>> NEXT CASE IS MCCLOUD VERSUS
STATE.
>> MAY IT PLEASE THE COURT,
NANCY RYAN REPRESENTING
MR. MCCLOUD.
THIS CASE PRESENTS THE SAME
LEGAL ISSUE IN A DIFFERENT
FACTUAL CONTEXT AND AT A
DIFFERENT PROCEDURAL JUNCTURE,
THE SAME ISSUE AS WAS JUST
DISCUSSED.
I BELIEVE THAT MR. MCCLOUD'S
CASE IS AN EASIER CASE THAN
MR. DAUGHERTY'S CASE IS TO
RESOLVE.
I BELIEVE THIS COURT NEEDS TO DO
NOTHING THAT IT HAS NOT ALREADY
DONE IN MONTGOMERY AND HAYGOOD,
TO HOLD THAT THE DCA INCORRECTLY
CONCLUDED ON REMAND AFTER
HAYGOOD THAT THERE IS HARMLESS
ERROR IN THIS CASE.
MR. MCCLOUD DEFENDED HIS CASE
SOLELY ON HEAT OF PASSION,
ARGUED SOLELY FOR A MANSLAUGHTER
VERDICT.
HE DID OBJECT TO A THIRD-DEGREE
MURDER JURY INSTRUCTION AS
UNSUPPORTED BY THE EVIDENCE.
THE EVIDENCE WAS THAT
MR. MCCLOUD SHOT ONCE IN THE
DARK AND KILLED HIS WIFE WITH
THAT SHOT.
AS WAS ARGUED BY DEFENSE COUNSEL
TO THE COURT, THERE WAS NO PROOF
THAT HE INTENDED TO FRIGHTEN
HERE.
THE THIRD-DEGREE MURDER OPTION
THAT THE JURY HAD WAS DEPENDED
ON THE PREDICATE CRIME OF AG
ASSAULT.
THERE WAS NO PROOF TO SUPPORT
THAT AS THE DEFENSE ARGUED
BELOW.
WE KNOW THAT MR. MCCLOUD'S JURY
STRUGGLED WITH THE INTENT ISSUE
AS FAR AS MANSLAUGHTER IS
CONCERNED IN THAT WHILE IT WAS
DELIBERATING, IT ASKED TO AND
DID WATCH TO LISTEN TO THE AUDIO
TAPES OF THE STATEMENT.
>> WAS THE THIRD-DEGREE MURDER
INSTRUCTION GIVEN IN THIS CASE?
>> YES, YOUR HONOR.
>> AND IT APPEARED AFTER THE --

>> IT APPEARED AFTER
SECOND-DEGREE AND BEFORE
VOLUNTARY MANSLAUGHTER BY ACT.
>> ARE YOU SAYING IN THIS CASE
THAT THE DEFENDANT OBJECTED TO
THE GIVING OF THAT INSTRUCTION?
>> HE DID, YOUR HONOR.
AT JOA TIME, THE DEFENDANT
ARGUED THAT THERE WAS NO
PREMEDITATION AND THE JUDGE SAID
LET'S GO AHEAD AND RESOLVE THIS
NOW.
WHAT DO YOU THINK ABOUT A LESSER
ON THIRD-DEGREE FELONY MURDER
BASED ON AG ASSAULT.
DEFENSE COUNSEL ARGUED AGAINST
IT SAYING IT WAS IN FACT
UNSUPPORTED BY THE EVIDENCE.
>> I'M ASKING DID HE OBJECT TO
THE GIVING OF THE INSTRUCTION?
>> AT JOA TIME, YES, YOUR HONOR.
THE JUDGE RAISED -- WENT AHEAD
AND HELD A LITTLE BIT OF CHARGE
CONFERENCE, ASKED IF HE WANTED
THE INSTRUCTION.
HE SAID ABSOLUTELY NOT.
IT'S UNSUPPORTED.
>> AND THE JUDGE OVER VOCIFEROUS
OBJECTION OF NOT GIVING
THIRD-DEGREE GAVE IT?
>> YES.
THE JUDGE SAID IF THERE IS EVEN
A SCINTILLA OF EVIDENCE THAT
COULD SUPPORT IT, I'M GOING TO
LET THE JURY DECIDE ABOUT
THIRD-DEGREE FELONY MURDER.
OUR POSITION IS THAT THERE IS NO
SUCH SCINTILLA, SINCE THE SHOT
WAS FIRED IN THE DARK.
THE ONLY EVIDENCE THAT SUPPORTS
A THIRD-DEGREE FELONY MURDER IN
THIS CASE IS THAT DURING THE
DEFENDANT'S LONG STATEMENTS TO
THE POLICE, HE MADE A LONG
STATEMENT IN THE POLICE -- HE
MADE -- IN THE 911 CALL AND IN
THE POLICE CAR HE SAID NUMEROUS,
NUMEROUS TIMES, ACCORDING TO THE
RECORD, I DID IT BECAUSE SHE
MADE ME DO IT WITHOUT SHE
WOULDN'T STOP GOING ON ABOUT THE
OTHER MAN SHE WENT WITH.
IN THE INTERROGATION, YOU'VE GOT
A TAPE.
YOU'VE ALSO GOT A TRANSCRIPT.

THE OFFICER WHO'S INTERROGATING
HIM THROWS OUT THE SUGGESTION
YOU JUST MEANT TO SCARE HER,
DIDN'T YOU?
HE SAID, WELL, WHEN I WENT AND
GOT THE GUN, THAT'S WHAT I
INTENDED, BUT THEN HE RETURNED
TO HIS MANY, MANY SPONTANEOUS
REPETITIONS OF THE FACT THAT HE
INTENDED TO FIRE, BUT HE DID IT
IN THE HEAT OF PASSION, BASED ON
BECAUSE SHE WOULD NOT STOP GOING
ON AND ON ABOUT THE BETTER MAN
SHE'D BEEN WITH.
>> THERE WAS ALCOHOL HERE.
I THINK THE VICTIM IN THIS CASE
HERSELF HAD A .1 SOMETHING
ALCOHOL LEVEL.
>> YES.
>> AND HE HAD BEEN DRINKING AS
WELL THAT NIGHT.
>> YES.
THE EVIDENCE SHOWS HE WENT AND
GOT A 12-PACK DURING THE
DISCUSSION.
>> SO THERE IS RECORD EVIDENCE
FROM WHICH A JURY COULD
DETERMINE THAT HE DID NOT -- HE
INTENDED TO SCARE HER, NOT TO
KILL HER.
THERE IS RECORD EVIDENCE.
>> I BELIEVE THE EVIDENCE WOULD
HAVE TO SHOW THAT HE BOTH
INTENDED TO AND DID SCARE HER
AND THAT'S WHERE OUR POSITION
HAS BEEN ALL ALONG, THAT HE DID
NOT -- THERE WAS NO OPPORTUNITY
FOR HIM TO DO SO.
>> THE JURY WAS INSTRUCTED ON
MANSLAUGHTER BY CULPABLE
NEGLIGENCE, CORRECT?
>> CORRECT.
>> SO THE FACT OF POINTING THE
GUN IN THE DARK WHILE IN THIS
HIGH DEGREE OF INTOXICATION, THE
JURY COULD HAVE REASONABLY,
BASED ON THOSE FACTS, FOUND HIM
GUILTY OF NEGLIGENCE BY CULPABLE
-- MANSLAUGHTER BY CULPABLE
NEGLIGENCE.
>> THEY COULD CONCEIVABLY HAVE
FOUND HIM GUILTY OF THAT.
THAT'S WHAT SEPARATES THIS CASE
FROM HAYGOOD BECAUSE IN HAYGOOD
THAT WAS A BEATING LIKE

MR. DAUGHERTY'S CASE.
THIS COURT HELD SENSIBLY ENOUGH
THERE WAS NO POSSIBILITY OF
CULPABLE NEGLIGENCE ON THOSE
FACTS.
>> SO WHY SHOULD YOU GET THE
RELIEF YOU'RE SEEKING IF THE
JURY WAS PROPERLY INSTRUCTED ON
MANSLAUGHTER BY CULPABLE
NEGLIGENCE, THE JURY HAD THAT
OPTION.
THERE WAS EVIDENCE IN THE RECORD
FROM WHICH A JURY COULD HAVE
FOUND HIM GUILTY FOR THAT AND
THEY DIDN'T.
>> BECAUSE IT WAS A VASTLY MORE
TENUOUS THEORY THAN THE HEAT OF
PASSION ARGUMENT.
>> WELL, THAT'S A JURY QUESTION.
THAT'S NOT FOR US TO DECIDE.
>> IT DEPENDS.
BUT IT DEPENDS ON A FACT THAT'S
NOT IN EVIDENCE, WHICH IS THAT
THERE IS NO EVIDENCE FROM WHICH
TO CONCLUDE THAT THE VICTIM EVER
SAW THE GUN.
THEY WERE WATCHING TV IN THE
DARK.
THE TV BLINKED OFF AND THEN HE
GOT UP AND SHOT.
SO I SUBMIT TO YOU THERE'S NO
EVIDENCE FROM WHICH A JURY COULD
IN FACT RATIONALLY CONCLUDE
CULPABLE NEGLIGENCE.
PLUS THE STATE'S THEORY OF
CULPABLE NEGLIGENCE DEPENDS ON
THE JURY DISCARDING EVERY
VOLUNTARY ACT THE DEFENDANT WENT
THROUGH.
HE WENT AND GOT THE GUN.
HE SAT WITH THE GUN.
HE GOT UP.
HE COCKED IT.
HE AIMED IT.
HE PULLED THE TRIGGER.
THE STATE'S THEORY IS THAT THE
JURY JUST DIDN'T GIVE ANY OF
THAT ANY CONSIDERATION AND WENT
WITH THE FACT THAT HE -- AT
ANOTHER POINT IN HIS STATEMENT
HE SAID, WELL, I DIDN'T MEAN TO
PULL THE TRIGGER OR I FORGOT THE
GUN WAS COCKED OR SOMETHING LIKE
THAT.
IT WAS AT ODDS WITH THE REST OF

THE PROOF.
IT WAS AT ODDS WITH THE REST OF HIS STATEMENT.
I THINK IT'S A VERY, VERY ODD ROUTE OF REASONING FOR THE JURY TO GET TO THE --
>> SHOOTING IN THE DARK ALONE ISN'T ENOUGH.
>> TO ESTABLISH CULPABLE NEGLIGENCE?
>> YES.
>> MY POSITION IS THAT THE PROOF, YOU KNOW, IN ITS NATURAL, LOGICAL IMPORT IS THAT HE COMMITTED THE VOLUNTARY -- HE COMMITTED A VOLUNTARY ACT OF MANSLAUGHTER IN THE HEAT OF PASSION.
AND THAT IT JUST -- THAT THE STATE IS NOW TAKING THE OPPORTUNITY TO SAY THERE WAS THIS OTHER LITTLE BITTY CRIME THAT THEY COULD HAVE GOT THERE BY JUST COMPLETING DISREGARDING ALL HIS VOLUNTARY ACTS.
I SUBMIT TO YOU THAT IS NOT A COMPELLING EXPLANATION OF WHAT HAPPENED IN THIS CASE.
>> UNDER YOUR THEORY, THE ACTUAL FAULTY INSTRUCTION WOULD BE THE CORRECT ONE, WHICH IS WHEN HE SHOT, IT WASN'T BY ACCIDENT, BY NEGLIGENCE.
HE INTENDED AT THAT POINT IN THE HEAT OF PASSION TO KILL HER.
I MEAN, THAT'S WHAT -- HOW IS THIS INSTRUCTION THAT WE'VE SAID IS ERRONEOUS IN OTHER CASES --
IT SOUNDS LIKE IT FITS PERFECTLY INTO WHAT YOU'RE SAYING YOUR DEFENSE WAS.
AM I MISSING SOMETHING?
>> HE NEVER SAID HE INTENDED TO KILL HER.
HE INTENDED TO PULL THE TRIGGER.
HE INTENDED A VOLUNTARY ACT OF MANSLAUGHTER, GETTING THE GUN, RAISING THE GUN, COCKING THE GUN, PULLING THE TRIGGER.
>> WELL, EITHER HE INTENDED TO KILL HER AT THE MOMENT HE PULLED THE TRIGGER OR HE INTENDED TO SCARE HER.
I'M SORT OF LOST ON WHY THE CULPABLE NEGLIGENCE AND EVEN

THIS VOLUNTARY MANSLAUGHTER BY ACT DON'T REALLY FIT INTO WHAT THE THEORY WAS IN THE CASE.
MAYBE YOU CAN EXPLAIN IT AGAIN BECAUSE I'M MISSING IT.
>> THEY DON'T FIT IN BECAUSE THE PROOF DOESN'T SUPPORT THEM AS THE DEFENSE ARGUED BELOW.
THE DEFENSE ARGUED SOLELY FOR THIS HEAT OF PASSION RESULT.
>> AND WITH HEAT OF PASSION, WERE THEY ARGUING THEN FOR SECOND-DEGREE MURDER?
>> NO.
MANSLAUGHTER BY VOLUNTARY ACT AS COMMITTED IN THE HEAT OF PASSION.
>> SO, IN OTHER WORDS, THE ARGUMENT THAT THE DEFENSE LAWYER USED, THEY TOOK THE MANSLAUGHTER BY ACT INSTRUCTION AND SAID AT THE MOMENT HE SHOT HER, HE DID INTEND TO KILL HER.
>> HE INTENDED THE VOLUNTARY ACT OF PULLING THE TRIGGER.
HE INTENDED THE VOLUNTARY ACT OF PULLING THE TRIGGER.
>> DID HE INTEND TO KILL HER AT THAT TIME WHEN HE -- IN THE HEAT OF PASSION?
>> I DON'T THINK EVEN THE STATE ARGUED HE INTENDED TO KILL HER.
HIS INTENT WAS MADE UNEQUIVOCALLY CLEAR BY HIS MANY, MANY COLORFUL STATEMENTS MADE AFTER THE MURDER.
>> WELL, IF HE DIDN'T INTEND TO KILL HER AND KILLED HER, WHY ISN'T THAT EQUALLY CULPABLE NEGLIGENCE, THAT HE PULLED THE TRIGGER IN THE DARK AND DIDN'T HAVE AN INTENT TO KILL HER AND SO THEREFORE IT'S CULPABLE NEGLIGENCE.
>> MY DIFFICULTY WITH THAT IS THAT HISTORICALLY THESE CASES WHERE THE DEFENDANT'S MENTAL STATE IS THE ONLY THING AT ISSUE AND HIS DEFENSE IS HEAT OF PASSION, THOSE ARE MANSLAUGHTER CASES.
THEY FIT INTO HAYGOOD.
THOSE ARE VOLUNTARY MANSLAUGHTER CASES.
I DON'T SEE HOW IT CAN BE NOT A

PROBLEM THAT HE DIDN'T GET A MANSLAUGHTER INSTRUCTION.
HE'S NEVER ASKED FOR ANYTHING BUT A CORRECT MANSLAUGHTER INSTRUCTION.
THE FACT THAT ANOTHER TENUOUS THEORY EXISTS SHOULDN'T --
>> HE DIDN'T REALLY ASK FOR A CORRECT MANSLAUGHTER INSTRUCTION, DID HE?
>> OH, NO, YOUR HONOR.
>> THE REASON WE'RE HERE IS BECAUSE HE FAILED TO ASK FOR IT.
>> THAT'S CORRECT, YOUR HONOR.
THAT'S CORRECT, YOUR HONOR.
THIS CASE WAS DECIDED -- WAS TRIED LONG BEFORE THE ORIGINAL FIRST DCA MONTGOMERY OPINION WAS ISSUED WHEN EVERYBODY WAS MISSING THIS ISSUE.
>> WE'VE GONE DOWN THE ROAD OF WHAT WE DID IN MONTGOMERY, BUT IT IS SORT OF -- IF IT'S SO OBVIOUS THAT MANSLAUGHTER BY ACT DOES NOT INVOLVE AN INTENT TO KILL AND THIS IS WHAT THE FOCUS WAS, HOW DOES THE DEFENSE LAWYER AND THE STATE NOT SEE THAT THEY'RE JUST MISSING THE CORRECT INSTRUCTION FOR MANSLAUGHTER BY ACT.
>> WELL, EVERYBODY MISSED IT FOR A TIME AND THIS COURT TOOK ACTION IN MONTGOMERY AND HAYGOOD.
I SUBMIT TO YOU, YOU SHOULD TAKE ACTION IN THIS CASE AS WELL BECAUSE THE JURY WHILE THEY WERE ASKING FOR AND -- ASKING TO LISTEN TO THE TAPES, LISTENING TO THE TAPES, IT'S CERTAINLY A RATIONAL READING OF THE RECORD THAT WHAT THEY WANTED TO RESOLVE WAS WHETHER HE ACTED IN THE HEAT OF PASSION OR NOT.
>> DO YOU THINK THAT HAYGOOD PRECLUDES THE MANSLAUGHTER BY CULPABLE NEGLIGENCE IN ALL CASES?
IT SEEMS TO ME THIS WOULD BE THE PERFECT CASE WHERE THAT WOULD BE A CORRECT JURY INSTRUCTION FOR MANSLAUGHTER.
BUT DO YOU THINK IT'S PRECLUDED BY HAYGOOD?

>> RIGHT.
I'M WRAPPING MY HEAD AROUND THE QUESTION, YOUR HONOR.
I THINK THIS CASE IS NOT ALL THAT DISTINGUISHABLE FROM HAYGOOD.
YOUR QUESTION IS DOES HAYGOOD EXCLUDE --
>> UNDER PROPER CIRCUMSTANCES.
>> IN A CASE WHERE THE DEFENSE OBJECTS TO IT?
BECAUSE IF THE DEFENSE ASKS FOR IT, I'M NOT ARGUING FOR A RULE THAT, NO, YOU CAN'T GIVE CULPABLE NEGLIGENCE.
I'M JUST SAYING THAT THE FACT THE JURY COULD HAVE GONE WAY OFF TO LEFT FIELD AND SAID, WELL, MAYBE IT WAS ONLY CULPABLE NEGLIGENCE SHOULDN'T DISTINGUISH THIS CASE FROM HAYGOOD BECAUSE THIS IS SUCH A CASE, VOLUNTARY MANSLAUGHTER CASE AND HE DIDN'T GET THE CORRECT INSTRUCTIONS.
>> DIDN'T THE EVIDENCE SHOW HE WAS ONLY ONE TO TWO FEET AWAY FROM HER WHEN HE SHOT HER?
>> I BELIEVE THERE WAS NO STEP LENGTH, YOUR HONOR.
I MAY BE WRONG, YOUR HONOR.
>> SO IF THE EVIDENCE SHOWED THAT THE MEDICAL EXAMINER TESTIFIED AND THE EVIDENCE SHOWED THAT HE WAS ONLY ONE TO TWO FEET AWAY FROM HER WHEN SHOT, THAT'S NOT VERY NEGLIGENT, IS IT?
>> I AGREE WITH YOU, YOUR HONOR.
IT'S JUST IT'S -- IN HAYGOOD THERE WAS A BEATING.
IT WAS NOT A BEATING WITH A BASEBALL BAT, BUT THE VICTIM WAS BEATEN TO DEATH AND THIS COURT SAID HOW IN THE WORLD DO YOU GET CULPABLE NEGLIGENCE BASED ON THAT.
AND I HAVE TO AGREE WITH JUSTICE POLSTON'S INSTINCT.
THAT'S MY INSTINCT, THAT THIS JUST ISN'T A CULPABLE NEGLIGENCE CASE TO THE POINT WHERE IT'S JUST OKAY THAT THE JURY NEVER GOT TO DETERMINE IF THIS WAS A MANSLAUGHTER.
IT JUST -- IT DOESN'T SEEM

RIGHT.
IT SEEMS TO ME THAT IN ANY CASE WHERE THE DEFENDANT IS CHARGED WITH FIRST-DEGREE MURDER, AS HERE, IS CONVICTED OF SECOND-DEGREE MURDER, AS HERE, ARGUED SOLELY FOR A MANSLAUGHTER VERDICT.
COMMON LAW HAS HELD WE CONSIGN IT SOLELY TO THE HEARTS AND MINDS OF THE JUROR TO DECIDE WHETHER A DEFENDANT HAS COMMITTED FIRST-DEGREE, HAS ACTED WITH PREMEDITATION, A DEPRAVED HEART OR IN THE HEAT OF PASSION.
BY DENYING RELIEF IN THIS CASE I SUBMIT TO YOU THAT WE ARE IN A SITUATION WHERE THE DEFENDANT WAS IN FACT DENIED A FAIR TRIAL BY THE FACT THIS JURY INSTRUCTION WASN'T GIVEN.
I'LL RESERVE MY REMAINING TIME, IF I MAY.
>> MY SECOND CRACK AT THIS.
FIRST OF ALL, FACTUALLY I THINK THIS CASE IS MUCH STRONGER FOR THE STATE, FOR A NUMBER OF REASONS.
FIRST OF ALL, IT'S DISTINGUISHABLE FROM THE REVERSAL IN HAYGOOD BECAUSE HERE CLASSIC CULPABLE NEGLIGENCE SITUATION.
THE DEFENDANT HAD MANY DIFFERENT THEORIES AS TO WHAT HAPPENED IN THAT ROOM AND WE ONLY KNOW HIS VERSION OF EVENTS.
BUT ONE OF HIS THEORIES WAS THAT HE WENT TO GET THE GUN TO SCARE HER AND HE HAD IT IN HIS HAND AND HE SAID I DIDN'T INTEND TO PULL THE TRIGGER, IT JUST WENT OFF AND MAYBE I SHOT, BUT I DIDN'T INTEND TO HIT HER AND THEY HAD A BUNCH OF DIFFERENT THINGS ABOUT WHAT HAPPENED.
THAT'S CLASSIC CULPABLE NEGLIGENCE.
WHICH IS UNLIKE HAYGOOD.
THE REASON HAYGOOD WAS REVERSED WAS -- WE TRIED TO SAVE IT BY SAYING THERE WAS ANOTHER VIABLE OPTION FOR MANSLAUGHTER.
IT WASN'T REALLY VIABLE.

IN THIS CASE IT'S A CLASSIC
SITUATION OF CULPABLE
NEGLIGENCE.
HIS DEFENSE WAS HEAT OF PASSION.
AND LET ME ADD ANOTHER THING.
THERE WAS A SPECIFIC HEAT OF
PASSION INSTRUCTION GIVEN AND
THE JURY WAS SPECIFICALLY TOLD
IF YOU FIND THAT HE WAS ACTING
IN THE HEAT OF PASSION SO THAT
IT WASN'T SECOND-DEGREE MURDER,
IT WASN'T A DEPRAVED MIND, IT
WAS HEAT OF PASSION, THEN
CONVICT HIM OF MANSLAUGHTER.
SO THERE WERE THREE WAYS TO
PROVE MANSLAUGHTER.
MANSLAUGHTER BY ACT WHICH
DOESN'T MAKE ANY SENSE AND WAS
INCORRECTLY INSTRUCTED ON.
MANSLAUGHTER BY CULPABLE
NEGLIGENCE.
AND MANSLAUGHTER BY HEAT OF
PASSION, WHICH WAS A SEPARATE
WAY OF PROVING MANSLAUGHTER IF
THEY FOUND THAT THE STATE DIDN'T
PROVE DEPRAVED MIND.
AND THE JURY FOUND THAT THE
STATE PROVED DEPRAVED MIND
BECAUSE THEY CONVICTED HIM OF
SECOND-DEGREE MURDER.
>> WAS HE INSTRUCTED ON ALL
THREE OF THE -- EVEN THOUGH WE
KNOW THAT THE BAD ACT
INSTRUCTION WAS IMPROPER, WAS
THE JURY INSTRUCTED ON BOTH THE
CULPABLE NEGLIGENCE AND THE HEAT
OF PASSION ALSO?
>> YES.
THE MANSLAUGHTER INSTRUCTION
INCLUDED MANSLAUGHTER BY ACT,
WHICH WAS INCORRECT, AND THEN
CULPABLE NEGLIGENCE, PLUS THEY
GAVE A SPECIAL INSTRUCTION ON
HEAT OF PASSION, AND THAT
INSTRUCTION SPECIFICALLY SAID WE
HAVE A QUESTION HERE BETWEEN
DEPRAVED MIND, WHICH IS WHAT THE
STATE ARGUED, OR HEAT OF
PASSION, WHICH WAS THE DEFENSE
ARGUMENT.
IF YOU BUY THE DEFENSE ARGUMENT,
THAT'S MANSLAUGHTER.
AND THEY WERE SPECIFICALLY TOLD
THAT.
SO WE WOULD SUBMIT THAT THIS IS

ONE OF THOSE CASES WHERE THERE
WAS VIABLE OPTIONS, WHICH SEEMS
TO BE THE TEST THAT THIS COURT
HAS ADOPTED IN HAYGOOD.
BUT LET ME ALSO GO BACK TO THIS
TWO STEP REMOVED THING.
BECAUSE IN THIS CASE, AGAIN, THE
DEFENDANT HAD A STEP IN BETWEEN.
HE HAD A THIRD-DEGREE MURDER
INSTRUCTION.
AND THE STATE ARGUED THAT HE WAS
GUILTY OF THIRD-DEGREE MURDER
BECAUSE THE UNDERLYING FELONY
WAS AGGRAVATED ASSAULT.
>> DID THEY OBJECT TO THE GIVING
OF THAT INSTRUCTION?
>> THEY DID, BUT YOU HAVE TO
GIVE AN INSTRUCTION ON THE
LESSER IF IT'S SUPPORTED BY THE
EVIDENCE.
AND IT WAS CORRECTLY GIVEN HERE
BECAUSE ONE OF HIS THEORIES WAS
SHE WAS TALKING ABOUT THIS
AFFAIR AND I WENT TO GET MY GUN
TO SCARE HER.
>> I THOUGHT WHEN IT CAME TO
LESSERS THAT YOU HAVE TO GIVE IT
IF IT'S REQUESTED BY THE
DEFENSE?
DO YOU HAVE TO GIVE IT, THE
THIRD-DEGREE MURDER, IF THE
DEFENSE DOESN'T WANT IT?
>> I BELIEVE THAT THE STATE'S
ENTITLED TO NECESSARY LESSER
INSTRUCTIONS AS WELL.
AND THE STATE ASKED FOR IT HERE
BECAUSE IT'S A VIABLE CRIME
HERE.
I MEAN, IF YOU BELIEVE THE
VERSION OF HIS STORY OF I WENT
AND GOT THE GUN TO SCARE HER AND
THEN I SHOT HER, THAT'S
THIRD-DEGREE FELONY MURDER.
THE STATE DID ARGUE THAT THIS
WAS PREMEDITATED.
HE SAT THERE FOR 15 MINUTES WITH
THIS GUN.
THE STATE ARGUED SHOULD FIND HIM
GUILTY OF FIRST-DEGREE MURDER,
SECOND-DEGREE MURDER OR
THIRD-DEGREE MURDER.
SO THE STATE ARGUED ALL OF THOSE
THINGS.
AND LET ME GO BACK TO THIS TWO
STEP REMOVED THING BECAUSE I

THINK IT'S IMPORTANT NOT
NECESSARILY IN THIS CASE BECAUSE
I THINK FACTUALLY WE HAVE A
DISTINGUISHED HAYGOOD BECAUSE OF
THE CULPABLE NEGLIGENCE.
BUT AS A MATTER OF LAW, AS THE
LOWER COURTS ARE STRUGGLING WITH
THESE ISSUES, THERE ARE A LOT OF
THESE MONTGOMERY CASES OUT
THERE, AND IF THIS COURT HOLDS
THAT THE TWO STEP REMOVED CASE
DOESN'T APPLY TO MONTGOMERY
CASES -- AND I DON'T UNDERSTAND
THE LOGIC OF THAT.
BUT IF IT THIS COURT HOLDS THAT,
THAT OPENS UP THE FIRST-DEGREE
MURDER CASES, TOO.
THIS ISN'T JUST COMING UP IN THE
CASES THAT ARE ON DIRECT APPEAL
AFTER MONTGOMERY.
>> HOW DO YOU SAY IT IS
APPLICABLE TO THE FIRST-DEGREE
MURDER CASES?
>> BECAUSE ONE OF THE REASONS
THAT THE ERROR IS FUNDAMENTAL IS
BECAUSE IT'S THE NEXT LOWEST
CRIME FOR SECOND-DEGREE MURDER.
IF IT'S TWO STEPS REMOVED, WE
SUBMIT IT'S NOT.
FIRST-DEGREE MURDER AND
MANSLAUGHTER ARE ALWAYS TWO
STEPS REMOVED, OKAY?
THE REASON -- I BELIEVE
MONTGOMERY HASN'T BEEN APPLIED
IN THE FIRST-DEGREE MURDER CASES
BECAUSE IT'S TWO STEPS REMOVED.
SECOND-DEGREE MURDER IS IN
BETWEEN THERE.
IN THESE CASES YOU HAVE TO --
>> SO HOW WOULD THAT CHANGE?
>> IF THE COURT WERE TO HOLD, AS
DEFENSE COUNSEL IS ASKING, THAT
THE TWO STEP REMOVED ANALYSIS
DOESN'T APPLY TO MONTGOMERY
ERROR, THEN I DON'T SEE WHY IT
WOULDN'T APPLY TO FIRST-DEGREE
MURDER CASES, TOO.
THE REASON IT DOESN'T APPLY TO
FIRST-DEGREE MURDER CASES IS
THERE'S AN OFFENSE IN BETWEEN.
WHAT'S UNUSUAL ABOUT THESE CASES
IS THESE CASES BOTH HAVE
THIRD-DEGREE MURDER AS WELL,
WHICH PUTS THAT OFFENSE IN
BETWEEN.

AND WHEN YOU LOOK AT-- THE
LONGSTANDING LAW IN THIS STATE
HAS BEEN IF IT'S A LESSER
OFFENSE THAT'S TWO STEPS
REMOVED, WE'RE NOT GOING TO
ASSUME THAT THAT AFFECTED THE
VERDICT.
>> I GUESS IN THIS CASE, THOUGH,
WITH THE DEFENSE OBJECTING TO
THE THIRD-DEGREE FELONY MURDER
INSTRUCTION, AGAIN, AND YOU'RE
TRYING TO LOOK AT WHETHER THE
DEFENDANT HAD THE BENEFIT OF THE
INSTRUCTIONS IT NEEDED TO BE
ABLE TO ARGUE ITS CASE.
DOESN'T THAT MAKE A DIFFERENCE?
>> NO, BECAUSE THE DEFENDANT
STILL ARGUED MANSLAUGHTER, EVEN
THOUGH THE THIRD-DEGREE --
>> THEY ARGUED --
>> THEY ARGUED HEAT OF PASSION
MANSLAUGHTER.
>> SO YOU'RE SAYING THAT IS THE
-- BECAUSE THAT WAS CORRECTLY
INSTRUCTED ON.
>> THAT WAS ANOTHER VIABLE
OPTION.
BUT FROM A LEGAL STANDPOINT I'M
ARGUING ABOUT THE TWO-STEP RULE
HERE.
IT DOES APPLY HERE.
AND I KNOW THAT THEY'RE THE SAME
DEGREE FELONY.
BUT THE JURY DOESN'T KNOW THAT.
AND YOU'RE LOOKING AT HOW THE
JURY ANALYZES THIS.
AND THE JURY IS SPECIFICALLY
TOLD THIS IS A STANDARD
INSTRUCTION THAT'S GIVEN IN
THESE CASES.
THE STATE HAS TO CONVINCE YOU
THAT THE DEFENDANT COMMITTED THE
MAIN CRIME OF WHICH HE IS
ACCUSED.
IF YOU FIND THAT THEY DIDN'T
CONVINCE YOU OF THAT, THERE MAY
BE EVIDENCE THAT HE COMMITTED
OTHER ACTS THAT WOULD CONSTITUTE
A LESSER INCLUDED CRIME.
SO IF THE MAIN ACCUSATION HAS
NOT BEEN PROVED BEYOND A
REASONABLE DOUBT, YOU WOULD NEED
TO DECIDE IF THE DEFENDANT IS
GUILTY OF ANY LESSER INCLUDED
CRIME.

SO THEY TELL THEM YOU START AT THE BOTTOM AND YOU GO DOWN TO THE BOTTOM.
IN THIS CASE THE JUDGE EVEN SAID WE HAVE CRIMES A THROUGH E HERE. IF YOU FIND A, THEN YOU DON'T GO TO B.
IF YOU DON'T FIND A, YOU GO TO B.
HE WAS VERY SPECIFIC ABOUT THAT. AND I QUOTED THAT INSTRUCTION IN MY BRIEF.
THAT'S HOW THEY WOULD TOLD TO ANALYZE THIS.
AGAIN, AS THIS COURT HAS NOTED, IF YOU DIDN'T FIND B, YOU'RE NOT GOING TO FIND C UNLESS YOU'RE COMPLETELY DISREGARDING THE INSTRUCTIONS.
SO THEREFORE ONCE YOU GET TWO STEPS REMOVED, THEN THE ERROR IN THE MANSLAUGHTER INSTRUCTION IS NOT FUNDAMENTAL.
AND EVEN IF THEY -- YOU KNOW, IN CASES WHERE IT'S ONE STEP REMOVED AND THEY OBJECTED, THEN WE REVERSE.
BUT EVEN IN CASES WHERE THEY OBJECT, IF IT'S TWO STEPS REMOVED, IT'S NOT REVERSIBLE ERROR UNDER THAT THEORY OF HOW FAR DOWN ARE WE GOING TO GO BEFORE WE STOP REVERSING THESE THINGS AND A DEFENDANT IS ENTITLED TO A FAIR TRIAL, NOT A PERFECT TRIAL, AND WE HAVE TO BE REALISTIC ABOUT WHAT THE JURY WOULD HAVE DONE.
SO WE WOULD SUBMIT THAT THE TWO-STEP RULE SETTLES THIS HERE IN BOTH CASES AND IT'S DIRECTLY APPLICABLE.
THERE'S NOTHING UNIQUE ABOUT MONTGOMERY ERROR THAT SAYS 40 YEARS OF CASE LAW SHOULD BE THROWN OUT THE WINDOW IN THIS CONTEXT.
BUT IN ADDITION IN THIS SPECIFIC CASE WE ALSO HAVE CULPABLE NEGLIGENCE AS A VIABLE ALTERNATIVE, PLUS WE HAVE THE HEAT OF PASSION INSTRUCTION, WHICH GAVE THEM ANOTHER WAY TO FIND MANSLAUGHTER, WHICH, SPECIFICALLY TOLD THEY COULD

FIND IT THAT WAY.
>> WAS THERE A LINE ON THE JURY INSTRUCTION -- ON THE JURY VERDICT FORM WHERE THEY COULD HAVE FOUND MANSLAUGHTER BY HEAT OF PASSION?
>> NO.
THEY COULD JUST FIND MANSLAUGHTER.
SO THERE'S NO SPECIFIC THEORY, I DON'T BELIEVE.
SO, YOU KNOW, FACTUALLY I BELIEVE THIS IS A STRONG CASE FOR THE STATE, THAT THE MANSLAUGHTER BY ACT INSTRUCTION, YEAH, IT WAS MESSED UP.
HE DIDN'T GET A PERFECT TRIAL.
BUT DID IT REALLY AFFECT THE VERDICT?
WE WOULD SUBMIT IT DID NOT.
BUT WE WOULD ALSO ASK THE COURT TO RECOGNIZE THIS TWO-STEP RULE APPLIES IN THIS CONTEXT.
AND BECAUSE WE HAD THE STEP IN BETWEEN, THE THIRD-DEGREE FELONY MURDER, WHICH THE STATE ARGUED AND THE STATE WAS ENTITLED TO.
I MEAN, THAT'S SUPPORTED BY THE EVIDENCE.
ONCE YOU GAVE THAT INSTRUCTION, THEN IT SEPARATED ANY ERROR FROM WHAT THE JURY ACTUALLY FOUND.
SO IN LIGHT OF BOTH OF THOSE REASONS, WE WOULD ASK THIS COURT TO AFFIRM.
THANK YOU.
>> THE STATE NOW TAKES THE POSITION THAT THIS IS A CULPABLE NEGLIGENCE CASE, BUT IT NEVER ARTICULATED THAT ARGUMENT TO THE JURY.
NEVER ONCE DID IT MENTION CULPABLE NEGLIGENCE IN ITS CLOSING.
I SUBMIT TO YOU, THINKING ABOUT JUSTICE POLSTON'S QUESTION, THIS IS NOT A CASE WHERE CULPABLE NEGLIGENCE AND VOLUNTARY ACT MANSLAUGHTER IT COEXIST.
SOMEONE ASKED EARLIER CAN YOU THINK OF AN EXAMPLE WHERE THEY DO?
I THINK THE EXAMPLE IS THE CHILD ABUSE OR CHILD NEGLECT CONTEXT.
IF YOU TOOK SOMEONE

INEXPERIENCED IN CARING FOR CHILDREN, GETS A CALL ON A CELL PHONE AND SAYS YOU SIT ON A SHELF, I'M GOING TO ANSWER MY CELL PHONE, THAT'S CULPABLE NEGLIGENCE AND IT'S ARGUABLY A VOLUNTARY ACT THAT WAS INTENDED TO -- WHAT HE INTENDED TO HAPPEN HAPPEN.
I'M JUST KIND OF SPIT-BALLING THIS IN RESPONSE TO YOUR QUESTION, YOUR HONOR.
I SUBMIT YOU SHOULD FORM A RULE OF LAW IF NEEDED IN THIS CASE THAT CULPABLE NEGLIGENCE DOES NOT CONSIST OF TAKING A .357, POINTING IT AT SOMEONE AND KILLING THEM.
IT'S A VOLUNTARY ACT CASE.
>> BUT, YOU KNOW, IT JUST SEEMS TO ME LIKE IF THE JURY WAS WILLING TO GO DOWN TO MANSLAUGHTER, AND GIVEN THE QUESTIONS THAT JUSTICE PARIENTE ASKED YOU EARLIER, IT SEEMS THAT THE MANSLAUGHTER BY CULPABLE NEGLIGENCE IS A BETTER FIT IN THIS CASE THAN MANSLAUGHTER BY ACT, EVEN IF PROPERLY INSTRUCTED.
>> I SUBMIT TO YOU, YOUR HONOR, THAT THE STATE TOOK A DIFFERENT VIEW IN THAT IT NEVER ARGUED THAT.
>> BUT THE JURY HAD THE FACTS AND THEY HAD THE INSTRUCTIONS. JURIES COME UP WITH THEIR OWN DECISIONS, REGARDLESS OF LAWYERS, ALL THE TIME.
>> THEY DO.
THEY DO, YOUR HONOR.
BUT THE STATE HAS RELIED ON THE FACT THAT WE GOT A HEAT OF PASSION INSTRUCTION.
I DON'T THINK THAT THAT INSTRUCTION PURPORTED TO OR DID DEAL WITH THE MONTGOMERY PROBLEM, WHICH IS IF THEY LOOKED AT THE HEAT OF PASSION INSTRUCTION AND SAID THIS IS A CASE WHERE THERE'S NO DEPRAVED HEART, LET'S LOOK AT THAT MANSLAUGHTER INSTRUCTION, AND WHEN THEY DID IT REQUIRES INTENT TO KILL.

THEY EASILY COULD HAVE SAID IN
THIS CASE HE DIDN'T HAVE AN
INTENT TO KILL.
THAT'S OUT.
SO I GUESS WE'RE BACK TO
DEPRAVED HEART.
THEY WERE OUT LONG ENOUGH TO
LISTEN TO THE AUDIO TAPES, BOTH
OF THEM.
>> WHY WOULDN'T THERE BE
MANSLAUGHTER BY HEAT OF PASSION?
MISS DAVENPORT IS SAYING THEY
GOT THAT INSTRUCTION.
>> THAT'S WHAT I'M TALKING
ABOUT.
THEY DID GET AN INSTRUCTION THAT
SAID IF YOU FIND NO DEPRAVED
HEART, THEN THE MANSLAUGHTER IS
THE APPROPRIATE VERDICT, BUT
THAT DOESN'T DEAL WITH THE
MONTGOMERY PROBLEM IN THE
MANSLAUGHTER BY ACT INSTRUCTION
THEY HAD.
I MEAN, IT --
>> YOU'RE TALKING PASSION.
BUT THEY GOT -- IT WAS A HEAT OF
PASSION CASE, SO WHY WOULDN'T
THE MANSLAUGHTER BY -- CORRECT
INSTRUCTION ON MANSLAUGHTER BY
HEAT OF PASSION SOLVE THE
PROBLEM FOR THE DEFENSE?
>> A CORRECT INSTRUCTION, THE
INSTRUCTION THIS COURT CAME UP
WITH IN 2012 TO FIX THE
MONTGOMERY PROBLEM.
>> I THOUGHT THEY HAD A SEPARATE
INSTRUCTION.
AGAIN, I'LL HAVE TO -- ON
MANSLAUGHTER BY HEAT OF PASSION.
THAT'S WHAT MISS DAVENPORT SAID.
>> AND THAT INSTRUCTION SAID
PURSUANT TO FLORIDA LAW, IF YOU
BELIEVE DEFENDANT'S PASSION
RESULTED IN A STATE OF MIND
WHERE DEPRAVITY, WHICH
CHARACTERIZES MURDER IN THE
SECOND-DEGREE, IS ABSENT, YOU
MAY RETURN A VERDICT OF
MANSLAUGHTER.
WHAT I'M SAYING IS THAT THAT
DOESN'T PURPORT TO DEAL WITH THE
PROBLEM IN THE MANSLAUGHTER
INSTRUCTION.
I SUBMIT TO YOU THEY GOT
INCONSISTENT MESSAGES ON WHETHER

THEY COULD IN FACT COME BACK
WITH A VOLUNTARY MANSLAUGHTER.
>> MANSLAUGHTER BY HEAT OF
PASSION.
>> I'M SORRY?
>> THERE WAS NO LINE ON THE
VERDICT FORM THAT HAD
MANSLAUGHTER BY HEAT OF PASSION
AS AN OPTION.
>> NO, YOUR HONOR.
>> OR MANSLAUGHTER BY CULPABLE
NEGLIGENCE.
>> RIGHT.
BUT THE ARGUMENT OF COUNSEL TO
THE JURY, DEFENSE COUNSEL TO THE
JURY, WAS THAT YOU NEED TO PICK
VOLUNTARY MANSLAUGHTER BECAUSE
THIS IS A HEAT OF PASSION CASE.
AND AS I POINTED OUT EARLIER,
THIS CASE ARISES AT A DIFFERENT
PROCEDURAL JUNCTURE THAN
DAUGHERTY, WHICH IS JUST ON ITS
WAY UP.
THIS CASE CAME UP ON BETWEEN
MONTGOMERY AND HAYGOOD.
THE STATE CONCEDED THAT HAYGOOD
CALLED FOR FURTHER
CONSIDERATION, THAT THE STATE
ARGUED HARMLESS ERROR TO THE
DCA.
THE DCA SAID IT'S HARMLESS, BUT
DIDN'T SET OUT THEIR REASONING.
THEY DO SAY THAT THEY CITE
DAUGHERTY.
SO I THINK IT'S POSSIBLE READING
THE DCA'S OPINION, THEY MAY HAVE
THOUGHT THAT THE FACT THAT
THERE'S -- THIS IS A TWO-STEP
REMOVED CASE COMPLETELY RESOLVES
THE HARMLESS ERROR PROBLEM AND
ESTABLISHES THAT THE ERROR IS
HARMLESS.
BUT WHEN A LESSER IS TWO STEPS
REMOVED THAT OPENS UP THE CASE
TO HARMLESS ERROR ANALYSIS.
IT DOESN'T RESOLVE THE QUESTION
OF WHY IT WAS HARMLESS.
I ASK YOU TO LOOK AT THE DCA'S
ONE PARAGRAPH OPINION ON
HARMLESS ERROR.
I SUBMIT TO YOU THEY DID NOT
ARTICULATE WHY, WHY THE ERROR IS
HARMLESS.
I SUBMIT TO YOU THAT THEY EITHER
-- YOU EITHER NEED TO SUBSTITUTE

YOUR JUDGMENT FOR THEIRS OR GIVE
THEM ANOTHER OPPORTUNITY TO
STATE WHY THEY THOUGHT IT WAS
HARMLESS.
THANK YOU.
I ASK YOU TO REVERSE.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT WILL BE IN RECESS FOR
30 MINUTES.
FOR TEN MINUTES.
TEN MINUTES.
>> ALL RISE.