>> ALL RIGHT.
THE NEXT CASE FOR THE COURT IS
GRIFFIN V. STATE.
[BACKGROUND SOUNDS]
[BACKGROUND SOUNDS]
>> COUNSEL, YOU MAY PROCEED.
>> MAY IT PLEASE THE COURT, I'M
KAREN KENNY FOR STEVE GRIFFIN.
THIS IS A CASE WHERE THE
DISTRICT COURT'S DECISION SHOULD
HAVE BEEN GUIDED BY THIS COURT'S
2010 MONTGOMERY DECISION.
HOWEVER, THE DISTRICT COURT HAS
DECIDED THAT THERE WAS NO
FUNDAMENTAL ERROR IN THIS CASE
EVEN THOUGH THE MANSLAUGHTER
INSTRUCTION THAT WAS GIVEN CAN
IS THE SAME-- GIVEN IS THE
SAME, A 2006 STANDARD
INSTRUCTION THAT THIS COURT
FOUND TO BE FUNDAMENTAL ERROR IN
MONTGOMERY.
AND THE DISTRICT COURT
RATIONALIZED THEIR OUTCOME HERE
IN AFFIRMING BY LOOKING AT THE
FACTS OF THE CASE AND DECIDING
THAT BECAUSE MR.GRIFFIN
TESTIFIED THAT HE WAS NOT THE
PERPETRATOR, THAT THAT TO THE
COURT MEANT THAT HE HAD NOT PUT
IN DISPUTE HIS INTENT AND,
THEREFORE, IT WAS NOT
FUNDAMENTAL ERROR FOR THE JURY
TO BE MISINSTRUCTED ON THE
LESSER INCLUDED OFFENSE
MANSLAUGHTER.
>> LET ME ASK YOU THIS, ASSUMING
THAT THEORY TO BE CORRECT, WOULD
THERE-- IN CASES WHERE THE ONLY
DEFENSE, THE ONLY THING IN
DISPUTE IS WHO DID IT, IN OTHER
WORDS, LET'S SAY I'M THE
DEFENDANT, I DIDN'T DO IT, I WAS
IN THE BAHAMAS AT THE TIME.
IN A HOMICIDE CASE THAT IS SO
INTENT, INTENSIVE--

>> CORRECT.
>> REGARDLESS OF OF THE THE LESSERS, AM I WAIVING ALL LESSERS?
I MEAN, IT'S A FRIENDLY QUESTION, BUT I'M CURE YOUS ABOUT THAT.
>> CORRECT.
NO, BECAUSE AS A GENERAL PRINCIPLE, A MISIDENTIFICATION DEFENSE OR AN ALIBI DEFENSE DOES NOT CONCEDE ANY ELEMENT OF THE CRIME BECAUSE IN ORDER FOR THE JURY TO CONVICT, THEY HAVE TO FIND THAT THE DEFENDANT WAS THE PERPETRATOR, BUT THEN THEY HAVE THE FIND THAT THE OTHER ELEMENTS OF THE CRIME ALSO WERE PROVEN.
AND IN THIS CASE JUST TO LOOK AT THE FACTS OF THIS CASE BECAUSE I THINK THE DISTRICT COURT'S OPINION ASSUMES THAT THERE'S NO DISPUTE ABOUT THE FACTS OF THIS CASE AND THAT THE ACTUAL SHOOTING THAT OCCURRED HAD TO BE DONE WITH THE DEPRAVED MIND NECESSARY FOR SECOND-DEGREE MURDER.
AND I THINK UNDER THE FACTS OF THIS CASE THAT ELEMENT OF INTENT WAS VERY MUCH IN DISPUTE.
AND IT WOULD HAVE BEEN A VERY RATIONAL VERDICT OF MANSLAUGHTER HAD THE JURY BEEN GIVEN THE CORRECT INSTRUCTION.
THE REASON I SAY THAT IS BECAUSE THE STATE RELIED ON A WITNESS NAMED ESTHER DENISE, AND SHE WAS THE VICTIM'S GIRLFRIEND.
AND SHE TESTIFIED THAT THE RELATIONSHIP BETWEEN THE DEFENDANT AND THE VICTIM WAS REALLY NOT IN DISPUTE.
SHE TESTIFIED THAT THEY WERE ALL IN A GROUP OF PEOPLE THAT WERE VERY, VERY GOOD FRIENDS.

SHE, SO THE DEFENDANT'S NAME WAS
STEVE, BUT HIS FRIENDS CALLED
HIM SCOTTY.
AND SHE WAS ASKED BY THE STATE
WOULD SCOTTY, JADEVEON AND MIKE
MIKE VISIT YOUR HOUSE
FREQUENTLY?
YES, MA'AM.
DID THEY EVER STAY OVERNIGHT?
YES, MA'AM.
HOW MANY TIMES WOULD THEY STAY
AT YOUR HOUSE OR VISIT?
ALMOST EVERY DAY.
AND THEN SHE SAYS, WE WERE
ALWAYS TOGETHER, IT WASN'T JUST
THE TWO MONTHS THAT SHE WAS
BOYFRIEND AND GIRLFRIEND WITH
THE VICTIM WHO WAS CALLED T.J..
SO OR ALL FRIENDS AND YOU WOULD
COME TO YOUR HOUSE, IT WAS
COMMON? YES, MA'AM.
SHE TESTIFIES THAT THEY WERE
GOOD FRIENDS.
THEY ALWAYS HUNG TOGETHER.
AND SHE TESTIFIES THAT THE GROUP
OF FRIENDS WERE VERY MUCH, UM,
USED TO LAUGHING, LAUGHING
TOGETHER, BEING--
>> WELL--
[INAUDIBLE]
I HE NEVER WOULD HAVE, HE'D HAVE
NO REASON TO HAVE AN INTENT TO
KILL HIM, IS WHAT YOU'RE GETTING
AT.
>> IT NEVER REALLY CAME OUT IN
THIS TRIAL WHAT-- I MEAN, IN
ORDER TO--
>> THERE HAD TO HAVE BEEN SOME
KIND OF A LITTLE SCUFFLE OR
FRACAS BETWEEN THEM.
I MEAN, IN YOUR BRIEF IT SAYS
THAT SHE TESTIFIED ON THE DAY OF
THE SHOOTING MILLS HAD PICKED UP
GRIFFIN AROUND HIS WAIST AND PUT
HIM OUT OF DENISE'S HOUSE AT
WHICH TIME GRIFFIN'S PANTS FELL

DOWN.
THEY HAD HAD A LITTLE SOMETHING.
>> AND THERE WAS A DISPUTE IN THE TESTIMONY ABOUT THAT INCIDENT.
BECAUSE, AND I THINK THIS GOES TO MOTIVE.
AND MOTIVE IS CIRCUMSTANTIAL EVIDENCE OF INTENT, AND IT CAN ALSO BE CIRCUMSTANTIAL EVIDENCE OF IDENTITY WHICH IT WAS BEING USED BOTH IN THIS TRIAL.
BUT SHE TESTIFIED THAT-- SO GRIFFIN CAME TO THE HOUSE THAT EVENING--
>> BUT THERE'S NO TESTIMONY THAT WHEN THAT HAPPENED, THAT MR.GRIFFIN SAID I'M GOING TO GET YOU FOR THAT OR THERE WAS ANY OVERT EXPRESSION OF ANIMOSITY.
>> ABSOLUTELY NOT.
HE TESTIFIED THAT THEY WERE GOING TO THE HOUSE, THEY WERE GOING TO PICK UP SOME MONEY THAT THEY WERE GOING TO BRING TO THEIR FRIEND, MICHAEL, AND THAT JADEVEON WENT INSIDE THE HOUSE, BUT WHEN GRIFFIN STARTED TO GO IN, THERE HAD ALREADY BEEN SOME DISPUTE BETWEEN GRIFFIN AND THOMAS MILLS.
GRIFFIN TESTIFIED THAT MILLS HAD CALLED HIM THAT MORNING AND ASKED HIM TO DELIVER SOME-- TO DRIVE HIM AROUND TO DELIVER DRUGS.
SO GRIFFIN SAID HE WOULDN'T DO IT.
SO MILLS WAS UPSET WITH HIM.
SO HE SAID THAT THAT'S WHY HE WOULDN'T LET ME IN THE HOUSE.
HE SAID YOU'RE NOT COMING IN.
SO GRIFFIN SAID, I WENT BACK OUT TO MY TRUCK.
I WAS WAITING FOR JADEVEON TO

GET THE MONEY BECAUSE WE WERE
GOING TO GO TAKE IT TO MICHAEL
IN SARASOTA.
SO HE SAID, HE SAID, YEAH, HE
PICKED ME UP, MY PANTS FELL
DOWN.
HE SAID I DIDN'T REALLY EVEN
HEAR ANYBODY LAUGHING ABOUT IT.
IT WAS NO BIG DEAL, UNDER
GRIFFIN'S TESTIMONY, HE SAID
MILLS WAS MAD AT HIM, BUT HE
DIDN'T SAY HE WAS MAD AT MILLS.
SO EVEN TO THE LOOK AT WHAT--
EVEN TO LOOK AT WHAT THE STATE'S
THEORY BEHIND WHAT WAS THE
INTENT IS THAT THERE WAS THIS
LITTLE INCIDENT HAD CAUSED THE
SHOOTING.
WELL, THAT IS REALLY A PRETTY
WEAK INFERENCE GIVEN ALL THE
TESTIMONY ABOUT HOW CLOSE THESE
FRIENDS WERE AND HOW MUCH
INVOLVED THEY WERE.
AND SO YOU HAD A SITUATION WHERE
AT THE TIME OF THE SHOOTING YOU
HAD, THERE'S A LOT OF CONFLICT
IN THE TESTIMONY ABOUT WHAT HAD
ACTUALLY HAPPENED.
SO THE STATE'S RELYING ON THIS
BECOME, ESTHER, WHO SAID THAT
SHE GOT OUT OF THE CAR, SHE WAS
WALKING INTO THE STORE.
SHE WAS TALKING TO MICHAEL WHO
GOT OUT OF THE OTHER CAR, AND
SHE WAS LOOKING TOWARDS THE
STORE.
SHE DIDN'T SEE, ACTUALLY, THE
SHOOTING OCCUR, BUT SHE TURNED
AROUND AND SAW A GUN BEING DRAWN
INTO THE OTHER CAR.
MICHAEL, WHO GOT OUT OF
GRIFFIN'S CAR, SAID HE NEVER SAW
A SHOT GUN IN THE CAR.
SO, ACTUALLY, IT WAS A PRETTY--
>> LET ME ASK YOU, WHAT YOU'RE
TELLING US IS THE FACTS YOU JUST

PRESENTED PLACE THE QUESTION OF
INTENT IN DISPUTE DURING A
TRIAL.
>> ABSOLUTELY.
>> NOW, THE PROSECUTOR ALSO MADE
THREATENING COMMENTS IN CLOSING
ARGUMENTS--
>> YES.
>> DID HE NOT?
OR THAT, BASICALLY, ALSO PLACES
INTENT IN DISPUTE SUCH AS HE HAD
PROVEN ALL THE ELEMENTS OF
SECOND-DEGREE MURDER INCLUDING
THE ELEMENT OF INTENT.
>> CORRECT.
AND THE, YOU KNOW, THE SECOND
DISTRICT CAME OUT WITH THE HILL
DECISION TWO DAYS BETWEEN WHEN
IT CAME-- THE SAME WEEK THAT IT
CAME OUT WITH THIS DECISION.
AND THAT WAS A MISIDENTIFICATION
SHOOTING THAT THEY REVERSED
UNDER MONTGOMERY.
>> LET ME ASK YOU THIS THOUGH,
ASSUMING EVERYTHING YOU SAID IS
CORRECT, HOW DO WE DISTINGUISH
THIS CASE ON BATTLE V. STATE?
>> BATTLE, WHICH THEY RELY ON,
OKAY?
THAT CASE HAS TO DO WITH
ATTEMPTED FELONY MURDER.
IT'S NOT EVEN--
>> ROBBERY.
ATTEMPTED ROBBERY OR--
>> RIGHT.
AND IN THE BATTLE CASE, LET ME
SEE HERE, THERE WAS A QUESTION
IN THAT CASE ABOUT, ABOUT
WHETHER OR NOT-- THE QUESTION
THERE IS, HAS TO DO WITH WHETHER
BATTLE COMMITTED AN INTENTIONAL
ACT THAT IS NOT AN ESSENTIAL
ELEMENT OF THE FELONY.
AND THEY SAY IN THAT CASE THAT
THAT IS NOT, THAT WASN'T
DISPUTED BECAUSE THE VICTIM WAS

SHOT IN THE HEAD, IT WAS NOT AN
ESSENTIAL ELEMENT OF THE FELONY.
I THINK THAT'S A VERY-- THAT
CASE HAS TO BE LOOKED AT AS VERY
FACTUALLY SPECIFIC.
WE'RE TALKING-- AND ALSO, OF
COURSE, THAT'S IN THE LINE OF
CASES WHERE YOU HAVE A PROBLEM
WITH THE MAIN OFFENSE, AND YOU
HAVE SOMETHING IN THE JURY
INSTRUCTION THAT DOESN'T
EXACTLY-- WASN'T REALLY EVEN IN
DISPUTE.
I'LL GIVE YOU AN EXAMPLE.
IN THIS CASE IF, FOR EXAMPLE,
THERE WAS SOMETHING IN THE
SECOND-DEGREE MURDER INSTRUCTION
THAT PUT, THAT WAS WRONG ABOUT
THE ELEMENTS THAT THE VICTIM
WAS DEAD, OKAY?
WELL, THAT WASN'T REALLY
IN DISPUTE.
I MEAN, EVERYBODY SAW THE
PICTURES OF THE MAN WITH THE
SHOTGUN BLAST THROUGH HIS
THROAT.
THERE WAS A STIPULATION BY THE
DEFENSE THAT THE MAN'S NAME WAS
THOMAS MILLS.
SO IF THERE WERE TO BE SOME
SMALL ERROR OR TO MISSION AS TO
THAT-- OR OMISSION AS TO THAT
ELEMENT, IT COULD BE SAID THAT
WOULDN'T BE FUNDAMENTAL ERROR
BECAUSE THERE REALLY WASN'T
ANYTHING FOR THE JURY TO EACH
QUESTION ABOUT THAT.
NOW, WHEN WE'RE TALKING ABOUT
MENTAL INTENT, THERE'S ALWAYS
SOMETHING FOR THE JURY TO
QUESTION BECAUSE IT'S ALMOST
ALWAYS CIRCUMSTANTIAL.
AND YOU HAVE TO LOOK AT MOTIVE,
AND IT'S NOT-- I THINK THE
SECOND DISTRICT IS SAYING THE
FACT THAT THERE WAS A SHOTGUN

BLAST INTO THIS MAN'S CAR MEANS
THAT THERE WAS A DEPRAVED MIND
WHO DID IT.
AND THAT'S JUST NOT LEGALLY ARE
CORRECT BECAUSE-- LEGALLY
CORRECT BECAUSE IT COULD HAVE
BEEN DONE BY THIS 18-YEAR-OLD
BOY WITHOUT THE DEPRAVED MIND
MEANING THE HATRED, THE ILL
WILL.
IT COULD HAVE BEEN MANSLAUGHTER,
YOU KNOW?
IT COULD HAVE BEEN A
FIRST-DEGREE MURDER, BUT HE
WASN'T CHARGED WITH THAT.
YOU HAVE TO LOOK AT THE MENTAL
INTENT AND SEPARATE IT OUT FROM
THE ACT ITSELF.
THE ACT DOES NOT TELL US WHAT
THE MENTAL INTENT WAS, AND
THAT'S SOMETHING THAT ONLY THE
JURY CAN DECIDE.
SO WHEN THE SECOND DISTRICT IS
LOOKING AT THAT AND MAKING THE
DECISION THAT THERE WAS NO
DISPUTE, WHAT THEY ARE SAYING IS
THAT THE JURY DIDN'T HAVE
ANYTHING TO LOOK AT HERE.
>> WELL, I MEAN, AGAIN, I'D LIKE
THE STATE TO ADDRESS THIS.
IF THAT'S THE CASE, THEN THERE
WOULD BE NO REASON TO SAY THAT
THE DEFENDANT WAS ENTITLED TO
ANY INSTRUCTION ON THE LESSER
INCLUDED OFFENSES.
RIGHT?
>> ABSOLUTELY.
>> BUT WHAT-- DOESN'T THIS,
AGAIN, AND I THINK THERE'S AN
ARGUMENT IF YOU, YOU KNOW, WANT
TO MAKE IT, HAVING THIS
ERRONEOUS INSTRUCTION, DOES IT
MAKE IT WORSE THAN HAVING NO
INSTRUCTION AT ALL ON THE
MANSLAUGHTER FOR, I MEAN, DOES
CAN IT MAKE IT MORE LIKELY

THEY'RE GOING TO END UP
CONVICTING OF SECOND DEGREE?
>> ABSOLUTELY.
BECAUSE THE ERROR THAT WAS
IDENTIFIED IN MONTGOMERY IS AN
ADDITIONAL ELEMENT IN THE
MANSLAUGHTER INSTRUCTION.
IT'S A HIGHER DEGREE OF AN
INTENT THAT ACTUALLY EVEN
APPEARS IN THE SECOND-DEGREE
MURDER.
SO THIS WAS A VERY CONSCIENTIOUS
JURY.
THEY CAME BACK AND ASKED A
QUESTION AND ASKED TO REHEAR ALL
OF THE TESTIMONY OF DENISE AND
OF THE DEFENDANT.
AND THEY WERE TOLD BY THE JUDGE
THAT THEY SHOULD CONSIDER
WHETHER THERE WAS A SECOND
DEGREE OR A MANSLAUGHTER IN
THEIR INSTRUCTION, AND THEN THEY
WERE TOLD AN ERRONEOUS
DEFINITION OF MANSLAUGHTER THAT
INCLUDED THE INTENT TO CAUSE THE
DEATH.
SO THIS JURY WOULD HAVE, IF IT
LOOKED AT THE MANSLAUGHTER,
COULD HAVE SAID, WELL, THAT
WASN'T, THAT WASN'T WHAT WE
FOUND, THERE WASN'T EVIDENCE OF
THAT, AND THEY WOULD DEFAULT IN
THAT CASE TO THE SECOND-DEGREE
MURDER.
AND THAT IS WHAT THIS COURT HAS
CONSISTENTLY SAID IN THE CASES
THAT FOLLOW MONTGOMERY, AND THAT
IS WHY I THINK THAT THE SECOND
DISTRICT IS OFF BASE, AND IT IS
CREATING A LOT OF CONFUSION, AND
IT IS ACTUALLY NOW IT'S IN
CONFLICT WITH THE FOURTH
DISTRICT IN A CASE THAT JUST
CAME OUT THIS MONTH IN A CASE
CALLED WIMBERLY.
AND THAT CASE REJECTED THE

SECOND DISTRICT'S ANALYSIS
BASICALLY HERE AND SAID WE DO
NOT AGREE WITH THE STATE'S
ARGUMENT THAT THE ISSUE OF
INTENT WAS NOT DISPUTED.
ALTHOUGH THE PETITIONER ARGUED
MISIDENTIFICATION AT TRIAL, HE
DID NOT CONCEDE THE INTENT WITH
WHICH THE SHOOTING WAS
COMMITTED.
AND I BELIEVE THAT IS THE SAME
ANALYSIS THAT SHOULD HAVE BEEN
APPLIED TO THIS CASE.
THANK YOU.
>> THANK YOU.
>> MAY IT PLEASE THE COURT, DAWN
TIPPEN REPRESENTING THE STATE OF
FLORIDA.
THE VERY SIMPLE QUESTION THAT
HAS BEEN PRESENTED BY PETITIONER
IN THIS CASE IS WHETHER USE OF
THIS 2006 MANSLAUGHTER BY ACT
INSTRUCTION AUTOMATICALLY
CONSTITUTES FUNDAMENTAL ERROR,
AND THE SIMPLE ANSWER IS, NO, IT
DOES NOT.
FUNDAMENTAL ERROR NECESSARILY
REQUIRES A REVIEW OF THE
PARTICULAR FACTS AND
CIRCUMSTANCES IN AN INDIVIDUAL
CASE.
SO HERE THE SECOND DISTRICT DID
EXACTLY THAT AND DETERMINED THAT
THE INTENT ELEMENT WAS NOT IN
DISPUTE.
BASED ON THIS COURT'S GREAT BODY
OF PRECEDENT SAYING THAT--
>> HERE'S MY PROBLEM WITH THAT.
YOUR ARGUMENT OR THE SECOND
DISTRICT'S DECISION PLACES THIS
BURDEN ON THE DEFENDANT TO THE
SAY SOMETHING TO THE EFFECT OF I
DIDN'T DO IT, BUT IF I DID, I
HAD NO ILL WILL, HATE OR SPITE
OR EVIL INTENT.
THAT'S PRETTY MUCH WHAT YOU'RE

ASKING A DEFENDANT TO DO.
AND THE BEST THING TO DO IS
OBJECT, OBVIOUSLY, FOR
FUNDAMENTAL ERROR PURPOSES.
I THINK YOU'RE PLACING A BURDEN
ON THE DEFENDANT THAT HE OR SHE
SHOULD NOT HAVE.
HOW DO YOU RESPOND?
>> WELL, I RESPECTFULLY DISAGREE
THAT THAT'S THE PRACTICAL EFFECT
OF THE STATE'S POSITION.
INSTEAD WHAT WE'RE SAYING IS--
AND LET ME BE CLEAR THAT THERE
IS A CONCEPTUAL AND A RACKET
CALL DISTINCTION BETWEEN A
CRIMINAL DEFENDANT WHO PLEADS
GUILTY AND GOES TO TRIAL TO HAVE
A JURY DECIDE HIS OR HER FATE
AND ELECTING A VERY SPECIFIC
DEFENSE THEORY AND PURSUING
THAT, AND IN SO DOING ELECTING
NOT TO CHALLENGE IN ANY WAY,
SHAPE OR FORM CERTAIN
ELEMENTS--
>> WAIT, HOW DO YOU-- IS
MISIDENTIFICATION AN
AFFIRMATIVE DEFENSE?
>> IT'S NOT AN AFFIRMATIVE
DEFENSE.
>> SO I DON'T, I'M NOT-- UNDER
YOUR THEORY WOULD IF THE JUDGE
HAD SAID I, HE'S CONCEDED, HE'S
ONLY ARGUING MISIDENTIFICATION,
SO IT'S ALL OR NOTHING, NO, I'M
NOT GIVING ANY LESSER INCLUDED
OFFENSES BECAUSE IT'S EITHER
GOING TO BE THE JURY DECIDES
THAT IT WAS HIM BECAUSE IF IT'S,
IF IT WASN'T HIM, FINE, BUT IF
IT'S, IT'S, YOU KNOW, SHOTGUN
INTO THE VEHICLE, IT CAN ONLY BE
SECOND-DEGREE MURDER.
WOULD THAT HAVE BEEN LEGALLY
PERMISSIBLE NOT TO INSTRUCT ON
LESSER INCLUDED OFFENSES?
>> WELL, THIS IS A CATEGORY ONE

LESSER INCLUDED OFFENSE WHICH
MEANS THE LAW SAYS IT HAS TO BE
GIVEN.
>> BUT WHY DOES IT HAVE TO BE
GIVEN IF UNDER YOUR THEORY HE'S
SAYING IT'S EITHER SECOND-DEGREE
MURDER OR NOTHING?
I MEAN, SOMETIMES DEFENSE
LAWYERS HAVE A REASON THAT THEY
DON'T WANT-- THEY WANT TO GO
ALL OR NOTHING, AND THEY SAY,
NO, WE DON'T WANT THEM.
I MEAN, I DON'T KNOW IF IT
HAPPENS OFTEN, BUT UNDER THAT
YOU SAID THE LAW REQUIRES
INSTRUCTIONS ON LESSER INCLUDED.
>> CATEGORY ONE LESSER--
>> AND THIS WAS, AND THIS
MANSLAUGHTER WAS A LESSER
INCLUDED?
>> YES, IT WAS A NECESSARILY
LESSER INCLUDED.
>> OKAY.
AND WE'VE SAID, AND I FEEL BADLY
BECAUSE I WAS PART OF THE COURT
THAT IMPROVED THIS INSTRUCTION,
SO NONE OF US WANTED THIS ALL TO
HAPPEN.
THAT THIS INSTRUCTION ALMOST,
EVEN THOUGH HE DIDN'T INTEND
THAT, MAKES IT SOUND LIKE, YOU
KNOW, THERE IS A HIGHER INTENT
FOR MANSLAUGHTER THAN THERE IS
FOR SECOND DEGREE, AND THAT'S
WHAT MONTGOMERY SAID.
SO I DON'T GET HOW IT WOULD BE
REVERSIBLE ERROR IF THEY GAVE NO
LESSERS, BUT IT'S NOT REVERSIBLE
ERROR IF THEY GAVE A ERRONEOUS
INSTRUCTION ON THE LESSER.
TELL ME-- EXPLAIN THAT
DIFFERENCE.
>> WELL, WE'RE CERTAINLY NOT
SAYING THAT IT WOULDN'T HAVE
BEEN REVERSIBLE ERROR HAD NO
NECESSARILY LESSER INCLUDED

OFFENSES BEEN GIVEN, BUT THAT'S
NOT OUR QUESTION HERE.
>> I MEAN, BUT I'M SAYING--
WE'VE SAID IN MONTGOMERY IT
MAKES IT WORSE FOR THAT
DEFENDANT TO HAVE THAT LESSER
INCLUDED THAT SOUNDS LIKE
THERE'S A HIGHER BURDEN.
IT MAKES IT MORE LIKELY THEY'RE
GOING TO CONVICT TO SECOND
DEGREE THAN MANSLAUGHTER.
>> WELL, IT MAY MAKE IT WORSE IN
CERTAIN CASES UNDER CERTAIN
FACTS, AND THAT'S THE CRITICAL
POINT HERE.
UNDER A TRUE FUNDAMENTAL ERROR
ANALYSIS, THERE CAN BE DIFFERENT
RESULTS.
THERE MAY OR MAY NOT BE A
FUNDAMENTAL ERROR IN AN
INDIVIDUAL CASE.
>> WELL, LET'S LOOK AT THIS
INDIVIDUAL CASE.
ISN'T THIS A CASE, I MEAN, THE
FACTS ARE AMBIGUOUS.
PUT ASIDE THE MISIDENTIFICATION,
ASSUME THAT THE JURY IDENTIFIED
THE RIGHT PERSON.
BUT ISN'T THERE AMBIGUITY, AND
IT'S JUST A BIT LIKE WHY THIS
HAPPENED OR EXACTLY HOW IT
HAPPENED OR WHAT THE STATE OF
MIND OF THE DEFENDANT WAS IS
HARD TO FIGURE OUT, ISN'T IT?
ISN'T THIS A CASE-- GIVEN ALL
THAT-- ISN'T THIS A CASE WHERE
A RATIONAL JURY REALLY COULD
LOOK AT THIS AND SAY WE'RE NOT
SURE EXACTLY WHAT HAPPENED HERE.
WE BELIEVE THAT THIS IS THE GUY
WHO DID IT, AND WE BELIEVE HE
PULLED THE TRIGGER.
BUT WE'RE NOT SURE WHAT HE WAS
THINKING, SO WE THINK IT'S
MANSLAUGHTER.
COULDN'T A RATIONAL JURY HAVE

SAID THAT BASED ON THE
CIRCUMSTANCES HERE AND THE FACTS
THAT WE KNOW AS THEY WERE
DEVELOPED?
>> RESPECTFULLY, NO, I DON'T
THINK SO.
>> WHY NOT?
>> WELL, MY PERCEPTION OF THE
RECORD IS A LITTLE BIT
DIFFERENT.
THE, IN MY VIEW THE EVIDENCE WAS
VERY STRAIGHTFORWARD AS TO
EXACTLY WHAT HAPPENED AND WHY IT
HAPPENED.
THE FRACAS THAT YOUR HONOR SPOKE
ABOUT A FEW MINUTES AGO THAT HAD
TAKEN PLACE EARLIER IN THE DAY
AND THE MANNER IN WHICH THIS
REALLY EXECUTION-STYLE TO FENCE
WAS-- OFFENSE WAS CARRIED OUT.
THE EVIDENCE ESTABLISHED, THERE
WAS A LITTLE BIT OF DISPARITY
WHERE EXACTLY THESE CARS WERE IN
RELATION TO EACH ORE, WE'RE
TALKING ABOUT A MATTER OF FEET,
AND WHICH DIRECTION THE PHANTOM
SUSPECT MAY HAVE COME FROM, THE
LEFT OR THE RIGHT.
BUT IN ALL OTHER CONTEXTS THE
EVIDENCE WAS--
>> WELL, FORGET ABOUT THE
PHANTOM SUSPECT.
WE KNOW THAT THE JURY DECIDED
THAT WASN'T RIGHT.
>> CORRECT.
>> OKAY?
>> CORRECT.
>> THAT'S-- WHAT THEY'RE LEFT
WITH, TELL ME ABOUT THAT.
>> THEY'RE LEFT WITH EVIDENCE
THAT THERE HAD BEEN AN INCIDENT
BETWEEN THE VICTIM AND THE
DEFENDANT EARLIER IN THE DAY AND
THAT THE DEFENDANT WAS DRIVING
AROUND THAT NIGHT AND ACTUALLY
DID A U-TURN TO FOLLOW THE

VICTIM'S CAR TO THIS STORE, THE
PURPLE-- I FORGET THE NAME
EXACTLY, BUT THE STORE WHERE
THIS INCIDENT OCCURRED AND
PULLED UP NEXT TO HIM WHILE THE
VICTIM'S PASSENGER HAD EXITED
THE CAR TO GO INTO THE STORE.
THEY HAD A BRIEF EXCHANGE--
>> WHAT DOES THE RECORD, WHAT
DOES THE RECORD SHOW ABOUT THE
SUPPOSED PURPOSE OF THAT?
OF HIM FOLLOWING HIM THERE?
>> WELL, THE DEFENDANT AT TRIAL
GAVE ONE MOTIVATION FOR THAT.
HE SAID THAT HIS PASSENGER
WANTED TO GO BUY CIGARETTES.
THE OBVIOUS QUESTION WAS, WELL,
WHY DIDN'T HE GO SOMEWHERE ELSE,
AND HE SAID HIS PASSENGER WANTED
TO BUY INDIVIDUAL CIGARETTES,
AND THAT WAS THE STORE THAT HAD
THEM.
BUT THERE WAS ANOTHER, THERE WAS
ANOTHER-- THE DEFENDANT'S
ACTUAL PASSENGER TESTIFIED FOR
THE STATE AND TESTIFIED THAT THE
CAR TURNED AROUND TO FOLLOW THE
VICTIM'S CAR.
AND THE INFERENCE, OF COURSE,
WAS THAT WAS SOME LEFTOVER
FEELING FROM THE INNOCENT THAT
HAD OCCURRED EARLIER IN THE DAY
WHERE THE VICTIM HAD EMBARRASSED
THE DEFENDANT BY PUSHING HIM OUT
OF THE HOME AND MAKING HIS PANTS
FALL DOWN.
SO, BUT THE REST OF THE EVIDENCE
SHOWED THAT WHEN THEY HAD THIS
BRIEF EXCHANGE OF WORDS, THE
DEFENDANT SAID SOMETHING ALONG
THE LINES OF, OH, YOU WANT TO
PLAY WITH GUNS AND THEN WAS, A
SHOT WAS HEARD, AND THE BARREL
OF A SHOTGUN WAS SEEN BEING
PULLED BACK INTO THE DRIVER'S
SIDE--

>> EXPLAIN THAT TO ME AGAIN
ABOUT WHO SAID, OH, YOU WANT TO
PLAY WITH GUNS?
>> IT WAS ALLEGED THAT THE
DEFENDANT WAS THE ONE WHO SAID
THAT TO THE VICTIM AND THEN
IMMEDIATELY AFTERWARDS THERE WAS
THE NOISE OF THE GUN FIRING AND,
AGAIN, THE BARREL OF THE SHOTGUN
WAS SEEP PULLING BACK-- WAS
SEEN PULLING BACK INTO THE
DEFENDANT'S CAR, AND THEN HE
PEELED OUT RIGHT AFTER THAT
WHILE HIS PASSENGER WAS ACTUALLY
STILL IN THE STORE.
HE LEFT HIS PASSENGER THERE.
>> IS THERE ANYTHING IN THE
RECORD THAT SHOWS WHETHER THE
VICTIM WAS ARMED?
>> NO, THERE'S NO EVIDENCE OF
THAT.
THE INFERENCE WAS THAT, AGAIN,
THE DEFENDANT HAD PULLED UP TO
HAVE WORDS AND THEN PULLED OUT
THE SHOTGUN--
>> WHAT'S THE EXPLANATION ABOUT
THE REFERENCE TO PLAYING WITH
GUNS?
HAD THERE BEEN SOME OTHER,
SOMETHING ELSE IN THE RECORD
THAT THAT COULD BE RELATED TO?
>> NOT SPECIFICALLY.
NOT SPECIFICALLY, NO.
IT WAS-- IN THE MANNER THAT THE
STATE ARGUED IT, IT WAS TO SHOW
THAT THERE WAS SOME BAD BLOOD
BETWEEN THEM, BETWEEN THE TWO.
AGAIN, THE INFERENCE FROM
EARLIER IN THE DAY AND THAT THE
DEFENDANT DECIDED AT THIS TIME
THAT HE WAS GOING TO GET A
LITTLE BIT MORE AGGRESSIVE AND
ACTUALLY NOT ONLY PULL OUT A
GUN, BUT SHOOT THE VICTIM WHICH
ULTIMATELY KILLED HIM.
SO THE--

>> WASN'T THIS TESTIMONY THAT
THE DE-- WASN'T THERE TESTIMONY
THAT SOMEBODY ELSE WALKED
BETWEEN THE CAR AND DID THE
SHOOTING?
>> THAT WAS THE DEFENDANT'S
TESTIMONY, YES.
BUT EVEN THAT DID NOT PLACE AN
INTENT TO KILL IN DISPUTE AT THE
TRIAL.
NONE OF THE EVIDENCE DID.
NONE OF THE EVIDENCE VIEWED ANY
WHICH WAY THE COURT WISHES TO
VIEW IT ACTUALLY PUT IN DISPUTE
THAT ELEMENT--
>> WAIT A MINUTE.
THIS GOES BACK TO THE DEFENDANT,
IT'S AN ESSENTIAL ELEMENT OF THE
TO CRIME, INTENT WHERE YOU GET
EITHER SECOND DEGREE OR A
MANSLAUGHTER.
IT'S UP TO THE STATE TO PROVE
THE INTENT.
SO UNLESS THEY WERE TO SAY WE
ARE, IT'S-- IT WASN'T ME, AND
WHOEVER DID THIS WAS A TERRIBLE
PERSON WHO DESERVES SECOND
DEGREE.
I MEAN, I DON'T UNDERSTAND WHERE
IN OUR LAW DOES THE DEFENDANT
HAVE AN AFFIRMATIVE OBLIGATION
TO PUT AN ESSENTIAL ELEMENT OF
THE CRIME IN DISPUTE?
>> WELL, LET ME TRY TO CLARIFY A
LITTLE BIT.
WE'RE TALKING ABOUT TWO
DIFFERENT INTENTS.
THERE'S THE DEPRAVED MIND INTENT
WHICH SUPPORTS A CONVICTION FOR
SECOND DEGREE, AND THE STATE
ABSOLUTELY MET THAT BURDEN, AND
THE DEFENDANT WAS, OF COURSE,
UNDER NO OBLIGATION.
THAT BURDEN NEVER SHIFTED TO HIM
TO ESTABLISH THAT THERE WAS NOT
A DEPRAVED MIND IN THAT KILLING.

BUT THEN THERE'S THE ERRONEOUS
INTENT TO KILL WHICH IS REALLY
WHAT WE'RE CONCERNED WITH HERE.
THAT, THIS COURT HAS WELL FOUND
IS NOT AN ACTUAL REQUIREMENT OF
MANSLAUGHTER.
SO WHEN WE SAY THAT INTENT WAS
NOT IN DISPUTE, REALLY WHAT
WE'RE TALKING ABOUT IS AN INTENT
TO KILL.
THAT SIMPLY WASN'T PART OF THE
EQUATION IN THIS CASE.
AND IT GOES BACK TO OUR BASIC
FUNDAMENTAL ERROR ARGUMENT WHICH
IS EVEN THOUGH A JURY
INSTRUCTION MAY PERTAIN TO AN
ESSENTIAL ELEMENT, IT MAY
PERTAIN TO A NONESSENTIAL
ELEMENT.
IT MAY BE THAT AN ELEMENT IS
ERRONEOUSLY TO OMITTED, IT MAY
BE THAT AN ELEMENT IS
ERRONEOUSLY DEFINED.
WHATEVER THE INSTRUCTION IS,
THERE CAN'T BE AUTOMATIC
FUNDAMENTAL ERROR FINDINGS.
THERE HAS TO BE A NECESSARY
REVIEW OF THE PARTICULAR FACTS
AND CIRCUMSTANCES.
AND THIS CASE IS VERY DIFFERENT
THAN THOSE CASES WHERE THIS
COURT CAN HAS ADDRESSED THE
MANSLAUGHTER INSTRUCTION BEFORE,
I'M TALKING ABOUT MONTGOMERY AND
HAYGOOD AND DANIELS AND EVEN THE
ATTEMPTED MANSLAUGHTER
INSTRUCTION--
[INAUDIBLE]
IN THOSE CASES THERE WAS
ARGUABLY EVIDENCE THAT COULD
HAVE SUPPORTED A MANSLAUGHTER BY
INSTRUCTION OR A THEORY, HAD THE
JURY BEEN PROPERLY INSTRUCTED
HERE, THERE IS ABSOLUTELY NO
EVIDENCE THAT WOULD HAVE EVER
SUPPORTED A MANSLAUGHTER THEORY.

A RATIONAL JURY COULD NOT HAVE FOUND A MANSLAUGHTER BY ACT OFFENSE UNDER THE FACTS OF THIS CASE.
NOW, THAT'S NOT GOING TO BE TRUE IN EVERY CASE, AND THE STATE UNDERSTANDS THAT.
HAYGOOD AND DANIELS AND MONTGOMERY ARE GOOD EXAMPLES OF THOSE.
BUT STILL IT CAN AND WILL HAVE DIFFERENT RESULTS DEPENDING ON THE INDIVIDUAL FACTS OF THE INDIVIDUAL CASE.
AND THAT'S OUR PRIMARY POSITION HERE IS THAT THE SECOND DISTRICT DID AN APPROPRIATE ANALYSIS OF FUNDAMENTAL ERROR.
THEY LOOKED AT THE FACTS OF THIS CASE, AND THIS IS A VERY TEXTBOOK SECOND-DEGREE MURDER CASE.
AND DISTINGUISH CAN BL FROM THOSE OTHER CASES LIKE HAYGOOD, LIKE DANIELS WHERE A DEFENDANT SPECIFICALLY SAID EITHER AT TRIAL OR TO LAW ENFORCEMENT AFTER ARREST I DID SOMETHING, BUT I DID NOT MEAN TO TO KILL THE VICTIM.
>> YOU SAY IT'S A TYPICAL SECOND DEGREE.
IT SOUNDS-- IF HE, IF YOUR THEORY IS THAT SOMETIME EARLIER THAT DAY THIS PERSON DISSED HIM AND HE ARMED HIMSELF WITH A GUN AND SHOT IT STRAIGHT AT THE DEFENDANT, I MEAN, AT THE VICTIM, SOUNDS TO ME LIKE IT WAS, IT'S FIRST-DEGREE MURDER.
SO, I MEAN, IF IT'S ALSO CLEAR THAT'S WHAT HAPPENED AS THAT DEPRAVED MIND YOU GO AND YOU'RE SAYING THERE'S NO QUESTION WHAT HAPPENED WAS A SHOTGUN INTO THE CAR AND WITH THE INTENT TO KILL,

HOW IS THAT JUST-- WHY ISN'T
THAT FIRST-DEGREE MURDER?
>> WELL, THE STATE'S THEORY WAS
NOT THAT HE HAD, STARTED
PLANNING EARLIER IN THE DAY OR
EVEN A MINUTE EARLIER BEFORE THE
ACTUAL SHOOTING THAT HE WAS
GOING TO CAN KILL THIS PERSON.
THE STATE'S THEORY WASN'T EVEN
THAT HE HAD FORMED ANY DESIGN TO
SHOOT THE GUN AT ALL UNTIL THOSE
VERY BRIEF WORDS WERE SPOKEN
BETWEEN THEM.
IN OTHER WORDS, THE STATE
PROPOSED THAT A LOT OF MACHISMO,
FOR LACK OF A BETTER WORD, GOING
ON HERE.
AND THE DEFENDANT DECIDE--
>> BE I THOUGHT THE EXCHANGE
WAS, OH, YOU WANT TO PLAY WITH
GUNS, IS THAT AN EXCHANGE?
WHAT DID THE OTHER GUY SAID?
>> HE USED A PROFANITY THAT I'D
RATHER NOT REPEAT,
IF THAT'S OKAY.
BUT THERE WAS A PROFANITY USED
RIGHT THEN, AND, OH, YOU WANT--
>> BY THE VICTIM?
>> I'M SORRY?
>> BY THE VICTIM?
>> YES.
>> WHAT WAS IT?
WHAT DID HE SAY?
IS.
>> HE SAID--
>> [INAUDIBLE]
ALL THE TIME.
>> SOMETHING, I'LL TRY TO BE
VERBATIM, BUT I BELIEVE IT WAS,
YOU KNOW-- [BLEEP] SOMETHING
ALONG THOSE LINES.
SO IT WAS IN TIME CONTEXT, IT
WAS VERY BRIEF.
IT WAS ONE STATEMENT HERE AND
ONE STATEMENT--
>> AND THAT'S WHEN HE SAID, OH,

YOU WANT TO PLAY WITH GUNS?
>> YES.
>> SO THERE WAS AN EXCHANGE.
>> THERE WAS AN EXCHANGE, YES.
I'M SORRY FOR NOT MAKING THAT
CLEARER.
>> I THOUGHT WHEN JUSTICE CANADY
ASKED THAT QUESTION, YOU SAID
THAT WAS ALL THAT WAS--
>> RIGHT.
BY THE DEFENDANT, I'M SORRY.
SO I WANT TO GO BACK AGAIN TO
THE FUNDAMENTAL ERROR ANALYSIS
IN THIS CASE THAT THE SECOND
DISTRICT DID A PROPER ANALYSIS,
IT DID LOOK AT THE PARTICULAR
FACTS OF THE CASE.
AND BECAUSE THIS COURT'S
PRECEDENT THAT THERE CAN NEVER
BE FUNDAMENTAL ERROR IN A JURY
INSTRUCTION IF IT PERTAINS TO AN
ELEMENT THAT IS NOT IN DISPUTE,
THE SECOND DISTRICT'S OPINION
COMPLIED WHOLLY WITH THIS
COURT'S PRECEDENT.
>> CAN A JURY INSTRUCTION ITSELF
PLACE AN ISSUE IN DISPUTE?
>> THAT'S AN EXCELLENT QUESTION.
I DON'T KNOW.
THEORETICALLY, CERTAINLY,
ANYTHING IS POSSIBLE.
>> IF IT DID, THE ERRONEOUS
MANSLAUGHTER INSTRUCTION IN THIS
CASE REQUIRING INTENT PROBABLY
PUT THE WHOLE ISSUE IN DISPUTE.
>> WELL, BUT REMEMBER ALSO THAT
IN THIS CASE, AS IT IS THE NORM
IN ALL THESE TYPES OF CASES, THE
JURY IS INSTRUCTED VERY
SPECIFICALLY ON THE CHARGED
DEFENDANTS, AND THEN THEY'RE
TOLD ABOUT WHAT THE LESSERS ARE.
AND IN THIS CASE IN PARTICULAR
THE JUDGE WAS VERY CLEAR IF, IF
YOU FIND THAT THE EVIDENCE DOES
NOT ESTABLISH SECOND-DEGREE

MURDER, THEN YOU NEXT MUST
DECIDE WHETHER THE STATE HAS
ESTABLISHED THE LESSER INCLUDED
OF MANSLAUGHTER--
>> WHICH IN THIS CASE HE
INSTRUCTED THE JURY MUST HAVE
THE INTENT TO KILL.
>> THAT'S HOW THIS COURT HAS
INTERPRETED IT.
>> HOW DOES THAT NOT PLACE THE
ISSUE OF INTENT IN DISPUTE?
>> WELL, FIRST OF ALL, WE
PRESUME THAT A JURY IS GOING TO
FOLLOW THE LAW AS THEY'RE
INSTRUCTED.
AND HERE THE RECORD GIVES EVERY
INDICATION THAT THAT'S EXACTLY
WHAT IT DID.
AGAIN, THE EVIDENCE IN THIS CASE
WAS STRAIGHTFORWARD AND IT,
FRANKLY, WAS OVERWHELMING IN
TERMS OF A SECOND-DEGREE MURDER
CHARGE.
BUT NOW WHETHER THE INSTRUCTION
ITSELF PLACED THE ERRONEOUS
INTENT TO KILL AN ELEMENT, OUR
POSITION WOULD BE THAT IT WAS
IMPOSSIBLE FOR IT TO DO THAT,
THE DISPUTE WOULD ONLY COME FROM
THE ACTUAL EVIDENCE IN THE CASE.
AND THAT CAN BE IN CONJUNCTION
WITH OPENING STATEMENTS, CLOSING
ARGUMENTS, IT CAN COME OUT
THROUGH DIRECT EXAMINATION OR
CROSS-EXAMINATION OF THE
WITNESSES, ANY PART OF THE TRIAL
FOR WHICH THE JURY IS PRESENT.
BUT I DON'T BELIEVE THAT SIMPLY
GETTING THAT INSTRUCTION IN AND
OF ITSELF PUTS THE ERRONEOUS
INTENT TO KILL ELEMENT IN
DISPUTE FOR PURPOSES OF
FUNDAMENTAL ERROR.
WELL, IF THERE ARE NO OTHER
QUESTIONS, I WOULD RESPECTFULLY
ASK THIS COURT TO AFFIRM THE

DECISION OF THE SECOND DISTRICT,
AND I WOULD ALSO LIKE TO THANK
THE COURT FOR GRANTING ORAL
ARGUMENT IN THIS MATTER.
THANK YOU.
>> COUNSEL?
>> THANK YOU.
I JUST HAVE ONE FACTUAL ISSUE
THAT I WOULD LIKE TO, I BELIEVE
CORRECT, AND THAT IS MY OPPOSING
COUNSEL SAID THAT MICHAEL WILCOX
TESTIFIED THAT THE REASON THEY
TURNED AROUND AND DID A U-TURN
TO GO BACK TO THE STORE WAS,
APPARENTLY, TO GET BEHIND,
FOLLOW THE VICTIM'S TRUCK.
AND I DON'T BELIEVE THAT'S A
CORRECT INTERPRETATION OF THE
TESTIMONY OF MICHAEL WILCOX.
I BELIEVE THAT HE TESTIFIED THAT
WE TURNED AROUND AND DID A
U-TURN BECAUSE I SAID I WANTED
TO BUY SINGLE CIGARETTES, AND WE
KNEW THAT WAS THE ONLY STORE
THAT SOLD THEM AND THAT WE
DIDN'T GET, WE DIDN'T KNOW WE
WERE BEHIND T.J.'S TRUCK UNTIL
AFTER WE HAD DONE THAT.
SO I THINK THAT EVEN THOUGH THE
STATE WANTED TO PRESS A THEORY
THAT THERE WAS SOME FOLLOWING OF
THE TRUCK TO GO IN BEHIND HIM,
THAT I DON'T THINK THEY BROUGHT
OUT TESTIMONY THAT WOULD SUPPORT
THAT.
>> NOW, WHAT'S YOUR
UNDERSTANDING OF WHAT ACTUALLY
TRANSPIRED BETWEEN THE TWO OF
THEM AT THE CAR, THE TESTIMONY?
I UNDERSTAND THE POSITION, YOUR
CLIENT'S POSITION WAS THAT IT
WAS SOMEBODY ELSE.
>> RIGHT.
>> WHAT DOES THE TESTIMONY SHOW
ABOUT THAT PARTICULAR EXCHANGE?
IS THERE ANYTHING IN ADDITION TO

WHAT WE'VE ALREADY HEARD?
>> SO, WELL, GRIFFIN TESTIFIED THAT THEY SPOKE FOR TWO OR THREE MINUTES AND THAT THEN HE PUT THE WINDOW UP.
THERE WAS A-- NOW, THERE WAS-- WILCOX LEFT THE CAR AND WENT INTO THE STORE, AND HE TESTIFIED THAT THERE WAS LOUD RAP MUSIC PLAYING FROM, IT SOUNDS LIKE, BOTH CARS AT THE TIME.
AND SO THERE WAS SOME, SOME SUGGESTION OF WHAT HE HAD HEARD, AND THEN THE DEFENSE CAME BACK AND SAID YOU COULD HAVE BEEN HEARING RAP MUSIC, RIGHT?
AND HE AGREED WITH THAT.
BUT ESTHER TESTIFIED THAT THERE WAS, HE HAD HEARD AS-- SHE HAD HEARD AS SHE WAS GOING-- SHE SAID SHE WAS BEHIND THE TRUCK TALKING TO MICHAEL WILCOX.
HE SAID THAT'S NOT TRUE.
BUT SHE TESTIFIED THAT SHE HEARD, YOU KNOW, THE VICTIM SAY SOMETHING LIKE UH, UH, YOU WANT TO PLAY WITH GUNS.
BUT THAT'S--
>> THE VICTIM SAID THAT?
>> YEAH, I BELIEVE SHE SAID THAT THE VICTIM SAID THAT.
>> WHO SAID THE PROFANITY OR THE, AND THE RACIAL SLUR?
>> I'D HAVE TO GO BACK AND LOOK TO BE SURE ABOUT THAT, SO I DON'T WANT TO-- BUT I THINK THEY'RE SAYING THAT THE VICTIM SAID THAT.
AND THERE WAS, YOU KNOW, THERE WAS-- IT WASN'T REAL CLEAR BECAUSE WILCOX WASN'T EXACTLY AGREEING WITH HER ON EVERYTHING ON THAT.
BUT THERE'S NO, I DON'T THINK THERE'S ANY TESTIMONY ABOUT ANYTHING THAT GRIFFIN SAID AT

THAT TIME.
SO I BELIEVE THAT THERE IS A FACTUAL DISPUTE AS TO WHAT WAS IN HIS MIND AT THE TIME AND THAT THAT IS NOT SOMETHING THAT CAN BE OVERLOOKED.
AND I ALSO BELIEVE THAT BASED ON THIS COURT'S VERY LONGSTANDING PRECEDENT WHEN THE JURY'S NOT CORRECTLY INSTRUCTED ON A LESSER INCLUDED OFFENSE, THE FACT REALLY SHOULDN'T COME INTO PLAY THAT THAT IS A FUNDAMENTAL ERROR AND THAT THE SECOND DISTRICT SHOULDN'T EVEN BE LOOKING AT THE FACT.
>> JUST ON THE REMARKS, IF THE DEFENDANT DIDN'T MAKE THE REMARKS ABOUT YOU WANT TO PLAY WITH GUNS OR F-YOU, IT WAS THE VICTIM, I MEAN, AGAIN, THIS WHOLE ISSUE OF WHOSE INTENT IT WAS IS AN ISSUE.
I MEAN, IT GOES BACK TO THIS--
SO IT LOOKS LIKE THE RECORD ON THIS ATTRIBUTES THESE WORDS TO THE VICTIM, NOT THE DEFENDANT.
>> I BELIEVE SO, YES.
SO I'D JUST ASK THE COURT TO QUASH THE DECISION OF THE SECOND DISTRICT AND REMAND THIS CASE SO THAT IT CAN BE RETRIED WITH CORRECT INSTRUCTIONS.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT IS IN RECESS UNTIL TOMORROW AT 9:00.