>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR.
GIVE ATTENTION, YOU SHALL BE HEARD.
GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO THIS SESSION OF THE FLORIDA SUPREME COURT.
ON TODAY'S DOCKET WE HAVE TWO CASES.
THE FIRST CASE WE'RE GOING TO HEAR IN THE COURTROOM.
THE SECOND CASE WE WILL HEAR VIRTUALLY AT 10:30 THIS MORNING.
BEFORE WE TAKE UP THE FIRST CASE, HOWEVER, I'D LIKE TO NOTE THAT JUSTICE MUNIZ CANNOT BE PRESENT IN THE COURTROOM TODAY.
HE IS, HOWEVER, OBSERVING THE ARGUMENT AND WILL BE PARTICIPATING IN THE DECISION OF THIS CASE.
I ALSO WANT TO EXTEND A WELCOME TO JUSTICE COURIEL AND JUSTICE GROSSHANS.
JUSTICE COURIEL HAS BEEN A MEMBER OF THE COURT FOR MORE THAN A YEAR.
JUSTICE GROSSHANS HAS BEEN A MEMBER OF THE COURT FOR ALMOST A YEAR.
THEY HAVE, NOT UNTIL TODAY, BEEN OUT OF THE BENCH DUE TO THE PANDEMIC AND NOT IN THE COURT DUE TO THE CIRCUMSTANCES IN WHICH WE'VE BEEN OPERATING.
SO I WELCOME THEM TO THE BENCH.
AS I SAID BEFORE IN VIRTUAL PROCEEDINGS, WE VALUE THEIR CONTRIBUTION TO THE COURT.
I KNOW THEY'VE BEEN LOOKING FORWARD, AS ALL OF US HAVE, TO BEING BACK ON THE BENCH HERE IN THE COURTROOM.

SO WITH THAT, WE WILL TAKE UP
THE FIRST CASE ON THE DOCKET,
BELL V. THE STATE.
>> THANK YOU, YOUR HONOR.
MAY IT PLEASE THE COURT, BARBARA
BUSHARIS REPRESENTING JESSE
BELL.
AND I'VE RESERVED FIVE MINUTES
OF TIME FOR REBUTTAL.
YOUR HONORS, THIS CASE IS ABOUT
MITIGATION; HOW MUCH IS ENOUGH,
HOW MUCH IS TOO LITTLE AND WHERE
ARE THE LIMITS OF ALLOWING A
DEFENDANT TO WAIVE OR SEVERELY
LIMIT THE MITIGATION THAT A
TRIAL COURT CONSIDERS WHEN
SENTENCING THAT DEFENDANT TO
DEATH.
THE INDIVIDUAL RIGHT TO CHOOSE
THE GOAL OF REPRESENTATION IS
SOMETIMES AT ODDS WITH THE
COURT'S RESPONSIBILITY, AND THIS
IS ONE OF THOSE CASES.
NO ONE DISPUTES THAT MR. BELL
HAS A RIGHT, HAD A RIGHT AT
TRIAL TO DIRECT THE DIRECTION--
OR CONTROL THE DIRECTION OF THE
PRESENTATION OF MITIGATION.
BUT THERE'S MORE THAN THAT AT
STAKE HERE.
THERE'S ALSO AN EIGHTH AMENDMENT
RIGHT AND AN EIGHTH AMENDMENT
CONCERN FOR THE COURT AND FOR
SOCIETY IN GENERAL THAT THE
DEATH PENALTY NOT BE IMPOSED
ERRATICALLY, ARBITRARILY OR IN
CIRCUMSTANCES WHERE THERE IS
COMPELLING MITIGATION WEIGHING
AGAINST IT.
WHEN YOU GO TOO FAR IN ALLOWING
THE DEFENDANT'S AUTONOMY TO
PREVENT THE COURT FROM
CONSIDERING MITIGATION, THEN THE
EIGHTH AMENDMENT CONCERNS ARE NO
LONGER RESPECTED.
AND BOTH OF THOSE ARE IMPORTANT
AND HAVE TO BE CONSIDERED.
>> COUNSEL, WOULD YOU BE ABLE
TO, ON THIS TOPIC, DISTINGUISH
THIS CASE FROM THIS COURT'S
RECENT DECISION IN KRAFT?
HOW WOULD YOU DISTINGUISH HOW WE
ADDRESS THE MITIGATION ISSUES IN
KRAFT WITH THIS CASE?

>> YOUR HONOR, I THINK ONE OF THE BIGGEST DISTINCTIONS BETWEEN THIS CASE AND KRAFT IS THAT IN KRAFT THERE WAS SIGNIFICANT MITIGATION IN THE RECORD.
THERE WAS SIGNIFICANT MITIGATION FOR THE COURT TO CONSIDER, AND EVEN THOUGH THERE WERE SPECIFIC INSTANCES OF MITIGATION OR OMITTED MITIGATION THAT THE DEFENDANT CHALLENGED ON APPEAL, THERE WERE STILL A NUMBER OF, YOU KNOW, RECORD-- PIECES OF RECORD EVIDENCE THAT THE COURT COULD POINT TO IN EXPLAINING ITS DECISION AND ITS WEIGHING OF THE AGGRAVATION AND THE MITIGATION.
HERE THE MITIGATION WAS SO LIMITED AS TO ALMOST BE A TOTAL WAIVER BUT NOT QUITE.
MR. BELL DELIBERATELY, IT APPEARS FROM THE RECORD, AND WITH THOUGHT PRESENTED AN EXTREMELY LIMITED MITIGATION CASE.
HE CALLED NO WITNESSES.
HE SAID HE DIDN'T WANT TO DRAG HIS FAMILY INTO COURT JUST TO SAY THAT THEY LOVED HIM.
HE DIDN'T COOPERATE WITH THE PRESENTENCE INVESTIGATION.
AND AS A RESULT, WHAT THE COURT HAD IN FRONT OF IT IN THIS CASE WAS MUCH MORE LIMITED THAN WHAT THE COURT HAD IN FRONT OF IT IN KRAFT.
>> IS MITIGATION SOMEHOW DIFFERENT?
THAT IS, I THINK YOU'D AGREE IF MR. BELL HAD DECIDED IF HE HAD AN ALIBI DEFENSE AND HAD ELECTED NOT TO PRESENT ANY EVIDENCE OF IT, BUT LET'S SAY THE ALIBI WAS, YOU KNOW, TURNED OUT TO BE A VERY GOOD ALIBI BUT EXERCISING HIS SIXTH AMENDMENT RIGHT TO DIRECT HIS DEFENSE CHOSE NOT TO PUT ON THE ALIBI DEFENSE.
I BELIEVE YOU'D AGREE THAT THAT WOULD BE A PERMISSIBLE CHOICE UNDER THE SIXTH AMENDMENT TO HIM, RIGHT?
>> YES, YOUR HONOR.
>> OKAY.

SO WHAT IS IT ABOUT MITIGATION
THAT MAKES IT DIFFERENT AND THAT
PUTS US IN A PLACE WHERE HE HAS
NO LONGER RESERVED THE RIGHT
UNDER THE SIXTH AMENDMENT TO
DIRECT ANY ASPECT OF HIS
DEFENSE?
>> WHAT'S DIFFERENT, YOUR HONOR,
IS THAT DEATH IS DIFFERENT.
WHAT'S DIFFERENT IS THAT THE
GOAL OF THE MITIGATION--
>> WELL, LET'S ASSUME BOTH
THINGS ARE-- STILL A DEATH
CASE, RIGHT?
SO LET'S ASSUME THAT INSTEAD OF,
YOU KNOW, TALKING ABOUT A
MITIGATION ARGUMENT HE'S TALKING
ABOUT A, YOU KNOW, PRIOR OFFENSE
AND HOW IT SHOULD BE SCORED OR
ANY OTHER COMPONENT OF HIS
SENTENCING.
YOU STILL WOULD ARGUE THAT
MITIGATION IS SOMEHOW DIFFERENT?
>> YES, YOUR HONOR, I WOULD
ARGUE THAT MITIGATION IS
DIFFERENT BECAUSE THE U.S.
SUPREME COURT'S EIGHTH AMENDMENT
JURISPRUDENCE MAKES CLEAR THAT
MITIGATION IS ESSENTIAL FOR THE
INDIVIDUALIZED SENTENCING
DETERMINATION THAT HAS TO TAKE
PLACE BEFORE THE DEATH PENALTY
IS IMPOSED.
AND WHEN, WHEN MITIGATION IS TOO
LIMITED, AS THIS COURT
RECOGNIZED I BELIEVE IN
MOHAMED--
>> DOESN'T-- AM I WRONG IN
UNDERSTANDING THAT THE
JURISPRUDENCE FROM THE U.S.
SUPREME COURT FOCUSES ON THE
EXCLUSION OF MITIGATION THAT A
DEFENDANT WISHES TO PUT ON?
>> THAT'S--
>> THAT'S PROBLEMATIC.
>> YES, THAT IS TRUE, YOUR
HONOR.
>> THAT'S WHAT, THAT'S WHAT THE
SUPREME COURT CASE IS TALKING
ABOUT.
>> BUT TO DATE, THE U.S. SUPREME
COURT HAS NOT SAID THAT IT IS
CONSTITUTIONALLY PERMISSIBLE TO
EXECUTE SOMEONE BY IGNORING

MITIGATION EITHER.
SO THE, THIS IS NOT A CASE,
YOU'RE CORRECT, IT'S NOT A CASE
WHERE MITIGATION WAS EXCLUDED
OVER THE DEFENDANT'S OBJECTION.
BUT WHEN YOU GO BACK AND YOU
LOOK AT WHAT THE COURT HAS SAID
ABOUT MITIGATION FROM THE
BEGINNING OF THE CURRENT DEATH
PENALTY REGIME AFTER FURMAN, THE
COURT HAS REPEATEDLY EMPHASIZED
THE NEED FOR AN INDIVIDUALIZED
SENTENCING DETERMINATION AS PART
OF THE SENTENCING PROCESS.
I BELIEVE IT WAS WOODSON THAT
SAID IT WAS A CONSTITUTIONALLY
INDISPENSABLE PART OF THE
SENTENCING PROCESS.
AND SO THE QUESTION BECOMES WHEN
YOU HAVE A DEFENDANT WHO WANTS
TO CONTROL THE PRESENTATION OF
HIS CASE IN A CERTAIN WAY, WHERE
IS THE LIMIT OF THAT WHEN YOU
RUN UP AGAINST THE EIGHTH
AMENDMENT REQUIREMENT OF AN
INDIVIDUALIZED SENTENCING
DETERMINATION?
IF YOU ALLOW THE DEFENDANT TO
PRECLUDE THE PRESENTATION OF
MITIGATION TO THE POINT WHERE
YOU HAVE A RECORD LIKE THE ONE
BEFORE YOU NOW WHERE YOU DON'T
EVEN KNOW WHAT YOU DON'T KNOW,
THAT INDIVIDUALIZED
DETERMINATION IS SIMPLY NOT
POSSIBLE AND REALLY NEITHER IS
MEANINGFUL REVIEW OF THE TRIAL
COURT'S DETERMINATION BECAUSE
YOU'RE WORKING IN A VOID.
GOING BACK TO THE DEFENDANT'S
ABILITY TO CONTROL HIS DEFENSE,
YOUR HONOR, I WOULD SAY ANOTHER
THING THAT IS DIFFERENT ABOUT
THE PRESENTATION OF MITIGATION
IS THAT THE DEFENDANT'S AUTONOMY
INTEREST IS HIGHEST BEFORE THE
DEFENDANT HAS BEEN CONVICTED OF
ANYTHING.
AND I BELIEVE THAT WAS STATED IN
FARETTA.
SO YOU HAVE AT THE POINT IN TIME
WHEN A DEFENDANT IS CONTESTING
HIS GUILT OR INNOCENCE, YOU HAVE
THE HIGHEST DEGREE OF PROTECTION

OF THAT DEFENDANT'S AUTONOMY
INTEREST--
>> I AGREE.
I GUESS THE QUESTION THAT THEN I
GO TO IS YOU'VE SAID A COUPLE
TIMES THAT WE WOULD BE
SENTENCING IN A VOID.
BUT YOU'VE ALSO CONCEDED THAT
IT'S REALLY NOT A VOID IN THIS
CASE.
THE DEFENDANT DID PUT ON SOME
MITIGATING--
>> A SMALL QUANTITY.
YES, YOUR HONOR.
>> SO I GUESS MY QUESTION IS
ABOUT DISCRETION OR GRANULARITY.
I THINK YOU'D AGREE WITH ME,
WOULDN'T YOU, THAT IF IT WAS, IN
FACT, A VOID, IF THERE HAD BEEN
SOME SUPPRESSIVE EFFECT THAT
CAUSED IT TO BE A VOID, YOU'D
HAVE A STRONGER CASE.
THE FACT THAT YOUR CLIENT CHOSE
TO PUT ON LIMITED MITIGATION
SEEMS TO ME, AND I HOPE YOU'LL
ANSWER, TO BE A PURPOSEFUL
MODULATION, A CHOICE AS OPPOSED
TO A BLOCKAGE, RIGHT?
>> YOUR HONOR, I AGREE THAT
MR. BELL ACTED PURPOSEFULLY,
YES.
I JUST DON'T THINK THAT
COMPLETELY ANSWERS THE QUESTION
BECAUSE HIS AUTONOMY INTEREST
HAS TO BE MEASURED OR BALANCED
AGAINST HIS EIGHTH AMENDMENT
INTEREST IN NOT BEING SENTENCED
TO DEATH WITHOUT A FULL
CONSIDERATION OF THE
CIRCUMSTANCES AND AN
INDIVIDUALIZED SENTENCING
DETERMINATION.
SO, YES, HE HAS THE RIGHT TO
AUTONOMY, HE HAS THE RIGHT TO
CONTROL HOW HIS DEFENSE IS
PRESENTED, HE HAS THE RIGHT TO
DECLINE TO CALL HIS FAMILY
MEMBERS OR TO ANSWER QUESTIONS
ABOUT HIS BACKGROUND.
THAT DOESN'T MEAN THAT THE COURT
AND OUR JUDICIAL SYSTEM HAS NO
RESPONSIBILITY TO LOOK AT THE
FULLER PICTURE BEFORE SENTENCING
HIM TO THE FINAL PUNISHMENT.

AND THE REASON FOR THAT GOES
BACK TO THE THEME THAT DEATH IS
DIFFERENT.
THERE IS A FINALITY ABOUT THE
DEATH PENALTY THAT SIMPLY CAN'T
BE UNDONE.
THERE'S NO CLEMENCY THAT CAN BE
EXTENDED ONCE SOMEONE HAS BEEN
EXECUTED.
THERE'S NO SECOND CHANCE FOR
SOMEBODY WHO CHANGES THEIR
MIND--
>> LET ME ASK YOU THIS,
COUNSEL--
>> YES.
>> THE COURT ORDERED A PSI--
>> YES.
>>-- IN THIS CASE.
AND THE PSI INCLUDES THE
SUPPLEMENTAL INFORMATION.
IT HAS SOME FAMILY HISTORY
BACKGROUND, IT HAS SOME
BACKGROUND INFORMATION, AND I
TAKE IT YOUR POSITION IS THAT
THIS IS NOT SUBSTANTIAL ENOUGH.
>> I-- YES, YOUR HONOR.
IT'S NOT ONLY NOT SUBSTANTIAL,
IT'S DE MINIMIS.
>> BUT GIVEN-- BUT IT DOES
PROVIDE THE COURT WITH SOME
INFORMATION ABOUT HIM.
AND IS IT YOUR POSITION THAT
SOME OF THE, SOME OF THE
INFORMATION REVEALED IN THE
SUPPLEMENTAL PART OF THE PSI
WERE STRONG ENOUGH THAT THE
JUDGE, SHOULD HAVE LIT A
LIGHTBULB IN THE JUDGE'S HEAD
THAT PERHAPS IF HE OR SHE SHOULD
HAVE ASKED FOR MORE INFORMATION?
>> I THINK THERE ARE TWO, TWO
PIECES OF INFORMATION IN
RESPONSE TO THAT, JUSTICE
LABARGA.
ONE, THAT YOU HAVE A DEFENDANT
WHO'S INVITING THE DEATH PENALTY
WHO HAS A CONCEDED LIFELONG
HISTORY OF DEPRESSION.
AND, TWO, THAT YOU HAVE A
DEFENDANT WHO KILLED SOMEONE HE
HAD IDENTIFIED AS A SEX OFFENDER
WHO INDICATED, AT LEAST AT ONE
POINT IN TIME, THAT HE HAD BEEN
SEXUALLY ABUSED OR THAT THERE

WAS SEXUAL ABUSE IN HIS
CHILDHOOD.
AND I KNOW THAT THE STATE
POINTED OUT THAT MR. BELL SAID
AT SENTENCING THAT HE HAD NOT
HAD AN ABUSIVE CHILDHOOD.
BUT, YOU KNOW, A PERSON CAN HAVE
A GENERALLY GOOD CHILDHOOD AND
STILL SUFFER AN ACT OF SEXUAL
ABUSE.
WE DON'T, WE DON'T KNOW WHAT THE
STORY WAS, BUT THOSE TWO THINGS
ARE NOT NECESSARILY DIRECTLY IN
CONTRADICTION.
>> FAIR ENOUGH AS TO ONE OF THE
PEOPLE KILLED, RIGHT?
THERE WAS SOMEONE ELSE WHO WAS
NOT AN ACCUSED CHILD MOLESTER
WHO WAS A TARGET OF THIS
DEFENDANT, RIGHT?
>> YOU'RE TALKING ABOUT THE
OFFICER--
>> YES.
>>-- WHO SURVIVED THE ACT?
>> YES, YES.
>> THANKFULLY, YES.
ABSOLUTELY, YOUR HONOR.
AND, YEAH, YOU KNOW,
INDISPUTABLY THE DEFENDANT
MAINTAINED ALL ALONG THAT THAT
WAS ONE OF THE REASONS HE
TARGETED THIS PARTICULAR CELL
MATE.
AND SO, JUSTICE LABARGA, I WOULD
SAY THOSE ARE TWO THINGS THAT
SHOULD HAVE WARRANTED FURTHER
EXPLORATION BEFORE A SENTENCE OF
DEATH WAS SIMPLY IMPOSED.
>> NORMALLY, BECAUSE I USED TO
GET THESE PSIs ALL THE TIME
WHEN I WAS A TRIAL JUDGE, AND
LET'S SAY IT WAS A ROBBERY CASE,
JUST A ROBBERY CASE.
SOMETHING LIKE THAT, YOU GET A
PSI.
IN THOSE CIRCUMSTANCES YOU WOULD
AGREE THAT WHATEVER'S CONTAINED
IN HERE USUALLY IS ENOUGH FOR
THE JUDGE TO MAKE A DECISION AS
FAR AS SENTENCING?
>> I WOULD AGREE THAT IT'S OFTEN
ENOUGH.
I WOULD ALSO SAY, YOUR HONOR, IN
MY EXPERIENCE I'VE SEEN PSIs

FOR ROBBERY THAT WERE MUCH MORE COMPREHENSIVE THAN THE PSI IN THIS CASE.
THIS ONE, FOR ONE THING, IDENTIFIES A COUPLE OF FAMILY MEMBERS BUT MAKES NO EFFORT TO-- DOESN'T INDICATE THAT ANY EFFORT WAS MADE TO TALK TO THEM, YOU KNOW?
THE DEFENDANT MAY NOT HAVE SIGNED A RELEASE, MR. BELL MAY NOT HAVE ENCOURAGED THE INVESTIGATOR IN PREPARING THE PSI, BUT THERE'S NOTHING PREVENTING THAT TYPE OF INVESTIGATION, YOU KNOW?
THERE'S NO LAW PREVENTING THE INVESTIGATOR FROM CONTACTING PEOPLE LIKE FAMILY MEMBERS SIMPLY BECAUSE THE DEFENDANT IS NOT SUPPORTIVE OF THAT.
AND I WOULD, I WOULD ARGUE THAT AT THE POINT IN TIME WHEN THE PSI HAS BEEN ORDERED-- ESPECIALLY BECAUSE HERE THE RECORD SHOWS THAT THE COURT ORDERED IT IN AN ABUNDANCE OF CAUTION BECAUSE SUCH MINIMAL MITIGATION HAD BEEN PRESENTED.
JUST ENOUGH BUT NOT VERY MUCH.
IN THAT CIRCUMSTANCE TO SIMPLY SAY, WELL, THE DEFENDANT'S NOT COOPERATING, WE CAN'T INVESTIGATE THIS WAS NOT ENOUGH OF AN EFFORT AND DIDN'T PROVIDE THE COURT WITH ANY ADDITIONAL USEFUL INFORMATION THAT WASN'T ALREADY IN FRONT OF IT.
GOING BACK TO THE EIGHTH AMENDMENT FOR A MOMENT, YOUR HONORS, IF I MAY, IT WAS LOCKETT WHERE THE U.S. SUPREME COURT POINTED OUT THAT THE NEED FOR TREATING EACH DEFENDANT IN A CAPITAL CASE WITH THAT DEGREE OF RESPECT DUE TO THE UNIQUENESS OF THE INDIVIDUAL IS FAR MORE IMPORTANT THAN IN NONCAPITAL CASES.
AND THAT'S SOMETHING THE COURT RECOGNIZED ALSO IN WOODSON AND, I BELIEVE, IN EDDINGS AND OTHER DECISIONS TOO.
WHAT I WOULD SAY IS WHEN YOU ARE

LOOKING AT THAT BALANCE BETWEEN
THE DEFENDANT'S AUTONOMY AND THE
JUDICIAL SYSTEM'S NEED FOR
INFORMATION BEFORE HANDING DOWN
A REASONED SENTENCE THAT'S GOING
TO YIELD AN EXECUTION AT THE END
OF THE PROCESS, THAT THAT
DISTINCTION BETWEEN CAPITAL
CASES AND NONCAPITAL CASES HAS
TO COME INTO PLAY, THAT THE
AUTONOMY INTEREST-- HOWEVER
IMPORTANT-- CAN BE RESPECTED
WITHOUT IGNORING THE POSSIBILITY
THAT THERE'S, THAT THERE'S
SIGNIFICANT MITIGATING EVIDENCE
THAT'S NOT BEFORE THE COURT.
YOU DON'T HAVE TO COMPEL-- OR
YOU CAN'T COMPEL A DEFENDANT TO
TESTIFY.
YOU DON'T HAVE TO FORCE HIM TO
GO THROUGH THE MOTIONS OF
PRESENTING A CASE THAT HE
DOESN'T WANT TO PRESENT.
BUT WHEN YOU HAVE ALL OF THE
RESOURCES OF THE STATE AVAILABLE
TO YOU, THERE SHOULD BE SOME
MORE INVESTIGATION INTO A
PERSON'S CIRCUMSTANCES AND
BACKGROUND BEFORE SENTENCING
THEM TO A PUNISHMENT THAT YOU
CAN'T UNDO.
IF THE COURT HAS NO FURTHER
QUESTIONS, I'LL RESERVE THE REST
OF MY TIME.
THANK YOU.
>> COUNSEL?
>> MR. CHIEF JUSTICE AND MAY IT
PLEASE THE COURT, BY NAME IS
JASON RODRIGUEZ, ASSISTANT
ATTORNEY GENERAL FOR THE STATE
OF FLORIDA.
IN MY TIME BEFORE THE COURT,
I'LL EXPLAIN WHY THE TRIAL COURT
DID NOT FUNDAMENTALLY ERR IN
SENTENCING JESSE BELL TO DEATH,
AND THAT'S THE FIRST HURDLE THAT
THIS COURT NEEDS TO OVERCOME, IS
THAT NONE OF THESE ISSUES WERE
PRESERVED BELOW.
AND EVEN WHEN A DEFENDANT OR A
CAPITAL DEFENDANT ENTERS INTO A
GUILT PHASE TRIAL THE, THE
FAILURE TO PRESERVE IS A BAR
THAT CAN ONLY BE SURMOUNTED BY A

SHOWING OF FUNDAMENTAL ERROR.
THAT'S PROBLEMATIC IN THIS CASE BECAUSE OF THE LACK OF INFORMATION THAT WE HAVE AND THE WAIVERS THAT APPELLANT BELL HAS CONTINUALLY PUT FORWARD IN THE RECORD BEFORE US.
IN THIS CASE WE HAVE NO FUNDAMENTAL ERROR THAT'S BEEN PRESENTED TO THIS COURT.
THIS ISSUE WAS NOT ARGUED AS FUNDAMENTAL ERROR.
TO THE EXTENT IT WAS, ALLUDED TO AS A PROCESS VIOLATION, THIS COURT HAS REPEATEDLY HELD THAT CONCLUSORY OMISSIONS OF ERROR ARE SIMPLY NOT ENOUGH.
WERE WE TO GET PAST THAT HURDLE, THE ERROR IS NOT FUNDAMENTAL IN THIS CASE.
THERE IS WEIGHTY AGGRAVATION IN THIS CASE, THREE OF THE MOST SEVERE AGGRAVATORS KNOWN TO FLORIDA'S DEATH PENALTY SCHEME AS THIS COURT HAS REPEATEDLY NOTED.
AND IN LIGHT OF THAT, THE MITIGATION THAT WAS PRESENTED INCLUDING THE MITIGATION THAT WAS PROPOSED OR ALLUDED TO IN APPELLANT'S BRIEF WHICH WAS DEPRESSION-- CONSIDERED BY THE TRIAL COURT-- SEXUAL ABUSE EVIDENCE THAT WAS CONTROVERTED BY BELL ITSELF ON PAGES 199 AND 599 WHO NOTE THAT BELL CATEGORICALLY DENIED BEING SEXUALLY ABUSED.
SO THE ARGUMENT THAT THERE IS NO CONFLICT BETWEEN HIS STATEMENTS AND THE IDEA THAT HE WAS SEXUALLY ABUSED, IN FACT, IS NOT SUPPORTED BY THE RECORD.
WERE WE TO MOVE PAST THAT, HE DIDN'T MOVE MITIGATION IN THE EIGHTH AMENDMENT WHILE IT DOES REQUIRE CERTAIN PROTECTIONS BE PUT IN PLACE CONSIDERED REASONED JUDGMENT BY A TRIAL COURT IMPOSING DEATH, IT DOES NOT REQUIRE THE TRIAL COURT TO PERFORM THE TASK OF COUNSEL FOR A SELF-REPRESENTED DEFENDANT.
BELL IN THIS CASE STONEWALLED

THE TRIAL COURT AT EVERY TURN AS
NOTED ON THE PSI ON PAGE 3.
BUT HE ALSO ADMITTED HIS
COMPETENCY REPORT INTO EVIDENCE
IN MITIGATION EXPLICITLY.
AND THE COMPETENCY REPORT
CONTAINS A DECENT AMOUNT OF
MITIGATING INFORMATION THAT THE
TRIAL COURT COULD CONSIDER
INCLUDING THE EXTENT OF HIS
DEPRESSION.
SO FOR THOSE REASONS, THE STATE
WOULD REQUEST THE COURT AFFIRM,
IF IT HAS NO FURTHER QUESTIONS
OF COUNSEL.
>> COUNSEL, YOU'RE NOT GETTING
AWAY THAT EASILY.
IN MOHAMAD, WE SAID TO BE--
THAT TO BE MEANINGFUL, THE PSI
SHOULD INCLUDE INFORMATION SUCH
AS PREVIOUS MENTAL HEALTH
PROBLEMS, SCHOOL RECORDS AND
RELEVANT BACKGROUND.
IS IT THE STATE'S POSITION THAT
THE PSI IN THIS CASE MET THE
MOHAMAD STANDARD, AND IF THE
ANSWER IS NO, YOU SAID THE STATE
DOESN'T HAVE THE RESPONSIBILITY
TO DO THE JOB OF DEFENSE
COUNSEL.
I'M WONDERING WHETHER, HOWEVER,
THE STATE DOES HAVE A JOB TO DO
HERE.
DOES THE STATE HAVE ANY
OBLIGATION TO MAKE SURE THAT THE
PSI IS ADEQUATE TO SUPPORT THE
PUNISHMENT THAT THE STATE IS
ADVOCATING FOR?
>> SO THE ANSWER TO YOUR FIRST
QUESTION IS, NO.
THIS WOULD LIKELY NOT HAVE BEEN
SUFFICIENT UNDER MOHAMAD IF
WE'RE JUST LOOKING AT THE PSI.
WE'VE GOT A PREDICATE ELEMENT
THOUGH BEFORE WE GET TO MOHAMED,
AND THAT'S WHETHER THERE WAS A
WAIVER OF MITIGATION AND A
FAILURE TO CHALLENGE THE DEATH
SENTENCE.
IN THIS CASE, BELL CHALLENGED
CERTAIN OF THE AGGRAVATORS.
HE CHALLENGED THE HEINOUS,
ATROCIOUS AND CRUEL AGGRAVATOR
AT THE PENALTY PHASE AND SAID

HIS OWN DEATH WOULD BE HEINOUS, ATROCIOUS AND CRUEL IF THAT'S THE STANDARD.
SO WE DON'T HAVE THAT, AND WE HAVE THE PRESENTATION OF MITIGATION INCLUDING ACCEPTING THINGS THAT HE TESTIFIED TO IN THE PENALTY PHASE; NEVER ASSAULTED OFFICERS BEFORE, HE SUFFERED FROM DEPRESSION, HE HAD GOOD BEHAVIOR IN COURT, HIS FAMILY LOVES HIM, HE'S HAD GOOD BEHAVIOR SINCE AND HE'S AN HONEST PERSON.
THEN WE HAVE A COMPETENCY REPORT DONE BY AN EXPERT INCLUDING HE WAS ON PROZAC AND HAS A LONGSTANDING HISTORY OF DEPRESSION BUT IS PRESENTLY UNDER CONTROL OF MITIGATION.
SO EVEN THOUGH THIS PSI WASN'T SUFFICIENT UNDER MOHAMED, WE DON'T GET TO MOHAMED AT ALL WHEN WE'VE GOT HIS TESTIMONY AND AN ACTUAL EXPERT REPORT COMING INTO THE RECORD.
SECOND, REGARDING THE STATE'S OBLIGATION, THIS COURT HAS IMPOSED A POLICY REQUIREMENT.
IF WE WERE TO BYPASS THAT AND MOHAMED APPLIED, THIS COURT HAS DEEMED IT AS SUCH, THE LANGUAGE OF THIS COURT THAT ALL OF THIS INFORMATION SHOULD BE IN IT.
SO WE WOULD HAVE ON THE ONE HAND A MOHAMED ERROR, BUT THEN WE HAVE ANOTHER LEGAL PHILOSOPHY, JUDICIAL PRINCIPLE, THAT OF INVITED ERROR.
AND IN THIS CASE, THE PSI ON PAGE 3 SPECIFICALLY NOTES THAT THE PSI COULD NOT BE AS COMPREHENSIVE AS USUAL BECAUSE BELL PREVENTED THE RELEASE OF INFORMATION.
AND THAT'S PARTICULARLY CRITICAL IN THIS CASE WHERE BELL WAS AN INTERSTATE COMPACT TRANSFER FROM KANSAS.
IT'S NOT CLEAR HOW MANY, HOW MUCH OF THESE RECORDS THE STATE OF FLORIDA COULD ACTUALLY GET EVEN IF IT UTILIZED ITS BEST EFFORT BECAUSE WE'RE NOT DEALING

WITH A FLORIDA DEFENDANT.
SO TO PUT THE BURDEN ON THE STATE IN THIS CASE WHERE IT'S NOT EVEN CLEAR THE STATE COULD HAVE OBTAINED THE INFORMATION CERTAINLY IS NOT AN EIGHTH AMENDMENT VIOLATION, AND NONE OF THE CASES FROM THE U.S. SUPREME COURT SUPPORT THE IDEA THAT THE STATE MUST GO FORWARD AND, I GUESS, NEGOTIATE WITH OTHER STATES IN ORDER TO GET MITIGATION INFORMATION THAT MAY OR MAY NOT EXIST PARTICULARLY WHEN WE HAVE A COMPETENCY REPORT AND HIS OWN TESTIMONY.
IF THERE ARE NO FURTHER QUESTIONS FROM THE COURT, IN THAT CASE THE STATE OF FLORIDA REQUESTS THIS COURT AFFIRM THE CAPITAL SENTENCE ENTERED IN THIS CASE.
THANK YOU, YOUR HONORS.
>> OKAY, COUNSEL, REBUTTAL.
>> YOUR HONORS, I'M TRYING TO REMEMBER WHETHER IT WAS FARR, BUT I'M REMEMBERING AN OLD DISSENT OF JUSTICE KOGAN FROM DECADES AGO THAT REALLY COULD HAVE BEEN WRITTEN LAST WEEK.
THIS COURT HAS BEEN STRUGGLING FOR YEARS WITH HOW DO WE BALANCE THESE INTERESTS, THE INTEREST OF THE DEFENDANT TO CHOOSE NOT TO PRESENT A MITIGATION CASE, THE INTEREST OF THE COURT AND OF THE STATE OF FLORIDA IN NOT SIMPLY EXECUTING PEOPLE BECAUSE THEY SAY THEY WANT TO BE EXECUTED WHICH IS REALLY PARTICIPATING IN SOMEBODY'S SUICIDE.
YOU KNOW, OUR RESPECT FOR THE AUTONOMY OF THE INDIVIDUAL IN ANY OTHER CIRCUMSTANCE CAUSES US TO TRY TO PREVENT SUICIDE, NOT TO FACILITATE IT.
AND SO I THINK THE COURT HAS AN OBLIGATION IN THESE INVITED CAUSES TO MAKE SURE THAT THE COURT IS IMPOSING THIS PENALTY FOR SUBSTANTIAL REASONS.
YES, YOUR HONOR.
>> HOW DO YOU RESPOND TO THE STATE'S ARGUMENT ON

PRESERVATION?
>> AS A PRACTICAL MATTER, YOUR HONOR, WHEN YOU HAVE A DEFENDANT AT THE TRIAL LEVEL WHO BASICALLY INVITED THE DEATH PENALTY, THAT DEFENDANT IS NOT GOING TO PRESERVE ERROR.
I THINK IN KRAFT THE COURT DIDN'T REALLY REACH THIS ISSUE AND DISCUSSED IT AS, UNDER THE HARMLESS ERROR STANDARD AS A DISCRETIONARY DECISION OF THE TRIAL COURT.
BUT I WOULD SAY AS I DID IN THE BRIEFS THAT IT COULD BE LOOKED AT AS FUNDAMENTAL ERROR BECAUSE THE FAILURE TO CONSIDER MITIGATION, THE SIMPLE ACCEPTANCE OF THE DEFENSE CASE WITHOUT LOOKING FURTHER VITIATED THE RELIABILITY OF THE RESULT AND SO ROSE TO THE LEVEL OF FUNDAMENTAL ERROR.
>> HOW DO YOU RESPOND TO THE ARGUMENT THAT IN THIS PARTICULAR INSTANCE MR. BELL INTRODUCED HIS COMPETENCY REPORT AS MITIGATION, AND IN IT THERE WAS A LOT OF INFORMATION ABOUT HIS BACKGROUND, HIS PROGRESSION, HIS MEDICATION AND EVERYTHING ELSE? WHAT ELSE DO YOU FEEL WAS NEEDED FOR THE COURT TO CONSIDER?
>> YOUR HONOR, THAT'S ABSOLUTELY CORRECT THAT THAT WAS INTRODUCED.
BUT THAT REPORT DIDN'T GIVE, DIDN'T NECESSARILY GIVE THE PICTURE OF A LIFELONG HISTORY OF DEPRESSION.
IT GAVE A PICTURE OF MR. BELL AT A SPECIFIC POINT IN TIME WHEN HE WAS BEING ASSESSED FOR COULD HE GO AHEAD WITH THESE LEGAL PROCEEDINGS.
>> YOU WOULD HAVE PREFERRED THAT IT BE AN EXPERT TESTIMONY--
>> THAT WOULD HAVE--
>>-- EXPLAINING HIS CHILDHOOD, HIS REACTIONS, THINGS LIKE THAT. THAT WOULD HAVE BEEN YOUR PREFERENCE.
>> THAT WOULD BE PREFERABLE, YOUR HONOR, AND THAT WOULD HAVE

GIVEN THE COURT MORE INFORMATION
TO WEIGH AGAINST THE
CIRCUMSTANCES OF THE OFFENSE AND
A FULLER PICTURE OF MR. BELL AS
AN INDIVIDUAL.
YES.
I'M NOT SAYING THAT ALONE WOULD
HAVE BEEN CONSTITUTIONALLY
REQUIRED, BUT THAT WOULD HAVE
BEEN SOMETHING THAT COULD HAVE
BEEN DONE.
AND, AGAIN, WE'RE WORKING WITH
OMISSIONS HERE.
WE DON'T KNOW WHAT WE DON'T
KNOW.
WE CAN'T SAY WHAT WOULD BE IN
THE RECORD IF THE COURT HAD GONE
LOOKING FOR SOME OF THE EVIDENCE
THAT WAS SUGGESTED WAS OUT
THERE.
AS FOR THE DEFENDANT'S RECORDS
BEING IN KANSAS, I DON'T KNOW
THE LOGISTICS OF GETTING RECORDS
FROM ONE PRISON SYSTEM TO
ANOTHER, BUT I WOULD SUGGEST
THAT IF YOU CAN MOVE A PRISONER
FROM ONE STATE TO ANOTHER, YOU
CAN ALSO GET HIS RECORDS TO GO
FROM ONE STATE TO ANOTHER.
WHAT ALL OF THIS GOES BACK TO,
YOUR HONORS, IS THAT THE
DEFENDANT'S AUTONOMY INTERESTS
AND THE COURT'S RESPONSIBILITIES
HAVE TO BE VIEWED DIFFERENTLY IN
A CAPITAL CASE BECAUSE DEATH IS
DIFFERENT.
BECAUSE OF THE FINALITY OF THE
PENALTY, BECAUSE OF ITS
REJECTION OF REHABILITATION,
BECAUSE OF ITS REJECTION OF ANY
POSSIBLE FUTURE CLEMENCY FOR THE
DEFENDANT.
THE AUTONOMY INTERESTS-- WHICH
WE ALREADY KNOW ARE NOT
ABSOLUTE-- CAN BE RESPECTED
WHILE STILL REQUIRING ENOUGH OF
AN INDIVIDUALIZED SENTENCING
PROCESS THAT THE SENTENCE
SATISFIES THE EIGHTH AMENDMENT
AND NOT JUST THE SIXTH.
SO WE ASK THAT YOU REVERSE, IF
THERE ARE NO FURTHER QUESTIONS.
THANK YOU.
>> WE THANK YOU BOTH FOR YOUR

ARGUMENTS IN THIS CASE TODAY.
THE COURT WILL NOW STAND IN
RECESS, AND WE'LL RECONVENE FOR
OUR VIRTUAL ARGUMENT AT 10:30.