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"Killer Choices": Felony Murder, Lesser Offenses, and the Death Penalty

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Case at a Glance

A crime charged often encompasses lesser crimes — so-called lesser included offenses. In this case, a defendant charged with two capital, felony murders committed while perpetrating a sexual assault wanted the jury instructed that it could find him guilty of lesser offenses — second-degree murder or manslaughter. The instruction was refused because Nebraska law does not recognize lesser included offenses when the charge is felony murder. Now the Supreme Court decides whether Nebraska's rule unconstitutionally forces capital juries to convict or acquit.

"Killer Choices": Felony Murder, Lesser Offenses, and the Death Penalty

by Daniel D. Blinka

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ISSUE

This case concerns the interplay between felony murder, the lesser-included-offense doctrine, and constitutional restrictions on capital punishment. Specifically, does Nebraska's rule that felony murder does not contain any lesser included offenses mean that a death sentence imposed for felony murder is unconstitutional?

FACTS

Randolph Reeves murdered two women at a Quaker meetinghouse in Lincoln, Nebraska, in March 1980. High on alcohol and peyote, Reeves entered through a window and proceeded to an upstairs bedroom where he sexually assaulted one woman and stabbed her seven times with a knife. Another woman was present in the house, and Reeves stabbed her to death as well. The first victim managed to call for help and identify Reeves as her attacker before she died hours later in a hospital.

Nebraska charged Reeves with two counts of felony murder. Specifically, the State alleged that Reeves committed murder in the course of, or while attempting to commit, first-degree sexual assault.

The trial jury rejected Reeves' defenses of insanity and diminished capacity, convicting him of both felony murder charges. Under Nebraska law, a first-degree felony murder conviction is punishable by death or life imprisonment. A three-judge panel sentenced Reeves to death.

Reeves appealed to the Nebraska Supreme Court and that court affirmed the death sentence despite several errors by the sentencing panel. 334 N.W.2d 433 (1984).

Reeves pursued his state-law, post-conviction remedies but was rebuffed again by the Nebraska Supreme Court. 453 N.W.2d 359 (1990). Although the United States Supreme Court vacated the

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Nebraska high court's second decision and sent the case back to that court for reconsideration in light of the Court's decision in *Clemons v. Mississippi,* 494 U.S. 738 (1990) (defining and limiting the authority of state appellate courts to uphold death sentences despite errors at trial), the Nebraska Supreme Court again affirmed Reeves' death sentence. 476 N.W.2d 829 (1991).

Reeves exhausted his remedies under Nebraska law and then turned to federal court by filing a petition for habeas corpus relief *(see* Glossary), raising 44 claims. The district court initially reversed the death sentence, 871 F. Supp. 1182 (D. Neb. 1994), but the Eighth Circuit reversed in turn and sent the case back to the district court for further proceedings, 76 F.3d 1424 (8th Cir. 1996).

On its second look, the district court again reversed the death sentence, this time concluding that the Nebraska Supreme Court failed to provide Reeves adequate notice and a hearing when it "resentenced" him. 928 F. Supp. 941 (D. Neb. 1996).

The State appealed, and once more the Eighth Circuit reversed on the sentencing issue but concluded nevertheless that Reeves deserved a new trial because the trial judge had improperly denied his request for lesser-included-offense instructions in violation of *Beck v. Alabama,* 447 U.S. 625 (1980). *(Beck* held that it is unconstitutional to impose the death penalty when a state statute forbids a jury to find the defendant guilty of a noncapital, lesser included offense.)

Reeves, the appeals court noted, requested but was denied jury instructions on second-degree murder and manslaughter, lesser included offenses with respect to the offense of capital, felony murder. According to the Eighth Circuit, *Beck* "held that in a capital case due process requires that the jury be given the option of convicting the defendant on a lesser included, noncapital offense if the evidence would support conviction on that offense." 102 F.3d 977, 982 (8th Cir. 1996). Thus, said the appeals court, *Beck* seeks to avoid presenting juries with a choice of "death or nothing."

The Eighth Circuit then explained that under Nebraska criminal law there are no lesser included offenses of felony murder, a charge that "conclusively presumes" the intent to kill from the underlying felony. In Reeves' case, the jury could conclusively presume his intent to kill from the fact that the victims died during the course of a sexual assault. Yet, said the appeals court, this reasoning would seem to violate other United States Supreme Court decisions requiring proof of intent to kill if the death penalty is to be imposed.

The Eighth Circuit ruled in short that Nebraska could not have it both ways. Either its bar against jury consideration of lesser crimes violated *Beck* or its felony murder statute contravened case law requiring proof of mental culpability.

The case is back before the Supreme Court, which granted the State's petition for a writ of certiorari. 118 S. Ct. 30 (1997).

Case Analysis

In general, a defendant is tried on the charges selected by the prosecutor. The jury's options are to find the defendant guilty or not guilty of the charged offenses.

The lesser-included-offense doctrine broadens the jury's options in some instances. Most jurisdictions permit both the prosecution and the defense to request lesser-included-offense instructions, but the judge must answer two questions in determining the propriety of such instructions. The first question is whether the substantive criminal law recognizes the crime on which an instruction is requested as a lesser offense of the crime charged? If it does, the second question is whether the evidence at trial supports the conclusion that the defendant is not guilty of the charged offense but is guilty of a lesser included offense.

This case presents a conflict among federal appeals courts focusing largely on the first question. The Eighth Circuit's opinion is flatly inconsistent with the Ninth Circuit's decision in *Greenwalt v. Ricketts,* 943 F.2d 1020 (9th Cir. 1991), which held *Beck* inapplicable because Arizona law — like Nebraska law — recognizes no lesser included offenses of felony murder.

Nebraska, of course, agrees with the Ninth Circuit. In the State's view, the Constitution does not mandate lesser-included-offense instructions when state law recognizes no such lesser offenses. Nebraska argues that its law has been clear for more than a century: felony murder has no lesser offenses. Accordingly, the Eighth Circuit's decision will have a significant and disruptive impact on Nebraska's criminal law.

Nebraska also maintains that *Beck* is different from this case. As the State sees it, the pivotal fact in *Beck* was that Alabama law recognized a lesser included offense of the crime charged, but a statute specifically prohibited its use solely in capital cases. That, argues the State, is not the case here. Nebraska law does not recognize the lesser-included-offense doctrine in *any* felony murder case whether the penalty is death or life imprisonment.

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The State also notes that unlike the situation in *Beck,* the jury in Reeves' trial played no role in sentencing him; rather, he was sentenced by a panel of judges who had the option of a life sentence without parole. In short, argues Nebraska, Reeves' trial jury was not placed in a *Beck*-like, death-or-acquit situation. Further, the jury's determination of guilt was not dispositive of the sentence; the panel of judges was free to follow whatever course it thought appropriate.

Nebraska next contends that Reeves cannot meet the second requirement for a lesser-included-offense instruction — namely, that the evidence at trial supported his requested instructions on second-degree murder and manslaughter.

Reeves' sole defense at trial, according to the State, was that he lacked the mental capacity to understand what he was doing when he killed the two women. His defense, if believed by the jury, would have exonerated him of any criminal responsibility; but, says the State, it would not have resulted in his conviction on a lesser included offense.

Reeves responds that the Eighth Circuit correctly applied *Beck.* Pointing to evidence in the record, Reeves contends that the jury could have convicted him of second-degree murder or manslaughter had it been given those options. For example, Reeves maintains that his intoxication raised questions about his capacity to form the specific intent to kill, and the physical evidence created ambiguity about whether a first-degree sexual assault actually occurred.

Reeves also defends the Eighth Circuit's decision and argues that the appeals court did not "rewrite" Nebraska's criminal law. On this point, Reeves notes that Nebraska recognizes lesser included offenses for all species of homicide except felony murder, an aberration never explained by its supreme court.

Reeves also attacks the reasoning behind the Nebraska rule. The rule is based on the premise that the purpose or intent to kill is conclusively presumed from the criminal intent required for sexual assault. But, counters Reeves, that begs the question — namely, did he harbor the requisite intent to kill? In short, Nebraska never fully or clearly explained the reasons for its unique felony murder rule. Yet, Reeves maintains that under the State's general homicide and lesser offense law, he was entitled to the instructions.

Reeves next argues that the *Beck* rule applies with full force even when a panel of judges, not a jury, decides the sentence in a capital case. Reeves contends that Nebraska's sentencing scheme actually presents a greater danger of unreliable capital convictions precisely because the jury is told not to consider the consequences of its verdict.

In the event Reeves should prevail, Nebraska advances a fallback argument: the Eighth Circuit's holding is a new rule within the meaning of *Teague v. Lane,* 489 U.S. 288 (1989) (plurality opinion [*see* Glossary], and thus is unavailable to help Reeves in this case. *(Teague* precludes application of new constitutionally derived rules of criminal procedure to cases that are final when the new rule is announced. Final in the *Teague* context means that the defendant has exhausted or waived all direct appeals, i.e., appeals as a matter of right, and the United States Supreme Court either considered or refused to consider any final direct-appeal decision.)

SIGNIFICANCE

Each state has its own relatively unique body of criminal law. Federalism, the division of authority between the states and the national government, traditionally has given the states wide latitude to define crimes in their own ways.

There are, however, constitutionally imposed minimum requirements that states must observe. The Supreme Court thus has the opportunity in this case to expand or contract the sphere within which states can operate in defining what constitutes a crime and how criminals are punished.

Of all varieties of capital murder, felony murder is perhaps the most controversial. A number of states have repealed their felony murder laws because the rationale of such crimes runs counter to more modern thinking about criminal culpability.

Murder is defined generically as the purposeful taking of human life without justification or excuse. Murder is reprehensible because the defendant formed the mental purpose to take human life and acted on that state of mind. Yet, one of the more difficult tasks in a murder case is proving that the defendant in fact had the purpose to kill when he or she committed the lethal act.

Felony murder, unlike murder, is committed when the defendant kills someone during the course of perpetrating some other crime defined as a felony. For example, in this case Reeves' victims died while he was committing the felony of sexual assault. Although the prosecutor must prove all elements of sexual assault, including the intent to have nonconsensual sexual contact, felony murder does not require

proof that the defendant intended to kill. Culpability in connection with the underlying felony, e.g., sexual assault, is sufficient for a felony murder conviction and, perhaps, a death sentence.

The practical consequences of all this is clear. It is easier for a prosecutor to obtain the death penalty by charging felony murder than by charging intentional murder.

Critics, however, contend that felony murder unduly dilutes the mental culpability required for murder, especially in capital cases. The problem is aggravated in jurisdictions, like Nebraska, that recognize no lesser included offenses for felony murder.

The lesser-included-offense doctrine widens the range of a capital jury's options. The competing views are straightforward. The prosecutor wants to restrict a jury's options to guilty or not guilty of felony murder. To the extent that the defendant can widen the array of options by allowing the jury to consider non-capital crimes as well as the capital crime of felony murder, the likelihood of a death sentence diminishes significantly. Although cloaked in abstruse jargon about felony murder and lesser offenses, at bottom this case addresses the range of options that juries should be given in capital cases.

Attorneys of the Parties

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Amicus Briefs

In support of Frank X. Hopkins, Warden, Nebraska State Penitentiary

Joint brief: Arizona joined by California, Delaware, Idaho, Illinois, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, and Virginia (Counsel of Record: Jon G. Anderson, Assistant Attorney General of the State of Arizona; (602) 542-4686).

In support of Randolph K. Reeves

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