IN THE

SUPREME COURT OF FLORIDA

MARK D. MIKENAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 64,317

SUPPLEMENTAL BRIEF OF APPELLEE ON THE MERITS

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PRELIMINARY STATEMENT

By Order of this Court dated May 24, 1984 Appellant's Motion to file a supplemental brief was granted. The following is Appellee's brief on the claim of ineffective assistance of counsel in light of Strickland v. Washington, 35 Cr. L. 3066 (1984).

ISSUE II

EVEN UNDER THE STANDARD ESPOUSED IN STRICKLAND V. WASHINGTON 35 Cr. L. 3066 (1984) APPELLANT RECEIVED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

Appellee, State of Florida, respectfully submits counsel's performance in this case was reasonably effective under the Strickland v. Washington, 35 Cr. L. 3066 (1984) standard as pronounced by the United States Supreme Court. It is further submitted that the Washington standard for prejudice, i.e., "reasonable probability the result of the proceeding would have been different", differs only in a small degree from the "likelihood of affecting the outcome of the court proceedings" standard previously used based on Knight v. State, 394 So.2d 997 (Fla. 1981). This interpretation of a difference in degree only is borne out by the language of the Washington opinion as well as the result reached in that particular case.

The court in Washington held a convicted defendant has the burden of showing counsel's performance was not within the range of competence demanded of attorneys in criminal cases. He must show counsel's performance was deficient, and the deficient performance prejudiced the defense. In making his claim the defendant must identify the acts or omissions of counsel. See 35 Cr L. at 3072. This is comparable to Step 1 of the evaluation process afforded cases under Knight v. State, supra.

Secondly, the court must determine if the identified acts or omissions are outside the wide range of professionally competent assistance. In deciding whether specific conduct is deficient, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment". (35 Cr. L. at 3071) (emphasis added). Thus, contrary to Appellant's assertion, there must be a showing of a serious deficiency. Compare to Step 2 of the Knight procedure.

On Strickland v. Washington, supra. the Supreme Court affirmed this Court's and the federal courts rulings that inquiry must be made into counsel's performance given the totality of circumstances as they existed at the time, eliminating hindsight evaulation.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances the challenged action 'might be considered

> sound trial strategy." See *Michael v. New York, supra,* at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299, 343 (1983) (35 Cf. L. at 3072)

Even if an error by counsel is professionally unreasonable, a conviction or sentence need not be set aside unless the defendant can show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". The term probability means:

> PROBABILITY. Likelihood; appearance of reality or truth; reasonable ground of presumption; verisimilitude; consonance to reason. The likelihood of a proposition or hypothesis being true, from its conformity to reason or experience, or from superior evidence or arguments adduced in its favor. People v. O'Brien, 130 Cal. 1, 62 P. 297; Shaw v. State, 125 Ala. 80, 28 So. 290. Coppinger v. Broderick, 39 Ariz. 473, 295 P. 780, 781. Inference; assumption; presumption. Ohio Bldg. Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N.E. 149, 154. A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it. Harris v. State, 8 Ala. App. 33, 62 So. 477, 479.

See Black's Law Dictionary 1364 (Rev. 4th ed. 1968). A reasonable probability is a probability sufficient to undermine confidence in the outcome. 35 Cr. 1. at 3073. The defendant must show the errors had an adverse effect on the defense; it is not enough to show the errors had some conceivable effect on the outcome of the proceedings. The defendant must affirmatively prove prejudice. *Id.*

The fact that the Knight standard differs only in a small degree from the Strickland v. Washington standard is made clear in Washington itself. In discussing the outcome determative standard, the standard used in assessing motions for new trial based on newly discovered evidence, in the context of ineffective assistance of counsel claims, the Court noted that standard was "not quite appropriate" and the proper standard "should be somewhat lower". Id at 3073. The Supreme Court went on to say that despite the heavier burden in the strict outcome-determinative test, that difference would alter the merits of an ineffectiveness claim in only the rarest of cases. The case sub judice is not one of those rare instances.

The Court applied its newly articulated standard to the facts on the Washington case, a case not unlike the one before this Court. The defendant there pled guilty to three first degree murder charges without benefit of a sentencing bargain. He was sentenced to death on each murder. On collateral attack Washington claimed his attorney had not effectively represented him at sentencing. His allegations included, inter alia, a claim of failure to present character mitigating evidence. The Florida Supreme Court in assessing Washington's claims applied the Knight standard. Washington v. State, 397 So.2d 285 (Fla. 1981). The federal appeal court applied its own standard to the facts. See Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982).

Despite the slightly different standard for prejudice the Supreme Court found Washington had not been prejudiced by any acts

or omissions of counsel and found no serious deficiencies. The court began its application of the standard to the facts of the case by observing "the principles we have articulated are sufficiently close to the principles applied both in the Florida Courts and in the District Court...." 35 Cr. L. 3074.

Likewise, application of the Strickland v. Washington standard to this case reveals counsel's performance was not deficient and there is no "reasonable probability" that any error would have changed the sentence imposed. Appellant has not demonstrated that it is error to allow a defendant to plead to first degree murder without getting a life sentence. Washington itself was a plea situation. Accord Jackson v. Estelle, 548 F.2d 617 (5th Cir. 1977).[1]

Appellant has also railed to show counsel did not investigate and prepare the 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).

1/ Appellee hereby incorporates by reference the argument made on this point in the State's original brief filed in this cause.

In his efforts to investigate Appellant's case and fashion a defense, Mr. Knight discussed the theme of psychiatric treatment with the defendant (RE 804). 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, 590 F.2d 1382 (5th Cir. 1979).

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.

Sub judice, Louise Boutin, the co-defendant's girlfriend came to court at the request of defense counse. 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, there 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).

Although counsel believed he was limited to proof of those mitigating circumstances enumerated in the statute, he was nonetheless prepared to have 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 presentence investigation report (PSI).

Appellant has not demonstrated counsel's performance was "outside the wide range of professionally competent assistance." Even on Appellant's claim of ineffectiveness based on failure to comply with the requirements of Rule 3.230, Florida Rules of Criminal Procedure, on recusal of judges, there has been no showing that but for the failure to so comply the sentencing would have been different. Appellant on direct appeal was given a new sentencing hearing. Mikenas v. State, 367 So.2d 606 (Fla. 1979) (Mikenas I).

Resentencing occurred before a different judge, and Appellant was again sentenced to death. Mikenas v. State, 407 So.2d 892 (Fla. 1982) (Mikenas II).

Application of the new standard for ineffective assistance of counsel shows counsel's conduct was not deficient, and there is no reasonable probability that the results of this case would have been different but for any act or omission on counsel's part.

CONCLUSION

Based on the foregoing argument the Order of the trial court denying 3.850 relief should be affirmed.

Respectfully submitted,

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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. Mail to the Law Firm of Goodwin, Procter and Hoar, 28 State Street, Boston, Massachusetts 02109, this 13th day of June, 1984.

Peggy A. Lawrence
Of Counsel for Appellee