IN THE SUPREME COURT OF FLORIDA

MARK D. MIKENAS, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 64,317	FILED SID J. WHITE JUN 4 1984 CLERK, SUPREME COURT By _____ Chief Deputy Clerk

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

SUPPLEMENTAL BRIEF OF APPELLANT

Allan van Gestel
Joseph L. Cotter
Margaret R. Hinkle
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

IN THE SUPREME COURT OF FLORIDA

MARK D. MIKENAS, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 64,317

SUPPLEMENTAL BRIEF OF APPELLANT

This Supplemental Brief is submitted by appellant Mark D. Mikenas solely to apply to this case the "ineffective assistance" of counsel test enunciated in Strickland v. Washington, ___ U.S. ___, 52 U.S.L.W. 4565 (May 14, 1984). Washington provides this Court with the opportunity not only to cure the defects in Mark Mikenas' representation by Attorney Knight but also to harmonize its view of effective assistance of counsel with the Supreme Court's teachings. In ruling on Mark Mikenas' fate, this Court will also set the tone for and instruct the trial courts of the State and the practitioners in those courts on the quality of attorney performance expected in death penalty cases. This Court is exhorted to set the standard of attorney performance at a level that will guarantee justice and unchallengeable finality.

In Knight v. State, 294 So.2d 997 (1981), this Court adopted the following principles to determine ineffective assistance of counsel:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and

> serious deficiency measurably below that of competent counsel . . . .
>
> Third, the defendant has the burden to show that this specific serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings . . . .
>
> Fourth, in the event that the defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there is no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. Id. at 1001.

In Strickland v. Washington, supra, the Supreme Court effectively rejected the Knight v. State standard and, for the first time, set forth when a claim of ineffective assistance of counsel requires reversal of a death sentence. The Washington test requires that a defendant show, first, that his counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant by depriving him of a fair trial. 52 U.S.L.W. at 4570. Under Washington, an attorney's performance is measured by a test of reasonably effective assistance, 52 U.S.L.W. at 4570, and the proper test for prejudice is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability is one "sufficient to undermine confidence in the outcome." 52 U.S.L.W. at 4572.

A comparison of the Washington and Knight standards reveals significant distinctions. First, Washington requires a lesser showing of prejudice for constitutional infirmity than did Knight: the Supreme Court expressly rejected the Knight outcome-determinant test in favor of a showing of a reasonable probability of a different result. Second, the performance inquiry set forth in Washington is less stringent than that of Knight: Washington

imposes a test of "reasonableness," while Knight sets forth a standard of "substantial, serious deficiency". Third, unlike Knight, Washington provides no opportunity for the prosecution to rebut a constitutional violation once prejudice is established. In addition, Washington rebukes the State's claim in this case that a defendant's burden with regard to ineffective assistance of counsel is to prove the facts relied upon by "strong and convincing evidence." Appellee's Brief at 4. The appropriate standard is proof by a preponderance of the evidence. Strickland v. Washington, supra, 52 U.S.L.W. at 4572.

In both his Brief and Reply Brief, Mark Mikenas demonstrated that he adduced an overwhelming amount of evidence at the 3.850 hearing showing that the performance of his former attorney, Robert Knight, suffered from numerous prejudicial errors in violation of the more stringent Knight v. State test. With the Supreme Court's adoption of the more relaxed Strickland v. Washington test, it is all the more clear that Attorney Knight failed to comply with the requirements of the Sixth Amendment. Attorney Knight breached his "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." In significant respects, he did not "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 52 U.S.L.W. at 4570. Knight's performance was deficient, i.e., below professional norms of reasonableness, in the following areas:

1. At the May 3, 1976 plea hearing, Knight conceded he had not prepared Mark adequately for the earlier hearing. R. at 177. ("Subsequently, however, I became of the opinion that the defendant may have not been fully prepared for the proceedings at the time of the plea. If any fault is to attach

because of that, then I will take responsibility"). Nonetheless, Knight never moved to withdraw the plea. Knight also failed to explain adequately to Mark that the prosecution had not agreed to withhold live witnesses at the penalty trial, and he failed to explain the nature of the proceedings. R. at 976, 981-83. He never explained to Mark the factors by which the judge and jury would decide whether Mark would be sentenced to death. Nor did he discuss the likelihood that Mark would receive a death sentence, nor the probable effect of a guilty plea upon that likelihood. Moreover, Knight never informed Mark of the specific constitutional rights he would waive by pleading guilty, a deficiency made more grievous because the sentencing judge also failed in this regard. R. at 176-81, 981-82. In sum, Knight totally failed to discharge his responsibility under Fla. R. Crim. P. 3.171 to advise Mark 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 might have been open to him."

2. By his own concession, Knight's narrow plan for the penalty trial was to attempt to establish the statutory mitigating circumstance of failure to conform conduct to the requirements of law. R. at 847-848. Knight tried 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. However, Knight's execution of even this narrow unimaginative plan was deficient because, of the two defense witnesses he called to testify at the penalty trial, he completely failed to prepare either. Total failure to prepare witnesses violates established norms of reasonableness, particularly when a man's life is at stake. See, e.g., Arizona v. Edwards, No. CA-CR 5483 (Ariz. 1983) ("We can find no excuse to justify counsel's failure to interview witnesses until the day of trial") (Lexis copy attached hereto as Exhibit A).

3. Knight admits that he failed to prepare Dr. Choong Jin Whang, the neurosurgeon who operated on Mark after he was shot in the spine. The way Knight mishandled this pivotal witness is shocking: Knight subpoenaed Dr. Whang to testify. Before calling Dr. Whang to testify, Knight had only one brief telephone conversation with him in which he did not even discuss his testimony. The only time that Knight "prepared" Dr. Whang was the day Dr. Whang testified, and Knight squeezed in this cursory "preparation" during a court recess in which the prosecution was also present. R. at 851. Attorney Knight's failure to prepare Dr. Whang clearly falls below prevailing norms of practice. See, e.g., Code of Professional Responsibility EC 6-4 (". . . a lawyer's obligation to his client requires him to prepare adequately . . .").

4. Knight never prepared Mark Mikenas to testify at the penalty trial. Knight never told Mark what his role was in carrying out Knight's plan. R. at 852. Mark learned he was to testify moments before he took the stand. As a result of the lack of preparation, Knight's examination of Mark was predictably deficient, particularly in its failure to humanize Mark. "To ensure a meaningful penalty hearing in capital cases, it is essential that the client be presented to the sentencer as a human being." Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299 (1983) R. at 408, 430. In addition, the examination was woefully brief. Although the penalty trial covers more than 500 pages of stenographic transcript, Knight's direct examination of Mark covers only four pages. Penalty Tr. Trans. at 404-415 and 421-424; see R. at 863-64. In contrast, State Attorney Salcines conducted an aggressive cross-examination (for which Mark was utterly unprepared), covering 27 pages of transcript. Penalty Tr. Trans. at 424-451.

5. Knight failed to move properly under Fla. R. Crim. P. 3.230 for the recusal of the sentencing judge. See Appellant's Brief at 19-21. Recognizing the prejudice inherent in a statement of the judge about co-defendant Mark Rinaldi, Knight made an oral Motion for Recusal at the beginning of the penalty trial. The motion totally failed to comply with the requirements of Rule 3.230, which requires a written motion, two affidavits and a certificate of counsel that the motion is made in good faith. The flaws in Knight's recusal motion were compounded in that Knight never even moved to withdraw the guilty plea after the motion to recuse was denied.

6. Knight failed to discharge his responsibilities to Mark Mikenas regarding plea negotiations. He allowed Mark to plead guilty to capital murder without some assurance that the prosecution would agree to a life sentence. Before the guilty plea was entered, he spent little time attempting to convince Mark to reconsider his reluctance to accept the plea bargain, despite his belief that there was no substantive defense to the first-degree murder charge. R. at 868, 974. Knight never advised Mark of the precise risk involved in rejecting the State's offer of a life sentence. Indeed, Knight could not have advised Mark meaningfully of this precise risk because, prior to entry of the guilty plea, he had conducted essentially no investigation of the likely aggravating and mitigating circumstances that would be presented at the penalty trial. R. at 824-25, 843-51, 858-59, 977-78.

7. Knight's plan for defending Mark Mikenas was not only flawed in execution, but unreasonably narrow in conception. Knight failed to introduce evidence that Mark had been offered a recommendation of life imprisonment in exchange for a plea of guilty to the murders of Anthony Williams and Vito Mikenas, Jr. Knight also failed to offer evidence that Mark 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.

7. Knight failed to introduce evidence that co-defendant Rinaldi had been indicted for the same charges as Mark and already had gone to trial, had been found guilty on two counts of second degree murder, had received two life sentences, and had parole eligibility within six months. R. at 827. "The jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation of the sentence . . . ." Messer v. State, 330 So.2d 137, 141-42.

8. Knight failed to investigate and elicit testimony from co-defendant Rinaldi that Mark Mikenas did not conceive the attempted robbery, did not own a gun or bring one to the convenience store on November 3, 1975, did not know a gun had been brought to the scene until moments before he entered the store, and never contemplated firing the gun. Indeed, Knight conceded he never met or attempted to meet with Rinaldi. R. at 241-43, 248-49, 252, 265-67, 271-72, 279-80, 957-58.

9. Knight failed to investigate and elicit testimony regarding Mark Mikenas' troubled childhood, his father's alcoholism and absences from home, Mark's love for and protectiveness towards his family, and his grief over the death of Williams and his brother, Vito. R. at 856-57, 1071-72.

10. Knight failed to introduce evidence regarding Mark Mikenas' non-violent nature. Before the evening of November 3, 1975 Mark had never shot a gun. Outside the Army he had never carried a loaded weapon, and as an Army enlisted man, he had refused to fire a gun and was honorably discharged as a conscientious objector. R. at 955-56.

11. Knight made a series of improper, damaging concessions during the penalty trial. For example, he conceded the admissibility of Mark Mikenas'

New York conviction for third degree robbery under the mistaken impression that the crime involved the use or threat of violence. In fact, the conviction was for unarmed robbery, which under New York law is not a crime involving the use or threat of violence. R. at 865-67; Penalty Trial Trans. at 288. In addition, in his closing argument Knight conceded that the New York conviction established the existence of an aggravating circumstance, even though the State had offered no evidence to support such a finding. Penalty Trial Trans. at 486.

12. Knight failed to object to the highly prejudicial closing argument by State Attorney Salcines, failed to move for a mistrial, and failed to request curative instructions. In his summation, the State Attorney improperly argued that Mark should be sentenced to death because Williams was a police officer. This factor was not a statutory aggravating circumstance. Moreover, at the time of the attempted robbery, Mark Mikenas neither knew nor could have known that Williams was a police officer. Penalty Trial Trans. at 466, 469-470, 511.

In Mark Mikenas' case, the "adversarial testing process" did not work. See Strickland v. Washington, 52 U.S.L.W. at 4571. Here the process broke down. Indeed, the enumerated errors are reasonably likely to have tilted Mark Mikenas' sentence from life to death. The fragility of the outcome in this case is apparent from the closeness of the jury's 7 to 5 vote. Had Attorney Knight's representation not been deficient, the advisory jury probably would have recommended life. This is particularly likely since the jury heard testimony of prior criminal history which this Court ruled to be an improper statutory aggravating factor. See Mikenas v. State, 367 So.2d 606 (1978). In the words of one of the jurors: "The vote on the advisory sentence was seven for the death penalty and five for life imprisonment and 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; see also R. at 916.

Furthermore, an attorney whom the judge at the 3.850 hearing ruled to be an expert witness but whose testimony was offered by proffer would have found prejudice even under the more stringent Knight v. State test. Attorney Patrick Doherty was qualified during the 3.850 hearing as an expert witness in the area of competency of counsel in Florida capital cases. If permitted to testify, he would have stated that Knight's representation 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 or two other jurors would have joined the five jurors who voted for life, resulting in an advisory opinion for life instead of death. R. at 947-948. Had the jurors recommended life, their recommendation would have been entitled to great weight. As the facts of this case favoring death are neither clear nor convincing, the sentence would have been life. See Tedder v. State, 322 So.2d 908 (Fla. 1975).

In evaluating ineffectiveness of counsel, "at all times the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is challenged." Strickland v. Washington, supra, 52 U.S.L.W. at 45-73. In this regard, a death sentence weakly supported by the record is more likely to have been infected by error than one with strong record support. Id. at 4572. Can any justice of this Court reflect upon Knight's performance and have confidence in the outcome of the sentencing proceeding?

Knight's gross failure to prepare witnesses resulted in a garbled presentation of certain mitigating evidence. His narrow conception of the defense

prevented the judge and jury from ever hearing the most compelling mitigating evidence. His mishandling of the recusal motion left uncured a problem of judicial bias, though Fla.R.Crim.P. 3.230 itself reflects the prejudice inherent in such a situation by providing for automatic disqualification. For these and all the other reasons already enumerated, this Court can have no confidence in the outcome of Mark Mikenas' penalty trial.

Consider, also, the other unique flaws in this record: Mark's guilty plea entry was tainted by an unconventional Petition for Further Inquiry Into the Circumstances Surrounding the Plea of Guilty; the sentencing judge, whose objectivity was questioned by counsel, issued erroneous fact-finding which resulted in vacation of the death sentence; no new advisory jury was convened, making the resentencing hearing inadequate; and the resentence rested on a variety of lawless findings and considerations. See Appellant's Brief at 46-50.

Add to these errors Knight's failure to provide advocacy for mercy. The only reliable conclusion is that the entire process leading to Mark's death sentence was fundamentally unfair.

Respectfully submitted,

MARK D. MIKENAS

By his attorneys,

Margaret R. Hinkle

Allan van Gestel
Joseph L. Cotter
Margaret R. Hinkle
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Dated: June 2, 1984

L087/P
6/2/84

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Peggy A. Quince, Esq., Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, via first class mail, postage pre-paid, this 2nd day of June, 1984.

Margaret R. Hinkle

Margaret R. Hinkle, Esquire
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700