>> NEXT CASE UP IS KOPSHO
V. STATE.
WHENEVER YOU'RE READY.
>> THROUGH CCRC, WE REPRESENT
MR. WILLIAM KOPSHO IN THIS CASE.
WE ARE HERE TODAY BASED ON THE
SUMMARY DENIAL OF ALL OUR CLAIMS
IN OUR PLEADINGS WITH THE LOWER
COURT AND THEN THE DENIAL OF AN
EVIDENTIARY HEARING FOR EACH OF
THE CLAIMS WHERE WE REQUESTED
ONE.
I WILL NOT BE WAIVING ANY OF OUR
ARGUMENTS, AND I DO WISH TO
FOCUS ON CLAIM 1A, CLAIM 1B AND,
IF TIME PERMITS, FIRST.
CONCERNING CLAIM 1A--
>> JUST, WHY DON'T YOU WANT TO
JUST DISCUSS HEARST FIRST?
I MEAN, THIS WAS A CASE-- WAS
THE ISSUE OF THE
CONSTITUTIONALITY OF THE STATUTE
RAISED IN THE DIRECT APPEAL?
>> IT WAS, YOUR HONOR.
IT WAS RAISED THROUGH MOTIONS
LIMINE AND THE DIRECT APPEAL IN
OUR INITIAL BRIEF FILED BY MY
PREDECESSOR--
>> THE JURY VERDICT WAS 9-3?
>> THAT WAS THE ORIGINAL IN
2005.
THE CURRENT ONE, 2009'S VERDICT
WAS 10-2.
>> 10-2.
>> YOU'RE CORRECT THOUGH, HEARST
IS, OBVIOUSLY, DOES CARRY QUITE
A BIT OF WEIGHT ON THIS CASE.
BUT I DO STILL WISH TO ATTEND TO
THE TRIAL COURT'S DENIAL OF
1A, 1B, AND THEN WE WILL
DEFINITELY DISCUSS HEARST.
CONCERNING 1A, THE TRIAL COURT
OR CIRCUIT COURT DENIED THE
CLAIM BECAUSE IT WAS SUPPOSEDLY
CUMULATIVE AND REFLECTED BY THE
RECORD, AND WE WOULD ASSERT IT
WAS NEITHER.
YOU LOOK AT THE PLEADINGS THAT
WERE BEFORE THE CIRCUIT COURT,
THERE WERE SIGNIFICANT FACTUAL

ALLEGATIONS AS TO SEXUAL ABUSE
THAT MR. KOPSHO SUFFERED FROM
THE BEGINNING OF AGE 11,
CULMINATING IN SEXUAL ABUSE AT
THE HANDS OF A PRIEST LATER IN
HIS TEEN YEARS.
AND IN THE INTERIM, HAVING
SEXUAL ABUSE AT THE INDIANA
BOYS' SCHOOL.
AT NO POINT THROUGHOUT THE
RECORD THROUGH DR. McMAN'S
TESTIMONY AS DEPOSITION, AT
TRIAL IN 2009 OR 2005 IS SEXUAL
ABUSE MENTIONED.
>> SO YOU'RE-- BUT I THINK THE
WAY IT WAS FRAMED WAS NOT THE
FAILURE OF COUNSEL, BUT THE
FAILURE TO OBTAIN, QUOTE, A
COMPETENT MENTAL HEALTH EXPERT.
DON'T WE LOOK AT THOSE CLAIMS
DIFFERENTLY?
IN OTHER WORDS, YOU'RE NOT--
YOU'RE SAYING THAT BY-- YOU'RE
NOT CRITICIZING COUNSEL FOR
RELYING ON DR. McMAHON, YOU'RE
SAYING DR. McMAHON WAS WITH
NOT A COMPETENT MENTAL HEALTH
EXPERT.
ISN'T THAT THE DISTINCTION THAT
SORT OF MAKES YOUR CLAIM
DIFFERENT FROM SYSTEM OF THE
OTHERS WHERE-- FROM SOME OF THE
OTHERS WHERE, I MEAN, WE FAVOR
EVIDENTIARY HEARINGS.
BUT CAN YOU EXPLAIN WHY IT WAS
FRAMED THAT WAY AS OPPOSED TO
THAT THE TRIAL COUNSEL WAS
INEFFECTIVE IN NOT FURTHER
DEVELOPING THE SEXUAL ABUSE
ALLEGATIONS?
>> ESSENTIALLY-- AND I CAN'T
SPEAK TO MY PREDECESSOR'S
WORDING, BUT I WILL NOTE THAT
THROUGHOUT THE INITIAL BRIEF AND
IF YOU GO BACK TO THE BRIEFS,
THE MOTION TO VACATE THAT WAS
FILED WITH THE CIRCUIT COURT,
ESSENTIALLY IT WAS BOTH.
CONCERNING THE FAILURES OF
COUNSEL, THE INITIAL-- THE

MOTION TO VACATE GOES
SIGNIFICANTLY TO FAILURES OF
COUNSEL TO PROPERLY INVESTIGATE
THE CASE SO THAT--
>> OKAY.
SO YOU'RE SAYING IF THE--
AND I DON'T HAVE-- ALLEGING
INEFFECTIVE ASSISTANCE OF
COUNSEL FOR FAILING TO INSURE A
REASONABLY COMPETENT MENTAL
HEALTH EVALUATION.
THE SCOPE OF THE FIRST CLAIM WAS
NOT THAT NARROW?
IS THAT WHAT YOU'RE SAYING?
>> ESSENTIALLY, YES, YOUR HONOR.
>> WELL, DO YOU-- IT EITHER IS
OR ISN'T.
I MEAN, BECAUSE TO ME THAT IS
DIFFERENT-- BECAUSE SAYING IT'S
CUMULATIVE, OF COURSE, SEEMS TO
IMPLY THAT THEY DIDN'T PUT ON
ENOUGH MENTAL HEALTH MITIGATION.
SO WAS THE TRIAL COURT CONFUSED,
OR DID YOUR PREDECESSOR'S
PLEADINGS CONFUSE THE TRIAL
COURT?
>> I CAN'T SPEAK TO EXACTLY HOW,
HOW CONFUSION OCCURRED.
BUT WHAT I CAN DO IS CLARIFY THE
CLAIM AND THEN ALSO,
ESSENTIALLY, NOTE WHAT THE
EXPERT WOULD TESTIFY TO AND HOW
THAT WOULD AFFECT BOTH THE
INEFFECTIVE ASSISTANCE PRONG AND
THE PREJUDICE PRONG.
ESSENTIALLY, DR. RUSSELL WAS
NOTED IN THE BRIEF SO THAT HE
COULD TIE THE FACTS THAT WERE
NOT PRESENTED AT TRIAL THAT WERE
NOT CONSIDERED IN THE MENTAL
HEALTH EVALUATION OF MR. KOPSHO.
AND HE WOULD SHOW IF WE HAD HAD
AN EVIDENTIARY HEARING HOW THE
EVALUATION ITSELF SUFFERED
WITHOUT THIS MITIGATION
PRESENTED TO DR. McMAHON AND
THEN HOW IT FAILED TO,
ESSENTIALLY, TIE THE EVALUATION
TO A FINDING OF THE STATUTORY
MITIGATOR UNDER 9211416B,

ESSENTIALLY, EXTREME EMOTIONAL DISTRESS, MR. KOPSHO'S INABILITY TO CONFORM TO THE REQUIREMENTS OF THE LAW.
AND THAT ARGUMENT, YOUR HONOR, I WOULD NOTE THAT IT'S-- IT CAN'T BE CUMULATIVE EITHER SINCE AT ABSOLUTELY NO POINT WAS THIS PRESENTED TO THE JURY.
>> WELL, IT COULD BE CUMULATIVE, BUT NORMALLY WE LOOK AT THAT AFTER THERE'S AN EVIDENTIARY HEARING.
YOUR POINT IS ONLY THERE COULD BE AN EVIDENTIARY HEARING.
>> WELL, TRUE.
WE WOULD ASSUME IT WOULD TURN OUT NOT TO BE CUMULATIVE.
BUT, YES, FOR PURPOSES OF TODAY I WOULD JUST NOTE THAT TO ASSUME IT WAS CUMULATIVE MAY BE-- THE WORD ESCAPES ME.
ESSENTIALLY, BE TOO QUICK ON THE TRIAL COURTS TO ASSUME THAT IT WAS.
NOW, GOING INTO 1B I WOULD ALSO-- JUST SO THAT WE CAN REACH HEARST-- I WOULD NOTE THAT THERE THE INEFFECTIVENESS WAS CLEAR.
TRIAL COUNSEL IN HIS LIFE MEMORANDUM ARGUES THAT THERE WAS, ESSENTIALLY, BASED ON THE ASSUMPTION THAT MR. KOPSHO WOULD BE REMOVED FROM HIS TRIGGERS THAT DR. McMAHON FOUND CONCERNING HIS RELATIONSHIP WITH WOMEN, THAT HIS PERIOD IN PRISON WOULD PROTECT SOCIETY AND, THEREFORE, HE WOULD ADJUST TO PRISON.
ESSENTIALLY, THAT TRIAL COUNSEL WAS MAKING ASSUMPTIONS THAT MR. KOPSHO WOULD ADJUST TO PRISON, ASSERTED THOSE ASSUMPTIONS IN HIS ARGUMENT IN HIS MEMORANDUM AND THEN LEFT IT TO THE TRIAL COURT TO DECIDE WHETHER THE NONSTATUTORY MITIGATOR EXISTED.

TRIAL COURT THEN, ESSENTIALLY, GAVE THE NONSTATUTORY MITIGATOR LITTLE WEIGHT ASSUMING, WELL, MR. KOPSHO WAS FACING A POSSIBLE LIFE IMPRISONMENT SENTENCE THAT COULD BE FORESEEN TO BE POSSIBLY MITIGATING AND, THEREFORE, THAT FACTOR RECEIVES LITTLE WEIGHT.
THE ISSUE THERE IS YOU HAVE COUNSEL THAT CLEARLY PERCEIVED THAT ISSUE TO BE OF INTEREST TO THE TRIAL COURT AND THEN FAILED TO OBTAIN ANY EVIDENCE TO BACK UP HIS ARGUMENT WHICH WE DID HAVE EVIDENCE OF, AND WE ASSERTED THAT EVIDENCE IN CLAIM 1B.
SO YOU HAVE INEFFECTIVENESS.
THE PREJUDICE THERE IS THAT WITHOUT ANY FORM OF EVIDENCE, THE TRIAL COURT WAS DEPRIVED OF AN ABILITY TO, ESSENTIALLY, PROPERLY WEIGH THE FACTOR.
AND WE WOULD ASSERT THAT HAD AN EVIDENTIARY HEARING OCCURRED, WE WOULD HAVE BEEN ABLE TO SHOW GREAT WEIGHT SEEING THAT MR. KOPSHO HAD BEEN INCARCERATED FROM 2002 WHEN THIS MURDER OCCURRED UP UNTIL 2009.
TRIAL COURT DENIED THE CLAIM SAYING THAT IT WAS CUMULATIVE, I BELIEVE, EXPLAINED WHY IT IS NOT CUMULATIVE CONCERNING THE TRIAL COURT'S DENIAL OF CLAIM 1B AS SPECULATIVE I WOULD NOTE THAT A MOTION FOR REHEARING SHOWED VERY EXPLICITLY HOW WE COULD EASILY AMEND THE CLAIM IN GOOD FAITH TO SHOW THAT THE CLAIM WAS NOT SPECULATIVE, THAT MR. AIKEN, THE EXPERT WE WISHED TO PROVIDE, HAD ACTUALLY MET WITH MR. KOPSHO.
SEEING AS THAT THAT WAS APPARENT THAT THE CLAIM COULD BE SHOWN TO NOT BE SPECULATIVE, WE SHOULD HAVE BEEN GIVEN LEAVE TO AMEND.
AND IN TRUTH, THAT LEAVE SHOULD HAVE BEEN GRANTED AS A DENIAL OF THE ORDER ITSELF.

AND IT WAS NOT.
>> WAS THERE SOME REASON THAT ON THE SECOND CLAIM THE EXPERT YOU HAD HADN'T REALLY, HADN'T EXAMINED YOUR CLIENT IN AND THE ISSUE REALLY IS HOW IS THAT-- ISN'T THERE A TIME WHERE DEFICIENCY, NOT GETTING THAT TYPE OF EXPERT, HOW-- IS THAT ALWAYS, LIKE, IF SOMEONE DOESN'T GET THAT KIND OF EXPERT, THERE'S A CONSIDERATION THAT THEY'RE DEFICIENT?
I MEAN, WE DON'T NORMALLY SEE THOSE EXPERTS, UNLIKE MENTAL HEALTH EXPERTS, THIS IDEA THAT HE COULD ADJUST WELL TO PRISON X. ON THE PREJUDICE PRONG, DIDN'T THE JUDGE CONSIDER HIS, THAT FACTOR IN HIS SENTENCING ORDER?
>> TWO QUESTIONS, YOUR HONOR. CONSIDERING THE PREJUDICE PRONG, YOU ARE CORRECT.
THE DEFENDANT HAS A CONSTITUTIONAL RIGHT TO PRESENT THE CLAIM.
IT MAY NOT ALWAYS RISE-- CREATE PREJUDICE.
IT MAY NOT--
>> WELL, THEY MIGHT HAVE A RIGHT, BUT THE ISSUE AS TO WHETHER--
>> THE SECOND PRONG.
>>-- AN ISSUE NOT TO HAVE ONE.
>> THE ISSUE HERE IS THAT THE TRIAL COUNSEL DID RECOGNIZE THE NEED TO MAKE THAT ARGUMENT BY THE FACT THAT THEY MADE THE ARGUMENT IN THE LIFE MEMORANDUM WITHOUT ANY EVIDENCE.
AND SO WE'D JUST NOTE THAT THIS WAS AN AVENUE THAT A REASONABLE ATTORNEY WOULD HAVE PURSUED.
THIS ATTORNEY RECOGNIZED THAT IT WAS A REASONABLE AVENUE AND DID NOT PURSUE FURTHER EVIDENCE TO BACK UP THEIR CLAIM.
NOW, JUST TO MAKE SURE WE ATTEND TO HEARST--

>> BEFORE YOU GO ON, A
CLARIFICATION ON YOUR FIRST
POINT.
>> CLAIM 1A?
>> YES.
I'M TRYING TO MAKE SURE I
UNDERSTAND EXACTLY YOUR POSITION
ON THIS.
>> YES, YOUR HONOR.
>> YOU DO AGREE THAT COUNSEL
OBTAINED AN EXPERT, MENTAL
HEALTH EXPERT.
>> YES.
DR. McMAHON.
>> OKAY.
AND IS-- YOU'RE NOT SAYING THAT
THAT'S INEFFECTIVE ASSISTANCE IN
SELECTING THAT EXPERT.
>> NO.
TRIAL COUNSEL--
>> OKAY.
AND THEN THE NEXT THING WHAT
YOU'RE SAYING IS THAT
DR. McMAHON DID NOT TOUCH
ANYTHING ABOUT THE SEXUAL ABUSE
AT ALL.
>> CORRECT.
AND IF YOU LOOK AT THE RECORD
OR--
>> I MEAN, THAT'S IT?
THAT'S THE ESSENCE OF THAT
ARGUMENT?
>> I BELIEVE SO--
>> OKAY.
ALL RIGHT.
>> AND THE ISSUE IS THAT
DR. McMAHON IN HER DEPOSITION,
IT NEVER SEEMS THAT THIS
EVIDENCE WAS EVER BROUGHT TO HER
ATTENTION.
AND THE CONCERN IS A REASONABLE
COUNSEL IN TRIAL COUNSEL'S
POSITION WOULD HAVE PURSUED
THIS.
PARTICULARLY FOR SEVERAL
REASONS.
FIRST, AFTER 2005 HE ALREADY WAS
AWARE THAT MR. KOPSHO
ESSENTIALLY CREATED-- HAD A
PATTERN OF RELATIONSHIPS WITH

SIGNIFICANTLY YOUNGER WOMEN,
THAT THOSE ROMANTIC, SEXUAL
RELATIONSHIPS SEEMED TO CAUSE
SOME FORM OF TRIGGER WITHIN
MR. KOPSHO.
TRIAL COUNSEL EVEN MENTIONS AT
THE BEGINNING OF 2009'S
SENTENCING HEARING DURING
DISCUSSIONS WITH THE JUDGE APART
FROM THE JURY THAT HE WAS AWARE
OF A BOOK RELATING TO CHARLES
MANSON'S THREE-YEAR STAY AT THE
INDIANA BOYS' SCHOOL.
AND THOUGH I ADMIT I KNOW IT'S
NOT IN THE RECORD, IF YOU LOOK
AT TRIAL COUNSEL'S NOTE, THE
BOOK--
>> IF IT'S NOT IN THE RECORD--
>> FAIR ENOUGH.
BUT CONCERNING THE HINT TO
CHARLES MANSON'S STAY THERE,
CHARLES MANSON HAD MADE THE
ALLEGATION THAT HE WAS SEXUALLY
ABUSED AT THE INDIANA BOYS'
SCHOOL.
THE FACT THAT MR. KOPSHO'S
MITIGATION DID TOUCH ON A
PATTERN OF SEXUAL ISSUES, OF
ISSUES WITH WOMEN, AT THE VERY
LEAST REASONABLE COUNSEL WOULD
HAVE ASKED HIS CLIENT-- DOCTOR
OKAY.
SO, AGAIN, I THINK-- AND I'M
LOOKING AT WHAT YOU ALLEGE IN
YOUR AMENDED MOTION.
YOUR BEEF WITH WHAT THE COUNSEL
DID NOT DO WAS PRESENT MORE
INFORMATION ABOUT THE BORDERLINE
PERSONALITY DISORDER ROOTED IN
AN ABUSIVE CHILDHOOD.
IT'S-- SO THAT IS, THE FOCUS IS
ON WHAT COUNSEL FAILED TO DO.
AND WE REALLY DON'T KNOW WHY HE
DID OR DIDN'T--
>> YES.
>>-- BECAUSE THERE WAS NO
EVIDENTIARY HEARING.
>> CORRECT.
AND THAT'S THE MAIN ISSUE.
WE MADE A PRIMA FACIE SHOWING SO

THAT THESE QUESTIONS CAN BE
ANSWERED.
>> DID-- YOU SAY HE HAD A
BORDERLINE PERSONALITY DISORDER?
>> THAT IS ASSERTED IN OUR
PLEADING.
>> AND SO WHAT WAS SUPPOSED TO
HAVE BEEN DONE IN RELATIONSHIP
TO THAT?
WHAT DID YOU ALLEGE COULD HAVE
BEEN DONE WITH THAT KIND OF
INFORMATION?
>> THE TRIAL COUNSEL NEVER
SOUGHT TO PRESENT ANY EVIDENCE
OR ARGUMENT AS TO STATUTORY
MITIGATORS.
WE WOULD ASSERT THAT PROPER
EVALUATION BASED ON PROPER
MITIGATION THAT WE HAVE PLED IN
OUR MOTIONS AND PLEADINGS AND
BRIEFS WOULD HAVE LED TO THAT
STATUTORY MITIGATOR UNDER
921146B.
>> WHAT YOU HAVE IN YOUR
ALLEGATION IS THAT A COMMON
SYMPTOM IS THAT FREQUENT,
INAPPROPRIATE AND INTENSE ANGER
KNOWN AS RAGE.
I MEAN, THERE'S-- IT GOES ON.
I MEAN, YOU HAVE PRETTY DETAILED
ALLEGATIONS AS TO WHAT--
>> YES, YOUR HONOR.
AND WE'LL ADMIT THAT
DR. McMAHON SPOKE TO RAGE, BUT
THE ISSUE IS, OBVIOUSLY, WHEN IT
COMES TO MENTAL HEALTH,
EMOTIONAL UPBRINGING, AN
INCOMPLETE PICTURE--
PARTICULARLY INCOMPLETE MISSING
SUCH SIGNIFICANT MITIGATION--
WILL LEAD TO AN INACCURATE
ASSESSMENT.
EVEN DR. McMAHON OR EVEN THE
BEST PSYCHOLOGISTS,
PSYCHIATRISTS, MENTAL HEALTH
EVALUATOR IN THE WORLD--
>> NOW DO YOU WANT TO-- YOU'RE
ALMOST OUT OF-- NOW DO YOU WANT
TO GO ON HERBST?
>> SURE.

YES, YOUR HONOR.
CONCERNING HEARST, WE JUST
ARGUE-- OBVIOUSLY, THIS CASE
BECAME FINAL AFTER RING BUT
BEFORE HEARST.
WE WOULD ARGUE STILL THAT HEARST
IS RETROACTIVE TO MR. KOPSHO.
SEVERAL ASPECTS--
>> WHAT WERE THE AGGRAVATORS
FOUND IN HERE?
PRIOR VIOLENT FELONY, HE HAD A
PREVIOUS CUD NAPPING AND SEXUAL
A-- KIDNAPPING AND SEXUAL
ASSAULT?
>> YES, YOUR HONOR, THERE WERE
FOUR.
CCP, PRIOR VIOLENT FELONY
AGGRAVATOR, HE WAS ON PAROLE AT
THE TIME OF THE MURDER--
>> WAS THERE A CONTEMPORANEOUS
FELONY HERE ALSO?
>> YES, YOUR HONOR, KIDNAPPING.
>> OKAY.
SO THE ONLY FELONY-- THE ONLY
AGGRAVATOR THAT WAS NOT ONE OF
THOSE THAT IS CLEAR FROM THE
RECORD WAS THE CCP.
IS THAT FAIR TO SAY.
>> WELL, YOUR HONOR, WE DO
ARGUE-- AND I CAN'T ASSUME FOR
PURPOSES OF ARGUMENT YOUR POINT,
BUT WE ASSERT THAT, NO, THOSE
ARE NOT CLEAR FROM THE RECORD.
>> WELL, I MEAN, DURING THE
COURSE OF THE KIDNAPPING, WAS HE
CONVICTED OF KIDNAPPING?
>> HE WAS CONVICTED OF
KIDNAPPING.
THE ISSUE, THOUGH, IF YOU LOOK
AT HEARST, IF YOU'RE GOING TO
GIVE WEIGHT TO HEARST'S
ASSERTION THAT A RULE THAT THE
JURY MUST FIND EVERY AGGRAVATING
CIRCUMSTANCE, AN AGGRAVATING
CIRCUMSTANCE ESSENTIALLY--
>> AND YOU BELIEVE HEARST SAYS
YOU MUST FIND EVER, A JURY MUST
FIND EVERY AGGRAVATING
CIRCUMSTANCE?
>> YES--

>> IS THAT WHAT YOU JUST
SAID..
>> YES.
THAT IS GOING TO BE
INCORPORATED INTO
THEIR DECISION.
OBVIOUSLY, IF AN AGGRAVATING
CIRCUMSTANCE IS NOT INCORPORATED
INTO THE DECISION, IT DOESN'T
HAVE TO BE FOUND.
BUT CONCERNING THE JURY, IT DID
NOT CONSIDER KIDNAPPING AS AN
AGGRAVATING CIRCUMSTANCE.
IT MADE A FINDING AS TO WHETHER
THEY BELIEVED IT OCCURRED OR NOT
AS PER THE LULL.
HOWEVER--
>> THEY MADE A FINDING THAT HE
HAD, IN FACT, COMMITTED THE
CRIME OF KIDNAPPING.
>> YES, YOUR HONOR.
AND THAT WAS AT THE GUILT PHASE.
WE WOULD JUST NOTE THEY HAVE TO
MAKE THE FINDING THAT
MR. KOPSHO'S KIDNAPPING
AGGRAVATED THE MURDER, SO TO
SPEAK.
IT WAS AN AGGRAVATING
CIRCUMSTANCE IN THIS SITUATION.
AT LEAST THAT IS WHAT WE ASSERT,
AND IT IS IN OUR PLEADING.
NOW, BUT YOU'RE CORRECT THAT IF
THIS COURT WERE TO BELIEVE THAT
THAT WAS ALREADY FOUND BY A JURY
AS AN AGGRAVATING
CIRCUMSTANCE,CCP WAS NOT CLEARLY
FOUND BY THEM AT LEAST UNDER THE
CONCEPTION OF HEARST FOR
PURPOSES OF ARGUMENT AT LEAST AT
THIS TIME.
NOW, GOING TO RETROACTIVITY,
YOUR HONORS--
>> [INAUDIBLE]
>> DIDN'T YOU MAKE AN
ARGUMENT-- GO AHEAD.
>> I WOULD JUST RELY ON PRIOR
ARGUMENTS, PARTICULARLY THOSE
CONCERNING SULLIVAN V. LOUISIANA
AS TO THE CONCEPTION OF A
VERDICT THAT WAS MADE IN THE

PAUL JOHNSON CASE AND RELY ON
THE RETROACTIVITY ARGUMENT IN
LAM PRIX GIVEN THAT MY TIME IS
NEAR, SO I'LL JUST RESERVE THE
REST FOR REBUTTAL.
THANK YOU, YOUR HONORS.
>> MAY IT PLEASE THE COURT, I'M
STACY KERCHER FROM THE OFFICE OF
THE ATTORNEY GENERAL ON BEHALF
OF THE STATE IN THIS CASE.
I'LL TAILOR MY ARGUMENT TO WHAT
MY OPPOSING COUNSEL ARGUED AND
DEAL FIRST WITH CLAIM 1A WHICH
IS THE INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM FOR FAILING TO DO
A COMPLETE MENTAL HEALTH
EVALUATION.
>> SO IT'S MORE THAN-- THE
AMENDED COMPLAINT DID ENLARGE IT
TO TALK ABOUT THAT THE MORE
INFORMATION SHOULD HAVE BEEN
EITHER PROVIDED TO THE MENTAL
HEALTH EXPERT.
AND I GUESS MY QUESTION HERE IS
SINCE FOR THE LAST MANY YEARS
WE'VE ENCOURAGED THAT IF THERE'S
ENOUGH ALLEGATIONS THAT COURTS
SHOULD NOT SUMMARILY DENY THESE
CLAIMS.
I MEAN, IF YOU LOOK AT THE CASES
WHERE--
[INAUDIBLE]
CUMULATIVE, THOSE ARE ALWAYS
AFTER AN EVIDENTIARY HEARING.
WHY IN THIS CASE, THIS IS A
SERIOUS ALLEGATION THAT MAYBE
WASN'T DEVELOPED, MAYBE THERE'S
A REASON THAT THE LAWYER HAD FOR
NOT DEVELOPING IT.
IT'S A RETRIAL, SO HE HAS THE
BENEFIT OF, AT LEAST THE TRIAL
AND PENALTY, ALLOW IT TO BE
DECIDE DECIDED BY A JUDGE.
I MEAN, IT LOOKS LIKE IT VERY
WELL COULD BE CUMULATIVE OR IT
WON'T MAKE A DIFFERENCE OR NOT
DEFICIENT.
AT LEAST WE HEAR IT FROM THE
LAWYER AND FROM THE EXPERT
THAT THEY NOW WANT TO PRESENT.

>> SURE.
WELL, THE SHORT ANSWER TO THAT, JUSTICE PARIENTE, THIS IS UNUSUAL BECAUSE IT WAS A SUMMARY DENIAL, AND GENERALLY TRIAL COURTS ARE, IN AN ABUNDANCE OF CAUTION, GRANTING EVIDENTIARY HEARINGS ON ALL 3851 CLAIMS.
>> AND I THOUGHT THAT THE STATE USUALLY REALIZING THAT THAT'S WHAT OUR REQUEST IS DOESN'T PUT US IN A SITUATION WHERE WE COULD END UP WITH NOW TWO APPEALS.
I MEAN, AGAIN, SO YOU'RE SO CLEAR THAT THIS ONE IS THE EXCEPTION TO EVERY OTHER CASE BECAUSE WHY?
>> WELL, AND IT IS VERY CLEAR.
AND BASED ON THIS COURT'S LAW IN FRANKLY AND BARNES AND VALENTINE, ALL OF WHICH ARE CITED IN MY BRIEF AND RESPONSES, A DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING JUST BY MAKING CONCLUSORY OR SPECULATIVE ARGUMENTS.
BECAUSE THE COURT, IT'S A DE NOVO REVIEW, AT THAT POINT IT'S THE DEFENDANT'S BURDEN ALONE TO PROVIDE A FACIALLY-SUFFICIENT CLAIM--
>> OKAY.
SO LET ME ASK YOU THIS.
HE SAYS, THIS IS JUST THE PART I'VE HIGHLIGHTED.
COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT EXPERT TESTIMONY THAT MR. KOPSHO WAS SUFFERING FROM MOOD DISORDER AND A BORDERLINE PERSONALITY DISORDER WHICH WAS ROOTED IN HIS ABUSIVE CHILDHOOD AND ADOLESCENCE.
AND IT GOES ON AND ON.
AND IT STARTS WITH, YOU KNOW, IT'S IN GREAT DETAIL.
I DON'T KNOW WHY THAT'S NOT ENOUGH DETAIL.
>> AND THE ANSWER TO YOUR QUESTION, JUSTICE PARIENTE,

BECAUSE EVEN IF WE'RE ACCEPTING ALL OF THOSE FACTUAL ALLEGATIONS AS TRUE, DR. McMAHON ALREADY TESTIFIED TO ALL OF THOSE THINGS.
AND I'M CITING TO VOLUME THREE, RECORD SITE 558--
>> HERE'S THE PROBLEM WITH THAT. IT'S LIKE IF SOMEONE SAYS, WELL, YOU PUT ON A LAY WITNESS TO SAY THIS, AND NOW YOU HAVE THE MENTAL HEALTH EXPERT.
WE DON'T-- I MEAN, IS THE ALLEGATION THAT DR. McMAHON, THAT WASN'T HER AREA OF EXPERTISE, SHE WASN'T SUPPLIED ENOUGH INFORMATION ABOUT HIS HISTORY OF SEXUAL ABUSE?
YOU KNOW, WHAT HAPPENED AT THE INDIANA SCHOOL FOR BOYS.
THAT'S THE, THAT'S WHAT THE MISSING PIECE IS THAT WOULD MAKE THIS SO OOZY TO-- EASY TO AFFIRM IF THIS WAS ALL DECIDED BASED ON THAT EVIDENTIARY HEARING.
THAT'S, FOR ME, MY ISSUE.
AND MAYBE, YOU KNOW, WE MAY AGREE WITH YOU, BUT THAT'S-- WHEN THE LIFE OF SOMEONE'S AT STAKE, WE WANT TO MAKE SURE THAT EVERYONE'S GOTTEN THEIR RIGHT.
>> ABSOLUTELY.
SO IF THERE IS ANY SEMBLANCE OF A FACTUAL DISPUTE FROM THE PLEADINGS, HE WOULD HAVE BEEN GRANTED AN EVIDENTIARY HEARING.
THE COURT IN THIS CASE WAS CORRECT TO SUMMARILY DENY BECAUSE ALL OF THE ALLEGATIONS THAT ARE ALLEGED BY THE APPELLANT IN THE 3851 MOTION WERE IN DETAIL DESCRIBED BY DR. McMAHON IN THE PENALTY PHASE.
>> NOW, I CAN AGREE WITH YOU THAT DR. McMAHON DID WHAT I CONSIDER TO BE A GOOD JOB IN HER TESTIMONY.
AND THE TRIAL JUDGE ACTUALLY DID

A VERY GOOD JOB IN THE ORDER
GOING THROUGH ALL OF THIS
TESTIMONY OF DR. McMAHON.
HOWEVER, WHEN I WENT THROUGH IT,
I DIDN'T SEE ANYTHING IN HER
TESTIMONY THAT TALKED ABOUT
SEXUAL ABUSE.
AND KEEPING IN MIND THAT THIS IS
A CRIME OF KILLING-- HE KILLED
HIS WIFE.
IN A PREVIOUS RELATIONSHIP,
EVIDENTLY, HE ASSAULTED SOMEONE
ELSE.
AND SO IT SEEMS-- AND I KNOW
THAT SHE SAID IN HER TESTIMONY
THAT IT'S THESE INTIMATE
RELATIONSHIPS THAT REALLY GETS
HIM INTO TROUBLE.
FOR LACK OF A BETTER WORD.
>> CORRECT.
>> SO WHY WOULDN'T IT HAVE BEEN
IMPORTANT THEN TO HAVE DEVELOPED
THE, ANY SEXUAL ABUSE IF THERE
WAS ANY TO SORT OF LET US KNOW
THAT THIS IS MAYBE HIS WHOLE
SEXUAL RELATIONSHIPS WITH WOMEN
WERE BASED ON THIS ABUSE?
>> I UNDERSTAND YOUR POINT,
JUSTICE QUINCE X THE ANSWER TO
THAT IS BECAUSE THERE WAS NO
SEXUAL ABUSE.
THE COURT MAKES A FACTUAL
FINDING IN THE SENTENCING ORDER
THAT THE 14 MITIGATORS THAT WERE
PRESENTED BY THE DEFENSE IN
THEIR SENTENCING MEMORANDUM AND
THAT THEY PRESENTED EVIDENCE OF
INCLUDED THINGS LIKE BEING
ABUSED BY LARGER CHILDREN AT THE
INDIANA BOYS' SCHOOL--
>> BECAUSE-- I UNDERSTAND THAT,
AND I READ THAT ORDER.
BUT WE DON'T KNOW IF THERE WAS
ANY SEXUAL ABUSE IF WE DIDN'T
HAVE ANY TESTIMONY AT THE
EVIDENTIARY HEARING ABOUT
WHETHER OR NOT THERE WAS SEX.
I MEAN, I WOULD ASSUME SINCE
THEY WERE MAKING THE ALLEGATION,
THAT AT LEAST SOMETHING WAS

GOING TO BE PRESENTED ABOUT
SEXUAL ABUSE IN HIS PAST.
>> AND, JUSTICE QUINCE, I WOULD
RESPECTFULLY DISAGREE BECAUSE WE
HAVE AN EXTREMELY COMPREHENSIVE
MENTAL HEALTH INVESTIGATION BY
DR. McMAHON IN THIS CASE.
WE HAVE 26 HOURS OF FACE-TO-FACE
INTERACTION.
SHE PERFORMED VARIOUS TESTS ON
HIM.
THIS IS AN INTELLIGENT
INDIVIDUAL WITH AN IQ OF 105.
HE GRADUATED FROM HIGH SCHOOL,
HE MAINTAINED A JOB.
HE WAS APPROXIMATELY 47, A DAY
SHY OF 47 YEARS OLD.
>> DID SHE ASK HIM ANYTHING
ABOUT SEXUAL ABUSE?
>> IN HER TESTIMONY, AND THIS IS
CITED AT VOLUME 30 RECORD SITE
558, AND THIS IS ACTUALLY IN THE
SENTENCING ORDER, THE ORDER
DENYING, RATHER.
THE TRIAL COURT TAKES
DR. McMAHON'S TESTIMONY AND
TALKS ABOUT ALL OF THE THINGS
THAT SHE REVIEWED.
SHE REVIEWED 36 DEPOSITIONS.
SHE TALKED TO ALL OF HIS FAMILY
MEMBERS.
SHE TALKED TO A PRIOR
PSYCHOLOGIST IN HIS SEX OFFENDER
PROGRAM.
SHE TALKED TO D.O.C., SHE
REVIEWED D.O.C. RECORDS.
SHE SPOKE TO HIS MOTHER WHO AT
THE TIME HAD ALZHEIMER'S WHO
WASN'T PARTICULARLY HELPFUL, BUT
SPOKE TO FAMILY MEMBERS,
COWORKERS.
OF ALL OF THESE
INDIVIDUALS, THERE WAS NO
MENTION OF SEX ABUSE.
IN THE INDIANA BOYS' SCHOOL
THERE WAS TESTIMONY-- AND YOU
CAN TELL THAT THE JUDGE, JUDGE
EDDIE WHO WAS THE SENTENCING
JUDGE AND THE JUDGE WHO
SUMMARILY DENIED THE ORDER, OR

THE MOTION, RATHER-- IS GIVING
HIM THE BENEFIT OF THE DOUBT OF
THESE THINGS.
BECAUSE HE WAS AT THE ADMITTEDLY
HORRIBLE AT THE TIME INDIANA
BOYS' SCHOOL DURING 1970,
THERE'S NO DIRECT EVIDENCE THAT
WAS PRESENTED IN THE PENALTY
PHASE, AND IT'S NOT FOR LACK OF
TRYING.
BUT THERE WAS NO EVIDENCE THAT
HE WAS ACTUALLY ABUSED.
THERE WAS NO EVIDENCE THAT HE
WAS ONE OF THE INDIVIDUALS WHO
WAS HERE AT THE FACILITY BEING
BULLIED BY THE OLDER CHILDREN.
BUT THE JUDGE ASSUMED BECAUSE
THESE THINGS WERE GOING ON AT
THE TIME HE WAS THERE, THAT HE
WAS ENTITLED TO THAT MITIGATION
AND ACTUALLY ACCORDED HIM OF
THAT MITIGATION.
>> I THINK YOU'RE DOING A
BEAUTIFUL ANSWER HERE WITHOUT
ANSWERING THE ONE ESSENTIAL
QUESTION WHICH WAS THAT SOMEBODY
ASKED ABOUT SEXUAL ABUSE AT THAT
LOCATION.
>> AND, JUSTICE LEWIS, THERE WAS
NO, NO EVIDENCE OF SEX--
>> YOU DON'T KNOW IF YOU DON'T
ASK THE QUESTION.
I MEAN, THAT WAS WHAT THE
QUESTION WAS.
SO IS THAT WAS NOT ASKED.
BUT YOU'RE A SAYING IT WASN'T
NECESSARY TO ASK THAT QUESTION,
THAT YOUR ARGUMENT?
>> MY ARGUMENT IS THAT
DR. McMAHON, HER PURPOSE WAS
TO FIND ANY MITIGATION THAT
SHE--
>> WELL, WE ALWAYS AGREE WITH
THESE.
WE HAVE NO REASON TO BELIEVE
THAT THESE EXPERTS ENGAGE IN BAD
FAITH AND TRY TO HIDE THINGS.
BUT AGAIN, IT COMES BACK TO CAN
THEY MISS THINGS, AND IT'S
POSSIBLE.

AND, AGAIN, I MEAN, YOU'RE
MAKING A WONDERFUL ARGUMENT.
BUT WE HAVE TO GET TO THE HEART,
WHICH WAS THE QUESTION, WAS THAT
SUBJECT MATTER ATTEMPTED TO BE
DISCLOSED?
AS THE QUESTION WAS ASKED.
AND YOUR ANSWER IS, NO, THEY
TALKED ALL AROUND IT BUT DIDN'T
ASK THAT QUESTION.
IS THAT FAIR?
>> AND I CAN'T TELL YOU THE
EXACT TESTIMONY.
I DON'T KNOW IF THAT EXACT
QUESTION WAS ASKED.
MY POSITION IS THAT IF THERE WAS
ANY INDICATION OF SEX ABUSE THAT
CAME OUT IN THIS EXTENSIVE
INTERVIEW PROCESS WITH
DR. McMAHON WITH ALL OF THE
FAMILY MEMBERS, THAT THAT WOULD
HAVE BEEN TESTIFIED TO.
>> OKAY.
>> AND BECAUSE IT WASN'T, I HAVE
TO ASSUME THAT--
>> BUT THAT'S WHY WE HAVE-- THE
THING ABOUT THESE EVIDENTIARY
HEARINGS IS YOU'RE TALKING ABOUT
PUTTING ON A LAWYER, AND THEN
THIS EXPERT DOCTOR THAT THEY
WERE PREPARED TO--
>> RUSSELL.
>> DR. RUSSELL.
I DON'T KNOW IF THAT TAKES A
DAY.
WE MAY FIND OUT THAT THERE IS NO
SEXUAL ABUSE.
WE MAY FIND OUT THAT
DR. McMAHON HAD EVERYTHING AND
THERE REALLY-- THIS IS NOTHING,
NOTHING MORE.
BUT WE HAVE IT WITH THE RECORD
THAT WE CAN FEEL CONFIDENT IF
SOMEBODY'S GOING TO BE PUT TO
DEATH THAT THE MITIGATION WHICH,
AS JUSTICE QUINCE SAID, YOU'VE
GOT A SITUATION WHERE THIS IS A
CRIME OF VIOLENCE, PASSION,
PERVERSION THAT IS ROOTED IN
INTIMATE, YOU KNOW, INTIMATE

PARTNER ABUSE TO MAKE SURE THAT
IT'S BEEN EXPLORED.
I'M STILL SURE I UNDERSTAND HOW
WE CAN SUMMARILY DENY IT AS
CUMULATIVE WITHOUT HAVING THE
ALLEGATIONS THAT ARE IN THE--
AND YOU SAID, AND I THINK THE
WAY THIS STARTED WAS YOU THINK
THEY WERE NOT DETAILED ENOUGH.
AND I THINK MY-- THEY'RE PRETTY
DETAILED.
>> WELL.
AND I'M, RESPECTFULLY, JUSTICE
PARIENTE, MY ARGUMENT WAS THAT
IF IT'S NOT CLEAR THAT THERE'S A
FACTUAL DISPUTE, IF THEY
DON'T HAVE A PRIMA FACIE CLAIM
FOR INEFFECTIVE ASSISTANCE OF
COUNSEL ON THE RECORD, THEY'RE
NOT ENTITLED TO A HEARING.
>> WELL, I THINK IF SOMEBODY IS
IN EMOTIONAL DISTRESS, UNDER THE
INFLUENCE OF EXTREME EMOTIONAL
DISTURBANCE THAT COULD BE TIED
TO THE BORDERLINE PERSONALITY
DISORDER AND THAT WHY IT IS THAT
FROM A YOUNG AGE HE HAD THIS
GOING ON TO EXPLAIN THAT THIS
WAS, HE WAS NOT IN CONTROL OF
HIS EMOTIONS BECAUSE OF HIS
PERSONALITY, THAT'S A, COULD BE
A POWERFUL MITIGATOR.
I DON'T KNOW.
>> ABSOLUTELY.
AND, JUSTICE PARIENTE, I DO HAVE
THREE POINTS TO ANSWER THAT.
FIRST, I WANTED TO CLARIFY.
MY POINT THAT IN THE
SENTENCING MEMORANDUM IT WAS
ARGUED WITHOUT ANY EVIDENCE, AND
THAT GOES INTO CLAIM TWO,
FAILURE TO CALL JAMES AIKEN, BUT
IT KIND OF TOUCHES ON ONCE.
IT WAS NOT WITHOUT EVIDENCE.
DR. McMAHON TESTIFIED TO THE
FACT THAT BECAUSE-- AND HE WAS
NOT DIAGNOSED WITH BORDERLINE
PERSONALITY DISORDER.
HE WAS DIAGNOSED WITH DEPENDENT
PERSONALITY DISORDER WITH

BORDERLINE FEATURES.
>> I THOUGHT THAT'S WHY HE WAS INEFFECTIVE, BECAUSE HE DIDN'T--
>> NO.
HE ACTUALLY RECEIVED THAT DIAGNOSIS FROM DR. McMAHON.
SO SHE DID TESTIFY IN DETAIL TO THE FACT THAT THESE TRIGGERING FACTORS ARE TRIGGERED WHEN A ROMANTIC PARTNERSHIP BREAKS UP.
AND LYNNE, THE VICTIM, WAS HIS SIXTH WIFE.
SHE WAS 17 WHEN HE MET HER, AND HE WAS APPROXIMATELY 45.
>> WHAT NUMBER WIFE?
>> SIXTH.
HE HAD HAD FIVE PRIOR MARRIAGES.
AND THE PRIOR VIOLENT FELONY WAS ACTUALLY AN EX-GIRLFRIEND THAT HE HAD SEXUALLY ASSAULTED WHICH GOES MORE TO HEARST, SO I'LL GO BACK TO THAT.
>> SO ALL THE MORE REASON WHAT WE DON'T KNOW IS-- AND, AGAIN, DR. McMAHON IS SOMEBODY THAT WE'VE HEARD FROM BEFORE.
I DON'T KNOW THIS OTHER EXPERT.
I DON'T KNOW WHAT THE TRIAL LAWYER THOUGHT.
AND THAT'S WHY FROM MY POINT OF VIEW WE SORT OF MANDATED EVIDENCE SHARE HEARING--
EVIDENTIARY HEARING UNLESS T CONCLUSIVELY REFUTED BY THE RECORD.
>> AND SO THAT WOULD GO TO MY THIRD POINT.
EVEN IF WE'RE SAYING COUNSEL WAS DEFICIENT IF THERE'S A PRIMA FACIE CASE THAT DR. RUSSELL SHOULD HAVE BEEN CALLED, AND THE STATE'S POSITION IS, YOU KNOW, IT'S THE LINE OF CASES THAT IT'S ANOTHER EXPERT, DEFENSE ATTORNEYS ENTITLED TO RELY ON HIS COMPETENT EXPERT TESTIMONY.
BUT EVEN STILL IF WE'RE SAYING DEFICIENCY, WE HAVE TO GO TO

PREJUDICE.
AND THERE HAS TO BE A PRIMA FACIE SHOWING AS TO PREJUDICE AS WELL.
AND SO IF WE'RE SAYING THAT DR. RUSSELL CAME IN AT AN EVIDENTIARY HEARING OR AT THE PENALTY PHASE AND TESTIFIED TO THE FACT THAT THERE WAS POSSIBLE SEX ABUSE WITH THE INDIANA BOYS' SCHOOL OR-- AND HE WAS 16 WHEN HE WENT THERE, SO IT WASN'T AT AN EARLY AGE, AND THAT WAS AFTER HE HAD HAD PROBATION VIOLATIONS AND WAS STEALING FROM IF HIS MOTHER AND WAS UNCONTROLLABLE.
SO THEY SENT HIM TO THE INDIANA BOYS' SCHOOL.
SO McMAHON TESTIFIES THAT TRIGGERS THIS ABANDONMENT WHICH LEADS INTO A INDEPENDENT PERSONALITY DISORDER.
SO WHEN A ROMANTIC PARTNER LEAVES HIM, TRIGGERS HIS RAGE, AND HE'S UNCONTROLLABLE.
SO EVEN IF WE'RE SAYING THAT, THAT ADDITIONAL PIECE OF INFORMATION WITH ALL OF THE OTHER TESTIMONY THAT DR. McMAHON TESTIFIED TO IN MITIGATION AND THE FACT THAT IT LED TO, YOU KNOW, WHETHER IT WAS BEING LEFT BY HIS MOTHER AND BULLIED BY HUSBAND MOTHER AT INDIANA BOYS' SCHOOL OR THE FACT THAT--
>> YOU SEE, ALL YOU'RE REALLY ARGUING NOW IS BECAUSE IT'S CUMULATIVE, IT CAN'T BE PREJUDICIAL.
AND YOU'RE SAYING THEY DIDN'T ALLEGE ENOUGH TO SHOW IT WOULD HAVE MADE A DIFFERENCE.
BUT I-- THAT IS, THOSE TYPE TYPES OF THINGS ARE ISSUE OF FACT AND LAW THAT WE THEN LOOK AT ON AN EVIDENTIARY RECORD IN FRONT OF US, NOT FROM SAYING THERE'S NO WAY THIS JURY THAT VOTED 10-2 WOULD HAVE VOTED 6-6

IF THEY HAD THIS MORE COMPELLING
DISPLAY OF WHAT WAS REALLY GOING
ON WITH THIS DEFENDANT.
>> WELL, AND IT PROCEEDS THAT
THERE WOULDN'T HAVE BEEN A
DIFFERENT OUTCOME AT TRIAL.
EVEN IF DR. RUSSELL HAD
TESTIFIED TO THIS, THE TRIAL
JUDGE GAVE HIM MODERATE WEIGHT
TO THIS MITIGATING CIRCUMSTANCE.
>> BUT NOW WE HAVE THE RUB.
WE CAN GO RIGHT INTO THE HER
ISSUE HERE BECAUSE THE QUESTION
REALLY, DEPENDING ON WHAT HEARST
MANES, IS WOULD IT HAVE MANE
MADE A DIFFERENCE TO THE JURY.
>> RIGHT.
>> I MOON, IT COULD MEAN THAT.
>> AND IN THIS CASE, THE STATE'S
OPINION IS WE DON'T EVEN HAVE TO
REACH THE HEARST ISSUE BECAUSE
WE HAVE FOUR AGGRAVATORS.
AND I DISAGREE WITH MY OPPOSING
COUNSEL BECAUSE DURING THE
COMMISSION OF AN ARMED
KIDNAPPING-- WHICH HE WAS
CONVICTED OF UNANIMOUSLY BY THE
JURY OF A CONTEMPORANEOUS CRIME
OF ARMED KIDNAPPING-- WAS GIVEN
LITTLE WEIGHT AS A MITIGATING
FACTOR.
EXCUSE ME, AS AN AGGRAVATING
FACTOR.
SO THERE WAS AN AGGRAVATOR THAT
WAS FOUND, AND THE REASON IT WAS
GIVEN LITTLE WEIGHT IS BECAUSE
THE JUDGE WAS COGNIZANT OF THE
DOUBLING FACTOR.
AND BECAUSE THERE WAS ALSO A
PRIOR VIOLENT FELONY WHICH
INCLUDED AN EX-GIRLFRIEND BY THE
NAME OF HELEN LITTLE, HE WAS--
HE HAD SERVED, WAS SUPPOSED TO
SERVE A TEN-YEAR PRISON
SENTENCE, BUT IT PLED DOWN TO AN
ARMED FALSE IMPRISONMENT AND
BATTERY FOLLOWED BY FIVE YEARS'
PROBATION.
THAT PROBATION WASN'T SET TO
EXPIRE UNTIL APPROXIMATELY 2006.

SO HE WAS ON PROBATION WHEN THIS
OCCURRED, WAS CONTEMPORANEOUSLY
CONVICTED OF ARMED KIDNAPPING
AND HAD HAD THE PRIOR VIOLENT
FELONY.
SO AS WELL AS THE CCP.
SO GOING BACK TO I THINK IT WAS
AN ARGUMENT EARLIER THIS WEEK
THAT DEALT WITH HEARST, THE ONLY
AGGRAVATING FACTOR THAT WAS NOT
FOUND UNANIMOUSLY BY A JURY WAS
THE CCP.
WHICH IN THIS CASE, GREAT WEIGHT
WAS ATTRIBUTED TO TWO OTHER OF
THE MITIGATING-- EXCUSE ME,
AGGRAVATING FACTORS.
THE OTHER RECEIVED MODERATE AND
THE OTHER RECEIVED LITTLE.
BECAUSE THE JUDGE, AGAIN, WAS
COGNIZANT OF DOUBLING WITH THAT.
SO HEARST DIDN'T CHANGE THE FACT
THAT RING, THAT A CASE OF A
PRIOR VIOLENT FELONY OR A
CONTEMPORANEOUS FELONY IS
OUTSIDE THE PURVIEW OF RING.
SO REGARDLESS OF THE HEARST
ANALYSIS, THIS CASE SHOULD NOT
BE AFFECTED BY THAT OR AT LEAST
HARMLESS ERROR, BECAUSE CCP
WOULD BE THE ONLY ONE THAT WAS
NOT UNANIMOUSLY FOUND BY A JURY.
EVEN THOUGH HEARST DOESN'T
ENTITLE A DEFENDANT TO A
UNANIMOUS JURY FINDING, THAT'S
STILL KIND OF BEING WORKED OUT.
AND--
>> DO YOU AGREE THAT IT'S BEEN
PROPERLY PRESERVED TO BE
PRESENTED TO THIS COURT?
AND IF NOT, WHY NOT?
>> I BELIEVE THAT THE HEARST
CLAIM HAS BEEN PROPERLY
PRESERVED--
>> FINE.
THAT'S FINE.
>> YES, YOUR HONOR.
>> OKAY.
>> SO IS YOUR ARGUMENT REALLY
THAT, WELL, IF YOU ASSUME THAT
RING AND HEARST WOULD APPLY TO

THIS CASE, IS YOUR ARGUMENT
REALLY A HARMLESS ERROR ONE
OR--
>> WELL, MY PRIMARY ARGUMENT,
JUSTICE QUINCE, WOULD BE THAT
IT'S OUTSIDE THE PURVIEW OF RING
TO BEGIN WITH, BECAUSE THERE WAS
THE CONTEMPORANEOUS CONVICTION
FOR ARMED KIDNAPPING--
>> YOU CONCEDING THAT HEARST
APPLIES ON POSTCONVICTION, IS
RETROACTIVE?
>> NO.
BUT WE WERE DISCUSSING IT, SO IF
WE'RE TALKING ABOUT THAT.
>> JUST WANTED TO MAKE SURE THAT
THE STATE WAS NOT COB SEEDING
THAT.
[LAUGHTER]
>> NO.
UNDER THE WOOD ANALYSIS, IT
WOULDN'T HAVE BEEN RETROACTIVE
ANYWAY.
AGAIN, IN OPPOSITION TO WHAT MY
OPPOSING COUNSEL SAID, IN THE
CASE WAS FINAL ON THE DENIAL OF
CERTIORARI BY THE UNITED STATES
SUPREME COURT ON OCTOBER 1,
2012.
SO IT WOULD BE QUITE A BIT
OVERDUE.
BUT IF THERE ARE NO FURTHER
QUESTIONS BY THE COURT, I WOULD
ASK THAT THE TRIAL COURT'S
SUMMARY DENIAL BE AFFIRMED AND
ANY POSTCONVICTION RELIEF
CONCERN AND KOPSHO WOULD NOT BE
ENTITLED TO ANY POSTCONVICTION
RELIEF.
THANK YOU.
>> JUST TO DELVE INTO SOME OF
THE FACTUAL ISSUES AND THEN GO
INTO HEARST, MENTIONINGS OF
MENACES OF HERSELF,
CONSIDERING THE RELIANCE
McMAHON HAD TO GROUP THERAPY
WHILE HE WAS ON PROBATION FOR
HIS SEXUAL OFFENSE, EVEN
DR. McMAHON NOTED CONCERNS
THAT DR. SHAW'S IMT TREATMENT--

IT WAS DONE THROUGH A GROUP
CALLED IMT-- APPEARED TO BE
FAIRLY LIMITED.
AND SO SHE DID NOT HAVE A FULL
PICTURE OF MR. KOPSHO IN THAT
REALM.
AND AS THIS COURT DID NOTE, AT
NO POINT IN THE RECORD IS SEXUAL
ABUSE NOTED, SO I'LL JUST--
>> WELL, IS THERE, DO YOU HAVE
EVIDENCE THAT HE WAS SEXUALLY
ABUSED?
>> YES, YOUR HONOR.
FROM THE AGE OF 11.
AND WE INTEND TO PROVE THAT,
YES.
>> OKAY.
THAT'S A PRETTY--
>> NOW.
>> GOING FROM IT WASN'T A
COMPETENT MENTAL HEALTH
EVALUATION TO THAT HE WAS
SEXUALLY ABUSED AND THAT WAS
JUST MISSED?
THAT'S WHAT YOU'RE ALLEGING?
>> YES, YOUR HONOR.
>> THAT'S WHAT YOU'VE ALLEGED.
>> I THINK MY PRIOR PREDECESSOR
OUGHT TO BE STRONGEST TO ARGUE,
AND IT IS A STRONG ARGUMENT,
THAT SUCH A INCIDENT-- LEADS TO
PRESENTATION OF MITIGATION.
AND THERE WAS FOCUS MORE ON THE
LATTER, BUT THERE IS THE FOREMAN
AS WELL.
NOW, GOING INTO HEARST I WOULD
JUST NOTED THAT IT IS CORRECT
THAT HIS CASE BECAME FINAL IN
2012.
WE DO ARGUE THAT HEARST IS
LEGISLATE PROACTIVE REGARDLESS.
>> WAS THE ARGUMENT PRESENTED, A
RING ARGUMENT, NOT A HEARST
ARGUMENT?
BUT A RING/APPRENDI ARGUMENT
PRESENTED TO THE TRIAL JUDGE AT
THAT TIME?
>> YES, YOUR HONOR.
>> OKAY.
>> IT WAS CONSISTENT THROUGHOUT

THE TRIAL PROCESS.
>> WHAT DID THIS COURT-- WAS IT
RAISED ON DIRECT APPEAL?
>> YES, YOUR HONOR.
AND BASED ON THE CONCEPTION OF
RING AT THE TIME, IT WAS
REJECTED.
>> BASED ON HE HAD THESE PRIOR
VIOLENT FELONIES, CONTEMPT RAIN
NOW FELONIES.
>> YES, YOUR HONOR.
>> AS WELL AS IT JUST DIDN'T
APPLY.
>> I MAY BE WRONG, BUT I BELIEVE
IT WAS CLAIM EIGHT FOR THE
DIRECT APPEAL.
BUT IT WAS DIRECTLY RAISED AT
THAT POINT.
NOW, CONCERNING INTERPRETATIONS
OF HEARST WHETHER SOMEONE WITH
ONE PRIOR VIOLENT FELONY
ESSENTIALLY AUTOMATICALLY
QUALIFIES FOR DEATH, I WOULD
JUST REITERATE ONCE AGAIN I
BELIEVE THE ARGUMENT WAS MADE IN
LAMBRIX AND YOU HAVE A SITUATION
WHERE HEARST, ELAINE, RING WHEN
ALL READ TOGETHER THAT THE
COURT-- PARTICULARLY WITH
ELAINE-- SEE WHAT IS NEEDED TO
ESTABLISH THE POSSIBLE
PUNISHMENT UNDER THE LAW.
BECAUSE OF THE WAY FLORIDA
STATUTE IS WRITTEN, THE FACTUAL
FINDING THAT MITIGATING
CIRCUMSTANCES DO NOT OUTWEIGH
AGGRAVATING SINGS IS ESSENTIALLY
A FACT THAT MUST BE FOUND.
PARTICULARLY READING ELAINE WITH
HEARST.
THAT BECOMES MORE IMPORTANT
BECAUSE ELAINE CLEARLY NOTES
THAT TO ESTABLISH PUNISHMENT
UNDER THE LAW, THAT IS THE
PURVIEW OF THE JURY.
IT IS THE REALM OF THE JUDGE TO
DECIDE WHAT SPECIFIC PUNISHMENT
WOULD APPLY ONCE THE RANGE UNDER
LAW IS ESTABLISHED.
WHEN YOU ADD THAT FRAMEWORK TO

OUR CASE OR ANY OTHER FLORIDA CASE, YOU RUN INTO THE SITUATION WHERE FLORIDA DIVIDED THOSE TWO SECTIONS, SO TO SPEAK, THE ESTABLISHING OF THE PUNISHMENT VERSUS THE SETTING OF A SPECIFIC PUNISHMENT.
HEARST AND ELAINE ESSENTIALLY READ IN CONJUNCTION WITH THE FLORIDA STATUTE IS STYLISH.
THE JUDGE'S CHOICE REALLY ONLY TO GIVE LIFE OR DEATH ONCE A JURY HAS RECOMMENDED DEATH.
THAT IS THE REALM, THE RANGE THAT IS AVAILABLE TO THE JUDGE.
SEEING AS MY TIME RUNNING OVER, I WOULD JUST THANK THIS COURT AND ASK THAT WE HAVE AN EVIDENTIARY HEARING AT THE TRIAL COURT LEVEL AND ALSO THAT WE'D ALSO NOTE HEARST IS RETROACTIVE.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
COURT'S IN RECESS FOR TEN MINUTES.