Eddie Lee Sexton v. State of Florida

SC07-286

NEXT CASE ON THE CALENDAR THIS MORNING IS SEXTON VERSUS STATE OF FLORIDA.
>> GOOD MORNING.
ROBERT STRAIN FOR MR. SEXTON.
YOUR HONOR, THIS MORNING I WOULD LIKE TO SUGGEST THAT YOUR FOCUS OF WHETHER MR. FRASER'S APPROACH TO PRESENTING MITIGATION EVIDENCE IN 1998 WAS BASED ON A REASONABLE INVESTIGATION OF THE LAW AT THAT TIME.
THIS IS IN CONTRAST TO MANY TYPICAL TYPE CASES WHERE THE -- IT WOULD APPEAR THAT THE INEFFECTIVENESS OF COUNSEL MAY BE NOT TO INVESTIGATE THE FACTS OF THE CASE OR THE FACTS OF THE DEFENDANT.
>> YOU KNOW, I HAVE TO ASK YOU THIS.
IF -- MY COLLEAGUE JUSTICE CANTERO IS NOT HERE TODAY, WHAT I THINK I HEARD YOU SAY IS THIS ISN'T AN ISSUE OF A FAILURE TO INVESTIGATE, BECAUSE AS YOU WOULD AGREE, INVESTIGATE THE FACTS, BECAUSE THIS TRIAL LAWYER HAD REPRESENTED MR. SEXTON IN THE FIRST AND THE SENTENCE -- SECOND RESENTENCING.
WHAT CASE DO WE HAVE OUT THERE THAT SOMEONE MAKING A DECISION TO NARROW FOCUS AND REJECT CERTAIN -- PUTTING ON CERTAIN MITIGATION AND PUTTING ON OTHER MITIGATION, IS UNREASONABLE AS A MATTER OF LAW?
>> WELL, --
>> DOVE A CASE THAT --
>> IT WAS BACK IN 1998, YOUR HONOR, THAT THIS COURT ISSUED THE BROWN DECISION.
AND EVERY -- THEY REFER TO THE

HITCHCOCK, HEADINGS AND WALK KEN'S DECISION, WHICH HAD BEEN BUILDING IN '76, '82 AND '86 AND IN BROWN, THE COURT QUOTED HITCHCOCK WHICH WAS AN '87 CASE AND SAID THE OBLIGATION IS TO PRESENT ANY AVAILABLE MITIGATION EVIDENCE AT TRIAL.
>> YOU ARE NOT REALLY SAYING THAT A DEFENSE LAWYER AFTER A -- HAS TO THROW IT ALL OUT LIKE, YOU KNOW, A PAINT BRUSH AND SEE WHAT STICKS.
THAT WOULD BE -- WOULD ALMOST NEED A LORE AND WHAT I'M HAVING TROUBLE IS WITH, IN THIS CASE IF YOU LOOK AT THE FIRST SENTENCING, THE JUDGE FOUND A SERIES OF MITIGATORS.
-- THE JUDGE FOND A SERIES OF MITIGATORS AND THE SECOND RESENTENCING THE JUDGE FINDS ALL THOSE MITIGATORS BUT FINDS IN ADDITION A STATUTORY MITIGATOR, OF HIS MENTAL DISTRESS, OR MENTAL, YOU KNOW, EXTREME EMOTIONAL DISTRESS.
SO WHAT IS IT THAT YOU SAY SHOULD HAVE ADDITION BEEN PRESENTED THAT CAN BE SEEMED TO BE DEFICIENT FOR NOT PRESENTING IT, AND HOW DOES THAT UNDERMINE CONFIDENCE IN THE OUTCOME?
>> I MEAN --.
>> ME, I'M NOT SEEING IT.
>> WELL, I WILL -- LET ME EXPLAIN IT THIS WAY.
NUMBER ONE, HITCHCOCK MADE IT CLEAR, IF NOTHING ELSE, THAT BY 1987, DEFENSE COUNSEL WAS OBLIGATED TO NOT ONLY INVESTIGATE THE FACTS OF THE CASE BUT ALSO TO INVEST GUY AN UNDERSTAND THE LAW, IN HITCHCOCK IN THE EDINGS CASE SAYS YOU PRESENT ALL AVAILABLE.
JUSTICE PARIENTE -- LET ME REFER --
>> MAY I JUST --
>> I.
>> HITCHCOCK AND LOCK TALK ABOUT WHETHER ANYTHING -- GIVING DEFENSE LAWYERS THE OPPORTUNITY TO PRESENT ANYTHING THAT MIGHT

BE MITIGATING.
NONE OF THOSE CASES SAY, THEN, THAT A DEFENSE LAWYER IS THEN OBLIGATED TO -- EVERY, SINGLE PART OF THE INVESTIGATION, WHATEVER HAS BEEN UNCOVERED, MUST BE PUT ON IN A MITT -- SO WHAT CASE SAYS THAT, THEY ARE DEFICIENT IF THEY DON'T PUT ON --
>> LET ME EXPLAIN, REMEMBER, THE -- EVEN BY 1989, WHEN THE FIRST SET OF ABA GUIDELINES WAS PRESENT IN FEBRUARY OF THAT YEAR, THE ABC GUIDELINES WERE NOT FOR EXAMPLE CREATED OUT OF NOWHERE.
IT WAS A SYNTHESIS OF WHAT WAS EVOLVING SINCE 1976, AND -- AT THAT TIME.
JUSTICE PARIENTE, LOOK AT WHAT WE HAVE BRIEFED AND WHAT THE RECORD SHOWS MR. FRASER SAID WHY HE DID NOT PRESENT THESE ASSORTED MITIGATION ITEMS THAT THE POSTCONVICTION COUNSEL FOUND.
HE, HIMSELF, WRONGLY AND IMPROPERLY, HE SAID WHATEVER HE GAVE HAD TO MAKE HIS DEFINITION OF PERSUASIVE VALUE SO NO EXTRANEOUS GARBAGE WOULD GO IN.
>> THAT IS A STRATEGIC DECISION.
HE DIDN'T USE THE -- THE GUY, THE DOCTOR, THERE ARE TWO PEOPLE BUT THE ONE THAT INVESTIGATED -- EVALUATED HIM, WHO WOULD HAVE SEXTON, WHO WOULD HAVE SAID THAT HE WAS A SADISTIC PSYCHOPATH, YOU THINK THAT IS THE KIND -- WOULD YOU --
>> THERE YOU ARE --
>> LET ME ASK YOU THIS:
WOULD YOU ADVICE A LAWYER TO PUT ON THAT KIND OF EVIDENCE?
>> JUSTICE PARIENTE, YOU ARE RECEIVING TO DR. MAHER IN THE 1994 TRIAL AND THIS IS DEALING WITH THE 1998 RETRIAL.
>> YOU SAID EVERYTHING SHOULD BE PUT ON, WOULD YOU RECOMMEND THAT THIS TESTIMONY, THAT PSYCHOLOGICAL --
>> DR. STEIN --

>> LET ME FINISH MY QUESTION.
>> I'M SORRY.
>> OKAY.
BECAUSE WE HAVE -- WOULD YOU RECOMMEND BECAUSE THAT WAS THERE AND IT COULD BE CONSIDERED MITIGATION, THAT THAT EVIDENCE OF BEING CALLED -- EVALUATED HIM AND SAID I DON'T THINK YOU WANTED ME, I FIND YOUR CLIENT IS A SADISTIC PSYCHOPATH, SHOULD BE PUT ON?
>> DR. STEIN THE STATE'S EXPERT AT THE POSTCONVICTION PROCEEDING ANSWERED THAT ANY PSYCHOPATH, WHETHER SEXUALLY DEVIANT OR NOT DOES NOT CHOOSE TO BE THAT, AS THEY ARE GROWING.
THAT THEY ARE -- DO NOT BECOME THAT WAY BECAUSE IT WAS A DESIRE.
EVERY COMPONENT IN A PERSON'S LIFE, AND DR. STEIN AGREED WITH THIS, THAT MAKES A PERSON TO BE THAT, IF THAT IS MR. SEXTON'S DIAGNOSIS, EVERY FEATURE IN HIS LIFE IS INDEPENDENTLY MITIGATION AND FOLLOWS THIS COURT'S --
>> I GUESSER ANSWER, BECAUSE I DIDN'T HEAR A YES OR A NO, IS YES, THAT IT IS UNREASONABLE, NOT TO PUT ON THAT EVIDENCE.
>> IN 1994, COUNSEL DECIDED NOT TO USE DR. MAHER AT ALSO THE 1994 TRIAL HAD NO MENTAL HEALTH EXPERTS OR TESTIMONY AT ALL FOR ANY MITIGATION.
>> YOU HAVE TO ANSWER THE QUESTION, PLEASE.
IS IT YOUR POSITION THAT DEFENSE COUNSEL WOULD BE REQUIRED TO PUT ON THE TESTIMONY OF SOMEBODY LIKE DR. MAYER.
- MAHER WHEN THE THEORY OF THE DEFENSE WAS --
-- MENTAL HEALTH AND ARE OBLIGATED TO PUT ON TESTIMONY FROM A PSYCHIATRIST THAT SAYS HE IS A SADISTIC PSYCHOPATH.
>> I'M NOT HERE -- I'M IN A BOX, JUSTICE BELL, AM I NOT, WHERE YOU ARE ASKING ME TO DEFEND A DECISION MADE IN THE 1994 TRIAL?
WHEN WE ARE HERE ON

POSTCONVICTION ON THE -- LET ME PUT --
>> CLARIFY THIS POSITION.
WHAT -- LET ME ASK YOU ANOTHER WAY.
WHAT ROLE DOES THE EXPERIENCE AND PROFESSIONAL DECISION MAKING OF A DEFENSE ATTORNEY HAVE IN DETERMINING WHAT PENALTY PHASE EVIDENCE TO PUT ON AND WHATNOT TO PUT ON INTO THIS IS THE THING, IS THE BOMB LINE IS NOT ONLY AS TO MR. FRASER.
ADMITTEDLY, BEING BEHIND THE TIMES AT LEAST A DECADE, SO IF YOU TRACE THE HISTORY OF POSTCONVICTION DEFENSE WORK FROM 197 OF 6 TO 1994 -- 1976 TO 1994, MR. FRASER DID DECIDE TO USE AND PURSUED FORENSIC PSYCHOLOGISTS AT THE RETRIAL.
AND THE KIRK IS, THERE IS NO TWO WAYS ABOUT IT.
MR. FRASER AND ANYBODY INVOLVED IN MR. SEXTON'S CASE, 1994 OR 1998, KNEW THAT THE ABOUT A BIZARRE FEATURES OF HIS WHOLE LIFE, OF HIS WHOLE FAMILY, THE INCEST AND EVERYTHING ELSE, AND IT IS NOT LIKE -- EVEN IF DR. MAHER HAD TESTIFIED IN 1994 IT'S NOT LIKE THE JURY WOULD HAVE BEEN SURPRISED AND SAYING OBSERVING GOODNESS WE ARE DEALING WITH A DEVIANT SEXUAL PSYCHOPATH.
THE WHOLE TRIAL WAS ABOUT THAT.
THAT WAS THE REASON THIS COURT ALLOWED ESPECIALLY WITH THE REFINEMENT AFTER RETRIAL, TO BRING THE MOTIVE OF WHY IN THE WORLD PIXIE STRANGLED HER CHILD AND WHY PIXIE'S HUSBAND WAS STRANGLED BY SON WILLIAM.
THIS CASE WAS VERY, SAY, UNIQUE OR CERTAINLY SPECIAL.
THERE WASN'T ANY WAY TO AVOID THE MASSIVE NEGATIVE DETAILS IN THE STATE'S CASE.
WHICH REQUIRED THE DEFENSE TO BUILD IT UP.
>> THE DEFENSE DID -- I MEAN, IN CONTRAST TO WHAT WE MAY OR MAY NOT THINK ABOUT THE LAST CASE,

THIS IS A DEFENSE TEAM THAT INVESTIGATED ALL OF THE MITIGATION AND YOU MENTION ABOUT WHAT COULD HAVE BEEN SHOWN ON HIS CHILDHOOD.
THE PROBLEM IS, IS THAT THEY HAD BOTH THERE WAS CREDIBILITY DETERMINATIONS MADE BY THIS TRIAL JUDGE ABOUT DAVID SEXTON AND THEY HAD THE FAMILY, THE FAMILY, THOUGH, KEPT DENY -- DENIED THAT THERE WAS AN ABUSIVE CHILDHOOD.
AND SO THIS IS NOT EACH AN ISSUE OF SOMEBODY SAYING, WELL, DON'T TALK TO MY FAMILY, OR NOT TALKING TO THE FAMILY.
THIS IS A QUESTION OF TALKING TO FAMILY, PUTTING ON FAMILY MEMBERS, AND FAMILY MEMBERS PORTRAYING A CHILDHOOD FOR THIS MAN, WHO, BY THE WAY WAS 52 YEARS OF AGE AT THE TIME OF THIS CRIME, THAT DENIED THERE WAS ANYTHING OUT OF ORDER IN THEIR CHILDHOOD.
>> JUSTICE PARIENTE, WHEN YOU LOOK AT JUSTICE -- JUDGE ROGERS' ORDER, HE ACCEPTED THE POSTCONVICTION EVIDENCE.
RECOGNIZING AS ANYBODY INVOLVED WITH THE SEXTON FAMILY HAS BEEN SINCE 1991, THAT IT HAS BEEN AN EXTRAORDINARILY DIFFICULT FAMILY TO SORT THROUGH IN THIS.
BUT, JUDGE PADGETT DID NOT HAVE A PROBLEM AND IS ACCEPTING ALL OF THE EVIDENCE THAT WE PRESENTED.
>> THIS IS WHAT HE FOUND ON PAGE 14, OF THE 28-PAGE ORDER.
THE COURT FINDS THE TESTIMONY OF MR. FRASER TO BE HIGHLY CREDIBLE AND THE EVIDENCE TO BE PERSUASIVE, HE PERFORMED A REASONABLE INVESTIGATION INTO DEFENDANT'S CHILDHOOD AND BACKGROUND AND IN ORDER TO DISCOVER AND PRESENT THE POTENTIAL MITIGATION TO THE JURY AND THE COURT AS WELL AS TO PROVIDE THAT INFORMATION TO DEFENSE EXPERTS.
THE COURT FINDS THE DEFICIENCY

IN THE RESULTS OF THE
INVESTIGATION IS ATTRIBUTABLE TO
UNAVAILABLE RECORDS AND RETICENT
WITNESS.
COUNSEL'S INVESTIGATION IS NOT
DEEMED SUFFICIENT SIMPLY BECAUSE
FAMILY MEMBERS ARE NOW 12 YEARS
AFTER THE MURDER PROVIDING
POTENTIAL MITIGATION
INFORMATION.
ADDITION THE COURT FINDS COUNSEL
WAS AWARE OF OTHER POTENTIAL
MITIGATION, SUCH AS MILITARY
RECORDS AND MENTAL HEALTH ISSUES
AND PHYSICAL CONDITIONS SUCH AS
MULTIPLE SCLEROSIS AND MADE A
STRATEGIC DECISION TO FOCUS ON
DEFENDANT'S BRAIN DAMAGE
INSTEAD.
AND THAT WAS AN INFORMED
DECISION, BASED ON A REASON NAL
INVESTIGATION AND THAT IS THE
KIND OF ORDER WE LIKE TO SEE,
MAYBE YOU DON'T LIKE TO SEE,
BECAUSE IT IS -- IT HAS MADE A
CREDIBILITY FINDING, SHOWS THAT
THE COUNSEL WAS AWARE OF ALL OF
THIS.
AND SAID NO, THIS IS HOW I'M
GOING TO HANDLE THIS PENALTY
PHASE.
>> JUSTICE PARIENTE, ABOUT 8
PAGES LATER, IN THAT ORDER, IS
WHAT I ALSO CITE AND THAT IS THE
-- VIA POSTCONVICTION
MITIGATION.
THAT THE JURORS DID NOT HEAR IN
AN 8-4 RECOMMENDATION.
FOR DEATH.
THE DEFENDANT'S EARLY CHILDHOOD
BACKGROUND AND IMPOVERISHED
CONDITIONS, DISADVANTAGED OR
DEPRIVED CHILDHOOD, POSSIBLE
PHYSICAL ABUSE BY THE BROTHER
OTIS.
LIMITED EDUCATION, HIS FAMILY
HISTORY, OF MENTAL ILLNESS, HIS
FAMILY HISTORY OF RETARDATION.
HIS FAMILY HISTORY OF LEARNING
DISABILITIES, MR. SEXTON'S
HISTORY OF ALCOHOL AND NARCOTICS
DEPENDENCE AND LASTLY, THE
DIAGNOSIS OF MULTIPLE SCLEROSIS,
INVOLVING MR. SEXTON'S LACK OF

USE OF HIS LEGS, AT RETRIAL, THE FACT THAT HE IS BLIND IN ONE EYE AT THE TIME OF RETRIAL, ALL DISCLOSED BY THE D.O.C. RECORDS, FROM 1994 TO 1998.
ONE FURTHER THING ABOUT YOUR QUOTE.
IN -- AND MY POINT IS THAT JUDGE ROGERS ERRED IN THE INTRODUCTION TO THAT ORDER THAT YOU JUST QUOTED, BECAUSE HE JUST REFERS TO THE ONE ASPECT OF THE REQUIREMENT IN STRICK RAND IS -- STRICKLAND IS TO INVESTIGATE THE FACTS BUT STRICKLAND SAYS ALSO HE HAD TO INVESTIGATE THE LAW. AND THE LAW IN 1998, IF NOT IN 1994, SAID ALL ASPECTS OF A DEFENDANT'S LIFE HAS TO BE PRESENTED.
MR. -- JUST GIVE ME ONE MORE MOMENT, BECAUSE -- THE FOCUS HAS TO BE THAT MUCH LIKE DR. STEIN, MUCH LIKE THE PROSECUTOR, MR. FRASER DIDN'T UNDERSTAND THAT MITIGATION EVIDENCE DID NOT HAVE TO HAVE A NEXT RUSS -- NEXUS TO THE CRIME BUT THE JUDGE SAID WE WERE RIGHT AND THAT IS WHY HE FOUND THESE THINGS AND SO WHEN JUDGE PADGETT WROTE THE ORDER HE IGNORED THE LAW.
BY 1986 THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS WAS ALL WRITING -- ALREADY PUBLISHING ARTICLES OF THE BUILDUP THROUGH THE EARLY 80s OF USING EXPERTS OF EVERY KIND TO HELP DEFENSE COUNSEL INTERVIEW PEOPLE AND ONLY TWO JURORS NEEDED TO VOTE EXTRA AND MAKE IT A LIFE RECOMMENDATION AND MR. FRASER DID NOT TELL ANY JUROR THE D.O.C. HAS BEEN PUSHING HIM AROUND IN A WHEELCHAIR FOR TEN YEARS AND DIDN'T EXPLAIN ANYTHING ABOUT HOW HE CAME TO BE THAT WAY, EXCEPT FOR THE MITIGATOR PROVEN FOR THE PET SCAN AND JUSTICE PARIENTE I HAVE NOT HIDDEN FROM THE JUDGE OR THE COURT.
IT WAS REMARKABLY EXCELLENT DEFENSE WORK AND CUTTING EDGE

DEFENSE WORK FOR MR. FRASER TO
GET THE PET SCAN IN, IN 1986.
SOME COTS SAY --
THEY HAVE BEEN DOING FIVE --
HEARINGS ON PET SCAN AND MRIes
FOR MITIGATION AS RECENTLY AS
TWO OR THREE YEARS AGO AND YET
IN 1996, ME HE IS GOING IN AND
IT IS INCONGRUOUS AND BECAUSE HE
DIDN'T UNDERSTAND THE NEED TO
BRING IT IN AND ONE LAST
ANALYSIS.
WHEN MR. FRASER TESTIFIED HE
DIDN'T WANT TO CLUTTER UP THE
RECORD WITH EXTRANEOUS GARBAGE,
WHAT -- AND I ASK THIS COURT IN
MY BRIEFING, OH, HELPING HIS MOM
AND HIS WIFE CLEAN UP THIS HOUSE
IS NOT EXTRANEOUS GARBAGE BUT
MULTIPLE SCLEROSIS IS?
HOW IS PLAYING SANTA CLAUS
PERSUASIVE TO THE JURY AS
MR. FRASER ARGUED, BOTH IN 1994
AND 1998 AND A CASE LIKE THIS,
WHERE MR. SEXTON'S RELATIONSHIP
OR HIS OWN -- WITH HIS OWN
CHILDREN IS PRECISELY WHY HE IS
SITTING WHERE HE IS TODAY.
WHEN MR. FRASER HAD THE
OPPORTUNITY TO EXPLAIN THE
POVERTY OF THE SEXTON FAMILY
GROWING UP IN WEST VIRGINIA WHEN
MY CLIENT AND HIS OLDER BROTHER,
OTIS WENT WITH A BUCKET TO THE
RAILROAD TRACKS AND PICK UP THE
LOOSE COAL OFF THE PASSING
TRAINS.
MR. FRASER LISTENED TO ONLY THE
SISTER AND THAT WAS WRONG AND
SOCIAL WORKERS AND OTHER EXPERTS
CAN HELP YOU GUIDE AND GET
THROUGH TO THESE PEOPLE, THEY
ARE TRAINED FOR IT.
MR. FRASER RECOGNIZED THAT BY
2006, YOU SAW HIS TESTIMONY, HE
SAID I EVENTUALLY LEARNED TO DO
THE SHOCK AND APPROACH AND BRING
EVERYTHING IN, BUT HE WAS A
DECADE LATE.
AND WHEN HE REFERRED TO
HILLSBOROUGH COUNTY, ONLY
ROUTINELY APPROVING MITIGATION
SPECIALISTS IN 2002, AND 2003,
WELL, THAT PROBABLY IS A DECADE

LATE FOR THAT COURT, TOO.
BUT HE DIDN'T ASK FOR IT HERE.
HE EXPLAINED THAT AS A PRIVATE DEFENSE COUNSEL, GETTING CONFLICT CASES ALL THE WAY THROUGH THE ENDS OF THE 1990s THEY ACTED AS THEIR OWN SOCIAL WORKER, THEIR OWN MITIGATION EXPERT, AND WHEN YOU ARE -- I'M SORRY ABOUT THE TIME, ARE APPOINTED WITH ONLY THE TWO VOTES BEING CHANGED, FROM THE ITEMS THAT DIDN'T PERSUADE JUDGE PADGETT, THE RESULTS ARE THE -- OF THIS TRIAL COULD HAVE BEEN DIFFERENT.
THE DEFECT OF JUDGE PADGETT IS THAT HIS ORDER IGNORED AS I POINT OUT ESPECIALLY IN MY REPLY BRIEF AND THAT YOU FOLKS HAVE DONE AND THE HARDWICK AND BROWN, IN ATLANTA, WHAT HAPPENED TO THE JURY?
JUDGE PADGETT DOESN'T SAY ANY OF THESE ITEMS LEARNED IN AND -- AVAILABLE IN 194 IF NOT 1998, WOULD HAVE PERSUADED THE JURY.
HE LOOKS TO HIMSELF WHEN HE SAYS, WELL, I WOULDN'T HAVE GIVEN IT ANY WEIGHT OR NO WEIGHT OR SOME WEIGHT.
THAT IS FINE.
BUT CASES LIKE BROWN LEE AND HARDRICK, REMIND THE COURT THAT IT IS THE JURY'S ROLE, IF THEY DIDN'T HEAR THESE THINGS, IF THEY DID NOT HEAR MR. SEXTON WAS -- WOULD BE SUFFERING A MISERABLE, PATHETIC, DISGUSTING EXISTENCE IN PRISON BY GOING BLIND, AND LOSING HIS SIGHT, AND NOT BEING ABLE TO WALK AND CONTROL ANY OF HIS MUSCLES, AND THAT -- THAT WOULDN'T HAVE HIT ONE JUROR?
THAT IS WRONG AND INEFFECTIVE AND FOR JUDGE PADGETT TO SAY IT WOULDN'T HAVE AFFECTED ME, THAT MEANS THE JURY'S ADVISORY DECISION WAS UNRELIABLE AND HARMED AND THEREFORE I RESPECTFULLY URGE THIS COURT TO REVERSE.
THANK YOU.

>> THANK YOU.
IF THERE IS NOTHING FURTHER.
>> ASSISTANT ATTORNEY STEVEN AKE ON BEHALF OF THE STATE OF FLORIDA, IF I UNDERSTAND COUNSEL ARGUMENT IT IS THAT TRIAL COUNSEL'S REQUIRED UNDER THE LAW TO PRESENT EVERYTHING THAT IS OUT THERE, WHICH IS SIMPLY NOT THE LAW, AND -- THIS STATE OR THE UNITED STATES UNDER SUPREME COURT PRECEDENT.
THERE IS NO CASE LAW THAT REQUIRES A TRIAL ATTORNEY TO PRESENT MITIGATION AS JUSTICE PARIENTE WAS POINTING OUT FOR EXAMPLE WITH DR. MAHER IN THE FIRST TRIAL THAT SAID THAT HE WAS A SADISTIC SEXUAL PSYCHOPATH.
COUNSEL WOULD NOT BE REQUIRED TO PRESENTED THAT TYPE OF EVIDENCE.
HE HAD A SOUND STRATEGIC REASON FOR PRESENTING THE EVIDENCE THAT HE DID PRESENT, HE TESTIFIED IN DETAIL REGARDING HIS INVESTIGATION INTO THIS CASE AND THE BASIS FOR HIS REASONING TO FOCUS ON BRAIN DAMAGE, AS HIS MAJOR THEME IN THE PENALTY PHASE.
HE SPECIFICALLY SAID, I WAS TRYING TO LIMIT MY MENTAL HEALTH EXPERTS SO THAT I DIDN'T OPEN THE DOOR FOR THE STATE TO BRING IN ALL OF THIS OTHER EVIDENCE OF THIS -- OF THE SEXUAL DEVIATION.
>> BECAUSE THAT WAS, GAIN, WE REVERSED IN THE GUILT PHASE, THE FIRST GUILT PHASE, BECAUSE THERE WAS TOO MUCH EVIDENCE OF ALL -- I MEAN, THERE WAS A LOT OF SEXUALLY DEVIANT BEHAVIOR.
>> RIGHT.
>> -- DEVIANT BEHAVIOR, AND IT WAS A HORRIBLE CRIME, THAT IF HE HAD PUT ON THE -- THIS OTHER TYPE OF MENTAL HEALTH EVIDENCE, THAT THERE WOULD HAVE BEEN ALL OF THE THINGS WE SAID SHOULDN'T HAVE COME IN, IN THE GUILT PHASE, WOULD HAVE -- IT WOULD HAVE OPENED THE DOOR.
>> EXACTLY RIGHT, YOUR HONOR.

THAT IS -- BASED ON THIS COURT'S FIRST OPINION, REVERSING THAT FOR A NEW TRIAL, ALL OF THAT EVIDENCE THE COURT EXCLUDED IN THAT OPINION WOULD HAVE BEEN FOR THE COMING, IF THEY WOULD HAVE PRESENTED THAT TYPE OF MENTAL MITIGATION, AND --
>> WHAT TYPE OF MENTAL -- THE MULTIPLE SCLEROSIS I KNOW THERE WAS -- A REASON YOU HAD, BUT THERE IS SOMETHING -- I MEAN, THE JURY MUST HAVE SEEN HIM IN A WHEELCHAIR.
>> RIGHT.
HE SAID THAT HE WAS AWARE OF IT.
HE DIDN'T -- HADN'T -- OBTAINED ALL THE RECORDS FROM THE DEPARTMENT OF CORRECTIONS IN THE JAIL AND MEDICAL RECORDS AND STUFF AND HIS BASIS FOR NOT PUTTING THAT IN WERE TWOFOLD, ONE HE DIDN'T FIND IT COME -- COMPELLING AND HAD THE EXPERT LOOK AT IT TO SEE IF THERE WAS A NEXUS BETWEEN THAT AND THE CRIME AND HE KNEW IT WASN'T NECESSARILY REQUIRED BUT STILL DIDN'T THINK THE FACT THAT HIS CLIENT HAD MULTIPLE SCLEROSIS AS GOING TO BE THAT PERSUASIVE ON THE JURY IN THIS CASE AND HE WAS AWARE OF IT.
HE JUST --
>> DID THE JURY IN THE PENALTY PHASE KNOW THAT HE -- HE WAS PRESENTLY IN YOU A WHEELCHAIR.
>> YES.
I BELIEVE HE WAS IN' WHEELCHAIR AT THE TRIAL.
I'M NOT SURE -- I KNOW HE TESTIFIED AS TO THE FACT THAT HE WAS AWARE HE WAS IN THE WHEELCHAIR AND I DON'T REMEMBER IF THE RECORD FROM TRIAL EVER SPECIFICALLY SAID THAT BUT I BELIEVE IT CAME OUT THAT HE WAS IN THE WHEELCHAIR AT THE TRIAL.
BUT, A LOT OF THAT WAS BASED ON SEXTON'S ONLY SELF-REPORTING AS TO HIS SYMPTOMS AND OVER THE COURSE OF HIS REPRESENTATION, MR. SEXTON, HE HAD HIM FROM 1994, THIS FIRST TRIAL, ALL THE

WAY THROUGH, THAT HE FOUND THAT HE BASICALLY WAS VERY MUCH EXAGGERATING HIS PHYSICAL AILMENT AND WHAT HAVE YOU, THAT HE BASICALLY DID NOT PUT TOO MUCH STOCK INTO WHAT THE SELF-REPORTING WAS, DONE BY SEXTON IN THE CASE BUT HE DID OBTAIN MEDICAL RECORDS AND ATTEMPTED TO OBTAIN MORE.
HE HAD A PROBLEM OBTAINING SOME OF THE OLDER OHIO MEDICAL RECORDS, BECAUSE THEY COULDN'T LOCATE THE DOCTORS OR WHAT HAVE YOU AND HE DID MAKE A CONCERTED EFFORT TO DO THAT KIND OF RESEARCH INTO THE MITIGATION.
BASICALLY, THIS BOILS DOWN TO, COUNSEL MAKING A STRATEGIC DECISION AS DOING EXTENSIVE INVESTIGATION AND THIS COURT IS -- UPHELD SUCH STRATEGIC DECISIONS, NUMEROUS TIMES AND PRACTICALLY EVERY POSTCONVICTION CASE THAT COMES BEFORE YOU, I THINK THE JUDGE IN THE CASE, THE TRIAL JUDGE HEARD ALL OF THE EVIDENCE DID A VERY DETAILED ORDER, THAT IS, SUPPORTED BY THE EVIDENCE IN THIS CASE AND I DON'T THINK THERE IS ANY REASON TO REVERSE BASED ON ANYTHING THAT HAS COME BEFORE THE COURT.
>> BY THE WA, NOT ONLY DID HE PUT ON THE EVIDENCE OF A PET SCAN BUT HE ALSO -- IN THE SECOND PENALTY PHASE BUT HE PUT ON THE EVIDENCE OF A CLINICAL PSYCHOLOGIST.
TALK ABOUT THE -- ALL THE OBJECTIVE TESTING THAT WAS DONE. THAT SHOWED BRAIN FUNCTION AND I THINK TO ME, WHICH LED TO THE STATUTORY MITIGATOR, SAYS A PERSON SUFFERS FROM BRAIN DYSFUNCTION IMPULSIVE AND SHOWS POOR JUDGMENT AND LIMITED TOLERANCE TO STRESS, SO, IN TERMS OF THIS CASE, HE REALLY MADE AN EFFORT TO LINK UP THIS BRAIN DAMAGE WITH LAWYERS, AND SOMETIMES LAWYERS THROW IT OUT TO THE TERRIBLE ACTS THAT OCCURRED THAT -- MURDER.

>> RIGHT.
AND YOU KNOW, AS YOU POINTED OUT, HE SUCCEEDED IN GETTING THE STATUTORY MENTAL MITIGATION IN THE RETRIAL, THAT WAS HIS WHOLE THEME WAS, I'M GOING SHOW THIS BRAIN DAMAGE AND HE WAS ABLE TO GET THE PET SCAN WHICH WAS CUTTING EDGE AT THAT TIME AND THOUGHT THAT THAT WAS GOING TO BE VISUALLY IMPRESSIVE TO THE JURY TO SHOW THEM -- AND LINK IT UP, THE PET SCAN RESULT AS TO THE BRAIN DAMAGE, BASICALLY, AFTER THE EVIDENTIARY HEARING WHAT THEY HAVE NOW IS THEY SAY TRIAL COUNSEL WAS INEFFECTIVE MORE NOT DISCOVERING AND PRESENTING EVIDENCE AS TO NONSTATUTORY MITIGATION AND MOST OF THAT IS BASED ON TESTIMONY THAT THE TRIAL -- FROM DAVID SEXTON'S TESTIMONY FROM A BROTHER THAT WAS BASICALLY DISGRUNTLED AND HAD IT IN FOR HIM AND HE -- TRIAL COUNSEL HAD TALKED TO DAVID SEXTON BACK AT THE TIME OF -- COUNSEL HAD TALKED TO DAVID SEXTON DURING THE PENALTY PHASE AND FOUND HE DID NOT WANT TO CO-OP AND ALSO TALKED TO NUMEROUS OTHER SIBLINGS OF APELLANT, THE SISTERS AND BROTHERS, AND TALKED TO ALL THE FAMILY MEMBERS BUT NONE OF THIS IMPOVERISHED BACKGROUND OR WHAT HAVE YOU WAS FORTHCOMING FROM THOSE INDIVIDUALS.
>> WHAT WOULD HAVE BEEN PERHAPS COMPELLING TO TRY TO DEP IT BUT I'M NOT EVEN SURE HOW IT WAS DEVELOPED ON THE -- IN THE EVIDENTIARY HEARING IS NOT THAT THEY -- THE POOR -- A POOR FAMILY, BUT THAT THERE WAS IN FACT SEXUALLY DEVIANT BEHAVIOR PERFORMED ON MR. SEXTON, THAT WOULD HAVE IN A WHOLE SYNDROME OF DEVIANCE AND THAT WOULD HAVE BEEN -- YOU KNOW, THAT WOULD -- PERHAPS START TO PUT SOMETHING IN A DIFFERENT LIGHT, IF YOU ARE THEN GOING TO -- SO TELL US

AGAIN --
>> THAT IS NOT FAIR, YOUR HONOR, NO EVIDENCE OF SEXTON EVER BEING SEXUALLY ABUSED AS A CHILD, SIMPLY -- NO NOT EVEN IN WHAT DAVID SEXTON NOW SAYS INTO NO.
NO.
THE ONLY THING HE SAID WAS OTIS WAS PHYSICALLY ABUSIVE TO HIM, HIS OLDER BROTHER OF TWO YEARS,.
>> I THOUGHT THERE WAS SOMETHING STRANGE WITH COWS.
>> THAT WAS WITH HIS BROTHER, OTIS SEXTON AND DAVID SEXTON CLAIMED OTIS SEXTON HAD SEXUALLY DEVIANT BEHAVIOR BUT OTIS DENIED THAT.
>> AND THE JUDGE -- WHAT CREDIBILITY FINDINGS DID THE JUDGE MAKE ABOUT DAVID SEXTON.
>> HE DIDN'T FIND HIM CREDIBLE.
THAT IS IN THE ORDER.
HE SAID THAT HE BASICALLY DISCOUNTED HIS TESTIMONY.
OTIS SEXTON DENIED ALL THAT AND GAVE HIM A REASON FOR WHY DAVID SEXTON WAS CLAIMING HE CONSIDERED OUTRAGEOUS LIES AGAINST HIM, BUT, BASICALLY THE TRIAL ATTORNEY TALKED TO ALL THESE FAMILY MEMBERS AND HAD COME UP WITH A DIFFERENT PICTURE THAN WHAT WAS PRESENTED IN POSTCONVICTION AND HE ATTRIBUTED THAT TO THE FACT THAT THE FAMILY MEMBERS DID NOT WANT TO BE FORTHCOMING WITH INFORMATION.
THEY WERE VERY I THINK WORDS HER VERY, THE MOST IMPENETRABLE FAMILY HE HAD COME ACROSS IN HIGH SCHOOL YEARS AND HE HAD -- I THINK HE SAID HE DID 30 FIRST DEGREE MURDER TRIALS AND PENALTY PHASES AND FOUND THIS FAMILY WAS VERY DIFFICULT TO GET INFORMATION FROM.
THEY HAD SHIFTING ALLIANCES, WHERE SOME POINTS WOULD LIKE AND SAY POSITIVE THINGS ABOUT APELLANT AND A MONTH LATER WOULD BE THE EXACT OPPOSITE.
SO, UNLESS THE COURT HAS FURTHER QUESTIONS I WILL RELY ON THE ARGUMENT MADE IN THE BRIEF AND

ASK THE COURT AFFIRM.
THANK YOU.
>> REBUTTAL.
>> CERTAINLY.
>> A FEW BRIEF MOMENTS TO RESPOND, TO MR. AKE.
NUMBER ONE, I WOULD TAKE THE JUDGE'S FINDING OF POSTCONVICTION THAT THERE WAS POSSIBLE PHYSICAL ABUSE INFLICTED BY OTIS SEXTON ON EDDIE SEXTON IS REFLECTIVE OF WHAT WAS AN OUTRIGHT REJECTION OF WHAT DAVID SEXTON INDICATED AND NUMBER 2, MR. Fraser'S 30 TRIAL EXPERIENCE I THINK YOU WILL FIND HIS TESTIMONY, THAT WAS AS OF -- WHEN HE TESTIFIED IN 2006.
-- TESTIFIED IN 2006.
AT THE TIME IN THE FIRST TRIAL IN 1994 I BELIEVE HE INDICATED THAT HE HAD PERHAPS FOUR TO FIVE CAPITAL CASES.
AND BY THE TIME OF THE RETRIAL, HE MIGHT HAVE HAD THREE, FOUR MORE.
SO, NOT THAT THAT -- WHEN YOU READ MR. FRASER'S TESTIMONY YOU WILL SEE IT IS A HISTORY OF CAPITAL DEFENSE WORK IN THIS COUNTRY.
SINCE FUHRMAN BECAUSE THAT THIS IS YEAR THAT MR. FRASER GRADUATED FROM LAW SCHOOL BUT IT IS INEXCUSABLE WHEN DEFENSE COUNSEL OR -- AROUND THE COUNTRY, STARTING IN AT LEAST IN THE EARLY '80s, WERE USING EXPERTS AND SOCIAL WORKERS AND PSYCHOLOGISTS AS OPPOSED TO PURE PSYCHIATRISTS OR BOTH OR ALL, FOR HIM TO, IF THIS COURT IS TO RULE THAT ONCE YOU GET A STATUTORY MITIGATOR, THERE IS NO SOCIAL HISTORY, AND IT IS OKAY TO SAY, WELL, THE GUY'S DAD DIED WHEN HE WAS TEN AND, YEAH, FOR SOME PEOPLE HERE, HE APPEARED NORMAL, AND SOME CHRISTMASES HE PLAYED SANTA CLAUS, AND THAT -- INCONGRUOUS AS I ALSO STATE IN THE BRIEF, MR. FRASER WAS UNDER AN OBLIGATION TO TRY TO EXPLAIN

HOW IN THE WORLD MR. SEXTON IN THIS FAMILY EXISTED BY THE 1998. OF ALL OF THE FAMILIES THAT NEEDED AN EXPLANATION AND TO DEAL WITH THE SOCIOPATHIC AND SEXUAL EPISODES, AND WHAT COMPONENTS LED UP TO THAT, MR. SEXTON'S -- WOULD BE HARD TO IMAGINE ANY MORE IMPORTANT CASE TO GO WITH THE APPROACH MR. FRASER DOES NOW.
SO I, AGAIN, POINT OUT THAT HIS WORK WAS UNREASONABLY PROFESSIONAL IN 1998, EVEN IN 1994 AND FOR JUDGE PADGETT TO IGNORE THAT ONLY TWO DIFFERENT JURORS HAD TO VOTE, IF THEY HEARD THIS OTHER EVIDENCE, IN MY EYES, AND OTHER TRIAL ATTORNEYS, WHEN WE ARE DOING POSTCONVICTION WE THIRD QUARTER, GOSH WHAT WOULD IT BE LIKE FOR ME TO DO CLOSING ARGUMENT WITH THIS NEW EVIDENCE AND I TELL YOU, WHEN YOU READ IT, IT IS ONE THING.
BUT WHEN YOU RECOGNIZE WHAT A -- JURY ON RESENTENCING WOULD HEAR WITH THE THINGS THAT DR. STEIN TESTIFIED FOR THE STATE, THAT WE AGREE WITH, THAT DR. McCRANEY AND THE SOCIAL WORKER, I BELIEVE THAT THIS WOULD SHOW THAT THERE WOULD BE A REASONABLE RESULT OF A -- AT MINIMUM.
>> WE'LL TAKE THIS CASE UNDER ADVISEMENT AND THE COURT WILL TAKE A VERY SHORT RECESS THIS MORNING, BEFORE WE HEAR OUR FINAL CASE.
>> PLEASE RISE.