IN THE SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT MARK D. MIKENAS

INTRODUCTION

In its brief, the State fails to refute Mark Mikenas' showing that his guilty plea was not voluntary and intelligent. The State mischaracterizes Mark Mikenas' position and fails to apply the totality of the circumstances test in examining the infirmities of the guilty plea. The State also fails to address Attorney Knight's Motion for Further Inquiry and thus never even attempts to rebut that the April 12 plea was fatally flawed. The State's argument that Attorney Knight effectively assisted Mark Mikenas with regard to plea negotiations and pleading guilty wholly misses the mark.

The State's attempt to counter the showing that Mark Mikenas was denied effective assistance of counsel is similarly flawed. The State miscites and misstates the law as to burden of proof. Significantly, the State concedes that Attorney Knight's representation was deficient in his failure to follow proper procedures in seeking recusal of the sentencing judge. Moreover, the State totally misconstrues Mark Mikenas' argument with regard to Attorney Knight's failure to have a psychiatrist consult with Mark before his guilty

plea. And the State never even addresses Attorney Knight's failure to prepare the only two witnesses he called in "defense".

The State mistakenly argues that Enmund v. Florida is inapplicable to this case. Carlos v. Superior Court of Los Angeles County, No. L.A. 31487 (Cal. Supreme Ct. Dec. 12, 1983) (copy attached as Appendix), demonstrates that the death sentence here is excessive and disproportionate because Mark Mikenas did not intend to kill Anthony Williams.

The State also erroneously asserts that Mark Mikenas should have raised on direct appeal that the Florida capital sentencing statute made the death penalty more likely for unintentional felony murder than for comparable premeditated murder. Mark Mikenas' claim was not available at the time of direct appeal in 1981 because it flows from the Supreme Court's 1982 decision in Enmund v. Florida, 458 U.S. 783.

The State also errs in arguing that Mark Mikenas raised on direct appeal that the due process clause is violated by Florida procedures for excluding evidence offered by the State to rebut mitigating circumstances not put in issue. True, Mark Mikenas raised on direct appeal the propriety of the sentencing judge admitting evidence of prior criminal history and his entitlement to a new advisory jury after remand. But the due process claim he makes before this Court simply could not have been advanced before the 1981 decision in Mikenas v. State, 407 So.2d 892.

ARGUMENT

I. THE STATE HAS FAILED TO REFUTE MARK MIKENAS' SHOWING THAT THE GUILTY PLEA IS CONSTITUTIONALLY INFIRM

The State's response to the claim that Mark Mikenas' guilty plea was not voluntary and intelligent rests on conclusory assertions unsupported by the

record, the law, or any fair reading of Appellant's brief. The State commits four glaring errors.

First, the State tries to dismiss Mark Mikenas' claim that his mental and physical condition prevented a voluntary and intelligent plea. The State argues that the facts and circumstances reflected in the record are not, standing alone, independently sufficient to vitiate the plea. The State also improperly characterizes Mark's mental state as nervousness and distress resulting from his legal predicament, in order to contrive a basis for reliance on State v. Brest, 421 So.2d 638 (Fla. D.C.A. 1982) and Fluitt v. Superintendent, Green Haven Correctional Facility, 480 F.Supp. 81 (S.D.N.Y. 1979).

The State's argument fails on both grounds. It is beyond contention that the voluntariness of a plea must be determined by "considering all the relevant circumstances." Brady v. United States, 397 U.S. 742, 749 (1970); Williams v. State, 259 So.2d 753, 754 (Fla. D.C.A. 1972). To suggest that every fact and circumstance, standing alone, must be established as independently sustainable is a misstatement of the law. See, e.g., Yesnes v. State, 440 So.2d 628, 634, 635 (Fla. D.C.A. 1983).

Moreover, this case is distinguishable from both Brest and Fluitt. There, the defendants merely presented conclusory, subjective testimony of the expected distress and nervousness of an individual facing criminal prosecution and prison. In this case, the record reflects undisputed objective evidence of the circumstances which affected Mark Mikenas' inability to make an informed, reasoned judgment--his extensive physical injuries and pain, the debilitating influence of medication, his severe mental anguish over the death of his brother, and his extreme desire to shield his parents from the horrors of a graphic trial. The State altogether fails to rebut the showing that at the time of the plea the cumulative effect of these coercive facts and circum-

stances impaired Mark Mikenas' ability to consult with Attorney Knight and to weigh rationally the alternatives available to him.[1]

The State's second glaring error is its response to Mark Mikenas' showing that the record of the plea proceedings failed to demonstrate affirmatively the knowing and voluntary nature of the plea. See Boykin v. Alabama, 395 U.S. 238 (1969). The State relies exclusively upon the litany employed by the sentencing judge during the April 12, 1976 plea hearing, and studiously avoids any reference to the flaws of that procedure revealed by Attorney Knight's Motion for Further Inquiry filed on April 22, 1976. The omission is not surprising--Attorney Knight concedes in the Motion that Mark Mikenas had been unprepared to plead and unaware he would be called upon to enter a plea. As is demonstrated in Appellant's Brief at 8-11, the April 12 hearing was constitutionally deficient for the precise reasons detailed in the Motion. Thus, the State cannot rely on the sentencing judge's questioning on April 12. Nor can the State rely on the May 3, 1976 hearing to validate the earlier hearing. On May 3, the court conducted no inquiry adequate to resolve the doubts cast over the voluntariness of the plea by the Motion for Further Inquiry. See Griffith v. Wyrick, 527 F.2d 109, 113 (1975); Yesnes v. State, 440 So.2d 628, 635 (Fla. D.C.A. 1983).

The State makes a third major error. Mark Mikenas was under the impression that in return for his pleas of guilty and nolo contendere the State would

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/1/ The State asserts without any reference to the record that Mark Mikenas made an informed judgment to plead guilty because he "could and did talk intelligently with counsel about pleading, witnesses, photographs of the bodies, descriptions of the bodies, etc." Appellee's Brief at 14. To the contrary, the record reveals that Mark was severely depressed, withdrawn, could not initiate inquiries to his attorney, and could not even bring himself to talk about the circumstances underlying the indictment and plea. R. at 914-15, 966, 995, 1056-62.

agree to dispense with witnesses at the penalty trial and instead read a stipulated statement of facts. In attempting to explain away the stipulated statement of facts, the State relies solely on testimony of Attorney Knight that the sentencing judge discussed the possibility of stipulating facts with counsel after the April 12 plea hearing. However, the central fact is not when the judge first openly discussed the issue with counsel, but what Mark Mikenas believed at the time of his pleas. The State concedes what the record makes clear--Mark Mikenas believed there would be a stipulation of facts at the penalty trial. Appellee's Brief at 16; see R. at 975-76, 981-83. Because the April 12 plea was fatally flawed, the only proper focus of the inquiry into the plea is the May 3 hearing. On May 3, Mark Mikenas understood that an agreement had been reached with the State regarding a stipulation of facts. R. at 986, 992. This understanding, whether the result of an honest mistaken impression or a failure of a communication, destroys the voluntariness of the plea. See Appellant's Brief at 7-8.

Finally, the State claims that Attorney Knight effectively assisted Mark Mikenas in plea negotiations and in advising him to plead guilty because, given Mark's psychological incapacity to plead guilty to the murder of his brother and his fear of going to trial, a guilty plea was "the only choice available." Appellee's Brief at 21. The State's argument wholly misses the point. At a minimum, Mark was deprived of an adequate investigation of the facts, meaningful advice about the precise risks in pleading guilty, diligent plea negotiation, and effective assistance prior to and during the plea hearings.[2]

/2/ The State obliquely states that Attorney Knight discussed the initial plea bargain with Mark only after Attorney Knight "complet[ed] discovery

(Footnote continued)

Appellant's Brief at 11-16. Mark Mikenas was thereby effectively denied the opportunity to enter the plea intelligently upon the culmination of a rational decision-making process.

II. THE STATE'S ATTACK ON MARK MIKENAS' SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL IS INVALID

The State's attempted rebuttal of Mark Mikenas' showing of ineffective assistance of counsel begins with a disingenuous discussion of burden of proof. The State cites three cases to support its erroneous contention that under Florida law the defendant's burden "is to prove the facts relied upon by strong and convincing evidence." Appellee's Brief at 4. All three cases were decided before Knight v. State, 394 So.2d 997 (Fla. 1981). The only case that actually refers to "strong and convincing evidence," Russ v. State, 95 So.2d 594 (Fla. 1957), concerns a writ of error coram nobis.

Similarly, of the cases supporting the State's assertion that "the Federal Courts have also placed a heavy burden of proof on the Petitioner," two involve delay in filing federal petitions for habeas corpus and thus are inapplicable. The third, Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), repeats the standard established in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), cert. granted, 103 S.Ct. 2451 (1983): the petitioner has the burden of establishing that counsel's representation was deficient and that this deficiency caused the

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/2/ (Footnote continued)

in the case." Appellee's Brief at 6. The "discovery", except for a joint deposition of one witness taken with counsel for Mark Rinaldi, included only the depositions taken by the State the night of the offense and police reports. R. at 816. The important point is Attorney Knight's concession that he did not initiate any significant factual investigation. R. at 824.

petitioner prejudice. With a man's life at stake, it is chicanery at best to argue that, simply because Mark Mikenas bears a burden of proof, his burden is "heavy."

Moreover, applying the prejudice standards of Knight v. State and Washington v. Strickland is improper in this capital case where counsel failed to investigate, prepare, and present mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104 (1982), is instructive. There, the Court considered a death sentence imposed after the sentencer excluded mitigating evidence not expressly provided for in the capital sentencing statute. The Court reversed without considering whether the exclusion had caused the defendant prejudice. It sufficed that the exclusion had the potential to cause him prejudice. The same standard applies here.

Even apart from these fundamental legal errors,/3/ the State's rebuttal of Mark Mikenas' showing of ineffective assistance of counsel is mistaken, misleading, and always beside the point. The State picks through the record seeking scraps to explain Attorney Knight's conduct. But the explanation does not cohere.

The State's treatment of Attorney Knight's failure to seek a psychiatric examination for Mark Mikenas deceptively avoids the issue. The State argues: "Counsel cannot be faulted for continuing to pursue a course when there was no

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/3/ Significantly, the State virtually concedes that Attorney Knight's representation was deficient insofar as he failed to comprehend or follow proper procedures in seeking recusal of the sentencing judge. See Appellant's Brief at 19-21; Appellee's Brief at 29. Standing by itself, that blunder speaks volumes about the skill of Mark Mikenas' lawyer and establishes that Mark did not receive effective assistance of counsel. See Appellant's Brief at 28.

evidence of a problem." Appellee's Brief at 27. However, Attorney Knight himself testified to a grave problem--throughout his representation, Mark Mikenas seemed severely depressed. R. at 914-915. Mark's mental state is evidenced by his rejection of a plea bargain that would have guaranteed him his life, his guilty plea on April 12, 1976, and his subsequent misgiving about the plea leading to the May 3 hearing. In this context, it means nothing that Attorney Knight had discovered that Mark had no prior significant psychiatric history. The material psychiatric condition was Mark's mental state at the time of the shooting of Anthony Williams and at the time of the entry of the pleas. Attorney Knight took no action to professionally test Mark's mental condition--despite Mark Mikenas' severe depression, despite his despair over his brother's death, and despite his wavering about the guilty plea.

The State's argument concerning the conduct of the penalty trial is drawn so thin it shatters upon inspection. Attorney Knight never really focused on how he would execute his idea for a defense, and his conception was far too narrow. See Appellant's Brief at 17-18; 22-24. Indeed, he lacked any idea for a defense until after he had his client plead guilty. See R. at 825. In a capital sentencing, the only possible "defenses" are to defeat the state's proof of aggravating circumstances and to provide as much mitigating evidence as possible. The brief testimony of two witnesses was Mark Mikenas' only "defense." In Doctor Whang, Attorney Knight presented a witness he never even spoke to about the facts before the day of trial, a witness who was totally unprepared, who had appeared on the State's witness list, and who could not present coherently the theory of the defense. And, in Mark Mikenas, Attorney Knight presented a witness who was utterly unprepared and thus utterly disabled from eliciting mercy from judge and jury. The State never even addresses Attorney Knight's failure to prepare these two witnesses.

At the same time that Attorney Knight narrowed the "defense" to the abbreviated presentation of two unprepared witnesses, he failed to use available mitigating evidence. Attorney Knight intended only to attempt to establish one mitigating circumstance--that Mark Mikenas' capacity to conform his conduct to law was substantially impaired at the time of the offense. Penalty Tr. at 404. No strategic decision--no decision at all--was involved in Attorney Knight's failure even to consider offering whole lines of available mitigating evidence. See Appellant's Brief at 23-24. See R. at 825-826 (Attorney Knight never spoke with Mark Rinaldi and did not attend his trial); 858-863 (Attorney Knight did not consider offering Rinaldi's testimony); 873-874 (Attorney Knight did not consider informing the jury about the State's offer to recommend life imprisonment); 875-876 (Attorney Knight did not consider informing the jury about Rinaldi's sentence); 918 (Attorney Knight did not consider offering non-statutory mitigating evidence); 858 (Attorney Knight did not consider testimony that Mark Mikenas had left the Army because of his unwillingness to fire a gun). As a result, this mitigating evidence never came before the jury.[4]

III. THE STATE MISTAKENLY ARGUES THAT ENMUND v. FLORIDA IS INAPPLICABLE TO THIS CASE. TO THE CONTRARY, ENMUND DEMONSTRATES THAT MARK MIKENAS' DEATH SENTENCE SHOULD BE VACATED BECAUSE HE DID NOT INTEND TO KILL

Because Mark Mikenas did not intend to kill Anthony Williams, his death sentence violates the Eighth Amendment. See Enmund v. Florida, 458 U.S. 782

/4/ Other available mitigating evidence that was never presented to the jury included testimonial letters from Mark Mikenas' family, friends and former teachers in Connecticut. The State correctly states these letters were before the sentencing judge. Appellee's Brief at 9. However, the trial judge refused to show them to the jury, R. at 856, 857, 1072, and Knight's failure to present the contents of the letters to the jury was never addressed by the State.

(1982); Appellant's Brief at 31-35. The State presents no effective rebuttal of this point. In Carlos v. Superior Court of Los Angeles County, No. L.A. 31487 (Cal. Supreme Ct. Dec. 12, 1983) (slip opinion attached hereto as Appendix), the Court held the California death penalty statute inapplicable to cases of unintentional murder. In so doing, the Court stated:

> The reasoning of [Enmund] raises the question whether the death penalty can be imposed on anyone who did not intend or contemplate a killing, even the actual killer. The court's analysis of the deterrent and retributive purpose of the death penalty focuses on the subjective intent and moral culpability of the defendant, and in this context there is no basis to distinguish the killer from his accomplice. The threat of capital punishment is unlikely to deter an accidental or negligent killing, and in terms of moral responsibility for an unintended homicide, all participants in the underlying felony would seem equally culpable. Consequently, the question whether the felony murder special circumstance can constitutionally be applied to any defendant, including the actual killer, who did not intend or contemplate a killing appears a substantial and yet unsettled constitutional issue under the Eighth Amendment. Slip. op. at 33-34.

This Court should follow Carlos and decline to uphold a sentence of death upon one who did not intend to kill.

IV. THE STATE ERRONEOUSLY CONTENDS THAT MARK MIKENAS WAIVED HIS CLAIM THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL /5/

The State's assertion that Mark Mikenas waived his attack on the constitutionality of the Florida capital sentencing statute is without substance. The State's response is bewildering: "This is an issue which should have been raised on direct appeal." Appellee's Brief at 31.

/5/ The capital sentencing statute applicable to Mark Mikenas made the death penalty more likely for unintentional felony murder than for comparable premeditated murder and thus violates the Eighth Amendment and the equal protection clause.

The argument that the United States Constitution prohibits a statutory scheme making the death penalty more likely for unintentional felony murder than for comparable premeditated murder is a corollary of the 1982 decision in Enmund v. Florida, 458 U.S. 783, issued after Mark's direct appeal. The State does not--and cannot--argue that Mark Mikenas should have raised on direct appeal his argument in part III of his principal brief. See Appellant's Brief at 31-36. That argument, too, flows from Enmund. To argue that Mark Mikenas has waived the right to make the present argument is inconsistent as well as inaccurate.

The close connection between Enmund and this claim under the Eighth Amendment and equal protection clause becomes clear from the California Supreme Court's discussion in Carlos v. Superior Court of Los Angeles County, supra, slip op. at 34-37:

> If the initiative were construed to impose a penalty of death or life imprisonment without parole for unintended felony murder, it would punish more severely a defendant who did not intend to kill than one who did. Such a distinction would create problems under both the Eighth Amendment and the equal protection clause . . . . The language from Godfrey v. Georgia indicates that the Eighth Amendment requires a 'meaningful basis' (446 U.S. 420, 427), a 'principled way' (p. 433), to distinguish capital from noncapital murders. The equal protection clause may require more. We deal with a classification affecting the express, fundamental right to life itself . . . . [T]he state might have to show that the classification established by the 1978 initiative is necessary to achieve a compelling state interest . . . .
>
> Even under this stringent standard the state may well be able to justify treating a deliberate felony murder as more serious than a deliberate murder unrelated to a felony. But it is doubtful that it could explain treating an unintended felony murder as an offense more serious than willful nonfelony murder. As the Court explained in Enmund, the state's interest in deterrence and retribution does not warrant a death penalty for a defendant who

did not intend to kill . . . and it is difficult to conceive of any other interest that might justify such a result./6/

V. THE STATE WRONGLY ASSERTS THAT MARK MIKENAS RAISED ON DIRECT APPEAL THAT DUE PROCESS IS VIOLATED BY FLORIDA PROCEDURES FOR EXCLUDING EVIDENCE THE STATE OFFERS TO REBUT MITIGATING CIRCUMSTANCES NOT PUT IN ISSUE

In reliance on Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981), Mark Mikenas demonstrated that Florida procedures for excluding evidence offered by the prosecution to rebut mitigating circumstances a defendant has not put in issue violate due process. Appellant's Brief at 43-45. The State's claim that this issue was raised on direct appeal misunderstands the issue. The propriety of the sentencing judge admitting evidence of Mark Mikenas' prior criminal history was raised on direct appeal, as was Mark Mikenas' entitlement to a new advisory jury. However, Mark Mikenas has never before had an opportunity to raise this due process claim because it is a consequence of the 1981 decision in Mikenas v. State, 407 So.2d 892, where this Court explained its remand for resentencing without a jury.

/6/ The decision in Carlos reduces by yet another state the number of states that apply a felony aggravating circumstance as Florida does. See Appellant's Brief at 39-41.

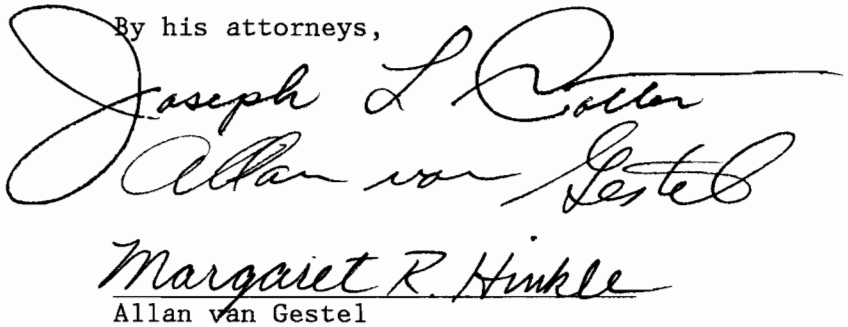
CONCLUSION

For the reasons set forth herein and the reasons set forth more fully in Appellant's Brief, Mark Mikenas' death sentence must be vacated.

Respectfully submitted,

MARK D. MIKENAS

By his attorneys,



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DATED: February 6, 1984

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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, Room 804, Tampa, Florida 33602, via express mail, this sixth day of February, 1984.

Margaret R. Hinkle

Margaret R. Hinkle