

1988

# William Andrews v. Gerald R. Cook : Reply Brief

Utah Supreme Court

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**BRIEF**

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

880024

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William Andrews,	)	
	)	
Petitioner - Appellant,	)	
	)	
v.	)	No. 880024
	)	
Gerald R. Cook, Warden of	)	
the Utah State Prison,	)	
	)	
Respondent-Appellee.	)	

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Reply Brief of Appellant

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Appeal from Denial of Post-Conviction Relief in the Third Judicial District In and For Salt Lake County, State of Utah, the Honorable David S. Young, Presiding

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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## I. INTRODUCTION

Stripped to its essentials, the State's Brief advocates a fundamental injustice in this capital case. The State admits William Andrews did not kill any of the victims of this crime -- despite the contrary suggestions at trial. The State does not contest that Mr. Caine's ineffectiveness at trial taints the record here on the critical issue of the degree of Mr. Andrews' participation in the crimes. The State virtually concedes a lesser included offense instruction should have been given to the jury that convicted William Andrews. The State does not dispute the affidavits of William Andrews' lawyers that the failure to earlier raise the issue of failure to instruct on lesser included offenses, was not the result of any tactical decision on their part -- or Mr. Andrews' own affidavit that he was never told anything about this question. The State does not deny that the failure to give a warranted lesser included offense instruction in a capital case is prejudicial and injects a level of unreliability into the decision to impose the death penalty, unacceptable under the Eighth Amendment. Yet the State urges this Court to uphold William Andrews' sentence of death, solely because his court-appointed and volunteer lawyers -- like the prosecutors and courts of the time -- did not anticipate the line of state and federal cases on which the issue here rests, years before it emerged.

With life at stake, this Court should not allow itself to be made a party to such unprincipled maneuverings.

## II. RESTATEMENT OF FACTS

Petitioner's Brief documented critical omissions by trial counsel which if pursued, would have presented to the jury a view of Mr. Andrews' participation which was much more favorable to his defense. (Pet. Brief, pp. 6-10; 12; 14-18; 29-34, 36).

The State's Statement of Facts attempts to blur distinctions in the trial evidence between the acts of Mr. Pierre and those of Mr. Andrews. Moreover, the State's presentation overstates the trial evidence of Mr. Andrews' participation. This hyperbole could seriously mislead the Court. We treat here the more serious examples.

Assertion: "As he [Orren] approached the basement stairway, Andrews and Pierre confronted him with guns and forced him down the stairs. Pierre's gun discharged twice, startling Andrews (who was standing in front of Pierre at the time) and prompting him to say, 'What did you do that for, man?' (3071-72)." Brief, p. 5. There was no testimony that Orren was "forced" down the stairs by Mr. Andrews. Orren testified at 3069, "the man at the top of the stairs [Pierre] waved the gun, his gun to indicate for me to go down the stairs," and at 3070 that "[Andrews] was holding his gun on me at the bottom of the stairs."

Assertion: "When Orren refused to administer the caustic substance, Andrews placed a gun at his head and threatened him by saying, 'Man, there is a gun at your head!' (3078)." Brief, p. 6. At p. 3078 Orren testified that Mr. Andrews was standing "approximately maybe four feet from me" and that "he had his gun in his hand. I am sure he had it aimed at my head." There was no testimony that Mr. Andrews

"placed" the gun at his head. Mr. Andrews did nothing when Mr. Walker refused to administer the liquid.

Assertion: "Pierre captured her [Carol] at gunpoint upstairs while Andrews guarded the other victims." (No citation). Brief, p. 6. At p. 3082 Orren testified simply that Mr. Andrews was "at the bottom of the steps" when Carol came in.

Assertion: ". . . Andrews continued to pour . . . (3084-87, 3128, 3182)." Brief, p. 6. Orren testified that Mr. Andrews poured each of the doses of Drano, but at 3182-83, on cross-examination, he admitted that he only saw Mr. Andrews pour the liquid in the cup the first time and "wasn't really observing Mr. Andrews after that point."

Assertion: "At no time did Andrews display any fear over pouring the Drano, and at no time did either assailant threaten the other if he did not administer the substance (3208, 3211)." Although these record references are correct, the testimony was in response to leading questions to which Mr. Caine did not object. They also ignore Orren's testimony at 3183-84:

Q: So at some point concerning the administration of the liquid this statement ["I can't do it, I am scared"] was also said?

A: That's correct.

Q: That you are clear about?

A: Nodding his head up and down.<sup>1</sup>

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<sup>1</sup> Mr. Walker's testimony at the preliminary hearing made it clear that Mr. Andrews made this statement just before Mr. Pierre began administering the liquid. See Pet. Br. at p. 7.

The State also asserts that "Both assailants then covered three of the victims' mouths with tape" Brief, p. 7. Yet at the preliminary

Assertion: "Orren heard mumbled conversation between the assailants, but could only discern Andrews saying, 'I can't do it, I am scared,' and later Pierre's reply to Andrews of 'about 30 minutes.' (3092-93, 3095, 3187)." Brief, p. 8. The sequence of events is not clear from the cited testimony. Orren testified at 3094-95 that Mr. Pierre took his watch and wallet just before Mr. Pierre said "about 30 minutes." There is no indication that Mr. Pierre's comment was in "reply" to Mr. Andrews saying "I can't do it, I am scared." Mr. Andrews left the scene right after Mr. Pierre said "about 30 minutes" (3095-96) and was not seen again by Orren.

### III. ARGUMENT

#### A. Introduction

The State spends more than sixty pages of its brief setting forth the facts and arguing that this Court, unlike the court below, should refuse to address the merits of the petition and instead, dismiss it as procedurally barred or as an abuse of the writ.

The State also seeks to avoid the full impact of Mr. Caine's ineffectiveness by ignoring the evidence which was available at trial but not utilized by him to differentiate the level of Mr. Andrews' participation from that of Mr. Pierre. The State does not argue that these omissions did not demonstrate ineffectiveness of trial counsel.

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(Footnote Continued)

hearing Mr. Walker's testimony was that Mr. Pierre taped his mouth, and that he could not see who else was taped or who did the taping. PH Tr. 32-39.

The State does not even attempt to argue that these glaring omissions were reasoned decisions in furtherance of a "trial strategy." No conceivable trial strategy would have wasted the opportunity to bring out to the jury that:

1. Mr. Andrews did not continue to pour the liquid as Mr. Pierre administered it. He refused, saying, "I can't do it, I'm scared." Pet. Brief, p. 7.
2. Mr. Andrews did not participate in taping the mouth of any victim. Id. at p. 8.
3. Mr. Pierre's taping of the victims' mouths occurred 30-40 minutes after the liquid had been administered, and was not for the purpose of keeping the liquid in, but rather to keep the victims silent. Id. at pp. 9-10.
4. Whatever it was that Mr. Pierre wanted Mr. Andrews to do around 9:00 p.m. that evening, Mr. Andrews refused to do, again saying, "I can't do it, I'm scared." He left the store within minutes, and was not seen or heard again by Mr. Walker. Id. at p. 9.

The State does not even attempt to deny the prejudicial effect of these omitted points. The omitted evidence strongly supported Mr. Andrews' defense that he did not intend that killing take place; he actively refused to take part in the administration of the liquid and in the subsequent killings. The trial evidence that the jury did hear thus exaggerated or misstated Mr. Andrews' participation in the critical events which every reviewing court, including this Court, used to satisfy itself that the evidence of Mr. Andrews' guilt of

first degree murder was overwhelming. Clearly this "evidence" was tainted by Mr. Caine's ineffectiveness.

All of these omissions are directly relevant to the substantive issue presented by the petition, Mr. Andrews' entitlement to a jury instruction on second degree felony murder.

The State spends only five pages addressing the merits of this issue. We begin our reply by addressing those arguments.

B. The Evidence Supported a Second Degree  
Felony Murder Instruction.

Contrary to the State's assertion, there is no requirement that the evidence in support of the lesser included offense instruction be "compelling" (Brief, pp. 61-62); rather the issue is simply whether the evidence "provide(d) a rationale basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."<sup>2</sup>

The State's assertion that Judge Young's "denial of relief should be affirmed on the ground that the absence of the instruction did not result in a constitutional violation, "(Brief, p. 63) would directly contravene the holding of Beck v. Alabama, 447 U.S. 625 (1980), and this Court's decision in State v. Oldroyd, 685 P.2d 551 (Utah 1984).

Even the record which overstated Mr. Andrews' participation clearly supported an interpretation that Mr. Andrews did not intend that any killing take place. That is all that was required to entitle him to the instruction. The contrary conclusion reached by the district court is unsupported in the evidence and error.

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<sup>2</sup> State v. Hansen, 734 P.2d 421 at 424, quoting from State v. Baker, 671 P.2d 152 at 159. See also Utah Code Ann. § 76-1-402(4).

C. The Failure to Give the Instruction Violated  
Mr. Andrews' Rights Under the Eighth Amendment.

The State concedes that since Beck v. Alabama, 447 U.S. 625 (1980), in capital cases the failure to give lesser included offense instructions violates the defendant's constitutional rights, where the evidence would support the instruction. See Trujillo v. Sullivan, 815 F.2d 597, 601 (10th Cir.), cert. denied, 108 S.Ct. 296 (1987).

The State seeks to avoid the Beck decision by arguing that the failure to ask for the felony murder instruction and the failure to object to the absence of the instruction did not constitute ineffective assistance of counsel because it was part of an "all or nothing" trial strategy. (Brief, pp. 63-64).

We are puzzled by this assertion, as it directly contradicts the State's concession, buried in footnote 36:

"Because the State has no reason to doubt the testimony of petitioner's counsel in their affidavits concerning a deliberate withholding of the issues the State does not assert that prong of the abuse of the writ doctrine as a basis for dismissal of the petition." Brief, p. 40.

Regardless of whether the State concedes the point, the record below is uncontroverted. Mr. Caine's affidavit states in pertinent part:

"In connection with Mr. Andrews' defense, I took exception to the trial court's refusal to instruct the jury of the lesser included offense of second degree murder. I did not make any tactical decision to withhold the lesser included offense of second degree murder from the jury, and affirmatively objected to the court's refusal to submit that lesser included offense. My arguments to the jury did not discuss the alternative of second degree murder because the jury was not instructed on that alternative." Add. at pp. 12-13.



The foregoing statement clearly shows that Mr. Caine, rather than choosing to take an all or nothing approach, was forced to do so by the court's ruling. Such a response does not constitute "an objectively justifiable trial strategy" (Brief, p. 63) but rather an attempt to make the best out of a bad situation. Mr. Caine's joining in the exceptions to the failure to give the lesser included offense instructions which were proffered is also totally inconsistent with the State's belated theory of an all or nothing trial strategy. It similarly distinguishes this case from the "all or nothing" cases cited by the State.<sup>3</sup>

The State argues unconvincingly that the lesser included offense instructions which were tendered in behalf of Mr. Pierre, and as to which Mr. Caine did object to the court's refusal, should be ignored because these instructions were inconsistent with the defense theme that no death was intended by Mr. Andrews. (Brief, p. 64). That assertion is only partially true as to Mr. Pierre's proposed instruction No. 3, and completely untrue as to proposed instructions 4 through 12. See State Add., Appendix B. The trial court's refusal of these instructions clearly violated Mr. Andrews' Eighth Amendment rights under Beck.

We turn then to the issue of Beck's application to the felony murder instruction, where it was supported by the evidence but not requested by Mr. Caine nor given sua sponte by the trial judge.

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<sup>3</sup> E.g., State v. Mora, 558 P.2d 1335 (Utah 1977); Maynor v. Green, 547 F.Supp. 264 (S.D. Ga. 1982); Aldrich v. Wainwright, 777 F.2d 630 (11th Cir. 1985), cert. denied, 107 S.Ct. 324 (1986); Rawlins v. Craven, 329 F.Supp. 40 (C.D. Calif. 1971); Poulson v. Turner, 359 F.2d 588 (10th Cir.), cert. denied, 385 U.S. 905 (1966); State v. Mitchell, 278 P.2d 618 (Utah 1955).

D. Beck Requires that the Trial Court  
Instruct on Lesser Included Offenses  
Regardless of Whether Requested.

This Court has long recognized that the failure to give a warranted lesser included offense instruction, even though not requested by the defendant, can be reversible error. State v. Cobo, 60 P.2d 952, 958 (Utah 1936); State v. Mitchell, 278 P.2d 618, 622 (Utah 1955); State v. Dyer, 671 P.2d 142, 145 (Utah 1983); State v. Close, 499 P.2d 287, 288-89 (Utah 1972). This should be particularly true in capital cases, where this Court has traditionally gone to great lengths, including sua sponte review, to protect the rights of those facing the death penalty. State v. Standrod, 547 P.2d 215 (Utah 1976); State v. Lafferty, 749 P.2d 1239, 1254 (Utah 1988); State v. Wood, 648 P.2d 71, 77 (Utah 1982); State v. Pierre, 572 P.2d 1338, 1345, 1353 (Utah 1977); State v. Stenback, 2 P.2d 105 (Utah 1931); State v. Tillman, 750 P.2d 546, 552-53 (Utah 1987).

In applying Beck the Ninth Circuit has held that it was constitutional error for the trial court to fail to give a lesser included offense instruction, even where not requested by the defendant. Vickers v. Ricketts, 798 F.2d 369, 373-74 (9th Cir. 1986), cert. denied, 107 S.Ct. 928 (1987). In reaching this result the court rejected the argument which the State advances here, namely that the evidence in support of the instruction must be "compelling." (Brief, p. 62). Id. at 373. Creation here of a standard of compelling evidence would contravene both U.C.A. § 76-1-402(4), and this Court's long standing precedents as to the quality of the evidence required.\*

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\* The Tenth Circuit has adopted a compelling standard to the review of failures to give lesser included offenses in non-capital cases, but

The State also urges that the evidence in support of the second degree felony murder instruction would have to be compelling before Mr. Caine could be held to be ineffective for failing to request it (Brief, pp. 61-62). That would hardly be a proper test here, where it is obvious that the instruction best fit the theory of the defense, and Mr. Caine was well aware of the trial evidence in support of unintentional killing, in fact arguing it to the jury.

E. Mr. Caine's General Ineffectiveness at Trial and on Appeal Were at Issue in the District Court and are Properly Before this Court.

The State urges that the required showing of ineffective assistance of counsel is at least the same for generally overturning a conviction as it is for excusing procedural default or abuse of the writ (Brief, pp. 42, 46-51). If this is so, then petitioner should be afforded the same latitude in proving the general ineffectiveness of his counsel and the resulting prejudice in either case.

However here the State seeks to artificially limit the issue of ineffectiveness to the single question of failure to advocate the giving of an instruction on second degree felony murder. This test would preclude the full review of the record which the Court prefers in making the determinations of whether counsel was in fact ineffective and whether the ineffectiveness resulted in prejudice.<sup>5</sup>

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(Footnote Continued)

adheres to the normal standard under Beck in capital cases. Trujillo v. Sullivan, 815 F.2d at 601, 603: "Thus there is clearly now a constitutional right to a lesser included offense instruction when the death penalty is imposed and the evidence warrants the instruction." Id. at 601.

<sup>5</sup> State v. Lairby, 699 P.2d 1187, 1206 (Utah 1984); State v. Frame, 723 P.2d 401, 405 (Utah 1986).

The State seeks to impose this unfavored limitation by asserting that ineffectiveness as to the failure regarding the felony murder instruction was the only ineffectiveness urged in the petition and in the proceedings before the district court (Brief at pp. 23-24; 51-52).

Yet in the district court Petitioner's Reply Memorandum in Opposition to Motion to Dismiss relied as well upon Mr. Caine's general ineffectiveness both at trial<sup>6</sup> and on appeal.<sup>7</sup>

The affidavits of Messrs. Hill (Add. at 14-16) and Athay (Add. at 17-19) clearly raise questions about Mr. Caine's general ineffectiveness which go beyond the single issue surrounding the lesser included offense instruction. This evidence came in without objection from the State. Nor did the State seek to limit the more general assertions as to Mr. Caine's overall effectiveness which were argued at the hearing below.

Finally, it is clear that the district court here considered and ruled on the broader issue of ineffectiveness (Mem. Decision, pp. 2-3; 4), and ruled on the adequacy of the evidence in support of the more general assertion. Judge Young considered the petition in light of the evidence before him.<sup>8</sup>

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<sup>6</sup> ". . . [T]he cause for that [procedural default] lies in Mr. Caine's inexperience and his inability to render effective assistance in a capital trial of this complexity . . ." p. 9.

<sup>7</sup> "On appeal Mr. Caine clearly did an ineffective job in representing Mr. Andrews. . . . Mr. Caine's failure to clearly raise the second degree murder issue was a result of that ineffectiveness. . . . The seven-page brief filed by Mr. Caine clearly fell below prevailing professional norms for representation of clients in capital cases in the State of Utah." p. 10.

<sup>8</sup> See H.C. Tr., pp. 5-9; 11-12; 19-20; 22-23; 31; 33-35.

The State argues that Mr. Caine's affidavit and his conduct in joining in the lesser included offenses instruction exception at trial should be ignored. According to the State, if there is a hypothetical "objectively justifiable trial strategy" (Brief, p. 50, n. 39; p. 63) any factual inquiry is foreclosed over whether that was in fact the trial strategy employed or whether counsel was in fact ineffective. If that were the case, then the numerous cases which reflect evidentiary hearings regarding ineffectiveness, where the issue of trial strategy is fully explored, would simply reflect needless judicial inquiry.<sup>9</sup> Of course the trial record itself may provide the answer, clearly showing a deliberate withholding and/or an "all or nothing" trial strategy.<sup>10</sup> But that is not this case.

F. Abuse of the Writ Does Not Apply  
To This Successor Petition.

The State argues that this petition should be barred as abusive because the issue raised here based upon Beck should or could have been raised in November, 1978, when the first State petition was filed. Since Beck was decided on June 20, 1980, some twenty months after the first petition was filed, the State is reduced to arguing that counsel should have been able to foresee the result in Beck based

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<sup>9</sup> Aldrich v. Wainwright, 777 F.2d 630 (11th Cir. 1985), cert. denied, 107 S.Ct. 324 (1986); Parks v. Brown, 840 F.2d 1496, 1508-10 (10th Cir. 1987); Bell v. Watkins, 692 F.2d 999, 1009 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983); Robison v. Maynard, 829 F.2d 1501, 1513 (10th Cir. 1987); State v. Lairby, 699 P.2d 1187 (Utah 1984).

<sup>10</sup> Maynor v. Green, 547 F. Supp 264 (S.D. Ga. 1982); State v. Malmrose, 649 P.2d 56, 59-60 (Utah 1982), overruled on other grounds, State v. Long, 721 P.2d 483 (Utah 1986) (cautionary instruction on photo identification required).

upon the state of the case law in November, 1978. The State thus argues that Beck was not novel, and hence no "good cause" is shown for failing to raise it in the prior State petition. The court below gave no rationale for its conclusion that "the defendant could or should have raised the issues contained in this present Petition either on appeal, or in prior post-conviction relief . . . ." Mem. Decision, p. 3 (Add. p. 3).

The State, in supposedly addressing the issue of abuse of the writ, goes to considerable lengths to demonstrate that the concept of felony murder has long been recognized in Utah, as has the doctrine that failure to instruct on a warranted lesser included offense is reversible error. (Brief, pp. 29-33). Those facts are irrelevant to the issue of failure to raise the Beck issue in the first State petition, for mere errors are not cognizable under Rule 65B(i); only constitutional issues could be raised in the first petition.

The State also interjects ineffectiveness of counsel into its abuse of the writ discussion. (Brief, pp. 40-52). It argues that there is no right to effective counsel in post-conviction proceedings (Brief, pp. 41-42).<sup>11</sup> That is entirely inappropriate, as it is not petitioner's position that there were defects in the first petition that were due to ineffective counsel, or that the failure to raise the

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<sup>11</sup> While there may not be any Sixth Amendment right to counsel in post-conviction proceedings, the Fourth Circuit, in a recent en banc opinion, has recognized a right to counsel in State post-conviction proceedings based upon the death-sentenced petitioner's right to access to the courts pursuant to Bounds v. Smith, 430 U.S. 817 (1977). Giarrantano v. Murray, No. 87-7518 and 87-7519 (4th Cir. June 3, 1988). The State had cited the original panel decision, 836 F.2d 1421 (4th Cir. 1988) which has now been reversed. Brief, p. 42.

Beck issue there constituted ineffective assistance. Given Mr. Caine's inexperience and the time constraints faced by Mr. Ford when he entered the case,<sup>12</sup> it is disingenuous for the State to argue that counsel could have fashioned a Beck issue.

The "good cause" for not raising Beck in the first petition is Beck's novelty and unavailability. That unavailability excuses both Mr. Caine and Mr. Ford, and thus the State's point that petitioner does not claim that Mr. Ford was ineffective is a nullity (Brief, pp. 40, fn. 37; 51). Mr. Ford, of course did not participate as counsel at either the trial or the direct appeal.

Similarly the State's contention that the standard for finding ineffective assistance that excuses abuse of the writ should be more difficult than the ineffectiveness standards of Strickland v. Washington, 466 U.S. 668 (1984) (Brief, pp. 42-46), is simply inapplicable to petitioner's showing of good cause under Rule 65B(i)(4).<sup>13</sup> We turn then to the State's contention that Beck was not novel.

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<sup>12</sup> Mr. Ford entered the case at a time when Mr. Andrews' execution was imminent; he had to rely entirely on Mr. Caine; the first petition was dismissed by the trial court two days after it was filed. See Ford Affidavit, Add. at 9-10. The time factor was an "objective factor external to the defense . . .," Murray v. Carrier, 477 U.S. 478, 488 (1986).

<sup>13</sup> The only authority for this proposition is Judge Tjoflat's dissenting opinion in Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987), cert. granted, 108 S.Ct. 1467 (1988). This Court's application of Strickland has not demonstrated any indication that the current standard is too lax. See cases cited at fn. 5, supra, p. 10.

1. The Beck Decision was Unforeseeable  
at the Time of Petitioner's First  
State Habeas Corpus Petition.

In response to petitioner's argument that Beck was a novel development in Eighth Amendment jurisprudence the State asserts that there existed federal and state case law which "strongly suggested the due process issue (as either a federal or state constitutional matter) . . . ." Brief at 34. This argument is flawed for two reasons: (1) there, in fact, had been no holding by any court that raised the failure to give a lesser included offense instruction in a capital case to the level of a constitutional violation, (the idea had been rejected on numerous occasions) nor were the cases leading up to Beck a clear harbinger of Beck's final holding; (2) the State equates the law of due process with the law of the Eighth Amendment when, in fact, the two theories are entirely independent and distinct.

a. Until Beck, the Failure to Instruct on a Lesser  
Included Offense Did Not Present a Constitutional Claim.

In order to seek relief under Utah R. Civ. P. 65(i) a petitioner must allege that "in [the] proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the State of Utah or both." It is clear that at the time of petitioner's first post-conviction relief petition neither the Constitution of the United States nor the Constitution of the State of Utah had been held to require instructing the jury on a lesser included offense in a capital case. Indeed, as late as January, 1980, a mere six months before the Supreme Court's decision in Beck, the Fifth Circuit held that the failure to give a lesser



included offense instruction did not raise a federal constitutional issue. Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). Numerous federal decisions had similarly held that failure to give a lesser included offense instruction presented no federal constitutional issue: Kreiling v. Field, 431 F.2d 502 (9th Cir. 1970); Poulson v. Turner, supra, n. 3; DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975); Rawlins v. Craven, 329 F.Supp. 40 (C.D. Calif. 1971); Grech v. Wainwright, 492 F.2d 747 (5th Cir. 1974); Alligood v. Wainwright, 440 F.2d 642 (5th Cir. 1971); Higgins v. Wainwright, 424 F.2d 177 (5th Cir.), cert. denied, 400 U.S. 905 (1970); Flagler v. Wainwright, 423 F.2d 1359 (5th Cir.), cert. denied, 398 U.S. 943 (1970); Bonner v. Henderson, 517 F.2d 135 (5th Cir. 1975). The State points to no case prior to the 1980 Beck decision in which the failure to give a lesser included offense instruction was held to offend the Eighth Amendment. That the Fifth Circuit, two years after petitioner's first state post-conviction relief petition, failed to see a constitutional issue under facts similar to the case here, shows that the law was not clear in 1978. It would have required clairvoyant counsel to fashion a Beck issue.<sup>14</sup> Clairvoyance is not the standard of "availability."

In arguing that Beck was easily predictable, the State relies heavily on Keeble v. United States, 412 U.S. 205 (1973). Keeble, and the other cases cited by the State in support of this argument (Joe v.

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<sup>14</sup> The Supreme Court itself remarked about the lack of clarity in its recent Eighth Amendment decisions: "The signals from this Court have not, however, always been easy to decipher." Lockett v. Ohio, 438 U.S. 586 at 602 (1978); see also, Id. at 599, as to the "confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment."

United States, 510 F.2d 1038 (10th Cir. 1974) and United States v. Antelope, 523 F.2d 400 (9th Cir. 1975), reversed on other grounds, 430 U.S. 641 (1977)) are all cases involving American Indians prosecuted under the Major Crimes Act. All three decisions specifically declined to reach any constitutional issue and decided the issues before them as a matter of statutory construction. A common theme running through the three cases is a concern for the integrity of tribal jurisdiction balanced against the need to provide Indians with the same type and quality of procedural protection as was enjoyed by non-Indians charged with the same crimes. Keeble, 412 U.S. at 213; Joe, 510 F.2d at 1040; Antelope, 523 F.2d at 402 et. seq.

To deny Indian defendants the same protection afforded non-Indian defendants solely because of their ethnic origin would raise constitutional questions, but the constitutional problem would be one of equal protection, not some violation of the Eighth Amendment. In Antelope the court is primarily concerned with equal protection issues and nowhere even mentions the Eighth Amendment. The footnote identified by the State as evidence that the Antelope court viewed Keeble as defining a constitutional right to a lesser included offense instruction (Brief at 36) in fact is limited to Indian defendants charged under the Major Crimes Act. An Indian's "constitutionally guaranteed" right to such an instruction can be seen as an outgrowth of their right to equal protection of the law in a setting where the enumerated offenses of the controlling statute would have treated them differently solely for constitutionally impermissible reasons. Keeble, Antelope and Joe do not stand for the proposition that the common law

of the states in which the crimes occurred would be constitutionally deficient if provision were not made for a lesser included offense instruction.

In Beck, the Supreme Court acknowledged that the law up to that time had recognized that a lesser included offense instruction can "be beneficial to the defendant," Beck, 447 U.S. at 633, and quoted its decision in Keeble to the effect that "we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense . . . ." Id. at 634. Thus, until Beck, the right to a lesser included offense instruction, while "beneficial" to a defendant, had not yet reached the level of a right of constitutional dimension.

The State argues that because Beck relied in part on three cases decided in 1976 dealing with state sentencing schemes in capital cases (Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Gregg v. Georgia, 428 U.S. 153 (1976)) the petitioner here should have been able to construct a Beck-type argument in his first State petition. (Brief at n. 34). Those cases, however, arose in legal settings significantly different from the question presented here and cannot be read as clear precursors of Beck. They are too legally remote from the Beck decision to have served as the basis for the argument petitioner advances here. Woodson dealt solely with procedures at the sentencing phase and did not consider a lesser included offense issue; Roberts struck down a procedure requiring instructions on lesser included offenses even if unwarranted by the

evidence, and Gregg merely held that giving such an instruction would not violate the Constitution. None of these cases are clear enough signposts to alert counsel that Beck was on the horizon.

2. Due Process Precedent Does Not Accurately Predict Eighth Amendment Law.

In response to petitioner's argument that his confinement is in violation of the Eighth Amendment the State points to federal and state cases which it contends suggest the due process issue raised by petitioner. Brief at 34. This argument fails to recognize the difference between due process precedent and precedent supporting Eighth Amendment claims. "It is clear that not every claim that implicates the fundamental fairness standards embodied in the due process clause necessarily implicates the Eighth Amendment as well." Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987) at n.2, cert. granted, 108 S.Ct. 1106 (1988). The two doctrines are distinct and comprise different aspects of Constitutional theory. "The distinction between claims that implicate the fundamental fairness standards embodied in the due process clause and those that implicate the Eighth Amendment has been recognized from the inception of the Supreme Court's modern Eighth Amendment jurisprudence." Ibid. A comparison of McGautha v. California, 402 U.S. 183 (1971) with Furman v. Georgia, 408 U.S. 238 (1972) points up this distinction. In McGautha, the Supreme Court had held that the due process clause of the Fourteenth Amendment was not violated by standardless jury discretion procedures or a unified guilt and sentencing process. Id. at 196-203 and 213-217. One year later, in Furman, the Court held that these same features of Georgia's

capital sentencing scheme violated the Eighth Amendment. The due process precedent of McGautha was an inaccurate predictor of the Eighth Amendment law later announced in Furman. The State concedes that Keeble and the Utah cases it cites do not directly suggest an Eighth Amendment violation but concludes that this distinction is not critical. Brief at n.34. The Supreme Court's Eighth Amendment jurisprudence, however, is to the contrary.

3. No Utah Decision Recognized a Constitutional Issue.

With regard to a claim made under the Utah Constitution, the State points to State v. Gillian, 463 P.2d 811 (Utah 1970) in which this Court reversed on direct appeal a conviction of first degree murder because the jury was not instructed on the defendant's theory of the case, where there was evidence to justify such an instruction. Nowhere in Gillian, however, does this Court refer to the failure to give a lesser included offense instruction as a constitutional violation of any kind. The State cites a number of other Utah cases (Brief at 38), but none of them give any indication of a violation of the federal or Utah Constitution, either based upon due process or any other concept. In fact, it would be six years after Mr. Andrews' first State petition before this Court in State v. Oldroyd, 685 P.2d 551 (Utah 1984) would come to that conclusion.

This Court should reject the contention that in 1978 reasonably competent counsel could have foreseen Beck, and hold that Beck's novelty and unavailability is good cause under Rule 65B(i)(4) for not raising the issue in the prior petition.

G. Any Procedural Default at Trial or on Direct Appeal is Cured by the Ample Demonstration of Cause and Prejudice Here.

The issue as to procedural default here is whether, because counsel for petitioner at trial failed to request a second degree felony murder instruction, and failed to object to the absence of one,<sup>15</sup> and failed to raise that issue on direct appeal, as well as failed to raise the refusal of the lesser included offense instructions that were requested, petitioner is barred from raising these issues in this petition.

The State agrees that such procedural bars can be avoided by a showing of cause for the prior failure and a demonstration of resulting prejudice. Brief, n. 38.

1. There is Cause and Prejudice to Excuse Any Default.

The first cause of the default is that at trial and on direct appeal petitioner's counsel was ineffective. The fact of his ineffectiveness has been demonstrated in petitioner's opening brief, pp. 6-10; 12; 14-15; 16-18; 29-34; 36. The State nowhere really contests Mr. Caine's ineffectiveness, but rather attempts to excuse it as "trial strategy." We have dealt with that contention elsewhere in this brief. (supra, pp. 7-8) We add that no alleged "trial strategy" would excuse Mr. Caine's failures to raise these issues on direct appeal.

The prejudice caused by this ineffectiveness is apparent: Mr. Andrews stands sentenced to death under a constitutionally-suspect

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<sup>15</sup> State v. Close, 499 P.2d 287, 288-89 (Utah 1972).

conviction. The rationale of Beck provides all the prejudice necessary, for it requires that the jury be given the "third option" of the lesser included offense. Here that option was denied Mr. Andrews because of Mr. Caine's ineffectiveness at the trial and on direct appeal. Here there was a "reasonable probability" that but for counsel's ineffectiveness the result here would have been different. State v. Lairby, 699 P.2d 1187, 1205 (Utah 1984).

Mr. Caine's ineffectiveness included not knowing what the Utah law was on second degree felony murder under the new 1973 statute. Mr. Caine, according to Mr. Ford's affidavit, thought that second degree felony murder was not covered by the new statute. Ford Affidavit, pp. 2-3.<sup>16</sup> Not knowing what a client's rights are is of course within the ambit of ineffective assistance. State v. McNicol, 554 P.2d 203, 204 (Utah 1976); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979). An "uninformed error" can constitute ineffective assistance. Maynor v. Green, 547 F.Supp. 264, 268 (S.D. Ga. 1982). So too can the failure to raise on direct appeal, an issue which will secure reversal. People v. Titone, 505 N.E.2d 300, 305 (Ill. 1986)(dissenting opinion), cert. denied, 108 S.Ct. 210 (1987);

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<sup>16</sup> Mr. Ford states:

I do recall at one time asking Mr. Andrews' original counsel, John Caine, whether he had considered raising an issue regarding the trial court's failure to instruct on second degree felony murder, sometime after the original petition was dismissed by this [trial] court. He told me that section of the Utah Code was not enacted at the trial of this case.

Add., p. 10-11.

Robison v. Maynard, 829 F.2d 1501, 1511-12 (10th Cir. 1987); Murray v. Carrier, 477 U.S. at 496-97.

But for the presence of State v. Norton, 675 P.2d 577 (Utah 1983), cert. denied, 466 U.S. 942 (1984), we could simply rely on ineffectiveness of counsel without considering the issue of novelty. But Norton is troubling because it held that second degree felony murder was not available as a lesser included offense where as here the robbery victim was killed. Norton was this Court's first decision construing the new second degree felony murder provisions of the 1973 statute. Contrary to the State's implied assertion (Brief, pp. 30-32) Utah had no well developed case law on second degree felony murder.<sup>17</sup>

This fact poses the vexing issue: If Mr. Caine had preserved and raised the second degree felony murder issue in the direct appeal, would he have lost because he got the Norton decision,<sup>18</sup> or won a reversal because he got the Hansen decision? If it was the former result, petitioner is protected by unavailability, if the latter, by ineffectiveness. Certainly petitioner cannot lose on both theories.

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<sup>17</sup> Under the old statute it appears that if a killing occurred in the course of certain enumerated felonies, it was first degree murder, regardless of the defendant's intent. Only if the murder took place in the course of an unenumerated felony was second degree felony murder available. State v. Schad, 470 P.2d 246 (Utah 1970). For this reason the issue of second degree felony murder as a lesser included offense of first degree murder rarely came up under the old statute. The other two cases cited by the State (Brief, p. 31), State v. Condit, 125 P.2d 801 (Utah 1942) and State v. Thorne, 117 Pac. 58 (Utah 1911) did not involve a "lesser included offense" -- in both, felony murder was first degree murder.

<sup>18</sup> It is interesting to note that the State urges here that Norton should be ignored because its error was so apparent. (Brief, pp. 31-32), yet in Hansen the State was strenuously arguing in favor of Norton: Hansen, 734 P.2d at 425-26.



Mr. Caine's clearly ineffective assistance at trial and on direct appeal constitutes cause for any procedural default. Under Beck the prejudice is that Mr. Andrews has been sentenced to death based upon a constitutionally unreliable verdict of first degree murder.

#### IV. CONCLUSION

The merit of Mr. Andrews' constitutional claim is clear. Neither abuse of the writ nor procedural default bars the claim.

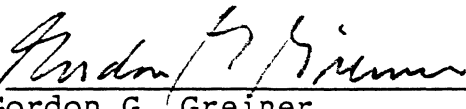
The judgment of the district court should be reversed, and the case remanded to the district court to vacate petitioner's sentence of death and/or his conviction of first degree murder, or to conduct an evidentiary hearing to resolve any disputed factual issues revealed by these proceedings.

Respectfully submitted this 27th day of August, 1988.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of August, 1988, I mailed five (5) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT by placing copies thereof in the United States mail, postage prepaid, addressed to the following:

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