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The "Third Option": Extending the Lesser Included Offense Doctrine to the Non-Capital Context

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NOTE

THE "THIRD OPTION": EXTENDING THE LESSER INCLUDED OFFENSE DOCTRINE TO THE NON-CAPITAL CONTEXT

I. INTRODUCTION

The issue of whether there is a constitutional right to have a jury instructed on the lesser included offenses ("LIO") of the crime charged has arisen again with the Ninth Circuit's recent decision in Solis v. Garcia. On September 21, 1991, Victor Solis drove the car from which his companion, Christopher Moffat, fired the deadly shots that killed Kenneth O'Brien. The State charged Solis with murder. At his trial, Solis testified that he did not know Moffat possessed a gun, nor did he know that Moffat planned to use it. Solis then testified that after he learned that Moffat was armed, he believed Moffat would only shoot the gun into the air to scare the other men. Solis' attorney requested that the judge instruct the jury on the LIO of voluntary manslaughter. The instruction was refused and the jury was...


2. See Solis, 219 F.3d at 924.

3. See id. The prosecutor argued that Solis was a joint perpetrator of an intentional killing, or in the alternative, that Solis "aided and abetted a planned crime which foreseeably resulted in a homicide." Id.

4. See id. at 925.

5. See id. O'Brien was accompanied by two other men, Patrick Titherina and Starr McCullough, collectively referred to by the court as the "Linda Vista boys." Id. at 924. The three men were walking along the street when Solis and Moffat happened upon them. See id. The Linda Vista boys had challenged Solis to a fight earlier in the night, before he returned with Moffat. See id.

6. See id. at 925.
charged on the crimes of first-degree and second-degree murder only, under the doctrine of "natural and probable consequences." Ultimately, the jury found Solis guilty of second-degree murder.

On December 19, 1995, Solis filed a petition for a writ of habeas corpus in federal district court, alleging that the failure of the trial court to instruct the jury on the requested LIO of voluntary manslaughter had deprived him of due process. The Court of Appeals for the Ninth Circuit, following Bashor v. Risley, declined to hold that a constitutional right to a LIO instruction exists in a case in which there is no possibility of the death penalty being imposed.

However, there is such a constitutional right in capital cases, when the punishment of death is being sought. Such a discrepancy has led to an extensive split among the federal circuit courts regarding the disposition of this issue. While the Third Circuit has extended this constitutional right to non-capital cases, the First, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have expressly rejected such an interpretation.

This Note explores the existing circuit split and advocates that this constitutional right already recognized in capital cases should be applicable in non-capital cases as well. Part II describes the history of the LIO doctrine. Part III addresses the due process concerns of this issue by exploring the Supreme Court's decision that the defendant in a capital case has a right to a LIO instruction and the subsequent Court

7. Id. The Natural and Probable Consequences doctrine provides: "Individuals may be held as accomplices for crimes they did not intend to aid, if those crimes are the 'natural and probable consequence' of the crime they did intend to assist." Audrey Rogers, Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent, 31 Loy. L.A. L. Rev. 1351, 1360 (1998).

8. See Solis, 219 F.3d at 925 (stating: "[d]uring deliberation the jury asked the judge for instructions on a charge not involving murder, which the judge declined to give").

9. See id; see also U.S. Const. amend. V ("No person . . . shall be deprived of life, liberty or property, without due process of law."); see also U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

10. 730 F.2d 1228, 1240 (9th Cir. 1984) (holding that there is no constitutional right to have the jury instructed on LIOs in a non-capital case).

11. See Solis, 219 F.3d at 929.

12. See Beck v. Alabama, 447 U.S. 625, 637 (1980) (holding that when there is doubt as to whether conviction of a capital offense is justified, "the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction").


14. See Bagby v. Sowards, 894 F.2d 792, 797 (6th Cir. 1990); Tata v. Carver, 917 F.2d 670, 673 (1st Cir. 1990); Valles v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988); Perry v. Smith, 810 F.2d 1078, 1080 (11th Cir. 1987); Trujillo v. Sullivan, 815 F.2d 597, 603 (10th Cir. 1987); Nichols v. Gagnon, 710 F.2d 1267, 1269 (7th Cir. 1983).
decisions that have limited that right. Finally, Part IV discusses the differing positions of the circuit courts regarding LIO instructions in non-capital cases. Part IV also notes the need for the Supreme Court to resolve the twenty-year-old question of whether to extend its capital holding to non-capital cases and argues that the extension of such a right is warranted.

II. HISTORY

A. The Evolution of the Lesser Included Offense Doctrine

Rule 31 of the Federal Rules of Criminal Procedure provides that the “defendant may be found guilty of any offense necessarily included in the offense charged.” This doctrine provides that a “criminal defendant may be convicted at trial of any crime supported by the evidence which is less than, but included within, the offense charged by the prosecution.” “The purpose of this protection is to prevent juries from improperly resolving their doubts in favor of conviction when one or more of the elements of the charged offense remain unproven, but the defendant seems plainly guilty of some offense.” Traditionally, the right to a LIO instruction originated at common law as a tool of the prosecution in cases where the proof failed to show some element of the crime charged. In time, however, there was a shift in the role of LIO instructions from that of a prosecutor’s aid to a defendant’s right. As early as 1895, defendants have claimed an entitlement to jury instructions on LIOs. In Sparf v. United States, the defendant unsuccessfully argued that the judge’s failure to give the instruction constituted an impermissible encroachment on the fact-finding role of the jury. Only one year later, the exact opposite result was reached in Stevenson v. United States. There, the Supreme Court held that, if so
warranted by the evidence, failure to instruct on LIOs could constitute a violation of the defendant’s rights resulting in reversible error.\(^2\)

**B. The Federal Standard on Lesser Included Offenses**

In *Schmuck v. United States*,\(^4\) the Supreme Court finally resolved the question of exactly what offenses are “necessarily included” in other offenses, and thus defined as LIOs. In *Schmuck*, the defendant was a used-car distributor who was convicted in district court for twelve counts of mail fraud.\(^5\)

On appeal to the Seventh Circuit, Schmuck claimed that the district court erred by not instructing the jury on the misdemeanor offense of odometer tampering.\(^6\) A Seventh Circuit panel reversed the conviction, holding that under Rule 31(c),\(^2\) the district court should have instructed the jury on the lesser offense of odometer tampering.\(^2\) The panel applied the “inherent relationship” test, first articulated in *United States v. Whitaker*,\(^2\) as a means of determining what constitutes a LIO for the purposes of Rule 31(c).\(^3\) The inherent relationship test proffers that “one offense is included in another when the facts as alleged in the indictment and proved at trial support the inference that the defendant committed the less serious offense, and an ‘inherent relationship’ exists between the two offenses.”\(^3\) “This relationship arises when the two offenses relate to the protection of the same interests and the proof of the greater offense can generally be expected to require proof of the lesser offense.”\(^2\)

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23. *See id.* at 323.
25. *See id.* at 707. Schmuck’s fraudulent practices consisted of purchasing used cars, rolling back their odometers, and then selling the automobiles to retail dealers for prices much higher than the cars were worth because of their low-mileage readings. *See id.* The dealers who purchased these automobiles from Schmuck were required by state law to submit a title application form to the Wisconsin Department of Transportation before reselling the car to a retail customer. *See id.* “The submission of the title application form supplied the mailing element of each of the alleged mail frauds.” *Id.*
26. *See id.* at 708.
27. *Fed. R. Crim. P.* 31(c) states: “[T]he defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.”
31. *Id.* at 708-09 (discussing the Seventh Circuit decision).
32. *Id.* at 709 (discussing the Seventh Circuit decision).
The Court of Appeals for the Seventh Circuit vacated the decision of the panel and ordered the case to be reheard en banc. On rehearing, the court rejected the “inherent relationship” test, adopting instead the “elements test,” whereby one offense is “necessarily included” within another, greater, offense “only when the elements of the lesser offense form a subset of the elements of the offense charged.” The Supreme Court subsequently agreed with the court of appeals’ holding that the “elements test” was the proper approach, stating that “[w]here the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).” This ruling now serves as the federal standard for determining exactly which crimes can be found to be LIOs.

The Supreme Court has also determined when a defendant is entitled to an instruction on LIOs. According to the Court, the elements of the crime charged must constitute a lesser crime, there must be an evidentiary basis for a finding of guilt on the lesser offense, and the “charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.”

33. See United States v. Schmuck, 784 F.2d 846, 846 (7th Cir. 1986) (vacating the panel’s decision).
34. United States v. Schmuck, 840 F.2d 387 (7th Cir. 1988) (reh’g en banc).
35. Schmuck, 489 U.S. at 716.
36. See id. The Schmuck Court proffered several reasons for rejecting the inherent relationship test in favor of the elements test. See id. at 716-21. First, the use of the words “necessarily included” in Rule 31(c) suggests a comparison of the statutory elements of the offenses in question. See id. at 716. “[T]he language of Rule 31(c) speaks of the necessary inclusion of the lesser offense in the greater.” Id. at 717. While the elements test adopts this requirement, the inherent relationship test dispenses with the necessary inclusion relationship altogether. See id. Under the inherent relationship test, a LIO instruction is permitted even if the proof of one offense does not invariably require proof of the other, so long as the two offenses “serve the same legislative goals.” Id. Second, both the weight of authority and the history of Rule 31(c) support the adoption of the elements test. See id. at 718 (tracing the history of the prevailing practice under Rule 31(c) from common law forward). “The Rule . . . is the most recent derivative of the common law practice that permitted a jury to find a defendant ‘guilty of any lesser offense necessarily included in the offense charged.’” Id. at 718 (quoting Beck v. Alabama, 447 U.S. 625, 633 (1980)). Finally, the elements test involves a textual comparison of statutes, rather than relying on inferences drawn from evidence adduced at trial. See id. at 720. Therefore, the test is more predictable in its application, promoting judicial economy. See id. In contrast, the inherent relationship test is uncertain and unpredictable, “ripe with the potential for confusion.” Id.
38. Id. at 350. The Fifth Circuit, like many others, has elaborated on this view to some extent. See United States v. Harrison, 55 F.3d 163, 166 (5th Cir. 1995). Before a defendant is entitled to a jury instruction involving LIOs, two prerequisites must be met: “(1) the elements of the offense are a subset of the elements of the charged offense and (2) the evidence at trial permits a jury to rationally find the defendant guilty of the lesser offense yet acquit him of the greater.” United States
III. SUPREME COURT DECISIONS CONCERNING THE LESSER INCLUDED OFFENSE DOCTRINE

A. The Landmark Decision of Beck v. Alabama

In the landmark case of Beck v. Alabama, the Supreme Court held that a criminal defendant in a capital case is constitutionally entitled to a jury instruction on LIOs. However, this holding was specifically limited to the capital context only, as the Court stated in a footnote “[w]e need not and do not decide whether the Due Process Clause would require the giving of such instructions in a non capital case.” This left the door open for the circuit courts to decide on their own whether or not to extend Beck to non-capital offenses.

In Beck, the defendant was convicted of robbery-intentional killing, a capital offense in the state of Alabama. Felony murder, a non-capital offense, is considered a LIO of robbery-intentional killing. However, under the Alabama death penalty statute the judge was specifically precluded from giving the jury the option of convicting the defendant of a LIO. Alabama juries were given only two options; conviction, which would result in the imposition of the death penalty, or acquittal, which would allow the defendant to escape punishment for any participation in the alleged crime.

The defendant raised several arguments on appeal. However, the Supreme Court granted certiorari to decide the answer to a single question: “May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and

v. Deisch, 20 F.3d 139, 142 (5th Cir. 1994). This test incorporates the one set forth in Schmuck, while better defining it for easier application.

40. See id. at 637.
41. Id. at 638 n.14.
42. See id. at 627.
43. See id. at 628.
44. See id. at 628-29.
45. See id. It is interesting to note at this point that under Alabama law, the defendant was entitled to a LIO instruction in a non-capital case if “there [was] any reasonable theory from the evidence which would support the position.” Id. at 630 n.5 (quoting Fulghum v. State, 277 So. 2d 886, 890 (Ala. 1973)). In fact, the prosecution even conceded that without the statute prohibiting the LIO instruction in capital cases, Beck would have been entitled to a LIO instruction on felony murder as a matter of state law. See id.
46. See Beck, 447 U.S. at 632.
when the evidence would have supported such a verdict?" The Court's answer to this question was no.

In Beck, the defendant argued that the prohibition on LIO instructions in capital cases violated the Eighth Amendment of the Constitution, as applied to the states through the Fourteenth Amendment, as well as the Due Process Clause of the Fourteenth Amendment. According to the defendant Beck, precluding the jury from being instructed on LIOs "substantially increas[ed] the risk of error in the fact-finding process."

In response, the State of Alabama countered that precluding the LIO instructions prejudiced neither the fact-finding process nor the defendant. Rather, according to the State, the mandatory imposition of the death penalty makes the jury more likely to acquit when the case before them is doubtful. Alabama further argued that prohibiting LIO instructions is a "reasonable way of assuring that the death penalty is not imposed arbitrarily and capriciously as a result of compromise verdicts."

The Court, relying heavily on its decision in Keeble v. United States, agreed with Beck, stating that it is "now 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" According to the Court,

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47. *Id.* at 627.
48. *See id.* (stating "we now hold that the death penalty may not be imposed under these circumstances").
49. *See id.* at 632; *see also U.S. Const. amend. XIV.* The defendant in *Beck* further argued that when the evidence clearly establishes the defendant's guilt of a serious non-capital crime, "forcing the jury to choose between conviction on the capital offense and acquittal creates a danger that it will resolve any doubts in favor of conviction." *Beck*, 447 U.S. at 632. Moreover, under Alabama law, a trial judge is required to instruct the jury on LIOs in appropriate non-capital cases. *See id.* at 632. The defendant argued that, because of this, a total prohibition on LIO instructions "constitutes an irrational discrimination violative of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 632 n.8. The Court did not consider it necessary to consider this issue in view of their disposition of the case. *See id.*
50. *Beck*, 447 U.S. at 632. The facts of the case were that Beck and an accomplice entered the home of the eighty-year-old victim intending to rob him, and in the course of the robbery, the man was killed. *See id.* at 629-30. Beck contended, however, that it was the accomplice who killed the man, while he himself neither intended nor participated in the man's killing. *See id.* at 630.
51. *See id.* at 633.
52. *See id.*
53. *Id.*
54. 412 U.S. 205, 214 (1973) (holding that an Indian prosecuted in federal court under the Major Crimes Act is entitled to a jury instruction on a LIO, even though the lesser offense is not one of the crimes enumerated in the Act).
when there is unquestionable evidence that the defendant has committed a serious, violent offense, but there is doubt as to whether conviction of a capital offense is justified, "the failure to give the jury the ‘third option’ of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." Thus, Alabama was constitutionally prohibited from withdrawing the “third option” from the jury.

Unfortunately, it is not clear from its holding in *Beck* what the basis for the Court’s decision was. While both due process and Eighth Amendment concerns come into play, neither one is indicated as the grounds for the holding. The Court alludes to the due process issue by stating, “[w]hile we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard.”

Here, the Court reiterated its concerns about failing to allow the jury consideration of the “third option,” stating, “[s]uch a risk cannot be tolerated in a case in which the defendant’s life is at stake.” The Court then lunged into a discussion of the “significant constitutional difference between the death penalty and lesser punishments,” thereby invoking Eighth Amendment concerns.

Whatever the grounds for the decision of the Court in *Beck*, there can be no arguing with the fact that this holding represented a landmark victory for criminal defendants. By allowing the jury in a capital case to consider all of the offenses consistent with the evidence, rather than just the one offense with which the defendant is charged, it ensures accuracy in the fact-finding process. By all means the decision of the Supreme Court in *Beck* is the first step in the right direction.

56. *Beck*, 447 U.S. at 637. According to the Court, if the jurors have any doubts about the guilt of the defendant, they will be more likely to resolve their doubt in favor of conviction than set the defendant free. See id. at 642.

57. See id. at 638.

58. See id. at 634-39.

59. Id. at 637.

60. Id.

61. Id. “[D]eath is a different kind of punishment from any other which may be imposed in this country.” *Id.* (alteration in original) (quoting Justice Stevens’ opinion in *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)). In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court provided further credence for the *Beck* Court’s position when it stated:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

*Id.* at 305.
B. Beck's Progeny

In the years following the Beck holding, the Supreme Court had the opportunity to revisit the constitutional issue of the LIO doctrine several times. In each of the cases that would follow, the Supreme Court refined the holding expounded in Beck, striving to limit the implications of its decision. However, the Court left some important questions unanswered in its subsequent cases. It did not decide whether or not to extend the constitutional right of LIO instructions already recognized in capital cases to non-capital cases. Nor did the Court define the precise basis of its holding in Beck: whether it was the Eighth Amendment or the Due Process Clause.

1. Hopper v. Evans

The defendant in Hopper v. Evans was convicted in state court of the capital offense of intentional killing during the course of a robbery and was subsequently sentenced to death. Interestingly, the defendant in Hopper was tried under the same Alabama capital murder statute later invalidated by the Supreme Court in Beck and, consistent with the state statute, the judge refused to allow a LIO instruction to be given to the jury. It took the jury less than fifteen minutes to return a guilty verdict.

The defendant's mother subsequently initiated habeas corpus proceedings in federal district court, challenging the conviction on the grounds that the Alabama statute unconstitutionally precluded consideration of LIOs. The district court rejected this argument. The defendant then appealed his case to the Court of Appeals for the Fifth


64. See id. at 606, 608. The defendant testified that he and an accomplice embarked on a cross-country crime spree, in which they committed about thirty armed robberies, nine kidnappings, and two extortion schemes in seven different states over the course of a two month period. See id. at 606. The defendant signed a detailed written confession admitting that he shot the victim during the robbery, and his testimony at trial indicated that he had done so intentionally. See id. at 607. Evans testified that he felt no remorse for the murder and that he would kill again in similar circumstances. See id. He further stated that he "would rather die by electrocution than spend the rest of [his] life in the penitentiary." Id. at 607-08.

65. See id. at 608.

66. See id.

67. See id.

While awaiting appeal, the Supreme Court rendered its decision in *Beck*, invalidating the Alabama statute under which the defendant was convicted and sentenced to death. Because of the Court's holding in *Beck*, the Court of Appeals reversed the District Court's denial of relief.

On certiorari to the United States Supreme Court, the Court held that the Circuit Court had misread the opinion in *Beck*. The Court of Appeals had interpreted *Beck* to stand for the proposition that, in every case, the defendant is entitled to a lesser included offense instruction. However, according to the Supreme Court, the actual thrust of *Beck* is 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.'" The defendant in this case, through his own testimony, made it crystal clear that he was responsible for the victim's death, he had killed the victim intentionally, and that he would not hesitate to kill again if faced with the same circumstances. According to the Court, "[t]he evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim." Therefore, an instruction on the LIO of intentional killing was not warranted.

Unfortunately, *Hopper* did not help to clarify whether the Supreme Court considered *Beck* limited to the capital context, the decision thus having rested on Eighth Amendment grounds, or whether it was a more general due process right. If anything, it served only to add to the confusion surrounding the issue. The Court seems to categorize its holding as an Eighth Amendment consideration which is alluded to by its remark that "[o]ur holding in *Beck*, like our other Eighth Amendment decisions." Only two paragraphs later, however, the Court states, "*Beck* held that due process requires that a lesser included offense instruction be given . . . ." The Court seems to waver back and forth between the different constitutional provisions rather than taking a firm stand.

69. See Evans v. Britton, 628 F.2d 400, 400 (5th Cir. 1980).
71. See Evans, 628 F.2d at 400 (1980).
73. See id.
74. Id.
75. See id. at 612.
76. Id. at 613.
77. See id.
78. Id. at 611.
79. Id.
2. *Spaziano v. Florida*

Four years after the Court laid down its ruling in *Beck*, it faced a rather interesting question in *Spaziano v. Florida.* What did *Beck* require in a capital case when the statute of limitations had run on all of the possible LIOs? "Joseph Robert Spaziano was indicted and tried for first-degree murder." However, the indictment against Spaziano was not brought until "two years and one month after the alleged offense." Consequently, Florida's statute of limitations period of two years for non-capital offenses had run.

At the close of all evidence, the trial judge informed Spaziano that he would instruct the jury on the non-capital LIOs of attempted first-degree murder, second-degree murder, third-degree murder and manslaughter, but only on one condition, the defendant would have to waive the statute of limitations as to those offenses. Spaziano refused and the court accordingly instructed the jury solely on the crime of capital murder. Consequently, the jury returned a verdict of guilty of murder in the first-degree.

The Supreme Court of the United States granted certiorari and subsequently affirmed the opinion of the Supreme Court of Florida. The way in which the Court first framed the issue, without yet exploring it, implied that the defendant never even stood a chance. The Court noted: "[t]he issue here is whether the defendant is entitled to the benefit of both the lesser included offense instruction and an expired period of limitations on those offenses." Spaziano argued he should not be forced to waive a substantive right, the statute of limitations defense, in order to receive a "constitutionally fair trial." The Court claimed to have no

81. See id. at 455.
82. Id. at 450. The primary evidence against Spaziano was the testimony of a witness who stated the defendant had taken him to a garbage dump, where he pointed out the remains of two women he claimed to have tortured and murdered. See id.
83. Id.
84. See id. (noting there was no statute of limitations in place for capital offenses).
85. See id.
86. See id.
87. See id. at 451. Spaziano appealed his conviction to the Supreme Court of Florida who affirmed the conviction but reversed the sentence of death. See id. at 452. Spaziano's principal contention was that *Beck* required reversal of his conviction due to the trial court's failure to instruct the jury on LIOs. See id. The Supreme Court of Florida found "nothing in *Beck* requiring that the jury determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty." Id. at 452-53.
88. See id. at 454.
89. Id.
90. Id. at 455.
quarrel with Spaziano’s general premise, but declined to apply it to the specific situation before them.\textsuperscript{91}

According to the Court, \textit{Beck} found essential not simply a LIO instruction, but rather the “enhanced rationality and reliability the existence of the instruction introduced into the jury’s deliberations.”\textsuperscript{92} The Court reasoned that where no LIO is legally available, the instruction “detracts from, rather than enhances, the rationality of the process.”\textsuperscript{93} The Court indicated that the goal of \textit{Beck} was to eliminate the distortion of the fact-finding process caused by the all-or-nothing situation (convict or acquit completely).\textsuperscript{94} However, the Court concluded that requiring a LIO instruction on LIOs for which the defendant may not be convicted produces yet another type of distortion into the fact-finding process.\textsuperscript{95}

Hence, the Court was unwilling to accept the “social cost” of “tricking” the jury into believing it has a choice of crimes from which to convict the defendant, “if in reality there is no such choice.”\textsuperscript{96} Rather, “conviction of only one of the instructed offenses would carry an enforceable sentence.”\textsuperscript{97}

The Court ultimately held that when a LIO instruction is warranted by the evidence in a capital case, but the statute of limitations on the lesser included non-capital offenses has already run, the defendant should be given the choice of whether or not to waive the statute of limitations.\textsuperscript{98} If the defendant chooses not to waive the statute of limitations and thus the jury does not receive the LIO instruction, it does not violate the rule of law set forth in \textit{Beck} to only instruct the jury on the capital offense.\textsuperscript{99}

The line of reasoning in \textit{Spaziano} was very similar to that of \textit{Hopper}. The two cases viewed together clarify that \textit{Beck} requires a LIO instruction when the instruction is legally authorized, meaning it is available under the statute of limitations,\textsuperscript{100} and is warranted by the evidence.\textsuperscript{101} Put another way, the \textit{Beck} rule is only applicable when a
LIO is rationally and reasonably available as a verdict, both as a matter of law and based upon the evidence put forth at trial.\textsuperscript{102} If the jury cannot convict the defendant of the LIO, \textit{Beck} does not apply.\textsuperscript{103}

As for the constitutional basis of \textit{Beck}, \textit{Spaziano} failed to shed any light on the bewilderment. Although the Court engaged in a lengthy discussion of constitutional fairness, it failed to point to a specific constitutional provision upon which its decision was grounded. The Court focused generally on due process type issues but also made several references to the death penalty. Thus, whether \textit{Beck} rests on Eighth Amendment or due process principles was not determined by this Court.

3. \textit{Schad v. Arizona}

\textit{Schad v. Arizona},\textsuperscript{104} the next case to interpret \textit{Beck}, came seven years later with a new twist. Now the Court was called upon to examine the interaction of \textit{Beck} and the Felony Murder Doctrine.\textsuperscript{105} Yet again, the Court declined to make any exceptions to the traditional rules in order to accommodate the concerns raised in \textit{Beck}.

Schad was indicted on first-degree murder, defined under Arizona law as “murder which is ... wilful, deliberate or premeditated ... or which is committed ... in the perpetration of, or attempt to perpetrate ... robbery....”\textsuperscript{106} At trial, the prosecution presented two theories: premeditated murder and felony murder.\textsuperscript{107} Schad requested a jury instruction on the LIO of theft.\textsuperscript{108} Although the trial judge refused this particular instruction, he did instruct the jurors on the LIO of

\begin{footnotes}
\textsuperscript{102} See id.; see also \textit{Spaziano}, 468 U.S. at 456-57.
\textsuperscript{103} See \textit{Spaziano}, 468 U.S. at 455.
\textsuperscript{105} See id. at 627.
\textsuperscript{106} Id. at 628 n.1 (quoting the since revised ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1973)). On August 9, 1978, a highway worker discovered the badly decomposed body of a seventy-four year-old man in the underbrush of U.S. Highway 89 in Arizona. \textit{See Schad}, 501 U.S. at 627. The body still had a rope around its neck and the cause of death was determined as strangulation. \textit{See id.} Approximately one month later, Schad was arrested for possession of a stolen vehicle, the automobile belonging to the murder victim found on Highway 89. \textit{See id.} at 628. A search of the car revealed the victim's personal belongings. \textit{See id.} The police found two of the victim's credit cards in Schad's wallet, which he had begun using about one month before. \textit{See id.}
\textsuperscript{107} See \textit{Schad}, 501 U.S. at 629. The court instructed the jury that "first-degree murder is murder which is the result of premeditation ... Murder which is committed in the attempt to commit robbery is also first-degree murder." \textit{Id.}
\textsuperscript{108} See id.
\end{footnotes}
second-degree murder. The jury convicted Schad of murder in the first-degree and he was sentenced to death.

On certiorari to the Supreme Court, Schad argued that the Court's holding in *Beck* entitled him to a jury instruction on felony murder's LIO of robbery. The Court reiterated the rationale of *Beck*, emphasizing that the "fundamental concern [there] was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free . . . ." The Court went on to hold that the trial judge's instruction on second-degree murder in *Schad* satisfied the "third option" requirement announced in *Beck*, and that the jury's verdict was therefore reliable.

The majority found *Beck* satisfied because the *Schad* jury was provided with the opportunity to convict Schad of second-degree murder, thereby fulfilling the "third option" requirement. According to the dissent, however, the alternative of second-degree murder provided no "third option" to a choice between conviction for felony murder/robbery and complete acquittal because second-degree murder is only a LIO of premeditated murder. "Consequently, if the jury believed that the course of events led down the path of felony murder/robbery, rather than premeditated murder, it could not have convicted petitioner of second-degree murder as a legitimate 'third option' to capital murder or acquittal."

The dissent in *Schad* further went on to challenge the State's contention that felony murder has no LIOs by stating, "[i]n the case of a

109. *See id.*
110. *See id.* The Arizona Supreme Court affirmed Schad's conviction. *See id.*
111. *See id.* at 645.
112. *Id.* at 646.
113. *Id.* at 647. The Court stated that the goal of *Beck* was to eliminate the distortion of the fact-finding process that exists when a jury is not instructed on LIOs and is instead faced with an all-or-nothing choice. *See id.* According to the Court, this concern was not implicated in Schad's case because the jury was not forced to choose between a capital conviction and innocence. *See id.* They had a third option, second-degree murder. *See id.* at 646-47.
114. *See id.*
115. *See id.* at 660 (White, J., dissenting).
116. *Id.* Schad's defense at trial was that although he may have robbed the victim, he was not the one who murdered him. *See id.* at 647. If the jury believed such a theory, they would have been forced to acquit Schad even though they believed him guilty of robbery because they were not given the option to convict of robbery. *See id.* Hence, even though Schad was indeed given a LIO instruction, it was one inconsistent with the defense he argued at trial. *See id.* Therefore, while the jury was not faced with an all-or-nothing choice of first-degree murder or acquittal, it was impossible for them to even consider a verdict consistent with Schad's side of the story. *See id.*
compound crime such as felony murder, in which one crime must be proved in order to prove the other, the underlying crime must, as a matter of law, be a lesser included offense of the greater.” Thus, according to the dissent, robbery was a LIO of the felony murder/robbery for which Schad was tried and the LIO instruction should have been presented to the jury.

Yet again, the specific constitutional basis of the Beck LIO rule seemed to evade the Court’s attention. The majority referred to Schad’s contention “that the due process principles underlying Beck require that the jury in a capital case be instructed on every lesser included noncapital offense,” but the Court failed to characterize exactly what those principles are. It did quote the due process concerns of both the Beck and Spaziano opinions, but these allusions were coupled closely with references to capital cases. Overall, Schad represented an even more restrictive reading of Beck’s already narrow reasoning regarding LIOs and the Constitution, suggesting that the Court is not inclined to extend Beck as a general rule beyond the capital context.

4. Hopkins v. Reeves

The final case to interpret Beck came in 1998 in Hopkins v. Reeves when the Supreme Court was called upon to resolve a conflict between the Eighth and Ninth Circuits. The Court phrased the question before it as “whether Beck requires state trial courts to instruct juries on offenses that are not lesser included offenses of the charged crime under State law.” The Court held that such instructions were not constitutionally required.

In Hopkins, the State proceeded against the defendant, Reeves, on a theory of felony murder. Under Nebraska law, felony murder is a form

117. Id. at 661-62.
118. See id. “[T]he evidence here met the independent prerequisite for a [LIO] instruction that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater.” Id. at 662 (quoting Schmuck v. United States, 489 U.S. 705, 716 n.8 (1989)). Therefore, “[d]ue process required that the jury be given the opportunity to convict petitioner of robbery, a necessary lesser included offense of felony murder/robbery.” Schad, 501 U.S. at 662 (White, J., dissenting) (citing Stevenson v. United States, 162 U.S. 313, 319-20 [1896]).
119. Schad, 501 U.S. at 646.
120. See id. at 646-47.
122. See id. at 94.
123. Id. at 90.
124. See id. at 91.
125. See id. On March 29, 1980, police found the caretaker of the Religious Society of Friends meeting house lying on the floor, stabbed seven times in the chest with a serrated kitchen knife, which was later found upstairs. See id. The officers then went to an upstairs bedroom where they
of first-degree murder and is defined as “murder committed ‘in the perpetration of or attempt to perpetrate’ certain enumerated felonies, including sexual assault or attempt to commit sexual assault in the first-degree.” During the trial, Reeves requested that the jury be instructed on both murder in the second-degree and manslaughter, which, according to him, were LIOs of felony murder. The trial court refused such an instruction and Reeves’ jury was presented with only the two counts of felony murder. The jury convicted Reeves on both counts of felony murder and a three-judge panel subsequently sentenced him to death on both convictions. Reeves claimed that the denial of the LIO instruction constituted a violation of Beck and warranted the reversal of his death sentence.

found the partially clad body of another woman, fatally stabbed twice. See id. A billfold containing the defendant Reeves’ identification was lying near the second woman’s body. See id. The police also found underwear, later identified as the defendant’s, in the middle of the blood-soaked sheets of the bed. Examination of the underwear subsequently revealed semen of defendant’s blood type. See id. Prior to dying, the first victim told the police that the defendant had raped her. See id. The police arrested the defendant who told them that “although he could not remember much about the murders due to severe intoxication, he did recall stabbing and raping [the caretaker].” Id. Consequently, the State charged Reeves with two counts of felony murder. See id.

126. Id. (quoting NEB. REV. STAT. ANN. § 28-303 (Michie 1995)). When proceeding on a felony murder theory in Nebraska, there is no need to prove a culpable mental state with respect to the murder because the intent to kill is presumed as long as the State proves intent to commit the underlying felony. See State v. Reeves, 344 N.W.2d 433, 442 (Neb. 1984). Furthermore, under Nebraska law, capital sentencing is a judicial function. See Hopkins, 524 U.S. at 92 (discussing NEB. REV. STAT. § 29-2520 (1995)). Therefore, even though conviction for felony murder renders a defendant “death eligible,” the jury is not charged with the function of recommending sentencing. See id.

127. See Hopkins, 524 U.S. at 92.

128. See id. The basis for the trial court’s refusal was the fact that the Nebraska Supreme Court had consistently held that second-degree murder and manslaughter were not LIOs of felony murder. See id.

129. See id.

130. See id. at 93. The district court rejected Reeves’ Beck claim but instead granted relief on an unrelated ground. See Reeves v. Hopkins, 871 F. Supp. 1182, 1202, 1205-06 (D. Neb. 1994). This holding was later reversed by the Court of Appeals for the Eighth Circuit and remanded back to the district court. See Reeves v. Hopkins, 76 F.3d 1424, 1427-31 (8th Cir. 1996). On remand, the district court again granted Reeves’ petition, holding that the Nebraska Supreme Court had violated Reeves’ due process rights by affirming his conviction. See Reeves v. Hopkins, 928 F. Supp. 941, 959-65 (D. Neb. 1996). The State again appealed to the Eighth Circuit, who held this time that although there was no due process violation, the Nebraska trial court had committed constitutional error in failing to give the requested LIO instructions. See Reeves v. Hopkins, 102 F.3d 977, 983-85 (8th Cir. 1996). According to the court of appeals, the constitutional error was the same as that in Beck because in both cases, state law “prohibited instructions on noncapital murder charges in cases where conviction made the defendant death-eligible.” Id. at 983. It made no difference that Nebraska law does not recognize any lesser included homicide offenses to felony murder. See id. Because the defendant “could have been convicted and sentenced for either second-degree murder or manslaughter,” the Eighth Circuit concluded that he was constitutionally entitled to his proposed
On certiorari, the Supreme Court stated that the Eighth Circuit's holding constituted an impermissible encroachment on Nebraska's state sovereignty.\textsuperscript{131} According to the Court, the approach taken by the court of appeals would, in effect, require "that States create lesser included offenses to all capital crimes, by requiring that an instruction be given on some other offense—what could be called a 'lesser related offense'—when no lesser included offense exists."\textsuperscript{132} The Court further elaborated on this proposed scheme, rendering it "not only unprecedented, but also unworkable."\textsuperscript{133}

The \textit{Hopkins} Court reiterated the holding of the \textit{Beck} Court that "denial of the third option [of a LIO] 'diminish[es] the reliability of the guilt determination'" by placing the jury in an all-or-nothing situation.\textsuperscript{134} According to the \textit{Hopkins} Court, the "third option" denied to the jury in \textit{Beck} was obviously unconstitutional because the death penalty was automatically tied to conviction, and the \textit{Beck} jury was told that if it convicted \textit{Beck} of the charged offense, it must sentence him to death.\textsuperscript{135} The Court distinguished \textit{Hopkins} from \textit{Beck} on this basis, finding that such a possibility did not exist in Reeves’ case.\textsuperscript{136} The ultimate holding of the Court was that instructions on LIOs are only required in capital cases when the law of the state recognizes such offenses as included in the greater crime charged.\textsuperscript{137} Since the law of the State of Nebraska did not recognize any LIOs to felony murder, Reeves was not constitutionally entitled to have the jury be instructed on any.\textsuperscript{138}

\textsuperscript{131}See Hopkins, 524 U.S. at 96.
\textsuperscript{132}See Hopkins, 524 U.S. at 97.
\textsuperscript{133}See Hopkins, 524 U.S. at 98 (quoting Beck v. Alabama, 447 U.S. 625, 638 (1980)).
\textsuperscript{134}See Hopkins, 524 U.S. at 98.
\textsuperscript{135}See Hopkins, 524 U.S. at 99.
\textsuperscript{136}See id. The Court discussed the fact that, in \textit{Beck}, there was a significant possibility that defendants would be sentenced to death whose conduct really did not merit it, simply because their juries felt they had committed some serious crime and were reluctant to let them escape punishment entirely. See id. However, according to the Court, such factors were not present in Reeves’ case since his jury was not charged with the duty of imposing the sentence. See id. Their burden was merely to determine guilt or innocence. In addition, the sentencing panel did not face the same dilemma as the jurors in \textit{Beck}, choosing between death and freedom. See id. Rather, the judges in \textit{Hopkins} had another alternative, life imprisonment. See id. at 98-99.
\textsuperscript{137}See id. at 99. "To allow respondent to be convicted of homicide offenses that are not lesser included offenses of felony murder . . . would be to allow his jury to find beyond a reasonable doubt elements that the State had not attempted to prove . . . ." Id.
\textsuperscript{138}See id. It should be noted that although this holding severely limited \textit{Beck}, it only pertains to the capital context and does not affect the position of this Note that the right to LIO instructions should be extended to non-capital defendants.
The outcome of *Hopkins* is troubling because it further reduces the already limited rights of capital defendants. The purpose of the Court's holding in *Beck* was to eliminate distortion in the fact-finding process. It spoke of providing juries with a "third option," LIOs. It said nothing about limiting that "third option" to only those LIOs recognized by state law. If the fundamental concern of the *Beck* Court was that juries would impose unwarranted punishment on defendants whose conduct did not merit it, then it follows that providing the jury with any option other than acquittal or capital conviction would make sense as long as it is consistent with the defense. Whether the judge or the State would find the "third option" technically a LIO or not would not, in all probability, have any impact on the jury's deliberations and should, therefore, play no role in determining whether or not a defendant is constitutionally entitled to such an instruction.

IV. THE SPLIT AMONG THE FEDERAL CIRCUITS

Whether the right expounded in *Beck* should be extended to non-capital defendants is a question still under debate in the federal circuit courts. The Tenth Circuit, in *Trujillo v. Sullivan*, surmised that the ultimate resolution to this query "turns in part on which constitutional provision [the Supreme Court] rested the *Beck* decision." The Court of Appeals in *Trujillo* observed that *Beck* may simply be just another in the line of Eighth Amendment cases "delineating procedural safeguards to ensure that the death penalty is not imposed on the basis of caprice or emotion." However, the *Trujillo* Court went on to discuss the possibility that the *Beck* Court may have grounded its decision on broader-based concerns of due process under the Fifth and Fourteenth Amendments. Assuming the latter is true, it supports the proposition that the failure to provide LIO instructions in non-capital cases

139. See *Beck*, 447 U.S. at 637. "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense," *id.*, but there is doubt as to whether the evidence justifies a capital conviction, the "failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.*

140. See *id.*

141. 815 F.2d 597 (10th Cir. 1987).

142. See *id.* at 601. The court of appeals went on to state that "[u]nfortunately, the Court's opinion is less than clear on this point." *Id.*

143. *Id.*

144. See *id.* Here, the court of appeals discussed such concerns as the right to a fair and impartial trial, the reliability of the fact-finding process, and the increased risk of unwarranted convictions when the jury is faced with an all-or-nothing choice between conviction and acquittal, rather than being given a LIO instruction. See *id.* at 602.
constitutes a violation of due process.\textsuperscript{145} Given the myriad confusion surrounding the underlying constitutional basis for the Supreme Court's holding in \textit{Beck}, it is not surprising that the federal circuit courts are split as to whether due process requires extending \textit{Beck}'s holding into the non-capital context.

The majority of the federal courts to consider this issue have failed to provide relief for state denials of LIO instructions in non-capital cases.\textsuperscript{146} At present, only one circuit, the Third, extends the \textit{Beck} rule to the non-capital realm.\textsuperscript{147}

Federal circuit courts usually confront the constitutional issue of LIO instructions in cases where the defendant has been convicted in state court and then, as a means of appeal, files a petition for a writ of habeas corpus in federal district court. Federal habeas relief is authorized when it is found that a defendant is being held "in violation of the Constitution or laws or treaties of the United States."\textsuperscript{148} Analysis of the habeas corpus issue by the federal courts has resulted in two different lines of reasoning for denying LIO claims in non-capital cases. These two approaches stem from the Supreme Court's decision in \textit{Beck} as well as the Court's holding in \textit{Hill v. United States}.\textsuperscript{149}

\textbf{A. Extending Beck to Non-Capital Cases—The Third Circuit}

Of all the circuit courts to consider whether \textit{Beck} applies to non-capital defendants, the Third Circuit, in the decision \textit{Vujosevic v. Rafferty},\textsuperscript{150} is the only court of appeals to explicitly extend the constitutional right to such cases.\textsuperscript{151} The other circuits have cleverly

\begin{itemize}
  \item \textsuperscript{145} See id. The Trujillo Court concluded, "[t]he same concern for reliability of the factfinding process when no 'third option' is provided also arises in the case in which the death penalty is not imposed." \textit{Id.} Therefore, "[a] due process violation would necessarily be found . . . if a trial court erroneously refused to give a lesser offense instruction warranted by the evidence." \textit{Id.}
  \item \textsuperscript{146} See discussion \textit{infra} Part IV.B-D.
  \item \textsuperscript{147} See \textit{Vujosevic v. Rafferty}, 844 F.2d 1023, 1027 (3d Cir. 1988).
  \item \textsuperscript{148} 28 U.S.C. § 2254(a) (1995) provides, in pertinent part, that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody . . . only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." \textit{Id.; see also} 28 U.S.C. § 2241 (1995) (setting forth the federal power to issue the writ). For further discussion of these statutes and the history of the federal habeas corpus doctrine, see Eric M. Freedman, \textit{Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789, 51 ALA. L. REV. 531 (2000)}.
  \item \textsuperscript{149} 368 U.S. 424 (1962).
  \item \textsuperscript{150} 844 F.2d 1023 (3rd Cir. 1988).
  \item \textsuperscript{151} See id. at 1027.
\end{itemize}
found a variety of ways to either conclude that Beck does not apply entirely or that they were precluded from even reaching the issue.

Vujosevic and his co-defendant were charged with the murder of Frederick Baron.\textsuperscript{152} At the close of all evidence, Vujosevic requested the jury be instructed on the LIO of aggravated assault, but the application was denied.\textsuperscript{153} The jury convicted Vujosevic of aggravated manslaughter and the judge sentenced him to twenty years imprisonment.\textsuperscript{154} On appeal, Vujosevic argued that the failure of the trial court to instruct the jury on the requested LIOs amounted to an infringement of his constitutional rights. He claimed that by refusing the LIO instruction, the court had deprived him of the opportunity to have the jury consider the theory he had advanced in his defense, that he beat the victim but did not cause his death.\textsuperscript{155} The Third Circuit agreed with Vujosevic.\textsuperscript{156}

The Court of Appeals began its discussion by citing Beck for the now famous proposition that, "[i]n capital cases, a court must give a requested instruction on lesser included offenses where it is supported by the evidence."\textsuperscript{157} The court then stated: "This court applies that requirement to non-capital cases as well,"\textsuperscript{158} relying on Bishop \textit{v. Mazurkiewicz}\textsuperscript{159} and Keeble \textit{v. United States}.\textsuperscript{160}

According to the court, just because the jury chose aggravated manslaughter does not mean it was convinced beyond a reasonable doubt that Vujosevic caused Frederick Baron's death.\textsuperscript{161} The court reasoned that the "manslaughter instruction did not necessarily offer the

\textsuperscript{152} See id. at 1026. The evidence showed that Baron was walking near the railroad tracks when he encountered Vujosevic, and his co-defendant, St. Laurent. See id. at 1024. Baron's "badly battered body" was found by the police several hours later. See id. at 1025. By Vujosevic's own testimony, he admitted to participating in Baron's beating but not in the choking which caused his death. See id. at 1025-26. Vujosevic claimed that he left the scene of the crime before St. Laurent and that St. Laurent later admitted choking Baron. See id. at 1026.

\textsuperscript{153} See id.

\textsuperscript{154} See id. After exhausting all appeals in the state courts, Vujosevic filed a petition for a writ of habeas corpus in the district court. See id.

\textsuperscript{155} See id. at 1026-27.

\textsuperscript{156} See id. at 1027.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} 634 F.2d 724 (3d Cir. 1980).

\textsuperscript{160} 412 U.S. 205 (1973). The Third Circuit cited to Keeble for the exact proposition Beck had used to rely on it—the fact that distortion in the fact-finding process creates a risk that a defendant may be otherwise convicted of a more serious crime than that which the jury believes he committed simply because the jury does not want to see him escape punishment. See Vujosevic, 844 F.2d at 1027.

\textsuperscript{161} See Vujosevic, 844 F.2d at 1027-28. The court stated, "[i]t may mean nothing more than that, causation aside, Vujosevic's beating of the victim fit the instruction of aggravated manslaughter better than manslaughter." Id. at 1028.
jury a rational compromise between aggravated manslaughter and acquittal; only an aggravated assault charge could do that.162 Accordingly, the Third Circuit concluded that the trial court had committed constitutional error in failing to instruct the jury on the LIO of aggravated assault.163

B. Restraining Beck—The Fifth, Sixth, and Eleventh Circuits

At the opposite end of the spectrum from Vujosevic, a plurality of circuits have refused to find constitutional error for failure to instruct the jury on LIOs in the non-capital context, adopting an almost automatic non-reviewability rule.164 In most instances, the circuit court had heavy precedent binding its decision. The Sixth Circuit at one time actually extended the Beck rule to non-capital cases,165 but then ignored such precedent in a later case to come before the court.166

In Perry v. Smith,167 the Eleventh Circuit, relying on authority from the Fifth Circuit,168 upheld Perry's state court conviction for murder and subsequent life sentence, denying his petition for federal habeas corpus relief.169 In his appeal, Perry claimed the conviction violated his due process rights because the jury was not given the opportunity to consider the LIOs of manslaughter or criminally negligent homicide.170 The circuit court rejected this argument, holding "that the Constitution's Due Process Clause does not require a state court to instruct the jury on lesser included offenses" in a non-capital case.171

162. Id.
163. See id.
164. The Ninth Circuit also denies non-capital defendants the right to have the jury instructed on LIOs. See supra notes 1-11 and accompanying text.
165. See Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984).
166. See Bagby v. Sowders, 894 F.2d 792, 797 (6th Cir. 1990).
167. 810 F.2d 1078 (11th Cir. 1987).
168. See id. at 1080 (citing Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980)). See infra note 171 for a more detailed discussion of Easter's role in the Perry decision.
169. See Perry, 810 F.2d at 1080. The facts of the case established that Perry and an accomplice entered the murder victim's houseboat at gunpoint with the intention of robbing the victim of drugs. See id. at 1079. The victim, Horace Godwin, put up a fight while Perry was attempting to tape him, and during the altercation Perry shot him. See id. Perry and his accomplice then fled from the boat. See id. Godwin pursued, another scuffle broke out and another shot was fired. See id. Godwin subsequently died. See id.
170. See id. The Alabama Court of Criminal Appeals found no error because the LIOs had not been "adequately supported in the evidence." Id. Perry then initiated his habeas proceeding in federal district court. See id. at 1079-80.
171. Id. at 1080. However, the court admitted to being uncomfortable with this decision, feeling instead that the state trial court may have erred in failing to instruct the jury on LIOs. See id. The court clearly stated "[w]hile we have some qualms about whether the state trial court committed
The Fifth Circuit soon followed suit with their 1988 holding in *Valles v. Lynaugh*. Valles was convicted of murder and sentenced to forty-five years imprisonment. After exhausting all state court appeals, Valles filed a petition for a writ of habeas corpus in federal court, claiming that the trial court erred by failing to instruct the jury on the LOs of voluntary manslaughter, self-defense, and defense of a third person.

This circuit court was bound by precedent again. In its opinion, the court held that "[i]n a non-capital murder case, the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue." Unlike the Eleventh Circuit, the Fifth Circuit never even reached the issue of a due process violation. They avoided the topic completely by finding that no such constitutional question even exists when a state court fails to instruct the jury on LOs.

In 1990, the Sixth Circuit issued its opinion in *Bagby v. Sowders*, joining the Fifth and Eleventh Circuits in their stance on this troublesome issue. Bagby was convicted in Kentucky state court of first-degree rape, second-degree burglary, and of being a second-degree persistent felony offender. On petition for a writ of habeas corpus in federal court, Bagby claimed his due process rights were violated when the state court refused to instruct the jury on the LO of first-degree sexual abuse.

The *Bagby* opinion concluded that the failure to administer LO instructions in a non-capital case did not violate due process and was not otherwise cognizable in federal habeas proceedings. The essence of the

procedural error . . . *Easter* is clearly applicable and controls our decision to affirm." *Id.* Thus, the Eleventh Circuit may have felt that *Beck* was entirely applicable to the non-capital context, but due to precedent was constrained in its disposition of this case.

172. 835 F.2d 126 (5th Cir. 1988).
173. See *id.* at 127. The evidence at trial showed that "Luis Barragan, the unarmed aggressor in a barroom brawl, was fatally wounded by a knife wielded by Valles." *Id.*
174. See *id.*
175. See *id.* (citing Alexander v. McCotter, 775 F.2d 595 (5th Cir. 1985)).
176. *Valles*, 835 F.2d at 127. The court went on to state, "[i]t is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law, unless that interpretation violates the Constitution." *Id.* at 128 (citations omitted). Here, the court found no breach of the Constitution. *See id.*
177. 894 F.2d 792 (6th Cir. 1990).
178. See *id.* at 793.
179. See *id.*
180. See *id.* at 797. The opinion addressed two theories that might support Bagby's assertion that refusing the LO instruction encroached upon his due process rights: (1) the Due Process Clause of the Fourteenth Amendment requires a LO instruction whenever warranted by the evidence, regardless of whether the case is labeled capital or non-capital; and (2) even if due process does not
Sixth Circuit's analysis was the statement, "[i]t appears to us that the Supreme Court's opinion in *Beck* is grounded upon Eighth Amendment concerns, rather than those arising from the Due Process Clause... [hence,] we are not required to extend *Beck* to non-capital cases." The court highlighted the Supreme Court's references in *Beck* to the capital nature of the case, including the thoughtfully framed issue and the extremely narrow holding. The Court of Appeals for the Sixth Circuit minimized the more general concerns of *Beck* regarding distortion in the fact-finding process possibly leading to an increased risk of unwarranted convictions, observing, "[a]pparently, it was the risk of an unwarranted conviction where the death penalty is imposed that the Court found intolerable." The court also considered the Supreme Court's decisions in *Hopper* and *Spaziano*, but concentrated solely on the portions of those opinions that referred to Eighth Amendment concerns, leaving unexplored the due process considerations of those cases.

Satisfied that the constitutional basis of *Beck* was grounded in the Eighth Amendment rather than the Due Process Clause, and that extending *Beck* to non-capital cases was, therefore, not required, the Sixth Circuit remarked, "[i]nstead, we must determine whether the error asserted by Bagby is of the character or magnitude which should be cognizable on collateral attack." The court concluded that the failure to instruct the jury on LIOs did not rise to the level of cognizance required on federal habeas corpus review, citing several other opinions in neighboring circuits to further support its position.

Including the Ninth Circuit's decision discussed in Part I of this Note, at least four circuits have concluded time and again that the reasoning behind *Beck* was not persuasive enough to prompt reconsideration of prior precedent denying a constitutional right to LIO mandate the giving of a LIO instruction, the Due Process Clause is still violated because the state court "so manifestly and flagrantly violated their own clearly stated law in refusing [the] requested instruction." *Id.* at 794. The *Bagby* court reasoned that the second theory would require a federal court to find that the state court improperly applied its own law, which is not the function of the federal court. *See id.* at 795. According to the circuit court, this second theory would only be valid "under the most unusual circumstances," which were not the facts of Bagby's case. *Id.*

181. *Id.* at 796-97. *But see* Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984) (holding that the principle expounded in *Beck* demanding LIO instructions is required by due process and is "not limited to capital cases").

182. *See Bagby*, 894 F.2d at 796. The issue in *Beck* was framed as "[m]ay a sentence of death constitutionally be imposed...?" *Beck*, 447 U.S. at 627 (1980). The Court also went on to state its holding as "the death penalty may not be imposed under these circumstances." *Id.*

183. *Bagby*, 894 F.2d at 796.

184. *See id.*

185. *Id.* at 797.

186. *See id.*
instructions in non-capital cases. Hiding behind the shield of precedent, these courts have managed to avoid taking a stand on this issue, compounding the error created by the state courts and further diminishing the already minimal rights of criminal defendants.

C. The "Complete Miscarriage of Justice" Approach—The First, Seventh, and Tenth Circuits

Several circuits have opted not to apply the traditional approach adhered to by the Fifth, Sixth, Ninth, and Eleventh Circuits. Rather, these circuits have created their own scheme, a third system in which the circuit courts respect the fact that Beck reserved the non-capital question, and instead apply the Supreme Court's independent standard of review for habeas cases as enunciated in Hill v. United States. 187

The Seventh Circuit was one of the earliest circuits to apply the Hill "miscarriage of justice" approach with their opinion in Nichols v. Gagnon. 188 In that case, a jury found Nichols guilty of rape and other offenses, and he was sentenced to a total of twenty-two years in prison. 189 After exhausting all state remedies, Nichols filed a federal habeas corpus action, claiming that the trial court's refusal to instruct the jury on the LIO of attempted rape was constitutional error. 190

According to the Court of Appeals, "failure to instruct on a[n LIO], even if incorrect under state law, does not warrant setting aside a state conviction unless 'failure to give the instruction could be said to have amounted to a fundamental miscarriage of justice.'" 191 The court went on to engage in a discussion of the Supreme Court's holding in Beck, stating that until the Supreme Court dictates otherwise, it would refrain

187. 368 U.S. 424 (1962). The Supreme Court articulated the standard in Hill as whether an error amounted to so "fundamental [a] defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure," presenting "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Id. at 428 (alterations in original).
188. 710 F.2d 1267 (7th Cir. 1983).
189. See id. at 1268. The evidence at trial displayed that Nichols had been drinking at a bar with a group of people that included Marie Greenamyer. See id. After leaving the bar in separate cars, Greenamyer noticed Nichols was following her. See id. In an attempt to evade Nichols, Greenamyer turned accidentally down a dead end street. See id. Nichols then got out of his car and approached her, making advances toward her. See id. When she tried to run, he attacked her, choking her and threatening her with a knife. See id. Greenamyer stopped resisting and Nichols attempted to have intercourse with her. See id. There was some dispute as to whether Nichols was successful. See id.
190. See id.
191. Id. at 1269 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).
from extending the rule on LIOs to non-capital defendants. The circuit court opted instead to continue adherence to the "fundamental miscarriage of justice" standard, indicating that none existed in Nichols' case; hence, his habeas petition would be denied.

Four years later, in Trujillo v. Sullivan, the Tenth Circuit reached the same conclusion as the Nichols court. There, the court remarked on how the Fifth, Eighth and Ninth Circuits had all explicitly adopted the position that failure of a state court to instruct the jury on LIOs fails to present a constitutional question and thus, is not cognizable on federal habeas corpus review. The court then went on to criticize these holdings, declaring that "[t]he theory underlying this automatic bar to habeas review has not been well articulated." The circuit court noted that the Supreme Court had already embraced the test espoused in Hill as the general standard for habeas corpus review.

The Trujillo court reconciled Beck's holding with that of Hill, finding that since the Beck court had expressly declined to decide the non-capital question of LIOs, Hill could not possibly "have stood for the proposition that a failure to instruct never violates due process and thus

192. See id. at 1271. According to the court, asking federal courts to determine "the accuracy of state court determinations of guilt would enmesh the federal judiciary in almost every detail of state criminal procedure," requiring them to regularly "review failures to instruct on lesser included offenses under state law as well as decide other issues unrelated to a specific federal constitutional safeguard." Id. at 1272. The court further concluded, "[w]e shall decline this task until directed to take it up by our judicial superiors." Id.

193. Id. Here, the Seventh Circuit relied on precedent, United States ex rel. Peery v. Siefel, 615 F.2d 402, 404 (7th Cir. 1979), in which the court formally adopted the Hill "miscarriage of justice" approach. See id. at 1269.

194. 815 F.2d 597 (10th Cir. 1987).

195. See id. at 602. Trujillo was convicted of murdering two individuals. See id. at 600. According to the evidence, Trujillo, Garcia, and a man known as "Barbershop" were inmates in the New Mexico State Penitentiary. See id. The three were involved in an altercation, which Officer Jewett happened upon on the catwalk of one of the cellblocks. See id. When Officer Jewett arrived, he observed Trujillo and Garcia holding shanks and fighting with "Barbershop." See id. Officer Jewett attempted to break up the fight and was stabbed in the process. See id. Both Officer Jewett and "Barbershop" died of multiple stab wounds. See id. After his conviction, Trujillo filed a petition for a writ of habeas corpus in federal court, claiming that the trial court had erred in failing to instruct the jury on a LIO of first-degree murder with respect to the death of Officer Jewett. See id.

196. Id. at 602.

197. See id.; see discussion supra note 187 (discussing the Hill standard). According to the circuit court, the Hill standard "appears to say that a 'due process like' analysis of the facts of a case is required to determine whether a claimed error can be addressed under a writ." Trujillo, 815 F.2d at 603. However, the majority of federal circuit courts to address this issue seemed to have concluded that the failure to instruct on LIOs when such an instruction is warranted by the evidence does not constitute a "fundamental defect" of the type described in Hill. See id.
is never cognizable in a habeas proceeding.” According to the circuit court, *Hill* appears to “require a due-process look at the facts of each case so as to determine whether the failure to instruct is sufficiently egregious to warrant habeas relief.” The court concluded by observing that the only question left open by the Court in *Beck* is “whether habeas relief should be automatically accorded when a trial court fails to instruct on a [LIO] warranted by the evidence because a due process right to such an instruction exists.” Even though the Tenth Circuit was ultimately unwilling to extend *Beck* to Trujillo’s case, it nevertheless gave non-capital habeas petitioners a tremendous win; the right to have their individual cases examined for a fundamental miscarriage of justice.

Influenced greatly by the decisions of the Seventh and Tenth Circuits, the First Circuit subsequently declared the *Hill* standard the appropriate level of review when faced with a habeas corpus petition regarding LIO instructions in the non-capital context. The court determined that the *Hill* approach achieved the appropriate balance it was seeking. On the one hand, the court decided that the rule in *Beck* should not be extended to non-capital cases, and therefore, the absence of a LIO instruction “in a noncapital case rarely, if ever, present[ed] a constitutional question.” At the same time, however, the court wanted to comport with First Circuit precedent, retaining the right to review jury instructions when error by the state court had “so infected the entire trial

198. *Id.* (alteration in original). The court went on to state, “[t]he *Beck* Court would not have left the question open if it had believed it was foreclosed by a generic application of *Hill.*” *Id.*

199. *Id.*

200. *Id.*

201. *See id.* at 604. Unfortunately for Trujillo, however, the court was unable to find any error on the facts of his case. *See id.*

202. *See Tata v. Carver,* 917 F.2d 670, 672 (1st Cir. 1990). There, Tata was found guilty of trafficking cocaine. *See id.* at 670. At the close of all evidence, the judge instructed the jury on the offense of “trafficking in one hundred grams or more of cocaine” and on the LIO of “simple possession.” *Id.* at 671. Following the jury charge, Tata objected, claiming the court had erred by not instructing the jury on the LIO of “trafficking in less than one hundred grams of cocaine” and on the LIO of “possession with intent to distribute.” *Id.* This objection served as the basis of his habeas petition, asserting that the refusal of the LIO instructions violated his due process rights. *See id.* at 671.

203. *Id.* at 672. The court based this conclusion on their speculation that *Beck* was “founded in [E]ighth [A]mendment jurisprudence, rather than on due process concerns.” *Id.* The court went on to quote the Seventh Circuit’s holding in *Nichols* regarding the extension of *Beck* to the non-capital context, saying to do so would “transform the federal courts in the exercise of their habeas corpus jurisdiction from enforcers of specific constitutional rights to guarantors of the accuracy of state court determinations of guilt.” *Id.* (quoting *Nichols v. Gagnon,* 710 F.2d 1267, 1272 (7th Cir. 1983)).
that the resulting conviction violate[d] due process.'234 The Hill standard allowed the court to reconcile these competing interests.235 Holding that no fundamental miscarriage of justice had occurred as a result of the trial court's refusal to instruct the jury on the requested LIOs, the court denied Tata's petition for habeas relief.236

D. An Obstacle to Habeas Review—Teague v. Lane

In 1990, the Supreme Court erected yet another barrier to the attainment of federal habeas corpus relief, with its decision in Teague v. Lane.207 There, the Court held that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated."230 One exception would apply the new rule retroactively if it placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," essentially decriminalizing a certain class of conduct.209 The second exception was reserved for decisions that would introduce "watershed rules of criminal procedure."210

In Turner v. Marshall,211 the Ninth Circuit was the first court to consider the impact of Teague on a court's power to extend the rule in Beck to non-capital defendants.212 The Turner court briefly noted the positions of the various circuit courts on whether to extend Beck to non-capital cases. It ultimately concluded that the defendant's argument must fail because it would "require application of a new rule of law in a habeas corpus case," in contravention of the rule laid down in Teague.213

204. Tata, 917 F.2d at 672 (quoting Grace v. Butterworth, 635 F.2d 1, 6 (1st Cir. 1980)).
205. See id. at 672.
206. See id. at 673.
208. Id. at 316.
209. Id. at 311.
210. Id. ("those procedures that . . . are 'implicit in the concept of ordered liberty'").
211. 63 F.3d 807 (9th Cir. 1995).
212. In Turner, the defendant had filed a petition for habeas relief, claiming the trial court had improperly failed to instruct the jury on the LIO of theft. See id. at 810. As a result the jury convicted Turner of murder, robbery, burglary and use of a dangerous weapon in committing a felony. See id. For this, Turner received life imprisonment without the possibility of parole. See id. at 811.
213. Id. at 818. "With the intercircuit split on whether the lack of a lesser included offense instruction in a non-capital case presents constitutional error, any finding of constitutional error would create a new rule, inapplicable to the present case under Teague." Id. at 819. It should be
Less than a year later, the Second Circuit followed in the footsteps of the Ninth Circuit with its decision in *Jones v. Hoffman.* In that case, Jones was convicted in state court for felony murder. After exhausting all state remedies, Jones applied to the federal court for habeas relief, claiming that the trial court erred by failing to instruct the jury on the LIO of second-degree manslaughter. Citing precedent, the court observed that both the Supreme Court and the Second Circuit have yet to recognize a constitutional right to LIO instructions in non-capital cases. Therefore, the court found itself barred from extending such a right under *Teague.*

**E. Does Due Process Require the Extension of Beck to the Non-Capital Context?**

Considering the extensive split among the federal circuits regarding the LIO issue in the non-capital context, it is clear that resolution of this issue by the Supreme Court is long overdue. There are several persuasive reasons for extending *Beck* to non-capital defendants, due process being the foremost among them. Unfortunately, only one circuit has recognized the importance of this situation, hopefully pioneering the way for other circuits to follow.

The focal concern in *Beck* was the risk of unwarranted convictions that could possibly result from the refusal of a trial judge to instruct a jury on the LIOs of the crime charged. Although death is a higher price to pay than imprisonment, there is no reason why the jury should not be given the option to convict on a lesser offense in both cases. Both capital

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214. See supra notes 1-11 and the accompanying text.
215. See *id.* at 48. Jones and two accomplices met at a party and subsequently committed robbery-murder. See *id.* at 47.
216. See *id.* at 47-48.
217. See *id.* at 48 (citing *Rice v. Hoke,* 846 F.2d 160, 164 (2d Cir. 1988), in which the court stated, "[t]his Circuit has not yet ruled on this issue.") (alteration in original).
218. See *Jones,* 86 F.3d at 48. "Since a decision interpreting the Constitution to require the submission of instructions on lesser-included offenses in non-capital cases would involve the announcement of a new rule, we hold that *Teague* precludes our consideration of the issue." *Id.* The court also noted that neither of the two exceptions articulated in *Teague* applied to the case at hand. See *id.*
219. See *Vujosevic v. Rafferty,* 844 F.2d 1023, 1027 (3d Cir. 1988); see also discussion supra notes 150-63 and accompanying text.
220. See *Beck v. Alabama,* 447 U.S. 625, 638 (1980) (holding, "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.").
and non-capital punishment involve the deprivation of a person's liberty, which according to our Constitution, cannot be encroached upon without "due process of law." No justifiable reason can be advanced to limit this protection solely to the capital context. In either situation, capital or non-capital, there is the risk that a jury will return a verdict of guilty rather than set a defendant free, even if they are not entirely convinced of guilt for the crime charged. This risk should not be minimized in non-capital cases just because the possibility of death is not imminent, especially if there is a legitimate means recognized to reduce such risk.

The foundation for the Supreme Court's decision in *Beck* was its prior holding in *Keeble v. United States*. *Keeble* was a non-capital case, the defendant having been convicted of "assault with intent to commit serious bodily injury." The *Keeble* Court stated, "if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal." The Court went on to hold, "a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory." This passage was quoted exactly in the *Beck* opinion, providing the Court support for its holding. As *Keeble* itself was a non-capital case, the decision of the *Keeble* Court clearly states that the defendant is entitled to have the jury instructed on LIOs in any context. Thus, the Supreme Court based its reasoning in a capital case verbatim on non-capital precedent. It is therefore paradoxical to claim that the logic of *Beck* should not be extended to the non-capital context.

In fact, there is a large body of case law on the issue of jury instructions which does not distinguish between capital and non-capital punishment. The most famous of these is the Supreme Court's decision

221. U.S. CONST. amends. V, XIV.
222. The Court even recognized the significance of this in *Beck*, finding LIO instructions valuable as a "procedural safeguard" to a defendant when he is clearly guilty of some crime but perhaps not the offense with which he is charged. *See Beck*, 447 U.S. at 637. The Court there was convinced that if faced with an all-or-nothing choice, the jury will resolve any doubts in favor of conviction if not given the "third option" of convicting of a LIO. *See id.* There is no authority establishing the same is not true of a jury in a non-capital case.
223. 412 U.S. 205 (1973); *see also supra* notes 54-55 and accompanying text.
224. *Id.* at 206.
225. *Id.* at 212.
226. *Id.*
228. *See Keeble*, 412 U.S. at 212.
The purpose of the Winship holding was to combat erroneous jury findings, focusing on the fact that the accused in a criminal proceeding "has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." The thrust of Winship addresses the due process requirement of the "guilt beyond a reasonable doubt" standard, exalting it as a "prime instrument" for reducing the risk of unwarranted convictions due to factual error. The Court referred to the reasonable doubt standard as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"

The Court in Beck openly acknowledged the fact that juries are more likely to convict even when reasonable doubt exists, if they are not given the chance to consider LIOs. This probability applies to non-capital juries as well. Foreclosing juries from considering the "third option" in non-capital cases clearly violates the due process requirements of Winship, by failing to afford defendants the full benefit of the reasonable doubt standard. By not giving their juries the option to consider LIOs, non-capital defendants are being convicted of a crime greater than that of which they are actually being found guilty, depriving them unjustifiably of their due process rights. As Justice Harlan so eloquently wrote in his concurrence to Winship, "it is far worse to convict an innocent man than to let a guilty man go free."

V. CONCLUSION

The LIO doctrine is an important aspect of criminal procedure, one that has not received enough attention in recent years. The use of LIOs ensures accuracy in the fact-finding duty of the jury, regardless of the type of punishment that is threatened to be inflicted. The LIO procedure is an issue in virtually every criminal trial in this country. The use or refusal of it has the possibility of completely altering the outcome of a trial, and consequently, the defendant's life, whether that is literally, or in terms of the duration of his confinement.

230. Id. at 363.
231. Id.
232. Id. (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).
233. See Beck, 447 U.S. at 637.
234. Winship, 397 U.S. at 372 (Harlan, J., concurring).
In *Beck v. Alabama*, the United States Supreme Court took a very bold step in declaring a constitutional right to LIOs in the capital context. However, they have retreated from this position at every opportunity by continually narrowing the rule over the years. The Court managed to avoid taking a real stand on this issue by leaving the question of LIOs in the non-capital context open for the circuit courts to decide. This decision has led to complete confusion on the subject, with different rules in numerous federal jurisdictions.

It is time for the Supreme Court to revisit this issue, taking note of the chaos created by the federal Courts of Appeal. The Court needs to stand behind its position of wanting to ensure full accuracy of the jury’s findings in criminal trials and extend the constitutional right espoused in *Beck* to the non-capital context as well. Due process requires as much.

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