University of Michigan Journal of Law Reform

Volume 16

1983

Habeas Corpus Review of State Trial Court Failure to Give Lesser Included Offense Instructions

Michael H. Hoffheimer
University of Michigan Law School

HABEAS CORPUS REVIEW OF STATE TRIAL COURT FAILURE TO GIVE LESSER INCLUDED OFFENSE INSTRUCTIONS

State prisoners convicted by juries that did not consider possible lesser included offenses[1] have increasingly sought federal habeas corpus relief in recent years. An ancient common law writ, habeas corpus is used to test the legality of a prisoner's detention.[2] Today state prisoners apply for the writ as a means of challenging in a federal tribunal the constitutional validity of their confinement by the state.[3]

1. A lesser included offense is an offense that the accused may be convicted of if properly charged with a different offense. Lesser included offenses constitute offenses that are established by proof of less than all of the elements of the offense charged. Typically an attempt to commit the charged offense is an included offense.

Illinois, for example, defines the included offense as an offense that "(a) Is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged, or (b) Consists of an attempt to commit the offense charged or [to commit] an offense included therein." Criminal Code of 1961 § 2-9, ILL. REV. STAT. ch. 38, § 2-9 (1979). *See also* MODEL PENAL CODE § 1.07(4) (1980). *See generally* Note, *Improving Jury Deliberations: A Reconsideration of Lesser Included Offense Instructions,* 16 U. MICH. J.L. REF. 561 (1983).

2. In granting relief in such cases, prisoners are not freed. Rather, the state is compelled to release the prisoners unless they are retried and proper instructions are given at the new trial.

For the historical development of the use of habeas corpus, see W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12-63 (1980). The legal recognition of individual liberties, which is traditionally traced back to the Magna Carta, and the writ of habeas corpus have separate historical roots. Only as a result of the English constitutional crisis of the seventeenth century did the two converge. *See id.* at 33-63; D. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 12-13 (1966).

Habeas corpus was used in the colonies and was acknowledged by the United States Constitution, which provides that "the writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the Public Safety may require it." U.S. CONST. art. 1, § 9, cl. 2.

Congress authorized federal courts to issue writs of habeas corpus in 1789:

> [J]ustices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. — *Provided,* that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court in order to testify.

Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 82.

3. The number of applications for habeas corpus relief has increased greatly in recent years. In fiscal year 1980, 7031 applications were filed. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT table 21, at 232 (1980). Dispositions of 1020 applications were appealed. *Id.* at 367. In fiscal year 1981, 7790 applications for habeas corpus relief by state prisoners were filed in federal district courts. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT table 21, at 211 (1981). Dispositions of 1258 applications were appealed. *Id.* table 3, at 188.

The availability of federal collateral review of a state conviction depends upon whether the alleged state court failure violated federally protected rights. The federal courts of appeals are currently split on whether they have jurisdiction to consider a habeas corpus application from a state prisoner who claims that the state failed to give lesser included offense instructions.[4] Although a growing number of federal

4. The Supreme Court has so far refused to decide whether the failure of a state trial judge to give lesser included offense instructions at a criminal trial is unconstitutional. The elaboration of the scope of the right to lesser included offense instructions has consequently devolved to the lower federal courts. The Court of Appeals for the District of Columbia need not confront the problem, because prisoners convicted in that jurisdiction are *federal* prisoners and a different mechanism for postconviction review is provided for federal prisoners. *See* 28 U.S.C. § 2255 (1976). That statute has a different history and does not pose the same constitutional problems that are presented by federal review of state court judgments.

The Courts of Appeals for the First and Fourth Circuits have not yet decided whether jurisdiction exists to review a state court failure to give lesser included offense instructions. District courts in the two circuits have approached the problem in an ambiguous way. In Lewinski v. Ristaino, 448 F. Supp. 690 (D. Mass. 1978), the applicant, convicted of second degree murder, alleged denial of due process and equal protection where the trial judge refused to give a requested instruction on involuntary manslaughter. In denying the writ the district court noted the controversy among federal courts and considered the merits: "Assuming, without deciding, that denial of a requested charge can infringe constitutional rights, petitioner's challenge is without merit." *Id.* at 697. In Shrader v. Riddle, 401 F. Supp. 1345 (W.D. Va. 1975), the district court similarly reached a negative determination on the merits. The court held that allegations regarding defective instructions or insufficient evidence were not proper matters for habeas corpus "absent a deprivation of due process." *Id.* at 1351. Finding that the state law was properly articulated at trial, the court concluded that its application to the facts of the applicant's case "did not amount to a constitutional deprivation." *Id. But see* Simpson v. Garrison, 551 F. Supp. 618 (W.D.N.C. 1982) (viewing Hopper v. Evans, 102 S. Ct. 2049 (1982), as possibly invalidating authority denying habeas corpus jurisdiction).

Several federal circuits currently reject applications for habeas corpus from state prisoners who complain of trial judge error in failing to instruct the jury on lesser included offenses. The federal courts give different reasons for their lack of jurisdiction. The nineteenth-century theory that lack of state jurisdiction is a prerequisite for habeas corpus relief has almost completely disappeared, although the Eighth Circuit has denied jurisdiction on that basis. *See* DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975). The court held that a state trial defect must be "jurisdictional" in order to be cognizable. *Id.* at 1338. *See also* Moore v. Buckhoe, 175 F. Supp. 780 (W.D. Mich. 1958) (recognizing that it was error under state law to have instructed the jury either to convict of first degree murder or acquit, because state law required the jury to fix the degree of homicide, but denying relief because the error was not sufficiently jurisdictional to warrant habeas corpus relief), *aff'd,* 269 F.2d 840 (6th Cir. 1959). The Sixth Circuit no longer adheres to the analysis of *Moore. See* Brewer v. Overberg, 624 F.2d 51 (6th Cir. 1980) (per curiam), *cert. denied,* 449 U.S. 1085 (1981). The reasoning in *DeBerry* and *Moore* is inconsistent with the Supreme Court's rejection of absence of state court jurisdiction as a prerequisite for habeas corpus relief. *See infra* note 20 and accompanying text.

The Second Circuit does not accept applications complaining of state court omissions of the instructions, on the theory that such applications fail to allege federal violations on which habeas corpus relief could be based. *See* United States *ex rel.* Smith v. Montanye, 505 F.2d 1355 (2d Cir. 1974) (holding that the habeas corpus application failed to raise constitutional issues of deprivation of due process), *cert. denied,* 423 U.S. 856 (1975); *see also* Lewis v. Dalsheim, No. 79 Civ. 6883, slip op. (S.D.N.Y. June 30. 1980); Forman v. Smith, 482 F. Supp. 941 (W.D.N.Y. 1979), *rev'd on other grounds,* 633 F.2d 634 (2d Cir. 1980); United States *ex rel.* Young v. Follette, 308 F. Supp. 670, 673 (S.D.N.Y. 1970).

The Eighth Circuit currently refuses to accept jurisdiction though it advances different reasons

courts have accepted such jurisdiction, even these courts are divided over the appropriate standard of review.[5] Consequently, the availability of federal habeas corpus relief to state prisoners varies widely among the federal jurisdictions.

---

for doing so. *See* Cooper v. Campbell, 597 F.2d 628 (8th Cir.), *cert. denied,* 444 U.S. 852 (1979); DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975); Greenhaw v. Wyrick, 472 F. Supp. 730 (W.D. Mo. 1979); Boothe v. Wyrick, 452 F. Supp. 1304 (W.D. Mo. 1978). *But see* Tyler v. Wyrick, 635 F.2d 752 (8th Cir. 1980) (per curiam), *cert. denied,* 452 U.S. 942 (1981). In *Tyler* the court affirmed dismissal of an application that alleged denial of due process by the trial judge's failure to give lesser included offense instructions on second degree murder and manslaughter. The Eighth Circuit recognized that a defendant is entitled to instructions on a legal defense if the request is timely and the defense is supported by evidence, but the court held that mere failure to give an instruction is not cognizable in habeas corpus: "The error must so infect the entire trial that the defendant was deprived of his right to a fair trial guaranteed by the due process clause of the fourteenth amendment." *Id.* at 753. Instead of justifying dismissal solely by lack of jurisdiction, the court briefly examined the facts — a felony-murder situation — and found that "[n]o evidence supported a lesser offense instruction." *Id.* at 754.

The Ninth Circuit has apparently abandoned an earlier position of accepting habeas corpus jurisdiction in such cases. In Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972), *aff'd,* 484 F.2d 1196 (9th Cir. 1973) (per curiam), the district court denied relief where the applicant alleged denial of due process by the failure of the trial judge to instruct on the lesser included offense of manslaughter. Acknowledging that such a failure might represent a denial of due process, the district court suggested that due process violations "can occur only if the evidence is reasonably susceptible of an interpretation other than murder or innocence." *Id.* at 1004. Considering the trial record, the court concluded that the applicant's proposed theories of manslaughter were speculative. *Id.* at 1004-05. Thus, the application, though articulating a possible constitutional claim, was without merit. In affirming, the Ninth Circuit adopted the district court's holding. *Shaffer,* 484 F.2d at 1198.

In James v. Reese, 546 F.2d 325 (9th Cir. 1976), the Ninth Circuit affirmed the dismissal of an application from a prisoner who had not yet exhausted state court remedies. The court further affirmed on jurisdictional grounds: "Failure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding." *Id.* at 327.

Although *James v. Reese* is more recent than *Shaffer,* the effect of its holding is uncertain. Its analysis of the jurisdictional issue, which the court acknowledged need not be reached, is arguably dicta; thus, *Shaffer v. Field,* which the court did not overrule, should still be controlling law in the jurisdiction.

The Tenth Circuit also refuses to accept jurisdiction for habeas corpus applications based on failure of the state court to give lesser included offense instructions. In Poulson v. Turner, 359 F.2d 588 (10th Cir. 1966), the court affirmed the dismissal of an application by a state prisoner sentenced to death for first degree murder who claimed that the trial judge should have given lesser included offense instructions. The court held that the alleged error was "only trial [error] of the state court and . . . not such as to deprive the accused of his constitutional rights." *Id.* at 591. *See also* Gist v. Oklahoma, 371 F. Supp. 541, 542 (E.D. Okla. 1974).

In a few instances, however, courts that deny jurisdiction to consider an application because it does not state a federal ground for relief have nonetheless proceeded to consider the merits of the claims. *See, e.g.,* Lewis v. Dalsheim, No. 79 Civ. 6883, slip op. (S.D.N.Y. June 30, 1980) (available April 15, 1983 on LEXIS, Genfed library, Dist. file) (holding that the issue had not been raised in the state courts, that failure to give lesser included offense instructions was not a constitutional issue, and concluding after a review of the record that the instruction was properly withheld under state law).

5. The Third Circuit was the first federal appellate court to take jurisdiction to consider applications for habeas corpus where state trial courts did not give lesser included offense instructions. The court held that the failure could constitute a denial of due process and that the error was not rendered harmless because an applicant was convicted of the more serious of two

This Note advocates that federal courts review state criminal convictions in habeas corpus proceedings when lesser included offense instructions are available under state law but were not given. Part I demonstrates that granting such review conforms to the modern jurisdictional scope of federal collateral review because failure to give the in-

---

alternative offenses so long as a third option was legally available and not considered by the jury. *See* United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974) (en banc), *cert. denied,* 420 U.S. 952 (1975). Under state law juries had absolute authority to return a conviction of manslaughter when so instructed at a murder trial. Because there were no standards for the issuance of manslaughter instructions, the court held that due process required that all defendants charged with murder have the same opportunity "upon request duly made" to have the jury consider manslaughter instructions. *Id.* at 346. The court granted the writ, holding that refusal to give the instructions was not harmless when the applicant was convicted of first degree murder despite the fact that instructions on second degree murder had also been given. The court reasoned that, had the manslaughter instructions been given, the jury might have compromised on a second degree murder verdict. *Id.* In a subsequent case the Third Circuit denied relief, not because it lacked jurisdiction, but because it concluded after reviewing the trial record that evidence would not have supported conviction of the lesser offense and that the trial judge thus properly refused to give the requested instruction. *See* Bishop v. Mazurkiewicz, 634 F.2d 724 (3d Cir. 1980) (reh'g en banc), *cert. denied,* 452 U.S. 917 (1981). *See also* United States *ex rel.* Powell v. Pennsylvania, 294 F. Supp. 849, 852 (E.D. Pa. 1968) (denying the application of a state prisoner convicted of voluntary manslaughter who claimed that the failure of the trial judge to instruct the jury on involuntary manslaughter was a denial of due process but concluding that if there were evidence supporting the instruction, it would be required under state law, and the failure to give it would warrant habeas corpus relief), *appeal dismissed on other grounds,* 425 F.2d 267 (3d Cir. 1970).

In several other applications district courts in the Third Circuit have denied relief only after considering trial court records and concluding that, in light of the evidence, the trial judge properly omitted the instruction on the lesser included offense. *See* United States *ex rel.* Jacques v. Hilton, 423 F. Supp. 895, 900 (D.N.J. 1976); United States *ex rel.* Wilson v. Essex County Court, 406 F. Supp. 991 (D.N.J. 1976); United States *ex rel.* Victor v. Yeager, 330 F. Supp. 802, 804 (D.N.J. 1971).

Recently the Fifth Circuit accepted habeas corpus jurisdiction to consider state omissions of lesser included offense instructions. *See* Bell v. Watkins, 692 F.2d 999, 1004 (5th Cir. 1982). Prior to *Bell* the Fifth Circuit regularly denied jurisdiction, considering the omission as not presenting a constitutional issue. *See, e.g.,* Easter v. Estelle, 609 F.2d 756, 758 (5th Cir. 1980); Bonner v. Henderson, 517 F.2d 135 (5th Cir. 1975) (per curiam); Grech v. Wainwright, 492 F.2d 747, 748 (5th Cir. 1974); Alligood v. Wainwright, 440 F.2d 642 (5th Cir. 1971); Higgins v. Wainwright, 424 F.2d 177, 178 (5th Cir.) (per curiam), *cert. denied,* 400 U.S. 905 (1970); Flagler v. Wainwright, 423 F.2d 1359, 1360 (5th Cir.) (per curiam), *cert. denied,* 398 U.S. 943 (1970).

The Sixth Circuit also accepts jurisdiction. *See* Brewer v. Overberg, 624 F.2d 51 (6th Cir. 1980) (per curiam), *cert. denied,* 449 U.S. 1085 (1981). The applicant, convicted of murder for the shooting death of his girlfriend, had argued that the shooting was accidental, but the judge did not instruct the jury on manslaughter and negligent homicide. As a threshold question the circuit court determined that state court failure to instruct on lesser included offenses was a cognizable ground for habeas corpus relief. *Id.* at 52. Nevertheless, the court held that the issue of the manslaughter instruction was not preserved and that negligent homicide was not a lesser included offense under state law. *Id.* at 53. *See also* Pilon v. Bordenkircher, 593 F.2d 264, 268 (6th Cir.) (affirming denial of relief because the failure to instruct on reckless homicide was correct under state law), *vacated and remanded,* 444 U.S. 1 (1979).

The Seventh Circuit recently considered the split in the circuits and concluded that it had jurisdiction. *See* Davis v. Greer, 675 F.2d 141 (7th Cir. 1982). At trial the court gave felony-murder and involuntary manslaughter instructions but refused to give voluntary manslaughter instructions. In

structions undermines the fact-finding function of juries and is therefore unconstitutional. Part II analyzes the proper standard of review and determines that the federal interest in protecting the reliability of the fact-finding process should prevail over any conflicting state interest in refusing to give lesser included offense instructions. Part II then proposes a standard of review that protects this federal interest while at the same time maintaining federal-state comity by invalidating only those state failures to give lesser included offense instructions that are the result of state policies unrelated or antagonistic to the goal of furthering the reliability of the fact-finding function of juries.

I. FEDERAL HABEAS CORPUS JURISDICTION

The present scope of federal habeas corpus jurisdiction has been shaped by two related processes. First, the scope of the writ has been extensively expanded and continues to evolve through legislative and judicial action. Second, federal courts are authorized to grant habeas corpus relief only for prisoners detained in violation of federal law; thus, the elaboration of substantive federal law — especially the expansion of due process — directly affects the scope of habeas corpus jurisdiction.

A. Federal Collateral Review of State Court Error

Federal court jurisdiction to review state trial court error is firmly established, despite its shifting theoretical justifications and despite recent criticism of the expansion of such collateral review.[6] Before the Civil War, federal courts generally did not issue writs to state prisoners con-

---

affirming denial of habeas corpus relief, the Seventh Circuit expressly accepted jurisdiction; noting the split among the circuits, it declined to follow the Fifth, Eighth, and Ninth Circuits, and followed the Third and Sixth. On the merits, however, the court held that the applicant was not denied due process.

Prior to *Davis v. Greer* the Seventh Circuit's position was ambiguous. *See* United States *ex rel.* Peery v. Sielaff, 615 F.2d 402, 404 (7th Cir. 1979) (per curiam) (holding that, "in general," failure to instruct on lesser included offenses does not present a constitutional issue, but nonetheless considering the evidence presented at trial), *cert. denied,* 446 U.S. 940 (1980); United States *ex rel.* Parker v. Gray, 390 F. Supp. 70, 73 (E.D. Wis. 1975) (holding that refusal to instruct on second degree murder was not a denial of a jury trial, and even if the refusal raised constitutional issues, no instruction was warranted in the case as a matter of state law), *aff'd mem.*, 530 F.2d 980 (7th Cir. 1976). *But see* Muller v. Israel, 510 F. Supp. 730, 736 (E.D. Wis. 1981) (relying primarily on authority outside the circuit in concluding that it is "well settled" that failure to instruct on lesser included offenses does not establish habeas corpus jurisdiction).

6. *See, e.g.*, Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U. CHI. L. REV. 31 (1965); Oaks, *Legal Historiography in the High Court—Habeas Corpus,* 64 MICH. L. REV. 451 (1966).

victed by state courts under state law.[7] Federal courts lacked jurisdiction to grant relief if the applicant was "imprisoned under process issued from the state courts."[8] The limitation was statutory, however, not constitutional, and there were important exceptions to the limitation. For example, federal courts could accept jurisdiction "where the imprisonment although by a state officer, [was] under or by color of the authority of the United States."[9]

Nevertheless, the scope of habeas corpus review was limited by the nineteenth-century view that illegal imprisonment was detention in violation of the jurisdiction, or in excess of the sovereign authority, of the convicting tribunal.[10] Habeas corpus relief was granted only for those jurisdictional defects that rendered the trial proceeding "absolutely void" or "contrary to principles of law, as distinguished from mere rules of procedure."[11]

This began to change in 1867 when Congress enacted the first legislation that broadly authorized habeas corpus relief for state prisoners.[12] Although the legislative intent is not entirely clear, certainly a basic congressional goal was to extend the power of federal collateral review

---

7. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81, expressly extended the writ only to prisoners detained under the authority or by color of authority of the *federal* government. *See supra* note 2. On two occasions prior to the Civil War, Congress had extended the jurisdiction of federal courts to grant habeas corpus relief to state prisoners. In 1833 federal courts were authorized to issue the writ "in all cases of a prisoner . . . confined . . . for any act done . . . in pursuance of a law of the United States," *see* Act of March 2, 1833, ch. 57, § 7, 4 Stat. 632, 634, and in 1842 federal courts were further empowered to grant habeas corpus relief to a foreign citizen imprisoned by state courts for acts done under authority of the prisoner's country or the law of nations, *see* Act of Aug. 29, 1842, ch. 257, 5 Stat. 539.

8. R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 154 (1858).

9. *Id.*

10. *See generally Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1040. 1045-55 (1970).

11. R. HURD, *supra* note 8, at 333.

12. The Act provides that federal courts "shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. This Act is the antecedent of current legislation that empowers federal courts to review collaterally the detention of state prisoners complaining of deprivation of due process during their state trial:

> [A Supreme Court Justice or circuit or district court judge] shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254 (1976). In the 1960's the Supreme Court's interpretation of the history of the writ provided justification for the Court's granting habeas corpus relief to state prisoners in novel situations. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963) (granting relief when police had interrogated a defendant who they did not know had been given a drug with "truth serum" properties). Yet scholars have sharply criticized the Court's historiography. *See* Mayers, *supra* note 6, at 58; Oaks, *supra* note 6, at 459.

to its constitutional limits.[13] The drafters of the 1867 Act did, however, consider the writ as having two important conditions: the availability of relief would be limited by contemporary constitutional restrictions on federal judicial authority, and the writ would continue to issue only as a means of reviewing court judgments issued outside the trial court's "jurisdiction."[14]

Federal courts for many years adhered to the conceptual framework that based habeas corpus jurisdiction on the absence of state court jurisdiction,[15] but twentieth-century developments in constitutional jurisprudence rendered that framework increasingly anomalous. Federal courts began to apply new and more exacting constitutional standards to the states, thus directly altering the state court jurisdiction. For instance, in *Johnson v. Zerbst,*[16] decided in 1938, the United States Supreme Court treated assistance of legal counsel at trial as a prerequisite for the state's jurisdiction over the case.[17] Absence of legal counsel meant absence of state jurisdiction and therefore justified federal jurisdiction to grant habeas corpus relief.[18] In 1942 in *Waley v. Johnston,*[19] the Court went a step further and abandoned the theory that federal jurisdiction existed only when the applicant had been convicted by a state court lacking jurisdiction: "[habeas corpus] extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."[20]

The increased federal constitutional supervision of state criminal procedures in the 1950's and 1960's further enlarged the scope of habeas

---

13. During the introduction of the bill to the Senate, its effects were described as being "to enlarge the privilege of the writ of habeas corpus, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them." CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866).

14. *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441 (1963); Mayer, *supra* note 6, at 43-48; Peller, *In Defense of Federal Habeas Corpus Relitigation,* 16 HARV. C.R.-C.L. L. REV. 579, 603-20 (1982).

15. *See generally Developments in the Law—Federal Habeas Corpus, supra* note 10, at 1054.

16. 304 U.S. 458 (1938).

17. *Id.* at 468.

18. *Id.*

19. 316 U.S. 101 (1942).

20. *Id.* at 105. By broadly predicating federal habeas corpus jurisdiction on a violation of the Constitution or federal laws by state tribunals, the Court did not drastically alter the scope of habeas jurisdiction; rather, it merely articulated the theory of that jurisdiction in more modern terms. The explanation of jurisdiction in *Waley* conforms to the relevant legislation, which never expressly limited federal review to state judgments entered without jurisdiction. Some commentators have characterized the shift in the Court's approach as a radical departure from past practice. Mr. Oaks, for example, emphasizes that a conviction in a court of general jurisdiction could only be attacked collaterally for "formal" jurisdictional defects. Oaks, *supra* note 6, at 468. It is clear from nineteenth-century sources, however, that the defects that warranted habeas corpus relief were substantive, not merely procedural or formal. *See* R. HURD, *supra* note 8, at 333.

corpus review.[21] Indeed, use of the writ played an important role in the Warren Court's elaboration of constitutional standards for state criminal trials.[22]

The recent increase in habeas corpus applications has been associated with the expanded scope of the writ. In response to the increase, restrictions on the availability of the writ have been proposed as an administrative necessity.[23] Others continue to defend vigorously the right of prisoners to have federal habeas corpus review of their convictions.[24]

B. State Court Due Process Violations and Habeas Corpus Relief

To invoke habeas corpus relief an applicant must articulate a denial of federally protected rights.[25] A state prisoner convicted by a jury

---

21. *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953); Fay v. Noia, 372 U.S. 391 (1963).

22. The Court's treatment of the writ and its relation to the emergence of new national standards of criminal justice are discussed in Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1037-64 (1977). *See also* Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 958 (1964).

Dissatisfaction with the substantive constitutional views of the Court spawned a literature critical of the federal procedure of collateral review. *See, e.g.*, Collins, *Habeas Corpus for Convicts — Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335 (1952) (legislative grace); Bator, *supra* note 14, at 525-26 (suggesting that when the constitutional issue is fully litigated in state courts it should not be collaterally reexamined in habeas corpus proceedings); Torbert, *The Overly-Broad Application of Federal Habeas Corpus*, 43 ALA. LAW. 22 (1982) (a statement by the Chief Justice of the Supreme Court of Alabama supporting federal legislation to curtail the use of the writ).

For a discussion which emphasizes the similarity of the Burger Court's treatment of habeas corpus to the Warren Court's, see Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 459-70 (1980).

23. In an influential article, Judge Friendly proposed that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970). Judge Friendly discussed the increase of state prisoner petitions, emphasized the scarceness of judicial resources, and concluded that such resources are better spent on trial. *Id.* at 143-47. A "colorable" showing of innocence would not, for instance, include violations of fourth amendment rights. *Id.* at 161.

In contrast, Chief Justice Shaefer of the Supreme Court of Illinois questioned the link between the number of prisoner petitions and the scope of federal review. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 21 (1956). Justice Schaefer suggested that the increase was related to prison practices and the degree of literacy among inmates rather than the doctrinal shift of the Supreme Court. He noted, for example, that prisoner petitions in Illinois were effectively censored until 1944. *Id.*

Although this Note cannot address in detail the administrative problems incident to the recognition of a federal right to lesser included offense instructions, two points should be made. First, the increase in caseload would not be dramatic, for the applications must be given preliminary consideration, and many contain recognized claims that trigger federal jurisdiction. Dismissing on the merits often would consume no more judicial resources than dismissing on jurisdictional grounds. Second, it is doubtful that administrative costs are a concern relevant to the recognition of basic legal rights.

24. *See generally* Peller, *supra* note 14, at 582.

25. 28 U.S.C. § 2241(c)(3) (1976).

that did not consider possible lesser included offenses may be able to demonstrate a denial of due process of law[26] or an infringement of the applicant's right to a trial by jury.[27] Because lesser included offense instructions are constitutionally required, at least in some cases, federal jurisdiction should exist to consider the application.[28]

1. Proof of all elements of an offense as a due process requirement—Habeas corpus relief is appropriate if a prisoner has been denied due

---

26. *See* U.S. CONST. amends. V, XIV. The great majority of federal courts treat habeas corpus applications alleging state trial court error for failure to give lesser included offense instructions as articulating due process claims. *See, e.g.*, Hopper v. Evans, 102 S. Ct. 2049 (1982); Davis v. Greer, 675 F.2d 141 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 310 (1983); Tyler v. Wyrick, 635 F.2d 752 (8th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 942 (1981); Brewer v. Overberg, 624 F.2d 51 (6th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1085 (1981); United States *ex rel.* Peery v. Sielaff, 615 F.2d 402 (7th Cir. 1979) (per curiam) (also addressing sixth amendment claim), *cert. denied*, 446 U.S. 940 (1980); United States *ex rel.* Smith v. Montanye, 505 F.2d 1355, *cert. denied*, 423 U.S. 856 (1975); United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974) (en banc), *cert. denied*, 420 U.S. 952 (1975); Muller v. Israel, 510 F. Supp. 730 (E.D. Wis. 1981); Greenhaw v. Wyrick, 472 F. Supp. 730 (W.D. Mo. 1979); Booth v. Wyrick, 452 F. Supp. 1304 (W.D. Mo. 1978); Lewinsky v. Ristaino, 448 F. Supp. 690 (D. Mass. 1978); United States *ex rel.* Jacques v. Hilton, 423 F. Supp. 895 (D.N.J. 1976); United States *ex rel.* Parker v. Gray, 390 F. Supp. 70 (E.D. Wis. 1975), *aff'd*, 530 F.2d 980 (1976) (unpublished); Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972), *aff'd*, 484 F.2d 1196 (9th Cir. 1973) (per curiam); United States *ex rel.* Powell v. Pennsylvania, 294 F. Supp. 849 (E.D. Pa. 1968), *appeal dismissed per curiam*, 425 F.2d 267 (3d Cir. 1970).

27. *See* U.S. CONST. amends. VI, XIV. The sixth amendment right to a jury in criminal trials applies to the states through the fourteenth amendment, *see* Duncan v. Louisiana, 391 U.S. 145 (1968), but the scope of the right guaranteed to state defendants may not be coextensive with that guaranteed to federal defendants, *see, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972) (Powell, J., concurring) (unanimous jury verdict required for federal convictions under sixth amendment is not binding on states). A few state prisioners seeking habeas corpus review of state trial court failures to give lesser included offense instructions have alleged violation of the right to trial by jury. *See* United States *ex rel.* Peery v. Sielaff, 615 F.2d 402 (7th Cir. 1979) (per curiam), *cert. denied*, 446 U.S. 940 (1980); Muller v. Israel, 510 F. Supp. 730 (E.D. Wis. 1981); Forman v. Smith, 482 F. Supp. 941 (W.D.N.Y. 1979), *rev'd*, 633 F.2d 634 (1980); United States *ex rel.* Parker v. Gray, 390 F. Supp. 70 (E.D. Wis. 1975), *aff'd*, 530 F.2d 980 (1976) (unpublished).

Even federal circuits that do not accept jurisdiction to review failures to give lesser included offense instructions grant habeas corpus relief when state trial judges fail to give instructions on justifications such as self-defense because failure to instruct on justification effectively denies the accused a right to a jury trial. *See* United States *ex rel.* Means v. Solem, 480 F. Supp. 128, 137-38 (D.S.D. 1979), *aff'd*, 646 F.2d 322 (8th Cir. 1980); Zemina v. Solem, 438 F. Supp. 455 (D.S.D. 1977), *aff'd*, 573 F.2d 1027 (8th Cir. 1978) (per curiam).

In addition, a state practice of arbitrarily giving lesser included offense instructions in some cases but not in others might arguably deprive some defendants of equal protection. *See* Lewinski v. Ristaino, 448 F. Supp. 690 (D. Mass. 1978). In one case, United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974) (en banc), *cert. denied*, 420 U.S. 952 (1975), the court granted relief to the applicant where under state law a jury had the prerogative to convict of manslaughter, but there were no standards governing when such instructions were to be given. The court held that "due process" required that all state defendants be given the same opportunity to have the jury consider the lesser included offense. *Id.* at 346. The court did not reach the equal protection issue. *Id.* at 340.

28. Even if federal jurisdiction exists, the decision whether to grant relief will depend on the applicable standard of review, discussed *infra* Part II, as applied to the specific facts.

process;[29] however, the question whether the failure to give lesser included offense instructions constitutes a due process violation can be answered only by reference to the scope of due process, which has evolved over the years.

In the nineteenth century, when lack of jurisdiction in the trial court was considered a prerequisite for federal habeas corpus jurisdiction, failure to give the instructions was not a basis for habeas corpus relief.[30] Courts then denied habeas corpus jurisdiction because they assumed that an improper conviction for the higher offense was an evidentiary problem and not a fundamental violation of the United States Constitution.[31]

The Court has effectively overruled these older cases by recognizing a constitutional requirement of proof beyond a reasonable doubt in criminal trials.[32] Because proof beyond a reasonable doubt must be established for "every fact necessary to constitute the crime with which [a defendant] is charged,"[33] a conviction supported solely by proof of a lesser included offense violates the Constitution.[34] Despite the restriction of the scope of habeas corpus review in other contexts,[35] the Court has held that habeas corpus review should extend to claims by state prisoners that their conviction resulted from evidence insufficient to establish guilt beyond a reasonable doubt.[36] Furthermore, in reviewing the conviction collaterally, a federal court is not bound by the state court's determination of the sufficiency of the evidence as a matter of fact or law.[37] Consequently, a state prisoner can invoke habeas cor-

---

29. *See supra* note 12 and accompanying text.

30. In *In re* Eckart, 166 U.S. 481 (1897), the Court denied an original habeas corpus application from a prisoner where the verdict failed to specify the degree of murder even though, under Wisconsin law, murder was divided into degrees and the sentence imposed varied according to the degree of the offense. The Court acknowledged that the conviction and sentence were erroneous, but the sentencing error was not a jurisdictional defect and the state trial judgment was consequently not "void." *Id.* at 482. Rather it was an error by the judge "committed in the exercise of jurisdiction." *Id.* at 483.

31. In Crossley v. California, 168 U.S. 640 (1898), the Court affirmed denial of habeas corpus relief for an applicant who claimed that there was no evidence that he was guilty of first degree murder. He alleged that the evidence established only proof of second degree murder but that the trial judge submitted to the jury only instructions regarding first degree murder. The Supreme Court rejected habeas corpus jurisdiction: "This was a matter of error, and with its disposition by the highest tribunal of the State, it was not within the province of the Circuit Court to interfere. Nor can the writ of *habeas corpus* be made use of as a writ of error." *Id.* at 641.

32. *See In re* Winship, 397 U.S. 358 (1970).

33. *Id.* at 364.

34. *Id.*

35. *See generally* Peller, *supra* note 14, at 592-602.

36. *See* Jackson v. Virginia, 443 U.S. 307 (1979).

37. Federal courts review the facts to determine if any rational trier of fact could find the elements established beyond a reasonable doubt. *See* Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

Some commentators have seen *In Re Winship* and *Jackson v. Virginia* as threats to the proper

pus jurisdiction if the trial court's failure to instruct on lesser included offenses resulted in a conviction not based on proof beyond a reasonable doubt.

In deciding whether failure to give the instructions resulted in a conviction based on inadequate proof, the reviewing court's attention should be directed to two issues: (1) whether juries are likely to convict a defendant of the charged offense when only elements of lesser offenses have been proved; (2) whether the difference between the greater and the lesser offense is established by additional elements that the state must prove. If failure to give lesser included offense instructions has diminished the state's burden of proof or rendered jury deliberations unreliable, then the court should accept habeas corpus jurisdiction and grant relief.

2. All-or-nothing choice as pressure to convict— Habeas corpus relief is appropriate if the defendant was denied a fair jury trial.[38] When defendants have committed acts constituting only a lesser offense, failure to give lesser included offense instructions confronts juries with the dilemma of either convicting defendants of the higher (and improper) offense charged or acquitting them outright.[39] In recent years the Court has recognized that juries facing this dilemma are under considerable

---

relation between federal and state courts. For critical discussions of the impact of *Jackson* on state sovereignty over criminal law, see Comment, *Federal Review of the Evidence Supporting State Convictions:* Jackson v. Virginia, 79 COLUM. L. REV. 1577 (1979) (criticizing federal interference with substantive criminal law and suggesting that sufficient alternative grounds for federal review exist); *see also* Note, *Guilt, Innocence, and Federalism in Habeas Corpus,* 65 CORNELL L. REV. 1123 (1980). By requiring proof beyond a reasonable doubt of all elements of an offense, the Supreme Court not only articulates a constitutional standard of burden of proof, it also interferes with substantive state law by requiring proof of an element of a crime because the definitions of elements of crimes are exclusively within the province of the states. There is no substantive federal criminal law that provides an affirmative source of such elements, nor are federal courts constitutionally empowered to develop a federal common law of crimes. *See* United States v. Worrall, 2 U.S. (2 Dall.) 384, 391, 394, 395 (1798) (Justices Chase and Peters sitting in the Pennsylvania circuit differing as to whether the Constitution then empowered the federal judiciary to establish criminal common law). Federal common law jurisdiction in criminal cases was authoritatively rejected in United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). It has been argued that the drafters of the Judiciary Act of 1789 did not mean to give the federal courts any common law jurisdiction over criminal acts. *See generally* Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49, 73-74 (1923).

38. *See* 28 U.S.C. § 2254; *see also* U.S. CONST. amends. VI, XIV.

39. Although the behavior is not legally encompassed by the greater offense, it may be excluded only by elements that seem technical to a jury. It may be assumed that the behavior is contrary to the morals of the community and likely is widely thought to be "illegal." The tendency of jurors to convict a defendant of the more serious offense absent a less severe alternative is supported by empirical research. One study concluded that "the severity of consequences associated with available decision alternatives may be a potent factor in juror decisions. These are more likely related to the subject's personal standards of appropriate retribution than to legally prescribed standards." Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors,* 22 J. PERSONALITY & SOCIAL PSYCHOLOGY 211, 217 (1972).

pressure to convict, and that the all-or-nothing choice tends to distort the truth-finding functions of juries and to undermine the reliability of jury verdicts.[40]

Although the Supreme Court has not yet established lesser included offense instructions as a general due process requirement for state criminal trials, it did hold in *Beck v. Alabama*[41] that the distortion of fact finding caused by the all-or-nothing choice poses an unacceptable risk of wrongful conviction, at least in death penalty cases.[42] Consequently, failure to give lesser included offense instructions was held to violate due process if capital punishment could be imposed for the greater offense but not for the lesser included offense; the Court based its decision on both the increased risk of error in the fact-finding process and the severe and irreversible consequences of that error.[43]

---

40. In Keeble v. United States, 412 U.S. 205 (1973), the Court reversed the petitioner's conviction of assault with intent to commit serious bodily injury on an Indian reservation. Federal jurisdiction over crimes committed on the reservation rested on a statute that did not include the lesser included offense of simple assault. The Court held that if the facts warrant the lesser included offense instruction, the defendant is entitled to it, and such instructions do not expand the reach of the empowering legislation. *Id.* at 214. The Court stressed that failure to give the lesser included offense instruction may induce the jury to return a false conviction, *id.* at 212, but reserved the question of whether the instruction is required by the fifth amendment, *id.* at 213.

41. 447 U.S. 625 (1980).

42. *Beck* held that the death penalty could not be imposed unless the jury was permitted to consider conviction for a lesser included non-capital offense where the evidence would have supported such a verdict. *Id.* at 627.

The defendant was charged with and convicted of the capital offense of robbery during which the victim was intentionally killed. Because Alabama's death penalty statute did not allow mens rea to be furnished by means of the felony-murder doctrine, felony murder was a lesser included offense of the crime charged; however, Alabama law prohibited the option of conviction of a lesser included offense. The defendant claimed that the prohibition violated due process and that capital punishment under the circumstances imposed cruel and unusual punishment. He also claimed denial of equal protection, but the Court did not reach that issue because it had not been properly preserved. *Id.* at 632 n.8.

The Court did find a violation of due process and elaborated five sources of authority for the requirement of lesser included offense instructions: (1) under the common law a jury was empowered to find an accused guilty of any lesser offense necessarily included in the charge, (2) Alabama's failure to provide capital defendants the protection of lesser included offense instructions was unique in modern law, (3) federal rules entitled a defendant to lesser included offense instructions, (4) states that had considered the problem unanimously found a defendant entitled to a lesser included offense instruction when the evidence supported it, and (5) the Court noted the availability of lesser included offense instructions for all non-capital crimes in Alabama. *Id.* at 633-37.

43. The Court stated in *Beck*:

> While 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. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense — but leaves some doubt with respect to an element that would justify conviction of a capital offense — the failure to give the jury the "third

Notwithstanding the qualifications articulated in *Beck*, habeas corpus jurisdiction should not depend on the severity of the punishment imposed by a state. The statutory prerequisite for habeas corpus is simply "custody" of the prisoner by the state.[44] Moreover, the Supreme Court has broadly interpreted the sort of restrictions on personal liberty that warrant habeas corpus relief.[45] Therefore, if the omission of a lesser included offense instruction significantly undermines the reliability of jury fact finding, and if the sentence imposed for the principal offense is greater than that which might have been imposed for a lesser offense, habeas corpus relief should be given. Because a trial procedure that "leaves some doubt with respect to an element which would justify conviction"[46] violates due process, recent decisions granting habeas corpus relief to prisoners convicted of capital crimes should be extended to all persons convicted and sentenced for an offense if the state court failed to give appropriate lesser included offense instructions.[47] Because the failure to give the instructions presents a significant possibility that the accused was convicted on the basis of evidence that did not establish guilt of the offense charged, and because proof of all elements of an offense is a recognized due process requirement, the only additional claim necessary to establish habeas corpus jurisdiction should be custody.

Nevertheless, even in capital cases lesser included offense instructions can be required by the Court only if the evidence would support con-

---

option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

447 U.S. at 637 (1980). The Court distinguished the death penalty from lesser penalties and also found that the safeguards provided in Alabama by a mistrial option and the final sentencing determination by the court did not adequately protect against the risk of wrongful jury conviction. *Id.* at 637-38, 643-45.

44. 28 U.S.C. § 2254 (1976).

45. *See, e.g.*, Hensley v. Municipal Court, 411 U.S. 345 (1973) (holding that a person released on own recognizance during stay of sentence pending review in habeas corpus could apply for habeas corpus relief); Braden v. Thirtieth Judicial Circuit Court, 410 U.S. 484 (1973) (allowing defendant in custody in one jurisdiction to challenge by habeas corpus an indictment in the second); Jones v. Cunningham, 371 U.S. 236 (1963) (allowing person on parole to apply for habeas corpus relief).

46. *Beck*, 447 U.S. at 637.

47. Ironically, one court after *Beck* refused to recognize a right to lesser included offense instructions in noncapital cases. Roland v. Mintzes, 554 F. Supp. 881 (E.D. Mich. 1983). This case is inconsistent with Sixth Circuit precedent that recognizes a right to lesser included offense instructions even in noncapital cases. For instance, in Brewer v. Overberg, 624 F.2d 51, 52 (6th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1085 (1981), although the opinion did not mention the sentence imposed, murder was not a capital crime, under state law. *See* OHIO REV. CODE ANN. §§ 2903.02(B), 2929.02(B) (Baldwin 1979). The authority of the *Roland* opinion is also questionable because the court denied relief on two independent grounds, including forfeiture of the claim by failure to object at trial.

Other courts have viewed recent Supreme Court cases as raising a "significant question" about the continued validity of the older line of cases denying a federal right to lesser included offense instructions. *See, e.g.*, Simpson v. Garrison, 551 F. Supp. 618 (W.D.N.C. 1982) (applicant was serving life sentence).

viction for the lesser offense.[48] Thus, the central problem for the habeas corpus court is the standard of review for determining whether evidence at trial warranted the instruction.

3. Rejection of lesser offense as prerequisite for conviction of greater offense— In addition to the erosion of reliable jury deliberation caused by all-or-nothing choice, failure to give lesser included offense instructions can impede proper consideration of the elements of the offense charged. Omitting the instructions may actually alter the legal standards in the instructions that are given and thus effectively change the elements of the charged offense. The jury may consequently convict a defendant on the greater offense — not just because of a lack of alternatives, but because omitting the instructions reduced the state's burden of proving the greater offense.

For many important criminal offenses, critical elements are established negatively or by a process of elimination.[49] This is typically true of the proof of mens rea in homicide. An element of murder may be defined as intentionally or knowingly causing death.[50] Yet that element is only established positively when a jury considers and rejects any affirmative defenses or the presence of any legally mitigating circumstances, such as provocation or unreasonable self-defense.[51] A conviction obtained without jury consideration of the lesser included offense instruction may therefore rest on a legally inadequate definition of the elements that allowed conviction notwithstanding absence of sufficient evidence to establish the additional element necessary for conviction on the greater offense.

---

48. *Beck,* 447 U.S. at 627. The Court further elaborated the *Beck* qualification in Hopper v. Evans, 102 S. Ct. 2049 (1982). In *Hopper,* the district court denied habeas corpus relief to an applicant challenging Alabama's prohibition of lesser included offense instructions in capital cases. The court of appeals reversed, following *Beck.* Evans v. Britton, 628 F.2d 400, 401 (1980), *reh'g granted,* 639 F.2d 221 (1981) (en banc), *rev'd sub nom.* Hooper v. Evans, 102 S. Ct. 2049 (1982). The Supreme Court reversed again, holding that the prohibition did not prejudice the applicant and that the applicant was not entitled to a new trial because evidence presented by the defendant had precluded the possibility of the lesser offense. "*Beck* held that due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper,* 102 S. Ct. at 2053. The Court concluded that no instruction on unintentional homicide was warranted where confessions introduced by the defendant plainly established intent. *Id.* at 2054.

The Court did not exclude the possibility that a state court policy of refusing to give lesser included offense instructions might adversely affect trial strategy: "In another case with different facts, a defendant might make a plausible claim that he would have employed different trial tactics . . . but for the preclusion clause. However, this is not this case . . . ." *Id.*

49. This is typically true of the proof of mens rea in homicide — the largest category of convictions for which habeas corpus review is sought when states fail to give lesser included offense instructions.

50. *E.g.,* Criminal Code of 1961 § 9-1, ILL. REV. STAT. ch. 38, § 9-1(a) (1979).

51. *Cf.* MODEL PENAL CODE § 210 (1980). "A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being." *Id.* § 210.1(1). "Except as provided [below] . . . , criminal homicide constitutes murder

II. PROPOSED STANDARD FOR FEDERAL HABEAS CORPUS REVIEW

Once a federal court has accepted jurisdiction to review state trial court omissions of lesser included offense instructions, habeas corpus relief should be granted if the state has violated federally protected rights.[52] For the most part, however, federal courts have not fashioned a clear standard for such collateral review; rather, they have responded to habeas corpus applications on an ad hoc basis.

The absence of a clear standard has several adverse effects. First, an inappropriate standard may be applied, or a standard that yields a satisfactory result in one context may be generalized and extended to cases where it does not. Second, the failure to articulate a standard aggravates tensions between federal and state courts. Federal courts depend on state courts to effectuate federal policy and protect federally recognized rights;[53] however, these rights can only be protected to the extent that they are understood by the state courts. Conversely, so far as the states have an interest in maintaining the institutional integrity of their courts, they can shield state court judgments from interference from federal courts by establishing an opportunity to litigate federal constitutional issues in state court.[54] But state courts can only preserve their autonomy to the extent they can uniformly apply standards promulgated by federal courts.

A. The Test: Protection of Federal Rights

This Note proposes that lesser included offense instructions should be required as a matter of federal law; the only exception would be where omitting the instructions is the result of a state policy designed

---

when: (a) it is committed purposely or knowingly . . . ." *Id.* § 210.2(1). The exception is manslaughter: "Criminal homicide constitutes manslaughter when . . . a homicide *which would otherwise be murder* is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." *Id.* § 210.3(1)(b) (emphasis added). Without an instruction on the *exception,* homicide "which would otherwise be murder" should be found to be murder. On the basis of incomplete instructions a jury will likely conclude that all the elements necessary for murder have been established.

The practical consequence is the same in those jurisdictions that define murder in terms of intent and malice aforethought, because those mental elements are effectively limited only by additional instructions requiring conviction of manslaughter if the jury finds provocation or unreasonable self-defense.

52. *See supra* notes 23-51 and accompanying text.

53. *See generally* Cover & Aleinikoff, *supra* note 22, at 1052-68.

54. *See* Brennan, *supra* note 22, at 958. Habeas corpus relief will not be granted until the prisoner has exhausted available state remedies. *See* 28 U.S.C. § 2254(b) (1976). Thus, by providing collateral review, states can themselves enforce the federal rights and minimize institutional friction with federal courts.

to enhance the probative value of jury deliberation.[55] If the existence of such a state policy is alleged, the federal court should investigate the operation of the state procedure to deterimine whether it is rationally related to the objective of protecting the integrity of the fact-finding process.

The requirement that lesser included offense instructions be given as a matter of federal law provides an easily applicable bright-line test. This part of the test incorporates the assumption that the state's interest in omitting the instructions is subordinate to the federal interest in requiring them as a means of fully effectuating the due process and jury trial rights of an accused.[56]

The second part of the test — allowing exceptions if the state's policy enhances the fact-finding process — recognizes that federal courts must be sensitive to the legitimate interests of states in administering state criminal law and policing the jury process. For example, a state in a murder trial may prohibit instructions on the lesser included offense of attempted murder if cause of death is not at issue. Likewise, a state may determine that for certain offenses, such as capital crimes, the danger of jury nullification compels withholding instructions on lesser included offenses.

Implementing the proposed standard would probably invalidate a large category of state practices. For example, a purely arbitrary state practice that gives trial courts absolute discretion over whether to give lesser included offense instructions is not designed to enhance the reliability of jury deliberation because there are no standards for when such instructions may be given. Consequently, omitting the instructions based on that policy should be held unconstitutional, and habeas corpus relief should be granted.[57] Likewise, when omitting the instructions is justified solely by a state policy that effects a forfeiture of unexercised rights, it should be held constitutionally invalid. Although the forefeiture policy may serve legitimate state interests by compelling timely presentation of the issue, it is not related to the objective of furthering the reliability of the jury's deliberation on the elements of an offense.[58]

---

55. It should not matter whether the state policy is express or implied, or the result of legislation or judicial decision.

56. *See supra* notes 22-51 and accompanying text.

57. *See, e.g.*, United States *ex rel.* Matthews v. Johnson, 503 F.2d 339, 345-46 (3d Cir. 1974) (en banc), *cert. denied*, 420 U.S. 952 (1975).

58. The availability of the substantive federal right should not be contingent on a state policy that requires timely requests for instructions. Recognition of the federal right, however, does not mean that it cannot be forfeited. *See infra* note 80 and accompanying text. Existence of the right should be differentiated from other conditions that may deprive the federal court of habeas corpus jurisdiction. Failure to request an instruction at trial need not automatically lead to forfeiture of the constitutional issue of the absence of the instruction. The procedure for preserving the constitutional issue might be post-trial motions to vacate judgment or for a new

Even if a state claims that its omission of lesser included offense instructions was the result of state procedures designed to insure reliable jury deliberation, the federal court should not automatically defer to the state practice. Rather, the court should consider the practical operation of the state procedure and balance state and federal interests. On the one side, states retain the exclusive power to define the elements of an offense, and state courts have a legitimate interest in insuring that the instructions are not given to the jury if they would increase the possibility of improper jury compromise.[59] On the other side, the federal interest lies in protecting the defendant's right to jury deliberation on every element required by state law and in enforcing the state's burden of proof for every element of the offense.[60] On balance, federal

---

trial; conversely, the constitutional issue might not be preserved even if the instruction was requested. Some states require courts to give lesser included offense instructions whether or not requested. *See* Shaffer v. Field, 339 F. Supp. 997, 1004-05 (C.D. Cal. 1972), (concluding that under California law a lesser included instruction must be given if evidence supports it, even if not requested), *aff'd per curiam*, 484 F.2d 1196 (9th Cir. 1973).

Moreover, if failure to request the instruction reflects a trial strategy predicated on a state policy of refusing to give such instructions, the right to have such instructions should not automatically be considered waived. In Beck v. Alabama, 447 U.S. 625 (1980), the Court did not address the issue of whether the instruction must be requested. A request in that case would have been futile because the state statute expressly prohibited a jury from considering lesser included offenses at a capital trial. In contrast, a request was necessary to preserve the constitutional issue on direct appeal in the state courts. Indeed, the dissent would have affirmed the conviction because it thought that the federal constitutional issue was inadequately presented on appeal to the Alabama Supreme Court. *Id.* at 648 (Rehnquist, J., dissenting). Significantly, in Hopper v. Evans, 102 S. Ct. 2049 (1982), discussed *supra* note 48, the Court specifically noted that the facts did not present a case where the applicant could have argued that without the preclusion rule he might have adopted different tactics that would have entitled him to the instruction. *Id.* at 2054.

Some federal courts require that the lesser included offense instruction be requested at trial. *See* Gray v. Lucas, 677 F.2d 1086, 1109 (5th Cir. 1982); Pilon v. Bordenkircher, 593 F.2d 264, 268 (6th Cir.), *vacated*, 444 U.S. 1 (1979); United States *ex rel.* Matthews v. Johnson, 503 F.2d 339, 346 (3d Cir. 1974) (en banc), *cert. denied*, 420 U.S. 952 (1975). Under this Note's proposed standard the federal court should reach the merits of the claim. *Cf.* United States *ex rel.* Wilson v. Essex County Court, 406 F. Supp. 991, 1000-02 (D.N.J. 1976) (no request for lesser included offense instruction was made at trial, but the claim was disposed of on the ground that on the record there was no constitutional prejudice to the accused).

59. In cases where omission of the instructions was the result of legitimate state policies, the federal court should not automatically invalidate the policy. Rather, the court should examine whether the state policy is effective or whether it undermines fair and objective jury deliberation on all elements. *Cf.* Beck v. Alabama, 447 U.S. 625 (1980) (examining the effects of the state policy of withholding lesser included offense instructions at capital trials and concluding that the policy undermined reliable fact finding).

60. Some commentators have argued that federal review of state court criminal judgments should be limited to consideration of the impact of state law on recognized and clearly defined federal rights and prohibitions. They propose a standard of review that takes each state judgment as a redefinition of the substantive criminal law of the state. *See, e.g.*, Comment, *supra* note 37, at 1589. The standard is urged in order to prevent interference with state power to define elements of crimes. *Id.*

In contrast, others have justified an independent federal standard in habeas corpus proceedings because the institutional interest that states have in their criminal process renders their objectivity

courts should invalidate those state practices that effectively shift the state's burden of proof to the defendant. To promote comity, however, the federal courts should consider only the burden of persuasion adopted by the state, not the adequacy of the evidence adduced at trial.

Federal courts should apply this approach when faced with a state statute or court rule prohibiting lesser included offense instructions where danger of improper jury compromise is especially great, such as cases where the principal offense is capital but the lesser included offenses are not. Although eliminating the danger of improper jury compromise may be intended to make the fact-finding process more reliable,[61] the state practice should be unconstitutional if as a practical matter, the alternatives forced on the jury encourage overconviction.[62]

Finally, in determining whether omitting the instructions warrants relief, the federal court should consider all the circumstances at trial that potentially aggravated the omission. Prejudicial remarks, such as statements by the prosecution or court emphasizing that acquittal would free the defendant from further judicial action, might induce the jury to convict despite lingering doubts about the defendant's guilt. Statements that by themselves do not constitute reversible error under state law could, if coupled with a failure to give lesser included offense instructions, constitute constitutional error and warrant habeas corpus relief.

B. Applying State Law: Effect Of Prior State Adjudication

Federal courts that accept jurisdiction to review state court failures to give lesser included offense instructions often limit their review to

---

suspect. *See, e.g.*, Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741, 767-69 (1982). The federal forum may also be preferred for various social or political reasons. *See, e.g.*, Note, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. MICH. J.L. REF. 465, 471-72 (1981).

Whatever the merits of the various theories, as a practical matter federal courts do grant habeas corpus relief in some cases where relief was not available from the states. For example, a state refusal to give instructions on self-defense is considered an unconstitutional attempt to shift or reduce the state's burden of proof even in federal jurisdictions that do not recognize a constitutional right to lesser included offense instructions. *See, e.g.*, Wynn v. Mahoney, 600 F.2d 448 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979); United States *ex rel.* Collins v. Blodgett, 513 F. Supp. 1056 (D. Mont. 1981); United States *ex rel.* Means v. Solem, 480 F. Supp. 128 (D.S.D. 1979), *aff'd*, 646 F.2d 322 (1980); Zemina v. Solem, 438 F. Supp. 455 (D.S.D. 1977), *aff'd per curiam*, 573 F.2d 1027 (1978).

This Note suggests that an approach that requires exculpatory or lesser included offense instructions interferes less with state law than an approach that affirmatively mandates an element or establishes self-defense as an affirmative constitutional right.

61. Alabama argued that its policy effectuated jury fact finding by withdrawing discretion that allowed jury nullification of capital punishment. Beck v. Alabama, 447 U.S. 625, 639 (1980).

62. *See id.* at 637. The Court in *Beck* limited its holding to the state's failure to give the jury the opportunity to convict on a lesser noncapital offense, justifying its holding in part

investigating whether state law was properly applied at trial.[63] This limited scope of review treats as res judicata the legal issue of whether the state properly defined "lesser included offense." As a result, a state can justify an omission of the instructions merely by legislatively or judicially defining the offense as not lesser or included.[64] This Note's proposed standard would end this deference: although states would retain their absolute power to define the *elements* of state offenses,[65] independent federal standards would apply in determining whether these elements constituted a lesser included offense.[66]

At the same time, federal-state comity compels federal courts to refrain from interfering prematurely in the state judicial process. Traditionally, habeas corpus has been treated as an extraordinary remedy: federal courts would not grant relief unless the applicant had

---

because of the severity of the greater capital punishment. *Id.* But the Court's holding was actually rooted in the recognition that the elimination of the option of convicting on the lesser offense undermined the reliability of the fact-finding process. Thus, habeas corpus relief should be available when the wrongful-custody requirement for jurisdiction is met. *See supra* notes 45-48 and accompanying text.

63. *See* Davis v. Greer, 675 F.2d 141 (7th Cir. 1982); Bishop v. Mazurkiewicz, 634 F.2d 724 (3d Cir.), *cert. denied,* 452 U.S. 917 (1981); Brewer v. Overberg, 624 F.2d 51 (6th Cir. 1980) (per curiam), *cert. denied,* 449 U.S. 1085 (1981); United States *ex rel.* Jacques v. Hilton, 423 F. Supp. 895 (D.N.J. 1976); United States *ex rel.* Wilson v. Essex County Court, 406 F. Supp. 991 (D.N.J. 1976); United States *ex rel.* Victor v. Yeager, 330 F. Supp. 802 (D.N.J. 1971); United States *ex rel.* Powell v. Pennsylvania, 294 F. Supp. 849 (E.D. Pa. 1968), *appeal dismissed,* 425 F.2d 267 (3d Cir. 1970).

64. *See* Brewer v. Overberg, 624 F.2d 51 (6th Cir. 1980) (per curiam), *cert. denied,* 449 U.S. 1085 (1981). The applicant in *Brewer* was convicted of murder for the shooting death of his girlfriend, which he claimed was accidental. The court held that the trial court's failure to instruct on negligent homicide did not constitute a denial of due process because the state appellate court had held that negligent homicide was not a lesser included offense under Ohio law. *See id.* at 53.

65. *See* 28 U.S.C. § 1738 (1976) (state legislation and judicial decisions must be given same effect by federal courts as by courts of the state). A radical departure from prior state law may, of course, be subject to challenge in habeas corpus proceedings as unconstitutionally vague or as an ex post facto law. U.S. CONST. art. I, § 10. Similarly, due process requires notice of conduct subject to criminal sanction. *See generally* Comment, *supra* note 37, at 1587.

66. To treat the conviction itself as res judicata on the question of whether a lesser offense is included and whether additional instructions should have been issued undermines the federally protected right to lesser included offense instructions. State determination of whether an offense is a lesser included offense is not binding on federal courts. *Cf.* Beck v. Alabama, 447 U.S. 625 (1980) (reversing conviction despite prohibition of instruction by state legislature and affirmance of conviction by Supreme Court of Alabama); United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974) (en banc) (granting habeas corpus relief despite affirmance of conviction by Supreme Court of Pennsylvania), *cert. denied,* 420 U.S. 952 (1975).

Moreover, federal courts have considerable experience with the analysis of lesser include offenses in their administration of federal criminal law. Lesser included offenses are defined by federal court rules. FED. R. CRIM. P. 31(c). The right of a federal defendant to lesser included offense instructions has long been recognized by the federal courts. *See, e.g.,* Keeble v. United States, 412 U.S. 205, 208 (1973); Sansone v. United States, 380 U.S. 343, 349 (1965); Stevenson v. United States, 162 U.S. 313 (1896). Thus it is well within the competence of the habeas corpus court to undertake an independent analysis of the state crimes and to determine whether they are included in the crime of which an applicant was convicted.

exhausted state court remedies. Consequently, the habeas corpus application will be dismissed if the applicant complaining of omitted lesser included offense instructions fails first to seek state remedies for the alleged constitutional violation.[67] The effect given a prior state court determination of constitutional issues is governed by the traditional scope of habeas corpus review as codified by statute.[68] In most cases, the contested issue will involve only questions of law and should be considered anew by the federal court.[69] If contested issues of fact must be resolved to determine the constitutional issue, the federal court may depend on prior state findings of fact, but only if the state provided an adequate forum for the determination of the facts at issue.[70]

C. *Procedural Default and Waiver*

Recognizing a federal right to lesser included offense instructions poses novel problems of judicial administration. One important problem is how and by what standards a defendant forfeits or waives the

67. This requirement is codified in 28 U.S.C. § 2254(b) (1976). If the prisoner has not exhausted state remedies, federal courts will reject applications that claim that the state violated the prisoner's constitutional rights by failing to give lesser included offense instructions. In circuits that currently do not accept jurisdiction to consider such claims, applications may be dismissed on jurisdictional and exhaustion grounds. *See* United States *ex rel.* Smith v. Montanye, 505 F.2d 1355 (2d Cir. 1974) (denying relief because the applicant had not exhausted state remedies and also because the application did not raise a constitutional claim), *cert. denied,* 423 U.S. 856 (1975); James v. Reese, 546 F.2d 325, 327 (9th Cir. 1973) (affirming dismissal of an application because the prisoner had not exhausted state court remedies and further justifying dismissal on the jurisdictional ground that "[f]ailure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding"); Mason v. Phillips, 548 F. Supp. 674, 675 (S.D.N.Y. 1982) (dismissing consideration of trial court's refusal to give a lesser included offense instruction on criminal trespass because the prisoner had not presented the issue to the state appellate court and had thus failed to exhaust the state remedies).

Alternatively, courts may deny jurisdiction and then reach the question of exhaustion. *Cf., e.g.,* Clark v. Peyton, 280 F. Supp. 205, 206 (W.D. Va. 1968) (holding that the refusal to give an instruction — unspecified in the opinion — was not a proper subject for federal habeas corpus relief and was also inappropriate because the applicant had not exhausted state remedies).

68. *See* 28 U.S.C. § 2254(b), (c), (d) (1976) (requiring exhaustion of state remedies and presuming the correctness of a prior state adjudication of facts). *See generally* Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L.J. 895 (1966); Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle,* 39 N.Y.U. L. REV. 78 (1964).

69. The assertion of violation of a federal right to lesser included offense instructions poses a two-fold legal analysis that can be performed, in most cases, on the basis of the record: first, the court must decide if the less serious crimes were lesser included offenses; second, it must decide if the failure to give the instructions violated the rule, discussed *supra* note 55 and accompanying text.

70. "[A] determination after a hearing on the merits of a factual issue, made by a State court . . . , shall be presumed to be correct [unless the merits were not resolved or the state forum was inadequate]." 28 U.S.C. § 2254(d) (1976). Otherwise the applicant has the burden of establishing that the state court's findings were erroneous. *See id.*

right to the instructions. Clear elaboration of these procedures is essential because, as a practical matter, the rules of default and waiver often determine the availability of habeas corpus relief.

For many years federal courts maintained that a procedural default in state courts that extinguished a constitutional claim also barred collateral relitigation of the issue in an application for habeas corpus relief.[71] This policy of federal incorporation of state forfeiture law was the subject of considerable criticism[72] and was abandoned in 1963.[73] To preserve federal-state comity, however, the Supreme Court maintained discretion to deny habeas corpus relief if the procedural default was the result of a deliberate effort to bypass procedures established by the state courts.[74]

Subsequently, the Court replaced the deliberate bypass standard with a "cause and prejudice" standard where states imposed forfeitures on defendants who failed to object at trial to alleged constitutional violations.[75] Habeas corpus relief thus remains available only if the prisoner establishes "cause" for the failure to object and demonstrates actual prejudice[76] resulting from the forfeiture.[77] Whether the constitutional issue is forfeited is determined by reference to *state* law;[78] defendants need not formally request the lesser included offense instructions if state law preserves the constitutional issue of their omission.[79]

1. Cause— The "cause and prejudice" standard applies to failures to object at trial to constitutionally defective jury instructions.[80] If the

---

71. *See generally* Hill, *The Forfeiture of Constitutional Rights in Criminal Cases,* 78 COLUM. L. REV. 1050, 1050 (1978).

72. *See, e.g.*, Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism,* 7 UTAH L. REV. 423, 441 (1961) ("[W]hen the state courts insist upon literal compliance with state procedures as the price of relief from the deprivation of fundamental rights, it is hard to see any basis in this for automatic preclusion from relief in federal habeas corpus."). The author suggested that deliberate attempts to circumvent state courts could be adequately contained by the traditional discretion of the court to deny habeas corpus relief. *Id.* at 441-42.

73. *See* Fay v. Noia, 372 U.S. 391 (1963).

74. *Id.* at 438.

75. *Cf.* Francis v. Henderson, 425 U.S. 536 (1976) (cause and prejudice standard applied where applicant alleged discrimination by grand jury); Wainwright v. Sykes, 433 U.S. 72 (1977) (cause and prejudice standard applied where there was a *Miranda* issue).

76. Failure to establish either cause or prejudice bars habeas corpus relief. *See generally The Supreme Court, 1981 Term,* 96 HARV. L. REV. 62, 219-20 (1981).

77. Francis v. Henderson, 425 U.S. 536, 542 (1976).

78. If the state court imposed no forfeiture and reached the merits, the federal habeas corpus court can also consider the application. *Cf.* Castaneda v. Partida, 430 U.S. 482, 485 n.4 (1977) (rejecting state's argument that challenge was not properly preserved according to state law when the state courts had nonetheless considered the merits of the challenge).

79. A proper procedure for preserving the constitutional issue might theoretically be a post-trial motion for a new trial or to vacate judgment.

80. In Engle v. Isaac, 102 S. Ct. 1558 (1982), the Court applied the *Wainwright* cause and prejudice standard where habeas corpus applicants had not objected contemporaneously to jury instructions and thus had failed to preserve the issue under state law, *id.* at 1572. *See* Gray

state imposes a forfeiture for failure to object at the appropriate time during trial, habeas corpus relief will not issue without a showing of cause and actual prejudice for the failure to object.[81] In contrast to the old deliberate bypass standard, the prisoner bears the burden of establishing a reason for the failure to object at trial. One commentator persuasively suggests that "the 'cause' requirement should be deemed satisfied whenever a default is unintentional."[82] Conversely, if the failure to object at trial was intentional, a showing of cause will be insufficient.[83]

2. Prejudice— The actual prejudice requirement is more problematic than the cause requirement, in part because the Court has refused to articulate the criteria for actual prejudice.[84] For a habeas corpus

---

v. Lucas, 677 F.2d 1086, 1109 (5th Cir. 1982) ("Under State law, Gray's failure to request an instruction on another lesser included offense precluded him from later raising that point . . . absent a showing of cause and prejudice."); Roland v. Mintzes, 554 F. Supp. 881 (E.D. Mich. 1983).

81. The dissent in *Beck v. Alabama* would have denied relief because the issue was not properly presented on appeal to the Alabama Supreme Court and that the federal courts therefore lacked jurisdiction. 447 U.S. at 648 (Rehnquist, J., dissenting). *See generally* Porter v. Leeke, 457 F. Supp. 253, 259 (D.S.C. 1978) (discussing conflicting authority for application of contemporaneous objection requirement to jury instructions).

82. Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims,* 130 U. PA. L. REV. 981, 983 (1982). The applicant would bear the burden of proving that the default was unintentional. *Id.* at 984. *But see* Seidman, *supra* note 22, at 466 ("cause" should be established if the default was nontactical); Western, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure,* 75 MICH. L. REV. 1214, 1238 (1977) ("Forfeiture of constitutional defenses is justified not by the deliberate and voluntary consent of the defendant . . . but by the overriding interests of the state."); *see also* Rubin, *Toward a General Theory of a Waiver,* 28 U.C.L.A. L. REV. 478, 536 (1981).

Because the state can have autonomous interests distinct from those of the defendant and the prosecution, the calculus of interests can yield different results for waiver and for forfeiture. Although the state has no interest in the finality of improper convictions, it does have an interest in the integrity of jury fact finding which may in some cases conflict with the interests of either or both adverse parties. If the state has an affirmative interest in *discouraging* the surrender of a right, the deterrent effect of voiding improper, deliberate waivers will tend to effectuate the state interest more than a policy of nullifying defaults. Thus, there is no inconsistency in the apparently anomalous policy advocated by this Note of prohibiting waiver but recognizing deliberate forfeiture of the right to lesser included offense instructions.

83. *See, e.g.,* Look v. Amaral, 546 F. Supp. 858, 860 (D. Mass. 1982) (dismissing the application where the prisoner at trial had declined the offer of the court to give a lesser included offense instruction on involuntary manslaughter and was subsequently convicted of second degree murder: "Due process cannot be denied where, as here, by direct statement of defense counsel, a defendant chooses not to have a lesser included offense instruction given and where the right to such an instruction has long been established in the state courts"). It is significant that the district court noted in this context that the prisoner did not allege ineffective assistance of counsel. *Id.* For a discussion of problems inherent in inferring a defendant's intent from behavior of counsel, see Seidman, *supra* note 22, at 467-68.

By itself the perceived futility of the claim does not establish cause. *See generally, The Supreme Court, 1981 Term, supra* note 76, at 219-20.

84. The meaning of "prejudice" is unclear. Recently the Supreme Court again refrained from giving prejudice independent meaning, instead evaluating prejudice "in the total context of the events at trial." United States v. Frady, 102 S. Ct. 1584, 1595 (1982). The Court denied relief to a *federal* prisoner who collaterally attacked a federal murder conviction. Applying the cause

application claiming the loss of the right to lesser included offense instructions, actual prejudice should be established if evidence at trial would have supported a conviction on the lesser included offense.[85] Moreover, even if no such evidence exists on the record, habeas corpus relief should still be available if the absence of such evidence was the result of a trial strategy made in anticipation of the court's failure to give a lesser included offense instruction.[86]

Actual prejudice should be deemed conclusively present in any claim for habeas corpus relief that establishes a constitutional violation under this Note's proposed standard of review because omitting lesser included offense instructions generally distorts the fact-finding process.[87]

---

and prejudice standard, a plurality concluded that failure to give manslaughter instructions did not actually prejudice the defendant. *Id.* at 1594, 1596. Merely shifting the burden of proof apparently did not itself amount to actual prejudice. The Court suggested that a different result would be proper, had the defendant "brought before the District Court affirmative evidence indicating that he had been wrongly convicted of a crime of which he was innocent." *Id.* at 1596. The Court did not explain how a defendant might prove innocence, but it apparently rejected as inadequate the legal argument that the prosecution did not prove guilt. *Frady* is questionable authority for habeas corpus cases; the finality issues addressed by the plurality in *Frady* are not analogous to those presented by federal collateral review of state court judgments, for the habeas corpus applicant has not had a federal forum consider the federal claim. *See generally* Note, *supra* note 60, at 470-72; Peller, *supra* note 14, at 667-68. As Brilmayer notes, "[a] constitutional right to an acquittal need not be based upon factual innocence, for 'guilt' is also a matter of constitutionally satisfactory proof." Brilmayer, *supra* note 60, at 773.

85. Hopper v. Evans, 102 S. Ct. 2049 (1982), held that a jury must be permitted to consider the lesser included offense only if evidence would support conviction of the lesser offense, *id.* at 2053. The rule will be a tautology if evidence that supports conviction of the greater offense by definition supports conviction of the lesser included offense. This was true with respect to the Alabama crimes at issue in *Hopper*. *See* ALA. CODE §§ 13-11-2(a)(2), 13-1-70 (1975), *repealed by* 1977 Ala. Acts § 9901. After *Hopper* some federal courts have denied relief because evidence supposedly did not support conviction on the omitted lesser offense. See, e.g., Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), which indicates the confusion. The court held that "there is no due process violation . . . unless there is some evidence to support an instruction on the lesser included offense." *Id.* at 1004. In a footnote, however, the court conceded that, had the defendant been convicted of the lesser offense, the evidence would have supported the conviction. *Id.* at 1005 n.8. *See also* Muner v. Jones, 553 F. Supp. 841 (S.D.N.Y. 1982) (accepting the state's argument that evidence supporting conviction of possession with intent to sell contraband did not support instruction on simple possession); Simpson v. Garrison, 551 F. Supp. 618, 621 (W.D.N.C. 1982) ("a rational jury would not have acquitted Petitioner of the greater offense of burglary and convicted him of the lesser-included offense of breaking and entering").

In contrast, the Third Circuit refused to second-guess the jury, reasoning that the mere presence of a lesser offense instruction might have encouraged compromise, and concluding that the omission was not harmless error. *See* United States *ex rel.* Matthews v. Johnson, 503 F.2d 339, 346 (3d Cir. 1974) (en banc), *cert. denied*, 420 U.S. 952 (1975).

86. *See supra* notes 48 & 51. For example, knowing that the state will not give manslaughter instructions, defendants will not introduce evidence of provocation because without mitigating instructions the evidence would be inculpatory of murder. The cause for the absence of evidence is a question of fact on which the habeas corpus court can conduct evidentiary hearings. 28 U.S.C. § 2243 (1976).

87. Mr. Hill suggests that actual prejudice should be irrelevant either where there was serious governmental misconduct or "where the integrity of the process for distinguishing guilt from innocence was significantly impaired." Hill, *supra* note 71, at 1093-94.

Thus, if applicants show "cause" for failing to preserve their claim in the state courts, the federal court should, as a matter of judicial economy proceed to consider the merits of the constitutional claim. If the court finds that the instructions were constitutionally required but omitted, then it should conclude that actual prejudice has been established and grant relief.

3. Intentional waiver— Some constitutional rights may be forfeited not only by operation of law; they can also be waived.[88] Waiver of a constitutional right requires the knowing and intelligent surrender of that right.[89] One commentator has suggested that a constitutional right to lesser included offense instructions should be accorded the same protections as the right to a jury trial or the right to counsel.[90] She proposes that the defendant be advised of the right and admonished before waiving it; that the trial court determine whether waiver of the instructions is made intelligently; and that, because the right is fundamental to the defense, the decision ultimately rests with the defendant personally, not with counsel.[91]

The analogy to the right to trial by jury or the right to counsel is inapt. The validity of a waiver must be determined by reference to the specific interests underlying the right that is purportedly surrendered.[92] The right to lesser included offense instructions is personal to defendants insofar as they are affected adversely by the failure to give the instruction; however, there is no corresponding *right* to waive the instructions when they are constitutionally required. The right to the instructions is therefore not analogous to the right to trial by jury or the right to counsel because they each have substitutes — bench trial in place of a jury trial, and pro se defense in place of counsel — that defendants can effect if they choose to waive their constitutional rights.

In contrast, the right to have a court give a lesser included offense

---

88. For a discussion of the traditional definitions of forfeiture and waiver, see Westen, *supra* note 82, at 1214-15.

89. *Cf.* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

90. *See* Note, Beck v. Alabama: *The Right to a Lesser Included Offense Instruction in Capital Cases,* 1981 WIS. L. REV. 560, 585-92.

91. *Id.* In concluding, the author suggests the possibility that the right to lesser included offense instructions not be "waivable." *Id.* at 591. Other authors have also suggested that not all rights can be waived. *See, e.g.,* Rubin, *supra* note 82, at 493-94.

92. Because waiver is a deliberate process effecting the surrender of constitutional protections, the calculus of competing interests need not be the same as that for forfeiture, the operation of which is retroactive. Even assuming that the prosecution relies detrimentally, the interest in discouraging surrender of the right to lesser included offense instructions may be affected differently depending on whether the forfeiture is made deliberately. *See supra* note 82 and accompanying text. Because of the overriding state interest in requiring lesser included offense instructions, courts could consistently preclude waiver of the right to such instructions.

instruction more closely resembles the right not to endure cruel and unusual punishment which has no recognized counterpart right that is personal to the defendant.[93] Although defendants as a tactical maneuver might hope to be acquitted by forcing the jury to consider only the greater offense, there is no federal interest, nor a corresponding constitutional right, to waive procedures established to protect the integrity of the fact-finding process.[94]

Because no personal interest in waiving the right to the instructions merits judicial protection, the effect of an attempted waiver must be determined by its systemic impact independent of the defendant's interests. For instance, the prosecution may rely detrimentally on the waiver. Retrial not only imposes high administrative costs, but the passage of time may make it significantly more difficult to establish the defendant's factual guilt. In addition, recognition of the waiver threatens to undermine the integrity of the fact-finding process. Binding the defendant to an agreement, just like protecting the prosecution's reliance interests, essentially presupposes that the right can be waived and that reliance was reasonable.[95] Neither assumption is warranted where the federal interest requires the lesser included offense instruction.

Ultimately, the federal interest in providing the instructions is the protection of reliable jury deliberation on every element of an offense. To effectuate this interest, the trial court must be given a duty to provide the instructions in appropriate circumstances notwithstanding waiver by the defendant. Moreover, habeas corpus relief functions not just as a remedy for prisoners but as an institutional incentive for state

---

93. In practice a defendant may intentionally forfeit the ability to assert an eighth amendment right under circumstances in which no other person has standing to raise the issue. *Cf.* Gilmore v. Utah, 429 U.S. 1012, 1014 (1976) (Burger, C.J., concurring in order) (terminating stay of execution because "next friend" of convict did not have standing where convict had purposely not appealed death sentence and opposed stay). The Court order referred to the defendant's "knowing and intelligent waiver of any and all federal rights," due to his intentional refusal to prosecute an appeal. *Id.* at 1013. This is not the same, however, as recognizing an affirmative right to endure cruel and unusual punishment. On the contrary, if the court had reached the issue and found a violation of the eighth amendment, the sentence would properly have been vacated, irrespective of the defendant's desires.

94. Of course, if a defendant so motivated intentionally fails to request the instruction and does not preserve the constitutional issue as a result, the defense will have been forfeited and habeas corpus relief will be denied. *See, e.g.,* Look v. Amaral, 546 F. Supp. 858 (D. Mass. 1982); Drielick v. Mintzes, No. 80-1725, slip op. (6th Cir. June 19, 1981) (unpublished) (available March 1, 1983, on LEXIS, Genfed library, Cases file).

95. Mr. Westen suggests that "the waiver of constitutional defenses, like the forfeiture of such defenses, is justified if, and only if, the state can prove that it has relied to its serious detriment on foreclosing the defendant from later asserting his constitutional defenses." Westen, *supra* note 82, at 1258. But if not all rights can be waived, or ought to be waived, that reliance interest should not be recognized.

courts to protect federal rights.[96] If relief is granted when the instructions are omitted, the prosecution will be encouraged to initiate the request for the instructions in order to insure the finality of the state court judgment and prevent future litigation of the constitutional issue.[97]

CONCLUSION

Federal courts should accept jurisdiction to review the failure of state trial courts to give lesser included offense instructions. Withholding such instructions can adversely affect the reliability of the jury's fact finding. Lesser included offense instructions should be required unless a state policy designed to insure the integrity of jury deliberations prohibits such instructions.

Federal collateral review of a state trial judge's failure to give lesser included offense instructions comports with the traditional scope of habeas corpus jurisdiction and provides a suitable means of effectuating federal rights without disturbing the appropriate relation between the state and federal judiciary.

—Michael H. Hoffheimer

96. Peller, *supra* note 14, at 668. The basic institutional justification for collateral federal review has been articulated as, in part, a response to the inadequacy of state protection where states are inevitably not disinterested agencies for the effectuation of the rights. *See generally* Brilmayer, *supra* note 60, at 768-69.

97. Failure of defense counsel to assert and preserve the issue may deprive the defendant of the right to competent legal representation and thus provide an additional ground for habeas corpus relief. Effective assistance of counsel is a separate constitutional right. U.S. CONST. amend. VI; *see* Gideon v. Wainwright, 372 U.S. 337 (1963). The court should recognize the constitutional right to the effective assistance of counsel, even if the basis of that sixth amendment claim is the forfeiture or incompetent litigation of the right that has been lost. *See generally* Note, Stone v. Powell *and the Effective Assistance of Counsel,* 80 MICH. L. REV. 1326, 1326-28 (1982).