IN THE SUPREME COURT OF FLORIDA

MARK MIKENAS, Petitioner, v. RICHARD L. DUGGER, Secretary, Department of Offender Rehabilitation, State of Florida, Respondent.	)	Case No. 71,129

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent by and through the undersigned assistant attorney general and responds to the habeas petition as follows:

I.

Petitioner was charged by indictment on November 5, 1975 with first degree murder for the shooting death of Anthony Williams, an off-duty police officer. He pled guilty to the murder and an advisory jury was impaneled on the issue of penalty. The defense presented two witnesses, Dr. Choong Jin Whang and the defendant. The defense attorney testified at an evidentiary hearing that he was prepared to present the defendant's mother and father to testify concerning his character and background. However, the parents did not want to testify when the time came to do so.

The advisory jury recommended a sentence of death, and the trial judge imposed such a sentence. On direct appeal, this Court vacated the death sentence and remanded for resentencing without further jury deliberations.

At resentencing in 1979, the defense requested the impanelling of a new advisory jury. The motion was denied, and the court's ruling was affirmed on appeal. At the pretrial hearing before resentencing, it was clearly stated by the trial judge that the defendant could present any evidence at the resentencing. The defense attorney stated at the resentencing hearing

that mitigating evidence was not limited to the factors enumerated in the statute. The defense presented three additional witnesses; Dr. Mark B. Lefkowitz, Dr. Sidney J. Merin, both psychologists and John Burciaga, a unitarian minister. These witnesses testified concerning nonstatutory mitigating evidence.

The argument made by the defense attorney covered both statutory and nonstatutory mitigating factors. She argued, consistent with arguments made by defendant's prior attorney in 1976, the defendants age, the acceptance of responsibility by the defendant's guilty plea, the fact that the crime was not especially heinous, atrocious or cruel and the fact that this was not a crime of malice as evidenced by the defendant being shot himself at the time his gun discharged. Counsel in addition argued against the death penalty per se. She went through a recital of cases involving robbery/murders where the defendants received life sentences. Counsel at length discussed petitioner's three years on death row, his ability to function and adjust to prison life and his potential for rehabilitation.

Before pronouncing sentence the trial judge heard from the defendant also. He explained that contrary to the prosecutor's inference, he did have mental anguish on behalf of the wife and child of the officer.

Prior to imposing sentence the trial judge said:

> "As I stated earlier, I have throughly reviewed the transcript of the testimony. I have reviewed the presentence investigation, the various letters directed to the Court by friends and family of Mr. Mikenas. I have heard the argument of counsel, and the Court finds the aggravating circumstances greatly outweigh the mitigating circumstances in this particular case."
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> (Record of Resentencing, p.309)

II.

The habeas petition filed by Mikenas raises the sole issue of whether he is entitled to relief under Hitchcock v. Dugger, 481 U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). In Hitchcock, the United States Supreme Court held the death

sentence cannot be imposed in a proceeding where the trial judge bars consideration of nonstatutory mitigating evidence or the sentencer refuses to or is precluded from considering any relevant mitigating evidence.

III.

Respondent submits Hitchcock is not applicable to this case since the sentencer, the trial judge, heard and considered nonstatutory mitigating evidence. At the original sentencing hearing the trial judge in fact gave the standard penalty phase instructions, which was a listing of all the statutory aggravating and mitigating circumstances without regard to which ones were applicable. The instructions did not include the catch-all instruction concerning any other aspects of the defendant's character. Defense counsel in his argument to the jury told the court to consider the fact of the defendant having accepted the responsibility of his action by pleading guilty. Counsel also argued both the defendant's testimony and Dr. Whang's testimony demonstrated the shooting was reflexive and not one of malice. It was additionally argued that the lack of the heinous, atrocious or cruel aspect of the crime was mitigation.

After argument, the instructions indicated above were given. There was no objection to the instructions, and no request for additional instructions. (Record in Case No. 49,928 at p.500). It is axiomatic that a party may not argue in the appellate courts the giving or failure to give a particular jury instruction unless there has been a proper objection in the trial court. See, Rule 3.390(d), Fla. R. Crim. P. Absent an objection at the time of sentencing, there has been a procedural default under Wainwright v. Sykes, 433 U.S. 72 (1977). Hitchcock does not preclude consideration of procedural default since that issue was never raised in either state or federal court in Hitchcock.

Respondent submits there was no cause for the default at the trial level. While Lockett v. Ohio, 438 U.S. 586 (1978) had not been decided at the time of petitioner's initial trial, there was

case law in this State which recognized the importance of non-statutory mitigating evidence and could have been used to support an objection at sentencing. See, Antone v. Strickland, 706 F.2d 1534, 1538 (11th Cir. 1983). In December, 1975 this Court decided Halliwell v. State, 323 So.2d 557 (Fla. 1975). The defendant in Halliwell brutally beat the husband of his lover after the husband had beaten the wife. This Court outlined the mitigating evidence thusly:

> In mitigation the record shows no prior arrests and that Appellant was a highly decorated Green Beret in Special Forces in the Vietnam war. Police officers testified he was under emotional strain over the mistreatment of Sandra by the victim and that Appellant was greatly influenced by her. There is testimony that she had attempted suicide, that she had rushed to him previously for help in martial conflicts, and that he cancelled diving instruction trips when she was in trouble.

(Ibid at 561).

Clearly, nonstatutory mitigating evidence was presented and this Court considered it in the weighing process. See also, Messer v. State, 330 So.2d 137, 141 (Fla. 1976) where this Court held the nonstatutory mitigating evidence of the co-defendant's plea bargain for 30 years should have been allowed at sentencing.

In addition to no cause being demonstrated there was no prejudice in this particular case. The defendant in his motion under Rule 3.850, Fla. R. Crim. P., presented the issue of non-statutory mitigating evidence as an ineffective assistance of counsel claim. Trial counsel discussed at the evidentiary hearing the absence of presentation of character mitigating evidence. Counsel had investigated and was prepared to present such evidence through the parents of the defendeant. When it was time to present such evidence, the witnesses did not want to testify. Neither counsel's nor the court's interpretation of the statute prevented this evidence from going before the jury. Darden v. Wainwright, 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed.2d 144, 160 (1986).

IV.

The court in Hitchcock left open the harmless error argument, and this Court acknowledged such claims in Delap v. Dugger, 12 F.L.W. 417 (Fla. 1987, Opinion filed October 8, 1987). The harmless error principle is applicable in this case since the defendant had a resentencing where the sentencer both heard and considered nonstatutory mitigating evidence. Petitioner was given a new sentencing hearing without a jury. Prior to the new sentencing hearing the court said:

> ". . . I am not prohibiting counsel at the time of resentencing that you present whatever you like, as you would in any other resentencing or any other sentencing case . . . as long as it's admissible under the rules, et cetera, I have never objected to allowing information brought to the Court at the time of sentencing."

(Record of Resentencing, p.245).

It was abundantly clear that any mitigating evidence could be presented at this new hearing.

That this was the case was made clear during the examination of one of the defense psychologists. Mark B. Lefkowitz, a psychologist, testified concerning petitioner's psychological make-up. He stated petitioner was an antisocial personality who could benefit from the structure of prison life. When defense counsel asked Dr. Lefkowitz a wide open question concerning mitigatintg factors, the prosecutor objected saying there had been no indication the doctor was familiar with the statutory aggravating and mitigating circumstances. Defense counsel responded with, "Judge; we're not limited by statutes to those specified mitigating circumstances and my question was does he know of any psychological mitigating factors." The trial judge overruled the state's objection. (Resentencing, p.271).

The defense not only presented the testimony of Dr. Lefkowitz but also Dr. Sidney Merin. Both testified concerning petitioner's adjustment to prison structure and how petitioner could benefit from a life sentence. Additionally, a minister testified about Mikenas and the death penalty in general. Before pronouncing sentence the trial judge indicated those things he

considered in his sentencing decision, i.e., prior sentencing testimony; presentence report; letters from friends and family and argument of counsel which included the mitigating factors offered by the three witnesses. Although some of this evidence was not rehashed in the sentencing order, it is clear from the judge's statement that the evidence was considered. (Record of Resentencing, p.309). The trial judge again in the opening paragraph of the sentencing order states the testimony, reports etc. he considered in sentencing. (Record of Resentencing, p.185). The court simply found the evidence did not amount to a mitigating factor. See, Floyd v. State, 497 So.2d 1211 (Fla. 1986) wherein this Court held the trial judge does not have to give proffered mitigating the weight desired by the defendant as long as he considers the evidence.

V.

Respondent is aware of the Court's recent decisions in Riley v. Wainwright, 12 F.L.W. 457 (Fla. Sept. 3, 1978); Thompson v. Dugger, 12 F.L.W. 469 (Fla. Sept. 9, 1987) and Downs v. Dugger, 12 F.L.W. 473 (Fla. Sept. 9, 1987); however, it is submitted that these cases should be revisited as they go far beyond the scope of the Supreme Court's Hitchcock decision. Both Hitchcock and Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) are based on the fact that the trial judge, the sentencer under Florida law, believed they could not consider nonstatutory mitigating evidence. And in McCrae v. State, 510 So.2d 874, 880 (Fla. 1987) this Court in ordering a new sentencing hearing said, ". . ., we find that the trial judge who sentenced appellant to death did not believe he was obliged to receive and consider evidence pertaining to nonstatutory mitigating factors." The Eleventh Circuit in Elledge v. Dugger, 823 F.2d 1439, 1448-9 (11th Cir. 1987) further emphasized the focus must be on the sentencer.

The sentencer in this case both received and considered nonstatutory mitigating evidence.

VI.

Petitioner is also attempting to relitigate an issue which was raised and disposed of on his prior direct appeals, the use of prior criminal record to rebut a mitigating factor not claimed. This Court on direct appeal reversed and remanded for resentencing because the trial judge used petitioner's criminal history as an aggravating circumstance. Mikenas v. State, 367 So.2d 606 (Fla. 1979). On appeal from resentencing the subject of prior criminal history was again discussed. The claim of the improper admission of the evidence was decided thusly in Mikenas v. State, 407 So.2d 892 (Flqa. 1982)

> In this case, the evidence itself was not improper, only the manner in which it was considered by the 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.
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> (text at p.893).

That ruling is still applicable and is the law of the case.

The defendant in Maggard v. State, 399 So.2d 973 (Fla. 1981) was granted relief because he expressly waived any reliance on the mitigating circumstances of no signifcant criminal history. No such waiver was made in this case. While defense counsel alluded to the standard to be applied in these circumstances, no waiver was made.

Based on the foregoing arguments, Respondent requests habeas relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Alan van Gestel, Esquire, Joseph L. Cotter, Esquire, Margaret Hinkle, Esquire, Paul E. Nemser, Esquire, GOODWIN, PROCTOR & HOAR, Exchange Place, Boston, MA 02109, this 26th day of October, 1987.

OF COUNSEL FOR RESPONDENT