

IN THE SUPREME COURT OF FLORIDA

ROBERT BEELER POWER,

Appellant/Cross-Appellee,

vs.

CASE NO. SC96659

STATE OF FLORIDA,

Appellee/ Cross-Appellant.

_____ /

REPLY BRIEF OF APPELLEE/ CROSS APPELLANT

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
ORANGE COUNTY, FLORIDA

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR STATE OF FLORIDA

TABLE OF CONTENTS

PAGE NO.:

CERTIFICATE OF TYPE SIZE AND STYLE ii

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 1

CROSS APPEAL ISSUE 1

WHETHER THE TRIAL COURT ABUSED ITS
DISCRETION IN GRANTING A PROTECTIVE ORDER
PROHIBITING THE STATE FROM REVIEWING
APPELLANT'S MEDICAL RECORDS FROM THE ORANGE
COUNTY JAIL?

CONCLUSION 4

CERTIFICATE OF SERVICE 5

TABLE OF CITATIONS

	<u>PAGE NO.:</u>
<u>Dillbeck v. State,</u> 643 So.2d 1027 (Fla. 1994)	2
<u>State v. Diquilio,</u> 491 So.2d 1129 (Fla. 1986)	3
<u>Trepal v. State,</u> 25 Fla.L.Weekly S190 (Fla. March 9, 2000)	3

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that

is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

The State will rely upon the statement of the case and facts set forth in its answer brief/initial brief on the cross-appeal.

CROSS APPEAL ISSUE

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A PROTECTIVE ORDER PROHIBITING THE STATE FROM REVIEWING APPELLANT'S MEDICAL RECORDS FROM THE ORANGE COUNTY JAIL?

The State continues to maintain that the Honorable Judge Blackwell White erred in granting a protective order precluding the State from receiving and reviewing appellant's Orange County jail medical records. Appellant's post-conviction claims rendered the records relevant and there were certainly less oppressive means to vindicate any privacy concerns that appellant may have had in the requested medical records.

The State is not arguing as appellant seems to believe, that he has absolutely no privacy interest in the requested medical records. (Appellant's Brief at 17). Instead, the State asserts that it has shown good cause for release of the records. Appellant has made specific claims regarding his mental condition and allowed his own experts to review a great number

of medical and psychiatric records.¹ It is simply unfair to allow appellant to control the scope and flow of information surrounding his mental condition, selectively using and releasing such information when it tends to support his claims, at the same time prohibiting the State from obtaining and reviewing information which it might use to rebut his post-conviction claims. This Court has recognized in the past that it will not require one side to abide by the "Marquis of Queensberry's rules, while the other fights ungloved." Dillbeck v. State, 643 So.2d 1027, 1031 (Fla. 1994).

In his brief, appellant maintains that he does not "lose his privacy interests because he is convicted of a crime." (Appellant's Brief at 19). Yet, based upon this record, the State must question whether or not appellant truly seeks to protect his privacy, or is simply attempting to limit the State's ability to rebut his post-conviction claims with

¹The allegations relating to appellant's mental state are set forth in appellee's/cross-appellant's initial brief. One of appellant's experts concluded after reviewing extensive medical and/or psychiatric records that "[t]he existence of symptoms of this disorder alone would have greatly affected Mr. Power's ability to make clear and rational choices about what may or may not have been on his own best interest. His ability to assist in the preparation of his defense would have been significantly impaired..." In concluding her report, Dr. Sultan stated: "Mr. Robert Power was unable to make a clear and rational decision regarding whether the presentation of circumstances described above should have been presented during his trial and sentencing hearing." (Supp. R. 13-14).

unfavorable evidence. The later point appears to be the case here as appellant has already allowed his own experts unfettered access to similar types of medical and/or psychiatric records, including the "1987-1993 State of Florida, Department of Corrections, **Medical Records** for Mr. Robert Beeler Power." (Supp. R. at 12)(emphasis added).

As for the standard of review, appellant claims "[e]rroneous rulings of law are reversible unless the State proves the error harmless beyond a reasonable doubt. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)." (Appellant's Brief at 23). DiGuilio has absolutely no application to the case *sub judice*. DiGuilio addresses an error at trial that benefits the State. This is an appeal from a pre-evidentiary hearing discovery order. And, the defendant is the beneficiary of the lower court's error in this case, not the State. This Court recently articulated the standard of review for appeals before this Court in a similar procedural posture:

Drawing upon the district courts' use of the writ of certiorari to provide an instructive model of how this Court may exercise its jurisdiction in such cases, we hold that to obtain relief an appellant must establish that the order compelling discovery does not conform to the essential requirements of law and may cause irreparable injury for which appellate review will be inadequate.

Trepal v. State, 25 Fla.L.Weekly S190, S191 (Fla. March 9,

2000).² Based upon the facts of this case, Judge White's granting a protective order which precludes the State from receiving or reviewing any of appellant's medical records from the Orange County jail does not conform to the essential requirements of the law.

²This deferential standard of review applies to all interlocutory appeals in post-conviction capital cases, or at least those that involve discovery issues.

CONCLUSION

WHEREFORE, based on the foregoing, and the argument contained in Appellee's Answer Brief, the State asks this Honorable Court to deny appellant any relief on his interlocutory appeal and affirm the decision of the Ninth Judicial Circuit Court below. The State also asks this Court to overturn the Ninth Judicial Circuit Court's order quashing the State's subpoena and granting a protective order which precludes the State from examining Powers' Orange County jail medical records.

Respectfully submitted,

**ROBERT A. BUTTERWORTH
ATTORNEY GENERAL**

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Pamela H. Izakowitz, Post Office Box 3294, Tampa, Florida 33601-3294, this _____ day of March 2000.

COUNSEL FOR STATE OF FLORIDA