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Robert Beeler Power, Jr. v. State of Florida

8 PLEASE BE SEATED. 9

GOOD MORNING. 10 WE ARE ON POWER VERSUS STATE. 11 YOU MAY PROCEED. 12

GOOD MORNING, MAY IT PLEASE THE COURT MY NAME IS 13 RACHEL DAY. 14 I AM HERE ON BEHALF OF APPELLATE ROBERT BEELER POWER 15 JUNIOR, WHO APPEALS THE DENIAL OF HIS RULE 3.850 MOTION 16 FOLLOWING AND EVIDENTIARY HEARING IN THE CIRCUIT COURT 17 IN ORLANDO. 18 THIS IS OF COURSE A CAPITAL CASE. 19 NOW THE ORDER ISSUED BY THE LOWER COURT NOTICED THAT AT 20 THE EVIDENTIARY HEARING, MR. POWER HAD PRESENTED A 21 WEALTH OF VERY, VERY COMPELLING MITIGATION, BOTH MENTAL 22 HEALTH MITIGATION AND MITIGATION TO DO WITH HIS 23 APPALLING FAMILY BACKGROUND. 24

NOT TO INTERRUPT YOU, BUT CAN YOU TELL US WHAT ISSUES 25 YOU'RE GOING TO ADDRESS IN THE LIMITED TIME SNUFF. 26

WHAT I'M GOING TO ADDRESS, THE REASON THAT THE COURT 53 1 DID NOT GRANT RELIEF TO THESE VERY COMPELLING MITIGATION 2 WAS THAT SHE FOUND THAT THERE WAS A VALID WAIVER OF THE 3 MITIGATION BY MR. POWER. 4 MR. POWER --. 5

SO YOU'RE GOING TO ADDRESS THE COMPETENCY OF COUNSEL 6 ISSUE? 7 NOT PRESENTING THE MITIGATION EVIDENCE, IS THAT CORRECT? 8

THAT IS CORRECT. 9 MR. POWER SUBMITS THAT THAT'S DIRECT SUPPORT, THE FACT 10 THERE WAS NO WAIVER, AND THAT THE COURT WAS IN ERROR IN 11 FINDING THAT. 12 AND THAT MR. BLANKNER, THE TRIAL ATTORNEY WAS 13 INEFFICIENT FOR NOT REALIZING THERE WAS NO WAIVER. 14

WHAT WAS THE PURPOSE OF HAVING THESE HEARINGS WITH 15 THE JUDGE AND THE DEFENDANT? 16 AND THE DEFENSE COUNSEL? 17 WAS THE FOCUS OF THAT TO DISCUSS MITIGATION AND 18 PRESENTING MITIGATION AND THE DEFENDANT'S VIEW OR 19 ATTITUDE TOWARDS THAT? 20 TELL ME ABOUT THOSE, HOW THEY CAME ABOUT. 21

I ASSUME THE COURT, CHIEF JUSTICE IS REFERRING TO THE 22 INCAMERA HEARINGS THAT OCCURRED BETWEEN THE GUILT PHASE 23 AND PENALTY PHASE. 24

WERE THERE TWO OF THOSE? 25

YES, YOUR HONOR, THERE WERE. 26

WHAT WERE THE PURPOSE OF THOSE? 54 1

WHAT HAPPENED WAS THIS, THE CONFERENCE TO DO WITH 2 SOME OTHER ASPECT. 3 I THINK THE PRESENTATION OF THE MEDICAL EXAMINER'S 4 EVIDENCE BY THE STATE. 5 AND DURING THE FIRST HEARING, DURING SUCH HEARING WHICH 6 WAS HELD IN JULY 1990, WHICH WAS ABOUT A MONTH AFTER THE 7 GUILT PHASE, COUNSEL FOR THE STATE RAISED A CONCERN ON 8 THE RECORD THAT TRIAL COUNSEL FOR MR. POWER WAS NOT 9 DOING SUFFICIENT TO PREPARE FOR THE PENALTY PHASE. 10 COUNSEL FOR THE STATE INDICATED THAT HE HADN'T RECEIVED 11 A WITNESS LIT, HE WAS PARTICULARLY CONCERNED THIS CASE 12 MIGHT COME BACK ON

COLLATERAL MATTERS, BECAUSE COUNSEL 13 WASN'T DOING ENOUGH TO INVESTIGATE THE PENALTY PHASE. 14 SO WHAT TRANSPIRED THAT COUNSEL FOR THE STATE FEELING 15 THAT COUNSEL FOR THE DEFENSE HAD NOT DONE ENOUGH 16 INVESTIGATION, HE HAD SENT HIS OWN INVESTIGATOR OUT TO 17 START COLLECTING RECORDS, WHICH IS WHAT SHE DID. 18 SHE WENT OUT AND GOT RECORDS FROM MR. POWER'S SCHOOL 19 RECORDS. 20 SHE GOT SOME RECORDS FROM MR. POWER'S PRE-INCARCERATION 21 IN CALIFORNIA. 22 SHE GOT JAIL RECORDS. 23 A NUMBER OF RECORDS. 24 AND THOSE RECORDS WERE TURNED OVER BY MR. LEONARD TO THE 25 DEFENSE ATTORNEY. 26 BUT THE SECOND THING MR. LEONARD, THE PROSECUTOR DID, HE 55 1 SUGGESTED BECAUSE CERTAIN RECORDS SUGGESTED MR. POWER 2 HAD HAD A HISTORY OF PUFFING GASOLINE AS A CHILD, THERE 3 MIGHT BE SOME BRAIN DAMAGE ISSUES AND HE ASKED ON BEHALF 4 OF THE STATE FOR AN MRI EXAMINATION TO BE DONE. 5 AND AN EEG EXAMINATION TO BE DONE. 6 HE ALSO THEN SUGGESTED THAT MAYBE THE COURT AND 7 MR. BLANKNER AND MR. POWER SHOULD HOLD INCAMERA 8 INSPECTION TO FULLY DETERMINE WHERE THEY'RE GOING. 9 AT THAT HEARING, -- HEARING, MR. BLANKNER THE TRIAL 10 ATTORNEY EXPRESSED TO THE COURTS THE VIEW THAT MR. POWER 11 DID NOT WANT TO PRESENT MITIGATION, FAMILY MEMBER 12 MITIGATION. 13 HE DIDN'T SPECIFY ANY OTHER SORT. 14 HE DIDN'T WANT TO PRESENT FAMILY MEMBERS. 15 DIDN'T SPECIFY WHICH FAMILY MEMBERS, EXTREMELY VAGUE. 16 MR. POWER THOUGHT THAT THE PRESENTATION OF SUCH 17 MITIGATION MIGHT BE AN ADMISSION OF GUILT. 18

THAT'S DIFFERENT THAN SOME CASES WHERE DEFENDANT SAYS 19 THAT THEY DON'T WANT TO SUBJECT THEIR FAMILY MEMBERS TO 20 THIS PROCESS. 21 I MEAN MR. POWER, IT SEEMS IN A VERY, VERY LENGTHY 22 DISCUSSION THE COURT HAD ABOUT YOU'RE PUTTING YOURSELF 23 IN A VERY HAZARDOUS POSITION, JUST KEPT ON ADHERING TO 24 THE POSITION THAT HE FELT THAT THIS WOULD SOMEHOW BE AN 25 ADMISSION TO GUILT. 26 AND THIS IS THE DEFENDANT THAT'S HAD PRIOR CONVICTIONS. 56 1 WE ARE NOT TALKING ABOUT SOMEBODY THAT IS NEW. 2 SO HOW IS THIS, WHAT YOU'RE SAYING, THIS ALL WASN'T A 3 VALID WAIVER, BUT THAT'S NOT THE -- THIS ISN'T THE 4 DIRECT APPEAL. 5 WHAT WE ARE REALLY LOOKING AT, HOW WAS THE DEFENSE 6 COUNSEL, WHAT DID THE DEFENSE COUNSEL DO THAT WAS 7 FUNCTIONING BELOW? 8

I THINK IT COMES TO A HEAD AT THE TIME OF THE SECOND 9 INCAMERA HEARING, WHICH WAS HELD IN OCTOBER 199, THREE 10 WEEKS BEFORE THE PENALTY PHASE. 11 WHEN IT TRANSPIRED, THAT MR. POWER, MR. POWER, THAT 12 THERE WERE MORE RECORDS WHICH MR. POWER HAD NOT YET 13 RECEIVED BECAUSE THEY REQUIRED A VALID RELEASE FOR 14 MEDICAL RECORDS FROM CALIFORNIA. 15 MR. POWER HAD HAD TWO PSYCHIATRIC HOSPITALIZATIONS IN 16 CALIFORNIA AND THE RECORDS THERE OBVIOUSLY WERE GREAT 17 SIGNIFICANCE. 18 MR. POWER ON THE RECORD AGREED TO SIGN A MEDICAL 19 RELEASE. 20 AND HE GAVE THAT TO HIS ATTORNEY, WHO WENT OUT TO 21 CALIFORNIA AND GOT THE MEDICAL RECORDS AND BROUGHT THEM 22 BACK. 23 BUT THEN AT THE BEGINNING OF THE PENALTY PHASE, TRIAL 24 COUNSEL SAID HE'D NEVER READ THEM. 25 AND THESE RECORDS ARE GOLD IN TERMS OF POTENTIAL 26 MITIGATION. 57 1 BOTH IN AND OF THEMSELVES AND MATERIALS THAT SHOULD HAVE 2 BEEN SUPPLIED TO A MENTAL HEALTH EXPERT. 3

WAS THERE A DOCTOR GUTMAN AND A DOCTOR MERIN INVOLVED 4 IN THIS CASE IN SOME FASHION? 5

YES, THERE WERE, THERE WAS A DR. GUTMAN WHO CONDUCTED 6 A COMPETENCY EVALUATION NEARLY THREE YEARS PREVIOUSLY TO 7 THE CAPITAL TRIAL. 8

WAS THE HUFFING AND THE ALLEGED BRAIN DAMAGE 9 SOMETHING THAT OCCURRED AFTER THAT EXAMINATION? 10

NO, THE HUFFING AND BRAIN DAMAGE -- THE HUFFING 11 OCCURRED WHEN MR. POWER WAS A CHILD STARTING WHEN HE WAS 12 TEN OR 11 YEARS OLD. 13

IS THAT NOT SOMETHING THAT WOULD HAVE DISCLOSED 14 ITSELF OR HAD IT BEEN IN THAT SITUATION, AT LEAST TO 15 PROFESSIONALS, WHO WERE THEN SEEN BY DOCTORS GUTMAN AND 16 MERIN. 17

THE COMPETENCY EVALUATION, NOT NECESSARILY. 18

DOCTOR MERIN SOMEBODY. 19

BRAIN DAMAGE DOES NOT SHOTS ON A COMPETENCY EXAM? 20

NOT NECESSARILY. 21 BRAIN DAMAGE NEEDS TO BE TERMED BY A NEUROPSYCHOLOGICAL 22 EVALUATIONS, BY SPECIALLY DESIGNED TEST TO SEE IF 23 PARTICULAR PARTS OF THE BRAIN ARE FUNCTIONING. 24 AND THAT WAS NEVER DONE. 25

ARE THERE OBJECTIVE SYMPTOMS THAT ONE MAY FIND DURING 26 PSYCHOLOGICAL EXAMINATIONS, EVEN THOUGH ONE IS NOT A 58 1 NEUROPSYCHOLOGIST, THAT WOULD INDICATE MENTAL HEALTH 2 ISSUES OR PROBLEMS THAT NEED TO BE EXPLORED FURTHER? 3

REALLY, A COMPETENCY EVALUATION IS A FAIRLY GROSS 4 INSTRUMENT. 5 IT IS EXAMINING VERY SPECIFIC ISSUES, WHETHER THE 6 INDIVIDUAL MEETS THE STANDARD FOR COMPETENCY. 7 IT WOULDN'T HAVE NECESSARILY FOUND ANY INDICATION OF 8 ORGANIC BRAIN DAMAGE. 9 I THINK THE TESTIMONY OF MR. MERIN, IS CLEAR, EVEN A 10 BRAIN SCAN, MRI DOES NOT NECESSARILY RULE OUT BRAIN 11 DAMAGE OF CERTAIN FORMS. 12 YOU HAVE TO HAVE NEUROPSYCHOLOGICAL TESTING. 13 AND THIS IS WHAT DOCTOR MERIN RECOMMENDED TWO YEARS 14 PREVIOUSLY. 15

DID THE TRIAL LAWYER TESTIFY THAT HE WANTED THE 16 DEFENDANT EXAMINED BY AN MENTAL HEALTH EXPERT BUT THE 17 DEFENDANT WOULD NOT COOPERATE? 18

WELL, WHAT HE SAID WAS THAT THE DEFENDANT SAID HE 19 WOULD NOT COOPERATE. 20 BUT THAT, SO THAT HE NEVER HIRED ONE. 21 NEVER CONSULTED WITH ONE. 22 NEVER SUPPLIED RECORDS TO ONE. 23 I MEAN, THERE ARE MANY DEFENDANTS ONE TIME OR ANOTHER 24 TEND TO SAY THEY DON'T WANT TO COOPERATE WITH MENTAL 25 HEALTH EXAMINATIONS. 26 THEY ARE NOT PLEASANT PROCEDURES. 59 1 HE NEVER HIRED ONE, NEVER CONSULTED ONE, NEVER TOOK ONE 2 TO JAIL TO SEE IF MR. POWER WOULD COME OUT OR NOT. 3 THAT NEVER HAPPENED. 4

DID HE CONSULT WITH THE PRIOR MENTAL HEALTH EXPERTS 5 THAT HAD EXAMINED THE DEFENDANT IN THESE PRIOR CASES? 6

HE SAID THAT HE HAD TALKED IMMEDIATELY PRIOR TO THE 7 PENALTY PHASE, WHICH IS LEAVING IT VERY, VERY LATE. 8 HE SAID HE HAD TALKED TO DOCTOR HANGER, WHO HAD 9 EVALUATED MR. POWER VERY PRELIMINARILY THREE YEARS 10 PREVIOUSLY. 11 THE EVALUATION WAS EXTREMELY PRELIMINARY AND HE 12 RECOMMENDED A BATTERY OF OTHER TESTING THAT NEEDED TO BE 13 FOLLOWED UP. 14

HE SAID HE DID NOT TALK TO ME. 15 DOCTOR CANKER SAID HE WOULD HAVE MADE HIMSELF AVAILABLE 16 HAD HE BEEN ASKED TO COME DOWN. 17 HE DID NOT TALK TO ME. 18

WHAT ABOUT THE ISSUE IN TERMS OF PRESENTING THE 19 TESTIMONY OF THE MOTHER AND OTHER FAMILY MEMBERS? 20 WHAT DOES THE RECORD SHOW US AS FAR AS THE DEFENDANT'S 21 ATTITUDE TOWARDS PRESENTING THEIR TESTIMONY? 22

IT -- ABOUT THE SEXUAL ABUSE AND THE OTHER 23 MITIGATION? 24

IT SHOWS US THAT MR. POWER'S ATTITUDE WAS EXTREMELY 25 AT MOST AMBIVALENT RATHER

THAN OUTRIGHT WAIVING. 26 WEIGH SAID WAS, THAT YES HE HAD TOLD HIS MOTHER NOT TO 60 1
TALK TO TRIAL COUNSEL. 2 HE DIDN'T TELL ANYONE ELSE NOT TO TALK TO TRIAL COUNSEL. 3 IT
IS NOTICEABLE TRIAL COUNSEL DIDN'T TALK TO A NUMBER 4 OF FAMILY MEMBERS WHO HAD
VERY COMPELLING MITIGATION, 5 THE SISTER, THE BROTHER, THE OTHER BROTHER, DAVID
WHITE. 6

WHAT WAS THE ATTORNEY'S EXPLANATION FOR NOT TALKING 7 TO THE PEOPLE? 8

WOULD BE THAT ROBERT WOULDN'T LET ME PUT IT ON 9 ANYWAY. 10

DID THE DEFENDANT REALLY SAY THAT? 11 ISN'T THERE A STATEMENT BY THE DEFENDANT
WHERE HE SAYS 12 THAT HE TOLD HIM I DIDN'T WANT TO PRESENT THESE 13 WITNESSES? 14 AND I
ASKED HIM NOT TO SPEAK TO HER REGARDING MY CASE OR 15 MY PAST? 16

HE IS NOT SPECIFIC ABOUT WHICH WITNESSES HE DID NOT 17 WANT TO TALK ABOUT. 18

HE DIDN'T SAY A PARTICULAR WITNESS, HIS MOTHER, HE 19 SAID THEM. 20 HE DID NOT WANT TO
PRESENT THOSE WITNESSES. 21

IT WAS NEVER VERY CLEAR WHICH WITNESSES THOSE 22 WITNESSES WERE, FIRST OF ALL. 23
SECOND OF ALL YOU HAVE TO TAKE THAT STATEMENT IN THE 24 CONTEXT OF THAT HEARING. 25
WEIGH SAID AFTER THAT IN THAT HEARING. 26 HE SAID WE HAVE NEVER SAT DOWN AND TALKED
ABOUT WHAT 61 1 WOULD BE SAID AND WHAT WOULDN'T BE SAID. 2 HE HAS NEVER BEEN TOLD
WHAT THE MOTHER IS GOING TO BE 3 ASKED ABOUT, AND WHAT SHE IS NOT GOING TO BE ASKED
4 ABOUT. 5 HE'S NEVER BEEN TOLD WHAT THE LIKELY CROSS-EXAMINATION 6 OF THE MOTHER IS
GOING TO BE. 7 HE TELLS THE TRIAL COURT THAT HE DOESN'T KNOW THAT. 8

WHAT WOULD THE MEDICAL -- WHAT WOULD THE MEDICAL 9 RECORDS, THE SCHOOL RECORDS,
ASIDE FROM THE TESTIMONY OF 10 THE WITNESSES, WHAT TYPE OF SCHOOL RECORDS, I MEAN
WHAT 11 KIND OF MITIGATION? 12

AT THE EVIDENTIARY HEARING, SHE SAID THE SCHOOL 13 RECORDS SAID THIS IS SOMEBODY WHO
ISN'T IN ONE SCHOOL 14 VERY LONG AT ALL. 15 HE IS HAVING A TERRIBLE TIME, HE IS BEING
MOVED AROUND 16 THE PLACE, WITH NO STABILITY. 17 HE'S GOT BAD RESULTS. 18 YOU KNOW,
THERE ARE PROBLEMS IN THE FAMILY. 19

AGAIN WE EARLIER HEAR ABOUT MENTAL RETARDATION. 20

IT IS NOT A MENTAL RETARDATION. 21

BECAUSE THIS SEEMS TO BE A FAIRLY SOPHISTICATED 22 DEFENDANT. 23 HE DIDN'T TESTIFY IN
THE EVIDENTIARY HEARING BUT IN THE 24 RESPONSES HE GIVES IN THE COLLOQUY, THIS IS NOT
STRIKE 25 ME AS SOMEBODY THAT IS AGAIN, I GUESS I GO BACK TO 26 SOMEBODY THAT IS AN
UNSOPHISTICATED PERSON, THAT DIDN'T 62 1 KNOW WHAT HE WAS DOING. 2

HE IS MENTALLY ILL. 3 HE IS NOT MENTALLY RETARDED. 4 THERE IS A BIG DIFFERENCE. 5 HE IS
SOMEBODY SUFFERING FROM SEVERE MAJOR RECURRENT 6 DEPRESSION. 7 TRIAL COUNSEL DIDN'T
INVESTIGATE THE REASONS WHY THIS 8 MAN WAS PURPORTEDLY WAIVING MITIGATION. 9 HE
SAID ON MEAN OCCASIONS THROUGHOUT HIS TESTIMONY AND 10 DEPOSITIONS, THERE IS
SOMETHING WRONG WITH THIS MAN, 11 HE'S GOT MENTAL PROBLEMS, HE IS PAR MADE, HE
DOESN'T 12 TRUST ANYBODY, HE DOESN'T TRUST HIS COUNSEL. 13 HE CEASE SOMETHING IS
WRONG AND HE ADMITS IT. 14 YET HE DOESN'T DRAW THE LINE AS TO WHY THIS MAN IS DOING 15
THIS EXTREMELY IRRATIONAL THING. 16 THE OTHER THING ROBERT POWER SAYS IN THAT
HEARING, HE 17 SAYS I WANT TO SIT DOWN AND EVALUATE THE EVIDENCE. 18 WOULDN'T IT BE
PRUDENT TO SIT DOWN AND LOOK AT WHAT'S 19 AVAILABLE, WHAT'S MITIGATING, WHAT'S NOT

MITIGATING? 20 HE SAYS THAT, WOULDN'T IT BE PRUDENT TO GET THE 21 PROSECUTOR AND THE DEFENSE ATTORNEY TOGETHER TO SIT 22 DOWN? 23

DOES THE DEFENSE ATTORNEY TESTIFY THAT HE TOLD THE 24 DEFENDANT THAT WITHOUT SOME TYPE OF MENTAL MITIGATION 25 THAT THIS WAS SURELY GOING TO BE A DEATH PENALTY RESULT? 26

I BELIEVE HE DID SAY THAT. 63 1 OBVIOUSLY THE JUDGE TOLD HIM THAT TOO. 2 BUT IT'S AN IRRATIONAL DECISION ON BEHALF OF MR. POWER. 3 AND. 4

WHY IS IT IRRATIONAL? 5

BECAUSE HE'S -- ESSENTIALLY IF HE UNDERSTANDS WHAT 6 HAS BEEN SAID TO HIM, HE IS CHOOSING TO DIE. 7 IT IS NOT A RATIONAL DECISION. 8

I MEAN WE HAVE A LOT OF CASES WHERE PEOPLE WAIVE THE 9 PRESENTATION OF MITIGATION. 10 FOR VARIOUS DIFFERENT REASONS. 11

AND IN 1988, THIS DEFENDANT WAS EXAMINED BY 12 DR. GUTMAN, AND YOU'RE TRYING TO PRESENT TO US SOMEBODY 13 SO IRRATIONAL OR ILLOGICAL, OBVIOUSLY HAS DEEP 14 PSYCHIATRIC PROBLEMS, BUT YET DR. GUTMAN EVALUATED HIM 15 AND SAID IN 1988 THAT HE WAS LOGICAL, RATIONAL, 16 REASONABLE, HAD A GOOD UNDERSTANDING OF THE CASE, WAS 17 ABLE TO MAKE DECISIONS, WAS ABLE TO COMMUNICATE WITH THE 18 JUDGE AND HAD HIS ATTORNEYS AND WAS THEREFORE COMPETENT. 19

WELL THAT WAS COMPETENCY IN 1988. 20 AND COMPETENCY AS WE ALL KNOW CHANGES ACCORDING TO 21 WHETHER THERE IS A PRESENCE OR ABSENCE OF MENTAL 22 ILLNESS. 23 EVIDENTIARY HEARING, MR. POWER PRESENTED THE TESTIMONY 24 OF THREE DOCTORS, ALL TESTIFIED THE KIND OF DEPRESSION 25 MR. POWER SUFFERED FROM WAS EPISODIC, CYCLICAL. 26 HE HAS SEVERE MAJOR RECURRENT EPISODES. 64 1

IF HE WAS THAT CHRONICALLY DEPRESSED AT THE TIME THAT 2 IT WAS GOING ON, THEN IS IT YOUR POSITION THAT THAT 3 WOULD NOT HAVE BEEN APPARENT IF NOT OBVIOUS TO A TRIAL 4 JUDGE? 5

YES. 6 THAT'S ENTIRELY MY POSITION BECAUSE THAT WAS THE 7 TESTIMONY OF DOCTOR HYDE, DOCTOR KANG AND FELDMAN. 8 DOCTOR FELDMAN TESTIFIED IN GREAT DETAIL, SOME PEOPLE 9 ARE VERY, VERY GOOD AT CONCEALING THEIR DEPRESSION. 10 DEPRESSED PEOPLE DO NOT WALK ABOUT WITH A LABEL ON THEIR 11 BACK SAYING I WANT TO KILL MYSELF. 12 THEY HIDE IT. 13 IT MANIFESTS ITSELF AS OTHER SYMPTOMS, SUCH AS 14 IRRITABILITY. 15 SUCH AS INABILITY TO MAKE DECISIONS. 16 THIS IS CLEARLY SOMETHING THAT MANIFESTED. 17 HE WAS FLIP-FLOPPING ABOUT, WHETHER TO ACCEPT MITIGATION 18 OR NOT. 19

COULD YOU EXPLAIN, YOU SAID THAT THERE WAS A TIME IN 20 THAT LAST HEARING WHERE THEY WERE TALKING ABOUT 21 OBTAINING RECORDS FROM CALIFORNIA. 22 AND IT DOES LOOK THAT THE DEFENDANT SAID LET'S OBTAIN 23 THOSE RECORDS. 24 AND YOU SAID THE DEFENSE ATTORNEY NEVER LOOKED AT THE 25 RECORDS? 26

HE NEVER LOOKED AT THOSE RECORDS. 65 1

WHAT ARE IN THOSE RECORDS? 2

IN THOSE RECORDS ARE RECORDS OF SUICIDE ATTEMPT WHILE 3 IN PRISON IN CALIFORNIA. 4 IT GIVES A DETAILED HISTORY OF MR. POWER'S PSYCHIATRIC 5 HISTORY, INCLUDING SUICIDE

ATTEMPTS STARTING AT AGE TEN. 6 IT GIVES A DETAILS OF HIM BEING IN AND OUT OF MENTAL 7 HOSPITALS, BEING MEDICATED WITH ELAVIL AND LITHIUM. 8

WHAT IS HIS EXPLANATION FOR NOT HAVING REVIEWED THOSE 9 RECORDS AND TALKED TO THE DEFENDANT? 10

HE SAID ON THE RECORD, THE BEGINNING OF THE PENALTY 11 PHASE, I HAVEN'T HAD TIME TO LOOK AT THEM. 12

I SEE MY TIME IS UP SO I'D LIKE TO DEFER FOR 13 REBUTTAL. 14

THAT'S FINE. 15

THANK YOU. 16

. 17

MAY IT PLEASE THE COURT, GOOD MORNING, MY NAME IS 18 DOUGLAS SQUIRE. 19 I REPRESENT THE APPELLEE, THE STATE. 20 I GUESS TO START WITH THE INCAMERA PROCEEDINGS. 21 IN THE FIRST PROCEEDING, IT'S CLEAR THAT THE TRIAL COURT 22 EXPLAINED VERY CAREFULLY THE MITIGATION. 23 ITS RELEVANCE, THE FACT HE HAD ALREADY BEEN FOUND GUILTY 24 AND THAT THERE WAS AT LEAST ONE AGGRAVATOR ALREADY IN 25 THE RECORD AND HE SHOULD HEED THE ADVICE OF HIS COUNSEL 26 TO PRESENT MITIGATION. 66 1 AND COUNSEL HAD OPENED THE HEARING AND PRIOR TO THIS 2 HEARING, WAS ON THE SAME DAY, JULY 12, THE HEARING THAT 3 THE STATE HAD ON ITS MOTION TO HAVE A NEUROLOGICAL EXAM 4 CONDUCTED ON THE DEFENDANT. 5 AND THE DEFENDANT WAS IN ATTENDANCE AT THAT HEARING. 6 AND THE INCAMERA HEARING WAS, ACCORDING TO BLANKNER, THE 7 TRIAL COUNSEL, AT HIS REQUEST. 8 AND THEN HE INTRODUCED THE HEARING BY STATING THAT HIS 9 CLIENT WAS PROHIBITING HIM FROM PURSUING MITIGATION. 10 AND THAT WAS THE EXPLANATION FOR NOT FOLLOWING UP ON 11 FILING ANY DISCOVERY AND HE HAD MOVED AT THE BEGINNING 12 OF THE TRIAL FOR --. 13

WHY DOES THE STATE ASK FOR THE NEUROLOGICAL 14 EXAMINATION? 15

THE STATE ATTORNEY BELIEVED THAT THIS WAS SOME 16 ATTEMPT IN MANEUVERING ON THE DEFENSE'S PART BY NOT 17 PURSUING DISCOVERY SO ANY POSSIBLE DEATH PENALTY LATER 18 COULD BE ATTACKED ON THAT BASIS. 19 SO STATE DECIDED TO INVESTIGATE IT ON THEIR OWN AND 20 FILED THOSE DOCUMENTS WITH THE COURT AND WITH THE 21 DEFENDANT. 22 AND IN FACT, DEFENSE ATTORNEY'S BILL SHOWS THAT HE 23 RECEIVED THE CALIFORNIA RECORDS AND I BELIEVE THEY WERE 24 ALMOST THE ENTIRE RECORDS, I DON'T KNOW THAT EVIDENTIARY 25 HEARING EVER DISCLOSED THE ACTUAL DIFFERENCE BETWEEN THE 26 CALIFORNIA RECORDS OBTAINED UNDER SUBPOENA BY THE STATE 67 1 AND THE CALIFORNIA RECORDS THAT WERE OBTAINED BY THE 2 PRIVATE INVESTIGATOR HOFFMAN WHEN HE WENT TO CALIFORNIA 3 LATER. 4 I DON'T KNOW THAT THERE WAS ANYTHING THAT DISTINGUISHED 5 THE TWO. 6 THOSE RECORDS WERE COPIED AND IT'S IN THE ATTORNEY'S 7 BILL AND PROVIDED TO POWER IN THE JAIL FIVE DAYS LATER. 8 AND THIS WAS ALL IN JUNE, MONTHS BEFORE THE PENALTY 9 PHASE. 10

IN THE ATTORNEY'S BILL THAT THE READING AND REVIEW OF 11 THOSE RECORDS? 12

FOUR AND A HALF HOURS, YES. 13

FOUR AND A HALF HOURS OF READING AND REVIEWING. 14

YES, SIR. 15

WHAT ABOUT YOUR STATEMENT YOUR OPPONENT ALLUDES TO AT 16 THE BEGINNING OF THE

PENALTY PHASE WHERE SHE SAYS THE 17 LAWYER SAYS THAT HE DID NOT EXAMINE THOSE RECORDS? 18

IF I UNDERSTOOD YOUR OPPONENT, DURING HER DIRECT 19 PRESENTATION, SHE SAID THAT THE DEFENSE LAWYER AT THE 20 BEGINNING OF THE PENALTY PHASE PROCEEDINGS ALLUDED TO 21 THOSE RECORDS FROM CALIFORNIA, BUT SAID HE HAD NOT READ 22 THOSE RECORDS. 23

I HAVE SEEN THAT IN THE, I THINK IT IS VOLUME 21 OR 24 22. 25 THAT BLANKNER TESTIFIED BOTH WAYS. 26 THAT HE HAD REVIEWED THEM AND HE ALSO TESTIFIED THAT HE 68 1 HAD NOT REVIEWED THEM. 2 SO EVEN IF HE HAD NOT REVIEWED THEM, IT HAS NEVER BEEN 3 ESTABLISHED WHAT DIFFERENCE THERE WAS BETWEEN THE TWO 4 SETS OF CALIFORNIA RECORDS. 5 THERE WAS -- HE DID TESTIFY HE KNEW ABOUT THE SUICIDE 6 ATTEMPTS. 7 HE KNEW THE DEFENDANT WAS ON ANTIDEPRESSANTS. 8 HE PRETTY MUCH KNEW ALL OF THE INFORMATION HE HAD SPOKEN 9 WITH THE PSYCHIATRISTS HIMSELF IN CALIFORNIA OVER THE 10 TELEPHONE. 11 HE HADN'T ACTUALLY GOTTEN THE RECORDS BECAUSE THE 12 DEFENDANT WAS REFUSING TO SIGN THE RELEASE. 13

WHAT INFORMATION DID HE GET FROM THOSE PSYCHIATRISTS 14 IF CALIFORNIA? 15

EXCUSE ME? 16

WHAT INFORMATION DID HE OBTAIN FROM THE PSYCHIATRISTS 17 IN CALIFORNIA? 18

HE WANTED TO KNOW WHAT THEY REMEMBERED OF THE 19 INCIDENT, IF THEY REMEMBERED ANYTHING. 20 WOULD THEY BE WILLING TO COME TO FLORIDA AND PARTICIPATE 21 IN THE DEFENDANT'S MITIGATION? 22 AND HE SAID THAT HE DID BELIEVE HE COULD GET THEM TO 23 COME OUT HERE. 24 GOT TO BE REMEMBERED THAT THE REASON HE AVOIDED 25 MARACONGAS, HE DECIDED -- STARTED TO REPRESENT THE 26 OSCEOLA RAPE CASE AND FOUR JUVENILE VICTIMS. 69 1 IN THAT CASE, APPARENTLY THE PD OFFICE USES A SCANNER, 2 THE NIGHT OF POWER'S ARREST, BECAUSE THESE WERE SUCH 3 HIGH PROFILE CLAIMS, THE PUBLIC DEFENDER WAS TOLD TO GO 4 MEET POWER AT THE JAIL THAT NIGHT OR THE NEXT MORNING. 5 AND I BELIEVE DAN PERRY WAS ASSIGNED TO REPRESENT POWER 6 FOR THE MURDER CASE. 7 WELL PERRY WANTED TO GO FORWARD WITH DEVELOPING A 8 POSSIBLE INSANITY DEFENSE, SO HE CONTACTED, DOCTOR 9 MARACONGUS (ph) AND ACCOMPANIED HIM TO THE JAIL TO DO A 10 BRIEF EXAM OF THE DEFENDANT. 11 IT WAS RIGHT AFTER THAT EXAMINATION THAT DAN PERRY 12 CALLED DENAKEY AND TOLD HIM POWER HAD ADMITTED TO THE 13 CRIME. 14 POWER TESTIFIED DAN PERRY HAD CONTACTED HIM ONCE HE WAS 15 APPOINTED TO THE CASE AND TOLD HIM POWER HAD ACTUALLY 16 ADMITTED TO THE MURDER CRIMES, THE DOCTOR MARAKONGA. 17 AND HE WASN'T GOING TO USE HIM EXCEPT AS A LAST RESORT 18 IF HE COULD GET POWER TO WAIVER ON TISSUE ALLOWING HIM 19 TO PUT FORTH AN EXPERT. 20

WAS THERE SOME EXPLANATION WHY DEFENSE COUNSEL DIDN'T 21 PRIVATELY CONSULT WITH MENTAL HEALTH EXPERT TO ADVISE 22 HIM IN THE PREPARATION OF THE MITIGATION CASE IN THIS 23 CASE? 24

IT'S CLEAR IN HIS TESTIMONY THAT HE REPEATEDLY SOUGHT 25 POWER TO ALLOW HIM TO HAVE SOME EXAM BY A PSYCHIATRIST 26 AND POWER REFUSED. 70 1 HE BELIEVED UNDER THE CASE LAW --. 2

NOT TALKING ABOUT HAVING HIS CLIENT EXAMINED 3 NOW. I AM TALKING ABOUT THE LAWYER CONSULTING WITH 4 A MENTAL HEALTH EXPERT, THAT IS, AND SAYING HERE IS 5 THE KIND OF CLIENT I GOT, HERE ARE RECORDS THAT I 6 HAVE, AND EVERYTHING THAT SHOWS THIS, AND NOW, 7 WHAT WOULD YOUR EVALUATION BE? 8 IN OTHER WORDS, CONSULTING WITH AN EXPERT SHORT OF 9 HAVING THE EXPERT EXAMINE HIS CLIENT. 10 WAS THERE SOME EXPLANATION BY THE LAWYER OF WHY UNDER 11 ALL THESE CIRCUMSTANCES, OF ALL THESE -- OBVIOUSLY 12

VOLUMINOUS, THIS MENTAL HEALTH BACKGROUND AND SEXUAL 13 ABUSE ON THIS DEFENDANT WHEN HE WAS A CHILD. 14 THE HOSPITALIZATIONS. 15 BUT WAS THERE SOME EXPLANATION BY THE LAWYER OF WHY HE 16 HIMSELF DIDN'T CONSULT WITH A MENTAL HEALTH EXPERT? 17

YEAH. 18

AND WHAT IS THAT EXPLANATION? 19

STARTED, HE BELIEVED THAT HE WAS BOUND BY THE RULES 20 OF ETHICS. 21 THAT IF HE HAD A COMPETENT DEFENDANT, WHO WANTED TO 22 WAIVE MITIGATION, HE HAD TO HONOR THAT DEFENDANT'S RIGHT 23 TO WAIVE MITIGATION. 24 THERE WAS NO CASE LAW AT THAT TIME THAT REQUIRED OR -- 25 HE THOUGHT WOULD EVEN ALLOW HIM TO PRESENT MITIGATION 26 OVER THE WISHES OF HIS CLIENT. 71 1 AS LONG AS HIS CLIENT WAS COMPETENT. 2 HIS CLIENT HAS BEEN FOUND COMPETENT AND HE HAD DISCUSSED 3 THIS AND IT IS CLEAR IN HIS TESTIMONY, HE REPRESENTED 4 POWER FOR OVER TWO YEARS. 5 AND IN THE OSCEOLA CASES, THE MOTHER, TWO BROTHERS, THE 6 FATHER, AND ACQUAINTANCE, AND I BELIEVE ONE OF THE 7 SISTERS, HE TESTIFIED, THAT THEY WERE IN, I BELIEVE 8 ORLANDO FOR THE OSCEOLA CASE. 9 AND HE WENT TO A MOTEL ROOM, THAT HE CAN ONLY REMEMBER 10 IS SMOKE FILLED. 11 COULDN'T REMEMBER WHICH MOTEL. 12 AND THERE ARE TRANSPORTATION BILLS IN THE RECORD FOR THE 13 PRIVATE INVESTIGATOR. 14 AND A LOT OF THE INFORMATION THAT HE KNEW ABOUT AS FAR 15 AS MITIGATION, ABOUT THE CHILDHOOD, THE ACCIDENTS, THE 16 HUFFING, CAME DURING THESE INTERVIEWS. 17 AND HE EVEN HAD A WRITTEN STATEMENT BY THE MOTHER, BUT 18 POWER HAD NEVER WAIVERED THAT HE WASN'T GOING TO ALLOW 19 HIM TO PRESENT IT. 20 AND HE KNEW BECAUSE OF THE SEVERITY OF THE MURDER CASE 21 THAT WAS UPCOMING THAT MITIGATION WAS GOING TO BE AN 22 ISSUE. 23 THIS WAS A VERY EXPERIENCED ATTORNEY. 24 BEEN AN ATTORNEY 13 YEARS, BEEN A STATE ATTORNEY WHO 25 TRIED FIVE FIRST DEGREE MURDER CASES, THREE HE HAD GONE 26 FOR THE DEATH PENALTY. 72 1 2003 PUT ON DEATH ROW, ONE EXECUTED AND ONE WHO'S 2 COMMITTED SUICIDE. 3

WHAT WAS HIS EXPERIENCE IN DEFENDING? 4

THAT WAS A MADE BIG POINT IN THE INITIAL BRIEF, THIS 5 WAS HIS FIRST CASE AS DEFENSE ATTORNEY DOING THE CAPITAL 6 CASE. 7 WAS NOT HIS FIRST CAPITAL CASE. 8 WHETHER YOU'RE PREPARED TO COUNTER MITIGATION OR PRESENT 9 MITIGATION, YOU ARE AWARE OF WHAT MITIGATION IS, WHAT 10 THE AGGRAVATORS ARE AND WHAT YOU NEED TO COUNTER. 11 AND HE BELIEVED BEING A STATE ATTORNEY WAS GREAT 12 PREPARATION TO DEFEND A MURDER CASE. 13

HERE IS MY CONCERN. 14 I THINK THERE ARE CASES WHERE WHEN WE LOOK AT IT, WE SAY 15 IT IS A TWO EDGED SWORD. 16 IF THEY PUT ON SOME TYPES OF MITIGATION, OTHER THINGS 17 ARE GOING TO COME OUT. 18 BUT HERE WE HAVE A BRUTAL RAPE, MURDER. 19 WE HAVE TWO PRIOR, HOWEVER MANY PRIOR RAPES. 20 AND THEN THE MITIGATION THAT'S PRESENTED IS LEGALLY 21 INSUFFICIENT. 22 YOU KNOW, THE STUDY. 23 IN TERMS OF LOOKING AT THE COLLOQUY IN OCTOBER, AND I 24 THINK THE JUDGE CERTAINLY DID A GOOD JOB. 25 BUT YOU HAVE MR. BLANKNER SAYING, YOU KNOW, THAT I CAN 26 UNDERSTAND WHY HE FEELS THE WAY HE FEELS. 73 1 AND I THINK IT IS A MATTER OF JUDGMENT AND A MATTER OF 2 TACTICS TO SOME EXTENT. 3 I THINK IT WOULD BE HELPFUL AND I HAVE SAID IT ALL 4 ALONG, BUT HE KNOWS THAT, WHY I THINK IT WOULD BE 5 HELPFUL AND WE HAVE GONE OVER IT. 6 THIS ISN'T A QUESTION OF BEING HELPFUL THIS. IS THAT, 7 IT'S LIKE A SURE THING THAT IF YOU HEAR, IF ANY JURY 8 HEARING WHAT YOU HEAR ABOUT MR. POWER, WITHOUT ANY 9 UNDERSTANDING OF HOW A MAN LIKE THIS COULD COME TO, YOU 10 KNOW, PERFORM THESE TERRIBLE ACTS, IT'S A SURE DEATH 11 PENALTY. 12 SO I GUESS IN TERMS OF WHAT IT IS, IT IS NOT A QUESTION 13 THAT IT COULD BE HELPFUL OR IT MIGHT BE IN HIS BEST 14 INTEREST. 15 IT'S LIKE IF HE DOESN'T DO THIS, HE IS FOR SURE GOING TO 16 HAVE THE DEATH PENALTY. 17 NOW HE EXPLAINED THAT IN PRIVATE TO HIM, DOES HIS 18

TESTIMONY SAY THAT HE TOLD HIM THAT FAILURE TO PRESENT 19 ANY OF THIS MITIGATION AND OF COURSE IT'S PRETTY HARD IF 20 HE DIDN'T CONSULT WITH A PRIVATE EXPERT TO, FOR HIMSELF 21 TOWNS WHAT THE NATURE OF THIS DEFENDANT'S MENTAL STATE 22 IS, THAT HE WILL FOR SURE HAVE THE DEATH PENALTY? 23 THIS ISN'T A MAN THAT WANTED THE DEATH PENALTY, RIGHT? 24 SO I GUESS I'M CONCERNED ABOUT WHAT ELSE IN THE 25 TESTIMONY IN THE EVIDENTIARY HEARING WAS THERE ABOUT 26 WHAT HE DID TO URGE THE DEFENDANT TO ALLOW HIM TO GO 74 1 FORWARD WITH MITIGATION COMPEL HIM THAT FAILURE TO DO SO 2 WOULD BE ESSENTIALLY A DEATH SENTENCE FOR HIM? 3

INITIALLY IT WAS COVERED VERY SPECIFICALLY BY THE 4 TRIAL COURT --. 5

I'M NOT, TRIAL COURT DID A GREAT JOB. 6 I UNDERSTAND WHAT THE STATE DID. 7 I AM REALLY CONCERNED ABOUT, WHAT COMES OUT OF THIS 8 HEARING, WHAT THE DEFENSE ATTORNEY IS SAYING IS, IT 9 MIGHT BE HELPFUL AND I HAVE TOLD HIM IT IS A MATTER OF 10 JUDGMENT, DID HE SAY THAT IN PRIVATE, DID HE TESTIFY AT 11 THE EVIDENTIARY HEARING THAT IN PRIVATE HE REALLY SLATED 12 -- STATED SPECIFICALLY THAT THIS WILL BE A DEVASTATING 13 EFFECT FOR HIM? 14

I BELIEVE SO. 15 THE TESTIMONY OF BLANKNER COVERS OVER TWO HUNDRED PAGES. 16 AND THE STATE'S CLOSING ARGUMENT BELOW CAN GIVE YOU 17 SPECIFIC RECORD CITES TO HOW MANY TIMES HE DISCUSSED 18 WITH THE DEFENDANT THE IMPORTANCE OF PUTTING FORTH THIS 19 MITIGATION. 20 AND HE ALSO EXPLAINED HOW IMPORTANT THE FAMILY PART OF 21 IT WAS, BECAUSE THE CALIFORNIA RECORDS WEREN'T 22 NECESSARILY THAT BENEFICIAL TO THE DEFENDANT BECAUSE HIS 23 PERSONALITY PROFILE SHOWED THAT HE WAS FAKING A PSYCH 24 PAT THICK DISORDER FOR SECONDARY GAIN. 25 THE DIAGNOSIS WAS THAT HE HAD BEEN INTERNALIZING HIS 26 VIOLENCE AGAINST, I MEAN THAT WAS THE SUICIDE EXPRESSION 75 1 INTERNALIZATION OF VIOLENCE. 2 AND HE POSED A FUTURE DANGER OF EXTERNALIZING THAT, 3 WHICH IS WHAT HAPPENED IN THIS CASE. 4 AS FAR AS THE OFFENSES THAT PROGRESSIVELY GOT WORSE. 5 IN ADDITION TO THAT,. 6

TALKING ABOUT COUNSEL TELLING HIS CLIENT HOW 7 IMPORTANT IT IS TO PUT ON THIS MITIGATION? 8

CORRECT. 9 THE POWER'S QUESTION IN THE FIRST HEARING, AGAIN HE 10 SHOWED THE TRIAL JUDGE WHO HAD HIM IN FRONT OF HIM 11 THROUGH THE ENTIRE PROCEEDINGS AND THE POST CONVICTION 12 JUDGE, SHE SAW HIM I BELIEVE OVER A PERIOD OF SIX YEARS. 13 AND THAT FIRST HEARING, HE EXPLAINED HIS JUSTIFICATIONS. 14 ONE HE DIDN'T WANT TO PUT HIS FAMILY THROUGH IT. 15 BUT THE FIRST ONE WAS HE BELIEVED THIS WAS A PURELY 16 CIRCUMSTANTIAL CASE AGAINST HIM AND HE THOUGHT IT WAS 17 INCONSEQUENTIAL AND WOULDN'T HOLD UP ON APPEALS. 18 THEY HAD WON THE WILLIAMS RULE EVIDENCE. 19 LOST THE SUPPRESSION. 20 HE BELIEVED IN DISCUSSIONS WITH THE ATTORNEY THAT HE 21 MIGHT BE ABLE TO GET THAT OVERTURNED ON APPEAL. 22 THEY TOLD HIM THEY DIDN'T AGREE WITH HIM. 23 BUT HE DIDN'T WANT TO PUT ANYTHING IN THE RECORD THAT 24 COULD BE CONSTRUED AS ADMISSION OR CONCESSION OF GUILT. 25 THE TRIAL JUDGE SAID I CAN GIVE THE JURY AN INSTRUCTION 26 AND TELL THEM NOTHING SHOULD BE CONSTRUED AS ADMISSION. 76 1 HIS QUESTION WAS HOW CAN YOU CURE THAT IMPLICATION IN 2 THE RECORD? 3 THAT IS PRETTY ON POINT RATIONAL QUESTION TO BE ASKED. 4 I DON'T KNOW, AND GUTMAN, WHO FOUND HIM COMPETENT IN 88, 5 WHICH WAS OVER THREE MONTHS AFTER HE WAS ARRESTED, 6 MARACONGA ONLY SAW HIM BRIEFLY AFTER HIS ARREST. 7 HE HAD HAD TIME TO SIT IN JAIL AND ADAPT. 8 I BELIEVE IT IS STILL CURRENT. 9 DON'T KNOW THERE IS A DIFFERENCE BETWEEN THEN AND NOW. 10 GUTMAN POINTED OUT THE WEAKNESS IN THE DEFENSE EXPERTS 11 WHEN THEY TRIED TO SAY, I MEAN THERE IS A BUSINESS 12 DISTINCTION BETWEEN THE EVIDENCE ON MITIGATION AND 13 WHETHER OR NOT HE WAS COMPETENT TO WAIVE. 14 THE EVIDENCE THEY PUT FORWARD AS FAR AS WHETHER OR NOT 15 HE WAS COMPETENT WAS THAT HE MIGHT HAVE BEEN IN THIS 16 EPISODE OF

DEPRESSION. 17 AND THE TRIAL JUDGE POINTED OUT AND GUTMAN POINTED OUT 18 THAT THE, IT'S THE LIFE OF THE RECORD. 19 THEY DON'T CITE ANYTHING SPECIFICALLY IN THE RECORD TO 20 SHOW ANY INDICATION THAT HE WAS DEPRESSED. 21 AND -- THAT'S WHY HE PREFERRED MARIN'S REPORT. 22

REFRESH OUR MEMORY WHAT HAPPENED AT THIS HEARING 23 WHICH SEEMED TO BE TAKING PLACE AS A RESULT OF TWO 24 INITIATIVES. 25 ONE BY THE STATE ATTORNEY, ASKING ACTUALLY FOR MENTAL 26 HEALTH EXAMINATION. 77 1 AND THE OTHER BY THE DEFENSE LAWYER, SAYING WELL I WANT 2 TO BRING THIS IN FRONT OF THE COURT TOO. 3 HOW DID THE COURT END UP ON THE STATE'S REQUEST FOR A 4 MENTAL HEALTH EXAMINATION OR SUGGESTION OF THAT AS FAR 5 AS THE BASIS OF ANY DECISION, IF THERE WAS A DECISION 6 MADE? 7 WHAT DID THE COURT DO WITH THE STATE'S URGING THAT THERE 8 BE A MENTAL HEALTH EXAMINATION SO THAT LATER THEY 9 WOULDN'T BE ABLE TO SAY, YOU KNOW,? 10

TRIAL COURT GRANTED THE STATE'S MOTION FOR A 11 NEUROLOGICAL EXAM OVER THE DEFENSE OBJECTION. 12 NEUROLOGICAL EXAM CAME BACK WITH NO EVIDENCE OF ANY 13 ORGANIC BRAIN INJURY. 14

AND WHAT DOCTOR WAS THAT? 15

DOCTOR COMMITTER. 16

IF THERE IS NO MORE QUESTIONS, I'D RELY ON THE BRIEF 17 AND THE ARGUMENTS PRESENTED HERE TODAY AND ASK THAT YOU 18 REFER THEM TO THE TRIAL COURT'S ORDER. 19

THANK YOU VERY MUCH. 20 MR. MARSHAL, HOW MUCH TIME HAS SHE? 21

LITTLE OVER FOUR MINUTES. 22

I'D LIKE TO RETURN WITH CALIFORNIA RECORDS. 23 THERE WERE TWO SEPARATE AND DISTINCT SET OF CALIFORNIA 24 RECORDS. 25 ONE WAS PRISON AND JAIL RECORDS, GOTTEN BY THE STATE. 26 THE OTHER WAS THE HOSPITAL RECORDS. 78 1 THIS WAS THE SORT OF RECORDS THE ABA STANDARDS FOR 2 CRIMINAL JUSTICE ARE SAYING IN THE WIG INS CASE THAT WE 3 HAVE TO GET THESE RECORDS. 4

DOES THE RECORD CLEARLY SHOW THAT THESE ARE TWO 5 DIFFERENT SETS OF RECORDS THAT WE ARE TALKING ABOUT? 6

YES. 7

SO THAT WHEN COUNSEL WAS BILLING FOR FOUR OR FIVE 8 HOURS OF EXAMINING RECORDS --. 9

YES, THAT WERE RECEIVED. 10

THOSE WEREN'T HOSPITAL RECORDS? 11

NO, IT IS VERY CLEAR IN THE RECORD YOUR HONOR. 12 THE HOSPITAL RECORDS, MR. POWER AGREED IN THE OCTOBER 13 INCAMERA HEARING TO SIGN A RELEASE, WHICH WAS THE ONLY 14 WAY THEY WERE GOING TO BE GOT. 15 MR. BLANKNER SENT HIS INVESTIGATOR TO CALIFORNIA, GOT 16 THOSE RECORDS. 17 HE TOLD THE COURT I HAVEN'T HAD TIME TO READ THEM. 18 THOSE RECORDS SHOULD HAVE ONLY BEEN THE STARTING POINT 19 OF ANY MENTAL HEALTH INVESTIGATION. 20

DID THE DEFENSE LAWYER TALK TO THE CALIFORNIA MENTAL 21 HEALTH DOCTORS? 22

HE SAID HE DID BUT HE HAD ABSOLUTELY NO RECOLLECTION 23 OF THE CONVERSATION. 24

HE SAID HE TALKED TO THEM BUT HE COULDN'T RECOUNT 25 WHAT THE CONVERSATIONS WERE?
26

PRETTY MUCH. 79 1 HE WAS VERY VAGUE ABOUT IT. 2 BEEN A LONG TIME. 3

HOW WOULD HE HAVE KNOWN ABOUT PRIOR SUICIDE ATTEMPTS, 4 ETCETERA? 5

WELL IT WAS ILLUSION TO IT IN THE PRISON RECORDS 6 SUPPLIED TO HIM BY THE STATE AS WELL.
7 BECAUSE HE HAD, MR. POWER HAD TRIED TO COME MIT SUICIDE 8 WHILE INCARCERATED IN
CALIFORNIA. 9 MR. DOCTOR MARACANGA, HE TESTIFIED THAT HE DID NOT ASK 10 MR. POWER
ANYTHING ABOUT THE TIME OF THE CRIME. 11 HE SAID VERY SPECIFICALLY IT IS HIS POLICY
ONLY TO ACT, 12 ASK ABOUT THE FACTS OF THE CRIME IF THE DEFENDANT HAS 13 ALREADY
CONFESSED TO THE CRIME. 14 MR. POWER HAD NOT ALREADY CONFESSED TO THE CRIME. 15 HE
HAD MERELY INDICATED TO DOCTOR MARACANGUS HE WAS 16 UNDER SUSPICION. 17 THE
DOCTOR WAS QUITE UNEQUIVOCAL ABOUT THAT POINT. 18

AS TO THE DR. GUTMAN ARGUMENT, THERE IS NO QUESTION 19 THAT THE TRIAL COURT FOUND
MR. POWER'S MENTAL HEALTH 20 EXPERTS AT THE EVIDENTIARY HEARING FAR MORE
COMPELLING 21 AND CREDIBLE THAN THOSE OFFERED BY THE STATE. 22 SHE SAYS SO IN AS MANY
WORDS IN HER ORDER. 23 VERY, VERY CLEAR THAT SHE WAS CONVINCED BY THAT 24 STATEMENT
THAT THE MITIGATION THAT THEY FOUND STATUTORY, 25 NON-STATUTORY MENTAL HEALTH
MITIGATION. BY THE SAME 26 TOKEN, DOCTOR HYDE AND DOCTOR SELLSON WERE ABLE TO POINT
80 1 TO NUMEROUS INSTANCES IN THE RECORDS WHICH THEY HAD 2 READ, INCLUDING THE
INCAMERA HEARING, MR. BLANKNER'S 3 DEPOSITION OF HIS DESCRIPTION OF INTERACTIONS WITH
4 MR. POWER SHOWED HE WAS DEPRESSED DURING THE DURATION OF 5 THIS PARTICULAR,
BETWEEN THE GUILT PHASE AND PENALTY 6 PHASE, AT LEAST SOME OF THE TIME. 7 SEVERELY
DEPRESSED. 8 DOCTOR HYDE EXPLAINED DEPRESSION OF THE SORT THAT STARTS 9 WHEN YOU'RE
A CHILD LIKE MR. POWER HAS, IT TENDS TO GET 10 WORSE AND WORSE. 11 WHILE IT'S CYCLICAL
AND METHODOICAL, THE CLOSER TOGETHER 12 THEY COME AND THE WORSE IT IS. 13 SO IT IS LITTLE
LIE LIKELY WITHIN DEGREE OF MEDICAL 14 PROBABILITY --. 15

REFRESH OUR MEMORIES AGAIN, AS FAR AS WHAT DID 16 DEFENSE COUNSEL DO AT THE PENALTY
PHASE, AND AT THE 17 PRESENTATION BEFORE THE COURT? 18 WHAT AFFIRMATIVELY DID THE
LAWYER DO? 19

HE PRESENTED THE TESTIMONY OF MICHAEL RADLICK, WHO 20 TALKED ABOUT THE LACK OF
FUTURE DANGEROUSNESS OF 21 MR. POWER BECAUSE HE WAS GOING TO BE INCARCERATED FOR
22 LIFE SENTENCE AND THE COST OF THE DEATH PENALTY AS 23 AGAINST THE COST OF IMPOSING
A LIFE SENTENCE. 24

HIS ARGUMENT TO THE JURY AND THEN SUBSEQUENTLY TO THE 25 JUDGE WAS STRICTLY
PREDICATED ON THAT EVIDENCE? 26

THAT WAS ALL THAT WAS PRESENTED, ABSOLUTELY. 81 1 THE JUDGE FOUND THAT THE
MITIGATED AGAINST THE DEATH 2 PENALTY IN GENERAL BUT NOT IN MR. POWER'S CASE. 3 SO IT
REALLY, THERE REALLY WAS NO ACTUAL REAL LEGAL 4 MITIGATION PRESENTED AT MR. POWER'S
PENALTY PHASE. 5

SO YOU'RE NOT ARGUING THAT YOUR CLIENT WAS NOT 6 COMPETENT AT THE TIME OF THESE
DECISIONS WERE BEING 7 MADE, ARE YOU? 8

I'M ARGUING HE DID NOT MAKE KNOWING WAIVER OF 9 INVESTIGATION BECAUSE INVESTIGATION
WAS NOT -- 10 INVESTIGATION WAS NOT DONE, SO MR. POWER DID NOT KNOW 11 WHAT WAS

THERE TO BE PRESENTED. 12 HE WAS VERY CLEARLY IN THE OCTOBER HEARING ASKING THAT. 13
IT IS VERY CLEAR --. 14

WHY WAS MR. POWER NOT KNOW ABOUT HIS PAST? 15

HE WOULDN'T KNOW THE SIGNIFICANCE OF IT IN TERMS OF 16 MITIGATION. 17 THAT WAS NEVER
CLEAR THAT THAT WAS EXPLAINED ON THE 18 RECORD. 19 I SEE I HAVE RUN OUT OF TIME. 20

THANK YOU VERY MUCH.