firm of Goodwin, Procter and Hoar, 28 State Street, Boston, Massachusetts 02109, this 13th day of January, 1984.



Of Counsel for Appellee