IN THE SUPREME COURT OF FLORIDA

MARK D. MIKENAS, Appellant, v. STATE OF FLORIDA, Appellee.		Case No. 64,317

APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, CRIMINAL DIVISION, IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLANT

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This appeal by Mark D. Mikenas seeks review and reversal of the Order entered on August 30, 1983, denying his Amended Motion for Post-Conviction Relief (the "3.850 Motion") and Motion to Withdraw Plea.

STATEMENT OF FACTS

This appeal arises from a tragic set of facts. Mark Mikenas, his younger brother, Vito, Jr., and their friend Mark Rinaldi all participated in an attempted robbery at a 7-Eleven Store in Tampa on November 3, 1975. Neither Mark Mikenas nor Mark Rinaldi knew until just before they entered the 7-Eleven store that Vito, Jr. had taken a gun with him from their apartment to the store. When they learned that Vito, Jr. had a gun with him, Mark Mikenas took the gun from him, because he feared Vito, Jr. might hurt someone during the course of the robbery. Two individuals died during the attempted robbery. Anthony Williams, an off-duty police officer who was not in uniform, died from a bullet discharged from a gun held by Mark Mikenas. Vito, Jr. died from a bullet fired by an auxiliary sheriff, Gary Barker.

Mark Mikenas and Mark Rinaldi were both charged with the first-degree murder of Anthony Williams and the second-degree murder of Vito, Jr. Mark

Mikenas entered a plea of guilty to the first-degree felony murder of Anthony Williams and nolo contendere to the charge of second-degree murder of his brother. No evidence was ever offered, and no finding has ever been made, that the shooting of Anthony Williams was intentional. Anthony Williams was shot while Mark Mikenas was blacking out, as Mark fell through a doorway, seconds after Mark suffered a gunshot wound to his spine. R. at 949-1011./1/

Mark Rinaldi went to trial. Although convicted and sentenced to concurrent life sentences on two counts of second-degree murder, Rinaldi has been free on parole since September, 1980./2/

STATEMENT OF THE CASE

An evidentiary hearing on the 3.850 Motion was conducted on June 22 and June 23, 1983. During the evidentiary hearing, the witnesses called by the appellant included Attorney Robert W. Knight,/3/ Mark Mikenas, Beatrice Mikenas (Mark's mother) and by stipulation, Vito Mikenas, Sr. (Mark's father). Attorney Patrick Doherty was qualified as an expert witness on ineffective assistance of counsel. His testimony was offered by way of proffer of defense counsel. At the hearing, the Court accepted the transcript of the June 9, 1983 deposition of Mark Rinaldi. R. at 225-282.

On January 26, 1976, Mark Mikenas, through Attorney Knight, was offered a plea bargain by the State in the presence of the Court. R. at 814. The State agreed to recommend a life sentence if Mark would plead guilty to both charges

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/1/ The Record on Appeal is cited herein as "R. at ___" and the transcript of the penalty trial held June 28 through July 1, 1976 as "Penalty Tr. Trans. at ___".

/2/ These facts are set forth in greater detail in the appellant's Amended Motion for Post-Conviction Relief. R. at 84-87.

/3/ Attorney Knight represented Mark Mikenas from January 7, 1976 to December 2, 1977. Attorney Knight served as Mark Mikenas' counsel through entry of his guilty plea, penalty trial, and initial appeal to the Florida Supreme Court. He was replaced by Attorney Ellen Condon, who represented Mark in the proceedings following the initial appeal to this Court.

lodged against him. Mark, however, could not bring himself to plead guilty to his brother's murder and thus did not accept the plea bargain. On March 9, 1976, the plea bargain was withdrawn. R. at 818-819. On April 12, 1976, Mark Mikenas pleaded guilty to the first-degree felony-murder of Anthony Williams and pleaded nolo contendere to the charge of second-degree murder of his brother. Following a request by Attorney Knight for an inquiry into the circumstances of the pleas, R. at 132-33, another hearing was held, on May 3, 1976.

The Mikenas penalty trial was conducted between June 28 and June 30, 1976. At that trial, the prosecution called eleven witnesses. Only two defense witnesses, including Mark Mikenas, were called by Attorney Knight. By a 7-5 vote, the jury recommended the death penalty. R. at 134, 916. On July 1, 1976, the trial judge imposed sentence of death for the shooting of Anthony Williams and life imprisonment on the murder charge arising out of Vito, Jr.'s death.

Appeal followed. On November 9, 1978, this Court affirmed the conviction for first-degree murder of Anthony Williams and for second-degree murder of Vito, Jr. However, the case was remanded for resentencing (without further deliberations by a jury) because the trial judge improperly considered a nonstatutory aggravating factor. Mikenas v. State, 367 So.2d 606 (1978). On July 31, 1979, Mark Mikenas was resentenced to death by a second trial court judge. Despite the request of defense counsel (Attorney Knight had been replaced by Attorney Condon), a new advisory jury was not convened. This Court affirmed the sentence of death on November 5, 1981. Mikenas v. State, 407 So.2d 892 (1981). The Supreme Court denied certiorari on June 1, 1982. 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed. 1308.

On January 25, 1983, Application for Clemency for Mark Mikenas was made by oral argument and written submission to Governor Graham and the Cabinet.

As of the filing of this Brief, no action has been taken on the Application for Clemency.

ISSUES PRESENTED FOR REVIEW

This appeal raises six issues for review:

1. Whether Mark Mikenas's sentence of death was based on an invalid guilty plea;

2. Whether Mark Mikenas was denied effective assistance of counsel during the course of his representation by Attorney Knight;

3. Whether, because Mark Mikenas did not intend to kill Anthony Williams, his death sentence is excessive and disproportionate;

4. Whether the Florida capital sentencing statute,[/4/] on its face and as applied to Mark Mikenas, improperly made imposition of the death penalty more likely for felony murder than for premeditated murder;

5. Whether the Florida capital sentencing statute on its face and as implemented provides proper guidelines for proof of mitigating circumstances;

6. Whether Mark Mikenas' death sentence was based on improper application of aggravating and mitigating circumstances and inadequate findings of fact.

ARGUMENT

I. MARK MIKENAS' SENTENCE OF DEATH WAS BASED ON AN INVALID GUILTY PLEA

A guilty plea must must be "voluntary, intelligent and uncoerced". Miller v. Turner, 658 F.2d 348, 351 (5th Cir. Unit B 1981); see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969). A guilty plea must also be entered with "sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed. 2d 1288 (1970). The voluntariness of a guilty plea can be

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/4/ Fla. Stat. §921.141, as amended through 1974 Fla. Laws c. 74-379, §1. All citations to "the Statute" refer to §921.141 unless otherwise indicated. The statute in effect at the time of the penalty trial is included in the Appendix as Exhibit A.

measured only by examining the entry of the plea and considering all relevant circumstances. Id. at 749. Consideration of the circumstances surrounding the entry of Mark Mikenas' guilty plea reveals that it was not knowing and voluntary for four reasons. First, Mark suffered from extreme emotional and physical distress and was incapable of exercising the judgment necessary to enter a guilty plea voluntarily. Second, his guilty plea was induced in part by his bona fide belief that it was pursuant to a plea agreement, the terms of which were never met. Third, the plea was entered under circumstances fraught with procedural error. Fourth, in entering the plea Mark was denied effective assistance of counsel.

A. Mark Mikenas Was Incapable Of Entering A Voluntary And Intelligent Guilty Plea Due To His Physical And Mental Condition

Having sustained a severe neurological injury, having been charged with his brother's murder when Vito, Jr. was actually shot by an auxiliary sheriff, and having no memory of how Anthony Williams' death occurred, Mark Mikenas suffered from extreme emotional and physical distress when he entered his plea of guilty. R. at 958-59. This extreme distress not only induced him to plead guilty, but also impaired his ability to consult rationally with Attorney Knight regarding available alternatives and the consequences of his plea. In brief, Mark Mikenas was incapable of exercising his judgment and free will.

The relevant facts are not disputed. Mark Mikenas was faced with trial for the murder of his own brother--a brother whom he loved deeply and from whom, fearing that Vito, Jr. might act impulsively and hurt someone, he took the gun which caused the death of Anthony Williams. Mark knew that his family anguished over the death of Vito, Jr. He also knew that going to trial for the murder of his brother would exacerbate their grief because graphic testimony and exhibits depicting his brother's dead body would likely be introduced. As a result, Mark was horrified at the thought of trial. R. at 969-971; Penalty Tr. Trans. at 427-29. Mark was also recovering from a life-threatening

gunshot wound. He had been shot in the spine by the auxiliary sheriff, an injury which required an emergency operation and weeks of hospitalization. As a result of severe pain, Mark was heavily medicated with Valium and Darvon through entry of the guilty plea and throughout the penalty trial. R. at 962-964.

Understandably, Mark Mikenas' own grief, the grief he knew he had caused his family, his personal injuries and pain, and the legal predicament he was facing, all caused him to become, in his words and those of his parents and Attorney Knight, "withdrawn" and "severely depressed." R. at 914-15, 966, 995. This seriously affected his ability to weigh rationally the alternatives available to him to make an informed judgment about pleading guilty. For example, Mark was never able to accept that he was legally responsible for the death of his brother and never able to discuss this matter with his parents. His thought process was such that, although he knew he faced the possibility of receiving a death sentence, he rejected a virtual guarantee that he would not be sentenced to death for the killing of Anthony Williams. R. at 1049. On January 26, 1976, in the presence of the Court, the State offered not to seek the death penalty if Mark agreed to plead guilty to both counts of the indictment, including the second-degree murder charge for the death of his brother. R. at 814, 818. Mark, when told of this offer by Attorney Knight, took the position that rejecting the offer and pleading nolo contendere, and thereby risking his own life, was the only available alternative because he simply could not admit that he was legally responsible in any manner for the murder of his brother. "He was shot by the auxiliary deputy and there was no way I could plead guilty to his murder and say I had murdered my brother." R. at 970.

At the time of entry of the guilty plea, Mark Mikenas' general physical, mental and emotional condition impaired his ability to exercise rationally his free will. It is axiomatic that a plea is not made voluntarily if a defendant

is under the influence of "mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights." See Baker v. State, 408 So.2d 686, 687 (Fla. 2d DCA 1982); Costello v. State, 260 So.2d 198, 200 (Fla. 1972). Mark Mikenas was simply unable, due to his own depression and the tragic coercive circumstances involved, to make a "reasoned choice" among alternatives. See Fontaine v. United States, 411 U.S. 213, 214-15, 93 S.Ct. 1461, 36 L.Ed. 2d 169 (1973); Manley v. United States, 396 F.2d 699-701 (5th Cir. 1968). His passive state of mind is substantiated by Attorney Knight: "It was just too much of a trauma for him, I think, so that he wanted to plead, and he wanted to plead probably to avoid the trauma of a trial." R. at 824. Simply put, Mark Mikenas' decision to plead guilty was not the result of a rational weighing, with the assistance of counsel, of the "advantages of going to trial against the advantages of pleading guilty." Brady v. United States, supra, 397 U.S. at 750.

B. Mark Mikenas' Guilty Plea Was Not Knowing or Voluntary Because It Was Induced by a Good Faith Belief That a Plea Agreement Had Been Reached With the State

Knowing that Mark Mikenas desired at all costs to avoid a trial at which graphic evidence of his brother's death would be introduced, Attorney Knight--after Mark's rejection of the plea bargain--informed him that should he plead guilty to Williams' first-degree murder and nolo contendere to his brother's second-degree murder, a stipulation of facts would be read at the penalty trial in lieu of the taking of live testimony or the admission of documents. R. at 981-84.

Whether as a result of an unkept promise made by the prosecution, a misunderstanding on the part of Attorney Knight, or a failure of communication between counsel and client, Mark believed at the plea hearing on April 12 and at the second hearing on May 3, 1976, that an agreement with the State had

been consummated regarding the stipulation of facts. R. at 976, 981-83. Accordingly, his guilty plea was induced by a "promise" not to put on live witnesses at the penalty trial.

When a defendant pleads guilty "on the basis of a promise by his defense attorney or the prosecutor, whether or not such promise is fulfillable, breach of that promise taints the voluntariness of his plea." McKenzie v. Wainwright, 632 F.2d 649, 651 (5th Cir. Unit B 1980), citing Brady v. United States, supra. Even where a defendent is induced to plead guilty on the basis of a subjective mistaken impression that a plea agreement had been reached, the plea may be involuntary and invalid. See, e.g., Knight v. United States, 611 F.2d 918, 921-22 (1st Cir. 1979); United States v. Frontero, 452 F.2d 406, 411 (5th Cir. 1971). Involuntariness of a plea occurs even if defense counsel does not make a clearcut statement that the prosecution had actually made an offer, but rather communicates an ambiguous remark to which the defendant gave the same meaning. The psychological effect of counsel's statement is the important factor. United States ex. rel. Thurmond v. Mancusi, 275 F.Supp. 508, 517 (E.D.N.Y. 1967). This Court has similarly held that a guilty plea induced by an honest misunderstanding or a failure of communication between the accused and court-appointed counsel contaminates the voluntariness of the plea. Thompson v. State, 351 So.2d 701 (Fla. 1977), cert. denied, 435 U.S. 998 (1978); Costello v. State, 260 So.2d 198 (Fla. 1972).

C. The Record Does Not Reflect That Mark Mikenas' Guilty Plea was Entered Knowingly and Voluntarily

Due process requires that a court accepting a guilty plea carefully and exhaustively inquire into its voluntary nature. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969). When Mark Mikenas entered his plea, Fla. R. Crim. P. 3.170(j) set forth the procedure to be followed to satisfy the due process requirements expressed in Boykin. Compare Fla. R. Crim. P. 3.172 (1977 adoption). Under Fla. R. Crim. P. 3.170 (j), trial courts are specifically

charged with determining on the record "that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and of its voluntariness . . . ." While the Rule does not prescribe a specific litany to be followed, the record must contain an "affirmative showing" that the guilty plea was entered intelligently and voluntarily. Scheller v. State, 327 So.2d 876, 877 (Fla. 2d DCA 1976). This Court has cautioned that the inquiry should be extremely thorough and never hurried or treated summarily. Williams v. State, 316 So.2d 267, 270, 271 (Fla. 1975).

The transcripts of the plea hearings fail to show affirmatively that Mark Mikenas pleaded guilty voluntarily and intelligently. Rather, the trial court's acceptance of the plea, and its subsequent inquiry into the circumstances surrounding its entry, can best be described as a hurried, formalistic exercise. Compare R. at 904 with R. at 906. Significantly, the Court never asked Mark Mikenas whether he was in pain or under the influence of medication, nor did he ask whether Mark Mikenas felt any pressure to plead guilty. Of more importance, he never asked why Mark Mikenas was pleading guilty. The guilty plea hearing was marked by a total lack of substantive dialogue between the Court and Mark. Compare ABA Standards for Criminal Justice, Ch. 14 Appendix (2d ed. 1979) (suggested colloquy);/5/ Lamadline v. State, 303 So.2d 17 (Fla. 1974) (approving detailed and extensive inquiry). More extensive inquiry surely would have determined that coercive factors existed including Mark Mikenas' belief of a plea agreement, his horror at the prospect of going to trial for his brother's murder, and the fact that he was under the influence of prescribed pain killers and sedatives.

/5/ This Court has relied heavily on the ABA Standards in determining the rights afforded defendants pleading guilty. E.g., LeDuc v. State, 415 So.2d 721 (Fla. 1982); Williams v. State, 316 So.2d 267 (Fla. 1975).

On April 22, 1976, Attorney Knight filed a Petition for Further Inquiry Into the Circumstances Surrounding the Plea of Guilty ("the Petition"). R. at 132. The basis for the Petition was Knight's averment that Mark Mikenas on April 12, 1976, had neither been prepared to plead nor aware that he was going to be called upon to plead that day. The facts set forth in the Petition in themselves warrant disregarding the April 12 plea as valid. See, e.g., Fla. R. Crim. P. 3.170(i) ("No defendant . . . shall be called upon to plead unless and until he has had a reasonable time within which to deliberate thereon."); Dixon v. State, 287 So.2d 698 (Fla. 1st DCA 1973); see also Owens v. Wainwright, 698 F.2d 1111 (11th Cir. 1983). Although the Petition placed the trial court on notice that the guilty plea on April 12 was tainted, during the subsequent hearing on May 3 not even one question was asked of Attorney Knight or Mark Mikenas regarding the specific facts and circumstances underlying its filing. Furthermore, no inquiry as to the voluntary nature of the plea was directed to Mark Mikenas. R. at 175-82.

Given the seriousness of the offense and the potential consequences of an involuntary guilty plea, due process required that the Court conduct a more exacting and thorough inquiry of Mark Mikenas once presented with doubt as to the voluntary nature of the earlier plea. E.g., United States ex. rel. Suggs v. LaVallee, 390 F.Supp. 383, 388 (S.D.N.Y.), vacated on other grounds, 523 F.2d 539 (2d Cir. 1975) (no "ratification" where complete absence of any meaningful inquiry into voluntariness of defendant's earlier plea after court alerted to possible involuntariness); Clark v. Sumner, 458 F.Supp. 1050 (D. Va. 1978). See ABA Standards for Criminal Justice, ¶ 14-1.4(b) (2d ed. 1979) (where doubts raised concerning defendant's understanding of plea, inquiry intensified). See also, e.g., Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed. 2d 103 (1975) (legitimate doubt as to mental competency gives rise to affirmative duty on part of judge to make further inquiry); Curry v. Estelle,

531 F.2d 766 (5th Cir. 1976).[6] The trial court was under an obligation to assess Mark Mikenas' understanding of the results of the plea negotiations. See Costello v. State, 260 So.2d 198, 201 (Fla. 1972); ABA Standards for Criminal Justice, supra, ¶14-1.5.

D. Mark Mikenas' Guilty Plea Was Rendered Involuntary By Ineffective Assistance of Counsel

A guilty plea is involuntary where a defendant has been deprived of effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 769-72, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970); Scott v. Wainwright, 698 F.2d 427, 429-30 (11th Cir. 1983). The Supreme Court has required that counsel provide a defendant pleading guilty with advice "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, supra, 397 U.S. at 771. In Florida, a showing that preceding the plea the advice of counsel was ineffective mandates the conclusion of "manifest injustice". Robinson v. State, 373 So.2d 898, 902-03 (Fla. 1979).[7]

/6/ In fact, the record reflects that Mark Mikenas was never made aware of the fundamental constitutional rights he waived by pleading guilty. See Boykin v. Alabama, 395 U.S. 238, 243 (1969). Attorney Knight not only failed to inform Mark Mikenas of the specific constitutional rights he would waive by pleading guilty, R. at 981-92, but a review of the transcripts of the two plea hearings reveals that the trial judge never informed Mark of either the right to confront witnesses or to be free from compulsory self-incrimination. Prior to Mark Mikenas' plea, this Court had stated that Fla. R. Crim. P. 3.170(j) required that the court expressly inform a defendant of the specific "Boykin rights" that would be waived by a plea of guilty. Williams v. State, 316 So.2d 267, 271 (Fla. 1976). See Lamadline v. State, 303 So.2d 17, 19 (Fla. 1974). Moreover, when Fla. R. Crim. P. 3.172 was adopted in 1977 specific waivers of these rights were explicitly required. Florida law thus reflects the constitutional requirement that an accused understand the constitutional protections waived for the guilty plea to be considered voluntary. See Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976).

/7/ Ineffective assistance of counsel is established where it is shown that the assistance of counsel was tainted by a "substantial and serious deficiency measurably below that of competent counsel." Knight v. State, 394 So.2d 997 (Fla. 1981); LeDuc v. State, 415 So.2d 721 (Fla. 1982). Deficiencies of counsel rendering a guilty plea involuntary and unknowing are prejudicial per se. Via v. Superintendent, Powhatan Correctional Center, 643 F.2d 167, 175 (4th Cir. 1981); see McMann v. Richardson, supra; Mason v. Balcom, 531 F.2d 717, 724-25 (5th Cir. 1976).

The obligation of counsel in assisting a defendant pleading guilty was aptly stated in Edwards v. State, 393 So.2d 597, 599 (Fla. 3d DCA), petition denied, 402 So.2d 613 (Fla. 1981): "It is a lawyer's duty to ascertain that his client's plea of guilty is entered voluntarily and knowingly, that is, upon advice which enables the accused to make an informed, intelligent and conscious choice to plead guilty or not." See Scott v. Wainwright, supra, 698 F.2d at 427 (counsel must ensure that the accused is fully informed of all available options and the direct consequences of the plea). This obligation mirrors the duty imposed by Fla. R. Crim. P. 3.171(b) (1972) that counsel advise a defendant of "all pertinent matters bearing on the choice of which plea to enter and the particulars attendant upon each plea, the likely results thereof as well as any possible alternatives which may be open to him." In re Florida Rules of Criminal Procedure, 272 So.2d 65, 94 (Fla. 1972) (now contained at Fla. R. Crim. P. 3.171 (c)(2)(ii) (1977)). Further, counsel has the specific ethical obligation of preparing a defendant to enter the plea and of assisting the court during the plea proceedings in ensuring that the plea is knowing and voluntary. See Hall v. State, 316 So.2d 279 (Fla. 1975). Applying the principles stated above, and ever-cognizant that "death penalty cases are different," LeDuc v. State, supra, 415 So.2d 721, the record demonstrates that Attorney Knight failed to provide Mark Mikenas with reasonably effective assistance of counsel with regard to pleading guilty.

1. Attorney Knight Failed to Discharge His Responsibility to Mark Mikenas Regarding Plea Negotiations

The prosecution had offered to recommend a life sentence if Mark Mikenas entered a plea of guilty to both the first-degree murder of Anthony Williams and the second-degree murder of his brother. Mark Mikenas informed Attorney Knight that he simply could not bring himself to plead guilty to the murder of his brother. Between the time the offer of life imprisonment was made on

January 26, and March 9, when the offer was withdrawn by the State, Attorney Knight spent little time attempting to convince Mark Mikenas to reconsider his reluctance to accept the plea bargain, despite Attorney Knight's belief there was no substantive defense to the charge of first-degree murder. R. at 968, 974. Attorney Knight never advised Mark of the precise risk involved in rejecting the State's offer not to seek the death penalty and in leaving his fate instead to an advisory jury and judge. Indeed, Attorney Knight could not have advised Mark Mikenas meaningfully of this precise risk because he had conducted essentially no investigation of the likely aggravating and mitigating circumstances that would be presented at the Mikenas penalty trial. R. at 824-25, 843-51, 858-59, 977-78.

Indisputably, counsel is obliged to investigate the facts of the case and to advise a defendant candidly of available alternatives and the likely outcome of the case. See ABA Standards Relating to the Defense Function, §§ 3.2, 5.1; American Law Institute, Trial Manual for the Defense of Criminal Cases § 202 (3d ed. 1974). This obligation specifically arises prior to the initiation of any serious plea negotiation. Id. at §106 et seq. It is particularly essential that counsel adequately advise a defendant of possible consequences where, as here, a defendant rejects a negotiated guilty plea offer. Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981). See Commonwealth v. Napper, 254 Pa. Super. 54, 60-61, 385 A.2d 521, 524 (1978) (Sixth Amendment violation where defendant knew there was no substantive defense and failed to make clear to the defendant "the risks, hazards, and prospects").

This error is compounded by the fact that Attorney Knight failed to disabuse Mark Mikenas of his belief that the pleas eventually entered were pursuant to a plea agreement or stipulation regarding the conduct of the penalty trial. As discussed above, following the prosecutor's withdrawal of its offer of life imprisonment, Mark Mikenas was led to believe until at least

June 9, 1976 that in return for a plea of guilty to first-degree murder, witnesses would not be called at the penalty trial and the parties would instead submit a stipulation of facts. R. at 981-84. Where a defendant pleads guilty, one of counsel's most fundamental obligations is to ensure that the plea is entered with full knowledge of its likely consequences. E.g., Bradbury v. Wainwright, 658 F.2d 1083, 1087 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 992 (1982); Edwards v. State, 393 So.2d 597 (Fla. 3d DCA), petition denied, 402 So.2d 613 (Fla. 1981); Fla. R. Civ. P. 3.171(b) (1972). Counsel fails to meet this responsibility where he advises a defendant to plead guilty but fails to ensure that the defendant understands that the prosecution has made no promises. See McBryar v. McElroy, 510 F.Supp. 706, 711-12 (N.D. Ga. 1981) (reasonable but mistaken belief induced by counsel's statements that he would not receive specific sentence). Attorney Knight's duty in this regard was heightened by his knowledge that Mark Mikenas was young, deeply conflicted about pleading guilty, dependent on his parents for advice, suffering extreme depression and heavily medicated. R. at 823-24, 828-29. See Jennings v. Zahradnick, 455 F.Supp. 495, 497-98 (W.D. Va. 1978).

Moreover, Mark Mikenas' expectation that Attorney Knight had negotiated a plea agreement was reasonable as a matter of law. Defense counsel has an affirmative obligation to explore plea bargaining alternatives. E.g., Cole v. Slayton, 378 F.Supp. 364, 368 (W.D. Va. 1974). In itself, the failure to seek aggressively any plea bargain, given the seriousness of the offense and the possible consequence of a death sentence, constitutes inadequate and ineffective assistance of counsel. See Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976). Given Mark Mikenas' inability to recall anything of the shooting of Anthony Williams, it simply defied logic for him to plead guilty, thereby risking death, without some "bargain" from the state. See also Jennings v. Zahradnick, 455 F.Supp. 495, 498 (W.D. Va. 1978).

2. Attorney Knight Failed to Assist the Trial Court in Ensuring that the Guilty Plea Was Entered Voluntarily

A substantial amount of the responsibility to ensure that a guilty plea is entered voluntarily is placed directly on counsel. See McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). See also Fla. R. Crim. P. 3.171(b) (1972). Counsel must not only assist the accused actually and substantially in making the decision to plead, but counsel is ethically bound to ensure that the plea proceedings achieve the purpose for which they were designed. Robinson v. State, 373 So.2d 898 (Fla. 1979); Hall v. State, 316 So.2d 279 (Fla. 1975). See Edwards v. State, 393 So.2d 597 (Fla. 3d DCA), petition denied, 402 So.2d 613 (Fla. 1981).

It cannot be contested that Attorney Knight had not adequately prepared Mark Mikenas to plead guilty on April 12. That very evening, Mark Mikenas had doubts about the plea. R. at 981-82, 984-86, 990-94. An exchange of phone calls between Mark Mikenas' parents and Attorney Knight followed. Within days, Attorney Knight filed the Petition for Further Inquiry Into the Circumstances of the Guilty Plea, in which Attorney Knight conceded that Mark Mikenas was unprepared.

Attorney Knight knew that Mark Mikenas was in some measure of pain, distressed, withdrawn, and severely depressed. R. at 914. Nonetheless, Attorney Knight did not inform the court, seek a continuance, or suggest that a psychiatric evaluation be performed on Mark Mikenas. R. at 840. Had Attorney Knight raised any of these matters, the court may well itself have determined during the colloquy on May 3 that Mark was not pleading knowingly and voluntarily. See Capshaw v. State, 362 So.2d 429 (Fla. 2d DCA 1978). See also Curry v. Estelle, 531 F.2d 766 (5th Cir. 1976). Counsel simply cannot stand mute during a plea colloquy to the prejudice of the defendant. See Jennings v. Zahradnick, 455 F.Supp. 495, 497-98 (W.D. Va. 1978). In addition, at no time prior to the plea hearings on April 12 and May 3, 1976, did Attorney Knight adequately inform Mark Mikenas of either the specific

constitutional rights he would waive by pleading guilty or any of the many "collateral" rights he would forego. See ABA Standards for Criminal Justice ¶14-1.4 (2d ed. 1979); Edwards v. State, 393 So.2d 597 (Fla. 3d DCA), petition denied, 402 So.2d 613 (Fla. 1981).

II. MARK MIKENAS' DEATH SENTENCE MUST BE VACATED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE COURSE OF THE PENALTY TRIAL

To establish ineffective assistance of counsel in Florida, a defendant must: (1) plead with specificity,/8/ (2) show that at least one omission or act was a "substantial and serious deficiency" and (3) show that at least one specific deficiency was prejudicial in that it probably affected the outcome of his penalty trial. Knight v. State, 394 So.2d 997 (1981). Upon the facts presented at the penalty trial and the 3.850 evidentiary hearing, Mark Mikenas has met each part of this test.

A. Attorney Knight Failed to Investigate, Prepare, and Present Critical Evidence

Throughout his representation of Mark Mikenas, Attorney Knight's performance was substandard. See, e.g., Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299 (May, 1983) ("Goodpaster, The Trial For Life"). R. at 408-71. Attorney Knight acknowledges that his only plan for the penalty trial was to show that the shooting of Anthony Williams was accidental and the result of a reflexive spasm caused by the auxiliary sheriff's shooting of Mark Mikenas. R. at 847-48. On its face, such a plan appears meritorious, given the nature of the shooting of Anthony Williams. However, Attorney Knight's execution of the plan demonstrated numerous substantial and serious deficiencies, any one of which meets the second prong of the Knight test.

First, Attorney Knight failed to investigate, prepare or present any psychiatric evidence with regard to Mark Mikenas' inability to conform his

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/8/ It is undisputed that the Amended Motion pleads the failures with specificity. See particularly R. at 120-29 and 605-6.

conduct to law. He simply made no attempt to hire an expert witness or even consult a physician in this regard. R. at 840. A few weeks before the penalty trial, after Attorney Knight told Mark Mikenas' parents that the stipulation of fact arrangement was not possible, Mrs. Mikenas suggested that he hire an expert witness to testify to the autoprotective reflex theory and develop mitigating evidence that a bullet in Mark Mikenas' lower spine could have triggered the firing of a gun held in his hand. R. at 1067. Attorney Knight disregarded Mrs. Mikenas' suggestion, and never filed a motion for expenses for an expert witness, or made any attempt to solicit such a witness. R. at 1067-68.

Second, Attorney Knight failed to effectively prepare and present Dr. Whang--the neurosurgeon who treated Mark after he was shot--to the jury. Attorney Knight subpoenaed Dr. Whang to testify at the penalty trial as the sole defense witness as to lack of intent. Oddly, Dr. Whang was originally on the list of prosecution witnesses, and it was--again--Mrs. Mikenas who suggested his use as a defense witness. R. at 1068-69. Before calling Dr. Whang to testify, Attorney Knight only had one brief, perfunctory telephone conversation with him in which his testimony was not even discussed. The only occasion on which Attorney Knight "prepared" Dr. Whang was the day Dr. Whang testified. This "preparation" was cursory, occurring during a court recess which also provided an opportunity for the prosecution to prepare Dr. Whang. Moreoever, before subpoenaing Dr. Whang, Attorney Knight had never discussed the autoprotective reflex concept or its application to the Mikenas case with him. And, although Attorney Knight had read Dr. Whang's medical reports, nothing in these reports dealt with the subject of autoprotective reflex. R. at 851.

Attorney Knight's substandard investigation, preparation and examination of Dr. Whang might have been less harmful if not coupled with Attorney Knight's

lack of preparation of Mark Mikenas. This lack was the third serious and substantial deficiency in Attorney Knight's performance. The facts in this regard are stark and troubling: Mark Mikenas was called to testify by his counsel with absolutely no preparation or any advice as to his role in carrying out Attorney Knight's plan. R. at 852. As his testimony at the 3.850 hearing shows, Mark Mikenas is an articulate human being who could have pleaded for his life in eloquent fashion, given adequate preparation. Instead, he appeared, even in the cold print of the transcript, to be nervous and bumbling. Worse, he was never even asked by Attorney Knight the critical question: "Did you intend to shoot Anthony Williams?" Nor was he asked by Attorney Knight to describe his version of the circumstances of the shooting; asked about the offer of the State of a life sentence and his reasons for not accepting a virtual guarantee of life; asked about his military experience, in particular his status as a conscientious objector; or asked about his relationship and love for his family, especially Vito, Jr.

Because Attorney Knight presented no mitigating evidence, his failure to prepare and present Dr. Whang and Mark Mikenas adequately must be deemed a serious and substantial deficiency. Attorney Knight himself concedes that he never prepared Dr. Whang or Mark Mikenas. R. at 850-53. Thus, understandably, his direct examination of both was woefully deficient from any perspective./9/ This deficiency, in and of itself, was almost an invitation to the judge and jury to impose a death sentence.

/9/ For example, although the three day penalty trial covers more than 500 pages of stenographic transcript, Attorney Knight's direct examination of Dr. Whang covers barely eight pages, and his direct examination of Mark Mikenas only four. Penalty Tr. Trans. at 404-415 and 421-424; see R. at 863-64. This contrasts graphically with State Attorney Salcines' cross-examination of Mark Mikenas, which covers twenty-seven pages of transcript. Penalty Tr. Trans. at 424-451.

B. Attorney Knight Failed to Move Properly for the Recusal of the Sentencing Judge

Attorney Knight further demonstrated his inability to render effective assistance of counsel by failing to properly seek recusal of the sentencing judge. Here, the basis for the motion to recuse was the following statement of the sentencing judge made at the time of Mark Rinaldi's sentencing on June 25, 1976, just three days before Mark Mikenas' penalty trial: "The only thing that saved you, son, [from a sentence of death] was that you didn't have the gun and you didn't run," a remark reported in the local press. R. at 876.

Fla. R. Civ. P. 3.230 governs judicial disqualification. The Rule requires that a motion to disqualify be in writing, accompanied by at least two affidavits setting forth facts relied upon to show the grounds for disqualification, and by a certificate of counsel that the motion is made in good faith. If the motion and affidavits are legally sufficient, recusal is mandatory. See, e.g., Livingston v. State, slip. op. No. 59,846 (Fla. Oct. 27, 1983); Bundy v. Rudd, 366 So.2d 440 (Fla. 1978); Jackson v. Korda, 402 So.2d 1362 (Fla. 4th DCA 1981); State v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977). This Court has only recently reiterated its recognition of the seriousness of a recusal motion:

> "Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds within a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstance is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned." Livingston v. State, supra, slip op. at 4, quoting Dickenson v. Parks, 104 Fla. 577, 582-84 (1932).

Recognizing the prejudice inherent in the trial judge's statement made three days earlier at Mark Rinaldi's sentencing, Attorney Knight made an oral motion for recusal at the beginning of the penalty trial:

> May it please the Court, we come forward with a motion asking the Judge to recuse himself from further proceedings in this matter on the grounds that at the sentencing of a co-defendant, Mark Rinaldi, on this past Friday, at which time the co-defendant was given two concurrent life sentences, the Court informed the co-defendant that except for the fact that he did not run and except for the fact that

he did not have the gun, the penalty could have been a death sentence. That what saved him was the fact he did not have the gun and did not run.

I suggest nothing indicating that the Court is not completely impartial. However, I do suggest that statement would be to anyone who saw it an inference, at least, that it was the Court's feeling that the person who did have the gun and the person who did run and the person who fired the fatal shot would be deserving of the death penalty. And I do not feel that this is something that can be cured. I therefore move that the Court recuse himself. Penalty Tr. Trans. at 4-5.

No affidavit was offered in support of the motion. After the trial judge refused to recuse himself, Attorney Knight made no attempt to withdraw the guilty plea. R. at 882.

At the 3.850 hearing, Attorney Knight conceded the significance of the recusal motion to Mark Mikenas' case. He also, however, demonstrated a complete lack of awareness of the requirements of Rule 3.230. Through the simple expedient of complying with the plain language of the Rule, Attorney Knight would have ensured the recusal of the trial judge. Attorney Knight clearly recognized that recusal of the sentencing judge was essential to the vindication of Mark Mikenas' rights:

Attorney van Gestel: And the action that you took was to make an oral motion to have Judge Rawlins recuse himself, is that right?

Attorney Knight: That is correct.

Attorney van Gestel: Why did you not make your motion in writing?

Attorney Knight: Because it was something that came up, I guess, over the weekend, Mr. van Gestel, and I raised it as a matter before trial.

Attorney van Gestel: You raised it sincerely, did you not?

Attorney Knight: Oh, definitely.

Attorney van Gestel: You believed it to be important to your client?

Attorney Knight: Definitely, and it was on the record. We had a court reporter. It was in open court.

Attorney van Gestel: Are you familiar with rule 3.230 of the Florida Rules of Criminal Procedure?

Attorney Knight: Not by number, Mr. van Gestel.

Attorney van Gestel: Are you familiar with the Rule of Criminal Procedure that deals with motions to have a judge recuse himself?

Attorney Knight: I am not sure what you are referring to.

Attorney van Gestel: Do you know that Rule 3.230 of the Florida Rules of Criminal Procedure provides that such a motion should be in writing and supported by two affidavits at least, and if it is, recusal is essentially automatic, that the Court has no option?

Attorney Knight: Well, I can't argue with that, then, Mr. van Gestel. R. at 880-81.

Thus, Attorney Knight's failure properly to seek recusal is a further example of ineffective assistance of counsel.

C. Attorney Knight Breached His Duty to Introduce Non-Statutory Mitigating Evidence

Defense counsel's duty to introduce mitigating evidence clearly extends to evidence of nonstatutory mitigating circumstances. The Supreme Court has twice held that sentencing juries are entitled to consider not only statutory mitigating factors, but any and all circumstances that could conceivably temper jury deliberation. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), the Court overturned a sentencing statute that limited the mitigating circumstances a jury could consider. The plurality concluded that the Constitution demands that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense . . ." Id. at 604 (emphasis supplied). In Eddings v. Oklahoma, a majority of the Court embraced the reasoning and result of Lockett and on remand ordered that the sentencing body "must consider all relevant mitigating evidence." 455 U.S. 104, 117, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982).

This Court has repeatedly held that Florida law has always, even before Lockett, required juries to hear and consider evidence of nonstatutory mitigating circumstances. As was noted in Songer v. State, 365 So.2d 696, 700 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), the capital sentencing statute explicitly provides that aggravating circumstances "shall be limited" to the

eight specified factors. No identical words of limitation precede the listed mitigating factors. "[T]he wording itself, and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive." Songer v. State, supra, 365 So.2d at 700. Making note of the cases where it had admitted evidence of nonstatutory mitigating circumstances, the Songer court concluded that "[o]bviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered." Id. Only recently this Court reaffirmed that Lockett did not change the law of Florida, and noted particularly that in 1976 (the year of Mark Mikenas' trial) "Florida law was consistent with the pronouncement of Lockett." Cooper v. State, 437 So.2d 1070 (Fla. 1983).

Therefore, when Attorney Knight presented the case for Mark Mikenas' life on June 28-30, 1976, he was under an affirmative obligation to present any and all evidence of mitigating circumstances, nonstatutory as well as statutory. His breach of that duty is made all the more remarkable by the fact that he seems to have had some sense that he could introduce evidence of nonstatutory circumstances, and thus made an effort, albeit feeble, to do so. In his closing argument, he urged consideration of "the fact that here the defendant has faced up to his unlawful behavior and has pleaded guilty. Not a mitigating circumstance which you will find in the statute. But one that I think you are entitled to consider." Penalty Tr. Trans. at 491 (emphasis added).

Despite this statement in his closing argument, Attorney Knight stated at the evidentiary hearing on the 3.850 motion that at the time of the penalty trial he believed he was limited by law to the mitigating circumstances enumerated in the Statute. R. at 126-27.[/10/] This was Attorney Knight's

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/10/ In light of this Court's consistent rulings in Songer, Enmund, Lucas, and

(Footnote continued)

first capital penalty trial. Perhaps as a result, Attorney Knight read the caselaw controlling the use of mitigating evidence incorrectly, if he read it at all. This deficiency was particularly harmful in light of the aggressive stance of the State Attorney's office.

At the penalty trial, Attorney Knight failed to offer the following available mitigating evidence:

(1) He failed to introduce evidence that Mark Mikenas had been offered a plea bargain by the State of a recommendation of life imprisonment in exchange for a plea of guilty to the murders of Anthony Williams and Vito, Jr. Attorney Knight also failed to introduce evidence that Mark Mikenas refused the State's plea offer because he could not bring himself to plead guilty to the murder of his brother. R. at 814-19, 969-32. In particular, this mitigating evidence was warranted after Messer v. State, 330 So.2d 137 (Fla. 1976), decided before the penalty trial.

(2) Attorney Knight failed to introduce evidence that Mark Rinaldi had been indicted for the same charges as Mark Mikenas, had gone to trial, been found guilty on two counts of second-degree murder and received two life sentences. Attorney Knight also failed to introduce evidence that Rinaldi had parole eligibility within six months. R. at 827. In Messer, the Florida Supreme Court remanded a capital case for resentencing because "the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation of the sentence . . ." 330 So.2d at 141-42. The same principle applies here.

/10/ (Footnote continued)

> most recently Cooper, it would appear that Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, 52 U.S.L.W. 8423 (1983), and Muhammad v. State, 426 So.2d 533 (1982), were incorrectly decided. Each case assumes that Lockett wrought a change in Florida law that trial counsel could not foresee; as noted above, this Court has elsewhere consistently maintained that "Lockett did not change the law of Florida." Cooper, supra at 2,3.

(3) Attorney Knight failed to investigate and elicit testimony regarding other nonstatutory mitigating factors, such as Mark Mikenas' troubled childhood, his father's alcoholism and absences from home, his military experience, his love for and protectiveness toward his family and, especially, his younger brother, Vito, Jr., and his intense grief over his brother's death. Such evidence was available from Mark and from his family and friends. R. at 856-57, 1071-72. See, Eddings v. Oklahoma, 455 U.S. 104 (1982).

(4) Attorney Knight failed to introduce evidence regarding Mark Mikenas' nonviolent nature: Mark refused to fire a gun in the United States Army; he had never before the evening of November 3, 1975 shot a gun; and outside the Army he had never carried a loaded weapon. R. at 955-56.

(5) Attorney Knight failed to investigate and elicit testimony from Mark Rinaldi that Mark Mikenas did not conceive the attempted robbery, did not own a gun or bring one to the 7-Eleven store on November 3, 1975, did not know a gun had been brought to the scene until moments before he entered the store, never contemplated firing the gun, and held the gun during the robbery in order to protect Vito, Jr. R. at 241-43, 248-49, 252, 265-67, 271-72, 279-80, 957-58.

D. Attorney Knight Made Damaging Concessions, Failed to Raise Objections Adequately, and Failed to Request Jury Instructions

Attorney Knight committed other major and substantial errors during the penalty trial. First, Attorney Knight failed to object to the State's delayed disclosure of the names of potential prosecution witnesses. The prosecution's disclosures on June 14, 1976, fourteen days before the penalty trial and on June 30, 1976, during the penalty trial, were clearly untimely under Fla. R. Crim. P. 3.220 (a)(1). Lightsey v. State, 350 So.2d 824 (Fla. 2d DCA 1977). Moreover, one person from the June 30 list actually testified at the penalty trial without objection by Attorney Knight. Penalty Tr. Trans. at 393-401.

This deficiency was prejudicial because if counsel objects because the State breaches the disclosure obligation, the trial court must conduct a

hearing to inquire into the surrounding circumstances before allowing testimony by the undisclosed witnesses. Zeigler v. State, 402 So.2d 365, 372 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982). Failure to conduct such a hearing is grounds for automatic reversal. Brey v. State, 382 So.2d 395, 399 (Fla. 4th DCA 1980). Therefore, Attorney Knight's failure to object to the delayed disclosure precluded the sentencing judge from making this essential inquiry into the cause of noncompliance, the substantiality of the evidence, and the inability of counsel to prepare for cross-examination, all to Mark Mikenas' prejudice.

Second, Attorney Knight made a series of improper and damaging concessions at the penalty trial. He conceded the admissibility of Mark Mikenas' New York conviction for third degree robbery because he was under the mistaken impression that the crime involved the use or threat of violence to the person. R. at 865-67; Penalty Tr. Trans. at 288. In fact, the conviction was for unarmed robbery, which under New York law is not a crime involving the use or threat of violence. Thus, the conviction was irrelevant to the aggravating circumstance. At the same time, Attorney Knight also conceded the admissibility of highly prejudicial facts surrounding the conviction, even though these facts were even less relevant to the aggravating circumstance. R. at 867. And, in his closing argument, Attorney Knight conceded that the New York conviction established the existence of the aggravating circumstance, even though the State had offered no evidence to support a finding of this circumstance. Penalty Tr. Trans. at 486.

Third, Attorney Knight also failed to object to a highly prejudicial closing argument by the State Attorney, failed to move for a mistrial, and even failed to request curative instructions from the court. In his summation, the State Attorney improperly argued that Mark Mikenas should be sentenced to death because Anthony Williams was a police officer, even though this was not a statutory aggravating circumstance, and at the time of the

attempted robbery Mark Mikenas could not have known that Anthony Williams was a police officer. Penalty Tr. Trans. at 466, 469-470, 511.

E. Attorney Knight's Acts and Omissions Prejudiced Mark Mikenas

Attorney Knight's deficient representation of Mark Mikenas is manifest from the enumeration just completed. Indeed, standing alone and in the aggregate, these deficiencies were so prejudicial that they tilted the balance in Mark Mikenas' case from life to death. Thus, Mark Mikenas has met the third part of the Knight test. Here follows a list--by no means exhaustive--of examples that buttress this conclusion:

First, if Attorney Knight's representation had not been substantially deficient, the advisory jury surely would have recommended mercy. Attorney Knight himself stressed the fragility of the majority that voted for death: "Given the fact that you have a seven to five jury which has heard the impermissible evidence that it was permitted to hear and still was that close to a split, would indicate that under the usual procedure which I had hoped would be followed, that there would have been a jury recommendation of mercy." R. at 916. Juror Joan Baggett also shows how close this case was in the minds of the jury:

> "The vote on the advisory sentence was seven for the death penalty and five for life imprisonment. I believe that if the jury had not heard the evidence of alleged prior criminal activity which did not result in convictions, there is a well-founded likelihood that the jury would have recommended life imprisonment rather than the death penalty." R. at 134.

Second, an expert witness, who was not permitted to testify, would have found prejudice from his review of the record. Attorney Patrick Doherty was qualified during the 3.850 hearing as an expert witness in the area of ineffective assistance of counsel in Florida capital cases. If permitted to testify, he would have stated this opinion: given that representation during the penalty trial was deficient and that nevertheless five of the twelve

jurors recommended life, had the penalty trial been effectively prepared and presented, it is more probable than not that at least one other juror would have joined the five jurors who voted for life. See Proffer by Attorney van Gestel.[11] R. at 947-948.

Third, logic and common sense dictate that prejudice resulted from Attorney Knight's failure to prepare Mark for his penalty trial examination. Consider the following testimony of Mark Mikenas at the 3.850 hearing.

> Q. Now, Mark, I want to ask you some questions that might be difficult for you to answer. You have testified here today that you had no preparation before you took the witness stand. I want you to think about June of 1976, while you were sitting on the witness stand, what you would have answered if Mr. Knight had asked you to testify to the jury and to the judge about your relationship with your brother, Vito.
>
> A. I would have explained that we were very close, we had grown up together. He was my very best friend, as I hope I was his. And I was very protective of him. I loved him. During our years the problems that we had at home growing up, we depended on each other more than we depended on anybody else.
>
> Q. If Mr. Knight had asked you during your penalty trial about why you rejected the offer from the State of Florida between January 26 and March 9th of a life sentence in exchange for two guilty pleas, what would you have said to Judge Rawlins and to the jury?
>
> A. I would have explained how much I cared about my brother, how much I loved him and that I had gone in there, into the store and taken the gun from him in order to protect him, so the thought of pleading guilty to having murdered my brother just wasn't something I could acknowledge in my own mind as well as stand up in court and plead guilty to it in front of somebody else.
>
> Q. If Mr. Knight had asked you, Mark, at the penalty trial, to testify as to the circumstances of your having shot Anthony Williams, what would you have told the judge and what would you have told the jury?

/11/ Allowance of testimony by expert witnesses in the area of ineffective assistance of counsel is generally appropriate. See e.g., Jackson v. State, 437 So.2d 147 (Fla. 1983); Meeks v. State, 418 So.2d 987 (Fla. 1982), cert. denied, 103 S.Ct. 799 (1983). Excluding the testimony of Attorney Doherty was error.

A. I would have mentioned the fact that we had only gone in there for food. There was never any intention to hurt anyone. In fact, the whole time I spent in the store with Mrs. Pearson, I had been trying to alleviate her fear that she wouldn't be hurt or harmed and it was only a matter of--it was an accident, that I had been running to the door and only expected to push him, Mr. Williams, away from the door. There was never any intention to shoot him or to hurt him. It was a regrettable situation . . . . it was just a matter of both of us being in the wrong place at the wrong time. It was purely an accident.

Q. Mark, if Mr. Knight, at the penalty trial, had asked you what there was about your character that you could say to illustrate the reason why you should receive a life sentence, what would you have said?

A. That is very hard to answer without seeming arrogant or self-serving. I could have stated that I am very considerate. I have a high degree of consideration for other people's feelings, and I like to read. I especially enjoy helping other people reach their potential, such as helping friends obtain their GED, passing a test to get a high school diploma or helping someone else, a good friend learn a trade, and I think most of all I would have mentioned the fact that seeing my brother killed . . . I became aware of how very dear the [rest of my family was] to me, how much I loved them and in that respect I think I could have said, without the least bit of selfishness, that the jury come back with a life recommendation because not dying is the only way I can spare the rest of my family any more anguish or grief than they have already had to go through losing another son. R. at 1009-11.

Had Attorney Knight asked even one similar question during the penalty trial, surely one additional juror would have voted for life. Surely the court would have granted Mark Mikenas mercy.

Fourth, a finding of prejudice is warranted by the undisputed fact that Mark Mikenas would automatically have had a new sentencing judge had Attorney Knight properly moved for recusal of the original sentencing judge. See Livingston v. State, supra, slip op. at 8 (recusal even more imperative than customarily if defendant's life is at stake). Attorney Knight himself acknowledges that the sentencing judge's comments could not be cured, a concession which on its face demonstrates prejudice. Penalty Tr. Trans. at 4-5.

Fifth, prejudice is demonstrated by Attorney Knight's failure to introduce evidence that the State had conditioned its plea bargain of life imprison-

ment upon Mark Mikenas pleading guilty to the murder of his brother. Thus, Attorney Knight failed to alert the jury that the State did not consider this to be an appropriate case to push unconditionally for the death penalty, and that the only reason Mark Mikenas was before them in a penalty trial was that the State had seen fit to impose its cruel, ghoulish condition upon the bargain. Accordingly, this Court should vacate Mark Mikenas' sentence of death. See Holmes v. State, 429 So.2d 297 (Fla. 1983).

F. Attorney Knight Permitted the Entry of the Guilty Plea Without Any Assurance that the Plea Would Result in Tangible Sentencing Benefits: This Constitutes Per Se Ineffective Assistance of Counsel

In light of the potential drastic consequences of a guilty plea in a capital case, counsel per se provides ineffective assistance where he permits a plea of guilty absent some articulable basis to conclude a significant probability exists that the plea will operate to the defendant's advantage. See Goodpaster, The Trial for Life. R. at 408. Mark Mikenas was uncertain, up to moments before the hearing on May 3, 1976, whether he should maintain his plea of guilty. R. at 993-94, 1061-62. Attorney Knight advised Mark Mikenas, and utilized Mark Rinaldi's counsel (perhaps the last person who should have offered advice) to convince Mark Mikenas that the entry of the guilty plea was the best available course of action. R. at 988-91, 993-94, 1059-62. Despite his efforts, Attorney Knight had no basis to believe that a guilty plea would yield Mark Mikenas any tangible sentencing benefits.

In a non-capital offense, counsel's advice to plead guilty might be viewed as a permissible tactical decision, resulting from the difficult assessment of the probability of success on the merits and the likely sentence that the sentencing judge would impose, given all the circumstances of the offense and the character of the accused. American Law Institute, Trial Manual for the Defense of Criminal Cases § 202 (3d ed. 1974). The entry of a guilty plea may thus permissibly be advised in the attempt to establish intangible mitigating benefits by demonstrating that the defendant is genu-

inely contrite and willing to accept legal responsibility for his conduct; that protective, deterrent or other purposes of correctional treatment short of retribution will be served by imposing a lesser sentence; and that the defendant, by making a public trial unnecessary, has demonstrated a genuine consideration for his victims and a desire to spare the court and state the expense of a lengthy trial. See ABA Standards for Criminal Justice, 14-1.8 (2d ed. 1979). See also Brady v. United States, 397 U.S. 742, 750-53, 90 S.Ct. 1463, 25 L.Ed. 2d 1288 (1970). Nevertheless, courts and commentators have recognized that the possibility of obtaining these intangible benefits may be insufficient to justify the advice to plead guilty, and that counsel has an affirmative obligation to attempt to obtain more concrete benefits through plea bargaining. See, e.g., Mason v. Balcom, 531 F.2d 717, 724 (5th Cir. 1976); Cole v. Slayton, 378 F.Supp. 364, 368, (W.D. Va. 1974); Trial Manual for the Defense of Criminal Cases, supra, § 206.

In a capital case, the decision to plead guilty takes on added dimension, and counsel's advice must be evaluated by a higher standard of performance. Goodpaster, The Trial for Life, R. at 408; Le Duc v. State, 415 So.2d 721 (Fla. 1982). See Colson v. Smith, 315 F.Supp. 179 (N.D. Ga. 1970), aff'd, 438 F.2d 1075 (5th Cir. 1971). See also Massie v. Sumner, 624 F.2d 72, 74 (9th Cir. 1980). The possibility that a sentence of death may result renders highly suspect an attorney's advice to plead guilty. As the American Law Institute has observed:

> [T]he consequences of conviction are . . . crucial in deciding how to plead, though they may follow equally no matter which plea is entered. The plain fact is that those consequences may be so awful, that even the faintest ray of hope offered by a trial is magnified in significance [and the defendant may have] nothing to lose by denying his guilt and going to trial. Trial Manual for the Defense of Criminal Cases, supra, § 204.

Advice to plead guilty is totally unjustifiable in a capital case in Florida, given the severity of the potential consequences and the fact that

the normal intangible "benefits" which may result from a guilty plea are unavailable due to the nature of the sentencing proceedings. Although the judge has the ultimate responsibility for imposing sentence in a capital case, the jury has a substantial role in assessing the aggravating and mitigating circumstances involved. E.g., McCampbell v. State, 421 So.2d 1072, 1075-76 (Fla. 1982); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). It may be proper to assume that a sentencing judge will recognize the informal mitigating factors arising from a plea of guilty. However, a jury of lay persons is unlikely to consider as a nonstatutory mitigating circumstance a defendant's legal admission of responsibility. Moreover, the possible benefits that might be expected as a result of a decision to spare the state and court the time and expense of proceeding to trial are lost in a capital case, because a full sentencing trial is mandatory. In short, the rationale sometimes used to justify an attorney's advice to plead guilty without the assurance of leniency by the judge is lacking in a capital case. Absent such justification, advising an accused to plead guilty without any articulable indicia that the action will result in a sentence less than death is per se ineffective assistance of counsel.

III. MARK MIKENAS' DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE BECAUSE HE DID NOT INTEND TO KILL ANTHONY WILLIAMS

Although there was a guilty plea, the evidence presented shows that Mark did not intend to kill Anthony Williams; rather, the death resulted from a physical reaction after Mark was struck in the spine with a bullet and as he lost consciousness. R. at 958-59. No court has ever heard evidence to the contrary. The record, in fact, reflects that the State relied exclusively on the felony-murder portion of Fla. Stat. Ann. §782.04 in obtaining Mark's plea of guilty and conviction. R. at 187-88. Under these circumstances, imposition of the death penalty is grossly disproportionate to the crime committed and violates the Eighth and Fourteenth Amendments.

A. The Felony Murder Rule Operates To Impose Criminal Liability For First-Degree Murder Without Regard To A Defendant's Culpability

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982), the Supreme Court held that Florida courts had unconstitutionally sentenced the petitioner to death through the combined operation of the felony-murder rule and the concept of vicarious accomplice liability. In particular, the Supreme Court held that "death is not a valid penalty under the Eighth and Fourteenth Amendments 'for one who neither took life, attempted to take life, nor intended to take life.'" In reaching this holding, the Court made clear that imposing the death penalty on a defendant who did not intend the death of his victim violates the proscription against cruel and unusual punishment. This implicit holding is all the more obvious in view of the widespread judicial and legislative hostility to the felony-murder rule.

The felony-murder rule embodies a concept of strict criminal liability, artificially supplanting the premeditation and deliberation traditionally required before punishment may be imposed for first-degree murder. See R. Perkins, Criminal Law at 37-45 (2d ed. 1969).[12] The rule in effect attributes to the defendant an intent to commit a more serious crime than he in fact intended to commit; indeed, by operation of a legal fiction, he is treated as if he had committed the most serious crime, premeditated murder. Thus, the rule frustrates the fundamental principle of Anglo-American juris-

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/12/ In many contexts, the Supreme Court has recognized the importance of intent and criminal culpability in defining the reach of the criminal law. See, e.g., Morissette v. United States, 342 U.S. 246, 250 (1952) (requirement that an act "can amount to a crime only when inflicted by intention is . . . universal and persistent in mature systems of law"); Robinson v. California, 370 U.S. 660, 666-67 n.9 (1962) (improper conviction for "crime" of narcotics addiction); Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975) ("the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability"); United States v. United States Gypsum Co., 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed. 2d 854 (1978) ("intent generally remains an indispensable element of a criminal offense"); Solem v. Helm, 51 U.S.L.W. 5019, 5023-24 (June 28, 1983) (jurisdictions recognize and apply clear distinctions based on the culpability of the offender).

prudence that classification of a crime should reflect the culpability of the offender. See, Dennis v. United States, 341 U.S. 494, 500, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).

Because of the harshness of imposing a sentence for first-degree murder where the killing is inadvertent or done by an accomplice, the felony-murder rule has been criticized with increasing frequency./13/ As the American Law Institute has noted, "principled argument in favor of the felony-murder doctrine is hard to find." Model Penal Code, supra, Comment at 37. Thus, it is not surprising that courts and legislatures have been markedly active in restricting the scope of the rule. They have imposed common-law limitations on the rule, and in some instances have abrogated it entirely. See, e.g., Commonwealth v. Matchett, 386 Mass. 492, 503-04 n.12, 436 N.E.2d 400, 407-08 n.12 (1982); People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980).

B. Mark Mikenas' Sentence of Death is Unconstitutionally Excessive and Disproportionate Under the Eighth and Fourteenth Amendments

The Court in Enmund used the two-pronged proportionality review articulated in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed. 2d 982 (1977), which held that death is a disproportionate penalty for a person convicted of rape./14/ "[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Id. at 592. "A punishment might fail the test on either ground," or as the

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/13/ E.g., People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980); Ex parte Ritter, 375 So.2d 270 (Ala. 1979), vacated on other grounds, 448 U.S. 903 (1980); People v. Washington, 62 Cal.2d 777, 402 P.2d 130, 44 Cal.Rep. 442 (1965). See, e.g., American Law Institute, Model Penal Code, § 210.2 Comment, at 36-39 (1980); LaFave & Scott, Criminal Law at 560-61.

/14/ Because the death penalty is qualitatively different from a sentence of imprisonment, the Court employs a different standard of proportionality review in death cases. See Solem v. Helm, supra, 51 U.S.L.W. at 5022-23; 5028-29 n.4 (Burger, C.J., dissenting).

"cumulative" result of a poor showing on both. Furman v. Georgia, 408 U.S. 238, 282, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972) (Brennan, J., concurring).

In assessing whether the death penalty was "grossly disproportionate" to Enmund's crime, the Court looked to available objective criteria./15/ The Court accepted Enmund's contention, based on two empirical studies, that juries had rejected imposition of the death penalty in cases in which the defendant did not take life or intend to take life. Moreoever, after an exhaustive review of state capital sentencing schemes, the Court determined that only eighteen states would permit capital punishment in Enmund's case. Enmund, supra, 102 S.Ct. at 3372-76. Thus, "only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where murder occurred to be sentenced to die." Id. at 3374./16/

Because the Court's conclusions on both objective criteria and the underlying statistical analyses were vigorously contested by the dissent, id. at 3387-90, and because the Court's findings were not, by its own admission, compelling in themselves, id. at 3374, 3376, the Court based its decision on its independent analysis of the extent to which imposing capital punishment for unintentional felony murder serves acceptable purposes of the criminal

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/15/ The Court in Coker similarly reviewed such objective factors as "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear." Enmund, supra, 102 S. Ct. at 3372.

/16/ Both the majority and dissent in Enmund would conclude that a mere three additional states would authorize the imposition of the death penalty in the present case involving an inadvertent killing. See id. at 3372-73 & nn. 5-13; id. at 5097-98 (O'Conner, J., dissenting). Since Enmund, however, Washington has revised its capital sentencing scheme and will no longer punish by death those who do not intend to kill, even if the accused is a triggerman. Rev. Code Wash. §§ 10.95.020, 9A.32.030 (1982). In addition, the two states that have enacted capital punishment legislation post-Enmund--Massachusetts and New Jersey--exclude felony-murder as a capital offense. N.J. Rev. Stat. § 2C: 11-3 (1982); Mass. G.L. c. 279 § 68, c. 265 §§ 1,2 (1982). Thus, the indicia of "legislative opinion" disfavoring the imposition of death in cases like Mikenas are remarkably close to those supporting the Court's conclusion in Enmund.

system. The Court emphasized Enmund's limited culpability: "It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" Id. at 3377. The Court then demonstrated that Enmund's death sentence did not serve the goal of deterrence:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," Fisher v. United States, 328 U.S. 463, 484, 66 S.Ct. 1318, 90 L.Ed. 2d 1382 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." Gregg v. Georgia, [428 U.S. 153, 186 (1976)].

In reviewing another frequently-stated goal of the death penalty--retribution--the Court again focused on Enmund's culpability: "American criminal law has long considered a defendant's intention--and therefore his moral guilt--to be critical to 'the degree of [his] criminal culpability,' . . . and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." Id. at 3378.

The Court's opinion makes clear the central basis for its finding of a constitutional violation: Enmund did not intend the deaths of the robbery victims. Given the record before this Court, no principled distinction can be drawn from the fact that Mark Mikenas held the gun that killed Anthony Williams./17/ The only reasonable interpretation of Enmund is that the death

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/17/ The Eleventh Circuit in Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), recently distinguished a case involving the actual perpetrator of the killing. The Court admitted that "Enmund did hold that the death sentence could not be imposed where no intent is shown." Id. Enmund was distinguished on the grounds that, although the defendant had been charged with felony-murder, the defendant had savagely beaten the victim to death with a firepoker and was "fully culpable for the murder." Likewise, the court in Ross v. Hopper, 716 F.2d 1528, 1533 (11th Cir. 1983), rejected an Enmund claim on grounds that the defendant contemplated life would be taken and in fact intended to kill the victim. No such showing has been or can be made here.

(Footnote continued)

penalty is disproportionate to the offense of felony murder where the defendant did not intend to kill and did not contemplate that anyone would be killed. In the present case, the record plainly reflects that Mark Mikenas did not intend to kill Anthony Williams and did not contemplate that anyone would be killed. Imposition of the death penalty in these circumstances is disproportionate to the offense committed.

IV. ON ITS FACE AND AS APPLIED, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL

A. Mark Mikenas Was Sentenced To Death Under A Statute That Violates The Eighth Amendment By Making The Death Penalty More Likely For Unintentional Felony Murder Than For Comparable Premeditated Murder.

As demonstrated above, "[a] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including . . . the gravity of the offense and the harshness of the penalty . . . ." Solem v. Helm, supra, 51 U.S.L.W. at 5023. In evaluating the gravity of an offense, "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." Id. Implicit in this analysis is a determination that the Eighth Amendment would invalidate a statute imposing consistently harsher punishment for the less grave of two crimes. Since death is the ultimate penalty, a determination that one capital crime is more grave than another cannot require that a more harsh punishment be given. However, it must require that the death penalty be no more likely for the less serious than for the more serious crime.

The Florida capital sentencing statute under which Mark Mikenas was sentenced to death for unintentional felony murder violates the Eighth Amend-

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/17/ (Footnote continued)

In Foster v. State, 436 So.2d 56 (Fla. 1983), the Florida Supreme Court distinguished Enmund on the grounds that the evidence fully supported the finding that the defendant was the person who shot the victim. However, the evidence also showed that the murders were intentional. Thus, unlike the present case, the defendant was fully culpable for the murders.

ment. On its face, as administered, and as applied,[18] the Statute makes imposition of the death penalty more likely for unintentional felony murder than for a class of comparable premeditated non-felony murders. This occurs both by operation of the "felony" aggravating circumstance, Fla. Stat. §921.141(5)(d),[19] and by operation of the language "capital felony" in Fla. Stat. §921.141(5). It also occurs through this Court's failure to use its proportionality review to assure that the more serious crime is punished more harshly than the less serious one. In particular, such a failure occurred in Mark Mikenas' case.

1. Section (5)(d) of the Florida capital sentencing statute makes imposition of the death penalty more likely for unintentional felony murder than for a class of comparable premeditated non-felony murder.

Under the Statute, virtually any defendant who commits felony murder is subject to aggravating circumstance Section (5)(d). This is so regardless of the defendant's lack of intent to kill. Since the existence of at least one sufficiently weighty aggravating circumstance is a prerequisite for capital murder in Florida, Barclay v. Florida, 51 U.S.L.W. 5206 (July 6, 1983), Section (5)(d) virtually guarantees eligibility for the death penalty for felony murder. No provision of the Statute creates similar guaranteed eligibility for premeditated murder. For defendants with other aggravating

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/18/ Appellant contends that, as administered, the Statute makes the death penalty more likely for unintentional felony murder than for comparable premeditated murder. Appellant's as administered challenge depends in part on facts that cannot be developed without discovery from the State. Specifically, appellant is entitled to answers to its interrogatories and production of the requested documents. R. at 48-71. These same facts--comparative treatment of unintentional felony murder and premeditated murder in Florida courts--are also relevant to appellant's facial attack. See Solem v. Helm, 51 U.S.L.W. 5019, 5023 (U.S. June 28, 1983).

/19/ Section (5)(d) provides: "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after commiting or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb."

circumstances, this discrepancy also affects the process of weighing the aggravating against the mitigating circumstances.

Indeed, for every unintentional felony murder within aggravating circumstance (d), there is a premeditated murder implicating all of the same aggravating circumstances except (d). For example, consider a hypothetical defendant "A" who, while robbing a convenience store, killed a store clerk when his gun accidentally discharged. Contrast hypothetical defendant "B" who entered the convenience store not to rob it, but to kill the store clerk, and walked up to the store clerk and killed him with one shot. Assume no other aggravating or mitigating circumstances for either defendant. Under the Statute, defendant A would be subject to the death penalty if a sentencer considered aggravating circumstance (d) sufficiently weighty. Defendant B would not be subject to the death penalty. Now suppose that both "A" and "B" had identical lengthy histories of past convictions for violent felonies. Then both would be eligible for the death penalty under aggravating circumstance (b),/20/ but in the weighing process, defendant A would be at a disadvantage: he would have <u>both</u> (b) and (d) on the aggravating side of the balance.

This is true in the <u>Mikenas</u> case. For example, suppose that Mark Rinaldi, Vito, Jr. and Mark Mikenas were involved in a misdemeanor in the 7-Eleven store rather than armed robbery. Suppose that every other fact in the case were identical except that the gunman shot the victim with premeditation. Then a judge could have found exactly the same aggravating and mitigating circumstances as the resentencing judge found in <u>Mikenas</u> except for circumstance (d).

/20/ Section (5)(b) states: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

Making the death penalty likelier for unintentional felony murder than for intentional non-felony murder makes deterrence of felonies more important than deterring murders. "[T]here is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." Enmund v. Florida, supra, 1025 Ct. at 3378. Thus, deterring felonies cannot be seen as a justification for deterring murders. Making the death penalty more likely for unintentional felony murder than for a class of comparable premeditated murders turns the Supreme Court's deterrence analysis on its head.

Nor does the Statute serve the death penalty's purpose of retribution. The interest in retribution "very much depends on the degree of [the defendant's] culpability--what [the defendant's] intentions, expectations and actions were." Id. at 3378. Both the unintentional felony murderer and the comparable premeditated murderer have killed a human being, but the premeditated murderer is more culpable for doing so. That the unintentional murderer has committed a felony increases his culpability, but not enough to make him more culpable than the premeditated murderer. Thus, Florida treats the more culpable murderer more leniently, which frustrates the purpose of retribution.

Comparison of Florida's capital sentencing scheme with those in other jurisdictions only supports the conclusion that Florida's scheme results in disproportionate sentencing. See Solem v. Helm, supra, 51 U.S.L.W. at 5023. Florida's scheme on its face treated unintentional felony murder, such as Mark Mikenas committed, more harshly than a class of comparable premeditated non-felony murders./21/ In this respect, Florida is in the minority of states. Of the 38 states with a death penalty, felony murder is not a capital

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/21/ In 1979, Florida amended its statute to add an aggravating circumstance applicable to premeditated murder. Fla. Stat. §921.141(5)(i).

offense in four.[22] In ten states, knowing, intentional, purposeful or premeditated killing is an element of capital murder.[23] In one state, the death penalty is reserved for deliberately premeditated murder or murder with extreme atrocity or cruelty.[24] One state would apply the death penalty only to felony murders of correctional officers or of law enforcement officers known to the defendant as such.[25] In six states, there is no felony aggravating circumstance comparable to Fla. Stat. §921.141(5)(d)[26] Three states have felony aggravating circumstances that require specific intent to kill.[27] One state does not apply its felony aggravating circumstance to felony murder.[28] One state applies its felony aggravating circumstance only if the defendant previously has been convicted of the same felony.[29] In sum, less than one quarter of the states have a capital sentencing scheme that makes the

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/22/ Mo. Rev. Stat. §§565.001, 565.003, 565.008(2) (1979); NH Rev. Stat. Ann. §§630:1 (III); 630:1a(I)(b)(2) (1974); N.J. Stat. Ann. §§2C:11-3a; 2C:11-3c; Pa. Stat. Ann., Tit. 18, §§2502(a), (b), 1102 (1980).

/23/ Ala. Code. §§13A-2-23, 13A-5-40(a)(2), 13A-6-2(a)(1) (1977 & Supp. 1981); Ill. Rev. Stat., ch. 38, ¶9-1(a)(3); ¶9-1 (b)(6) (1979); La. Rev. Stat. Ann. §14:30(1) (West Supp. 1981); N.M. Stat. Ann. §§30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Supp. 1981); N.Y. Penal Laws §§60.06, 125.27; Ohio Rev. Code Ann. §§2903.01(B), (C), (D), 2929.04(A)(2) (1981); Utah Code Ann. §76-5-202(1) (1978); Va. Code Ann. §18.2-31(d) (Supp. 1981); Wash. Rev. Code §§9A.32.030(1); 10.95.020 (Supp. 1981).

/24/ Mass. G.L. c. 265, §§1, 2 (Supp. 1982). Extreme atrocity or cruelty is not involved in the present case.

/25/ Vt. Stat. Ann. Tit. 13, §2303(b), (c) (Supp. 1981). As stated previously, at the time of the homicide, Mark Mikenas did not know that Anthony Williams was a law enforcement officer.

/26/ Ariz. Rev. Stat. Ann. §13-703(F) (Supp. 1982); Ark. Stat. Ann. §41-1303 (1977); Mont. Code Ann. §46-18-303 (1981); Neb. Rev. Stat. §29-25-23(1) (1979); Okla. Stat. Ann. §701.12 (Supp. 1982); S.D. Codified Laws Ann. §23A-27A-1 (Supp. 1982).

/27/ Colo. Rev. Stat. §16-11-103(6)(g); Idaho Code §19-2515(f)(7); Ind. Code §35-50-2-9 (b)(1).

/28/ State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941.

/29/ Conn. Gen. Stat. §53a-46a(g)(1). Mark Mikenas had no previous conviction for armed robbery.

death penalty more likely for an unintentional felony murder such as defendant committed than for a comparable premeditated murder. By contrast, in Enmund about one-third of the states would have permitted the death penalty for the defendant's crime. This reinforces the conclusion that the Florida scheme results in disproportionate sentencing in violation of the Eighth and Fourteenth Amendments.

2. The language "capital felony" in the Florida capital sentencing statute makes imposition of the death penalty more likely for unintentional felony murder than for comparable premeditated murder

All of the aggravating circumstances in the Statute except (a) and (b) relate to the characteristics of the "capital felony" for which the defendant is to be sentenced./30/ Ambiguity in the scope of the concept "capital felony" infects the application of aggravating circumstances (c) through (h) so that imposition of the death penalty can be more likely for unintentional felony murder than for comparable premeditated murder.

By definition, felony murder involves the commission of a felony and an act or event occurring during the course of the felony resulting in death (hereinafter referred to as the "homicide"). Fla. Stat. Ann. §782.04(1). In applying the particular aggravating circumstances (c) through (h) in a felony-murder context, the capital sentencing statute makes no distinction between

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/30/ Specific reference should be made to Fla. Stat. Ann. §921.141(5) attached hereto as Appendix Exhibit A. To facilitate the analysis in this section, a brief synopsis of the aggravating circumstances is useful: (a) the "capital felony" was committed by a person "under sentence of imprisonment"; (b) the defendant was previously convicted of another "capital felony"; (c) the defendant "knowingly created a great risk of death to many persons"; (d) the "capital felony" was committed while the defendant "was engaged . . . in the commission of . . . any robbery . . ."; (e) the "capital felony" was committed to avoid arrest or to effect escape; (f) the "capital felony" was "committed for pecuniary gain"; (g) the "capital felony" was committed "to disrupt or hinder the lawful exercise of any governmental function"; and (h) the "capital felony" was especially "heinous, atrocious, or cruel," Note that while (c) does not employ the phrase "capital felony," this aggravating circumstance relates to the conduct surrounding the capital felony. Elledge v. State, 346 So.2d 998, 1004 (1977).

the seriousness of the homicide and of the underlying felony. Thus, the aggravating circumstances for an unintentional felony murderer can derive solely from the nature of the underlying felony, rather than from the nature of the homicide. The Statute can thereby effect a death sentence for reasons unrelated to the seriousness of the homicide, even though the homicide is the act that justifies imposition of the death penalty. Enmund v. Florida, supra. By contrast, where application of the aggravating circumstances is derived solely from the facts relating to intentional and premeditated murder, the crime is more serious, but the same or fewer aggravating circumstances apply. Thus, the ambiguity in the term "capital felony" makes no measurable contribution to acceptable goals of punishment; under the Florida scheme, imposition of the death penalty can be more likely for the less serious of two crimes.

A few examples of the potential application of the interpretation of the term "capital felony" in the felony-murder context to include both the felony and the homicide starkly reveal the disproportionate sentencing that may result. If a rapist leaving the victim alive at the scene of the crime unintentionally killed a third person attempting to prevent the flight, aggravating circumstance (h) would apply if the defendant behaved cruelly during the rape. If, on the other hand, a rapist leaving the victim alive at the scene of the crime intentionally killed a third person attempting to prevent the flight, aggravating circumstance (h) would not apply, even though the defendant behaved cruelly. See Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) (error for trial judge to find heinous, atrocious, or cruel aggravating circumstance based on attempted murders committed seconds after intentional murder). The Mikenas case also illustrates this aspect of the Statute. The resentencing judge applied this interpretation of the term "capital felony" and found aggravating circumstances based on the nature of the felony rather than the homicide. See Appendix Exh. B.

If Mark Mikenas had shot Anthony Williams intentionally, these same aggravating circumstances found by the sentencing judge might not have applied. Their applicability would depend on Mark Mikenas' actual purpose in shooting Anthony Williams. For example, assume facts identical to the Mikenas case, except that the court had a basis for finding and in fact found that Mark Mikenas' sole reason for shooting Anthony Williams was longstanding personal animosity. Then the capital felony's purpose was not pecuniary gain, attempt to escape, or hindering law enforcement, and aggravating circumstances (e), (f), and (g) do not apply. Thus, for the unintentional felony murder, three aggravating circumstances would apply; for the comparable intentional murder, those same aggravating circumstances would not apply. Yet the unintentional felony murder is a less serious crime than the hypothetical intentional murder. Thus, in crucial instances, the Statute makes imposition of the death penalty more likely for unintentional felony murder than for comparable premeditated murder. The result is disproportionate sentencing that does not serve the deterrence and retribution interests of the death penalty.

V. FLORIDA PROCEDURES FOR EXCLUDING EVIDENCE OFFERED BY THE STATE TO REBUT MITIGATING CIRCUMSTANCES THE DEFENDANT HAS NOT PUT IN ISSUE VIOLATE THE DUE PROCESS CLAUSE

At the penalty trial, Attorney Knight attempted to exclude evidence of prior criminal activity. After the State had put on its first three witnesses, but before the State had offered any evidence about Mark Mikenas' prior criminal history, the State made a proffer of the evidence it intended to offer. Penalty Tr. Trans. at 283. Counsel objected to all but a small part of this evidence, and indicated clearly that Mark Mikenas was not invoking the mitigating factor of no prior criminal activity. Id. at 288-90. The trial court overruled the objection, but permitted defense counsel a standing objection. Id. at 291. The issue was raised on appeal. R. at 684-85. This Court did not expressly address the issue but remanded for resentencing without further deliberations by a jury. Mikenas v. State,

367 So.2d at 610. Before Mark Mikenas was resentenced to death without a jury, his counsel objected to the lack of a jury, arguing that the record was tainted with the evidence of Mark Mikenas' prior criminal history. R. at 485-93. After the resentencing, Mark Mikenas appealed the refusal to empanel a new jury, again arguing that the new jury was necessary because the record was tainted with the improper evidence of prior criminal history. This time on appeal, this Court explained why it had remanded for resentencing without a new jury:

> [T]he evidence itself was not improper, only the manner in which it was considered by the [penalty trial] court in its findings of fact. It was not improper for the jury or court to consider the evidence of defendant's prior criminal history in relation to the mitigating circumstance it was obviously intended to counter, that is, the lack of a significant history of prior criminal activity.

Mikenas v. State, 407 So.2d 892 ("Mikenas II"). The court totally disregarded defense counsel's standing objection to this evidence at the penalty trial and defendant's clear intention not to rely on this mitigating circumstance.

In Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981), this Court held that the defendant at the penalty trial for a capital felony has a right to exclude evidence offered in rebuttal of mitigating circumstances that he has not put in issue. In Maggard, before the penalty trial, the defendant expressly waived any reliance on the mitigating factor of no significant prior criminal activity. Over objection, the State was permitted to offer extensive evidence of his prior criminal record. This Court reversed, saying: "Mitigating factors are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist. " Id. at 978. This holding is consistent with the well-established principle that a death sentence may not be based upon consideration of non-

statutory aggravating factors. See, e.g., Mikenas v. State, 367 So.2d 606. Permitting the State to offer evidence in "rebuttal" of mitigating factors not in issue effectively converts the negative of the mitigating factor into a nonstatutory aggravating factor. Moreover, since there is no limit to the mitigating factors the defendant may seek to establish, Eddings v. Oklahoma, 455 U.S. 104 (1982), there might be no limit to the nonstatutory aggravating matter the State can introduce in "rebuttal" of anticipated mitigating evidence. This anticipated rebuttal evidence would not be subject to the safeguard that Florida law applies to statutory aggravating factors: the requirement of proof beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Maggard recognizes a defendant's right to exclude a virtually unlimited variety of nonstatutory aggravating matter and to insist upon proof of aggravating circumstances beyond a reasonable doubt. The joint implication of Maggard and Mikenas II is that, as a prerequisite for exercising this right, the defendant must follow a procedure nowhere foreshadowed in the Florida Rules of Criminal Procedure or elsewhere in Florida law: Florida apparently requires the defendant to waive expressly his right to offer the mitigating evidence, and this waiver must occur before the penalty trial. Mark Mikenas, of course, had no notice of this procedure at his penalty trial. Even if he had notice, due process would have required Florida courts to accept the substantially identical procedure his counsel followed.

This Court has thus recognized a defendant's right to exclude nonstatutory aggravating evidence--a right of critical importance to a defendant confronting the death penalty. To defeat exercise of that right by imposing a procedure of which the defendant had no notice and which in principle is indistinguishable from the procedure the defendant employed is unconstitutional. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

VI. THE RESENTENCING JUDGE IMPOSED MARK MIKENAS' DEATH SENTENCE ON THE BASIS OF UNCONSTITUTIONAL APPLICATION OF THE FLORIDA CAPITAL SENTENCING STATUTE

A. The Resentencing Judge's Findings of Fact Were Lawless, Cryptic and Conclusionary and Thus Failed to Meet Constitutional Standards

The Florida capital sentencing statute requires that the trial judge support a death sentence with specific written findings of fact. The resentencing judge's findings did not take into account the evidence presented to him. In addition, these findings were so inadequate as to render the case unreviewable in further proceedings. Thus, Mark Mikenas was denied the process he was due. See Eddings v. Oklahoma, 455 U.S. 104 (1982). Moreover, the resentencing judge's application of the Statute to Mark Mikenas, as described in the judge's inadequate findings, in no way approximated the conscientious focusing "on the individual circumstances of each homicide and each defendant" that the Supreme Court envisioned in Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976). Rather, application of the aggravating circumstance provisions was automatic and resulted in the arbitrary and capricious imposition of death. The resentencing judge invoked provisions of the Statute without regard for this Court's interpretations and limitations of these provisions.

For example, the manner in which the resentencing judge invoked provisions (d), (e), (f) and (g) of §921.141(5) demonstrates constitutional impropriety. According to his Findings of Fact, he considered provision (e) "in conjunction with, and not in addition to, aggravating circumstance (d)." (emphasis added.) Provision (f) was "considered in conjunction with aggravating circumstance (d) and (e)," and provision (g) was "considered in conjunction with aggravating circumstance (e)."

No conclusion can be drawn from this maze of conjunctions. True, this Court has stated that the Statute does not contemplate a strict tabulation of "X" number of aggravating circumstances to be counted against "Y" number of

mitigating circumstances. Nonetheless, the Statute surely requires a more clearly reasoned and articulated application than that rendered by the resentencing judge. In addition, the findings do not reflect any of the mitigating circumstances offered at the sentencing trial and at the resentencing hearing. Therefore, the resentencing judge's fact-findings violate Mark Mikenas' rights not only under Florida law, e.g., Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927 (1981), but also under the Due Process Clause and the Eighth Amendment./31/

B. Mark Mikenas Did Not Knowingly Create A Great Risk of Death to Many People

Section (5)(c) makes it an aggravating circumstance that the defendant "knowingly created a great risk of death to many people." No interpretation of the facts of this case supports the resentencing judge's findings relating to the "great risk to many people" provision. See, e.g., Mason v. State, 438 So.2d 374 (Fla. 1983). The resentencing judge improperly included Mark Mikenas' two accomplices among his tally; he also counted the wife of Anthony Williams, although no evidence shows Mark Mikenas knew of her presence or that she ever was in a zone of risk; and he counted the storeclerk, who, as the trial judge well knew, was out of the line of fire in a backroom. Therefore, Mark Mikenas did not knowingly create a great risk to many people.

C. The Resentencing Judge Misapplied and Incorrectly Doubled the Aggravating Circumstances of Murder Committed During a Robbery and Murder Committed for Pecuniary Gain

Section (5)(d) makes it an aggravating circumstance that "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery . . . ." The resentencing judge found this

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/31/ In addition, the resentencing judge's invocation of aggravating circumstance (a) that the capital felony was committed by a person "under sentence of imprisonment" was error, because the evidence before him established only that Mark Mikenas was on parole.

aggravating circumstance applicable, even though the robbery was an element of the crime of felony murder. If this application is valid, anyone convicted of first-degree murder occurring in the course of certain dangerous felonies would automatically enter the sentencing proceeding with one aggravating circumstance already established. Such a situation is virtually indistinguishable from that in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980), in which the court found that the invalid aggravating circumstances could have applied to anyone convicted of murder. Moreover, it placed Mark Mikenas in double jeopardy. See State v. Cherry, supra.

The resentencing judge also misapplied aggravating circumstance (f). He considered this provision "in conjunction with aggravating circumstance (d) and (e)." This Court has repeatedly held it error to count twice provisions (d) and (e) where the underlying felony is robbery. E.g., Riley v. State, 366 So.2d 19, 21 (Fla. 1978), cert. denied, 103 S.Ct. 317 (1982).

D. The Resentencing Judge Misapplied the Aggravating Circumstances of Capital Felony Committed to Avoid Arrest and Capital Felony Committed to Disrupt Governmental Function

The resentencing judge also incorrectly cumulated and misapplied the aggravating circumstances of capital felony committed for the purpose of avoiding arrest, Section (5)(e), and capital felony committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, Section (5)(f). Improper doubling of these provisions is inconsistent with White v. State, 403 So.2d 331 (Fla. 1981). The ambiguous and arguably overlapping scope of these provisions creates unconstitutional vagueness and overbreadth. In addition, these circumstances cannot apply to Mark Mikenas, because they operate only if the capital felony was committed with a purpose or motive to foil arrest or hinder law enforcement. Since the capital felony here was unintentional, there could have been no such finding.

In sum, imposition of Mark Mikenas' death sentence resulted from an error-ridden application of the Statute--an application not adequately explained or justified by specific findings, as the law requires./32/

It must be noted that none of the misapplications of the capital sentencing statute to Mark Mikenas enumerated in this part VI is "mere error of state law." Engle v. Isaac, 456 U.S. 107, 121 n. 21 (1982), quoting Gryger v. Burke, 334 U.S. 728, 731 (1948). An irrational or arbitrary application of the aggravating circumstances of a facially-valid sentencing procedure violates the Eighth Amendment. Godfrey v. Georgia, supra. Furthermore, arbitrary denial of an important state-created right violates due process. See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed. 2d 175 (1980).

In Proffitt v. Florida, the Supreme Court approved Florida's capital sentencing procedure only in reliance upon performance of "an informed, focused, guided and objective inquiry." 428 U.S. at 259. Such inquiry was woefully lacking as to Mark Mikenas.

/32/ A related reason why Mark Mikenas deserves resentencing is that the only sentencing trial at which he was able to make his case to a jury was saturated with prejudicial error. At his initial penalty trial, the jurors heard over objection abundant evidence of his prior criminal history--evidence which was not admissible because it did not concern convictions for capital felonies or felonies involving the use or threat of violence to the person. Those jurors also heard wide-ranging improper cross-examination about prior criminal matters not raised on direct examination. The trial judge's instructions misconstrued and did not adequately explain the aggravating and mitigating circumstances, introduced irrelevant and prejudicial issues into the jury's deliberations, and misplaced the burden of proof. In particular, the trial judge instructed the jury that it had to reach a majority vote for life as well as death. Especially in view of the jury's 7-5 vote, this was error. Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983). And when the prosecutor made his closing argument, the jurors were subjected to an inflammatory address that misstated the law and rested on facts not in or suggested by the record. For these reasons, the verdict of the only jury to hear Mark Mikenas' case was tainted with prejudice. Because of the central importance of the jury in the Florida capital sentencing scheme, the resentencing judge erroneously refused to investigate the need for a new jury and unconstitutionally denied Mark Mikenas' request to have a new and impartial jury deliberate his sentence.

CONCLUSION

Review of the entry of Mark Mikenas' guilty plea, the penalty trial, the evidentiary hearing on the motion for Post-Conviction Relief, and the applicable facts and law mandates that Mark Mikenas' guilty plea was invalid and that his death sentence must be vacated.

Respectfully submitted,

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