IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-874

ROBERT BEELER POWER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENTS IN REPLY 1

ARGUMENT I

NO ADVERSARIAL TESTING AT THE PENALTY PHASE. . . . 1

ARGUMENT II

IMPROPER SHACKLING 22

ARGUMENT V

INCOMPLETE AND INACCURATE RECORD 26

REMAINING ARGUMENTS 28

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

CASES

Anderson v. State, 822 So. 2d 1261 (Fla. 2002) 3

Baptist Hospital of Miami v. Maler,

579 So. 2d 97 (Fla. 1991) 24, 25

Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991) . . 4,21

Coleman v. Mitchell, 268 F. 3d 417 (6th Cir. 2001) 21

Davis v. State, 624 So. 2d 282 (Fla. 3rd DCA 1993) 23

Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994) 20, 22

Elledge v. Dugger, 823 F. 2 1439, 1445 (11th Cir. 1987) . . 4

Entsminger v. Iowa, 386 U.S. 748 (1967) 27

Evitts v. Lucey, 467 U.S. 287 (1985) 27

Hardwick v. Crosby, 320 F. 3d 1127 (11th Cir. 2003) 4

Kearse v. State, 770 So. 2d 1119 (Fla. 2000) 24

Muhammad v. State, 782 So. 2d 343 (Fla. 2001) 1

Pesci v. Maistrellis, 672 So. 2d 583 (Fla. 2nd DCA 1996) . 24

Rose v. State, 675 So. 2d 567 (Fla. 1996) 18, 22

State v. Lewis, 656 So. 2d 1248(Fla. 1994) 23-25

State v. Lewis, 838 So. 2d. 1102 (Fla. 2002) . 17, 18, 20, 22

United States v. Gaffney, 676 F. Supp. 1544 (M.D. Fla. 1987) 25

ARGUMENTS IN REPLY

ARGUMENT I - NO ADVERSARIAL TESTING AT THE PENALTY PHASE.

In its Answer Brief, the State refuses to address the arguments Mr. Power raised in his Initial Brief – trial counsel's ineffectiveness and failure to present mitigation.

In his Initial Brief, Mr. Power spent 66 pages arguing that he did not waive mitigation and that his trial counsel was ineffective for failing to present mitigation. Yet, in its Answer Brief, the State only repeats the trial court's order verbatim for nearly fourteen (14) pages and then over-simplifies that Mr. Power is "seeking reversal, in large part, based upon this Court's ruling in Muhammad v. State, 782 So. 2d 343 (Fla. 2001)." (Answer Brief at 23). The State is in error.

The State's reliance on one case amid 60 pages of argument illustrates the weakness of its case. Mr. Power argued from page 7 through page 66 of his Initial Brief that he did not waive mitigation and that trial counsel was ineffective for failing to present mitigation, even after the Office of the State Attorney conducted its own investigation into Mr. Power's mental state and turned it over to the defense (R. 3229). Though Muhammad supports Mr. Power's case,

it is not the only aspect of his argument.

Mr. Power only cited Muhammad on two occasions in his 66-page argument. The State hopes to divert attention from the 66 pages of argument and rely on two references to a single case as the essence of Mr. Power's argument. It is not.

The State fails to address any of the other supporting authority or facts in Mr. Power's Initial Brief. The State ignores the testimony of Robert Norgard, a criminal defense attorney who was qualified as an expert in criminal defense with a specialization in criminal defense litigation. Mr. Norgard testified, unrebutted, to the community standards in 1990, which called for obtaining a mental health expert (PC-R. at 879). He said that even if a client had no mental health diagnosis, "...you would still want a mental health professional that could explain family dynamics in terms of how it impact a person's life...[A] mental health professional in the context of a capital case is very expansive in that respect and a very necessary component in a capital case" (PC-R. at 880-881).

Mr. Norgard also testified, unrebutted, that in 1990, there was nothing prohibiting a competent defense attorney from presenting mitigating evidence to the judge in camera; from proffering the information into the court record; or

putting mitigation into the record and notifying the court that it was available (PC-R. at 943-944). None of that occurred in Mr. Power's case.

Despite Mr. Norgard's testimony being admitted as substantive evidence, the State argued that it was restricting its own argument to "whether counsel provided reasonably effective assistance at the time of Power's trial and sentencing," (Answer Brief at 23). The State then addresses the case of Anderson v. State, 822 So. 2d 1261 (Fla. 2002), a case from **2002**. Mr. Power's trial and sentencing were held in 1990. At no time does the State address whether counsel provided reasonably effective assistance based on case law in 1990.

The State incorrectly argues that Anderson applies to Mr. Power's case because trial counsel proffered witnesses who could have been helpful to Mr. Power and that the trial court engaged in on-the-record colloquys. (Answer Brief at 24).

The State ignores the fact that Mr. Anderson **explicitly** waived his right to present mitigation. The State ignores the fact that Mr. Anderson's trial counsel, on the record, announced to the court that he uncovered many witnesses who could testify in favor of Mr. Anderson and then proceeded to cite the names of all the witnesses and what they would have

said had they been called.

That did not occur in Mr. Power's case. In fact, the State concedes in footnote 2 that **nothing** was proffered as to Mr. Power's family (Answer Brief at 24). At the start of the penalty phase, trial counsel announced to the court that he would not present psychiatric testimony (R. 2351) and he told the court that he received background materials on Mr. Power, but "haven't had a chance to go through them. It was all we could do." (R. 2351).

The State also ignores the glaring and obvious mental health evidence in Mr. Power's case that is clearly lacking in Mr. Anderson's case. Mr. Power presented mental health testimony that the hearing court found to be "compelling and credible," (PC-R. 3731), yet the State failed to address any of it in its Answer Brief.[1]

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[1]Mental health mitigating evidence is distinguished during guilt phase to establish competency to stand trial and presenting mental health mitigating evidence at the penalty phase. "There is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider." Blanco v. Singletary, 943 F. 2d 1477, 1503 (11th Cir. 1991) quoted in Hardwick v. Crosby, 320 F. 3d 1127 (11th Cir. 2003). When mental health mitigating evidence was available and "absolutely none was presented [by counsel] to the sentencing body, and ...no strategic reason was...put forward for this

Mr. Power presented expert testimony that indicated that Mr. Power was "quite depressed," (PC-R. at 1583) from 1987 when Dr. James Merikangas evaluated Mr. Power for his rape charges in Osceola County. Dr. Merikangas recommended an MRI and additional neuropsychological testing, and sought Mr. Power's background materials. He also sought to interview Mr. Power's family members. Mr. Merikangas was never contacted by trial counsel.

The State also ignored the "compelling and credible" (PC-R. at 3731) testimony of Dr. Thomas Hyde, a behavioral neurologist who found that Mr. Power suffers from significant neurological impairment, including frontal lobe dysfunction that impacts on reasoning and impulse control (PC-R. at 1772).

Dr. Hyde found that in addition to brain dysfunction, Mr. Power suffered from a "major recurrent depression" and "post-traumatic stress disorder (PTSD)" (PC-R. at 1773). He described Mr. Power's depression as characterized by impaired reasoning and judgment, with chronic depression throughout his

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failure," that was "objectively unreasonable."

Similarly, "we have decided that failure to present mitigating evidence as to a defendant's family background or alcohol and drug abuse at the penalty phase of a capital case constitutes ineffective assistance of counsel, particularly when defense counsel "was aware of [petitioner's] past and knew that mitigation was his client's sole defense." Elledge v. Dugger, 823 F. 2 1439, 1445 (11th Cir. 1987) cited in Hardwick, Id.

adolescence and adult life. He had a suicide attempt while in prison in California and had been diagnosed with a mood disorder, either major recurrent depression or bipolar disorder.

Dr. Hyde testified that Mr. Power's depression clouded his judgment, impaired his reasoning ability, and significantly affected how he made assessments during the course of his life both before and after his incarceration (PC-R. at 1773-1774).

Dr. Hyde found that Mr. Power was severely depressed at the time of his capital trial in 1990-1991 because he showed signs of irritability, poor judgment, reasoning, distrust in certain aspects of his case "paranoid ideation approaching delusional thinking during the time of his trial." (PC-R. at 1783).

According to Dr. Hyde, Mr. Power's mental condition made it impossible for him to make a rational choices, including whether to waive mitigation. Dr. Hyde also noted that Mr. Power's impairment would probably not be apparent to the untrained lay observer (PC-R. at 1776). Trial counsel's contention that Mr. Power did not seem depressed when he purportedly waived mitigation does not excuse his failure to investigate Mr. Power's mental health, either as a basis for

mitigation or to determine whether Mr. Power's purported waiver of mitigation was knowing, intelligent and voluntary. This was particularly so when Mr. Power has a long and well-documented history of severe depression.

Dr. Hyde concluded within reasonable medical probability that Mr. Power's impairments are long standing, and support both the statutory mental health mitigating circumstances of being under the influence of extreme mental or emotional disturbance and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (PC-R. at 1782). The State does not address this in its Answer Brief.

The State also ignored the “compelling and credible” (PC-R. at 3731) testimony of Dr. Barry Crown, a psychologist who practices in clinical psychology, forensic psychology and neuropsychology, who found in Mr. Power a history of perinatal problems, poly-substance abuse that began at a young age, which included huffing gasoline, and severe incidents of brain trauma. He found Mr. Power to have significant neuropsychological deficits and impairments, and that pattern was indicative of brain damage (PC-R. at 798-811), which resulted in him having difficulty reasoning and making judgments.

In its Answer Brief, the State also sidesteps the "compelling and credible" (PC-R. at 3731) testimony of Dr. Faye Sultan, a clinical psychologist, who testified that she spent 15-16 hours evaluating Mr. Power and reviewed his extensive background materials (PC-R. at 1631-1636).

She found that Mr. Power never spent more than a few months at a time in any school because the family moved so often (PC-R. at 1636). Dr. Sultan testified about Mr. Power's California prison records that showed he suffered from serious mental illness, including major depression and that he had been raped in prison. The records showed his suicide attempts and how prison officials attempted to treat Mr. Power's depression with drugs, including Elavil and Lithium (PC-R. at 1636-1637).

Additional medical records introduced by Mr. Power from Santa Cruz County, California, showed that Mr. Power was diagnosed as a schizoid person, who experienced moderate distress syndrome, consisting of depression and anxiety (PC-R. at 1639).

Dr. Sultan's evaluation of Mr. Power and her interview with family members revealed that Mr. Power's mother, Donna McNeil, had an abusive and violent life. She suffered from mental illness

and major depression. She was hospitalized twice for depression and because of her illness, was unable to control or supervise her children. When pregnant with Robert, she ate only one meal a day because the family had no food (PC-R. at 1647).

Dr. Sultan, through her interviews of Mr. Power's family members, learned that the Power children were abused by Robert Power Sr., but that Robert Jr. was singled out for the majority of the abuse because he was a sickly child who was born with physical ailments and Robert Power Sr. saw this as a weakness (PC-R. at 1642-1643).

Dr. Sultan discovered that the Power boys had been raped by Grady Highsmith (PC-R. at 1645).

Dr. Sultan painted a picture of Mr. Power's upbringing, which included physical beatings, children being hungry, stealing food and a mother too scared to work. There was no heat in the winter and the children sleeping in snow suits because there was no electricity or heat in their Indiana home (PC-R. at 1646).

Mr. Power grew up in a chaotic and disturbed home; he was the victim of violence; had inadequate nutrition and lived in an inadequate house. The family moved often and Mr. Power had deficient schooling. As a young child, he began to abuse

illegal substances, and was exposed to toxic chemicals while his mother was pregnant with him. He was singled out for physical and mental abuse by his father (PC-R. at 1650-1651).

Mr. Power had no structure in his life. His mother suffered from major mental illness and the family was disrupted by her repeated hospitalizations. Robert Power Sr. left home when Robert Jr. was 10 or 11 years old. Robert Jr.'s mental condition deteriorated significantly (PC-R. at 1650). Dr. Sultan concluded that Mr. Power's mother developed attachments to other men, who were often violent and abusive.

Like the other defense experts who evaluated Mr. Power, Dr. Sultan found that depression was a significant part of Mr. Power's life (PC-R. at 1653). His depression significantly impaired his functioning, his reasoning, his judgment, his emotional state, and his thoughts about suicide. This affected Mr. Power's ability to make choices (PC-R. at 1656-1658). Dr. Sultan testified that severely depressed people **cannot** make rational decisions (PC-R. at 1666).

Dr. Sultan found the statutory mitigating factors that Mr. Power was under the influence of neurological impairment and severe depression at the time of the offense. His ability to conform his conduct to the requirements of law was substantially impaired based on his history of mental illness

(PC-R. at 1667). Dr. Sultan also testified that she found non-statutory mitigating factors and would have testified to these factors in 1990 had she been given the background materials and medical records of Mr. Power. She found brain damage; depression; use of solvents, illegal drugs and alcohol; chaotic family life; physical and mental abuse by father; neglect by mother; mother's exposure to toxic chemicals during pregnancy; no structure in life; scattered enrollment in school; inadequate education; placed in foster care; poverty and hunger; abandonment by father; and sexual abuse (PC-R. at 1668-1669).

Instead of trying to argue against the "compelling and credible" defense experts, the State in its Answer Brief simply ignores them. Instead, the State quotes from the testimony of Dr. Michael Gutman. According to the trial court, Dr. Gutman conducted a competency evaluation in 1988 and augmented it with a review of records given to him before the post-conviction evidentiary hearing. In his opinion, he said that Mr. Power was competent to waive mitigation in 1988, but acknowledged that he did not interview Mr. Power again (PC-R. at 3730).

In his testimony at the evidentiary hearing, Dr. Gutman testified that he conducted a competency and sanity evaluation

of Mr. Power on March 22, 1988 in the Osceola Jail -- **two years before** Mr. Power was tried on charges of first-degree murder (PC-R. at 1122). Dr. Gutman found that Mr. Power was competent at that time (PC-R. at 1125).

In 1999, Dr. Gutman said he obtained additional materials from the State Attorney and based on his review of those materials, found that Mr. Power was competent in 1990-1991 (PC-R. at 1130).

Dr. Gutman's opinion, however, is seriously flawed.

While doctors Hyde, Crown and Sultan had also conducted their evaluations retrospectively, unlike Dr. Gutman, they based their respective opinions in large part on live interviews with Mr. Power rather than merely relying on a review of records. Dr. Gutman admitted on cross examination that interviewing the patient would have been the better practice (PC-R. 1156).

Dr. Gutman also testified that he preferred the opinion of State witness Sidney Merin to those of doctors Hyde, Crown and Sultan, in large part because Merin gave a more detailed basis for his conclusions in his report. Yet, the trial court found Dr. Merin's test data to be "incomplete" and the other experts "were unable to interpret it or respond adequately to

his conclusions," (PC-R. at 3730).

On cross examination, however, Dr. Gutman admitted that he never made any attempt to contact doctors Hyde, Sultan or Crown, and neither listened to their testimony nor reviewed the transcripts of their testimony (PC-R. at 1147). Without understanding the substance of the defense experts opinions through their testimony and/or talking with them, Dr. Gutman did not have an accurate basis for rejecting their work. This is particularly pertinent given that Dr. Gutman admitted that severe depression can indeed affect a person's judgment, decision-making capacity, reasoning ability, and self-esteem, and can inculcate a feeling of hopelessness and worthlessness (PC-R. at 1143).

Dr. Gutman testified that he did not question Mr. Power about his drug history or his physical or sexual abuse history (PC-R. at 1138-1139). He did not review any hospital records from California or California prison records on Mr. Power. He did not review records that showed that Mr. Power was hospitalized in a psychiatric ward (PC-R. at 1139-1140). Dr. Gutman testified that he did not talk with Mr. Power's family members (PC-R. at 1141).

Dr. Gutman agreed with Dr. Hyde that the more times episodic depression occurs, the worse the prognosis for future

episodes, and that the prognosis is particularly bad for individuals such as Mr. Power who experience the onset of the condition in childhood or early adolescence (PC-R. at 1144).

Dr. Gutman also admitted that frontal lobe dysfunction of the kind diagnosed by doctors Hyde and Crown can cause impairments in reasoning ability, judgment, impulse control, and that closed-head injuries of the type suffered by Mr. Power are a major cause of such brain dysfunction (PC-R. at 1145). However, Dr. Gutman admitted he is not a neurologist and did not do any neurological testing, which would have proved such dysfunction.[2]

Dr. Gutman's understanding that competency to waive mitigation is the same standard as competency to stand trial also is flawed. In Mr. Power's case, his ability to make a knowing, intelligent and voluntary waiver of mitigation depended not only upon his mental state at the time of trial, but also on whether he had been fully and accurately appraised of the mitigation that existed.

On cross examination, Dr. Gutman agreed that in his

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[2]Dr. Gutman reviewed Dr. Comiter's evaluation, which consisted of a basic neurological examination together with an MRI and EEG. Dr. Gutman, however, admitted on recross examination that neither a normal EEG nor a normal MRI rules out brain injury, and that neuropsychological testing is a far more sensitive tool for determining brain dysfunction. (PC-R. at 1159).

review of the <u>in</u>-<u>camera</u> hearing during which Mr. Power purportedly waived mitigation, no description of the mitigation evidence was advanced, and it was impossible to tell whether Mr. Power knew in detail the extent of mitigating information he was electing not to present. (PC-R. at 1153).

Dr. Gutman's testimony failed to refute the conclusions of any of Mr. Power's mental health experts. His review was limited and his conclusions did not take into account all of the available evidence. Furthermore, the scope of his evaluation was fundamentally flawed, since it was limited to a basic competency standard, which he misunderstood. Dr. Gutman simply had no basis for his conclusions, and the trial court correctly found that the defense experts "were much more compelling and credible than those presented by the State" (PC-R. at 3731).

In its Answer Brief, while ignoring the testimony of the "compelling and credible" defense experts, the State also discussed the testimony of Dr. Sidney Merin, who he argued supported the trial court's conclusions (Answer Brief at 26).

Dr. Merin testified that he reviewed California prison records that showed that Mr. Power was depressed; that he attempted suicide; that he was on depression medication; that he had a history of depression and that the California records

were consistent in diagnosing Mr. Power as depressed (PC-R. 1033-1034). Dr. Merin testified that stress often impacts depression and that depression can impact one's ability to make choices.

The trial court concluded that while Dr. Merin examined Mr. Power in preparation for the evidentiary hearing and he agreed that "depression can impact a person's ability to make choices," he found that Mr. Power only suffered from an "illusion of depression." The trial court also found that Dr. Merin's testing data was "incomplete," which resulted in the other experts who evaluated Mr. Power being "unable to interpret it or respond adequately to his conclusions." (PC-R. at 3730).

Dr. Merin's incomplete testing and testimony should be disregarded, especially in light of the "compelling and credible" testimony of the defense experts. Dr. Merin spent a total of two hours with Mr. Power and had an assistant do the testing and the scoring of those tests (PC-R. at 1026-1027). That is in contrast to Dr. Sultan, who spent 15-16 hours with Mr. Power and who personally interviewed family members. Dr. Merin did not seek to speak to any of Mr. Power's family members or experts. He said he talked to no one other than the Assistant State Attorney and Mr. Power (PC-R. 1037). Dr.

Merin is predominantly an expert witness for the State (PC-R. at 1026).

Dr. Merin testified that he gave Mr. Power the MMPI, which is not a neuropsychological exam, but a personality test. He administered the Wechsler Adult Scale III, but failed to follow the protocol and the standards. And, Dr. Merin gave the Wisconsin Card Sort Test, which tests posterior frontal lobe and does not identify frontal lobe problems (PC-R. 967).

Thus, Dr. Merin's evaluation failed to examine the relationship between the brain function and behavior because it failed to address all the components of the brain. He specifically failed to address the region where Mr. Power's brain damage was located.

Dr. Merin testified that he found that Mr. Power had the ability to use words and symbols, but had an impaired ability to use visual functions (PC-R. at 978). Dr. Merin testified that he disagreed with Dr. Barry Crown's assessment of brain damage, but admitted that he did **not** give Mr. Power a full and complete exam and failed to give Mr. Power many of the batteries of tests required in complete neuropsychological exams (PC-R. at 1048).

Dr. Merin's raw data failed to follow the standard protocol (PC-R. at 818). Dr. Merin failed to record

responses from Mr. Power, which would have enabled the reviewer to properly score the tests. While Dr. Merin said he gave the test, he failed to document the responses, but recorded only the scores. The raw data, which Dr. Merin knew was going to be forwarded to Mr. Power's defense experts, had large blank spaces, making it impossible for other experts to determine Mr. Power's responses (PC-R. at 818). It is unknown whether this was deliberate.

The tests that Dr. Merin gave included the standard forms to properly record Mr. Power's responses. Those responses are an integral part of a complete profile. In Dr. Merin's profile booklet, there were **no** responses recorded. According to a defense expert, the manual specifically instructs the mental health evaluator to write down the responses, but that was not done in Mr. Power's case. Dr. Barry Crown called this an "unacceptable practice," and said, "I suppose there may very well be a forensic or psychological strategy for not doing it because as a result, no one else can look at it and determine what happened" (PC-R. at 820).

Dr. Merin's raw data was sent to all the defense experts. Because Dr. Merin's responses from his testing were incomplete and the defense experts were unable to interpret it or render a valid opinion. The trial court properly concluded that his

data was incomplete and properly concluded that the defense experts "were much more compelling and credible than those presented by the State" (PC-R. at 3731). The State's argument that doctors Gutman and Merin support the trial court's conclusions is simply wrong. Even the trial court said as much.

The State also argues that the trial court was correct when she found that while Mr. Power "certainly must have been affected by the trauma of his childhood and by his psychological impairments, he was still reasonably capable of making an informed waiver of mitigation." (Answer Brief at 26).

Both the State and the trial court misconstrued the law and facts. If the defense experts are "compelling and credible," their testimony must be believed. And, their testimony in the record clearly shows that Mr. Power did not have the ability to make a valid and intelligent waiver of mitigation, based on his lengthy history of depression, childhood trauma and psychological impairments.

Moreover, the State fails to address what precisely trial counsel did in his efforts to have Mr. Power validly and intelligently waive mitigation. In State v. Lewis, 838 So. 2d. 1102 (Fla. 2002), this Court held that the obligation to

investigate and prepare for the penalty portion of a capital case "cannot be overstated – this is an integral part of a capital case." Id. at "Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what its being waived and its ramifications and hence is able to make an informed, intelligent decision."

As in Lewis, Mr. Power's trial counsel did not spend sufficient time or understand what mitigation was available **before** his client's alleged waiver.[3] He also did not advise Mr. Power what was being waived.

Mr. Power's penalty phase was conducted five months after the guilty verdict (R. 3254). At the first in-camera proceedings on July 12, 1990, after the guilty verdict and four months before the penalty phase, the judge told Mr. Power

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[3]As this Court said in Lewis and in Rose v. State, 675 So. 2d 567 (Fla. 1996), the finding as to whether counsel was adequately prepared for penalty phase does not revolve solely around the amount of time counsel spends on the case or the numbers of days spent preparing for mitigation. Instead, it must be a case-by-case basis. In Rose, although counsel had 79 days to prepare for mitigation, it was not enough time, in part, because counsel had never had a capital case before. Id. at 573. Mr. Power's case was the first time trial attorney Wesley Blanker had defended a client in a first-degree murder case that went to penalty phase (PC-R. at 1335).

about the consequences of not presenting mitigation. He said that if the jury recommended death, "I should accept it," (PC-R. at 3200). At no time was Mr. Power asked if he knew what mitigation was and if he was freely and voluntarily waiving it. No colloquy was conducted.

After an off-the-record discussion between Mr. Power and Mr. Blankner, trial counsel said, "Thank you very much. We have had a discussion on this. I feel satisfied." (PC-R. at 3204). There was no further discussion and no explanation as to what he felt satisfied about.

At the second in-camera hearing on October 1, 1990, three weeks before the penalty phase, trial counsel told the court that he was waiting for Mr. Power's records from California. At this hearing, Mr. Power agreed to sign medical releases and said on the record:

> Mr. Power: I want them to know what information is available. If he doesn't know what information is available, how can he say whether it will be mitigating or aggravating?

(PC.-R. at 3218).

Mr. Power also told the court that he and his trial counsel never sat down and discussed what would be "said and what couldn't be said.....or the possibility of cross-examination and what could come out and what couldn't come out" (PC-R. at 3221-3222). Mr. Power asked out loud and on

the record:

> Mr. Power: Would it be prudent to evaluate all the witnesses, Mr. Blankner and the prosecutor – get them – when everything comes together, decide which is the best way to go? Whether this will be enough or whether, you know, other mitigating circumstances will be necessary because of lack of something in another area?"

(PC-R. at 3223).

Nowhere in these statements does Mr. Power say he wants to waive mitigation. Instead of waiving anything, Mr. Power specifically told the court he wanted **more** information from his attorneys. His agreement to sign medical releases for documents three weeks before the penalty phase was clearly **not** a waiver of mitigation.

As this Court said in Lewis, the standard relied upon in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994) is the appropriate standard the defendant must show to prevail. In Deaton, the record showed that defense counsel did not prepare for the penalty phase until after the guilty verdict was returned and then spent only a minimal amount of time in preparation, informed the defendant only as to a few of the potential mitigating circumstances that could be presented and did not search for any records to help establish mitigating circumstances.

This Court affirmed the trial court's order, holding that in light of the fact that there were a number of mitigating circumstances that existed but were not presented because counsel did not properly prepare for the penalty phase proceeding, counsel's errors were serious enough to have "deprived Deaton of a reliable penalty phase proceeding," and counsel's ineffective assistance was prejudicial. Id. at 9. n.6.

The same is true for Mr. Power. Trial counsel received background materials from the State Attorney, but failed to do anything with them. He failed to hire an a mental health expert or any other expert to evaluate Mr. Power. He failed to learn about Mr. Power's lengthy history of depression and discover the reasons for his alleged waiver of mitigation. He obtained Mr. Power's California records on the eve of the evidentiary hearing but failed to go through them. It was ineffective assistance of counsel where the "ultimate decision that was reached not to call witnesses [for mitigation] was not a result of investigation and evaluation, but was instead primarily a result of counsel's eagerness to lack onto defendant's statements that he did not want any witnesses called." <u>Blanco v. Singletary</u>, 943 F. 2d 1477, 1501-1502 (11th. Cir. 1991) cited in <u>Coleman v. Mitchell</u>, 268 F. 3d 417 (6th

Cir. 2001).

At his evidentiary hearing, Mr. Power presented the testimony of two experts who found that he met the statutory mitigating factors of being under the influence of extreme mental or emotional disturbance and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (PC-R. at 1667 and 1782). Moreover, the experts found and testified to extensive non-statutory mitigating factors such as brain damage; depression; use of solvents, illegal drugs and alcohol; chaotic family life; physical and mental abuse by father; neglect by mother; mother's exposure to toxic chemicals during pregnancy; no structure in life; scattered enrollment in school; inadequate education; placed in foster care; poverty and hunger; abandonment by father; and sexual abuse (PC-R. at 1668-1669).

The only evidence presented by the defense in mitigation at

Mr. Power's penalty phase was from Michael Radelet, who did not know Mr. Power personally, but who testified that based on Mr. Power's prior sentences, he would never be free again. He also testified about the cost of life in prison versus the cost of execution (R. 2442-2526).

Under <u>Deaton</u>, <u>Rose</u>, and <u>Lewis</u>, Mr. Power is entitled to relief.

ARGUMENT II

IMPROPER SHACKLING

Contrary to the State's argument, it is precisely because of the inconsistencies at the evidentiary hearing as to whether Mr. Power was shackled as to the reason why the jurors need to be questioned on the topic.

In its Answer Brief, the State correctly quoted trial counsel Wesley Blankner, who said he was unsure if his client was shackled in front of the jury. "I can't tell you for sure....I don't know....I couldn't guarantee one way or the other." (PC-R. at 1445).

Similarly, State witness Nancy Clark testified that she could not say one way or the other if Mr. Power was shackled in front of the jury. She said,"...common sense tells me he would have been shackled with his feet but I do not recall that."

Because of the discrepancy in testimony and the witnesses memory, Mr. Power should be allowed to question the jurors on this specific issue to determine if shackling influenced their decision at all.

Before Mr. Power's evidentiary hearing, the trial court denied the defense motion to interview jurors on the shackling issue, but said that Mr. Power could raise the issue again at a later time if "something else that came up as a result." (PC-R. at 621-622; 2496-2497). What came up later was the inconsistent testimony of witnesses Clark and Blankner at the evidentiary hearing.

Mr. Power has no other means of establishing prejudice but through interviews with the jurors themselves. His inability to fully explore what they saw and how it impacted on their decision prevents him from showing the unfairness of his trial and precludes a full and fair hearing on this issue.

In Rule 3.850 proceedings, this Court has authorized pre-hearing discovery: "On a motion which sets forth good reason, however, the court may allow limited discovery into matters which are relevant and material..." State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1994)(quoting and adopting language from Davis v. State, 624 So. 2d 282, 284 (Fla. 3rd DCA 1993). But, this Court cautioned: "We conclude that this inherent authority should be used only upon a showing of good cause." Lewis, 656 So. 2d 1250.

Because the issue remains unresolved from the evidentiary

hearing, and because Mr. Power has shown good cause why the jurors need to be questioned, juror interviews should be granted. Mr. Power is aware that Florida law prohibits litigants from disturbing the privacy of jury deliberations. Pesci v. Maistrellis, 672 So. 2d 583 (Fla. 2nd DCA 1996) citing Baptist Hospital of Miami v. Maler, 579 So. 2d 97 (Fla. 1991). In Baptist Hospital of Miami, Inc. v. Maler, this Court said: "To the extent an inquiry will elicit information about overt prejudicial acts, it is permissible; to the extent an inquiry will elicit information about subjective impressions and opinions of jurors, it may not be allowed." 579 So. 2d at 99.

Furthermore, the prohibition against juror testimony contained in the Florida Evidence Code pertains only to matters that inhere in the verdict, such as emotions, mental processes and mistaken beliefs of jurors. Id., ; Fla. Stat. sec. 90.607(2)(b). In Kearse v. State, 770 So. 2d 1119 (Fla. 2000), the court reaffirmed its holding in Baptist Hospital v. Maler and explained that the standard for interviewing jurors "was formulated 'in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it.'" Kearse at 1128, quoting Baptist Hospital v. Maler, 579 So. 2d 97, 100 (Fla. 1991).

Whether Mr. Power was shackled in front of the jury is a factual question about what jurors saw at trial. That information can only be discovered through depositions. Mr. Power's inquiry falls outside the realm of prohibited juror testimony and as such, the privacy of the jury deliberations will not be disturbed.

Under the parameters of Lewis, Mr. Power has clearly shown good cause for the request to interview jurors. Mr. Power cannot establish prejudice without this information from the jury. The State cites to no case law to support its objection to jury interviews (Answer Brief at 27-30).

Any concerns that may arise about intruding into the privacy of the jury deliberations may be relieved by formulating a limited set of questions narrowly tailored to fit Mr. Power's needs. See, Baptist Hospital v. Maler, 579 So. 2d 97 (Fla. 1991)(although this Court reversed the circuit court's grant of jury interviews, the facts of the case indicate the circuit court defined two limited questions to be asked of the jury). See also, United States v. Gaffney, 676 F. Supp. 1544 (M.D. Fla. 1987)(following Fed. R. Evid. 606(b), the court set forth four questions to be asked of jurors).

Mr. Power is entitled to due process and Eighth and Fourteenth Amendments rights to a fair trial. His inability

to fully explore whether the jury saw him shackled must be weighed against his constitutional rights. Relief is warranted.

ARGUMENT V

INCOMPLETE AND INACCURATE RECORD

On May 29, 2001, Mr. Power filed in the Circuit Court a motion to correct the transcript of the evidentiary hearing. The motion outlined 78 errors and misspellings. The errors were so pervasive as to effect the meaning of the testimony.[4]

The State argues that Mr. Power's argument was not sufficiently pled to allow for the formulation of a response. The State, however, was able to respond at the motion hearing held on January 14, 2002 when the prosecutor said, "The problem is, I really have no way of knowing whether or not those are appropriate corrections from my own recollection. They all seem to be that those were possibly points that were important to the defense." (PC-R. at 681). The trial court said she would set a hearing on the matter, but failed to do

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[4]It appears that the Motion to Correct the Transcript was omitted from the record on appeal, but the transcript from that motion hearing is included as part of the record on appeal (PC-R. at 670-688). It was filed in the Circuit Court at the same time as the Written Closing Arguments and listed 78 errors from the evidentiary hearing. Simultaneous with this Reply Brief, counsel is filing a motion to supplement the record on appeal with the May 29,2001 Motion to Correct the Transcript of Evidentiary Hearing.

so and completely ignored the issue when denying Mr. Power relief ten days later (PC-R. 3707-3766) .

Mr. Power's inability to have a complete and accurate record violates his rights to due process. Entsminger v. Iowa, 386 U.S. 748 (1967). An incomplete record is inaccurate and unreliable. Evitts v. Lucey, 467 U.S. 287 (1985). Mr. Power is entitled to relief on this claim.

REMAINING ARGUMENTS

Mr. Power relies on his Initial Brief as rebuttal to the remaining arguments advanced by the State.

CONCLUSION

Based on the arguments set forth in this Reply Brief as well as his Initial Brief, Mr. Power submits that the lower court's order denying Mr. Power relief should be reversed.

CERTIFICATE OF COMPLIANCE

Counsel certifies that this Reply Brief is typed in Courier-12 font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Reply Brief has been furnished by United States Mail, first-class postage prepaid to Douglas T. Squire, Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118 this 9th day of June, 2003.

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