

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 96-1693

FRANK X. HOPKINS, WARDEN, PETITIONER v.
RANDOLPH K. REEVES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June 8, 1998]

JUSTICE STEVENS, dissenting.

As a matter of Nebraska law, second-degree murder is not ordinarily a lesser included offense of felony murder.¹ Based in part on this fact, the Court holds that it was not necessary for the trial judge to grant respondent's request for an instruction authorizing the jury to find respondent guilty of that offense. The Court's logic would be unassailable if the State had not sought the death penalty.

The reason that Nebraska generally does not consider second-degree murder a lesser included offense of felony murder is that it requires evidence of an intent to cause the death of the victim, whereas felony murder does not. But in this case the State sought to impose the death penalty on respondent for the offense of felony murder. As a matter of federal constitutional law, under *Enmund v. Florida*, 458 U. S. 782 (1982), it could not do so without proving that respondent intended to kill his victim, or under *Tison v. Arizona*, 481 U. S. 137 (1987), that he had the

¹ See, e.g., *State v. Price*, 252 Neb. 365, 373, 562 N. W. 2d 340, 346 (1997); *State v. Masters*, 246 Neb. 1018, 1025, 524 N. W. 2d 342, 348 (1994); *State v. Ruyle*, 234 Neb. 760, 773, 452 N. W. 2d 734, 742-743 (1990); *State v. McDonald*, 195 Neb. 625, 636-637, 240 N. W. 2d 8, 15 (1976).

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moral equivalent of such an intent. The rationale for Nebraska's general rule that second-degree murder is not a lesser included offense of felony murder does not, therefore, apply to this case.² To be faithful to the teaching of *Beck v. Alabama*, 447 U. S. 625 (1980), the Court should therefore hold that respondent was entitled to the requested instruction.

Accordingly, I respectfully dissent.

²Moreover, a recent Nebraska Supreme Court decision suggests that Nebraska law may be in flux on the question whether second-degree murder is a lesser included offense of felony murder. Only a few weeks ago, the Nebraska Supreme Court held that a jury verdict finding a defendant guilty of second-degree murder constituted an implied acquittal of the crime of first-degree murder, as defined in §28–303 of Nebraska's criminal code, and therefore barred a second prosecution under that section for either felony murder or premeditated murder. *Nebraska v. White*, 254 Neb. 566, ___ N. W. 2d ___ (1998). In reaching that holding the Court explained: "The conduct prohibited by §28–303 is first degree murder. Premeditated murder and felony murder are not denominated in Nebraska's statutes as separate and independent offenses, but only ways in which criminal liability for first degree murder may be charged and prosecuted." *Id.*, at ___, ___ N. W. 2d, at ___ (slip op., at 8). The difference between a charge of premeditated murder and a charge of felony murder "is a difference in the State's *theory* of how [the defendant] committed the single offense of first degree murder. . . . Therefore, we hold that the crime of first degree murder, as defined in §28–303, constitutes one offense even though there may be alternate theories by which criminal liability for first degree murder may be charged and prosecuted in Nebraska." *Ibid.* Given this holding, the Nebraska Supreme Court may conclude that second-degree murder is a lesser included offense of both premeditated and felony murder, as they are both part of the "one offense" of first-degree murder.