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P R O C E E D I N G S

(11:05 a.m.)

JUSTICE STEVENS: We'll hear argument in Howell
against Mississippi.

Mr. Mitchell.

ORAL ARGUMENT OF RONNIE M. MITCHELL
ON BEHALF OF THE PETITIONER

MR. MITCHELL: Justice Stevens, and may it
please the Court:

The Court has directed us to address, in
addition to the question raised in the petition for writ
of certiorari, the following question. Was petitioner's
Federal constitutional claim properly raised before the
Mississippi Supreme Court for purposes of 28 United States
Code, section 1257?

Accordingly, we begin by addressing that
question and answering it affirmatively. Here, Howell
maintains, one, the standards for adjudicating State and
Federal claims of this particular type are identical --

JUSTICE GINSBURG: Where --

MR. MITCHELL: -- where they're labeled as
such --

JUSTICE GINSBURG: -- where was that -- where
was that maintained? Because I thought that below, all
there were was this was a -- was it a lesser-included offense

1 under State law, and I didn't see below any reference to
2 the Federal Constitution.

3 MR. MITCHELL: Justice Ginsburg, we believe that
4 the rule in Beck establishes that State law must be viewed
5 and State law is the determiner of whether an offense is a
6 lesser-included offense, but Federal law, the Federal
7 Constitution determines whether, as a matter of due
8 process under the Fourteenth Amendment and Eighth
9 Amendment concerns, whether an instruction must be given
10 as a Federal constitutional matter.

11 JUSTICE SOUTER: And -- and the standards under
12 Beck are different from the standards under the roughly
13 comparable State rule, as I understand it, because under
14 the State rule, the lesser offense need not be an included
15 offense, in the technical sense; and number two, there
16 need not be, in the absence of a further instruction, a --
17 a limitation to the jury to two choices, death or
18 acquittal, so that unless one is very careful to raise the
19 Federal standard, simply raising the State standard
20 wouldn't do it.

21 MR. MITCHELL: Respectfully, Justice Souter, we
22 would submit that Mississippi's own law says that it
23 embraces the Beck standard and that Mississippi's own
24 law --

25 JUSTICE SOUTER: Sure, it embraces it because

1 it's broader, which means that if you raise -- if you --
2 if you make a claim under the State standard, you are not
3 necessarily making a claim under the narrower, more
4 restrictive Federal standard.

5 MR. MITCHELL: We would respectfully submit that
6 -- that in Mississippi, for example, as contrasted with
7 the statutory scheme that was present in Hopkins, the
8 Nebraska scheme, in the Mississippi scheme, Mississippi
9 has held that simple murder is a lesser-included offense,
10 and therefore, by definition that offense at least mirrors
11 what is required under Beck.

12 Now, the question of whether some other
13 lesser --

14 JUSTICE SOUTER: What about -- what about the --
15 the Beck condition that in the absence of the instruction,
16 there must be a choice between -- the jury must be
17 confined to a choice between death and acquittal?

18 MR. MITCHELL: In --

19 JUSTICE SOUTER: That's -- that's not the same
20 in the State's scheme, is it?

21 MR. MITCHELL: Well, we believe that -- that it
22 is the same. And in fact, the -- the case that the State
23 cites, State v. Goodin, explains that. The representation
24 of Goodin in the State's brief, as it appears in the
25 respondent's brief at page 23, we contend is not

1 faithfully representative of what the Court said in that
2 case.

3 JUSTICE SOUTER: Is -- is Goodin the case that
4 -- that stands for the proposition that under -- under
5 State law, the -- the jury has an -- an option to sentence
6 for life, as -- as well as -- as to impose the death
7 sentence?

8 MR. MITCHELL: Goodin is the case that the State
9 cited for that purpose, but an analysis of what the
10 Mississippi Supreme Court actually said at page 656 of the
11 Southern Reporter, 787, is this. The Goodin jury did not
12 face the dilemma of the Beck jury. Here, the jury's
13 alternatives in the guilt phase were to convict Goodin of
14 capital murder, simple murder, or to acquit him, which is
15 the very purpose that the later cases -- and Beck itself
16 explains. Schad, for example, explains that the reason
17 for the Beck determination was that presenting only the
18 option of convicting of a capital offense or acquitting
19 was not constitutionally permissible.

20 JUSTICE SOUTER: So -- so I just want to make
21 sure I know where we stand. You're saying that the
22 assumption I was making, that under Mississippi law, in
23 the absence of an instruction for a lesser offense, the
24 jury has an option not only to acquit or to impose the
25 death penalty, but an option of life with or without

1 parole, that assumption is simply incorrect as a -- as a
2 fact about Mississippi law.

3 MR. MITCHELL: No, I do not believe that is
4 incorrect. I'm sorry, Your Honor. What I do believe is
5 correct is that under Mississippi law, the jury, because
6 of the bifurcated nature of the -- of the case, is given
7 at least the preliminary reference or preliminary
8 instruction that if there is a guilt verdict, then there
9 will be a sentencing phase. But we submit that that is a
10 distinction that this Court has not adopted, nor have
11 other courts adopted because in this situation --

12 JUSTICE SOUTER: But it takes you out of Beck,
13 at least arguably, doesn't it? The -- the question is,
14 have you raised something that is necessarily on all fours
15 with Beck? And given this sentencing scheme, we can't say
16 that simply raising a State claim necessarily raises the
17 Beck claim. Isn't that true?

18 MR. MITCHELL: Your Honor, we would respectfully
19 disagree with that position because of the analysis that
20 the Court has undertaken, for example, in Hopkins and
21 because of the analysis in Spaziano v. Florida. In those
22 cases, they were presented with schemes in which the jury
23 did not, of necessity, impose the death penalty. However,
24 the jury was confronted with exactly the same position --

25 JUSTICE SOUTER: But the consequence of the jury

1 verdict was -- was the death penalty.

2 MR. MITCHELL: Well, the consequence of the jury
3 verdict may have been the death penalty. For example, in
4 Spaziano, the -- the jury returned a verdict of guilty.
5 The jury recommended life, but the judge imposed a
6 sentence of death nevertheless. In the Hopkins case, the
7 -- a three-judge panel then imposed the death penalty.
8 Those -- those differences in sentencing schemes we do not
9 believe separates the rationale of Beck which is the
10 danger of affecting the jury verdict by being faced with
11 the dilemma of either convicting of a capital offense or
12 acquitting.

13 JUSTICE SCALIA: Mr. Mitchell, my -- my problem
14 is even more fundamental than Justice Souter's. Conceding
15 that the rule in Mississippi is exactly the same as the
16 Federal rule in Beck, it doesn't seem to me that arguing
17 Mississippi law, just because it happens to be the same as
18 Federal law, amounts to raising a Federal question.

19 Let's assume you have a -- a State law against
20 wire-tapping. It is unlawful. And you -- you come in and
21 you ask that the evidence be -- be excluded because it's
22 contrary to the State law. Have you raised a -- a Federal
23 -- a Federal question when all you cite is the State law,
24 even though the effect under State law is the same as the
25 Federal effect under the Fourth Amendment? It's not my

1 understanding that you've raised a Federal question.

2 MR. MITCHELL: I do not believe that I would
3 have unless in that particular State, if its highest court
4 had said, we embrace the same standard and we apply the
5 same --

6 JUSTICE SCALIA: That's all it takes for the New
7 York State Supreme Court, for example, to have said, well,
8 you know, our -- our wire-tap statute does the same thing
9 as the Fourth Amendment does anyway? That's all it takes?

10 MR. MITCHELL: I believe --

11 JUSTICE SCALIA: Thereafter, all you have to
12 do is cite the New York State statute, and you've raised a
13 Federal question.

14 MR. MITCHELL: No, respectfully, Your Honor.
15 However, if the State supreme court has adopted not only
16 the same purpose, but the very language and has, in
17 effect, said, our ruling in these cases is controlled by
18 the same provision of law, whether a -- a decision of this
19 Court, as in the Beck standard that we believe Mississippi
20 has adopted, or if the court has articulated that the
21 United States Constitution controls this particular
22 provision.

23 JUSTICE SCALIA: Well, I mean, if -- but the
24 State standard always has to -- has to comply with the
25 Federal requirement, doesn't it?

1 MR. MITCHELL: It always has to comply with the
2 -- with the Federal requirement, but as Justice Souter
3 pointed out, it may be broader, for example, in situations
4 where there might be a right to a -- a jury instruction on
5 a lesser-related offense. For --

6 JUSTICE SCALIA: So all it takes is a -- is a
7 single decision by the State supreme court which says that
8 our rule is no broader than the Federal constitutional
9 requirement, and thereafter all you have to do is appeal
10 to State law.

11 MR. MITCHELL: Well, while we believe that is
12 minimally sufficient, we believe that thereafter it is
13 important certainly to raise a claim which puts the court
14 on notice of a --

15 JUSTICE SCALIA: Of course --

16 MR. MITCHELL: -- claim.

17 JUSTICE SCALIA: -- it does. Why -- why is that
18 -- I mean, it seems to me counsel should stand up on his
19 two feet and say, we're raising a Federal question. Why
20 is that too much of an imposition when the statute
21 requires that you raise a Federal question? Why do we
22 have to go researching what the State supreme court said
23 several years ago?

24 MR. MITCHELL: Where -- where it is generally
25 understood, as in this case, that the two claims are

1 interwoven, we believe the jurisdiction of this Court, as
2 the Court has said, is plain.

3 JUSTICE SCALIA: So we have to figure out in
4 every case whether the two claims are interwoven. Do you
5 think -- do you think counsel for the defense isn't always
6 going to say that they're interwoven?

7 MR. MITCHELL: I think counsel for the defense
8 would, indeed, contend that they were interwoven.

9 JUSTICE SCALIA: I don't think it's too much to
10 ask counsel for the defense to say, we are raising a
11 Federal question. And it solves the problem.

12 MR. MITCHELL: The -- the difficulty in saying
13 that we -- that we raise a Federal question is that
14 suppose, in this instance, the trial counsel and appellate
15 counsel, Mr. Lott, had said, the jury in this case is
16 presented with an untenable position, convicting of a
17 capital offense or acquitting. That's untenable and that
18 raises a Federal question. Would the State then concede
19 that that was a sufficient assertion of a Federal
20 constitutional claim? Probably not, and that is because
21 the State contends, just as the amicus brief contends,
22 that this Court should adopt some inflexible rule that is
23 extremely and extraordinarily difficult to apply in the
24 context of, for example, a trial in Mississippi or North
25 Carolina where counsel understands the lifeblood of the

1 rule, the lifeblood even of the Constitution, but cannot
2 at the moment recall the correct citation.

3 JUSTICE BREYER: I mean, my goodness, all it
4 requires -- look, the problem is not a technical problem.
5 It's a human problem. A judge is a human being. He gets
6 the petition. There are 28 different issues. That's a
7 lot of work. He goes down one, two, three, four. He gets
8 to this issue, which is somewhere hidden among the 28, and
9 what it says is, there should have been a lesser-included
10 offense instruction and it cites three Mississippi cases,
11 which in turn cite one other case, and that -- that other
12 case says that the Mississippi rule has constitutional
13 implications and cites Beck. Well, I mean, if that's
14 supposed to be sufficient, I as a judge would have to, in
15 every one of these cases that's cited in these 28
16 different issues, start looking up the other cases in
17 Mississippi to see if there's some other place they cite
18 some other case that says something about a Federal case.
19 I mean, you see it's impossible.

20 MR. MITCHELL: And -- and we would concede that
21 but for the fact that in this particular instance, this
22 particular rule is so clearly identifiable.

23 JUSTICE BREYER: But it isn't even because,
24 after all, Beck talked about an instruction where the
25 choice was either convict the person of murder, death

1 penalty, or acquit him, and your case happens to involve
2 an instruction which said to the jury, convict him or give
3 him a life sentence or acquit him. So we don't even know
4 if -- if Beck applies to your case. That's never been
5 decided.

6 MR. MITCHELL: Well, Your Honor, we would
7 respectfully submit suppose that the -- that Howell's
8 counsel here had called this a Schad issue, for example,
9 where a sentencing scheme somewhat similar to the
10 present --

11 JUSTICE BREYER: I don't even know -- I am so
12 ignorant I don't even know if Schad is a Federal case or a
13 State case.

14 MR. MITCHELL: And -- and --

15 JUSTICE BREYER: So I guess if he had, he should
16 have said Fed or U.S. or whatever it is so that I'll know.

17 MR. MITCHELL: Or -- or suppose --

18 JUSTICE BREYER: That doesn't seem like such a
19 burden.

20 MR. MITCHELL: Or -- or --

21 JUSTICE SOUTER: I -- I wrote it.

22 (Laughter.)

23 MR. MITCHELL: But Justice Souter --

24 JUSTICE KENNEDY: Justice Souter was -- was a
25 State court judge as well.

1 (Laughter.)

2 MR. MITCHELL: Suppose, though, that this were
3 not -- were not a -- a lesser-included instruction case.
4 Suppose that what had happened in this case was that
5 Howell had stood before the judge and said, I'm asking for
6 you to appoint counsel, and the judge said, well, under
7 the law of this State, I don't have to do that. But then
8 Howell had responded, but the Supreme Court says that you
9 do. Would that then be sufficient to raise --

10 JUSTICE BREYER: Supreme Court? Yes, that's
11 probably pretty clear it's Federal.

12 MR. MITCHELL: Well --

13 JUSTICE BREYER: Maybe he meant the State
14 supreme court.

15 MR. MITCHELL: Maybe he meant the State supreme
16 court.

17 JUSTICE BREYER: All right. I'm saying you
18 don't carry it to extremes. Don't be ridiculous about it,
19 but that isn't an extreme case we have. We have which is
20 the case we have, the State, and then three State cases,
21 and then referring to one State case that says that Beck
22 is -- is a constitutional implication citing Beck. I
23 mean, I don't have to be extreme in order to say yours
24 isn't that extreme example.

25 MR. MITCHELL: No, but we would say -- we would

1 say this, Your Honor, that the effort to federalize the
2 claim as was done in the Mississippi Supreme Court was
3 done in an effort to address the instructions as a whole,
4 and --

5 JUSTICE O'CONNOR: Well, it isn't even clear
6 here that Beck would have been violated. As I understand
7 it, in -- in Mississippi the jury could have given a
8 sentence less than death despite the conviction. Isn't
9 that right?

10 MR. MITCHELL: We would concede that. Once the
11 sentencing phase was reached.

12 JUSTICE O'CONNOR: Yes. So I'm not sure if Beck
13 even applies on its own terms.

14 MR. MITCHELL: It would be our contention, Your
15 Honor, that -- that Spaziano v. Florida, that Schad, and
16 the cases following Beck, Hopkins v. Nebraska even would,
17 of necessity -- or Hopkins v. Reeves -- I'm sorry -- the
18 Nebraska scheme -- would, of necessity, report to the
19 court the continuing vitality of Beck even under these
20 circumstances, but it -- it is a matter that we believe
21 was at least made fairly and reasonably presented to the
22 court.

23 JUSTICE GINSBURG: Mr. Mitchell, what gives me
24 pause is that there are Mississippi cases -- you no doubt
25 know them -- where the court has seemed to think that the

1 Federal issue under Beck was discrete from the State
2 issue. So I forgot the name of them, but one of them was
3 striking because it says this doesn't run afoul of Beck,
4 and then it says, now we turn to Mississippi law on
5 lesser-included offense. And it -- the -- the State
6 supreme court treated those two as discrete. So when you
7 just say lesser-included offense, why should the Court
8 assume that you're talking about one rather than the other
9 when the Mississippi Supreme Court itself has made it
10 clear that it thinks they are discrete inquiries?

11 MR. MITCHELL: Justice Ginsburg, we would
12 respectfully submit that -- that the State's recitation of
13 Goodin is not a faithful representation of what happened
14 in Goodin. In Goodin, he was -- the defendant was given
15 the lesser-included simple murder instruction, which
16 Howell seeks. It was a robbery case. The report of the
17 case appears at 787 So.2d, beginning, I believe it's, 639.
18 At pages 655 and 656, the court addresses the Beck issue,
19 and it says there that because the jury's alternative in
20 the guilt phase was either to convict of capital murder or
21 simple murder or to acquit, then and in that circumstance,
22 the Beck -- that Beck was not violated. It then says we
23 must look to our practice to determine whether a
24 manslaughter instruction should be given.

25 And it is for that reason that we respectfully

1 submit that Goodin does not attempt to distinguish Beck,
2 but in fact squarely addresses a Beck claim, although --
3 and we candidly admit -- Goodin's counsel did cite Beck
4 itself to the Mississippi court. Nevertheless, the claim
5 was phrased in precisely the same manner in which Mr.
6 Howell's counsel expressed the same claim.

7 These claims, therefore, we would respectfully
8 contend, are not virtually identical but are in fact
9 identical. But even if there were some minor variations,
10 some deviations, as this Court indicated would appear from
11 time to time, we contend that clearly that such identity,
12 such virtual identity is sufficient to raise the issue.

13 In this case, Howell's trial and appellate
14 counsel raised two issues with regard to the jury
15 instructions. Those two issues themselves were
16 interrelated. Those two issues were a whole. Those
17 issues related to whether or not there was sufficient
18 evidence to convict of robbery and whether or not -- or
19 attempted robbery rather, and whether or not there was a
20 basis to give a lesser-included instruction. The cases
21 which he cites are State cases related to the necessity of
22 giving lesser-included instructions where there's an
23 attempted robbery and simple murder is, therefore,
24 included in that offense.

25 He also, at the outset of his contentions with

1 regard to jury instructions, says that under the Eighth
2 and Fourteenth Amendments, these jury instructions -- and
3 we contend that they must be considered as a whole. These
4 jury instructions violate his rights under the Eighth and
5 Fourteenth Amendments. It is our position that this is
6 sufficient -- while not a cognate of that, is sufficient
7 to at least be a corresponding claim, a substantially
8 identical claim to Beck, and one which entitles the
9 defendant as a matter of due process and as a matter of
10 Eighth Amendment consideration and concern, to an
11 instruction.

12 The difficulty that we face in a circumstance
13 such as this where the instruction is not given is that
14 the jury's function, while not always reviewable, but
15 which is always entitled to protection, may be called into
16 question and the quality of the verdict impeached, in
17 effect, by the failure to have the third option. In
18 essence, it is our contention that where a defendant uses
19 the very words that this Court has used to describe the
20 constitutional claim, where it uses the very words that
21 the State supreme court has used --

22 JUSTICE STEVENS: May I ask you this question,
23 Mr. Mitchell? Supposing the -- there are alternative
24 lesser-included offenses that might be urged by the
25 defendant as to -- to get an instruction on, and he asks

1 for the wrong one. In other words, the question -- there
2 is a question here about exactly what is the lesser-
3 included offense. It seems to me that if he tried to kill
4 -- if he killed the driver of the vehicle, there may well
5 have been some kind of crime. But maybe you ask for a
6 lesser-included offense of, say, simple murder and the
7 facts don't fit simple murder, but they might fit
8 manslaughter or something else. Would your request for --
9 for a simple murder, lesser-included offense instruction
10 be sufficient if you should really have asked for a
11 different lesser-included offense instruction?

12 MR. MITCHELL: We would respectfully submit that
13 -- that even the Mississippi court has addressed that
14 situation in -- in a case cited in -- in the briefs in
15 Mease. And there, the defendant asked five times for
16 instructions, lesser-included offense instructions, and
17 never actually got them right. The court said that that
18 is not a basis upon which to deny the instruction and
19 then, citing Beck, said that where there is a proper
20 lesser-included offense, the fact that the -- that the
21 defendant does not request the proper instruction still
22 rises to the constitutional proportions that a Beck claim
23 does.

24 JUSTICE SOUTER: Is -- is that the case here
25 too? One of the things that's neither here nor there I

1 guess, but one of the things that perplexed me was that I
2 would have thought that the lesser-included offense on --
3 on the theory that the -- that he didn't intend to kill,
4 he was sprayed with mace, got mad, pulled out a gun, and
5 shot and so on -- I would have thought the lesser-included
6 offense was a heat of passion kind of killing. But as --
7 as I read the -- the statement of -- of simple murder,
8 which requires a deliberate act, that didn't sound like
9 it. And I -- I read negligent homicide, and that didn't
10 sound like heat of passion. But is -- is it your point
11 here, if -- if we get into it, that as long as you asked
12 for some lesser-includeds, under Mississippi law that
13 raises the issue adequately?

14 MR. MITCHELL: We -- we believe that it does
15 raise it adequately. We believe that it --

16 JUSTICE GINSBURG: But then what would be a
17 lesser-included offense? Because if it's not simple
18 murder and it's not manslaughter, you haven't suggested a
19 third that it might be. I thought your whole position was
20 that this simple murder was right and the --

21 MR. MITCHELL: We do contend that it was right,
22 Your Honor.

23 JUSTICE GINSBURG: -- and the judge was obliged
24 to give it. So why -- in view of what Justice Souter just
25 said about simple murder requiring a deliberate design,

1 where was the deliberate design here?

2 MR. MITCHELL: We believe that -- that there
3 are, in effect, two forms of simple murder because of the
4 structure of -- and in fact, the Mississippi Supreme Court
5 has said this -- because of the structure of the
6 Mississippi murder definitions. They are contained in a
7 number of separate sections, but the most important of
8 which is that a killing, not done in certain enumerated
9 felonies, such as robbery or attempt to rob, would
10 constitute simple murder. We believe that the simple
11 murder instruction would have been correct. But even if
12 it were not, we would respectfully submit that that is
13 sufficient to raise the question.

14 JUSTICE GINSBURG: But what would be if it were
15 not? What would be the lesser-included offense?

16 MR. MITCHELL: Arguably it would be
17 manslaughter. For example, the Mease case, which the
18 State cites and to which I made reference, was a case in
19 which capital murder was not robbery murder as in this
20 case, but the killing of a police officer. In Mease,
21 there was an altercation between the sheriff and Mease.
22 During that altercation, Mease was struck on the head by
23 another deputy. His contention was that the gun fired,
24 which he was holding next to the sheriff's neck. The gun
25 fired by reaction for two reasons, one that he was in a

1 fight and, secondly, that he was struck. The Mease court
2 said that that was a proper basis to instruct on
3 manslaughter, the fact that he had pulled the gun and was
4 using it during the course of the fight.

5 Now, while I find that case difficult to parse,
6 we believe that that certainly could have been an argument
7 that could have been raised and that, albeit it was not,
8 it could have been a proper instruction to have been
9 given.

10 If there are no further questions, I'd like to
11 reserve the remainder of my time.

12 JUSTICE STEVENS: You may.

13 General Hood.

14 ORAL ARGUMENT OF JAMES M. HOOD, III

15 ON BEHALF OF THE RESPONDENT

16 MR. HOOD: Justice Stevens, may it please the
17 Court:

18 I'd like to make the point, as far as
19 jurisdiction goes, that -- that the defendant has failed
20 to make a Federal claim and he is required under Webb v.
21 Webb. If the Mississippi Supreme Court -- if the lower
22 court does not address the issue, then it is assumed that
23 it was not properly raised.

24 As to the issue of Beck, there is no Beck
25 violation. Actually Mississippi finally -- we've gotten

1 in one instance, we've -- we've become first in -- in this
2 regard. In Jackson v. State in 1976, our Supreme Court --
3 which was cited in a footnote 10, I believe, in -- in
4 Beck. In the Jackson case, Mississippi said -- we had the
5 same statute, pretty much, that Alabama had that
6 restricted a lesser-included offense instruction.
7 Mississippi said, number one, you cannot restrict that
8 lesser-included offense instruction if it is supported by
9 the facts, and number two, in the Jackson case, the court
10 held that it had to be bifurcation, which was the
11 problem, the impact on the guilt phase. And -- and so I
12 would submit to the Court that there is no impact in
13 Mississippi in this case on the guilt phase, nothing to
14 influence the jurors' decision, and that was the inherent
15 problem that the Court recognized in Beck.

16 Number two, Mississippi allows a life sentence,
17 which also distinguishes Beck. It -- it allows the jury,
18 in a separate, bifurcated hearing, to determine whether or
19 not the defendant should receive life or the death
20 penalty.

21 And then thirdly, in Mississippi, we have a
22 broader standard than the Federal standard. If it's any
23 lesser offense in Mississippi, then the defendant is
24 entitled to it if it's supported by the facts of the case.
25 So we have a broader standard that gives the defendant an

1 easier opportunity to meet that standard.

2 And thirdly --

3 JUSTICE SCALIA: I don't get your point. It
4 doesn't have to be a -- a lesser-included offense --

5 MR. HOOD: Yes, yes, sir --

6 JUSTICE SCALIA: -- so long as it's a lesser
7 offense?

8 MR. HOOD: -- Justice Scalia. It just has to be
9 a lesser offense.

10 And I would submit to the Court that if we are
11 analyzing a Federal constitutional issue, then perhaps we
12 -- we should follow Federal constitutional standards,
13 which was stated -- the strict elements test, in other
14 words, because under -- under Federal law, it has to be,
15 well, number one, a lesser-included offense, a true
16 lesser-included offense, and under the Schmoke case, this
17 Court has stated that that is in fact applying the strict
18 elements --

19 JUSTICE STEVENS: May I interrupt with a
20 question there, General Cox?

21 MR. HOOD: Yes, sir.

22 JUSTICE STEVENS: In this case, if the man
23 approached the victim in the car and shot him and killed
24 him, as I understand it, and the theory was an attempted
25 robbery and therefore the -- the capital offense. Now,

1 are you telling me that if they failed to prove there was
2 an attempted robbery, it was not an offense at all?

3 MR. HOOD: No, sir. I -- I'm not stating that.
4 It would -- it would be an offense, but based upon these
5 facts.

6 JUSTICE STEVENS: Then why wasn't he entitled to
7 an instruction on whatever offense it was?

8 MR. HOOD: Because the -- the facts in this case
9 show that there was no other reason for him to approach
10 that vehicle than to rob that individual. There was no
11 premeditated intent.

12 JUSTICE STEVENS: But his theory was if there
13 was a failure of proof on the attempted robbery, that all
14 was left was a -- a killing for some other reason. And if
15 there was a killing -- if there was a failure of proof on
16 attempted robbery, would he not then have been entitled to
17 a -- a lesser offense instruction?

18 MR. HOOD: Yes, sir, Justice Stevens.

19 JUSTICE STEVENS: So what your theory is then --

20 MR. HOOD: It depends on --

21 JUSTICE STEVENS: -- if I understand it
22 correctly, is the proof that there was an attempted
23 robbery is so convincing that no other theory was
24 available.

25 MR. HOOD: Well, that's the facts that we had in

1 this case. And your analysis there again will -- will
2 hinge on whether or not -- in Mississippi admittedly
3 murder would be a lesser-included offense if the facts
4 support it and also manslaughter. But now, if you apply
5 the Federal standard --

6 JUSTICE KENNEDY: But I still don't understand
7 your answer to Justice Stevens' question. I had the -- I
8 had the same problem. The evidence of robbery here was
9 circumstantial, strong, but still circumstantial based on
10 his earlier statements that he was going to make a sting,
11 I think he said, and then the witness saw him outside the
12 window and -- and he stopped the car. And I take it, he
13 didn't take the stand and say, I stopped the car to ask
14 for directions or something. But still it's -- it's --
15 that's certainly a jury issue as to whether there was a
16 robbery.

17 MR. HOOD: Yes, sir, it is. It's -- the -- the
18 facts were in this case, though, all night long they had
19 ridden around looking for someone to rob. They made a
20 statement in Tupelo --

21 JUSTICE KENNEDY: But -- but would the State of
22 Mississippi take the position that if there was no
23 robbery, there was no crime in this case --

24 MR. HOOD: No, sir.

25 JUSTICE KENNEDY: -- when a man is shot and

1 killed?

2 MR. HOOD: On the facts that we had, if -- if
3 you analyze it under the Federal standard -- and I would
4 submit to the Court that we should apply --

5 JUSTICE KENNEDY: No. I'm talking about just
6 Mississippi law. You're the prosecutor saying, we -- we
7 may not get robbery here. The -- is that the only thing
8 they charge is robbery or let the man go after he shoots
9 and kills the person he doesn't even know?

10 MR. HOOD: We don't know -- he didn't know this
11 defendant.

12 JUSTICE BREYER: No, no, but the question is
13 suppose we have a different case, not this case.
14 Everything is the same but for the fact we know for sure
15 it wasn't a robbery. That's all. Now, in that different
16 case, is it a crime under the law of Mississippi what
17 happened?

18 MR. HOOD: Well, first --

19 JUSTICE BREYER: I've told you everything about
20 the case. It's just like this one except we know it isn't
21 a robbery. Now, is it a crime? The answer we think is
22 absolutely it's a crime. And my next question is which
23 crime.

24 MR. HOOD: Which crime.

25 JUSTICE BREYER: Okay?

1 MR. HOOD: Yes, sir. You're correct. First, we
2 wouldn't have -- have charged --

3 JUSTICE BREYER: So which crime is it?

4 MR. HOOD: Based upon the facts that we had --
5 and he didn't know this individual. He had no
6 premeditated intent to kill him.

7 JUSTICE BREYER: Right.

8 MR. HOOD: It would not be murder.

9 JUSTICE BREYER: No. So it would be something.
10 What would it be?

11 MR. HOOD: It could arguably be a felony murder,
12 which is a separate statute in Mississippi.

13 JUSTICE BREYER: All right. So then maybe
14 there's a felony --

15 MR. HOOD: He meant to commit another --

16 JUSTICE BREYER: Is anything else possible?

17 MR. HOOD: -- another crime.

18 JUSTICE BREYER: Manslaughter?

19 MR. HOOD: Well --

20 JUSTICE BREYER: I mean, it's odd that in
21 Mississippi people just go around shooting each other all
22 the time and there's no statute that seems to cover it.

23 (Laughter.)

24 JUSTICE KENNEDY: And if you don't know someone,
25 then it's not murder?

1 (Laughter.)

2 JUSTICE KENNEDY: I don't understand.

3 MR. HOOD: Oh, yes, sir. That -- that happens
4 all the time.

5 JUSTICE BREYER: All right. So there must be --

6 MR. HOOD: But, of course, it's premeditation.
7 If there were evidence, say, for example --

8 JUSTICE BREYER: No, no, no. They just do it --
9 who knows why. All we know about them is they went and
10 killed somebody. Now, I think it's still a crime to kill
11 people in, I thought, all 50 States, but -- but --

12 (Laughter.)

13 JUSTICE BREYER: So I'm going to say which --

14 JUSTICE GINSBURG: Let's make it -- if we make
15 it concrete, let's take all that we have in this case is
16 the testimony that Rice gave. Rice was the one who
17 observed this murder, and he didn't have any statements
18 about the defendant needing money to pay off his debt.
19 You have only that snapshot scene of what the witness saw
20 from the window, which doesn't establish any robbery at
21 all because Rice said he didn't observe any robbery going
22 on. All he observed was the killing. Now, if that's all
23 you have in this case, a person was killed, an eyewitness
24 to the shooting, the eyewitness testifies exactly as Mr.
25 Rice did in this case, what crime would you indict for?

1 MR. HOOD: Justice Ginsburg, to -- to -- first
2 of all, we wouldn't have indicted for capital murder if we
3 didn't have that evidence. We wouldn't be discussing the
4 Beck issue. It wouldn't be a lesser-included offense
5 question. We'd strictly be focusing on those facts,
6 number one, that particular witness Rice was on the other
7 side of the vehicle. You had separate testimony from
8 Lipsey, the co-defendant who was in the vehicle and could
9 -- behind where -- where --

10 JUSTICE GINSBURG: Yes, but I'm giving you a
11 hypothetical where --

12 JUSTICE STEVENS: General Scott, I suggest you
13 try to answer her question.

14 JUSTICE GINSBURG: Yes. All you have --

15 JUSTICE STEVENS: The question is that's -- one
16 witness is all you had. Would there be a crime against
17 the law of Mississippi and if so, what would it be?

18 MR. HOOD: It would be manslaughter, I suppose,
19 Your Honor. That's not the facts in this case and -- and
20 I apologize --

21 JUSTICE BREYER: Okay. So what -- but -- but
22 the line of reasoning is -- is -- now, there is a crime.
23 Let's call it X. All right? And what you're -- what
24 counsel says is it's the law of Mississippi that if there
25 is a crime and it's X and it's lesser, you've got to

1 charge it if somebody just says, please give me a lesser-
2 included instruction, even if he's all mixed up as to what
3 the right crime is.

4 I don't know if that's the law of Mississippi.
5 From reading the Mississippi Supreme Court opinion, I
6 would say it wasn't the law of Mississippi because they
7 say you're not supposed to charge people in ways that
8 would mix them up. But, I mean, anyway -- but that's the
9 argument. So what's the response?

10 MR. HOOD: There --

11 JUSTICE BREYER: And don't take the one I just
12 suggested because I'm not sure that's right. What is your
13 response?

14 MR. HOOD: There are 12 separate manslaughter
15 sections in the Mississippi code, not in one section. Our
16 murder section lists -- lists four just in one section.
17 There are 12 different ones. We have one if you drive a
18 nail in a tree and -- and you're -- you're cutting lumber
19 and it kills someone, that's a manslaughter still.

20 This defendant only requested a culpable
21 negligence manslaughter instruction. There was no evidence
22 to -- to support that. The only potentially -- I -- I could
23 even make a stretch -- would be a heat of passion. He did
24 not request that -- request instruction, and --

25 JUSTICE SOUTER: Well, is that fatal to him? I

1 mean, that's what we're -- one of the things we're trying
2 to get at I guess. Is -- is that fatal to him?

3 MR. HOOD: His failure to request --

4 JUSTICE SOUTER: Under Mississippi law, would he
5 be entitled to a lesser offense instruction if he asked
6 for the wrong lesser offense? I.e., in this case, if he
7 failed to ask for heat of passion, would he still be
8 entitled to a correct lesser instruction, even when he
9 didn't ask for it?

10 MR. HOOD: Perhaps the judge should correct
11 within a particular statute, but not go look at all 12
12 statutes that he's under -- which -- which would classify
13 as murder.

14 JUSTICE SOUTER: So you say he's not entitled
15 then.

16 MR. HOOD: Yes, sir.

17 JUSTICE SOUTER: The -- the only thing he would
18 be entitled to, if he were correct, is the lesser
19 instruction that he asked for, and if he's not correct,
20 there's no error.

21 MR. HOOD: Yes, sir. He would have had to -- to
22 have specifically requested heat of passion. But there
23 again, I don't believe that he put on evidence to support
24 even --

25 JUSTICE SOUTER: No. We're just trying to get

1 at what Mississippi law is, and I think you've --

2 JUSTICE STEVENS: And under your view of the
3 facts, as I understand it, he would have been entitled to
4 a manslaughter instruction.

5 MR. HOOD: I don't -- that's only a stretch to
6 answer -- answer Justice Breyer's question.

7 JUSTICE STEVENS: Well, surely -- surely, if one
8 walks up to a car and shoots the driver dead, that's must
9 be a crime.

10 MR. HOOD: Yes, sir. It -- it would have to be
11 classified as --

12 JUSTICE STEVENS: And the question is we don't
13 know exactly which of your several statutory provisions it
14 violated, but if it violated one of them, I don't
15 understand. And if he's correct -- maybe he misrepresents
16 the law. He tells us, as a matter of State law, if he
17 asked for the wrong lesser-included instruction, but there
18 is a correct one, the judge has a duty to give the correct
19 instruction. That's what -- what the counsel has told us.
20 And if that's right, I don't understand why he wasn't
21 entitled to some lesser-included offense instruction.

22 MR. HOOD: I -- I believe what he was addressing
23 was language within a particular statute, meaning a
24 lesser-included offense of -- of murder or how you styled
25 it, whether it be depraved heart murder or -- or felony

1 murder, first degree murder.

2 JUSTICE STEVENS: So it's -- it's your view he
3 must ask for the correct lesser-included offense
4 instruction.

5 MR. HOOD: Yes, sir. And -- and there again,
6 I'd like for the Court to -- to understand my statement
7 that we should construe this on what -- how the Federal
8 law -- how you -- how the Federal courts construe it, not
9 use Mississippi's lesser standard, but let's -- let's
10 construe it on whether or not, first, it is a true lesser-
11 included offense because that's -- that's what the Federal
12 standard is, and that's what we followed in Nebraska.

13 And secondly, if it's a true lesser-included
14 offense, we have to use the analysis of the Federal courts
15 which says that it has to use the strict elements test.
16 Well, murder would not be a lesser-included offense under
17 Federal law because under the Mississippi capital murder
18 statute can be with or without deliberate design.
19 Therefore, there is no deliberate design. It would not be
20 a lesser-included offense of murder. Manslaughter would
21 not be a lesser-included offense under that same elements
22 test because it requires the additional element of sudden
23 provocation or heat of passion. So I would submit to the
24 Court, if we apply what's fair under Federal law, what the
25 floor is under Federal law, we should use the Federal

1 analysis and not Mississippi --

2 JUSTICE STEVENS: But is sudden provocation or
3 heat of passion part of the prosecution's burden or a part
4 of his -- one of the -- is it a matter of defense?

5 MR. HOOD: It would be a matter of the defense
6 raising sudden provocation. And I don't believe that they
7 -- they certainly didn't put on anything about culpable
8 negligence. For example, maybe he was spinning the gun in
9 his hand for culpable negligence. They didn't put on
10 anything about deliberate design because he didn't want to
11 testify. His defense was alibi and so he didn't take the
12 stand and say, I intended to kill this person, therefore,
13 give me the murder instruction. He's got to put on
14 evidence to support it, and I don't believe he put on
15 sufficient evidence for either of those.

16 And -- and I was the district attorney who tried
17 this case, so factually I -- I remember the -- the -- my
18 argument was that we couldn't have proved murder if we had
19 wanted to because there was no premeditation.

20 JUSTICE SOUTER: May I go back to the heat of
21 passion point? You say he did not put on evidence, but
22 wasn't there evidence in the record through a State's
23 witness that at least would have supported a heat of
24 passion argument, the evidence being that he went up to
25 the car, no gun was apparent, something happened.

1 Evidence shows that he was sprayed with mace, and at that
2 point, he pulls out a gun and shoots. That, I suppose, is
3 evidence of heat of passion. Couldn't he have asked for a
4 heat of passion instruction even though he did not put on
5 the heat of passion evidence himself?

6 MR. HOOD: He could have asked for a heat of
7 passion instruction, but --

8 JUSTICE SOUTER: Okay, but he did not do so.

9 MR. HOOD: -- but he did not do so. Yes, sir.
10 That -- those facts --

11 JUSTICE SCALIA: Wait. You're -- you're -- I
12 don't -- you're calling the heat of passion an element of
13 -- of the crime of manslaughter? It's not an element of
14 the crime.

15 MR. HOOD: It's sudden provocation, yes, sir.

16 JUSTICE SCALIA: Suppose you walk up and -- and
17 you blow somebody away. You can't -- there's no heat of
18 passion. There's no sudden provocation. You just walk up
19 and blow them away. And you're telling me that that's not
20 a crime because you can't -- you can't prove heat of
21 passion? You can't prove one of the other elements of
22 manslaughter? That can't be right.

23 MR. HOOD: No, sir. The --

24 JUSTICE SCALIA: Why isn't it enough that you
25 killed somebody?

1 MR. HOOD: If -- if --

2 JUSTICE SCALIA: You killed somebody. You

3 didn't plan to kill to somebody, so it's not murder.

4 Okay. But you killed somebody. Surely, there must be

5 some crime in -- in Mississippi that -- that covers that.

6 MR. HOOD: Yes, sir. You --

7 JUSTICE SCALIA: What is it?

8 MR. HOOD: -- charge murder and -- and the

9 prosecution --

10 JUSTICE SCALIA: No. It's not murder. It

11 wasn't -- you know, he didn't -- I didn't walk up to the

12 -- to the car intending to kill him. As you say, you

13 couldn't have indicted for murder.

14 MR. HOOD: Likely, the State would -- would have

15 -- have -- if those were the facts and that's all the

16 facts that we had, then the State would likely have

17 charged murder and asked for a lesser-included offense

18 instruction for manslaughter.

19 JUSTICE SOUTER: Manslaughter being defined as

20 killing without deliberation?

21 MR. HOOD: Yes, sir.

22 JUSTICE SOUTER: Okay. That's what he is saying --

23 JUSTICE SCALIA: There -- there is a -- you say

24 there -- there are what? Nine different manslaughter, did

25 you say?

1 MR. HOOD: Twelve different manslaughter --

2 JUSTICE SCALIA: Twelve different, and one of
3 them is simply killing somebody simpliciter, without any
4 provocation. Right?

5 MR. HOOD: Yes, sir, without. But he requested
6 the culpable negligent manslaughter instruction, and there
7 was no evidence of culpable negligent manslaughter. It's
8 a separate section in our code now. There are 12
9 different sections. It's not like we have one statute
10 that lists all of those. And -- and some of them are --
11 are arcane. And I think it's unfair to ask a trial court
12 judge to correct every request for an instruction and --
13 and -- he -- at trial, if you read --

14 JUSTICE KENNEDY: Well, let -- let me ask -- ask
15 you this. Knowing what we know now, we have the record,
16 we have the benefit of hindsight, we know the evidence, in
17 your view now what would have been the closest lesser-
18 included offense for which an instruction might have been
19 sought?

20 MR. HOOD: There are two possibilities that were
21 not requested. One is our felony -- felony murder.
22 Felony murder is -- is the killing of -- that occurs
23 without occurring with one of the seven offenses that we
24 have listed, murder, rape, and so forth, committing
25 another crime. Or heat of passion manslaughter. And I

1 would submit to the Court that -- that they never
2 requested anything about the felony murder and they never
3 requested the heat of passion manslaughter.

4 JUSTICE STEVENS: May I ask this question just
5 to help me sort of -- what are the -- as a matter of State
6 law, what are the elements of the offense for which he was
7 convicted?

8 MR. HOOD: Elements of the offense are that he
9 -- that he -- a killing occurred with or without intent
10 and that it was in the commission of -- of a crime,
11 robbery.

12 JUSTICE STEVENS: Those are the two elements.
13 And so that if you take out with -- in the commission of
14 another crime and just left the -- the other part of it,
15 would that also be an offense?

16 MR. HOOD: With or without under Mississippi
17 law --

18 JUSTICE STEVENS: In other words, you say -- you
19 say the offenses are killing somebody with or without the
20 intent to do so --

21 MR. HOOD: Yes, sir.

22 JUSTICE STEVENS: -- and in the course of an
23 attempted felony. Say you failed to prove the attempted
24 felony and you proved the remainder of the -- the other
25 elements. Is he guilty of anything in -- under

1 Mississippi --

2 MR. HOOD: It -- if you -- if you prove the
3 intent --

4 JUSTICE STEVENS: And if he is, why isn't it a
5 lesser-included offense is my next question.

6 MR. HOOD: Yes, sir. If you just take those
7 away and you just have those two elements, with or
8 without, if it's with intent, then it would be classified
9 as murder. If it's without, it could possibly be --
10 without intent, then it could be classified as
11 manslaughter.

12 JUSTICE STEVENS: It seems to me that then there
13 are two lesser-included offenses, and either one would
14 have -- he should have gotten an instruction on both.

15 MR. HOOD: I -- I --

16 JUSTICE STEVENS: And I don't understand why
17 not.

18 MR. HOOD: Yes, sir, I understand. But there
19 again, if we go back to what the Federal standards are,
20 we're talking about what the United States Constitution
21 requires, and therefore, I would submit to the Court that
22 we should apply what the Federal law is. And that law is
23 -- number one, is it a lesser-included offense? Using the
24 elements test, murder is not a lesser-included offense to
25 capital murder, and the reason being is because capital

1 murder is with or without intent and you add an additional
2 element of murder which requires intent. Same goes for
3 manslaughter because you had the additional sudden
4 provocation element.

5 So I would say that if we follow the Federal
6 standard and -- and that's -- that's the floor, and the
7 floor is it's got to be a lesser-included offense, it --
8 it's not a -- a lesser-included offense. So therefore
9 that should answer the question.

10 Secondly, under the Federal standard, you have
11 to prove that -- that the court -- the judge has to decide
12 that the -- a reasonable juror would acquit of the greater
13 offense and also convict of the lesser. Well, Mississippi
14 law does not require that, but I -- I'd submit to the
15 Court that -- that after the Beck decision in 1980, our
16 supreme court in the case of In re Jordan -- they applied
17 the Federal standard. They required that -- when they
18 analyzed Beck, they applied the Federal standard, in other
19 words, the -- the part about that you have to acquit. You
20 have to acquit on -- on the greater offense. And they
21 also included the lesser-included offense language in that
22 Beck analysis.

23 So, therefore, had he properly raised the
24 jurisdictional issue -- there's nowhere in the record does
25 he cite Beck. There's nowhere in the record that he

1 states facts that would even support Beck. So had he even
2 properly reached that issue and -- and cited Beck, I would
3 submit to the Court that the facts don't support it under
4 Mississippi law. The facts don't support it under Federal
5 law. And it doesn't meet the lesser-included offense
6 standard.

7 JUSTICE SOUTER: May -- may I ask you? I'm
8 unclear on -- on lesser-included in Mississippi. And I'm
9 going to take this step by step.

10 MR. HOOD: Yes, sir.

11 JUSTICE SOUTER: And tell me if I'm right or
12 wrong at each step.

13 The offense that he was charged with -- the
14 capital offense that he was charged with was killing with
15 or without intent in the course of committing a crime. Is
16 that correct?

17 MR. HOOD: Yes, sir.

18 JUSTICE SOUTER: All right. Now, his claim --
19 let's assume he claims this. There is evidence from --
20 from which you -- you could infer that he wasn't
21 committing a crime. He may or may not be right, but let's
22 assume that's his claim, and let's assume the judge says,
23 yes, there's some evidence that would indicate that he
24 wasn't up there robbing at the time he stood next to the
25 car. Assume the judge accepts that. He then says, on

1 that assumption, I want a lesser-included offense
2 instruction of simple murder, killing with intent. Is
3 that a lesser-included offense under -- under capital
4 murder?

5 MR. HOOD: There again, Your Honor --

6 JUSTICE SOUTER: Because what he's saying is,
7 I'm asking for an instruction on an offense which is
8 lesser -- it does not -- it's an offense that doesn't
9 include the course of the crime, but it does include the
10 other elements. It includes killing with intent. Isn't
11 that lesser-included on your definition of Mississippi
12 homicide law?

13 MR. HOOD: No, sir. And -- and I would say that
14 under the Federal standard, clearly it's not a lesser-
15 included offense. I would say under the State --

16 JUSTICE SOUTER: Yes. I mean, he's got to
17 qualify under the Federal standard. He says, the offense
18 I was charged with was killing with or without intent,
19 plus crime. I want an instruction that says nothing about
20 plus crime but simply charges on killing with or without
21 intent. Isn't he asking under Federal law for a lesser-
22 included instruction?

23 MR. HOOD: No, sir. He didn't -- first of all,
24 he never --

25 JUSTICE SOUTER: All right. Confine it to

1 killing with intent.

2 MR. HOOD: Yes, sir.

3 JUSTICE SOUTER: Under -- under -- as I
4 understood -- as I understood you to define the capital
5 offense, the State could prove the capital offense by
6 saying he did have intent when he killed and he also
7 happened to be committing a crime. Am I wrong about that
8 statement of Mississippi law?

9 MR. HOOD: I'm sorry, Your Honor. I apologize.
10 I -- I didn't follow you.

11 JUSTICE SOUTER: I thought you said that on the
12 capital offense, the killing could be with or without
13 intent.

14 MR. HOOD: Right.

15 JUSTICE SOUTER: I -- I --

16 JUSTICE SCALIA: I think you confuse us by
17 saying that. If you just left that out of your statement,
18 felony murder is killing in the course of a crime. Don't
19 say anything about intent. Intent is not an element of
20 felony murder. Right?

21 MR. HOOD: Yes, sir.

22 JUSTICE SCALIA: So if you want to get plain
23 murder, you're adding an element.

24 MR. HOOD: Right.

25 JUSTICE SCALIA: It has to be murder with

1 intent, and that's why you say it's not a lesser-included
2 offense because for plain murder, you need intent, and for
3 felony murder, you don't need intent.

4 MR. HOOD: Thank you, sir.

5 JUSTICE SCALIA: Isn't that -- isn't that your
6 case?

7 MR. HOOD: Yes, sir.

8 JUSTICE SOUTER: So that the Mississippi law for
9 felony murder is killing, pure and simple, plus crime, and
10 simple murder is killing plus intent. And that plus
11 intent is why it is not lesser-included.

12 MR. HOOD: Yes, sir, on a felony --

13 JUSTICE SOUTER: Okay. I understand you now.

14 Let -- let me ask you this as a matter of -- on
15 -- on the second point, as a matter of Mississippi law.
16 Under the charge of capital murder, was there a
17 possibility of sentencing to life or life without parole,
18 as well as the possibility of the death penalty upon
19 conviction?

20 MR. HOOD: Yes, sir, and that's why I would
21 submit to the Court it distinguishes --

22 JUSTICE SOUTER: Okay. So that's the second
23 reason why it would not fall within the -- the Beck rule.

24 MR. HOOD: Yes, sir.

25 JUSTICE SOUTER: Okay.

1 MR. HOOD: I'd like to also point out factually
2 that in the -- in the -- initially in the petition, the --
3 and actually at trial and at the Mississippi Supreme
4 Court, they talked about that the defendant may have been
5 able -- may have been out there selling drugs to the
6 defendant. I'd submit to the Court that a proper review of
7 the record, if you look at the Mississippi Supreme Court
8 opinion at page 98 and -- 97 and 98 and page 40, the
9 defendant in his own brief admits that that was not in
10 evidence. It came from the -- from a plea where the --
11 where one of the co-defendants pled, and it never was
12 placed before the jury.

13 Here in -- in the brief in this particular case,
14 they talk about, well, he -- maybe he was borrowing money,
15 the sting question, whether he was borrowing money. That
16 comment came from one of the witnesses named Powell who
17 was merely speculating. I don't know what he was talking
18 about a sting, but it could have been that he was going to
19 borrow money or -- or rob somebody. So that -- that was
20 speculation. So the -- the facts just don't support the
21 granting of a lesser-included offense in this particular
22 case.

23 I'd also like to ask the Court to -- to note
24 that in Hopkins v. Reeves in footnote 7, the -- the Court
25 suggests that we don't decide that -- that particular case

1 based upon the bifurcation issue alone. I would ask that
2 the Court answer that question in this particular case and
3 state that Beck has no application in this particular case
4 because the danger that occurred and the Court's concern
5 with in Beck is not -- doesn't happen here in the
6 Mississippi instance because in Jackson v. State, we
7 had already said that you have a bifurcated hearing --

8 JUSTICE STEVENS: Well, but -- but it is true
9 that -- that there's a difference between becoming
10 eligible for the death penalty, on the one hand, and not
11 being eligible on the other. And conceivably the Beck
12 concern is triggered when the failure to give a lesser-
13 included offense gives the jury the option of -- no other
14 option other than convicting of a capital offense.

15 MR. HOOD: Justice Stevens, I -- I would
16 respectfully disagree. We believe that the -- the Beck
17 issue is just with this question. You have a choice of
18 guilt and death penalty or acquittal. This question that
19 they're raising is conviction, not death penalty, or
20 acquittal. And those are separate issues.

21 JUSTICE STEVENS: -- an offense for which the
22 death penalty is the punishment.

23 MR. HOOD: Yes, sir, but it doesn't impact the
24 guilt phase, and that was what the problem was, I believe,
25 in Beck, was that -- that a jury might not -- they don't

1 want to turn him loose because -- and they give him a
2 conviction, which automatically carries the death penalty.
3 And that impacts the jury. And I understand that. That
4 was a proper decision, but that just didn't happen here in
5 this particular case. And Mississippi has just
6 distinguished Beck.

7 I don't believe that they properly raise this
8 Court's jurisdiction. They never cite Beck. They never
9 raised -- they never said due process.

10 JUSTICE STEVENS: No, but if the jurors' concern
11 is that you either have to acquit them or -- we want to
12 make sure he never walks out of prison again, and the only
13 way to do that is to convict him of a capital offense so
14 the judge can impose the death penalty. I don't know why
15 that Beck wouldn't be triggered on those facts.

16 MR. HOOD: Well, maybe I don't understand the
17 question correctly. But in Beck, you know, the jury
18 wasn't told that the judge would have a separate option of
19 denying the death penalty. In this case, judge in State's
20 -- court instruction C-5, the court says you are not to
21 consider the sentence, that you only consider the issue of
22 guilt or innocence of the charge. And so that's why I say
23 this is not a Beck issue because it doesn't impact the --
24 the jury's determination in the guilt phase.

25 JUSTICE KENNEDY: Well, it seems to me that

1 works against you because it takes away from the jury the
2 option of saying, well, we'll convict him of a serious
3 offense, but we'll be sure not to give him a capital
4 offense. So that -- it seems to me that that argument
5 then works against you.

6 MR. HOOD: Well, Justice Kennedy, in
7 Mississippi, we have, there again, that open standard, not
8 the Federal standard. And we would give him that
9 instruction and give that jury that option if the facts
10 support it, and I respectfully submit to the Court that --
11 that the facts do not support a lesser-included offense
12 under these facts.

13 If the Court has no further questions, thank
14 you.

15 JUSTICE STEVENS: Thank you, General Hood.

16 Mr. Mitchell, you have about 4 and a half
17 minutes left.

18 REBUTTAL ARGUMENT OF RONNIE M. MITCHELL

19 ON BEHALF OF THE PETITIONER

20 MR. MITCHELL: Justice Stevens, and -- and may
21 it please the Court:

22 With regard to the argument that the State makes
23 here that these individuals had ridden around all night
24 with a plan to rob and that, therefore, there were no
25 other -- there was no other possibility for the court to

1 consider in -- in granting instructions, first, it is our
2 contention that both Mississippi law and due process law
3 requires a judge to instruct a jury on all of the relevant
4 issues in the case, on all the relevant law in the case.
5 And in Fairchild v. State, that is precisely what the
6 Mississippi court did in saying that a court could not
7 simply conclude, no matter how strong the evidence of
8 attempt to rob or plan to rob, that it could, in effect,
9 direct a verdict and not instruct on lesser-included
10 offenses.

11 JUSTICE KENNEDY: Well, your -- were the two
12 principal lesser-included offenses in -- in your view your
13 D-13 and D-18 that are in the appendix?

14 MR. MITCHELL: Your Honor, those are the ones
15 that were -- were, in fact, raised. We believe that
16 rather than intent the -- on the simple murder, that the
17 issue is malice as opposed to intent. The statutory
18 definition, for example, of manslaughter in -- in
19 Mississippi statute 97-3 -- I believe -27 is a killing of
20 a human being without malice and while not in the
21 commission of these felonies.

22 Now, it may be that simply a small-town lawyer
23 from -- from North Carolina is told don't go to the big
24 city and get stung by some guy coming up to you and
25 saying, you know, I just got off the bus and I need to get

1 some money from you and my kids and my wife are waiting
2 for me in the hotel room. But that happens not only in
3 the big city, it also happens in Mississippi. And so
4 there was a basis in which a jury could reasonably infer
5 that there was a reason to approach that vehicle other
6 than an attempted robbery. And the question is, what is a
7 reasonable inference?

8 The Mississippi court here in its opinion said
9 that there was clearly evidence from which a jury could
10 infer robbery. We concede that, but there were also other
11 inferences that this evidence raised, and that evidence,
12 we respectfully submit, mandated a lesser-included offense
13 instruction.

14 We also contend that -- that the State has not,
15 heretofore, raised any issue about Beck's continuing
16 vitality, but we respectfully submit that Beck is of
17 continuing vitality. Just a -- a survey of even habeas
18 corpus cases from the various circuits will show that the
19 circuits are continuing to apply Beck even in States where
20 the statutory sentencing scheme is far different from Beck
21 and there is no preclusive statute involved, as there was
22 in Alabama.

23 We respectfully submit that the language in Beck
24 itself speaks to this issue. The Beck court added, the
25 same reasoning must apply to rules that diminish the

1 reliability of the -- the guilt determination, the very
2 point that Justice Kennedy pointed out undercuts
3 Mississippi's argument. It is this diminution of the
4 reliability of the guilt determination that is at issue
5 here.

6 In addition to that, we would respectfully
7 submit that under these circumstances, there was a basis
8 under which a lesser-included offense instruction was
9 mandated because Beck did not apply the Blockburger test.
10 In fact, it did not incorporate Blockburger, did not refer
11 to Mullaney v. Wilbur. What it did was it said if there
12 is a lesser-included offense, as defined by State law.
13 All of the succeeding cases from this Court have said if
14 there is a lesser-included offense, as defined by State
15 law, conceding that State law is the applicable standard
16 then and not the standard that the State now seeks to
17 impose, which it never raised in -- in its brief, which it
18 has never asserted to be the standard. Blockburger is
19 certainly not cited in anything that the State has
20 submitted. Blockburger is not contended to be the basis,
21 nor could it be. The basis is is there a lesser-included
22 offense under State law, and we contend that that is the
23 basis on which this case should be decided.

24 Thank you very much.

25 JUSTICE STEVENS: Thank you, Mr. Mitchell.

1 The case is submitted.

2 (Whereupon, at 12:04 p.m., the case in the
3 above-entitled matter was submitted.)

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