

FLORIDA SUPREME COURT, WEDNESDAY, MAY 9, 2012.

>> ALL RISE.

THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.

ALL WHO HAVE CALLS TO PLEA, DRAW NEAR, GIVE ATTENTION.

YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES, GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT.

THE FIRST CASE ON OUR DOCKET TODAY IS MERCK VERSUS THE STATE OF FLORIDA.

>> MAY IT PLEASE THE COURT, MY NAME IS JAMES VINIEGRA AND I REPRESENT MR. MERCK.

I'D LIKE TO ARGUE ISSUE NUMBER FIVE OF THE INITIAL BRIEF, TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT MENTAL HEALTH MITIGATION.

WITH RESPECT TO THE REMAINING ISSUES, I WOULD RELY ON THE BRIEFS.

>> COULD YOU SET THE STAGE ABOUT WAS THIS A SECOND OR THIRD PENALTY PHASE?

>> THERE WAS MERCK ONE, A PENALTY PHASE THERE, MERCK TWO AND THIS WAS THE THIRD PENALTY PHASE.

>> AND THE LAWYER THAT HANDLED THE THIRD PENALTY PHASE, WAS THAT THE LAWYER THAT HANDLED THE FIRST AND SECOND?

>> NO, YOUR HONOR.

THERE WERE DIFFERENT LAWYERS.

THE PDS WERE APPOINTED ON THE THIRD ONE.

MR. WATTS GOT APPOINTED AFTER A CONFLICT WITH THE PUBLIC DEFENDER AND BROUGHT SOMEONE ELSE IN BECAUSE OF THE WORKLOAD.

>> I WANT TO KNOW, WHEN SOMEBODY GETS TRIED ONE, TWO OR THREE TIMES, THERE WAS MENTAL HEALTH MITIGATION IN

>> THE SECOND ONE.

>> THE SECOND ONE.

SO WHAT ABOUT THE ARGUMENT THAT AND WHAT WAS THE JURY VERDICT IN THAT SECOND ONE?

>> THE SECOND ONE WAS A 12 OUT.

>> WITH MENTAL HEALTH MITIGATION

>> YES, BUT THERE WAS NOT A PSYCHIATRIST PRESENTED.

>> THE QUESTION IS DON'T WE WHEN LOOKING AT THE TOTALITY WE HAVE SOME ADVANTAGE OF SEEING, WELL, IF YOU TRY THIS TACTIC, THIS DIDN'T WORK.

DID THAT FIGURE INTO THIS LAWYER'S DECISION TO NOT CALL A MENTAL HEALTH EXPERT IN PENALTY PHASE NUMBER THREE?

>> WE DON'T KNOW WHAT FACTORED INTO MR. SCHWARTZBERG'S DECISION BECAUSE IF YOU LOOK AT THE TOTALITY OF CIRCUMSTANCES, HE DIDN'T LOOK INTO MUCH OF ANYTHING.

HE MADE AN UNINFORMED DECISION NOT TO PRESENT DR. MAYER AS THE MENTAL HEALTH EXPERT IN THE THIRD CASE IN WHICH HE HANDLED.

THIS CAN BE SEEN BY THE TOTALITY OF THE CIRCUMSTANCES.

>> WELL, DIDN'T HE TESTIFY, MR. SCHWARTZBERG?

>> MR. SCHWARTZBERG DIED ABOUT A YEAR AFTER THIS TRIAL.

THIS WAS HIS LAST TRIAL.

>> I THOUGHT THERE WAS SOMETHING IN THE RECORD ABOUT THE FACT THAT MR. SCHWARTZBERG TOOK THE POSITION THAT HE DIDN'T WANT TO CALL DR. MAYER OUT OF FEAR THAT IT WOULD OPEN THE DOOR TO (INAUDIBLE) TO SAY THINGS HE DID NOT WANT TO SAY.

>> I THINK WHAT THE COURT'S REFERRING TO IS 11 DAYS AFTER THE PENALTY PHASE, THERE WAS A SPENCER HEARING, AND AS AN AFTERTHOUGHT, MR. SCHWARTZBERG WAS TRYING TO EXPLAIN HIMSELF TO THE COURT. HE WAS TRYING TO EXPLAIN HIMSELF BECAUSE WHEN HE ABDICATED HIS RESPONSIBILITY TO PRESENT DR. MAYER AT THE PENALTY PHASE, IT CAUGHT THE COURT, DR. MAYER AND COCOUNSEL COMPLETELY BY SURPRISE. THEY WERE SHOCKED.

THEY HAD TO STOP THE TRIAL, TAKE A RECESS AND HAVE A COLLOQUY.

SO THEN 11 DAYS LATER AT THE SPENCER HEARING MR. SCHWARTZBERG AS AN AFTERTHOUGHT TRIED TO EXPLAIN HIMSELF, AND HE SAID TO THE COURT THE REASON WHY HE DID THAT WAS BECAUSE HE WAS CONCERNED IF HE CALLED DR. MAYER DR. SLOWMAN WOULD CONFUSE THE JURY ABOUT THE TERM OF SENTENCE THAT MR. MERCK MIGHT SERVE.

NOW, DR. SLOWMAN DID NOT TALK ABOUT ANY TERM OF SENTENCE.

ADDITIONALLY, DR. SLOMAN WAS GOING TO TESTIFY SIMPLY AS TO ANTISOCIAL PERSONALITY DISORDER.

THAT'S ALL HE WAS GOING TO SAY.

HE WAS A PSYCHOLOGIST, NOT A PSYCHIATRIST, LIKE DR. MAYER.

DR. MAYER HAD A VERY DETAILED DIAGNOSIS, AN AXIS I DIAGNOSIS OF BRAIN DAMAGE, FETAL ALCOHOL SYNDROME.

BOTH EXPERTS RELIED ON THE SAME BASIS FOR THEIR OPINION.

SLOMAN WAS GOING TO SAY IT WAS ANTISOCIAL PERSONALITY DISORDER.

ANTISOCIAL PERSONALITY DISORDER IS A DESCRIPTION OF BEHAVIOR, NOT AN EXPLANATION OF CAUSE.

DR. MAYER WOULD HAVE TESTIFIED AS TO THE DIAGNOSIS, AN AXIS I DIAGNOSIS, WHEREAS DR. SLOMAN WAS JUST GOING TO DESCRIBE THE BEHAVIOR.

>> YOU'RE DOING A VERY GOOD JOB OF EXPLAINING THIS, BUT LET'S GO BACK TO SCHWARTZBERG EITHER REASONABLY COULD HAVE DECIDED.

SCHWARTZBERG COMES IN HOW TO DO THE PENALTY PHASE?

>> THE WAY THEY DIVIDED IT WAS WATTS WOULD HANDLE THE LAY WITNESSES.

SCHWARTZBERG WAS GOING TO HANDLE THE EXPERT WITNESSES.

AND THE CROSS EXAMINATION OF THE STATE'S WITNESSES.

>> IN THE PENALTY

>> IN THE PENALTY PHASE.

THERE'S ONLY A PENALTY PHASE.

WATTS PRESENTED HIS END.

HE LAID OUT THE FOUNDATION, THE DYSFUNCTIONAL UPBRINGING THAT MR. MERCK SUFFERED, ALL THE PORTIONS ABOUT HIS MOTHER TRYING TO ABORT HIM BY DRINKING EXCESSIVE AMOUNTS OF ALCOHOL, DRINKING TURPENTINE, JUMPING OFF A PORCH, ALL IN AN EFFORT TO ABORT HIM.

SHE DIDN'T WANT HER HUSBAND WHO WAS IN VIETNAM THAT SHE BECAME PREGNANT WHILE HE WAS OVER THERE.

>> I'M TRYING TO FIND OUT ABOUT THE DEFICIENCY PRONG.

WHAT WHEN HOW LONG DID SCHWARTZBERG HAVE TO PREPARE FOR THE PENALTY PHASE?

>> HE CAME ON VERY LATE IN THE PENALTY PHASE, AND DR. MAYER CALLED HIM NUMEROUS TIMES, MADE SEVERAL SHORT PHONE CALLS TO SET UP A MEETING WITH HIM.

HE BILLED HIM ONLY FOR TWO 15 MINUTE CALLS, WHERE DR. MAYER IMploRED SCHWARTZBERG TO MEET WITH HIM SO THEY COULD

>> SO THIS IS NOT A SITUATION WHERE MAYER SAID DON'T PUT ME ON BECAUSE THIS WILL BE HARMFUL TO

>> ABSOLUTELY NOT.

DR. MAYER

>> WHAT DID COCOUNSEL DID COCOUNSEL THINK THAT MAYER WAS GOING TO BE CALLED?

>> APPARENTLY YES, BECAUSE HE TESTIFIED HE WAS SHOCKED.

IT CAME IN AT THE 11TH HOUR.

SCHWARTZBERG AFTER MR. WATTS PUT HIS LAY WITNESSES ON, SCHWARTZBERG ANNOUNCED THEY WERE GOING TO STREAMLINE THE TRIAL.

IT CAME AS A SURPRISE.

>> AND DID WATTS TESTIFY AT THE EVIDENTIARY HEARING?

>> YES, HE DID.

>> AND HE SAID THERE WAS NO STRATEGIC REASON FOR NOT CALLING MAYER?

>> HE SAID HE WAS SURPRISED AND MIFFED THAT AT THE 11TH HOUR THAT THEY WEREN'T GOING TO PRESENT DR. MAYER.

HE SAID HE THOUGHT THERE WAS SOME REASON FOR IT, BUT HE COULDN'T RECALL WHAT IT WAS.

>> WAS THERE A PROBLEM OR WAS THERE AN ISSUE WITH REGARD TO CONFLICT BETWEEN THE POSITION IN THE GUILT PHASE AND WHAT THE TESTIMONY MAY HAVE BEEN FROM THIS EXPERT, ANY ISSUES WITH REGARD TO THAT, ABOUT WHETHER MERCK HAD COMMITTED THIS ACT OR WHETHER HE HAD ADMITTED THAT HE HAD DONE THE ACT AND WHETHER THERE'S ANY ISSUE WITH REGARD TO WHETHER MR. MERCK HIMSELF HAD SAID THAT HE JUST THAT HE WENT ABOVE AND BEYOND ANYTHING THAT HE THOUGHT POSSIBLE?

IS THERE ANYTHING LIKE THAT THAT OUGHT TO BE FACTORED INTO THE TOTALITY THAT WE'RE TALKING ABOUT?

>> WELL, THE FACTS THAT WERE PRESENTED AT THE PENALTY PHASE WERE THE FACTS THAT WERE PRESENTED AT THE GUILT PHASE.

THEY WERE PRESENTED AT THE PENALTY PHASE THAT WAS PREVIOUSLY PUT ON.  
THE SAME FACTS WERE PUT ON AT THIS PENALTY PHASE.  
THE JURY KNEW WHAT HAPPENED

>> LET ME ASK.

IT'S A VERY SIMPLE, STRAIGHTFORWARD QUESTION.

WERE THERE ANY ISSUES OR DISPUTES WITH REGARD TO WHAT THIS EXPERT WOULD  
HAVE TESTIFIED TO THAT WOULD HAVE IMPACTED SOMETHING ABOUT HOW THE  
UNDERLYING EVENTS, THE GUILT OF THE GUILT PHASE OF THIS EVENT?

>> THERE WOULDN'T HAVE BEEN ANY

>> ANYTHING AT ALL?

>> ANY GUILT PHASE ISSUE.

>> WHEN I SAY GUILT PHASE ISSUES LET ME GO BACK AND MAKE SURE WE'RE  
COMUNT CAILTING.

WERE THERE ANY ISSUES WITH REGARD TO A LAWYER MAKING A DECISION TO CALL  
THIS WITNESS THAT WERE IMPACTED BY THINGS THAT MERCK MAY HAVE SAID TO HIM  
WITH REGARD TO HIS GUILT AND WHAT HE HAD DONE THAT WOULD SHOULD BE  
FACTORED INTO OUR DISCUSSION OR ANALYSIS?

>> WELL, AT THE 92 DEPOSITION, DR. MERCK DR. MAYER TESTIFIED THAT MERCK  
SAID TO HIM THAT HE WAS EXCESSIVE IN WHAT HE DID.

SO HE ADMITTED TO DR. MAYER EARLIER ON AT THE INITIAL INTERVIEWS.

>> WELL, HE ADMITTED THAT HE DID IT.

>> HE ADMITTED HE DID IT.

>> AND THAT HE WENT BEYOND WHAT WAS NECESSARY TO PROTECT HIMSELF.

>> THAT'S WHAT THE DOCTOR SAID.

>> IS THAT SOMETHING THAT SHOULD BE FACTORED INTO OUR DISCUSSION AND  
ANALYSIS?

>> IT'S NOT NECESSARILY FACTORED INTO SCHWARTZBERG'S PATTERN BECAUSE HE  
DIDN'T MENTION THAT AND ALSO THAT THE JURY HAD ALREADY CONVICTED HIM AT THE  
GUILT PHASE.

THE JURY HAD ALREADY HEARD ALL OF THE EVIDENCE PRESENTED AT HIS PENALTY  
PHASE, THE SAME EVIDENCE.

THE JURY ALREADY HEARD ALL OF THIS.

THEY HEARD THE FACTS OF THE CASE AND THE ISSUE WHETHER MR. MERCK ADMITTED  
TO IT OR NOT WAS NOT AN ISSUE AT ALL.

>> WHO IS DR. MILLER?

>> MILLER?

>> IS IT MAYER OR MILLER?

>> MAYER.

DR. MAYER.

DR. MAYER WAS THE DOCTOR WHO WAS WHO WAS RETAINED IN THE EARLY TRIAL.

>> IS THERE A DR. MILLER?

>> THERE WAS A DR MAIR RYN MAYBE YOU'RE REFERRING TO.

MARIN

>> THAT'S THE NEXT CASE.

>> LET ME ASK YOU.

I BELIEVE MR. WATTS TESTIFIED THAT WHEN THE SPENCER HEARING CAME ABOUT, THAT HE WAS HANDED THE FILE AT THE LAST MINUTE BY MR. SCHWARTZBERG, AND I THINK HE TESTIFIED THAT HE WAS PERTURBED BY THE LAST MINUTE CHANGE AND FELT UNPREPARED TO EXAMINE DR. MAYER DURING THE SPENCER HEARING, ALSO FELT THAT HE WAS SHOCKED AT THE LACK OF COMMUNICATIONS BETWEEN MR. SCHWARTZBERG AND DR. MAYER THROUGHOUT THE ENTIRE PROCEEDINGS.

>> CORRECT.

>> WAS THERE SOMETHING WRONG HEALTHWISE WITH MR. SCHWARTZ BERG?  
IT SEEMS LIKE EITHER HE LOST INTEREST IN THE CASE OR SOMETHING WAS GOING ON.

YOU SAID HE DIED SOON AFTER THE TRIAL?

>> THAT'S RIGHT.

AFTER THE TRIAL THIS WAS THE LAST TRIAL HE TRIED.

>> WAS HE ILL FOR AN EXTENDED PERIOD OF TIME?

>> HE HAD DONE CAPITAL TRIALS.

HE HAD WORKED WITH WATTS.

HE HAD WORKED WITH MAYER.

BUT HE HAD A HEART ATTACK.

HE HAD GASTROINTESTINAL PROBLEMS WHICH REQUIRED SURGERY.

HE WAS HAVING MARITAL PROBLEMS, MARITAL DISCORD WITH HIS WIFE.

SHE HAD SPENDING ISSUES, ACCORDING TO MR. WATTS.

MR. WATTS SAID THAT HE THOUGHT MAYBE HIS WIFE WAS MENTALLY ILL.

THEY WERE HAVING LITERALLY CUSTODY BATTLES OVER THEIR DOGS.

AND MR. WATTS

>> THIS WAS GOING ON WHEN IN RELATION TO THE

>> MR. MERCK'S TRIAL.

DURING MR. MERCK'S TRIAL.

THIS WAS ALL GOING ON.

BOTH THE ATTORNEY, WATTS, THE ATTORNEY HE WORKED WITH IN THE PAST MANY TIMES, AND DR. MAYER, WHO SCHWARTZBERG WORKED WITH, SAID THIS WAS UNUSUAL BEHAVIOR FOR MR. SCHWARTZBERG.

DR. MAYER SAID THAT ALTHOUGH SCHWARTZBERG WAS GOOD ON THE GENERALITIES, HE WAS WEAK ON DETAILS AND THAT'S THE REASON I WANTED TO GET WITH HIM ON THE MENTAL HEALTH ISSUES.

BUT THIS WAS UNUSUAL BEHAVIOR FOR MR. SCHWARTZBERG.

BOTH THE ATTORNEY AND THE EXPERT TESTIFIED TO THAT.

AND IN FACT THAT WAS THE LAST TRIAL THAT HE EVER TRIED BECAUSE OF ALL THESE HEALTH PROBLEMS AND MARITAL PROBLEMS HE WAS HAVING, DIED SHORTLY THEREAFTER.

>> DESPITE THE FAILURE OF MR. SCHWARTZBERG TO COMMUNICATE WITH DR. MAYER, IS THERE ANY QUESTION HERE AS TO WHETHER OR NOT DR. MAYER HAD BEEN GIVEN OTHER DOCUMENTS INVOLVING THIS DEFENDANT?

DID HE HAVE THE SCHOOL RECORDS?

DID HE HAVE ANY OTHER HEALTH OR MENTAL HEALTH RECORDS?

DID HE HAVE PRISON RECORDS?

WHATEVER.

DID HE HAVE THOSE KINDS OF INFORMATION THAT WOULD BE HELPFUL IN HIM DOING HIS ASSESSMENT?

>> DR. MAYER OBTAINED ALL OF HIS MATERIALS FROM THE PUBLIC DEFENDER'S OFFICE AFTER HE HAD WORKED THE CASE UP EARLY ON IN '92.

HE GOT NOTHING FROM SCHWARTZBERG.

EVERYTHING CAME FROM THE PUBLIC DEFENDER'S OFFICE.

>> SO DID HE TESTIFY IN THE PRIOR PENALTY PHASES?

>> NO, HE DID NOT.

THAT ONE ENDED IN A MISTRIAL.

HE NEVER TESTIFIED AT ANY OF THE PRIOR PENALTY PHASES.

HE GOT

>> BUT HE HAD EXAMINED THIS DEFENDANT PRIOR TO ALL OF THOSE PENALTY PHASES.

>> YES, YOUR HONOR.

>> AND SO WHY WASN'T HE USED IN ANY OF THOSE OTHER PENALTY PHASES?

>> WELL, HE GOT HE GOT WORKED IT UP BEFORE THE MISTRIAL AND HE JUST NEVER TESTIFIED THERE AND NONE OF THE OTHER LAWYERS WHO PROCEEDED THEREAFTER USED HIM OR CONTACTED HIM.

HE GOT THE MATERIAL HE WORKED UP THE CASE AND IN THE '92 DEPOSITION HE HAD THAT DETAILED DIAGNOSIS INVOLVING THE PA PTOSIS, THE NEUROLOGICAL PROBLEMS, THE STRESS DISORDER, THE ADD, THE BRAIN DAMAGE, THE FETAL ALCOHOL EFFECT.

HE HAD ALL OF THAT.

>> SO WITH ALL OF THAT BEING SAID, WHAT IS IT THAT HE WOULD HAVE CONTRIBUTED TO THIS PENALTY PHASE?

WOULD HE HAVE DEMONSTRATED THE STATUTORY MENTAL MITIGATORS OR WOULD THERE HAVE BEEN SOME NONSTATUTORY MENTAL MITIGATION?

WHAT IS IT THAT YOU BELIEVED A JURY SHOULD HAVE HEARD THAT WOULD HAVE PROBABLY MADE A DIFFERENCE?

I KNOW THIS WAS A 9 3 DETERMINATION BY THE JURY.

>> YES.

HE WOULD HAVE TIED UP THE MITIGATION BECAUSE THE JURY HAD HEARD HORRIBLE ANECDOTAL EVIDENCE OF MR. MERCK'S BACKGROUND.

IT WAS JUST HANGING OUT THERE.

DR. MAYER WOULD HAVE TIED IT UP.

HE WOULD HAVE LENT CONTEXT TO THAT TESTIMONY.

>> IN WHAT RESPECT?

>> (INAUDIBLE) THE VALID HISTORY OF THIS DEFENDANT?

>> THE VIOLENCE WAS ALREADY BROUGHT OUT THROUGH THE AGGRAVATE TORES.

THE STATE BROUGHT THOSE OUT.

ANY OTHER VIOLENCE OR ANYTHING THE STATE WAS GOING TO STAY AWAY FROM IT.

THERE WAS AN ACT OF VIOLENCE HE COMMITTED WHILE YOUNG, CAUSED MERCK ONE, AND IN FACT WHEN THE SPENCER HEARING WENT ON, DR. MAYER TESTIFIED IT NEVER GOT BROUGHT OUT IN HIS TESTIMONY OR ON CROSS EXAMINATION.

SURELY THE STATE DIDN'T WANT TO ELICIT THAT AND CAUSE ANOTHER MISTRIAL.  
>> WELL, LET ME LET'S SEE IF WE CAN JUST TIE THIS UP HERE.  
THE TRIAL JUDGE FOUND THAT MR. MERCK HAD THIS DIFFICULT CHILDHOOD, THAT THERE WAS ALCOHOL ABUSE AND MAYBE ALCOHOL DEPENDENCY HERE, AND SO HOW WOULD DR. MERCK MAYER'S TESTIFIED TIE ALL OF THIS TOGETHER?

>> WELL, WITH DR. MERCK'S TESTIMONY, THE DEFENSE COULD HAVE PRESENTED THE INSTRUCTION OF EXTREME MENTAL EMOTIONAL DISTURBANCE AT THE TIME OF THE OFFENSE.

>> BASED ON?

>> BASED UPON THE ALCOHOLISM, THE BRAIN DAMAGE, THE FETAL ALCOHOL EFFECT. HE HAD PAFTOSIS.

>> WE ALWAYS HEAR ABOUT ALL OF THESE THINGS, AND SO HE WAS PREPARED YOU'RE SAYING DR. MAYER WAS PREPARED TO SAY BECAUSE HE HAD ALL OF THESE THINGS, THAT GAVE HIM MENTAL AND EMOTIONAL DISTURBANCE AT THE TIME THAT THIS CRIME TOOK PLACE?

>> ABSOLUTELY, YOUR HONOR.

THEN THE JURY CAN DETERMINE MR. MERCK'S MORAL CULPABILITY AND BASICALLY THEY'D ALSO GET AN INSTRUCTION, CAPACITY TO APPRECIATE CAPACITY OF HIS CRIMINALITY.

THEY ALSO HAD THAT.

AS IS, THE JURY JUST HAD THIS

>> SO BECAUSE HE HAD ALL OF THESE CONDITIONS, YOU'RE SAYING THAT AT THE TIME THAT HE HAD THIS CONFRONTATION THIS IS THE CASE WHERE HE WAS AT A CAR AND

>> BAR FIGHT.

>> WAS MAKING SOME TALKING TO THIS GUY AND THEN WENT BACK TO HIS CAR AND GOT A KNIFE, I BELIEVE IT IS, AND STABBED THIS PERSON TO DEATH.

SO YOU'RE SAYING BECAUSE HE HAD THESE STATIC KIND OF CONDITIONS, HE AT THE TIME THAT HE WENT AND GOT THIS KNIFE FROM THE CAR, CONFRONTED THIS I BELIEVE UNARMED VICTIM, THAT HE WAS SUFFERING FROM A MENTAL OR EMOTIONAL DISTRESS.

>> ABSOLUTELY, YOUR HONOR.

ABSOLUTELY.

AND ALSO MR. SCHWARTZBERG ALSO ABANDONED PRESENTING A TOXICOLOGIST WHO WOULD TESTIFY AS TO A .16 AND A .26.

NO EXPLANATION FOR THAT.

>> YOU'RE WAY INTO YOUR REBUTTAL, BUT I HAVE TO ASK THE QUESTION I STARTED WITH AND MAKE SURE I UNDERSTAND.

IN THE SECOND PENALTY PHASE THERE WAS MENTAL HEALTH MITIGATION AND THE TRIAL COURT FOUND A STATUTORY MITIGATOR FOR EXTREME EMOTIONAL DISTRESS. IT WAS 12 0 AGAINST MR. MERCK, RIGHT?

>> YES.

>> SO IF WE EVEN IF WE FIND DEFICIENCY, I'M STILL HAVING TROUBLE HOW WHEN IT WAS PRESENTED, THERE WAS THE JURY WAS NOT ONLY UNMOVED, BUT ACTUALLY FOUND 12 0 AGAINST MR. MERCK.

>> THE EXPERT THAT TESTIFIED AT THAT PENALTY PHASE DID NOT TESTIFY AS TO THE DIAGNOSIS THAT DR. MERCK HAD OR DR. MAYER WOULD HAVE HAD IN THE THIRD PENALTY PHASE.

I'M WAY INTO ME REBUTTAL.

>> MAY IT PLEASE THE COURT, STEPHEN AKE ON BEHALF OF THE STATE OF FLORIDA. IF I UNDERSTOOD COUNSEL'S ARGUMENT, HE WAS SAYING ATTORNEY WATTS TESTIFIED THAT HE WAS SHOCKED AND MIFFED THAT THEY DIDN'T PRESENT DR. MAYER TO THE JURY.

I DON'T THINK THAT'S HIS TESTIMONY AT ALL.

WHAT HE WAS SHOCKED AND MIFFED AT WAS THE FACT THAT COCOUNSEL GAVE HIM DR. MAYER AT THE SPENCER HEARING AND HE WASN'T PREPARED FOR THAT.

>> WHAT DID HE SAY ABOUT COCOUNSEL, ABOUT WAS HE AT ALL DID HE ASSUME DR. MAYER WAS GOING TO BE TESTIFYING BEFORE THE JURY AT THE PENALTY PHASE?

>> YOUR HONOR, THEY RICHARD WATTS TESTIFIED THAT THEY HAD TAKEN DR. MAYER'S DEPOSITION IN OCTOBER OF THE YEAR PRIOR TO THE PENALTY PHASE.

THE PENALTY PHASE WAS IN MARCH, I BELIEVE, OF '04 AND IN OCTOBER OF '03 SCHWARTZBERG HAD TAKEN DR. MAYER'S DEPOSITION.

THEY HAD MADE A DECISION AFTER THAT TIME THAT THEY DIDN'T THINK THEY WERE GOING TO PUT HIM ON TO THE JURY.

HE COULDN'T RECALL THE DETAILS OF WHY HE DID THAT, BUT THEN

>> LET ME MAKE SURE.

THE DEFENSE LAWYER WHO IS HAS MAYER AS HIS EXPERT TOOK HIS DEPOSITION?

>> WELL, THE STATE TOOK HIS DEPOSITION.

HE WAS THERE.

HE WAS ATTENDING IT.

>> I THOUGHT THAT THERE ISN'T TESTIMONY FROM DR. MAYER HOW HE KEPT ON TRYING TO CALL MR. SCHWARTZBERG, NEVER GOT A CALL BACK, WAS GETTING INCREASINGLY CONCERNED BECAUSE HE HAD FOUND THAT SCHWARTZBERG PREVIOUSLY HAD ALWAYS BEEN A VERY GOOD LAWYER TO WORK WITH AND THIS TIME HE DIDN'T UNDERSTAND WHY HE WASN'T GETTING CALLS BACK?

>> DR. MAYER DID TESTIFY TO THAT REGARD, THAT HE HAD TRIED TO CONTACT HIM NUMEROUS TIMES.

>> SO DID DR. SO HIS COCOUNSEL INSTEAD OF BEING SHOCKED AND SURPRISED, HE TESTIFIED THAT TOGETHER HE AND MR. SCHWARTZBERG MADE A STRATEGIC DECISION NOT TO CALL DR. MAYER?

>> RIGHT.

HE SAID THAT THEY HAD MADE SOME DECISION, BUT HE JUST COULD NOT RECALL WHAT THAT DECISION WAS.

OBVIOUSLY, WE DIDN'T HAVE MR. SCHWARTZBERG THERE.

>> THE DECISION WAS OBVIOUSLY WHEN HE SAID HE DOESN'T RECALL THE DECISION, IT MUST HAVE BEEN NOT TO CALL DR. MAYER.

>> CORRECT, AND I BELIEVE THEY MADE THAT DECISION AT THE TIME OF THE DEPOSITION IN OCTOBER.

>> YOU BELIEVE THAT THEY BASED ON WHAT?

>> RICHARD WATTS' TESTIMONY, THAT THEY TOOK HIS DEPOSITION, DECIDED NOT TO



>> IS HIS DEPOSITION IN THE RECORD?  
>> YES.  
>> AND I WANT TO UNDERSTAND SOMETHING.  
THEY DIDN'T WANT HIS DEPOSITION BECAUSE OR THEY DIDN'T WANT HIS  
TESTIMONY BECAUSE MR. BECAUSE MR. MERCK CONFESSED THAT HE KILLED THE GUY?  
>> CORRECT.  
>> WELL, BUT THE JURY WAS ALREADY GOING TO HEAR HE HAD BEEN CONVICTED.  
THIS IS THE PNLT PENALTY PHASE.  
>> RIGHT.  
>> WHAT EVIDENCE WOULD HAVE COME OUT WHEN DR. MAYER TESTIFIED THAT THE JURY  
WOULDN'T HAVE HEARD ABOUT HIM BEING VIOLENT?  
WHAT WAS IT  
>> I THINK WHAT THEY WERE CONCERNED  
>> WHAT WERE THEY WORRIED ABOUT COMING OUT?  
>> WHAT THEY STATED ON THE RECORD AT THE TIME WAS THEY WERE CONCERNED WITH  
THE STATE CALLING THEIR REBUTTAL WITNESS, DR. SLOMAN.  
>> TO SAY WHAT?  
>> DR. SLOMAN WAS GOING TO DIAGNOSE ANTISOCIAL PERSONALITY DISORDER.  
>> I UNDERSTAND THESE ARE ALL THESE WORDS.  
SOMEBODY SAYS IT'S EXTREME EMOTIONAL DISTRESS.  
YOU'VE GOT KIND OF AN IMPULSIVE ACT HERE OF SOMEBODY WHO FOR A RIDICULOUS  
REASON ENDS UP KILLING THIS POOR, INNOCENT VICTIM.  
SO THE JURY'S LOOKING TO SAY, WELL, YOU KNOW, WHAT HAPPENED?  
DID SOMETHING SNAP?  
WHAT WAS IT THAT AS FAR AS HIS PRIOR LIFE THAT WOULD HAVE COME OUT THROUGH  
DR. MAYER THAT THE JURY WASN'T GOING TO HEAR OTHERWISE?

>> WELL, I DON'T KNOW THAT NECESSARILY DR. MAYER WOULD HAVE TESTIFIED,  
ALTHOUGH HE DID SAY THAT HE MET THE CRITERIA OF ANTISOCIAL PERSONALITY.  
I THINK MORE DR. SLOMAN WOULD HAVE TESTIFIED AS TO MORE THE NEGATIVE STUFF  
AS TO HIS PRIOR OUTBURST OF VIOLENCE.  
>> WHAT I'M ASKING ABOUT THE OUTBURST.  
MAYBE DID THE JURY NOT HEAR THAT?  
THESE WERE THINGS THAT THE JURY WOULD NOT OTHERWISE HAVE HEARD?  
>> THE JURY WAS AWARE THAT HE HAD BEEN CONVICTED OF THESE OFFENSES, BUT DID  
NOT KNOW THE DETAILS OF THE OFFENSES.  
>> WELL, I GUESS THE THING IS THAT IF I'M A JURY LISTENING TO SOMEBODY WHO  
HAS AN OUTBURST OF VIOLENCE AND I EITHER FIND THAT THAT PERSON HAS NEVER  
ACTED THAT WAY OR I NOW FIND OUT HE HAS OTHER PRIOR VIOLENT FELONIES, THIS  
GUY'S A VIOLENT GUY.  
I NOW AM LOOKING FOR AN EXPLANATION.  
IF AN EXPLANATION IS THAT DR. MAYER WAS PREPARED TO TESTIFY THAT HE HAD  
BRAIN INJURY, THAT HE HAD FETAL ALCOHOL EFFECT, THAT HE HAD PTOSIS, PTSD,  
IT GIVES THEM AN EXPLANATION FOR WHY SOMEBODY WOULD UNPROVOKED COMMIT A  
VIOLENT ACT.  
>> CERTAINLY, BUT YOU ALSO HAVE TO FACTOR IN DR. SLOMAN IS GOING TO SAY HE

DOESN'T HAVE BRAIN DAMAGE.

>> IS IT TRUE THAT DR. MAYER IS A PSYCHIATRIST?

>> YES.

>> AND WHAT'S DR. SLOMAN?

>> A SIGH COL PSYCHOLOGIST.

>> I DON'T KNOW HOW A PSYCHOLOGIST CAN TESTIFY TO ORGANIC BRAIN

>> WELL, HE

>> LET ME THEY'RE PSYCHOLOGISTS.

SO YOU'RE SAYING THE STRATEGIC DECISION WAS WE DIDN'T WANT DR. SLOMAN TO TESTIFY.

>> THAT'S WHAT THEY SAID ON THE RECORD, YOUR HONOR.

>> THE RECORD AT THE TIME OF THE SPENCER HEARING.

>> YES.

AT THE TIME OF THE PENALTY PHASE, THERE'S A COLLOQUY BECAUSE THE JUDGE REALIZES THEY'VE ANNOUNCED THAT THEY THINK THEY'RE ONLY GOING TO CALL ONE MORE WITNESS, BEING THE DEFENDANT HIMSELF, MERCK.

AND THE JUDGE REALIZES WE GOT DR. MAYER HERE IN THE COURTROOM, DR. SLOMAN IS HERE APPARENTLY.

THE STATE WANTED TO KNOW IF THEY WERE GOING TO CALL DR. MAYER.

MERCK ACKNOWLEDGED THAT HE KNEW THEY WEREN'T GOING TO CALL DR. MAYER IN FRONT OF THE JURY.

THAT WAS ALL DONE ON THE RECORD.

TEN DAYS LATER AT THE SPENCER HEARING MR. SCHWARTZBERG SAYS THE REASON WHY WE DIDN'T DO THAT HE WE DIDN'T WANT DR. SLOMAN COMING IN HERE AND TESTIFYING.

IT'S ALL ON THE RECORD.

>> IT REALLY KIND OF GOES BACK TO WHAT IS IT THAT WAS SO DEVASTATING ABOUT WHAT DR. SLOMAN WOULD HAVE SAID THAT WOULD HAVE CAUSED THEM TO MAKE THIS KIND OF DECISION?

WHAT IS IT SPECIFICALLY?

>> WELL, YOUR HONOR

>> THAT DR. SLOMAN WAS GOING TO SAY?

>> HE WAS GOING TO DETAIL HIS PRIOR CRIME.

HE WAS GOING TO TESTIFY THAT HIS I.Q. HAS GONE UP WHILE HE'D BEEN INCARCERATED AND THAT WOULD NEGATE BRAIN DAMAGE BECAUSE HE'S GOTTEN SMARTER.

I THINK DEFENSE COUNSEL IS WORRIED WHAT IS THIS JURY GOING TO HEAR AND IS IT GOING TO NEGATIVELY IMPACT DR. MAYER'S TESTIMONY TO THEM.

COUNSEL WAS AWARE THAT MENTAL MITIGATION HAD BEEN PRESENTED AT THE EARLIER PHASE WHERE IT WAS 12 0.

I THINK THEY'RE TAKEN A DIFFERENT STRATEGIC TACTIC HERE.

WE'LL LET THE JUDGE HEAR IT AT THE SPENCER HEARING.

THEY TEACH THAT IN THE SEMINARS.

>> THAT'S ALWAYS BEEN OF INTEREST TO ME, WHY DEFENSE ATTORNEYS DO JUST PRESENT THE MENTAL MITIGATION AT THE SPENCER HEARING AS OPPOSED TO BEFORE, YOU KNOW

>> I CAN TELL YOU, YOUR HONOR, THAT THEY TEACH THAT LIFE OVER DEATH SEMINARS, THAT THE REASON TO DO THAT IS YOU GO INTO THE PENALTY PHASE WITH THE JURY, YOU GET A VOTE.

SAY YOU GET A VOTE OF 7 5.

THEN YOU COME BACK AT THE SPENCER HEARING AND SAY HERE'S ALL THIS MENTAL MITIGATION THE JURY NEVER HEARD.

I DON'T WANT YOU TO OVERRIDE THAT.

THAT IS A STRATEGY BEING TAUGHT TO DEFENSE ATTORNEYS.

>> YOU'RE HERE ADVOCATING FOR THE STATE.

THERE MAY BE SOME CASES AND WE'VE SEEN THEM WHERE THE TYPE OF EVIDENCE THAT WOULD COME OUT, WHERE THEY'RE TRYING TO SORT OF PAINT THE PERSON AS THIS NICE GUY AND ALL THAT AND NOW YOU'RE GOING TO GET A DIFFERENT PICTURE.

BUT THAT'S NOT THIS CASE.

AND I THINK MY CONCERN IS REALLY ABOUT WHETHER WE HAD AN ATTORNEY THAT WAS ON THE VERGE OF EITHER SOME TYPE OF BREAKDOWN OR A YOU KNOW, WASN'T PLAYING AT HIS GAME AND WE'VE GOT A DEATH CASE.

SO MAYBE THE BETTER THING WOULD BE LET'S ADDRESS THE PREJUDICE PART, BECAUSE I'M A LITTLE CONCERNED ABOUT THE DEFICIENCY, BUT IT'S ON PREJUDICE I'D LIKE TO HEAR YOUR ARGUMENT AS TO WHY IT SHOULDN'T UNDERMINE OUR CONFIDENCE IN THE OUTCOME.

>> WELL, ONE, YOUR HONOR, IS THAT ALL THIS WAS PRESENTED TO THE JUDGE AT THE SPENCER HEARING.

THE TRIAL JUDGE HEARD ALL THIS THAT SENTENCED MERCK TO DEATH.

HE REJECTED THE MITIGATORS IN THIS CASE BASED ON THE FACTS OF THE CASE AND DR. SLOMAN'S TESTIMONY IN THE CASE BASED ON THAT, I THINK THE JURY WOULD HAVE DONE THE SAME THING.

I DON'T THINK YOU CAN SAY HE WAS PREJUDICED BECAUSE BOTH THE TRIAL JUDGE AND THIS COURT ON REVIEW HAD THAT INFORMATION IN FRONT OF THEM AS TO DR. MAYER'S OPINIONS.

HE DIDN'T OFFER ANYTHING NEW.

IT'S THE SAME OPINIONS THEY HAD BACK IN 1992 AND LATER ON IN 2003 WHEN THEY TOOK HIS DEPOSITION.

NOW, MR. SCHWARTZBERG HAD THOSE DEPOSITIONS.

I MEAN, DR. MAYER HAD BEEN ON THIS CASE SINCE DAY ONE.

SO HE HAD GIVEN TWO DEPOSITIONS IN THIS CASE.

AND SCHWARTZBERG HAD THAT INFORMATION.

HE KNEW THAT DR. MAYER HAD EVERYTHING HE NEEDED TO FORM HIS OPINIONS.

IT WASN'T A CASE OF HIM MAKING AN UNINFORMED DECISION NOT TO CALL HIM.

THIS WAS AN INFORMED DECISION NOT TO CALL HIM.

AND THEN AS THE TRIAL JUDGE FOUND IN DENYING THE MOTION, THEY CAN'T SHOW PREJUDICE IN THIS CASE BECAUSE

>> IS THE QUESTION THE QUESTION FOR US WHETHER OR NOT THAT DECISION HE MADE WAS A REASONABLE ONE UNDER THE CIRCUMSTANCES OF THIS CASE.

AND SO WHAT WE END UP WITH, IT SEEMS, IS THAT WE HAVE A DEFENDANT WHO MAY OR MAY NOT HAVE ORGANIC BRAIN PROBLEMS, BUT THE JURY NEVER GOT TO MAKE THE

EVALUATION BASED ON HAVING HEARD DR. MAYER AND THEN POSSIBLY HAVING HEARD DR. SLOMAN.

>> RIGHT, BUT I THINK THAT AGAIN IS A CLASSIC STRATEGIC DECISION THAT TRIAL COUNSEL HAS TO MAKE IN THE HEAT OF THE MOMENT AS TO HE HAD DR. MAYER THERE.

OBVIOUSLY THEY COULD HAVE PRESENTED HIM TO THE JURY.

BUT THEY TALKED ABOUT IT.

THEY CONFERRED DURING THE RECESS AND MADE THAT DECISION THAT WE'RE GOING TO CALL HIM AT THE SPENCER HEARING INSTEAD.

>> WAS DR. MAYER PREPARED I GUESS I'M STILL HAVING TROUBLE WITH THIS IDEA THAT THERE WASN'T DR. MAYER HAD TO KEEP ON CALLING MR. SCHWARTZBERG AND WE DON'T HAVE SCHWARTZBERG'S TESTIMONY, SO IT'S LIKE YOU'RE PIECING THIS TOGETHER.

BUT I THINK YOUR STRONGEST ARGUMENT IS REALLY IF THE JUDGE HEARD IT AND WE HAVE THE TESTIMONY THAT'S NOT REALLY THAT COMPELLING, THEN THAT PROBABLY IS THE WAY TO GO ON THIS.

I'M LOOKING AT THE ACTUAL DIRECT APPEAL CASE, AND IT WAS A 4 3 BECAUSE SOME OF US THOUGHT THE PENALTY PHASE ARGUMENTS WERE REALLY TAINTED.

THE PENALTY PHASE.

IS THERE ANY ARGUMENT IN THIS CASE ABOUT WHETHER TRIAL COUNSEL SHOULD HAVE OBJECTED TO SOME OF THESE PENALTY PHASE ARGUMENTS?

>> NO, YOUR HONOR.

THAT WAS NEVER AN ISSUE IN THEIR POSTCONVICTION PLEADING.

I WANTED TO KIND OF CORRECT THIS COURT'S MISUNDERSTANDING AS TO THE HEALTH OF MR. SCHWARTZBERG.

THERE WAS VAGUE TESTIMONY AND IT WAS VERY VAGUE AS TO THE TIMING OF THIS AS TO HIS HEALTH PROBLEMS, THAT HE DEFINITELY HAD HAD GASTRIC BYPASS SURGERY AND HAD A HEART ATTACK AT SOME POINT.

AND IT'S NOT CLEAR EVEN MR. WATTS COULDN'T RECALL WHEN IT WAS IN CONJUNCTION WITH THIS CASE.

BUT I THINK DR. MAYER HAS A PROBLEM WITH HIS INVOLVEMENT WITH SCHWARTZBERG, BUT I WOULD IMAGINE THAT MR. SCHWARTZBERG WAS WELL AWARE OF DR. MAYER'S CALLING HIM AND KNEW WHAT DR. MAYER HAD TO OFFER.

SO I DON'T THINK IT'S A CASE OF SCHWARTZBERG IGNORING, YOU KNOW, DR. MAYER NECESSARILY.

HE KNEW WHAT HE WAS GOING TO SAY.

HE KNEW HIS OPINIONS.

HE HAD EVERYTHING AVAILABLE TO HIM.

IF HE WANTED TO USE HIM, HE COULD TALK TO HIM AND USE HIM.

AND THEY DID TALK.

I DON'T THINK THIS IS A CASE OF MR. SCHWARTZBERG ABANDONING HIS DUTIES AS THEY'VE ALLEGED.

>> MR. MAYER AND IN A TIME LINE, DR. MAYER HAD ALREADY ESTABLISHED THIS DEFENDANT PRIOR TO MR. SCHWARTZBERG EVER GETTING ON THIS CASE, RIGHT?

>> CORRECT.

HE'D BEEN ON SINCE DAY ONE.

SO HE'D EXAMINED HIM BACK IN '92, I THINK IT WAS.

>> SO HIS REPORTS AND THESE DEPOSITIONS, ONE DEPOSITION WAS TAKEN OF HIM PRIOR TO MR. SCHWARTZBERG BEING ON THE CASE AND ANOTHER ONE WAS TAKEN THAT MR. SCHWARTZBERG ACTUALLY ATTENDED.

>> CORRECT, YOUR HONOR.

YES.

IF THERE ARE NO FURTHER QUESTIONS, I'D ASK THIS COURT TO AFFIRM.

THANK YOU.

>> REBUTTAL, I'D JUST LIKE TO POINT OUT THAT ON THE MERCK II, THE EXPERT THAT TESTIFIED AT THAT WAS A CRIMINALIST.

SO IT WASN'T A PSYCHIATRIST, A MEDICAL DOCTOR WHO COULD TESTIFY AS TO AXIS I DIAGNOSIS.

>> WHAT ABOUT THE ARGUMENT THAT THE JUDGE HEARD IT?

WE HAVE THAT, AND THE JUDGE DID NOT FIND THAT TO BE COMPELLING MITIGATION AS FAR AS NOT THAT IN EVALUATING THAT IT'S REALLY NOT STRONG MITIGATION THAT WOULD HAVE CHANGED OR UNDERMINED THE OUTCOME OF THE PENALTY PHASE?

>> THE ARGUMENT IS THAT IT DIDN'T GET BEFORE THE JURY.

THE JURY

>> I UNDERSTAND THAT, BUT IT'S NOT BUT A JUDGE HEARD IT AND EVALUATED IT AND DIDN'T FIND IT TO BE COMPELLING MITIGATION.

IS THAT WORTH ANYTHING IN OUR LOOKING AT DEFICIENCY?

>> WELL, JUDGE DOWNEY SAW THAT DIDN'T FIND THAT THE MITIGATORS WERE ESTABLISHED.

HE HAD TO GIVE GREAT WEIGHT TO THE JURY RECOMMENDATION.

AND HE WAS IN A POSITION TO OVERRIDE.

SO THAT WAS THE PREJUDICE TO MR. MERCK AT THAT POINT.

ADDITIONALLY

>> DR. MAYER HAD NEVER BEEN USED AS A WITNESS IN THE CASE IN ANY OF THE PRIOR TRIALS?

>> THAT IS CORRECT, YOUR HONOR.

>> WAS THERE ANY DISCUSSION OR ANY REASON GIVEN FOR THAT?

>> NO, YOUR HONOR.

THAT WAS A SHOCKING THING.

DR. MAYER WAS IN THE COURTROOM

>> NO.

NO.

NO.

I MEAN BEFORE.

BECAUSE I THINK JUSTICE QUINCE ASKED THE QUESTION EARLIER AND DIDN'T QUITE GET AN ANSWER.

BUT THIS EXPERT DID NOT TESTIFY AT ANY OF THE PRIOR PROCEEDINGS AND WAS ON BOARD FROM THE OUTSET.

SO HAD NOT BEEN CALLED THROUGH, WHAT, THREE?

THIS MAKES THE THIRD TIME?

>> CORRECT, YOUR HONOR.

NOW, THE FIRST ATTORNEY THAT RETAINED HIM, THAT CASE ENDED IN A MISTRIAL.  
THEN NEW ATTORNEYS CAME CAME ON.

I'D LIKE TO POINT OUT THE 2003 DEPOSITION THAT MR. SCHWARTZBERG MENTIONED,  
PTOSIS WAS NOT MENTIONED, ATTENTION DEFICIT DISORDER, FETAL ALCOHOL  
SYNDROME, POST TRAUMATIC STRESS DISORDER WAS NOT MENTIONED IN THE  
DEPOSITION.

>> DIDN'T THEY REFER BACK TO A DEPOSITION IN 1992, IF ANYTHING HAD CHANGED  
SINCE THAT TIME?

>> YES, YOUR HONOR.

THEY ASKED ONE QUESTION.

THEY SAID HAVE YOUR OPINIONS CHANGED SINCE 1992?

THE ANSWER WAS NO.

THEN THEY MOVED ON TO ADAPTABILITY IN PRISON AND THEY TALKED ABOUT THAT FOR  
THE REMAINDER OF THE DEPOSITION.

SO THE DIAGNOSIS WAS NOT FLESHED OUT.

SCHWARTZBERG DIDN'T ASK ANY QUESTIONS.

SCHWARTZBERG NEVER KNEW DR. MAYER'S DEPOSITION OR OPINION.

HE NEVER KNEW OF OF HIS OPINION EITHER THROUGH DEPOSITION OR TALKING TO  
HIM.

>> IS THERE CLEAR RECORD HE NEVER REVIEWED THE 1992 DEPOSITION?

>> THERE'S NO EVIDENCE HE REVIEWED IT.

>> IS THERE EVIDENCE HE DID NOT?

>> IT WAS NOT MENTIONED BY HIM.

HE NEVER MENTIONED IT.

NO ONE MENTIONED IT.

HIS PARTNER COULDN'T ADDRESS IT.

HIS PARTNER SAID I WAS SURPRISED AND SHOCKED WHEN HE ABANDONED THIS.

IT WAS A SHOCK TO ME ALSO.

HE WAS MIFFED AND UPSET AT THE 11TH AFTER THEY HAD DR. MAYER IN THE  
COURTROOM AND MR. WATTS LAYS THE FOUNDATION FOR HIS PARTNER TO PUT DR.  
MAYER ON AND HE SHUTS DOWN.

>> I DON'T THINK THAT REALLY ANSWERS JUSTICE LEWIS'S QUESTION.

WHAT EVIDENCE DO YOU HAVE THAT MR. SCHWARTZBERG WAS NOT FAMILIAR WITH THE  
EARLIER DEPOSITION THAT WAS TAKEN OF DR. MAYER?

>> ALL WE CAN REFER TO IS THE TOTALITY OF THE CIRCUMSTANCES, BECAUSE MR.  
SCHWARTZBERG'S DEAD AND HE CAN'T ANSWER THAT QUESTION.

>> SO YOU HAVE NO EVIDENCE THAT HE DID NOT.

>> THAT HE DID NOT.

HE DIDN'T RAISE IT.

HE DIDN'T ADDRESS IT.

EVERYTHING SURROUNDING LOOKS LIKE HE WAS NOT PREPARED.

WITH THAT, I'M OUT OF TIME.

THANK YOU.

>> THANK YOU.

WE THANK YOU BOTH FOR YOUR ARGUMENT.

