Original

IN THE SUPREME COURT OF FLORIDA

71129

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MARK D. MIKENAS,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

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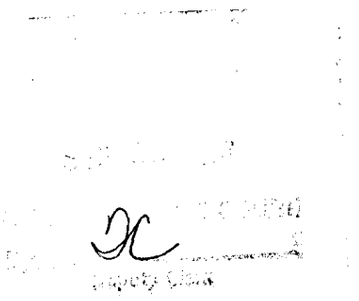


PETITION FOR WRIT OF HABEAS CORPUS

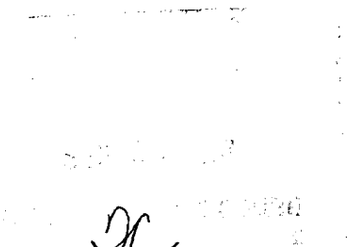
Allan van Gestel
Joseph L. Cotter
Margaret R. Hinkle
Paul E. Nemser
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, MA 02109
(617) 570-1000

ATTORNEYS FOR PETITIONER

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,



1. This is an original action under Fla. R. App. P. 9.100(a). The Court has original jurisdiction pursuant to Fla. R. App. P. 9030(a)(3) and Article V. Sec. 3(b)(7) and (9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The two issues presented were previously ruled upon by this Court in this case. Mikenas v. State, 407 So.2d 892 (Fla. 1981) ("Mikenas II"). See also Mikenas v. State, 460 So.2d 359 (Fla. 1984) ("Mikenas III"). Petitioner requests that this Court revisit the claims in light of errors of constitutional magnitude in the prior treatment of the claims: "[I]n the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled. . . ." Kennedy v. Wainwright, No. 68,264 (Fla. February 12, 1986).

2. The Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, entered the judgment of conviction and sentence under attack.

3. The date of the judgment of conviction is July 1, 1976.

4. The sentence is that Mark Mikenas be put to death by electrocution.

5. Mark Mikenas was charged in two counts of felony-murder, with first-degree murder of Anthony Williams and with second-degree murder of Vito Mikenas, Jr., petitioner's younger brother.

6. Mark Mikenas on advice of court-appointed counsel pleaded guilty to murder in the first degree of Anthony Williams and pleaded nolo contendere to the charge of second-degree murder of Vito Mikenas, Jr. The Court heard Mark Mikenas' guilty plea in proceedings on April 12, 1976, and May 3, 1976.

7. To determine Mark Mikenas' penalty, he was tried before an advisory jury and a judge. By a 7-5 vote, the jury recommended the death penalty, and Mark Mikenas was sentenced to death.

8. Mark Mikenas appealed his death sentence and his conviction for second-degree murder.

9. The facts of Mark Mikenas' appeal are as follows:

(a) On November 9, 1978, this Court affirmed the convictions, but because the trial judge improperly considered a non-statutory aggravating factor, the case was remanded to the trial court for resentencing without further deliberations by a jury. Mikenas v. State, 367 So.2d 606 (Fla. 1978) ("Mikenas I"). Rehearing was denied on March 7, 1979.

(b) On July 31, 1979, Mark Mikenas was resentenced to death by a different judge.

(c) This Court affirmed the second sentence of death on November 5, 1981. Mikenas II, 407 So.2d 892. Rehearing was denied on January 28, 1982.

(d) The Supreme Court of the United States denied a petition for a writ of certiorari on June 1, 1982. 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982).

(e) Mark Mikenas joined in an application for extraordinary relief and a writ of habeas corpus in this Court challenging the Court's practice of reviewing ex parte, non-record information concerning his and other capital appellants' mental health status and personal backgrounds. This Court denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) and the Supreme Court of the United States declined to review that decision by writ of certiorari, Brown v. Wainwright, 454 U.S. 100 (1981).

(f) A clemency hearing for Mark Mikenas was held before Governor Graham and other Cabinet officers on January 24, 1983. As of the date of the filing of this motion, the application for clemency remains pending without action.

(g) A first Motion for Post-Conviction Relief and a Motion to Withdraw Plea were filed on January 24, 1983 in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County. On May 21, 1983, the Motion for Post-Conviction Relief was amended. An evidentiary hearing was held on June 22 and June 23, 1983. On August 17, 1983, another amendment was filed to the Motion for Post-Conviction Relief. On August 30, 1983, the court, without findings or opinion, denied the Motion for Post-Conviction Relief as amended and the Motion to Withdraw Plea. On September 13, 1983, Mark Mikenas filed a Motion for Rehearing. On September 19, 1983, the court, again without opinion, denied the Motion for Rehearing. On September 27, 1983, Mark Mikenas noticed his appeal to this Court. On November 1, 1984, the Court affirmed the denial of the Motion for Post-Conviction Relief and the Motion to Withdraw Plea. Mikenas III, 460 So.2d 359. On November 14, 1984, Mark Mikenas moved for rehearing. On January 3, 1985, the Court denied the motion for rehearing.

(h) On January 7, 1985, Mark Mikenas filed in the United States District Court for the Middle District of Florida a Petition for Writ of Habeas Corpus. On January 23, 1987, proceedings in that action were continued pending the exhaustion of petitioner's remedies in the state courts.

(i) On December 30, 1986, a second Motion for Post-Conviction Relief was filed in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County. On January 16, 1987, the second Motion for Post-Conviction Relief was amended. On February 25, 1987, it was amended once again. That Motion is still pending before Judge Bonnano.

10. Other than the appeals and proceedings described in paragraphs 8 and 9, no other petitions, applications, or motions have been filed on Mr. Mikenas' behalf with respect to his convictions or sentence of death.

11. For reasons set forth in detail below, petitioner Mark Mikenas' sentence was obtained and imposed in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States and those guaranteed by the Florida Constitution.

INTRODUCTORY FACTS

12. On November 3, 1975, Mark Mikenas was arrested and charged with first-degree felony murder of Anthony Williams and with second-degree felony murder of his younger brother, Vito Mikenas, Jr. At arraignment on April 12, 1976, and at a subsequent proceeding on May 3, 1976, petitioner entered a plea of guilty to the charge of first-degree murder and nolo contendere to the charge of second-degree murder.

13. Mark Mikenas had a penalty trial on consecutive days from June 28 through July 1, 1976. The prosecution called 11 witnesses; the defense called the defendant and one other. The jury retired to begin deliberations at 3:25 p.m. on July 1, 1976. At 5:55 p.m., by a 7-5 vote, the jury returned with a recommendation that the judge impose a death penalty. The next morning, the court entered its findings of fact. The court imposed the sentence of death on the first-degree murder charge and life imprisonment on the second-degree murder charge.

14. Evidence introduced at Mark Mikenas' penalty trial showed: On the night of November 3, 1975, Mark Mikenas, his younger brother Vito Mikenas, Jr., and Mark Anthony Rinaldi entered a 7-Eleven store at 5604 North Hesperides in Tampa, Hillsborough County, Florida. They intended to steal from the store because they needed food. An auxiliary deputy sheriff, Gary Barker ("Barker"), had observed Mark Mikenas, his brother, and Rinaldi standing outside the store and had entered the store, alerted Paulette Pearson ("Pearson"), the store clerk, and secreted himself in a back hallway. When the three men entered, only Pearson and Barker were in the store. Five or ten minutes before the robbery began, when the Mikenas brothers

and Rinaldi were across the street from the convenience store, Mark Mikenas learned that his brother had brought a gun and intended to take it into the store. Mark Mikenas then took the weapon from his brother, because his brother had acted rashly on occasion.

The brothers used masking tape to tie up Pearson in the store's back room. Then Vito Mikenas and Rinaldi gathered food and other merchandise. From the cash register, they took about $40. Eventually, Mark Mikenas, Vito Mikenas and Rinaldi attempted to leave the store through the rear. They approached the rear hallway in which Barker was hiding. Barker revealed himself with gun drawn, identified himself as a law officer, and informed the three that they were under arrest. Anthony Williams was in the process of entering the front door of the store to make a purchase, while his wife remained at their car outside, beyond the view of the Mikenas brothers and Mark Rinaldi. Mark Mikenas, Vito Mikenas, and Rinaldi turned to face the front door. Barker called to Williams to get the police. At that point, Mark Mikenas reached for the gun he had inside his jacket. Barker fired a shot at Mark Mikenas. Mark Mikenas fired one shot into the ceiling in Barker's general direction. The Mikenas brothers turned and ran toward the front of the store. Barker shot at them, and Mark Mikenas heard his brother Vito scream and call his name. Barker shot again, and a bullet struck Mark Mikenas in the spine. Because of the wound in his spine, Mark Mikenas was falling to the ground as he came through the door. As Mark Mikenas fell, a shot fired from his gun struck and killed Williams, who was a short distance outside. Mark Mikenas has never had any recollection of the events that occurred after his brother was shot and has no recollection of firing the shot that killed Williams. Vito Mikenas died of his wounds. Mark Mikenas and Rinaldi were placed under arrest.

CLAIM I

MARK MIKENAS WAS SENTENCED TO DEATH IN VIOLATION OF THE CONSTITUTIONAL REQUIREMENT THAT CONSIDERATION MUST BE GIVEN TO EVIDENCE OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

Facts Material to Claim I.

15. In his opening statement at Mark Mikenas' penalty trial, the State Attorney remarked:

> [L]et's talk a little bit about those aggravating and mitigating circumstances that you have heard so much about at the outset of this case during jury selection. These are the circumstances you may consider in determining what punishment to recommend. And I am going to read them to you from the statute, and I would ask you to pay close attention, as you have to everything that has taken place during the course of this proceeding. (Penalty Trial Transcript, 216) ("Tr.")

The prosecutor then went through the list of aggravating circumstances enumerated in the Florida capital punishment statute in order. At the end of that recital, he stated: "Mitigating circumstances that the defense will attempt to show, or that the defense will have the opportunity to show, are that . . .," and went through the list of statutorily prescribed mitigating circumstances in a similar fashion. (Tr. 219).

16. In his closing argument, the State Attorney once again went through the statutory list of aggravating circumstances "one by one." (Tr.457-464). He told the jury he was going to do the same for "the mitigating circumstances," (Tr. 464-465) (emphasis added), and proceeded, as before, to "review them" just as they appeared in the statute. (Tr. 465-469) (emphasis added).

17. In his closing, Mark Mikenas' court-appointed attorney, Robert W. Knight, attempted to raise a non-statutory factor -- Mr. Mikenas' remorse, as indicated by his guilty plea. He reminded the jury that Mr. Mikenas had taken the stand and stated:

> He told you his story. He has no excuses for what he did . . . I think you saw a

> young man who, without making any excuses for him, has done something for which he is responsible, for which he has accepted responsibility, for which he has pleaded guilty. (Tr. 485).

18. Later in his summation, after referring to evidence that he said tended to prove two statutory mitigating circumstances, Attorney Knight returned to the theme of remorse. He once again called the jury's attention to "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 statutes. But one that I think you are entitled to consider." (Tr. 491).

19. Immediately after Attorney Knight completed his closing argument, the judge instructed the jury regarding the part that mitigating factors should play in their deliberations. He stated that, "[t]he mitigating circumstances which you may consider if established by the evidence are these," (Tr. 495), and proceeded to go through the statutory mitigating circumstances one by one. The judge made no reference to the non-statutory factor put forward by Mr. Mikenas' counsel. (Tr. 495).

20. After the jury, by a 7-5 vote, recommended that Mark Mikenas receive the death penalty, Attorney Knight asked the judge before passing sentence to consider "that this defendant standing before you has entered his free and voluntary plea, a plea of guilty, and has thrown himself by that plea upon the mercy of the Court." (Tr. 510).

21. In his findings of fact in support of the death penalty, the judge found that the only statutory mitigating factor present was Mr. Mikenas' youth. His findings did not refer to the non-statutory mitigating factors asserted by Mr. Mikenas' counsel.

22. At the resentencing hearing held before a different judge after this Court remanded the case, the judge refused to impanel a new advisory jury and relied explicitly on the

recommendation of the jury at the penalty trial. Resentencing Hearing Transcript at 99-100. Although Mr. Mikenas' new counsel was permitted to introduce more extensive evidence regarding non-statutory mitigating circumstances than had been introduced at the penalty trial, in the court's written findings of fact, where the judge listed the items he considered, there is no indication that he gave any consideration to any non-statutory mitigating factors. Findings of Fact In Support of the Death Penalty, July 31, 1979. See also Mikenas II, 407 So.2d at 893-94.

Argument Relating to Claim I.

23. The decision of the United States Supreme Court in Hitchcock v. Dugger, 481 U.S. ___, 95 L.Ed.2d 347 (1987), mandates that Mark Mikenas be given a new sentencing hearing before a new advisory jury. In Hitchcock, the Supreme Court, based on its "examination of the sentencing proceedings actually conducted," Id, 95 L.Ed.2d at 352, held that sentencing proceedings that paralleled those afforded Mark Mikenas were constitutionally deficient because they violated the Court's earlier edict that," in capital cases, 'the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.'" Id., 95 L.Ed.2d at 350, quoting Skipper v. South Carolina, 476 U.S. ___, 90 L.Ed.2d 1,6 (1986).

24. The Supreme Court's examination of the record before it in Hitchcock showed that, just as at Mark Mikenas' penalty trial, counsel for the defendant introduced evidence pertaining to non-statutory mitigating factors at the penalty phase and, in his closing argument, urged the jury to look at that evidence along with evidence pertaining to statutory factors. Id., 95 L.Ed.2d at 352-353.

25. As at Mark Mikenas' trial, the efforts of the counsel for the defendant in Hitchcock to put evidence pertaining to non-statutory mitigating factors before the jury were undercut

by the judge and the prosecutor. The prosecutor in his closing told the jury that it was "to consider the mitigating circumstances and consider those by number" and went down the statutory list item by item. Id., 95 L.Ed.2d at 353. The judge, in his charge, instructed the jury regarding mitigating circumstances in almost exactly the words used by the judge at Mark Mikenas' hearing. He stated that, "[t]he mitigating circumstances which you may consider shall be the following" and then proceeded, like the judge who sentenced Mark Mikenas, to recite the mitigating factors set out in the statute. Id.

26. After the jury recommended the death penalty by a majority vote, counsel for the defendant in Hitchcock urged the judge to take into account the defendant's family background and capacity for rehabilitation. The judge refused, stating that he was required to apply the facts only to those circumstances set out in the statute. In his findings in support of the death sentence he imposed, the only mitigating circumstance he found was a statutory one, the defendant's youth. Id.

27. In light of that record, the Supreme Court stated: "[W]e think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ___, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978)." Hitchcock, 95 L.Ed.2d at 353. The Court noted that those cases "hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid." Id. It therefore vacated Hitchcock's sentence and remanded the case for a resentencing hearing at which such evidence might be given due consideration.

28. Because its "examination of the sentencing proceedings actually conducted" in Hitchcock showed that the sentencing judge assumed that evidence pertaining to non-statutory mitigating factors could not be considered, the Supreme Court

did not reach the question of whether such consideration was prohibited by Florida law at the time of Hitchcock's trial in 1976. "We do note, however, that other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of non-statutory mitigating circumstances." Id. at 352.

29. This Court has held that it is "required by [the] Hitchcock decision to re-examine" claims such as those asserted by Mark Mikenas here "as a new issue of law." Thompson v. Dugger, Nos. 70,739 and 70,781, slip op. at 3 (Fla. September 9, 1987). In four instances, the Court has vacated death sentences where the record showed that the court and the prosecution together left the jury with the impression that it could consider only statutory mitigating circumstances, and where the jury was instructed either in the same words used at Mark Mikenas' trial or in the "substantially similar" language employed in Hitchcock. Downs v. Dugger, No. 71,100, slip op. at 5 (Fla. September 9, 1987). See also Thompson v. Dugger, Nos. 70,739 and 70,787 (Fla. September 9, 1987); Riley v. Wainwright, No. 69,563 (Fla. September 3, 1987); Morgan v. State, 12 Florida Law Weekly 433 (Fla. August 27, 1987).

30. This Court has further ruled that because of the central role of the jury in the Florida sentencing scheme, error of the sort found in Hitchcock and at Mark Mikenas' trial can only be cured by a new sentencing proceeding before a new advisory jury. Riley v. Wainwright, No. 69,563, slip op. at 4-5 (Fla. September 3, 1987). Significantly, the Court has held that where, as in Mark Mikenas' case, the jury's recommendation of death is by a 7-5 vote, the improper exclusion of evidence of non-statutory mitigating factors from the jury's consideration can never be harmless error and a vacation of the death sentence is required. Morgan, 12 Florida Law Weekly at 434.

31. The constitutional infirmities resulting from the improper jury instructions at Mark Mikenas' trial could not have been cured by any new resentencing hearing that did not take place before a new and untainted advisory jury. Magill v. Dugger, No. 85-3820, slip op. at 33-35 (11th Cir. July 28, 1987) (because of crucial role of jury in Florida sentencing scheme, improper jury instructions regarding mitigating circumstances render the entire sentencing process constitutionally infirm, regardless of any consideration given by the sentencing judge himself to non-statutory factors). Those infirmities were not cured by the hearing Mr. Mikenas received after his case was remanded for resentencing. Not only did the judge not convene a new jury, but he also relied explicitly upon the recommendation of the earlier, tainted jury. See id., slip op. at 33 (where, in re-imposing sentence, resentencing judge specifically relied on original jury's recommendation, it cannot be said that errors at penalty phase had no effect on re-imposition of sentence). Moreover, although the resentencing judge did allow the presentation of evidence of non-statutory mitigating factors, he did not give that evidence serious independent consideration -- indeed, he did not give it any weight at all. Mikenas II, 407 So.2d at 893-94. This Court's cases since Hitchcock make it clear that the "mere presentation" of evidence of non-statutory mitigating factors is not enough to meet the requirements of Lockett v. Ohio, 438 U.S. 586 (1978). Downs, No. 71,100, slip op. at 4; Riley, No. 69,563, slip op. at 7. Serious independent consideration is required. McCrae v. State, 12 Florida Law Weekly 310 (Fla. June 18, 1987).

32. From the record in Mark Mikenas' case, it "could not be clearer" that the errors that infected Hitchcock's trial, and those of the others whose sentences have been vacated since Hitchcock, were present at his trial also. He is, therefore, entitled to a new sentencing hearing before a new advisory jury.

CLAIM II

THE FAILURE TO RECOGNIZE MARK MIKENAS' RIGHT TO EXCLUDE EVIDENCE DESIGNED TO REBUT MITIGATING FACTORS HE DID NOT INTEND TO CLAIM WAS A VIOLATION OF DUE PROCESS.

Facts Material to Claim II.

33. In his opening statement at Mark Mikenas' penalty trial, the State Attorney, after describing for the jury the evidence he said would prove the existence of aggravating circumstances, listed the mitigating circumstances "that the defense will attempt to show, or that the defense will have the opportunity to show." (Tr. 219). First among those mitigating circumstances was no significant history of prior criminal activity. The prosecutor remarked that that mitigating circumstance was not present in the case. He stated that not only had Mr. Mikenas been convicted of a robbery in New York, but that there were "numerous warrants" outstanding for his arrest for other offenses. "So," the prosecutor concluded, "he does have a significant history of prior criminal activity." (Tr. 220).

34. After the State had put on its first three witnesses, but before the State had offered any evidence concerning Mark Mikenas' prior criminal history, the trial court, in light of the State Attorney's opening statement, asked the State to proffer in a summary fashion "the basic aggravating circumstances in the way of charges or convictions" that it planned to introduce, in order that Mr. Mikenas' lawyer might "make any objection he deems advisable, so he would have a standing objection to it for the purposes of the record." (Tr. 283). In response to that request, the State described in considerable detail the witnesses it intended to call and the testimony they were expected to give regarding prior criminal activity. The State Attorney's proffer indicated that there would be evidence relating not only to Mark Mikenas' one conviction for robbery, but also to several warrants that had been sworn out against him in his home state of Connecticut, to various

juvenile court adjudications in that state and to his arrest for shoplifting in Florida in October, 1975. The State Attorney, in conclusion, made no reference to mitigating circumstances, but instead contended that the instances of criminal behavior he had just described, "are all part of the aggravating circumstances of this case, and . . . they tend to show several of the key aggravating circumstances." (Tr. 283-286).

35. After the State had made its proffer, the trial court asked Robert W. Knight, Mark Mikenas' court-appointed counsel, if he wished to make any objections for the record in view of that proffer. Mr. Knight objected to the evidence pertaining to warrants being put before the jury, since that evidence did not, and could not, demonstrate the aggravating circumstance of prior crimes of violence beyond a reasonable doubt, as required by the statute. (Tr. 288). He objected further to evidence regarding the shoplifting charge, which the prosecutor had referred to for the first time in his proffer. Attorney Knight noted that shoplifting was not a crime of violence, and therefore, "according to the rules, should only be presented in rebuttal, should the defendant claim that he has no significant criminal history." (Tr. 289). Attorney Knight continued:

> Once a defendant makes that assertion that he has no significant criminal history, then evidence of other crimes, crimes other than those of violence or other than capital-felonies, would be admissible to rebut. But until the predicate is laid by the defendant, or the claim is made by the defendant, that he has no prior criminal history, I do not think the evidence of a crime such as shoplifting is properly before the jury.

(Tr. 289-90).

36. Following Attorney Knight's objection, the trial judge asked the State Attorney about an offense he had referred to in his proffer that Mark Mikenas had allegedly committed in August, 1975, but for which no warrant had ever issued. The State Attorney responded that he was going to introduce

evidence concerning that offense on the premise that the Florida capital punishment statute permits the use of "any evidence that has probative value," so long as it is not in violation of the constitution and the defendant is given an opportunity to rebut any hearsay. (Tr. 290).

37. At the conclusion of the State Attorney's remarks, the trial court overruled Attorney Knight's objection. He did, however, allow Attorney Knight "to have a standing objection for the purpose of the record in any further appeal in this matter." (Tr. 291).

38. When the state resumed the presentation of its case, the jury heard evidence of Mark Mikenas' prior criminal history from five of its remaining eight witnesses. Two witnesses testified about Mr. Mikenas' arrest and conviction for shoplifting. (Tr. 324-36). Another testified with regard to various non-violent crimes committed by Mr. Mikenas when he was a juvenile and to a non-violent burglary for which a warrant was issued for Mr. Mikenas' arrest. (Tr. 336-57). Another witness testified concerning two bank robberies in Connecticut, only one of which resulted even in the issuance of a warrant. As was the case with the burglary, Mark Mikenas was never tried for or convicted of either of the robberies. (Tr. 369-87).

39. Mark Mikenas testified on his own behalf at his penalty trial, but made no attempt to claim lack of a prior criminal history or to put his background in issue in any way. Indeed, his testimony consisted entirely of stating his age and describing the events that occurred the night Anthony Williams was shot. (Tr. 421-24). Nevertheless, the prosecution was permitted to inquire on cross-examination into the details not only of the robbery conviction but also of the shoplifting charge and a juvenile conviction for non-violent auto theft. (Tr. 429-46).

40. In closing argument, the State Attorney recounted the statutory mitigating circumstances, none of which, he claimed, applied. The State Attorney remarked that Mark Mikenas could not say he had no significant history of criminal activity, in light of the evidence that had been introduced to show that he was "seasoned in criminal activity" and had "a life of crime by his own volition." (Tr. 465).

41. In his instructions to the jury, the judge at Mark Mikenas' penalty trial stated that:

> The mitigating circumstances which you may consider if established by the evidence are these.
>
> That the defendant has no significant history of prior criminal activity. As number one.

(Tr. 495).

42. After the jury at Mark Mikenas' penalty trial voted 7-5 to recommend that he be sentenced to death, the trial judge issued his findings concerning aggravating and mitigating circumstances. He listed among the aggravating circumstances: "(F) that the defendant, Mark Mikenas has a substantial history of prior criminal activity." The judge accepted the jury's recommendation and sentenced Mark Mikenas to death. (Tr. 512-13).

43. Following the imposition of the sentence, Mark Mikenas appealed to this Court, claiming, inter alia, that evidence of his prior criminal history had been put before the jury in violation of the Florida capital punishment statute. The Court did not address the issue directly but remanded for resentencing without further deliberations by a jury. Mikenas I, 367 So.2d at 610.

44. Before Mark Mikenas was resentenced to death, his counsel objected to the lack of a jury, once again arguing that the jury's recommendation at the penalty trial was marred by the jury's improper exposure to the evidence concerning Mark's prior criminal record. After the resentencing, Mark raised the

same issue before this Court. This time the 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 II, 407 So.2d at 893.

45. In July, 1981, four months before its decision on Mark Mikenas' second appeal, this Court held in Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981), that the defendant at the penalty trial for a capital felony has a right to exclude evidence offered to rebut 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 and stated that:

> 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. Furthermore, the jury should not be advised of the defendant's waiver. In instructing the jury, the court should exclude the waived mitigating circumstance from the list of mitigating circumstances read to the jury, and neither the State nor the defendant should be allowed to argue to the jury the existence or the nonexistence of such mitigating circumstance.

Id. at 978.

46. In June, 1986, this Court reaffirmed the validity of Maggard in Fitzpatrick v. Wainwright, No. 65,785 (Fla. June 26, 1986). At the trial of that case, "the court had permitted the state to present defendant's juvenile arrest record to the jury in its sentencing phase case-in-chief, including descriptions of the conduct leading to the arrests. Defense counsel had

moved to exclude such evidence, representing to the court that the defendant would not seek to rely on the lack of a criminal record as a mitigating factor. Thus the question of the propriety of the state's anticipatory rebuttal was raised before the trial court and was available for argument on appeal." Fitzpatrick v. Wainwright, No. 65,785, slip op. at 2. Appellate counsel neglected to raise this ground of appeal. In a habeas corpus proceeding, this Court held that counsel's omission constituted ineffective assistance of counsel and that "allowing anticipatory rebuttal of the mitigating circumstance was error under Maggard v. State." Id. at 3.

47. Mark Mikenas raised the issue of improper anticipatory rebuttal of mitigating circumstances once again in his appeal to this Court from the denial of his first Motion for Post-Conviction Relief. The Court refused to consider the issue, stating that it had previously been raised on direct appeal, and therefore was not cognizable through collateral attack. Mikenas III, 460 So.2d at 361.

Argument Relating to Claim II.

48. The Court's decisions in Maggard and Fitzpatrick recognize that the defendant at the penalty phase of a capital trial in Florida has the right to exclude a virtually unlimited variety of nonstatutory aggravating matter and to insist upon proof of aggravating circumstances beyond a reasonable doubt. That right follows logically from the well-established principle of Florida law that a death sentence may not be based upon consideration of nonstatutory aggravating factors. See Mikenas I, 367 So.2d at 610. To permit the state to offer evidence in "rebuttal" of mitigating factors not at issue would have the effect of converting the negative of any mitigating factor into a nonstatutory aggravating factor. 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 could introduce in "rebuttal" of anticipated mitigating evidence. Moreover, anticipatory rebuttal evidence used as a nonstatutory aggravating factor 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 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

49. When read in conjunction, the combined implication of Maggard, Fitzpatrick and Mikenas II is that, in order to exercise the right to exclude anticipatory rebuttal evidence, a defendant must follow a procedure that in 1976 was 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 start of the penalty trial. Mark Mikenas, of course, had no notice of this procedure at the time of his penalty trial. A novel procedural requirement imposed by this Court five years after that trial, and then only tacitly, should not be permitted to prevent Mark Mikenas' vindication of his rights under Florida law. See NAACP v. Alabama, ex rel. Patterson, 357 U.S. 449, 457-58 (1958).

50. Despite their lack of notice of the procedural requirements, Mark Mikenas and his counsel did all that they might reasonably have been expected to do to exclude the anticipatory rebuttal evidence concerning a mitigating circumstance they had no intention of claiming. Although the prosecutor made a general reference to such evidence in his opening statement, he did not inform Attorney Knight of the details concerning that evidence until the time of his proffer. Even then, both the State Attorney and the trial judge appear to have been uncertain as to whether that evidence

was going to be introduced in an effort to establish, improperly, an aggravating circumstance or to rebut a mitigating one. See paragraph 34. Once the nature of the State's evidence became clear, however, and it became apparent that the evidence concerning the shoplifting charge and the juvenile adjudications bore no conceivable relationship to any aggravating circumstance, Attorney Knight objected to the introduction of that evidence in words very similar to those that the Court used five years later in Maggard. See paragraph 35. It is clear that the trial judge understood the objection Attorney Knight was making and the reasons for it; indeed, the judge anticipated the objection and prescribed the form it should take so as to preserve Attorney Knight's right to raise the issue on appeal. See paragraphs 34 and 35. Because the objection Attorney Knight made alerted the trial court to both the fact of his challenge to the State's evidence and the reasons for it, see Alburquerque v. Bara, 628 F.2d 767, 773 (2d Cir. 1980), consideration of Mark Mikenas' rights under Maggard should "not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964).

51. Maggard in effect recognizes that the introduction of evidence of a nonstatutory aggravating circumstance on the pretext of rebutting a mitigating circumstance that is not in issue is likely to be a "crucial, critical, highly significant factor" in the penalty phase of any capital trial. See Bryson v. Alabama, 634 F.2d 862 (5th Cir. 1981). At Mark Mikenas' trial, before he was sentenced to death by a 7-5 vote, not only was extensive evidence introduced to rebut the uninvoked and unrelied-on mitigating circumstance of no significant criminal history, but the prosecution called the jury's attention to that circumstance in both its opening and closing statements, see paragraphs 33 and 40, and the judge instructed the jury

concerning it, see paragraph 41, all in violation of the principles laid down in Maggard, 399 So.2d at 978. To deny to Mark Mikenas the benefit of this Court's holding in Maggard under such circumstances would be to deprive him of his right to "fundamental fairness" and to due process of law under the Fourteenth Amendment, Hicks v. Oklahoma, 447 U.S. 343 (1980), and to impose the death penalty on him in a "wanton" and "freakish" manner, in violation of the Eighth Amendment, Furman v. Georgia, 408 U.S. 238, 310 (Stewart, J., concurring) (1972).

CONCLUSION

For the foregoing reasons,the Court should vacate Mark Mikenas' sentence of death and remand this case for a new sentencing hearing before a new advisory jury.

MARK D. MIKENAS

By his attorneys,

Margaret R. Hinkle

Allan van Gestel
Joseph L. Cotter
Margaret R. Hinkle
Paul E. Nemser
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, MA 02109
(617) 570-1000

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