>> ALL RISE.
SUPREME COURT OF FLORIDA IS NOW
IN SESSION, PLEASE BE SEATED.
>> PRECEDENT BEFORE US TODAY IS
CALHOUN COUNTY SUPREME COURT LED
BY JUDGE GROVER OF THE CIRCUIT
OF FLORIDA.
IF YOU WOULD PLEASE STAND.
THANK YOU.
OKAY.
WHENEVER YOU ARE READY.
>> MAY IT PLEASE THE COURT.
I AM KAREN MORE, I REPRESENT
SC15-1655 ON THE APPEAL OF HIS
MOTION WAS MISTER MCGIRTH WAS
CONVICTED OF FIRST-DEGREE MURDER
OF DIANA MILLER, ATTEMPTED
FIRST-DEGREE MURDER OF JAMES
MILLER, ACQUITTED OF KIDNAPPING
SHEILA MILLER, THEIR 39-YEAR-OLD
DAUGHTER AND ROBBERY IN 2008.
THE JURY RECOMMENDED BY A VOTE
OF 11-1 BUT DEATH SENTENCE AND
THE TRIAL COURT IMPOSED THE
DEATH SENTENCE FINDING SEVERAL
AGGRAVATED IS.
THERE WERE NO INTERROGATORY
VERDICTS WITH THE JURY'S
RECOMMENDATION.
I WANTED TO ADDRESS TWO CRITICAL
ISSUES IN THE CASE WAS THE FIRST
IS THE IMPACT OF THE HEARST
DECISION ON MISTER MCGIRTH'S
CASE AND THE SECOND IS THE
UNRELIABLE POSTCONVICTION
PROCESS BELOW.
AS I STATED, MISTER MCGIRTH'S
JURY RECOMMENDATION WAS BY A
VOTE OF 11-1.
AND HURST, THIS COURT REQUIRES
UNANIMOUS DECISION ON ALL
CRITICAL FINDINGS FOR THE
IMPOSITION OF DEATH BY THE JURY.
THE JURY MUST FIND ALL
AGGRAVATED IS BEYOND REASONABLE
DOUBT UNANIMOUSLY.
THEY MUST FIND AGGRAVATED IS OUR
SUFFICIENT UNANIMOUSLY.
THEY MUST VOTE FOR DEATH
UNANIMOUSLY.

WE DIDN'T HAVE THAT HERE.
THE HEARST DECISION IS CRITICAL
HERE BECAUSE WE HAVE ONE GERRI,
ONE JUROR WHO VOTED FOR LIFE.
WE DO NOT KNOW AND CANNOT KNOW
WITHOUT INTERROGATORY VERDICTS
WHAT AGGRAVATED IS THE JURORS
FOUND, BY WHAT VOTE THERE IS
SUFFICIENCY FOR EACH AND WHETHER
ALL OF THEM OUTWEIGHED ANY
MITIGATE HIS.
THE JUDGE DECIDED THAT AND THIS
COURT SAID THAT IS IMPROPER.
>> THE RING ISSUE WAS RAISED ON
DIRECT APPEAL.
>> IT WAS.
>> THIS IS POSTCONVICTION.
>> WE FILED A HIDEOUS PETITION
WHERE WE RAISED THE HEARST --
>> HEARST WAS A DIRECT APPEAL.
>> HEARST WAS A DIRECT APPEAL.
>> THIS INVOLVES WHETHER IT IS
RETROACTIVE.
WE WOULD ARGUE THAT IT IS.
UNDER THIS COURT'S DECISION.
OBVIOUSLY THIS IS A
CONSTITUTIONAL DECISION BASED ON
THE 6 AMENDMENT FOR GERRI
SENTENCING, THE SIXTH AMENDMENT
FOR UNANIMITY, EIGHTH AMENDMENT
FOR UNANIMITY AND FLORIDA
CONSTITUTION RIGHT TO JURY TRIAL
FOR UNANIMITY.
IT IS A SUPREME COURT DECISION,
IT IS A CONSTITUTIONAL DECISION
OBVIOUSLY, UNDER THE SIXTH,
EIGHTH, AND FLORIDA CONSTITUTION
AND IT IS THE CRITICAL DECISION
THAT COULD HAVE SWEEPING RESULTS
SO WE WOULD ARGUE THE DECISION
SHOULD PERMIT THE RETROACTIVITY
OF HEARST TO MISTER MCGIRTH AND
THAT HIS CASE SHOULD BE REMANDED
FOR RESENTENCING IN ACCORD WITH
YOUR DECISION AND THIS COURT HAS
RECENTLY FOUND JUVENILE SENTENCE
TO MANDATORY LIFE SENTENCES
DESERVE RETROACTIVE EFFECT AND
MOST RECENTLY THAT THE
CONSTITUTIONALLY AFFIRMED TEST

FOR INTELLECTUAL DISABILITY
DESERVED RETROACTIVITY CERTAINLY
WHEN SOMEONE AT LIFE --
>> THE ARGUMENT ON THE
RETROACTIVITY OF HEARST BEING
APPLICABLE TO YOUR DEFENDANT'S
CASE YOUR OTHER ARGUMENTS ABOUT
THE PENALTY PHASE GO AWAY.
HE WOULD BE ENTITLED TO A NEW
PENALTY PHASE, CORRECT?
>> HE WOULD.
HE WOULD.
UNDER HEARST IF IT WAS REMANDED
FOR SENTENCING AND WAS
RETROACTIVE BUT THAT IS THE
ARGUMENT ON HEARST.
THE PROCESS WAS FATALLY FLAWED.
AND THE POSTCONVICTION PROCESS,
DID NOT HAVE THE BENEFIT OF
CONFLICT FREE COUNSEL.
>> DID MCGIRTH ASK TO REPRESENT
HIMSELF?
>> MISTER MCGIRTH ASKED THE
COURT TO DISCHARGE HIS COUNSEL
AND APPOINT NEW COUNSEL.
>> NEVER FOUND -- THE COURT
FOUND COUNSEL WAS NOT DOING WHAT
THEY WERE SUPPOSED TO BE DOING.
IS HE LEFT WITH THE CHOICE OF
CONTINUING WITH COUNSEL
REPRESENTING HIMSELF?
>> HE WAS.
THE CRITICAL ARGUMENT HERE IS
THE -- WAS INSUFFICIENT BY THE
COURT.
>> SUBSEQUENTLY SAID THERE IS
NOT GOING TO BE A DISCHARGE.
HERE IS AN EXAMPLE, MCGIRTH
IRONICALLY SAID COUNSEL IS
TRYING TO RAISE RING AND WHAT A
FRIVOLOUS ARGUMENT THAT IS.
>> IT WAS A LITTLE IRONIC AND
INDICATIVE OF HIS SUPERFICIAL
UNDERSTANDING OF THE PROCESS.
>> THAT IS TRUE OF ANY DEFENDANT
SEEKING TO REPRESENT THEMSELVES
AND YOU TELL THEM AND YOU TELL
THEM AND THEY THINK THEY WILL
MANIPULATE THE PROCESS AND THEY
COME BACK.

WE NOW RECTIFY FOR POST
CONVICTION, THEY NEED COUNSEL ON
UP TO THE POINT INCLUDING DEATH
WARRANT.
I DON'T GET HOW THIS PROCESS --
>> THIS PROCESS WAS FLAWED.
>> IS THERE GUILT TO IT?
YOU HAVE TO POINT TO SOMETHING
IN THE GUILT PHASE THAT COULD
HAVE BEEN RAISED THAT WASN'T
RAISED TO AGREE WITH YOU.
>> WHAT I WAS THAT IS WHAT I
WOULD POINT TO IS AT THE NELSON
HEARING, SCHEDULED FOR
EVIDENTIARY HEARING, MISTER
MCGIRTH ASKED TO BE HEARD AND
DISCHARGE HIS COUNSEL AND GAVE
SPECIFIC RULES.
THE ONE THAT IS MOST IMPORTANT
FOR OUR CONSIDERATION IS MCGIRTH
COMPLAINED HIS COUNSEL HAD NOT
FULLY INVESTIGATED THE
INVOLVEMENT OF THE VICTIM'S
39-YEAR-OLD DAUGHTER IN THE
MURDER, AND HAD THE COURT FULLY
INQUIRED AS REQUIRED UNDER
NELSON, OF COUNSEL ON THIS
ISSUE, THE COURT WOULD HAVE
LEARNED THAT A WEEK OR TWO PRIOR
TO THE EVIDENTIARY HEARING,
COUNSEL INTERVIEWED DETECTIVE'S
TRUTH WHO TOLD HIM SHEILA
MILLER, THE 39-YEAR-OLD
DAUGHTER, SHOT HER MOTHER AND
STROOP HAD BEEN TOLD NOT TO
PURSUE THE ADULT DAUGHTER'S
INVOLVEMENT IN THE MURDER.
SO WHAT WE HAVE HERE IS A GERRI
THAT HAD ALREADY REJECTED THAT
SHEILA MILLER WAS THE VICTIM OF
A KIDNAPPING.
HER CREDIBILITY WAS AT RISK.
THIS WOULD HAVE BEEN INCREDIBLY
IMPORTANT INFORMATION FOR THE
JURY TO HEAR.
IT SEEMS LIKE THE JURY CONVICTED
MISTER MCGIRTH BELIEVING HE WAS
THE MOST CULPABLE AND GAVE HIS
CODEFENDANT MISTER ROBERTS A
BREAK, HE WAS CONVICTED OF

SECOND-DEGREE MURDER.
HAD THE JURY KNOWN THAT SHEILA MILLER FIRED THE FIRST SHOT AND ORCHESTRATED THIS ENTIRE ROBBERY --
>> NEGATED HIS CONVICTION FOR THE MURDER?
>> NO.
>> HE STILL WOULD HAVE BEEN CONVICTED OF THE MURDER OF THE MOTHER.
I AM TRYING --
>> COULD HAVE BEEN.
COULD HAVE BEEN.
BUT IT WOULD HAVE CAST GREAT DOUBT ON THE TESTIMONY OF MISS MILLER WHO WAS A CRITICAL WITNESS.
>> WAS NEVER CHARGED?
>> NO, SHE WAS NEVER CHARGED.
>> I'M HAVING TROUBLE, LOOKING AT THE POINTS YOU RAISED ON APPEAL, HE WAS ABLE TO REPRESENT HIMSELF.
DID HE NOT PUT THAT TESTIMONY, THOSE WITNESSES OR MAKE THAT ARGUMENT TO THE JUDGE?
SHOULDN'T THE ISSUE BE WHETHER THE JUDGE AIRED IN NOT GIVING AN EVIDENTIARY HEARING OR NOT FIND THE A WITNESS RADICAL AS OPPOSED TO HE SHOULDN'T HAVE BEEN ABLE TO REPRESENT HIMSELF?
HE IS COMPETENT, DID HE PUT ON EVIDENCE OF THESE OTHER WITNESSES THAT SHOULD HAVE BEEN CALLED OR USED?
>> NO, HE DID NOT.
>> SPECIFICALLY WAIVE EVIDENTIARY HEARING, WITNESSES WERE THERE, READY TO TESTIFY, AND FOR WHATEVER REASON, HE DECIDED HE DID NOT WANT TO HAVE THE EVIDENTIARY HEARING.
>> WE HAVE TO GO TO THE INITIAL NELSON HEARING.
HAD THE COURT DETERMINED REASONABLE COST STANDARD OR NELSON, THE COUNCIL SHOULD HAVE INVESTIGATED THE STATEMENT BY

SHEELER MILLER AND TRIAL
COUNSEL, WITH THE COURT WOULD
HAVE HAD AMPLE EVIDENCE TO FIND
COUNSEL WAS PROVIDING EFFICIENT
REPRESENTATION.
AT THAT POINT THE COURT SHOULD
HAVE APPOINTED REPLACEMENT
COUNSEL INSTEAD OF PLACING THIS
YOUNG MAN WHO WAS 18 AT THE TIME
OF THE OFFENSE, TO HIGH SCHOOL
IN THE LAKE COUNTY JAIL, HAD
MANY MENTAL HEALTH ISSUES, THE
RECORD WAS REPLETE IN THE
POSTCONVICTION PROCESS.
AND IF MCGIRTH HAD CONFLICT FREE
COMPETENT COUNSEL, WOULD HAVE
HAD COMPETENT COUNSEL TO RAISE
ANY COMPETENCY ISSUES AND WE
LIKELY WOULD BE REVIEWING A
COMPLETE, FULLY DEVELOPED
POSTCONVICTION RECORD.
>> WASN'T THERE A REQUEST IN
THIS CASE FOR COMPETENCY
DETERMINATION AND WASN'T ONE
DONE?
>> THERE WAS ONE DONE.
>> WE HAD AN OPPORTUNITY.
THERE WAS AN OPPORTUNITY TO TEST
WHETHER OR NOT HE REALLY COULD
REPRESENT HIMSELF.
>> I WOULD SAY TO YOU THAT THAT
TEST WAS NOTHING SHORT OF A
FARCE.
MISTER MCGIRTH REPRESENTED
HIMSELF AT THE COMPETENCY
HEARING, HE HAD NO INTEREST IN
ANYONE ASSAILING HIS MENTAL
HEALTH.
HE CONDUCTED A CROSS-EXAMINATION
ON THE DEFENSE EXPERT WHO
TESTIFIED HE WAS INCOMPETENT,
HAD PSYCHOTIC DISTURBANCES, NO
APPRECIATION, OR RATIONAL
APPRECIATION OF THE CASE AND HOW
TO PRESENT IT.
IT WAS SHOOTING FISH IN A BARREL
AT THE COMPETENCY HEARING.
>> THE FACT OF THE MATTER IS THE
JUDGE WHO PRESIDED OVER THESE
AND INTERACTED WITH MISTER

MCGIRTH OVER AN EXTENDED TIME, I
DON'T SEE IT.
HAVEN'T SEEN THIS EVIDENCE THAT
ONE OF THE EXPERTS, UNQUALIFIED
SUPPORT FOR HIS COMPETENCY.
THE OTHER EXPERT RELIED
PRIMARILY NOT ON HIS
OBSERVATIONS BUT WHAT THE
LAWYER, AN AFFIDAVIT, IN THE
CONTEXT OF THAT HOW COULD WE
SECOND-GUESS FOR THE TRIAL JUDGE
SAID?
>> I WOULD SAY THIS WAS AT THE
PENALTY PHASE THE COURT DIDN'T
HEAR A LOT OF EVIDENCE THAT
SHOULD HAVE BEEN PRESENTED ON
MENTAL HEALTH ISSUES THAT WOULD
GO TO HIS COMPETENCY.
AT THE POINT IN THE
POSTCONVICTION HEARING THE COURT
HAD BEFORE IT A MOTION TO
EXCLUDE A PET SCAN RESULTS.
DOCTOR WOULD FOUND BRAIN
INJURIES AND HAD DONE A PET
SCAN.
THE STATE WAS CHALLENGING THE
RELIABILITY OF THAT PET SCAN SO
THE JUDGE HAD THAT BEFORE HIM.
NEVER CONSIDERED THE PET SCAN
OR, NEVER INTERVIEWED FAMILY
MEMBERS, IF HE HAD, HE WOULD
HAVE LEARNED RENALDO DEVON
MCGIRTH WAS BROUGHT UP IN
HORRIBLE CIRCUMSTANCES WAS
ABUSED AT THE AGE OF 9, WITHIN A
JUVENILE FACILITY FOR A YEAR AT
THE AGE OF 10 AND FOR ANOTHER
YEAR AT THE AGE OF 12, HAD
MULTIPLE ACCIDENTS, HEAD
INJURIES.
>> I AM GRASPING TO UNDERSTAND
HOW THAT IS NECESSARILY GOING TO
BE DETERMINATIVE TO COMPETENCY
TO PROCEED.
I UNDERSTAND IT MAY BE HIGHLY
MITIGATING.
THAT IS A DIFFERENT ISSUE IN
COMPETENCY TO PROCEED.
>> I WOULD SAY DOCTOR BERLAND
WHO WAS AWARE OF THIS

INFORMATION, MCGIRTH HAD
PROBLEMS WITH HALLUCINATIONS,
CONTINUING HEADACHES, AND
UNDERSTOOD FACTUALLY WHAT WAS
GOING ON BUT NO RATIONAL
APPRECIATION AND COULDN'T ASSIST
ANYONE.
THAT IS THE ARGUMENT --
>> ANYONE WHO DECIDES TO
REPRESENT HIM OR HERSELF IN
PROCEEDINGS SUCH AS THIS DOESN'T
HAVE RATIONAL UNDERSTANDING.
I UNDERSTAND THAT PERSPECTIVE.
THAT IS NOT THE WAY WE LOOK AT
IT.
WE HAVE GOT TO DECIDE, WE HAVE
GOT TO SECOND-GUESS THE TRIAL
COURT JUDGE.
I'M STRUGGLING TO SEE A REASON
TO DO THAT.
>> WHAT IS THE HARM IN HAVING
CONFLICT FREE COUNSEL REPRESENT
MISTER MCGIRTH AT A COMPETENCY
HEARING?
I WOULD ASK THE COURT TO REVISIT
THE LARKEN DECISION BECAUSE OF
THAT WAS WE HAVE COUNSEL
REQUIRED TO BE APPOINTED IN
THESE CASES.
WHEN CONFIDENCE IS AT ISSUE AND
FIGHTING IT TO ESSENTIALLY PUT
ON THE CASE FOR IN COMPETENCY.
IT IS NOT RECOGNIZED IN ANY
FEDERAL CASES.
IT STRETCHES CREDULITY TO ALLOW
SOMEONE WHO'S COMPETENCE IS
CHALLENGED TO CONDUCT HIS OWN
COMPETENCY HEARING ESPECIALLY
GIVEN HIS REPEATED AND VEHEMENT
REQUESTS TO REMOVE ALL MENTAL
HEALTH ISSUES FROM THE
PROCEEDINGS.
I WOULD ARGUE THAT THE
COMPETENCY HEARING WOULD HAVE
NEVER HAPPENED IF, OR AT LEAST
NEVER WOULD HAVE HAPPENED WITH
MISTER MCGIRTH AT THE HELM IF HE
HAD BEEN GIVEN COUNSEL AT THE
NELSON HEARING.
THAT WAS A CRITICAL MISS BY

POSTCONVICTION COUNSEL AND HE
WAS AT THE HEARING, TIME FOR
PLEADING, TIME FOR AMENDING IS
LONG PAST.
HE HAS EVIDENCE THE 39-YEAR-OLD
DAUGHTER, DEFENDANTS WERE 18,
AND 17 YEARS OLD, 39-YEAR-OLD
DAUGHTER FIRED THE FIRST SHOT
AND THE DETECTIVE WAS TOLD NOT
TO PURSUE IT.
THAT SHOULD HAVE BEEN RAISED AND
IT WASN'T.
THE COURT SHOULD HAVE APPOINTED
CONFLICT FREE COMPETENT SLEEP
COUNSEL AND WE WOULD NOT BE
BEFORE YOU NOW ON THIS FRACTURED
RECORD.
>> IS THERE A DIFFERENCE WHETHER
COUNSEL SHOULD BE APPOINTED ON A
COMPETENCY HEARING VERSUS THEIR
REQUIREMENT THAT THERE BE
COUNSEL, SEPARATE COUNSEL WHO
REPRESENT SOMEONE AT THE NELSON
HEARING WHEN THE ISSUE IS
WHETHER COUNSEL -- WE WOULD BE
COMING UP WITH A NEW SET OF CASE
LAW ON REQUIREMENTS.
>> NO ONE WAS REPRESENTING
MISTER MCGIRTH AT THE NELSON
HEARING.
>> THE JUDGE INQUIRES AND
ENSURES HIMSELF OR HERSELF
COUNSEL IS DOING AN APPROPRIATE
JOB.
THAT IS THE PURPOSE OF THE
NELSON HEARING.
>> I UNDERSTAND THAT BUT THIS
JUDGE MADE INSUFFICIENT INQUIRY
INTO THE CLAIM SPECIFICALLY
RAISED BY MISTER MCGIRTH.
>> YOUR POINT IS WHENEVER A
DEFENDANT COMPLAINS ABOUT HIS
LAWYER AND NELSON INQUIRY IS
CONDUCTING, A SEPARATE LAWYER IS
TO BE APPOINTED TO MAKE SURE THE
JUDGE IS PROPERLY LOOKING INTO
WHAT THE FIRST LAWYER IS DOING,
HOW MANY LAYERS?
>> THAT WASN'T WHAT I MEANT TO
SAY.

FOR THE COMPETENCY HEARING THAT
WAS HELD BUT NOT FOR THE NELSON
HEARING.
SORRY IF I CONFUSED YOU.
I RESERVE MY REMAINING TIME FOR
REBUTTAL.
>> MAY IT PLEASE THE COURT, I AM
MCGIRTH TO ON BEHALF OF THE
STATE IN THIS CASE WHICH I WOULD
LIKE TO ADDRESS ONE SPECIFIC
POINT MADE BY MY OPPOSING
COUNSEL THAT THERE WERE NO
INTERROGATORY VERDICT AND NO
SPECIFIC VERDICT IN THE CASE,
THAT IS INCORRECT WAS NOT ONLY
DID THE JURY UNANIMOUSLY FIND
ESTHER MCGIRTH WAS GUILTY OF THE
ATTEMPTED MURDER OF MISTER JAMES
MILLER, ALSO THEY SPECIFICALLY
FOUND HE WAS IN POSSESSION AND
DISCHARGED THE FIREARM WHICH HIT
MISTER MILLER IN THAT CASE AS
WELL.
>> THAT WAS DONE IN THE GUILT
PHASE.
>> CORRECT.
NO INTERROGATORIES.
>> NOT A SPECIFIC INTERROGATORY
AS TO THE AGGRAVATED.
>> HE WAS CORRECT IN SAYING
THAT.
>> THAT WAS A SPECIFIC FINDING
BY THE JURY IN THE GUILT PHASE.
ALSO HE WAS ON PROBATION AT THE
TIME OF THE OFFENSE BECAUSE THIS
WAS AN 11-1 VERDICT BY THE JURY.
OUR ARGUMENT WOULD BE THAT
HEARST IS NOT APPLICABLE IN THIS
CASE NOT ONLY BECAUSE IT IS NOT
RETROACTIVE BUT BECAUSE WE ARE
DEALING WITH THIS PROCEDURAL
RULE AND THE FACT THAT HE HAD A
PRIOR VIOLENT FELONY IN
CONTEMPORARY VIOLENT FELONY
WOULD TAKE IT OUTSIDE.
>> IF THIS WAS A DIRECT APPEAL?
>> WE WOULD BE DEALING WITH A
DIFFERENT ISSUE.
>> WHAT BE THE OUTCOME OF A
DIRECT APPEAL UNDER HEARST?

>> WE WOULD STILL ARGUE IT IS HARMLESS ERROR BASED ON THE FACT WE HAD A PRIOR VIOLENT HILLARY, THE FACT WE HAVE THE INTERROGATORY OR AT LEAST SPECIFIC JURY FINDING HE HAD AND DISCHARGED THE FIREARM.
>> HOW DID THAT GO TO THE OTHER FINDINGS HEARST REQUIRES THAT THE AGGRAVATED, THAT WERE THE MITIGATED AND HERE YOU -- SOMEONE SLIGHTLY OVER THE AGE OF 18 HAVING COMMITTED THIS MURDER SO WE DON'T KNOW, GOING BACK TO RETROACTIVITY, THIS, DO YOU AGREE IN THIS CASE AT THAT POINT RING, THE ARGUMENT WAS RING SHOULD APPLY IN FLORIDA?
WE REJECTED THAT?
>> CORRECT.
THAT WAS RAISED ON DIRECT APPEAL AND THAT WAS THE COURT'S FINDING.
>> WE WOULD HAVE TO DECIDE WHEN WE HAVE OTHER CASES, EITHER TOTAL RETROACTIVITY OR SINCE THE TIME RING WAS DECIDED AS TO WHETHER IT SHOULD BE RETROACTIVE AND I ASSUME STATES WOULD ARGUE IT SHOULDN'T BE RETROACTIVE AT ALL.
>> OUR ARGUMENT IS IT IS NOT RETROACTIVE AT ALL AND IN THIS CASE BECAUSE HIS CONVICTION WAS FINAL ON APRIL 18, 2011, WE ARE IN POSTCONVICTION SO HARMLESS ERROR, THE STATE OF THE ARGUMENT --
>> RETROACTIVITY APPLIES TO CASES THAT WERE FINAL BEFORE HEARST BECAUSE DIRECT APPEAL THERE IS NO QUESTION HEARST WHAT APPLY.
>> IT WOULD APPLY IF WE WERE IN DIRECT APPEAL BUT IN POSTCONVICTION OUR ARGUMENT WOULD BE THIS COURT DOESN'T HAVE TO REACH THAT QUESTION IN THIS CASE.
I AM NOT UNDERSTANDING HOW THEY

RAISED THAT IT SHOULD APPLY.
IN THIS CASE OR ANOTHER CASE
HAVE TO DECIDE WHETHER HEARST
SHOULD BE GIVEN RETROACTIVE
EFFECT?
>> ABSOLUTELY BUT IN THIS CASE
SINCE WE ARE IN POSTCONVICTION
MY ARGUMENT IS IT IS DIFFERENT
ANALYSIS THAN IF IT WERE DIRECT
APPEAL.
WE ARE GOING PAST EACH OTHER.
LET'S GO OVER IT AGAIN.
DIRECT APPEAL WE DON'T EMPLOY
RETROACTIVITY.
>> CORRECT.
>> IT WOULD APPLY AND UNDER
HEARST IT MIGHT OR MIGHT NOT BE
HARMLESS.
>> CORRECT.
>> IF IT IS IN POSTCONVICTION
THE WHOLE IDEA OF RETROACTIVITY
APPLIES TO CASES THAT WERE FINAL
BEFORE THE DIVISION APPLIED.
THAT IS WHAT RETROACTIVITY IS.
>> THE ANALYSIS WE USED IN THIS
STATE DETERMINES WHETHER IT
SHOULD BE GIVEN RETROACTIVE
EFFECT.
>> CORRECT.
>> WE USED JAMES ON DIRECT
APPEAL AND IT WAS SUBSEQUENTLY
FOUND TO BE PROPER ARGUMENT THAT
WE HAVE GIVEN RELIEF SO DON'T WE
HAVE TO DECIDE IN THIS CASE
WHETHER HEARST OR A CASE SIMILAR
TO THIS SHOULD BE GIVEN
RETROACTIVE EFFECT?
>> YES.
I AM SORRY IF I WAS BEING
CONFUSED.
>> WHY IT SHOULDN'T BE GIVEN
RETROACTIVE EFFECT.
>> THE PROCEDURAL RULE THAT WAS
ANNOUNCED IN HEARST AS
INTERPRETED BY THIS COURT,
ARGUING IS NOT GOING TO BE
APPLICABLE TO THIS CASE BECAUSE
WE HAVE SPECIFIC FINDINGS THAT
HE POSSESSED THE FIREARM.
>> THAT WOULD GO TO WHETHER IT

IS HARMLESS ERROR OR NOT.
SEEMS TO ME YOU ARE CONFLATING
THE TWO.
WE COULD DECIDE WE DON'T HAVE TO
REACH UNDER ANY CIRCUMSTANCE
WOULD BE HARMLESS ERROR BEYOND A
REASONABLE DOUBT, WE COULD DO
THAT, THAT WOULD MEAN WE WERE
CONSIDERING IT.
IF WE TAKE OUT THE HARMLESS
ERROR BECAUSE MAJORITY OF THIS
COURT DECIDED FIRST ERRORS WERE
NOT STRUCTURAL AND WERE CAPABLE
OF HARMLESS ERROR.
WHAT IS THE ARGUMENT WHY IT
WOULDN'T REQUIRE THERE BE SOME
RETROACTIVITY?
>> OUR POSITION IS ASIDE FROM
HARMLESS ERROR WE DON'T HAVE A
WATERSHED RULE OF PROCEDURAL
PROCEDURAL CHANGE IN THIS CASE
BECAUSE THE SPECIFIC FACTS THAT
OCCUR IN THIS CASE, WE HAVE AN
11-1 DECISION.
>> YOU WOULD TAKE RETROACTIVITY
RATHER THAN LOOK AT WHETHER IT
IS RETROACTIVE, YOU WOULD LOOK
AT EACH CASE AND DECIDE WHETHER
IT IS SIGNIFICANT ENOUGH IN A
CASE TO BE WARRANT RETROACTIVE
APPLICATION, WOULDN'T THAT BE
DIFFERENT THAN ANYTHING WE HAVE
DONE BEFORE?
>> THE STATE'S POSITION TO BE
CLEAR IS THAT HEARST WOULD NOT
APPLY TO THIS CASE AND HEARST
SHOULDN'T BE RETROACTIVE AT ALL.
>> IT IS FUNDAMENTAL
CONSTITUTIONAL SIGNIFICANCE
BECAUSE IT COMES FROM THE SIXTH
AMENDMENT, AND THE SUPREME
COURT.
THE ISSUE IS WHETHER IT MEETS
THE THIRD PRONG WHICH IS THE
OTHER THREE PRONGS OF WHETHER IS
THE RELIANCE, SIGNIFICANT ENOUGH
TO TRUMP OR YIELD TO THOSE OTHER
FACTORS.
DON'T WE HAVE TO DO THAT?
>> THAT ANALYSIS WOULD HAVE TO

BE DONE UNDER RETROACTIVITY.
>> WITH A STATE, THE OPPORTUNITY TO BRIEF THAT HASN'T BRIEFED IT?
>> ONE THING I WOULD LIKE TO POINT OUT, WE CAN SUBMIT SUPPLEMENTAL BRIEFING IF THE COURT WOULD LIKE BUT IN THIS CASE IN MY ARGUMENT, THE CLAIM THAT WAS PRESERVED AND PRESENTED UNDER HEARST TO THIS COURT IN MISTER MCGIRTH'S BRIEF, HE WAS ENTITLED TO COMMUTATION OF LIFE SENTENCE UNDER HEARST.
THE ONLY HEARST CLAIM RAISED THAT WOULD PERTAIN TO YOUR HONOR'S QUESTIONING IS UNDER THE ABS CLAIM.
WE CAN FILE SUPPLEMENTAL BRIEFING IF YOU WOULD LIKE BUT I WOULD LIKE TO ADDRESS THE OTHER CLAIMS RAISED MY COUNSEL.
SPECIFICALLY, I BELIEVE OPPOSING COUNSEL STATED MISTER MCGIRTH HAD A SUPERFICIAL UNDERSTANDING OF THE PROCESS AND THUS THE NELSON CLAIM WAS INCORRECTLY DECIDED BY THE COURT AND MISTER MCGIRTH WAS PREJUDICED BY GOING FORWARD AS WAS HIS OWN COUNSEL.
IN THIS CASE IT IS CLEAR ON THE RECORD I POINT OUT THE SPECIFIC PLACES IN MY BRIEF, BUT THE TRIAL BENCH, JUDGE LAMBERT, SPECIFICALLY QUESTIONED MISTER MCGIRTH AT LENGTH, ASKED HIM ON SEVERAL OCCASIONS, THE FOOL NELSON INQUIRY AND COLLOQUY INTERMINGLED BECAUSE THERE IS NOT A TRUE --
>> YOU USE TO -- WHAT OCCURRED WAS DURING THE NELSON INQUIRY AFTER THE NELSON INQUIRY THE COURT CONCLUDED THAT COUNSEL WAS NOT RENDERING EFFECTIVE COUNSEL AND THEN THE COURT SAID TO MISTER MCGIRTH IF YOU STILL WANT TO DISCHARGE THIS LAWYER, I WILL TREAT THAT AS A MOTION FOR YOU TO REPRESENT YOUR SELF.
SO IT IS NOT LIKE MISTER MCGIRTH

OFFERED TO REPRESENT HIMSELF.
IT WAS THE JUDGE WHO MADE THAT CALL.
>> IT OCCURRED SEVERAL TIMES.
WE HAVE IN THIS CASE A PROCEDURALLY COMPLICATED BUT FACTUALLY SIMPLE CASE.
WHAT ACTUALLY OCCURRED WAS 3851 IS FILED IN APRIL 2012, AND IN 2013, EVERYONE APPEARED FOR A HEARING READY TO GO ON A HEARING.
AT THAT POINT DOCTOR BERLAND WAS CALLED, BEGAN TO TESTIFY AS TO MENTAL HEALTH MITIGATION WHICH WAS THE MAIN STRATEGY REPRESENTED BY MISTER DINNER AT THAT POINT.
MISTER MCGIRTH BROUGHT TO THE COURT'S ATTENTION I OBJECT TO THIS, THIS IS FRIVOLOUS, I DON'T WANT TO PROCEED THIS, AND EVERYTHING IS HALTED.
MISTER MCGIRTH STATES HE WANTS TO REPRESENT HIMSELF.
HE DOES STATE I ONCE CONFLICT FREE COUNSEL.
IT IS CLEAR FROM A READING OF THE RECORD HE WANTS THE NEW ATTORNEY.
THIS IS CLEAR GAMESMANSHIP THROUGHOUT THE PROCESS.
MISTER MCGIRTH HAS AN AVERAGE INTELLIGENT IQ, SAVVY WITH THE PROCESS.
HE WAS 18.
>> HOW OLD IN THE POSTCONVICTION?
>> 23.
>> WHAT WAS HIS --
>> 98 IQ, GRADUATED HIGH SCHOOL.
>> HE GOT HIS DEGREE?
>> HE HAD BEEN INCARCERATED STARTING IN THE AGE OF 9.
>> HE GOT HIS EDUCATION IN THE JUVENILE JUSTICE?
>> THAT IS CORRECT.
HE RECEIVED HIS HIGH SCHOOL DIPLOMA AT THE LAKE COUNTY JAIL, THIS IS A PERSON MAKING RELEVANT

OBJECTIONS, ACTUAL RELEVANT CASE
LAW QUERIES TO HIS COUNSEL AND
TO MISTER GAMER.
HE NEVER REPRESENTED HIMSELF.
HE HAD HYBRID REPRESENTATION, I
BELIEVE OPPOSING COUNSEL SAID HE
REPRESENTED HIMSELF AT THE
COMPETENCY HEARING AND THAT IS
NOT CORRECT.
SEVERAL TIMES IN THE RECORD,
AFTER EVERY QUESTION SEVERAL
TIMES THROUGHOUT THE COMPETENCY
HEARING JUDGE LAMBERT ASKED
WOULD YOU LIKE TO CONFER WITH
STANDBY COUNSEL?
SOMETIMES HE SAYS NO.
AT TIMES HE SAID YES.
>> WHAT HAPPENED ON WAIVER OF
THE EVIDENTIARY HEARING?
IF THE GUILT PHASE AND THE FACT
THIS IS NO EVIDENTIARY HEARING
OBVIATES WHETHER THEY SHOULD
HAVE PURSUED THE DAUGHTER AS
BEING THE MAIN PARTICIPANT IN
THIS.
>> THAT IS THE CLAIM MISTER
MCGIRTH WAS GRANTED EVIDENTIARY
DEVELOPMENT.
>> DID HE SAY WHY?
>> HE DECLINED TO PUT ON THE
RECORD WHAT HIS REASONING WAS
FOR WAIVING OF EVIDENTIARY
HEARING.
WHAT IS CLEAR ON THE FACE OF THE
RECORD IS HE UNAMBIGUOUSLY,
UNEQUIVOCALLY, WITH EYES WIDE
OPEN AS REQUIRED BY SUPREME
COURT CASE LAW WAIVED HIS RIGHT
TO PUT ON EVIDENTIARY
DEVELOPMENT AND HIS
POSTCONVICTION COUNSEL TRIED
VARIOUS TIMES TO REASON WITH
MISTER MCGIRTH AND THE SPECIFIC
CLAIMS THAT WERE BROUGHT UP IN
THE ORIGINAL ARGUMENT WAS THAT
IT WASN'T EVEN AN UNAMBIGUOUS
CLAIM OF COMPETENCY OR
DEFICIENCY ON THE PART OF
POSTCONVICTION COUNSEL TO
TRIGGER A NELSON HEARING BUT THE

COURT DID A FOOL NELSON INQUIRY
ANYWAY, FOUND THEY WERE NOT
RENDERING EFFECTIVE ASSISTANCE
TO POSTCONVICTION COUNSEL.
IF WE CAN CALL IT SUCH A THING,
THAT HE WAS NOT ENTITLED TO SHOP
FOR A NEW ATTORNEY.
HE WAS PLAYING THE PROCESS
EXTENDED FROM THE TIME HE FILED
HIS ORIGINAL 3851 MOTION, 31/2
YEARS AND STATES ON THE RECORD
CONTROL OF HIS CASE IN
SEPTEMBER 23, 2013, SO FOR
APPROXIMATELY 21/2 YEARS AT
LEAST, MISTER MCGIRTH WAS THE
CAPTAIN OF HIS OWN SHIP.
HE GOT EXACTLY WHAT HE ASKED
FOR, HE KNEW THE REPERCUSSIONS
OF REPRESENTING HIMSELF, OF THE
EVIDENTIARY HEARING, REFUSING TO
CONFER WITH HIS COUNSEL EVEN AS
STANDBY COUNSEL AND COMPLAINING
HE IS PREJUDICED BY IT, TWO DAYS
AFTER HE WAVES THE EVIDENTIARY
HEARING HE FILES A MOTION TO
RECONSIDER AND CALLED IT
CONFLICT FREE.
THAT HE WANTED HIS COUNSEL TO
VIOLATE MCCLESKEY MOTION AND
ANOTHER INMATE FILED IN THE JAIL
AND TALKED TO HIM ABOUT IT AND
HE DISAGREED WITH THE PURSUING
OF MENTAL HEALTH MITIGATION AND
SAYS SEVERAL TIMES I'M NOT
CRAZY, I AM PERFECTLY FINE AND
CROSS-EXAMINE THIS DOCTOR
BERLAND AND MAKE THE RELEVANT
POINT ON THE CROSS-EXAMINATION.
WHAT THE JUDGE DID HAVE IN FRONT
OF HIM BEFORE THIS, HE SPENT
FIVE WEEKS WITH MISTER MCGIRTH
IN TRIAL.
HE PRESIDED OVER 31/2 YEARS OF
POSTCONVICTION PROCEEDINGS, HAD
A FULL-BLOWN COMPETENCY HEARING
WHERE HE STOPPED THE EVIDENTIARY
HEARING IN THE MIDDLE, MISTER
GAMER WAS INCOMPETENT, HAVE A
FULL EVALUATION BY DOCTOR
BERLAND WHO TESTIFIES, HE SAYS

THIS SEVERAL TIMES, I POINT IT OUT IN MY BRIEF, HE STATE SEVERAL TIMES HE IS BASING THIS LOOSE ASSOCIATION NON-SPECIFIED PSYCHOTIC DISORDER BASED ON GAMER'S MOTION, NEVER WITNESSED IT HIMSELF SO THERE IS NO CREDIBLE EVIDENCE OF INCOMPETENCY AND THE JUDGE POINTS OUT I HAVE NEVER -- HE SAYS I NEVER HAD A WITH THAT HE IS INCOMPETENT OR DOESN'T UNDERSTAND WHAT IS HAPPENING. I AM NOT SURE --

>> A 98 IQ OF SOMEONE WHO GOT THERE DEGREE, UNIVERSITY OF HARD KNOCKS, WHAT WE ARE REALLY DEALING WITH IS WHETHER THE JUDGE MADE APPROPRIATE DECISION UNDER THAT CIRCUMSTANCE, YOU MADE A STRONG SENSE OF WHAT HE NEEDED TO DO.

>> LET THE RECORD SPEAK FOR ITSELF IN TERMS OF BEING THE CAPTAIN OF HIS OWN SHIP HE MAKES RELEVANT OBJECTIONS AND TO BRING OUT THE POINT MY COCOUNSEL TALKS ABOUT AT THE TRIAL LEVEL THERE WAS EVIDENCE OF INCOMPETENCE, BUT HE SHOULD HAVE BEEN ON NOTICE, WHEN DOCTOR KROPP TESTIFIED HE TESTIFIED HE HAD NO IMPULSE CONTROL, NO PROBLEMS WITH IMPULSE CONTROL, NO PROBLEMS UNDERSTANDING, HAD CRIMINAL HISTORY TO REVIEW FROM THE AGE OF 9, NEVER BEEN MEDICATED ALL OF THIS TIME IN DEPARTMENT OF CORRECTIONS, NO MENTAL ILLNESS, NO EMOTIONAL DISTURBANCE, DIAGNOSED WITH ANTISOCIAL PERSONALITY DISORDER OR MARIJUANA USE, DOCTOR KROPP SPECIFIED HE HAD NO NEUROPSYCHOLOGICAL DEFICITS. THE ONLY PERSON WHO EVER FOUND ANY NEUROLOGICAL DEFICITS AND THE ONLY EVIDENCE ON THE RECORD WE HAVE IS TESTIMONY BASED ON MISTER GLIMMER'S MOTION.

>> THIS COMPETENCY EVALUATION, THE DOCTORS ACTUALLY TALK TO MISTER MCGIRTH?
>> BOTH DOCTORS MET WITH, DID A FULL EVALUATION OF MISTER MCGIRTH.
>> DID THEY DO ANY KIND OF TESTING OF MISTER MCGIRTH?
>> THERE WAS TESTING DONE AND THEY WERE VIDEOTAPED.
DOCTOR BERLAND MET WITH HIM SEVERAL TIMES, TESTIFIED HE NEVER EVIDENCED ANY OF THESE LOOSE ASSOCIATIONS HE WAS RELYING ON FOR HIS PSYCHOTIC DISTURBANCE IN PERSON, BUT HE DID SAY EVIDENCE, AND THE PARTICULAR LINEUP OF WITNESSES AT HIS EVIDENTIARY HEARING, WOULD NOT ANSWER WITHOUT REFERRING TO HIS NOTES.
AND EVERYONE IS PREPARED FOR AN EVIDENTIARY HEARING, GRANTED EVIDENTIARY REDEVELOPMENT ON THESE CLAIMS, 21 WITNESSES PRESENT IN THE FALL AND THAT IS ON THE RECORD.
THE STATE AND THE COURT BENT OVER BACKWARDS TO MAKE MISTER MCGIRTH'S CASE FOR HIM.
CONFERENCE CALLS WERE SET UP, INMATE WITNESSES WERE TRANSPORTED, WE WERE READY TO GO AND MISTER MCGIRTH WAS MADE AWARE OF THAT, WHEN HE WAVED IT WAS A FOOL KNOWING INTELLIGENT VOLUNTARY WAIVER, AND NO RECORD SUPPORT OF THESE CLAIMS, AND MISS MILLER WAS NOT INVESTIGATED FURTHER.
>> ARE YOU GOING TO GO INTO -- I UNDERSTAND YOU SAY THERE IS NOT BECAUSE IF ANY WAS HARMLESS.
>> YES, JUSTICE LEWIS, BASED ON THE FACT WE HAD AN 11-1 GERRI VOTE, AND THE CONTEMPORANEOUS ATTEMPTED MURDER OF JAMES MILLER, 40 YEARS, WITH ON PROBATION AT THE TIME OF THIS OFFENSE BY A PRIOR VIOLENT

FELONY AND A JURY FINDING HE SPECIFICALLY DISCHARGED THE FIREARM WHICH CAUSED THE ATTEMPTED MURDER OF MISTER MILLER, ANY ERROR IN THIS CASE COULD ONLY BE HARMLESS.
>> THERE ARE OTHER AGGRAVATING FACTORS, WAS THERE AND THE -- THOSE KIND OF THINGS WHICH ARE NOT INHERENT.
THE FACT HE HAD A PRIOR FELONY AND CONTEMPORANEOUS FELONY ARE ALREADY ON THE RECORD AND PROVEN.
WE DON'T HAVE ANY JURY VERDICT, GERRI DETERMINATION ON WHETHER IT WAS TO AVOID THESE OTHER AGGRAVATING IS.
IS YOUR ARGUMENT BASED ON JUST THOSE TWO AGGRAVATING FACTORS AND WE THEN HAVE A PROPORTIONAL SENTENCE IF WE ARE GOING TO BASE IT ON THOSE FACTORS?
>> IT IS NOT BASED ON THOSE FACTORS AND THERE WERE FIVE AGGRAVATED.
>> WE DON'T KNOW WHAT THE JURY FOUND ABOUT THOSE.
TWO OF THEM WERE ALREADY DEMONSTRATED.
WE DON'T KNOW WHAT WAS FOUND, SEEMS TO ME YOUR ARGUMENT HAS TO BE THOSE TWO ARE SUFFICIENT TO DEMONSTRATE IT WAS APPROPRIATE.
>> THAT IS A PRIMARY ARGUMENT BUT WITH REGARDS TO THE CCP, PRIOR VIOLENT FELONY WAS FOUND IN THE COURSE OF A ROBBERY, WITH THOSE THE MEDICAL EXAMINERS TAKING HAC FIRST, THE MEDICAL EXAMINER TESTIFIED SHEILA MILLER WAS ALIVE FOR 30 MINUTES, SHE CRAWLED INTO HER DAUGHTER'S BEDROOM, WAS BEGGING FOR HER LIFE, HER LUNGS WAS PUNCTURED, SHE BEGGED MISTER MCGIRTH TO CALL 911 COMMENTS YOU SHOT ME IN THE HEART, PLEASE CALL 911, I'M COLD, CAN I HAVE A BLANKET?

THE CODEFENDANT ATTEMPTED TO
BRING HER A BLANKET, CALL THEM
AN EXPLETIVE.
>> THAT ONE JUROR, 11-1 FOUND
THAT WAS NOT BEYOND REASONABLE
DOUBT.
>> FOR THE SPECIFIC AGGRAVATED
WE DON'T HAVE SPECIFIC JURY
FINDINGS ON MY ARGUMENT IS SO
PLAIN ON THE FACE OF THE RECORD
THAT IT WOULD HAVE TO BE FOUND
BY THE JURY.
THERE ARE NO FURTHER QUESTIONS I
ASK THE COURT TO AFFIRM THE
LOWER COURT'S DENIAL FOR LACK OF
PROOF OF THE EVIDENTIARY
HEARING.
>> I JUST HAVE A FEW MOMENTS.
I WOULD LIKE TO ADDRESS THE
NELSON HEARING AGAIN.
UNDER NELSON, ONCE A DEFENDANT
RAISES SPECIFIC COMPLAINTS ABOUT
CONDUCT OF HIS COUNSEL'S
REPRESENTATION THE COURT HAS A
DUTY TO INQUIRE BOTH OF THE
DEFENDANT AND COUNSEL.
THE COURT DID INQUIRE OF THE
DEFENDANT BUT DID NOT
SUFFICIENTLY INQUIRE OF COUNSEL.
HAVE THE COURT INQUIRED COUNSEL
COUNSEL WOULD HAVE DISCLOSED
THAT HE KNEW A WEEK OR TWO
BEFORE THE HEARING, PLENTY OF
TIME TO ASK FOR CONTINUANCE OR
FILE A MOTION TO SUPPLEMENT WITH
A NEW CLAIM ABOUT A CRITICAL
ISSUE OF TRIAL COUNSEL, IT WAS
NEVER DEVELOPED THAT SHEILA
MILLER ADMITTED SHOOTING HER
MOTHER.
THAT WOULD HAVE BEEN THE
INSTIGATOR, WOULD HAVE MADE HER
THE CAPTAIN OF THE SHIP WITH THE
17 AND 18-YEAR-OLD WHICH COULD
HAVE AFFECTED THE VERDICT AND
THE SENTENCING RECOMMENDATIONS
AND WOULD HAVE UNDERCUT HEINOUS,
ATROCIOUS AND CRUEL AGGRAVATED.
IF SHEILA MILLER FIRED THE FIRST
SHOT, THIS 20 OR 30 MINUTES THE

MEDICAL EXAMINER TESTIFIED WERE
ON HER, WHOEVER FIRED THE SECOND
SHOT, I WOULD ASK THE COURT LOOK
AT THAT.
THE SUFFICIENCY OF THE HEARING
LEADS OR INSUFFICIENCY NEEDS TO
LEAD TO ALL PROBLEMS IN THIS
CASE.
I ASK YOU TO RE-MANDATORY
SENTENCING UNDER HURST OR REMAND
FOR A NEW RELIABLE
POSTCONVICTION PROCESS,
THANK YOU.
>> THANK YOU FOR THE ARGUMENTS.