NO. 03-9560

IN THE SUPREME COURT OF THE UNITED STATES

MARLON HOWELL,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR RESPONDENT

This matter is before the Court on the grant of a writ of certiorari from the decision of the Supreme Court of Mississippi in the case of Marlon Howell (hereinafter "Howell"). Specifically, the Supreme Court of Mississippi has affirmed the conviction of capital murder and sentence of death imposed upon Howell by the Circuit Court of Union County, Mississippi, and Howell seeks relief from that judgment. The Respondent, State of Mississippi (hereinafter "the State"), respectfully submits that this Court is without jurisdiction to hear the question presented by Howell and, additionally, that Howell is not entitled to any relief, whatsoever, from this honorable Court.

QUESTIONS PRESENTED

I. THE QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS NEVER PRESSED OR PASSED UPON IN THE MISSISSIPPI SUPREME COURT; THEREFORE, THIS COURT IS WITHOUT JURISDICTION.

II. *BECK V. ALABAMA*, 447 U.S. 625, 638 (1980), IS WHOLLY INAPPLICABLE TO HOWELL'S CASE.

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The lower court's affirmance of Howell's conviction and sentence is reported at *Howell v. State*, 860 So. 2d 704 (Miss. 2003), and is Exhibit A to the petition for certiorari.

JURISDICTION

The order granting the writ of certiorari in this case instructed as follows, "In addition to the Question presented by the petition, the parties are directed to brief and argue the following Question: 'Was petitioner's federal constitutional claim properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. Sec. 1257?'" Pursuant to that order and to Rule 18.12 of this Court, the State addresses the question of jurisdiction "at the outset" of its brief as question I, *infra*. *See* U.S. Sup. Ct. Rule 18.12. As is fully explicated below, the claim raised in the petition was never presented to or decided by the Mississippi Supreme Court. Therefore, and with respect, this Court is without jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Howell seeks to invoke the Eighth and Fourteenth Amendments to the Constitution of the United States. He fails to do so.

STATEMENT OF THE CASE

This case arises from the May 15, 2000, capital murder of Hugh David Pernell, a retired postal worker who was delivering newspapers on a residential street in New Albany, Mississippi, in the early morning hours of that tragic day. Shortly after 5:00 a.m., Howell (who was in a vehicle with his friends/co-indictees Adam Ray and Curtis Lipsey) flagged down Pernell's vehicle. Howell approached and then reached in the driver's window of Pernell's car and struggled with Pernell. Howell then drew his Saturday Night Special from the waistband of his pants and shot Pernell in the heart. Pernell's foot hit the gas pedal, and his vehicle sped into a parked car in a nearby driveway. Howell, Lipsey, and Ray fled the scene.

The capital murder occurred in front of the home of Charles Rice, who was watching television in his living room as he prepared for work. Rice, prompted by the sound of a horn honking, went to his window. From this vantage point, he witnessed the entire crime. The next day, Rice viewed a lineup and unequivocally identified Howell as the killer.

The motive for the crime was undisputedly robbery. Howell owed supervision and other fees to his probation officer. Howell had received notification that he would be jailed, unless he made payment that very day – May 15, 2000. Howell told his friends that he "needed to make a sting," and he was looking for "an easy lick." Otherwise, he would be "locked up."

Howell and his friends had driven around most of the night, while Howell looked for "an easy lick." By 5:00 a.m., when Howell saw Pernell's vehicle, Howell, apparently, thought he had found one. However, when Pernell sped away from the scene, Howell's plans were foiled (a fact which is demonstrated by the bag of coins that was scattered in the floorboard of Pernell's car).

Thereafter, Howell, Lipsey, and Ray went to the home of their friend, Brandon Shaw. Lipsey and Ray told Shaw that Howell "shot somebody." Howell asked Shaw to take him home immediately. Howell hid the murder weapon behind Shaw's house, and Shaw took Howell home to Blue Mountain, Mississippi. Howell – known by his cohorts as "Chiefa" – ordered all those involved not to tell anyone.

Contrary to Howell's direction, his friends confessed to the authorities the very next day. When Howell was subsequently questioned by the police, he claimed to have been in Corinth, Mississippi, with a woman all night. However, at trial, Howell's family testified that he was at home in Blue Mountain at the time of the crime.[1]

Howell, Lipsey and Ray were indicted June 29, 2000, for capital murder. In March, 2001, Howell was tried before the Circuit Court of Union County, Mississippi. At the conclusion

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[1]The facts of this case, as found by the Mississippi Supreme Court, appear in greater detail in paragraphs two through nineteen of the opinion below. *See Howell*, 860 So. 2d at 712-15.

of the guilt phase of the trial, Howell requested instruction D-18, which was a combination of the State's withdrawn instruction on premeditated murder (S-3) and the defendant's proposed instruction on culpable-negligence manslaughter (D-13).[2] This request was denied. The jury convicted Howell of capital murder and, after a separate sentencing hearing, found that Howell should suffer death.

Howell then filed his automatic appeal in the Supreme Court of Mississippi, in which he raised twenty-seven issues for consideration.[3] Only two of those issues are pertinent to the claims raised in this Court.

Of primary significance is the assertion of error raised by Howell in claim number XIV before the Mississippi Supreme Court, namely:

> THE COURT ERRED IN ALLOWING STATE INSTRUCTION S-6 WHICH DID NOT INSTRUCT THE JURY ON THE LESSER

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[2]Howell abandoned the depraved-heart murder instruction that was in his proposed D-13 for the State's withdrawn instruction on premeditated murder, which defense counsel stated to be "the better instruction on the simple murder." J.A. at 17-20, 32. The premeditated murder instruction and the culpable-negligence manslaughter instruction were combined in proposed instruction D-18, which was refused. J.A. at 17-20, 36.

[3]In addition, the Mississippi Supreme Court, pursuant to state statute, considered, sua sponte, the following issue: "Whether the imposition of the death penalty is excessive or disproportionate in this case." *Howell*, 860 So. 2d at 717, 764-65.

> INCLUDED OFFENSE OF SIMPLE MURDER AND MANSLAUGHTER AND THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S INSTRUCTION D-13 AND D-18 ON THE CRIME OF SIMPLE MURDER AND MANSLAUGHTER.

J.A. at 39. The relevant portion of Howell's state-court brief is before this Court as pages 38-40 of the Joint Appendix. In that brief, Howell never purported to raise a federal claim. He never used the term "federal" or cited the Constitution of the United States. He never cited any federal authority at all – much less the seminal case upon which his current claim before this Court is based (*i.e., Beck v. Alabama*, 447 U.S. 625 (1980)).

Rather, Howell alleged that there was evidence to support his proposed manslaughter and murder instructions, and, under Mississippi law, he was, therefore, entitled to these instructions. In support of this claim, Howell cited only three cases, all of which were Mississippi decisions: (1) *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), for the standard of reviewing the denial of instructions under Mississippi law; (2) *Harveston v. State*, 493 So. 2d 365, 373 (Miss. 1986), for the proposition that a murder instruction is appropriate in Mississippi where the jury could have found that the defendant did not commit the murder in the course of a robbery; and, (3) *Edwards v. State*, 737 So. 2d 275 (Miss. 1999), for the purpose of attempting to distinguish Howell's case from a case where the Mississippi Supreme Court had held that a murder

instruction was unwarranted when the evidence indicated that the victim was killed only in the context of a robbery. J.A. at 39.

The Supreme Court of Mississippi addressed the denial of the manslaughter and murder instructions and concluded that Howell's claim was "contradicted by the evidence in the record. The facts of this case clearly do not support or warrant such instructions." *Howell*, 860 So. 2d at 744. The lower court's opinion cited two cases on this issue: *Presley v. State*, 321 So. 2d 309, 310 (Miss. 1975) and *Grace v. State*, 375 So. 2d 419, 420 (Miss. 1979). Both of these Mississippi cases were decided prior to *Beck v. Alabama*, *supra.*

In addition, one other issue from the lower court is relevant to the instant proceedings. Specifically, to the extent Howell claims that there was no evidence to support the underlying felony of robbery[4], it is noteworthy that the

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[4]In Mississippi, the underlying crime of armed robbery, upon which Howell's jury was instructed, includes the attempt to rob. *See* Miss. Code Ann. § 97-3-79 ("Every person who shall feloniously take **or attempt to take** from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery. . .") (emphasis added). Furthermore, the crime of capital murder is also defined as killing during the course of an attempted robbery. *See* Miss. Code Ann. § 97-3-19 (2)(e) ("The killing of a human being without the authority of law by any means or in any manner . . . . When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary,

Mississippi Supreme Court held to the contrary. That is, Howell claimed in issue XII of his state-court brief that the evidence of the underlying felony of robbery was legally insufficient to support Howell's capital murder conviction. S.C.R.[5] Appellant's Brief at 98-99. The Mississippi Supreme Court squarely rejected this claim and held: "There is no doubt that there is **ample** evidence in the record that a reasonable person could infer Howell's intent to rob Pernell." *Howell*, 860 So. 2d at 739 (emphasis added).

Furthermore, the Supreme Court of Mississippi denied relief on the remainder of Howell's claims and affirmed his conviction and sentence October 23, 2003. From this affirmance, Howell brings the instant petition in this Court.

SUMMARY OF THE ARGUMENT

The question raised in Howell's petition was never presented to or considered by the Mississippi Supreme Court. For this reason, this Court is, respectfully, without jurisdiction, and the petition for writ of certiorari should be dismissed. Alternatively, Howell's claim is without merit. That is, *Beck v.*

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kidnapping, arson, **robbery**, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, **or in any attempt to commit such felonies.**") (emphasis added).

[5]The direct appeal record in the Mississippi Supreme Court will be designated as "S.C.R." for state-court record.

Alabama, 447 U.S. 625 (1980), has no application to the instant case. If the evidence had warranted the instructions Howell proposed, there is nothing in Mississippi's law that would have prevented Howell from receiving them. However, the Mississippi Supreme Court found that there were no facts in this record that would have warranted the instructions on murder and manslaughter that Howell urged at trial. Therefore, Howell's claims to the contrary should be dismissed.

ARGUMENT

I. THE QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS NEVER PRESSED OR PASSED UPON IN THE MISSISSIPPI SUPREME COURT; THEREFORE, THIS COURT IS WITHOUT JURISDICTION.

Howell asks the Court to review a federal constitutional claim that was never presented to or decided by the state court below. Therefore, this Court lacks jurisdiction, according to 28 U.S.C. Section 1257 and the firmly established case law.

Specifically, Howell now claims that he was entitled to instructions on manslaughter and murder, based upon the Eighth and Fourteenth Amendments to the Constitution of the Untied States as well as the Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980) (hereinafter "the *Beck* claim"). As was detailed more fully in the foregoing statement of the case, Howell never raised in the lower court any federal claim regarding the denial

of the manslaughter and murder instructions at issue. Rather, the question before the Mississippi Supreme Court was whether, under state law, the evidence supported these proposed instructions.

Nonetheless, Howell now asserts two inapposite theories as to how the Court might have jurisdiction of the *Beck* claim. First, Howell alleged in his petition that he "raised this issue on appeal" below, but the Mississippi Supreme Court's opinion and the authority contained therein did not "address the federal constitution." *See* Petition for Certiorari at 3. Then, after this Court's instruction to address the question of jurisdiction, Howell now contends that federal and state law are "virtually identical" on this issue. *See* Brief for Petitioner at 17, 18. According to Howell, therefore, the Mississippi Supreme Court understood "that the claim before it include[d] the federal constitutional claim and both the State of Mississippi and capital defendants operate[d] under the notion that the claim [was] premised on both state law and the federal constitution." *See* Brief for Petitioner at 18-19.

The latter theory is inconsistent with that which was initially raised in Howell's petition.[6] This inconsistency

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[6]It is unclear how the lower court could fail to address a federal claim that it simultaneously addressed by implication. Most importantly, however, it is noteworthy that Howell has completely changed his argument on this point midstream (and, upon being prompted by the Court to address jurisdiction). *See* U.S. Sup. Ct. Rule 24 (a) (noting that a merits brief "may not change the substance

demonstrates the obviously tenuous nature of Howell's assertions of jurisdiction. Indeed, as the following discussion plainly indicates, both assertions are wholly without basis in fact or law.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'" *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-97 (1981)).

The Court has discussed several crucial bases for this "not pressed or passed upon" rule. *See McGoldrick v. Compagnie General*, 309 U.S. 430, 435-36 (1940). The first vital concern is comity. The Court has long held that "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 91 (1997) (quoting *Webb*, 451 U.S. at 500); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

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of the questions already presented" in the petition).

In addition, there are other important "practical considerations" that the Court has noted in connection with this rule. *Bankers Life & Casualty Co.*, 486 U.S. at 79. For example, the rule protects the Court's scarce resources by avoiding unnecessary consideration of cases where state courts resolve issues in accordance with state law. *Adams*, 520 U.S. at 90-91; *Webb*, 451 U.S. at 500. The rule assists the Court by allowing for proper development and refinement of the record, including: the pertinent facts and law; the state court's reasoning for its decision; and, the issues presented by the parties. *Adams*, 520 U.S. at 91; *Bankers Life & Casualty Co.*, 486 U.S. at 79; *Webb*, 451 U.S. at 500; *Cardinale*, 394 U.S. at 439.

Clearly, these well-settled bases for declining to consider a case such as Howell's are vitally important to the judiciary. The Court has concluded that scrupulous adherence to the "not pressed or passed upon" rule will, "promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). This conclusion is equally true and applicable in the instant case.

Furthermore, in contemplating the limits of this Court's jurisdiction, it is also necessary to recognize that Howell bears the burden of proving that his case is proper for consideration. As Howell conceded in his petition, the Mississippi Supreme Court never addressed any federal constitutional claim as to the

denial of the instructions at issue. Therefore, Howell bears the burden of demonstrating to this Court that he properly raised the federal claim in the state court.

> When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Board of Directors of Rotary Int'l, 481 U.S. at 550 (citations and internal quotation marks omitted). Howell has not met and cannot meet this burden.

A. THIS CLAIM WAS NOT EXPLICITLY RAISED OR CONSIDERED BELOW.

Howell's first claim regarding jurisdiction is that he raised the federal constitutional question below and the Mississippi Supreme Court failed to address it. However, in his brief before the Mississippi Supreme Court, Howell neither used the word "federal" to describe his claim, nor did he cite to the federal constitution or any other federal authority. He cited only Mississippi cases. More telling, however, is the fact that Howell never cited *Beck v. Alabama*, 447 U.S. 625 (1980), which is the federal authority upon which he now relies in this Court.

In addition, as Howell conceded in his petition for certiorari, the Mississippi Supreme Court's decision does not refer to or rely upon any federal authority whatsoever. In fact,

the two Mississippi decisions cited by the lower court were both rendered prior to this Court's decision in *Beck*, *supra*. *See* Petition for Certiorari at 3.

Under these circumstances, Howell cannot legitimately contend that the *Beck* claim was pressed or passed upon in the Mississippi Supreme Court – much less make the affirmative showing this Court requires. *See Street*, 394 U.S. at 582. Howell has "done nothing to demonstrate that [he] complied with the applicable state rules for raising [his] federal due process claims before the" Mississippi Supreme Court. *See Adams*, 520 U.S. at 87.

Howell's petition does not cite a single page, paragraph, or sentence in his brief where this federal claim was supposedly raised. *See* U.S. Sup. Ct. Rule 14(g)(i) (requiring "specific references" to the places in the record where the matter in dispute appears). In fact, he cannot do so, because he never raised the *Beck* claim in the Mississippi Supreme Court.

Indeed, this Court has dismissed writs of certiorari in other cases where the state court was silent and where there existed a considerably greater factual basis upon which to argue that a federal claim had been presented. For example, in *Adams, supra*, the petitioners raised "passing invocations of 'due process'" in their state-court brief, but failed to specify whether they were relying on the federal or state constitution. *Adams*, 520 U.S. at 89, n. 3. The petitioners' brief in the state court also cited the federal case that would have supported the

federal claim, albeit in a different context. *Id.* at 88. Furthermore, out of an abundance of caution, the respondents addressed the federal question in their brief before the lower court. *Id.* In addition, the respondents failed to raise an objection to jurisdiction in their brief in opposition. *Id.* at 91-92. On those facts, this Court held that the petitioners "did not meet our minimal requirement that a *federal* claim was presented." *Id.* at 89, n.3 (emphasis in original).

Similarly, in *Webb*, *supra*, this Court dismissed a writ of certiorari for lack of jurisdiction in a case where: the petitioner used the phrase "full faith and credit" in the lower court but failed to cite to the federal constitution; the state constitution in question did not have a "full faith and credit" clause; and, the respondent did not dispute jurisdiction in the brief in opposition before this Court. On those facts, this Court concluded: "Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without jurisdiction in this case." *Webb*, 451 U.S. at 501-02.

Clearly, Petitioner Howell has done far less than unsuccessful petitioners in other cases to affirmatively show that the question presented in his petition for certiorari was presented to the state court. Howell never mentioned the phrase "due process" in his state-court brief on this issue. J.A. at 39-40. He never cited the federal constitution, a federal case, or, specifically, *Beck*, *supra*, in any context with regard to the

denial of the disputed instructions. Moreover, the State did not address any purported federal claim in its brief on this point. Additionally, the State timely raised its objections to jurisdiction in its brief in opposition before this Court. Thus, Howell presents an even less compelling case for jurisdiction than other cases in which this Court has ruled against the petitioner as to jurisdiction.

Howell erroneously claims that the *Beck* case at issue in this appeal supports his assertion of jurisdiction. Specifically, Howell alleges that, in *Beck*:

> the defendant had clearly presented the claim regarding the granting of a lesser offense jury instruction to the lower state courts but did not develop the issue in his final brief on the merits to the Alabama Supreme Court. The state supreme court affirmed the conviction stating that the defendant had raised only one claim which related to state law.

Brief for Petitioner at 15-16 (citing *Beck*, 447 U.S. at 630-31, n. 6).

To the contrary, however, Beck's "petition for certiorari to the Alabama Supreme Court . . . specifically stated that he was challenging the Alabama statute as being in violation of the Eighth, Sixth, and Fourteenth Amendments to the United States constitution. . ." *Beck*, *id.*[7] Therefore, Howell has obviously

[7]The Court also noted that the Alabama Attorney General did not dispute jurisdiction, and that the Court "should not simply brush

mischaracterized this Court's discussion of jurisdiction in *Beck*, *supra*. Furthermore, even if Howell's interpretation of the facts in *Beck*, *supra*, were accurate, it would avail him of nothing – given that Howell never mentioned a federal claim or any federal authority on this issue in the trial or appellate courts of Mississippi.

Indeed, Howell has completely failed to demonstrate that his *Beck* claim was raised or considered in the lower court. He cannot make such a demonstration, given that there is absolutely nothing in the state-court record to remotely indicate that Howell raised this claim for consideration below. Similarly, any assertion that the state court remotely considered any federal claim on this point is wholly unsubstantiated by the record (as was conceded in Howell's petition before this Court). Therefore, Howell's initial claim (*i.e.*, that he presented the *Beck* claim and the Mississippi Supreme Court failed to address it) is without basis in fact or law.

B. THIS CLAIM WAS NOT IMPLICITLY RAISED OR CONSIDERED BELOW.

Howell's second and contradictory assertion of jurisdiction (raised for the first time in his brief of the merits) is that, "the Mississippi Rule on considering lesser offense

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aside the Alabama Attorney General's view of his own State's law." *Id.*

instructions in death penalty cases has an intrinsic[8] federal constitutional basis." *See* Brief for Petitioner at 13. This new claim is a completely inaccurate statement of Mississippi law for two reasons.

First, as will be discussed in further detail in issue II, *infra*, the federal law on this point is distinguishable from Mississippi law for many reasons. Of particular importance to the issue of jurisdiction is the fact that federal law only requires a lesser-included offense instruction in cases where State law recognizes the offense as such. However, the Mississippi

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[8]As Howell argues, "jurisdiction does not depend on citation to book and verse." Brief for Petitioner at 17 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 113-14, n.9 (1982)). However, the State would also point out that, jurisdiction should depend on citation to **something**. That is, in order for this Court to consider whether the state and federal claims are somehow interwoven, Howell would have to present some evidence that the federal claim is even arguably mentioned in the proceedings below. There must be some question or doubt on the pleadings. Otherwise, there would be nothing with which the state-law claim could be considered to interweave and nothing that could be considered "intrinsic" to that state-law claim. *See, generally, Michigan v. Long*, 463 U.S. 1032, 1037 (1983) (discussing this Court's procedures when the record is unclear as to whether the lower court was actually considering a federal claim, given that the lower court's opinion "referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law"). As discussed previously, there is no such lack of clarity in Howell's case; there simply was no assertion of a federal claim in the Mississippi Supreme Court. Moreover, as Howell conceded in his petition, the opinion of the lower court did not rely on federal authority.

Supreme Court is much more liberal in allowing manslaughter and/or murder instructions in capital murder cases. In addition, when faced with *Beck* claims, the Mississippi Supreme Court has consistently distinguished Mississippi law from the unconstitutional Alabama statute at issue in *Beck*, *supra*.

1. THE FEDERAL LAW IS NOT INTRINSIC TO THIS STATE-LAW CLAIM.

The Supreme Court of Mississippi very liberally allows instructions on manslaughter and murder in capital murder cases – regardless of whether those offenses are technically lesser-included or merely lesser offenses of capital murder. *See Mease v. State*, 539 So. 2d 1324, 1325 (Miss. 1989) (holding that, in cases where "the facts may fit two or more of the legally defined genera of homicide, the accused may of right demand that the jury be instructed of the alternatives the law affords"); *Lanier v. State*, 450 So. 2d 69, 79-80 (Miss. 1984) (reversing for failure to give a heat-of-passion manslaughter instruction in a capital murder case where the defendant was charged with killing a peace officer – even though heat-of-passion manslaughter is not technically a lesser-included offense thereof).

The lower court's rationale for liberally allowing manslaughter and murder instructions in capital murder cases is that the defendant is entitled to have the jury instructed on his theory of the case. The only requirement for granting such instructions under state law is that there must be **some** evidence

in the record to support the requested murder or manslaughter instruction. This line of Mississippi cases has been referred to as the "*Harper-Lee-Fairchild* evidentiary standard" for reviewing the denial of manslaughter and murder charges. *See Mease*, 539 So. 2d at 1334 (citing *Harper v. State*, 478 So. 2d 1017, 1021 (Miss. 1985); *Lee v. State*, 469 So. 2d 1225, 1230-31 (Miss. 1985); *Fairchild v. State*, 459 So. 2d 793, 800 (Miss. 1984)).

The basis for this line of cases appears to be the 1976 (pre-*Beck*) case of *Jackson v. State*, which is discussed *infra*, and which was the first, post-*Gregg* death penalty case in Mississippi. *See Jackson v. State*, 337 So. 2d 1242 (Miss. 1976); *Gregg v. Georgia*, 428 U.S. 198 (1976). Therefore, it is evident that the Mississippi law on this subject is considerably more expansive than and pre-dates this Court's pronouncement in *Beck*.

2. THE MISSISSIPPI SUPREME COURT HAS CONSISTENTLY DISTINGUISHED THE FEDERAL AUTHORITY FROM THE STATE LAW ON THIS ISSUE.

Nonetheless, Howell quotes dicta from the Mississippi Supreme Court's decision in *Fairchild v. State*, 459 So. 2d 793, 800 (Miss. 1984), to support his new allegation that the *Beck* claim was implicitly raised and addressed in the lower court proceedings. *See* Brief for Petitioner at 18-19. In the *Fairchild* dicta, the Mississippi Supreme Court noted in passing that the

denial of lesser-included offense instructions "takes on constitutional proportions" and cited *Beck*, *supra*. *See Fairchild*, 459 So. 2d at 800. Based on this, Howell contends that a *Beck* claim is "intrinsic" to Mississippi's law on this subject. This is inaccurate.

It is true that, when squarely faced with *Beck* claims, the Mississippi Supreme Court has noted that – to the extent *Beck* requires lesser-included offense instructions, if warranted by the evidence – *Beck* is in accord with the longstanding law in Mississippi. *See Wilson v. State*, 574 So. 2d 1324, 1336-37 (Miss. 1990) (quoting *Lanier*, 450 So. 2d at 79 and *Jackson v. State*, 337 So. 2d 1242, 1255 (Miss. 1976)); *Pinkney v. State*, 538 So. 2d 329, 353 (Miss. 1989) (vacated on other grounds in *Pinkney v. Mississippi*, 494 U.S. 1075 (1990)). However, by no stretch of the imagination has the Mississippi Supreme Court adopted a "*Beck*" rule to be used in considering the denial of murder and manslaughter instructions in capital murder cases.

Rather, when Mississippi inmates have raised *Beck* claims, the Mississippi Supreme Court has readily distinguished Mississippi's laws from the unconstitutional Alabama statute at issue in *Beck*. For example, in *Berry v. State*, the Mississippi Supreme Court held:

> Under the [Alabama] statute, the judge was specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense. . . . **This is not the case** with Berry, or **with the Mississippi statutes and**

> **case law**. The United States Supreme Court in *Beck* favorably cites *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976). *Beck*, 447 U.S. at 635, 100 S.Ct. at 2388-89. 65 L.Ed. 2d at 401 n. 10. This Court in *Jackson* struck down part of Mississippi's post-*Furman* death penalty statute which contained a similar prohibition on charging lesser included offenses, while warning that lesser included offense instructions should not be given indiscriminately or automatically, but when warranted by the evidence.

Berry v. State, 575 So. 2d 1, 11-12 (Miss. 1990) (emphasis added). Clearly, Mississippi's law is different from the preclusionary statute at issue in *Beck*, and the Mississippi Supreme Court has so held. Therefore, there is no reason for the Mississippi Supreme Court to adopt a "*Beck*" standard (as Howell contends it has), because there is no federally unconstitutional preclusion in Mississippi law.[9]

In addition, the Mississippi Supreme Court has distinguished *Beck* claims from the longstanding (and much more liberal) state law on lesser-offense instructions. For

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[9]In fact, to the contrary (as Howell pointed out in his petition), Mississippi's statute is quite generous in allowing for instructions on lesser offenses in capital cases. *See* Miss Code Ann. § 99-17-20 ("The judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused").

example, in the capital murder case of *Goodin v. State*, 787 So. 2d 639 (Miss. 2001), the inmate cited *Beck* and claimed that the trial court erred in the denial of a culpable-negligence manslaughter instruction. The Mississippi Supreme Court distinguished *Beck* and held that Goodin's jury was given the option of sentencing him to "the death penalty; life imprisonment without parole; or life imprisonment [and that these] options go far beyond sentencing the defendant to death or setting him free as condemned in *Beck*." *Goodin*, 787 So. 2d at 656. *See Jackson v. State*, 684 So. 2d 1213, 1228 (Miss. 1996) (separately addressing state law and *Beck* claim and distinguishing *Beck* on this same basis); *In re Jordan*, 390 So. 2d 584, 585, (Miss. 1980) (distinguishing *Beck* for same reason).

Furthermore, the Mississippi Supreme Court in *Goodin* clearly held that it considered the state and federal claims to be totally distinct and separate: "Having found no constitutional flaws in the jury instruction given, we must now determine whether **our practice** entitles Goodin to a manslaughter instruction. . . . The trial judge correctly found that Goodin presented no evidence at trial to warrant an instruction on culpable negligence manslaughter. This assignment of error is without merit." *Id.* (emphasis added).

Thus, even when an inmate squarely raises a *Beck* claim in the Mississippi Supreme Court (which Howell did not do), the Mississippi Supreme Court has never held that *Beck* is

controlling authority or adopted a "*Beck*" standard for considering the state-law question of the denial of lesser-offense instructions. To the contrary, the Mississippi Supreme Court has distinguished *Beck*, rather than embraced it.

Basically, Howell's convoluted claim on this point appears to be based on the following facts: (1) in his brief in the lower court, Howell cited a case (*Harveston v. State*, 493 So. 2d 365 (Miss. 1986)) for one proposition (*i.e.*, that a murder instruction is appropriate in Mississippi where the jury could have found that the defendant did not commit the murder in the course of a robbery) and that case cited a case (*Fairchild, supra*) that cited *Beck*, *supra*, in passing for another proposition (*i.e.*, that the denial of lesser-included offense instructions can have constitutional ramifications); and, (2) the State, in its brief in the lower court, cited a case (*Randall v. State*, 716 So. 2d 584 (Miss.1998)) for one proposition (*i.e.*, that this crime only occurred in the context of a robbery) and that case cited a case (*Fairchild, supra*) that cited *Beck*, *supra*, in passing for another proposition (*i.e.*, that the denial of lesser-included offense instructions can have constitutional ramifications). Based on these facts, Howell now contends that, "both Howell and the State of Mississippi were operating on the notion that the rule they were seeking to have applied was based on the federal constitutional due process clause as interpreted by Beck v. Alabama." Brief for Petitioner at 14. Not only is this analytically impossible, it is also completely inaccurate.

This Court has held that – even when a petitioner makes casual references in the lower court to federal authority in support of arguments on state law or in the context of an unrelated argument – the petitioner has not sufficiently preserved a federal claim for review. *Adams*, 520 U.S. at 88; *Bankers Life* at 77-78; *Board of Directors of Rotary, Int'l*, 481 U.S. at 550, n. 9; *Webb*, 451 U.S. at 493. Surely, therefore, it is completely illogical and specious for Howell to assert that he properly raised a federal claim below, based on the facts he has presented to this Court.[10] This reference to federal authority that both Howell and the State are alleged to have made is far too vague and far too removed from the actual issue in the lower court to even be considered comprehensible – much less an affirmative showing that Howell raised a federal claim in the lower court. Furthermore and most assuredly, the State was, in no manner "operating on the notion" that Howell raised a federal claim with respect to this issue in the lower court. Howell's argument to the contrary is simply incorrect.

Indeed, if the State had this "notion" (as Howell now contends), the State would have argued that such a federal claim was procedurally barred from consideration by the Mississippi

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[10]To reiterate, those facts were: (1) that Howell cited a case in the context of a state-law argument below that cited a case that cited the federal authority in passing for a different reason, and/or, (2) that the State – not Howell – cited a case, in the context of a state-law argument below, that cited a case that cited the federal authority in passing for a different reason.

Supreme Court for failure to raise in the trial court. *See Evans v. State*, 725 So. 2d 613, 632 (Miss. 1997) (reiterating that issues not presented to trial judge are "procedurally barred and error, if any is waived [and that this] rule is not diminished in a capital case"). *Williams v. State*, 684 So. 2d 1179, 1203 (Miss. 1996) (same). *See also Byrom v. State*, 863 So. 2d 836, 878 (Miss. 2003) (reiterating that "an objection on one or more specific grounds constitutes a waiver of all other grounds") (quoting *Doss v. State*, 709 So. 2d 369, 378 (Miss. 1996) and *Conner v. State* 632 So. 2d 1239, 1255 (Miss. 1993)); *Bishop v. State*, 812 So. 2d 934, 942 (Miss. 2002) (same).

Furthermore, the State would have argued that any federal claim was barred in the Mississippi Supreme Court for Howell's failure to cite authority.[11] *Byrom*, 863 So. 2d at 853 (reiterating that the failure to cite relevant authority obviates the Mississippi Supreme Court's obligation to review such issues on appeal); *Howell v. State*, 860 So. 2d 704, 760 (Miss. 2003) (same, even in the instant case); *Simmons v. State*, 805 So. 2d

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[11]Howell asserts that he argued at trial that the disputed instructions would "avoid placing the jury in the untenable position of convicting him of capital murder or cutting him loose. . . this argument being this Court's primary rationale supporting Beck v. Alabama." Brief for Petitioner at 14. However, such vague phraseology clearly is not enough to properly present a *Beck* claim to the Mississippi Supreme Court under that court's rules (which require the citation of relevant authority to support any claim).

452, 487 (Miss. 2001) (same); *Mitchell v. State*, 792 So. 2d 192, 202 (Miss. 2001) (same).

Thus, "[e]ven if, as a matter of federal law, petitioner had properly raised [his] federal question, we might still confront here an independent state procedural ground barring our consideration of the federal issue." *See Webb*, 451 U.S. at 498, n. 4.

In addition, Howell's claim that he or the State somehow raised the federal claim by implication (by citing a case that cited a case that cited *Beck*) is obviously feeble and transparent. Furthermore, as noted previously, the two cases cited by the Mississippi Supreme Court were pre-*Beck* and certainly could not be construed as to have implicitly encompassed a *Beck* claim.[12] Based on the foregoing, it can only be concluded that the *Beck* claim was not implicitly pressed or passed upon in the lower court.

This conclusion brings the analysis back to the practical reasons for rejecting flimsy claims of jurisdiction such as the one Howell now brings before this Court. That is – in order to demonstrate that the federal claim was not implicitly raised or considered below – the State has now reported to the Court in summary fashion on Mississippi's law regarding certain

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[12]Indeed, this fact seemed to be a considerable point of contention in Howell's petition for certiorari, but has now been dropped in favor of this new argument on the supposedly intrinsic nature of the *Beck* claim in Mississippi law.

procedural bars as well as the state law for nearly the past three decades on the propriety of murder and manslaughter instructions in capital murder cases. This fact alone demonstrates the inherent, practical difficulties in applying Howell's position regarding jurisdiction

Pragmatically speaking, it is much more appropriate to place the light burden on petitioners to this Court to interject the "federal" nature of any given claim into the proceedings below. Otherwise, in every direct appeal of a criminal conviction in the state courts, the State would be forced to brief all possible federal constitutional claims and the state courts would be forced to address such claims – regardless of whether the inmate actually raised such claims, or, in fact, intended to do so.

It would be completely unfair to place the burden on state courts to be clairvoyant by requiring them to determine whether they are inadvertently missing an opportunity to address a federal claim. This is especially true, when an unarticulated federal claim could possibly serve as the basis for reversal by this Court. Surely, if the concept of comity is to have any meaning, then a party must be required to posit a claim in the state court in such a manner as to make that court aware of the alleged federal nature of the claim.

Moreover, if Howell's position were adopted, this Court would be forced to study the law of all fifty states on every conceivable constitutional question every single time a decision is made on whether to grant a writ of certiorari under 28 U.S.C.

§ 1257. Indeed, in every case, the parties would have to litigate the issue of how closely aligned the state and federal law are[13] or should have to be – in order for this Court to decide whether to hear a federal claim that the state court did not even know it was being asked to consider. Clearly, Howell's position on jurisdiction is illogical and impractical.

The dispositive question upon which this Court must base its decision on Howell's case is not (as Howell contends) whether there is a federal basis for Mississippi's law on lesser-offense instructions. Rather, and with respect, the question is: whether this Court needs to know Mississippi's law on this or any subject – prior to deciding whether to grant a writ of certiorari. *See Webb*, 451 U.S. at 501 (noting that, "[i]n terms of our own workload, this is a very substantial matter"). *See also Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (noting that the "process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar").

It would be impossible to substantively analyze the similarities between state and federal laws in every case – prior

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[13]Indeed, no State (including Mississippi) may afford less protection to its inmates than those protections which are guaranteed and made applicable to the States in the federal constitution. Therefore, every state-court decision, by implication, must give a criminal defendant the minimal federal protection, when applicable. This does not mean that the criminal defendant has raised a federal claim or that the lower court has ruled upon a federal claim.

to determining whether jurisdiction exists under 28 U.S.C. Section 1257. Rather, the more appropriate course of action is to continue to apply this Court's longstanding precedent (set forth above), which requires the petitioners in this Court to demonstrate that the questions presented in the petition for a writ of certiorari were actually raised or considered in the lower court.

C. THE APPROPRIATE CONCLUSION TO BE DRAWN IN THIS CASE IS THAT HOWELL HAS FAILED TO ESTABLISH THIS COURT'S JURISDICTION TO CONSIDER THE QUESTION PRESENTED IN HOWELL'S PETITION.

The *Beck* claim at issue in Howell's petition for certiorari was never explicitly or implicitly raised or ruled upon in the court below.

> At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law.

Webb, 451 U.S. at 501 (emphasis in original). Howell has utterly failed to affirmatively show that he meets these minimal requirements. Therefore, the State respectfully submits that this Court is without jurisdiction to hear the question Howell presents for consideration.

II. *BECK V. ALABAMA*, 447 U.S. 625, 638 (1980), IS WHOLLY INAPPLICABLE TO HOWELL'S CASE.

Howell's substantive claim is that "under the Eighth and Fourteenth Amendments to the Constitution of the United States" he was entitled to have his jury instructed on murder and manslaughter. In support of this proposition, Howell cites *Beck v. Alabama*, 447 U.S. 625, 638 (1980), in which this Court struck down an Alabama statute that precluded juries in capital cases from considering statutory lesser-included offenses that were supported by the evidence. The Alabama statute further mandated that the jury automatically impose the death penalty upon finding a defendant guilty of a capital offense. This Court held that the Alabama procedure "introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck*, 447 U.S. at 643.

Howell's case is distinguishable from *Beck*, *supra*, for three reasons. First, the Mississippi statutes are completely different from the unconstitutional Alabama statutes at issue in *Beck*, *supra*. There is nothing in Mississippi's law that would have prevented Howell from receiving the requested instructions, if they had been warranted by the evidence. In addition, *Beck*, *supra*, applies only to offenses that are lesser-included under state law. Howell has utterly failed to even argue – much less demonstrate – that culpable-negligence manslaughter is a lesser-included offense of capital murder

under the Mississippi statutes. Finally, *Beck*, *supra*, applies only in cases where the proposed lesser-included offense instruction was supported by the evidence adduced at trial. As the Supreme Court of Mississippi plainly held, there was no evidence to support either the murder or the manslaughter instructions at issue in Howell's case.

Generally speaking, Howell's claim before this Court appears to mischaracterize an evidentiary question that was answered by the state court as a "due process" question. This "due process" claim is untenable, given that Mississippi's laws provide more protection than the federal authority. For all these reasons, Howell's claim is without merit.

A. MISSISSIPPI'S CAPITAL SENTENCING SCHEME IS STRIKINGLY DISSIMILAR TO THE UNCONSTITUTIONAL ALABAMA STATUTE AT ISSUE IN *BECK*.

The Alabama statute at issue in *Beck* "specifically prohibited [the trial judge] from giving the jury the option of convicting the defendant of a lesser included offense." *Beck*, 447 U.S. at 628. Mississippi's capital sentencing scheme contains no such preclusion clause. *See Jackson v. State*, 337 So. 2d 1242 (Miss. 1976) (striking down such a clause, prior to *Beck*).

To the contrary, Mississippi law very liberally allows for murder and/or manslaughter instructions in any capital murder case, when supported by the evidence. *See Mease v. State*, 539

So. 2d 1324, 1325 (Miss. 1989); *Lanier v. State*, 450 So. 2d 69, 79-80 (Miss. 1984). *See also* § 99-17-20 ("The judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused.").

Furthermore, the Mississippi statutes do not require the jury to automatically impose the death sentence upon a finding of guilt in a capital case. *See Goodin*, 787 So. 2d at 656 (distinguishing *Beck* on this basis); *Jackson*, 684 So. 2d at 1228 (same); *Jordan*, 390 So. 2d at 585. *See also* Miss Code Ann. § 97-3-21 (setting forth sentencing options for one convicted of capital murder as life, life without parole, and death).

Thus, Howell's jury "did not have to consider the dilemma faced by Beck's jury; its alternative to death was not setting [Howell] free, but rather sentencing him to life [or life without parole]." *See Hopkins v. Reeves*, 524 U.S. 88, 98-99 (1998) (noting the importance of such a distinction, but declining to decide "whether that difference alone would render *Beck* inapplicable").

Simply put, there is nothing about Mississippi's law that would have prevented Howell from receiving the requested instructions, if the instructions were warranted by the evidence. Therefore, the due process violation at issue in *Beck* would never be at issue under Mississippi law. Howell's claim before

this Court appears to mischaracterize an evidentiary question that was answered by the state court as a due process question. However, this "due process" claim is untenable, given that the process afforded Howell under Mississippi law is completely consistent with the federal authority (and, in fact, Mississippi's law affords Howell more protection than the federal law does).

Clearly, the "'artificial barrier' that restricted [Alabama's] juries to a choice between conviction for a capital offense and acquittal" does not exist in Mississippi. *See id.* at 96 (citations omitted). Therefore, the *Beck* decision is inapplicable to Howell's case, due to the differences in the state statutes at issue.

B. HOWELL HAS FAILED TO ESTABLISH THAT THE CULPABLE-NEGLIGENCE MANSLAUGHTER INSTRUCTION AT ISSUE WAS FOR A CRIME THAT IS CONSIDERED A LESSER-INCLUDED OFFENSE OF CAPITAL MURDER UNDER MISSISSIPPI LAW.

With respect to the culpable-negligence manslaughter instruction at issue in the instant case, Howell has failed to allege – much less demonstrate – that such manslaughter is a lesser-included offense of capital murder as defined by the statute under which Howell was charged. This Court has clearly limited the holding in *Beck*, *supra*, to cases where state law recognizes the offense at issue as a lesser-included offense of the capital offense (*i.e.*, the elements of the lesser-included

offense mirror elements of the primary offense). There simply is no federal requirement that a state court give an instruction "on some *other* offense – what could be called a 'lesser related offense' – when no lesser included offense exists." *Hopkins v. Reeves*, 524 U.S. at 97 (emphasis in original).

As stated previously, Mississippi's law is far more generous to those accused of capital murder. Therefore, the issue of whether this was a lesser-included or simply a lesser-related offense was immaterial to the state court.[14] However, for purposes of this Court's analysis of the *Beck* claim, it is significant that Howell has failed to even argue that culpable-negligence manslaughter is a lesser-included offense of capital murder as defined by the applicable statutes. Even a cursory review of the pertinent statutes clearly indicates that he cannot credibly make such a claim.

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[14]This distinction between the state and federal law on this question highlights the jurisdictional problem outlined above. It cannot be determined from this record whether – on the facts in this case – culpable-negligence manslaughter (or for that matter, murder) could be considered a lesser-included offense under Mississippi law. The state court was never asked to make such a determination. In fact, that determination was irrelevant under state law, which allows for an instruction on **any** homicide in a capital murder case, when supported by the evidence. As stated previously, this fact alone eviscerates Howell's contention that the state and federal claims "are virtually identical" on this question. *See* Brief for Petitioner at 17, 18.

That is, Howell was convicted of capital murder, defined by state statute as follows: "The killing of a human being without the authority of law by any means or in any manner. . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies[.]" *See* Miss. Code Ann. § 97-3-19(2)(e).

Howell simply cannot and does not demonstrate that the elements of culpable-negligence manslaughter are also elements of the primary offense of capital murder. The record reflects that proposed instructions D-13 and D-18 on culpable-negligence manslaughter were identical[15] and were based on the "catch-all" Mississippi manslaughter statute, which provides that: "Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter." *See* Miss. Code Ann. § 97-3-47. As the instruction indicates, culpable negligence for this purpose is defined as negligence "so gross as to be tantamount to a wanton

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[15]As noted previously, the distinction in the two instructions is in the definition of murder. The defendant at trial opted for the "better" definition of murder in proposed instruction D-18. J.A. at 17-20, 32.

disregard of, or utter indifference to the safety of human life[.]" J.A. at 18, 20.

There is no way that this definition of manslaughter could be a lesser-included offense of capital murder as defined above.[16] In fact, Howell does not even assert that it is. Therefore, *Beck*, *supra*, is wholly inapplicable to the manslaughter instruction[17] at issue in the instant case, given the

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[16]Indeed, the manslaughter statute specifically differentiates itself from "[e]very other killing. . .not provided for in this title" – which would include capital murder. *See* Miss. Code Ann. § 97-3-47. Moreover, the capital murder statute under which Howell was convicted does not contain a culpable negligence aspect at all. *See* Miss. Code Ann. § 97-3-19(2)(e).

[17]As noted elsewhere, Howell abandoned the depraved-heart murder instruction in D-13. J.A. 17-20, 32, 36. Depraved-heart murder is defined as the "killing of a human being without the authority of law by any means or in any manner. . . [w]hen done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual." *See* Miss. Code Ann. § 97-3-19 (1)(b). Howell has not demonstrated how this could be considered a lesser-included offense of capital murder.

With respect to the premeditated murder as defined in D-18, there could be circumstances under which this crime could be a lesser-included offense of capital murder as defined in Section 97-3-19(2)(e), which includes killings that are "with or without" deliberate design. *See* Miss. Code Ann. § 97-3-19(2)(e). *See also* Miss. Code Ann. § 97-3-19(1)(a) (defining murder as the "killing of a human being without the authority of law by any means or in any manner... [w]hen done with deliberate design to effect the death of any

instruction did not define a lesser-included offense of capital murder.

C. AS THE MISSISSIPPI SUPREME COURT HELD, THERE IS NO EVIDENCE IN THIS CASE TO SUPPORT THE MANSLAUGHTER AND MURDER INSTRUCTIONS AT ISSUE.

Finally, the State submits that Howell's claim is without merit because there was no evidence to support the murder and manslaughter instructions at issue in the instant case. As the Mississippi Supreme Court plainly held: "The facts of this case clearly do not support or warrant such instructions." *See Howell*, 860 So. 2d at 744. Therefore, Petitioner's claim to the contrary is without factual basis. *See, generally, Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (setting forth the deferential standard of review for factual issues determined by state courts).

Given this finding of fact and the due deference afforded such findings, it is obvious that Howell's claim is completely unsubstantiated. In fact, Howell makes only exceedingly vague assertions as to how the facts of this case might possibly constitute manslaughter or murder.

The definition of culpable-negligence manslaughter was set forth above. *See* Miss. Code Ann. § 97-3-47. The definition

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particular individual." However, as discussed, *infra*, the evidence in this case does not indicate that Howell premeditated the killing.

of murder that Howell preferred[18] at trial was contained in D-18, and is derived from the state statute on premeditated murder, which was also set forth above. *See* Miss. Code Ann. § 97-3-19(1)(a).

Howell basically enunciates four different scenarios under which he claims to have been entitled to an instruction on murder or manslaughter: (1) there was no evidence of robbery; (2) the victim sprayed mace on Howell; (3) Howell wanted only to sell the victim drugs; and (4) Howell wanted only to borrow money from the victim.[19] Generally speaking, Howell does not elaborate on how these "facts" might constitute murder or manslaughter.

Moreover, upon examining each of these scenarios, it is evident that Howell has taken great liberties with the record. Basically, Howell is attempting to hammer a square peg into what the Mississippi Supreme Court has declared to be a round hole. Howell would like to make the "facts" he presents fit

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[18]As noted previously, Howell abandoned his request for the depraved-heart murder instruction contained in D-13. J.A. 17-20, 32, 36. Nonetheless, Howell has failed to assert any facts or give any explanation as to how his actions in this case could possibly constitute depraved-heart murder, either.

[19]The Mississippi Supreme Court rejected the first three of these claims. The fourth is alleged for the first time in the Brief for Petitioner. *See* U.S. Sup. Ct. Rule 24 (a) (noting that a merits brief "may not change the substance of the questions already presented" in the petition).

Mississippi's statutory definitions of murder and manslaughter at issue, but he simply cannot do so.[20] So, rather than explaining how these "facts" support the legal definitions of any crime other than capital murder, Howell simply makes broad, conclusory claims that are without basis in fact or law.

Specifically, the first scenario Howell presents is that there was no evidence of robbery, and, therefore, the jury should have been instructed on murder.[21] The Mississippi Supreme Court considered the facts in this case in detail and concluded: "There is no doubt that there is **ample** evidence in the record that a reasonable person could infer Howell's intent to rob Pernell." *Howell*, 860 So. 2d at 739 (emphasis added). In fact, the State submits that the only explanation in the record as to why Howell flagged down the victim was that Howell "needed to make a sting" or he would be "locked up."

Regardless, however, Howell completely fails to inform this Court as to how he could have been guilty of premeditated

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[20]It is also noteworthy that Howell's defense at trial was alibi. It is quite incongruous for Howell to claim that he was not there and he did not do it, but when he did it, he did not intend to rob the victim; the victim sprayed him with mace; he only wanted to sell the victim drugs; and/or he only wanted to borrow money from the victim.

[21]It does not appear that Howell is claiming that he could be guilty of culpable-negligence manslaughter based on the alleged "fact" that he was not committing robbery. Certainly, he does not set forth how such "fact" would constitute culpable negligence.

murder in this case. There is no evidence that Howell went to the window of the victim's car to kill him, a fact which the District Attorney pointed out at trial.[22] In fact, even Howell repeatedly reminds this Court that he did not approach the victim's vehicle with his gun drawn. *See* Brief for Petitioner at

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[22]Specifically, the District Attorney argued that neither the premeditated murder nor the culpable negligence manslaughter instructions were warranted on the evidence, arguing, in part:

> [W]e couldn't prove simple murder if we wanted to. We don't have any. We don't have the intent. The murder to prove a simple premeditated murder. So that is why I say it's not a murder. This instruction is not supported by the facts of this case. They didn't know the victim so obviously he didn't have any other than to rob them and kill him other than the robbery motive. So therefore we are saying that there is no evidence of premeditation and simple murder. Whereas the evidence is sufficient to prove capital murder. And I believe the same thing would go for a manslaughter instruction if the instruction they have submitted is based upon a negligence, gross culpable negligence manslaughter. We disagree that they should – be entitled to that instruction because if you are committing the crime of armed robbery and regardless of whether it's negligence or whatever, whatever this case is whether it's with or with out deliberate design and you kill some one you are guilty of capital murder and not manslaughter.

J.A. at 32-33.

3, 4, 5, 7, 8. Thus, this first, unsubstantiated scenario avails Howell of nothing.

The second scenario Howell submits to this Court is that the victim sprayed mace on him. He does not specify which lesser crime this "fact"[23] supposedly would constitute. That is, Howell neglects to tell this Court how being sprayed with mace by the person he was trying to rob would make him guilty of manslaughter or murder under the instructions he proposed.

The third and fourth scenarios presented by Howell involve claims that he approached victim's car to borrow money from the victim or to sell drugs to the victim. Howell does not set forth any facts that would explain why the victim, who was minding his own business and running his paper route at 5:00 in the morning, would want to loan money to or buy drugs from Howell. Rather, the only evidence before the jury was that Howell needed money to pay his probation officer that day. He had ridden around all night looking for someone to rob. Finally, armed with the weapon in his waistband, he besieged the victim in this case. More telling, however, is the fact that Howell does

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[23]Indeed, there is evidence in the record that, when Howell got into the car with Lipsey after shooting the victim, Howell claimed to have been sprayed with mace. S.C.R. at 713. Howell fails to mention to this Court that Lipsey testified that he did not smell any mace or see any tears in Howell's eyes. In fact, Lipsey testified that there was nothing unusual about Howell's eyes or face. S.C.R. at 713-14. Furthermore, there is no evidence of any mace being found in the victim's car.

not explain how borrowing money from someone or selling drugs to someone would fit into the definition of premeditated murder[24] or culpable-negligence manslaughter under Mississippi law (even assuming, arguendo, that Howell was doing anything other than trying to rob the victim).

That is, even assuming for the purpose of argument that Howell did approach the victim to borrow money or sell drugs, these facts would not constitute premeditated murder or culpable-negligence manslaughter. Specifically, even assuming, arguendo, that Howell approached the vehicle of this paper carrier at 5:00 in the morning to borrow money from him or to sell him drugs – there is no evidence that he planned to kill the victim, which negates the need for an instruction on premeditated murder. Furthermore, there is no evidence (and Howell does not point to any) that would demonstrate any negligence whatsoever - much less negligence so gross as to be

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[24]In a footnote, Howell asserts that the selling-drugs scenario would have supported an instruction under Miss. Code Ann. §97-3-19(1)(c). Brief for Petitioner at 9, n. 1 (citing Miss. Code Ann. §97-3-19(1)(c) (defining murder as the "killing of a human being without the authority of law by any means or in any manner . . . [w]hen done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and or battery of a child in violation of subsection 2 of Section 97-5-39, or in any attempt to commit such felonies")). However, no proposed instruction on this theory of murder is raised. (J.A. at 17-20).

considered wanton disregard of, or utter indifference to the safety of human life.

Simply put, Howell has presented no evidence that would support the murder or manslaughter instructions at issue. Furthermore, he has not explained how any fact in this record would constitute the elements of premeditated murder or culpable-negligence manslaughter. Thus, it is evident that the Mississippi Supreme Court correctly concluded that the evidence did not warrant the murder and manslaughter instructions in this case.

For this reason, Howell's *Beck* claim must be rejected. It is undisputed that *Beck*, *supra*, does not apply in a case where the evidence fails to support a lesser-included offense instruction. This Court has specifically held:

> The *Beck* opinion considered the alternatives open to a jury which is constrained by a preclusion clause and therefore unable to convict a defendant of a lesser included offense when there was evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser offense. In such a situation, we concluded, a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious crime. 447 U.S., at 642, 100 S.Ct., at 2391. Or a jury might acquit because it does not think the crime warrants death, even if it concludes that the defendant is guilty of a lesser offense. *Id.*, at 642-643, 100 S.Ct., at 2391-2392. While in some cases a defendant might profit from the

preclusion clause, we concluded that "in every case [it] introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.*, at 643, 100 S.Ct., at 2392.

The Court of Appeals, quoting this statement from our *Beck* opinion, repeatedly stressed the words "in every case." 639 F.2d, at 223-224; 628 F.2d, at 401. It concluded that we meant that the Alabama preclusion clause was a "brooding omnipresence" which might "infect virtually every aspect of any capital defendant's trial from beginning to end." *Ibid.* **It is important to note that our holding in *Beck* was limited to the question submitted on certiorari, and we expressly pointed out that we granted the writ in that case to decide whether a jury must be permitted to convict a defendant of a lesser included offense "when the evidence would have supported such a verdict."** 447 U.S., at 627, 100 S.Ct., at 2384. Thus, our holding was that the jury must be permitted to consider a verdict of guilt of a noncapital offense "in every case" in which "the evidence would have supported such a verdict."

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Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But **due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.** The jury's discretion is thus

> channelled so that it may convict a defendant of any crime fairly supported by the evidence.

Hopper v. Evans, 456 U.S. 605, 610-11 (1982) (italics in original and other emphasis added).

"'Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Hopkins v. Reeves*, 524 U.S. at 99 (quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984)). Given that the Supreme Court of Mississippi has unequivocally held that there was no evidence in this case to warrant either a manslaughter or a murder instruction, it is evident that the denial of those instructions was proper. Howell received all the process that was due. If the trial court had granted the proposed instructions under these circumstances, it would have been a detriment to the process. Therefore, the State submits that Howell's *Beck* claim is without merit.

CONCLUSION

For the above and foregoing reasons the writ of certiorari should be dismissed in the instant case. With respect, this Court lacks jurisdiction to hear the question presented. Alternatively, the decision of the Mississippi Supreme Court to affirm Howell's conviction of capital murder and sentence of death should be affirmed.

Respectfully submitted,

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September 13, 2004

CERTIFICATE OF SERVICE

I, Judy T. Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief for Respondent** to the following:

Andre DeGruy
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This the 13th day of September, 2004.

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JUDY THOMAS MARTIN