

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: FRANK X. HOPKINS, WARDEN, Petitioner v.  
RANDOLPH K. REEVES, Respondents.

CASE NO: 96-1693 c. 4

PLACE: Washington, D.C.

DATE: Monday, February 23, 1998

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**Supreme Court U.S.**

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1                   IN THE SUPREME COURT OF THE UNITED STATES

2       -----X  
3       FRANK X. HOPKINS, WARDEN,     :  
4                   Petitioner             :  
5           v.                             :   No. 96-1693  
6       RANDOLPH K. REEVES,             :  
7                   Respondents.         :  
8       -----X

9   Washington, D.C.

10                                        Monday, February 23, 1998

11               The above-entitled matter came on for oral  
12       argument before the Supreme Court of the United States at  
13       11:03 a.m.

14       APPEARANCES:

15       DONALD B. STENBERG, ESQ., Attorney General of Nebraska,  
16               Lincoln, Nebraska; on behalf of the Petitioner.

17       ROY W. MCLEESE, III, ESQ., Assistant to the Solicitor  
18               General, Department of Justice, Washington, D.C.;  
19               United States, as amicus curiae, supporting  
20               Petitioner.

21       PAULA HUTCHINSON, ESQ., Lincoln, Nebraska; appointed by  
22               this Court, on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 96-1693, Frank Hopkins v. Randolph Reeves.

5 General Stenberg, you may proceed whenever you  
6 are ready.

7 Counsel, will you please take your seats.

8 ORAL ARGUMENT OF DONALD B. STENBERG

9 ON BEHALF OF THE PETITIONER

10 GENERAL STENBERG: Thank you. Thank you,  
11 Mr. Chief Justice, and may it please the Court:

12 This case presents the question of whether a  
13 defendant in a potential capital case has a constitutional  
14 right to effectively charge himself with crimes not  
15 charged by the prosecution and which are not lesser  
16 included offenses of the crimes that were charged by the  
17 prosecution, and to have his jury instructed on those  
18 offenses.

19 In Beck v. Alabama, this Court had said -- said  
20 that if a lesser included offense exists under State law  
21 and is supported by the evidence, that an instruction on  
22 that lesser included offense must be given at the request  
23 of the defendant. Here, Respondent Reeves was charged  
24 with two counts of felony murder. Specifically, he was  
25 charged with killing two women in the perpetration or

1 attempted perpetration of a first degree sexual assault.

2 The Respondent did not ask to have his jury  
3 instructed on the lesser included offense of first degree  
4 sexual assault, which does exist as a lesser included  
5 offense under Nebraska law. Instead, the Respondent asked  
6 to have his jury instructed on second degree murder and  
7 manslaughter.

8 For 100 years, the Nebraska Supreme Court has  
9 clearly and consistently held that second degree murder  
10 and manslaughter are not lesser included offenses of  
11 felony murder in the State of Nebraska.

12 QUESTION: Was -- was the manslaughter that he  
13 asked for the instruction on involuntary manslaughter, in  
14 other words killing in the course of committing an  
15 unlawful act?

16 GENERAL STENBERG: I don't recall, Your Honor,  
17 if the requested instruction was -- was specific as to  
18 which of the types that it was.

19 QUESTION: Well, would he have been correct  
20 if -- if he had asked for that? Isn't that a lesser  
21 included of -- of the felony murder charge?

22 GENERAL STENBERG: No, Your Honor, it is not,  
23 for a couple of reasons. Of course, for 100 years, the  
24 Nebraska Supreme Court has said that it's not.

25 QUESTION: I know. You have said that. I don't

1 understand why --

2 GENERAL STENBERG: Well, the -- there's two --  
3 there's really two answers. One is the more general  
4 answer that has been given by the Nebraska Supreme Court  
5 over the years, which is simply to say that -- that there  
6 are two different intents involved. Under a felony  
7 murder, the intent involved looks at the intent to commit  
8 the underlying felony. In this case, the first degree  
9 sexual assault. Under first degree premeditated murder,  
10 second degree murder and manslaughter, the focus is on the  
11 intent to kill or the intent to commit the murder.

12 In answering your question, Your Honor, we have  
13 to ask what unlawful act are we referring to. If we  
14 are -- are referring to the unlawful act alleged by the  
15 prosecutor, namely, first degree sexual assault, then  
16 felony murder and manslaughter are identical offenses.

17 QUESTION: What -- what about the -- what about  
18 the lesser sexual -- isn't there is -- what is it -- I  
19 guess second degree sexual assault, which -- which does  
20 not involve penetration?

21 GENERAL STENBERG: Yes, Your Honor. In the case  
22 of second degree sexual assault, to answer your question,  
23 we need to think about what the purpose of our  
24 manslaughter statute is. And the purpose of the  
25 manslaughter statute in the commission -- killing in the

1 commission of an unlawful act is that if someone is  
2 committing an unlawful act and someone is killed, that --  
3 that makes things worse.

4 Well, manslaughter is a class III felony under  
5 Nebraska law. Second degree sexual assault is also a  
6 class III felony under Nebraska law. So there would be  
7 no -- there would never be a case where a prosecutor  
8 would -- would need to charge manslaughter where you have  
9 a second degree sexual assault that you've already proved.  
10 The killing -- proving the killing adds nothing. And so I  
11 think, logically then, second degree sexual --

12 QUESTION: But he could -- he -- I mean, if he  
13 wanted to, he could charge it, couldn't he?

14 GENERAL STENBERG: We certainly could, Your  
15 Honor. But the -- but the concept of lesser --

16 QUESTION: But if we assume that such a charge  
17 is possible under Nebraska law, then why isn't it a lesser  
18 included of the charge here?

19 GENERAL STENBERG: Well, of course, the  
20 prosecutor could have charged any number of crimes. That  
21 doesn't make them lesser included offenses of some of  
22 these other crimes.

23 QUESTION: No, but why isn't this -- if -- if --  
24 if he had -- and I'm not sure that he clearly asked for  
25 this -- but if he had said, I want an -- an instruction on



1 the lesser included offense of involuntary manslaughter  
2 and the unlawful act that I have in mind is, if I've got  
3 this right second -- second degree sexual assault, why  
4 would that not have been a request for a lesser included  
5 -- an instruction on a lesser included offense within the  
6 meaning of that?

7 GENERAL STENBERG: Right. Well, the Nebraska  
8 Supreme Court has not spoken to that specifically. But my  
9 answer --

10 QUESTION: No, but just -- just as an analytical  
11 matter.

12 GENERAL STENBERG: Right, exactly.

13 QUESTION: Why -- why wouldn't it --

14 GENERAL STENBERG: Well, as an analytical  
15 matter, I just -- I don't think it fits the conceptual  
16 framework. It simply makes no sense to -- to have the  
17 prosecutor have to prove an additional element -- in this  
18 case, a killing -- in order to get the same punishment, a  
19 class III felony.

20 QUESTION: No, but you're saying the prosecutor  
21 might not have brought this as an original charge. And  
22 I -- I can see your point. I understand the point that  
23 you're making. But I don't -- I guess I don't understand  
24 why, within the meaning of Beck, this involuntary  
25 manslaughter, when the -- when the underlying offense is

1 second degree sexual assault, is not, just as an  
2 analytical matter, a lesser included offense within the  
3 meaning of Beck. There may be other reasons why Beck  
4 doesn't apply here, but I just want to get straight that  
5 if he had asked for it, that either would or would not  
6 have been a -- a well-taken point.

7 GENERAL STENBERG: Well --

8 QUESTION: And it strikes me as though it would  
9 be a well-taken point.

10 GENERAL STENBERG: Well, I understood Beck, Your  
11 Honor, to rely on the State's own definition of lesser  
12 included offenses. I did not understand Beck to -- to  
13 impose a Federal definition.

14 QUESTION: Well, I assume that -- that Beck's --  
15 well, I'm not sure. I mean, I -- I thought Beck probably  
16 assumed that there -- for purposes of Beck, that there was  
17 a Federal definition of what a lesser included offense is.  
18 But assuming -- assuming for the sake of argument that  
19 lesser included offense under Beck is -- is a -- is a --  
20 is a -- a Federal term, subject to Federal definition,  
21 would this, just as an analytical matter, have been a  
22 lesser included offense?

23 GENERAL STENBERG: No, Your Honor, it would not.  
24 And, of course, first of all, I strongly disagree with the  
25 premise that -- that -- that the definition of lesser

1 included offenses, under State law, is a Federal matter.

2 QUESTION: No, you may be right.

3 GENERAL STENBERG: But accepting that --

4 QUESTION: But I'm -- I'm just saying assume it  
5 for the sake of argument.

6 GENERAL STENBERG: Well, all -- I guess all I  
7 can do is repeat -- try and repeat, maybe in -- in  
8 slightly different words, the same -- the same point that  
9 I've made --

10 QUESTION: General Stenberg, is one reason  
11 you're having difficulty on this point is that the  
12 Nebraska Supreme Court has never spoken to it? Isn't that  
13 right?

14 GENERAL STENBERG: Well, the -- the Nebraska  
15 Supreme Court has never analyzed it in that way. They  
16 have clearly spoken to it many times. And for 100 years,  
17 it's held.

18 QUESTION: But they talked -- the "it" was  
19 felony murder. And they said there is no lesser included  
20 offense. But did they ever confront this statute that  
21 says manslaughter, unintentionally -- unintentionally  
22 killing while in the commission of an unlawful act,  
23 they -- did they ever say yes, we looked at that, those  
24 words on their face, and that's not a lesser included  
25 offense?

1           GENERAL STENBERG: I -- I don't believe there's  
2 a -- a case that addresses that.

3           I would add, Your Honor, here -- and I think  
4 it -- it's -- it's relevant -- is that -- that even if it  
5 were a lesser included offense, that under the facts in  
6 evidence under Nebraska law, the charge would not have  
7 been given.

8           QUESTION: Was -- was there any request, General  
9 Stenberg, for such an -- for such an instruction on second  
10 degree sexual -- sexual offense, sexual assault?

11          GENERAL STENBERG: I do not recall that they  
12 ever, at the time of the trial, identified second degree  
13 sexual assault. If they had, Your Honor, second degree  
14 sexual assault still requires an intent to use force for  
15 sexual contact. The -- the only defenses in this case  
16 were insanity and diminished capacity, so that an intent  
17 could not be formed. So that if -- if the defendant could  
18 not have formed an intent to commit first degree sexual  
19 assault and therefore a felony murder, the same evidence  
20 proved that -- that he did not have -- would not have had  
21 the -- the capability to form the intent to commit a sec  
22 -- second degree sexual assault.

23          So either he was guilty of both felony murder  
24 and unlawful event manslaughter, or he was -- he was  
25 innocent of both. But under the evidence in this case, he



1 could not have been acquitted of the greater and convicted  
2 of the lesser. Even if you assume that second degree  
3 sexual assault --

4 QUESTION: May -- may I ask -- and maybe it's  
5 the same question again -- but what are the elements under  
6 Nebraska law of involuntary manslaughter?

7 GENERAL STENBERG: Your Honor, there's -- the --  
8 the statute has two different ways of reaching that. One  
9 is -- is without malice -- a killing without malice, upon  
10 a sudden quarrel.

11 QUESTION: There must be a killing. And what is  
12 the second element of it?

13 GENERAL STENBERG: A killing without malice upon  
14 a sudden quarrel. The -- the other type of manslaughter  
15 defined by Nebraska law is a killing that is unintentional  
16 during the commission of an unlawful act.

17 QUESTION: All right. Now, is it -- is it not  
18 possible that on the facts of this case, they could have  
19 found that there was a killing that was unintentional in  
20 the course of a sexual assault?

21 GENERAL STENBERG: Yes, Your Honor, but --

22 QUESTION: And -- and is it not also true that  
23 in order to find him guilty -- what they did find him  
24 guilty of, they had to find some additional elements?

25 GENERAL STENBERG: No, Your Honor. What you

1 just described would be identical to -- to the felony  
2 murder. To -- to convict a felony murder, you need a  
3 first degree sexual assault and a killing in the  
4 perpetration of that. So if -- if -- if the unlawful act  
5 we're talking about is first degree sexual assault,  
6 they're identical offenses. So you either have to convict  
7 of both or acquit of both. And of course, before you get  
8 a -- a lesser included --

9 QUESTION: You say the two offenses are  
10 identical; one carries the death penalty and the other  
11 carries a very minor penalty.

12 GENERAL STENBERG: Well, Your Honor, that -- I  
13 think -- I think that probably gets to part of the -- part  
14 of the reason, perhaps, the Nebraska Supreme Court does  
15 not regard it as a lesser included offense.

16 QUESTION: Well, it would seem to be almost  
17 a fortiori under Beck that if the two offenses are  
18 identical, but one carries a lesser penalty, that that  
19 should be instructive. It seems to me that's an even  
20 easier case than Beck.

21 GENERAL STENBERG: No, I don't think so. I  
22 don't think so at all, Your Honor. Because, in that case,  
23 the jury could simply pick one or the other, with no  
24 standards to guide its -- to guide its decision. It would  
25 not --

1 QUESTION: Well, it knows that one is less  
2 serious than the other. That's the whole point of Beck.

3 GENERAL STENBERG: Well, but if they have the  
4 same identical elements, Your Honor, and the jury follows  
5 its instructions, it could not logically acquit of the  
6 greater and convict of the lesser. And before an  
7 instruction would be given in Nebraska, or in most courts,  
8 the possib -- one of the -- the rationale is that there  
9 must be evidence on which the jury could acquit of the  
10 greater offense and still convict of the lesser.

11 QUESTION: No, but doesn't --

12 QUESTION: Will you -- you tell us again, are  
13 you -- am I right in thinking that there are two offenses  
14 in Nebraska which have exactly the same elements, and one  
15 carries a -- a possible death penalty and the other  
16 carries a very small sentence?

17 GENERAL STENBERG: They only have the same  
18 elements, Your Honor, if we set aside the -- the 100 years  
19 of Nebraska jurisprudence and -- and -- and say that --  
20 try and say that -- that manslaughter is the lesser  
21 included offense of felony murder.

22 QUESTION: No, but what is the difference --  
23 what is difference in the elements? Maybe I misunderstood  
24 your answer to Justice Stevens. But I thought part of  
25 your answer was that in fact his hypothesis really was not

1 posing a difference offense.

2 GENERAL STENBERG: Exact -- well, let's --

3 QUESTION: Okay. So that the elements -- I -- I  
4 mean, I took that as meaning that the -- that the elements  
5 of the involuntary manslaughter, where a sexual assault  
6 was involved, is the same as the elements for felony  
7 murder, where a sexual assault is involved. Are -- is --  
8 are those identical in your view? Is that what you're  
9 telling us?

10 GENERAL STENBERG: On an elements -- not in the  
11 view of the Nebraska Supreme Court. Based on an --

12 QUESTION: No, but on an elements or not.

13 GENERAL STENBERG: -- elements -- on an elements  
14 test, if the underlying felony is first degree sexual  
15 assault, then yes, manslaughter and -- and felony murder  
16 would be the same offense. You would have to prove --

17 QUESTION: So a prosecutor -- so a prosecutor  
18 could have charged either one?

19 GENERAL STENBERG: Oh, sure. The prosecutor  
20 could have charged --

21 QUESTION: No, but you said I've got -- I've  
22 got -- I've got an offense consisting of the following  
23 elements here. And I can either go for the death penalty  
24 or I can go for a -- a -- a low-level criminal offense  
25 with a couple of years. He could have made that decision?



1           GENERAL STENBERG: Well, I suppose that's always  
2 true.

3           QUESTION: Yeah.

4           GENERAL STENBERG: I suppose the prosecutor  
5 could have charged on trespassing or -- or indecent --

6           QUESTION: No. But in that case, the -- the  
7 prosecutor is charging different elements. Here he's  
8 charging on your -- as I understand you, exactly the same  
9 elements. So he can say, gee, we'll either hang a person  
10 or -- or give them a couple of years in -- in prison.

11          GENERAL STENBERG: Well, I think that's the same  
12 prosecute -- prosecutorial discretion that exists in  
13 any -- in any criminal case. This doesn't --

14          QUESTION: But isn't -- doesn't that raise  
15 the -- because of that -- that enormous disparity, doesn't  
16 that raise the -- an even worse problem that -- that Beck  
17 was concerned with?

18          GENERAL STENBERG: I don't think so, Your Honor.  
19 Because the jury would either have to convict of both of  
20 acquit of both.

21          QUESTION: I suppose you would say, too, that  
22 the prosecutor could have charged simple assault, because  
23 that element was there, although the prosecutor had enough  
24 evidence to charge considerably more than that?

25          QUESTION: Well --

1 QUESTION: He can also suggest that the jury can  
2 act in an inconsistent way. And there's no constitutional  
3 objection to doing that. There's nothing that would have  
4 prevented the jury from returning not guilty on one and  
5 guilty on the other?

6 GENERAL STENBERG: Well, it seems to me, Your  
7 Honor, that this -- that this Court's jurisprudence  
8 would -- would prohibit placing before the jury two  
9 identical offenses with the same elements and the same --

10 QUESTION: But they don't have to be identical.  
11 Couldn't it be --

12 QUESTION: What -- what -- what is your  
13 authority for that?

14 GENERAL STENBERG: Well, really, Your Honor, the  
15 Furman and the whole line -- it would be arbit -- it would  
16 allow the jury to arbitrarily and capriciously choose  
17 between felony murder and manslaughter, with no standards  
18 whatsoever to guide its judgment.

19 QUESTION: So -- so you say there's a con --  
20 there would be a constitutional violation if the  
21 prosecution in this case indicted for both offenses?

22 GENERAL STENBERG: No, Your Honor, I didn't.  
23 Well, potential -- potentially there would -- there could  
24 have been a problem if -- yes, potentially there could be  
25 a constitutional problem in that event, yes, sir.

1           QUESTION: General, it seems to me -- may I go  
2 back to Justice Stevens' question. Because I think the --  
3 the question that Justice Stevens was asking probably is  
4 the same as the one that I -- I've been asking. And that  
5 is, simply based on an analysis of the elements, isn't  
6 there, under a Nebraska law, a lesser included offense  
7 here of involuntary manslaughter when the elements of  
8 involuntary manslaughter consist of an unintentional  
9 killing together with a second degree sexual assault?  
10 Just as an analytical matter, that's -- that's lesser  
11 included, isn't it?

12           Because it -- it -- it has -- it has -- it -- it  
13 is distinguished from the charge in this case in the  
14 following way: In this case, the charge was killing in  
15 the course of first degree sexual assault or attempted  
16 first degree sexual assault. And in order to prove first  
17 degree sexual assault you had to prove penetration. And  
18 in order to -- to prove the -- the attempt, you had to  
19 prove an intended penetration.

20           Under the second degree sexual assault, you  
21 don't have to prove penetration. So why isn't the  
22 unintended killing in the course of committing a second  
23 degree sexual assault lesser included just based on the  
24 analysis of elements?

25           GENERAL STENBERG: Well, I -- I've tried to

1 answer that question earlier, Your Honor, by -- by  
2 pointing out that they're both class III felonies, and it  
3 would make no -- if the prosecutor could already prove  
4 second degree sexual assault, it adds nothing to prove --

5 QUESTION: Okay. But that -- that simply says  
6 why a prosecutor wouldn't bring it. I'm saying why isn't  
7 it, as a matter of elements, a lesser included?

8 GENERAL STENBERG: Well, I think it's a matter  
9 of logic, Your Honor. Why would a legislature create that  
10 kind of system?

11 QUESTION: Well, I don't why. But they seem to  
12 have done so. Why isn't it lesser included?

13 GENERAL STENBERG: No, I disagree that they  
14 have. Under our Supreme Court interpretations, Your  
15 Honor, that -- that -- that question doesn't arise.

16 QUESTION: Well, General Stenberg, in -- in this  
17 case, I guess the defendant stabbed the woman seven times.  
18 Why would that come ahead of voluntary manslaughter?

19 GENERAL STENBERG: Well, I think it -- I think  
20 it's pretty clear from the evidence that it was not an  
21 unintentional --

22 QUESTION: Yes.

23 GENERAL STENBERG: -- killing here.

24 QUESTION: Can I -- can I you one question?

25 QUESTION: I -- I don't think he's finished



1     answering my question yet.

2                 GENERAL STENBERG: Well, it's very clear that it  
3     was not, of course, an unintentional killing.

4                 QUESTION: So it's all hypothetical really,  
5     whether this comes under the head of voluntary  
6     manslaughter, isn't?

7                 GENERAL STENBERG: Well -- well, I think it's --  
8     I think it is hypothetical, Your Honor. And I think  
9     another concept of lesser included is that the --

10                QUESTION: Except that the charge was felony  
11    murder. The charge was not in -- intentional killing,  
12    isn't that right?

13                GENERAL STENBERG: That's true. That's true.

14                QUESTION: And in felony murder, intent is -- to  
15    kill -- is irrelevant, as I understand it.

16                GENERAL STENBERG: That's exactly my point, Your  
17    Honor. Yes. That's exactly it.

18                QUESTION: Well, but --

19                GENERAL STENBERG: That's exactly why second  
20    degree murder and manslaughter are not lesser included  
21    offenses of felony murder.

22                QUESTION: There is one thing I've tried to look  
23    up that I have not been able to find, which to me is  
24    important as a matter of Nebraska law. It says in a case  
25    called State v. Price that the State cannot refuse a

1 request for an instruction in a capital felony murder case  
2 where the defendant wants to insist that there be a  
3 showing of intent or reckless indifference to the value of  
4 human life. Are you familiar with what I'm talking about?  
5 It's on page 11 of the NACDL brief. Do you know what I'm  
6 talking about? If you don't, it's not --

7 GENERAL STENBERG: I -- I've read the -- could  
8 you -- could you repeat your question?

9 QUESTION: Well, what I'm trying to find out is  
10 this --

11 GENERAL STENBERG: I've read the case.

12 QUESTION: Yeah, all right.

13 GENERAL STENBERG: Could you repeat your  
14 question, Your Honor?

15 QUESTION: Yeah. I'm trying to think up, in a  
16 capital case, a capital felony murder case, because of  
17 this Court's jurisprudence, Nebraska has said that the  
18 defendant is entitled to an instruction that there has to  
19 be some showing of either intent or reckless indifference  
20 to human life.

21 GENERAL STENBERG: I think, Your Honor, that may  
22 refer to the -- to the eligibility phase, if I'm not  
23 mistaken, but I'd have to --

24 QUESTION: And that's not something that goes to  
25 the jury in -- in the guilt phase?

1 GENERAL STENBERG: That's correct. That's my  
2 understanding.

3 QUESTION: Under Enmund v. Florida, you don't  
4 have to have an intent to kill?

5 GENERAL STENBERG: You do at the -- you do at  
6 the eligibility phase, not at the guilt phase.

7 QUESTION: And -- and -- thank you.

8 GENERAL STENBERG: If I could reserve --

9 QUESTION: One last thing I'd like to know, the  
10 State did not raise the Teague-barred argument in the  
11 courts below?

12 GENERAL STENBERG: Well, there was really no --

13 QUESTION: Yes or no.

14 GENERAL STENBERG: No, Your Honor, we did not.

15 QUESTION: And it was raised for the first time  
16 in the petition for certiorari?

17 GENERAL STENBERG: That is correct, Your Honor.

18 QUESTION: And does that give us, in your view,  
19 discretion whether to address that or not?

20 GENERAL STENBERG: That is my understanding of  
21 this Court's jurisprudence.

22 And may I reserve the rest of my time for  
23 rebuttal?

24 QUESTION: Yes, you may, General.

25 Mr. McLeese, we'll hear from you.

1 ORAL ARGUMENT OF ROY W. MCLEESE, III

2 UNITED STATES, AS AMICUS CURIAE,

3 SUPPORTING PETITIONER

4 MR. MCLEESE: Mr. Chief Justice, and my it  
5 please the Court:

6 The ruling of the Eighth Circuit in this case  
7 reflects two critical errors of law. First, that a State  
8 can never rely on its own law as a basis for denying a  
9 lesser offense instruction in a capital case, and, second,  
10 that this Court's decisions in Tyson and Enmund are  
11 relevant to the question of whether such instructions are  
12 constitutionally required under Beck.

13 As to the first error, this Court's decisions in  
14 Hopper and Spaziano made clear that a State may decline to  
15 give lesser offense instructions in a capital case based  
16 on the application of State law principles, such as the  
17 requirement that there be evidence to support the giving  
18 of those lesser offense instructions or that the lesser  
19 offenses be -- be available as a matter of State statute  
20 of limitations law.

21 And it is surely reasonable for State courts to  
22 decline to give lesser offense instructions on offenses  
23 that are not necessarily included in the charged  
24 offenses -- what might be called lesser unincorporated  
25 offenses. A requirement -- a constitutional requirement



1 that State courts instruct on such offenses would be  
2 utterly unworkable.

3 As this Court's decisions in Dixon and Schmuck  
4 have made clear, there is no logical limiting principal  
5 upon the idea of instructing juries on lesser unincluded  
6 offenses. There is no limiting principle, once you get  
7 into that form of analysis.

8 Moreover, given criminal defendants the right to  
9 inject into criminal trials new offenses --

10 QUESTION: What do you mean by lesser unincluded  
11 offenses?

12 MR. MCLEESE: I mean, for example, to take the  
13 clearer of the two, second degree murder under Nebraska  
14 law. Second degree murder under Nebraska law requires  
15 proof of intent to kill. Felony murder does not, under  
16 the elements tests, as -- as the Federal courts would  
17 apply it or as the Nebraska courts have applied it. It is  
18 quite clear that that is a lesser unincluded offense.  
19 It's lesser, but it has elements which are different  
20 from --

21 QUESTION: Well, what about the -- the  
22 manslaughter charge that -- the questions being asked --  
23 addressed here this morning?

24 MR. MCLEESE: Involuntary manslaughter, under  
25 Nebraska law -- the Nebraska courts have said for 100

1 years that it -- it and manslaughter generally are not  
2 lesser included offenses. They have never, so far as I'm  
3 aware, been confronted with a specific claim, focusing on  
4 unlawful act manslaughter. So they've never addressed  
5 that question.

6 And I think that raises real issues of --

7 QUESTION: But could I interrupt with just  
8 question. Supposing you have two offenses that -- one of  
9 which has three elements and the other has two of those  
10 three, and that's all you know about. And Nebraska, as a  
11 matter of State law, says, well, we're not going to call  
12 that a lesser included offense. Would Beck apply in that  
13 kind of situation?

14 MR. MCLEESE: I -- I think that that poses the  
15 question of whether Beck brings with it the federally  
16 constitutionally required imposition of an elements test  
17 as the Federal courts apply it.

18 QUESTION: My question is, in your view, could  
19 the State court say, well, we agree that -- that the  
20 capital offense has three elements in it and we also agree  
21 that the -- some other offense has only two of those  
22 elements in it, and otherwise they're exactly the same.  
23 But as a matter of State law, we will not treat that as a  
24 lesser included offense. Could they do that?

25 MR. MCLEESE: I think it would be an extension

1 of Beck and, therefore, a new rule for this Court to  
2 constitutionalize the elements test. And, therefore, I  
3 think Beck itself does not establish the proposition that  
4 a State would be obliged to submit el -- a lesser  
5 offense --

6 QUESTION: But that still isn't my question. My  
7 question is what is your view as to whether the State  
8 could do that?

9 MR. MCLEESE: Such a rule would not have a -- a  
10 substantial impact on Federal prosecutions. We adhere  
11 to --

12 QUESTION: You'd rather not answer the question  
13 is what you're saying?

14 MR. MCLEESE: No. I think I am -- I think it's  
15 different --

16 QUESTION: It's different from Beck, I agree.  
17 It's different from Beck, clearly. But I'm just asking  
18 you whether the rationale of Beck would apply squarely to  
19 that situation or not.

20 MR. MCLEESE: I think it would be unwise for the  
21 Court to take the step of reading Beck as imposing an  
22 elements test as a matter of Federal constitutional law.  
23 So the answer, in essence, is no, I don't think that Beck  
24 requires the conclusion that State courts are obliged to  
25 submit any lesser that would be a lesser offense under the

1 elements test under Federal law.

2 QUESTION: Mr. McLeese, you say that the Supreme  
3 Court of Nebraska has never had to confront the question  
4 raised here. One would have thought they would have had  
5 to confront it in the direct appeal in this case.

6 MR. MCLEESE: Had -- had -- had Respondent  
7 framed this issue for the Nebraska courts, they ought to  
8 have. But Respondent did not. I think the --

9 QUESTION: So Respondent never raised this issue  
10 in the Supreme Court of Nebraska?

11 MR. MCLEESE: Respondent, so far as I'm aware,  
12 has never suggested, until this Court -- in fact, it's  
13 never been suggested by anyone until this Court -- that if  
14 you apply an elements test, involuntary manslaughter,  
15 unlawful act manslaughter, is not a lesser -- is a lesser  
16 included offense. They never mentioned that theory at  
17 all.

18 All they did is -- and in the joint appendix, at  
19 30, is where there's the instruction which they proposed.  
20 It did refer to unlawful act manslaughter as one of the  
21 alternative lessers that -- that they sought to get. But  
22 when they were explaining to the trial court why they were  
23 entitled to defense instructions on second degree murder  
24 and manslaughter, at no point did they focus on  
25 involuntary act manslaughter, did they suggest that under



1 an elements test it would be a lesser, did they suggest  
2 that there was any particular unlawful act that would be  
3 appropriate in this particular case.

4 Those issues were never confronted, so far as  
5 I'm aware, until -- in Respondent's brief in this Court.

6 QUESTION: Not even in the Eighth Circuit?

7 MR. MCLEESE: No. And the Eighth Circuit's  
8 analysis, again, is completely different. The analysis of  
9 the Eighth Circuit is that it is irrelevant to the Beck  
10 question whether these would be lesser included offenses  
11 or not. And that's the ruling that we sought to  
12 participate, because we object to it and because it would  
13 have a substantial impact on Federal prosecution.

14 That ruling, which would constitutionalize a  
15 lesser unincluded offense doctrine that this Court -- this  
16 Court has repudiated in Schmuck and in Dixon, is entirely  
17 untenable.

18 I -- I should try to mention one thing about  
19 Nebraska law, although I don't profess to expertise in it.  
20 I think that there is at least one possible respect --  
21 again, I'm speculating, because Nebraska has never  
22 confronted this question -- in which involuntary act  
23 manslaughter might not be a lesser included offense even  
24 on an elements test. If you look at the statute which  
25 defines unlawful act manslaughter, it requires -- it

1 appears to require that the murder in fact be  
2 unintentional rather than -- rather than intentional.

3 If, as there is some suggestion in Nebraska law,  
4 that that's an element of the offense, that you can't have  
5 an intentional killing that would be an involuntary  
6 manslaughter, then they are not greater and lesser.  
7 Because I could commit a felony murder through an  
8 intentional killing in the course of a felony that would  
9 not be eligible for treatment as an involuntary  
10 manslaughter.

11 QUESTION: But -- but the intent here is -- is a  
12 little difficult. As I understand it, second degree  
13 murder was not charged because there was no intent. And  
14 yet when they get to the death eligibility phase, they  
15 have to say there's intent to comply with Edmunds. It  
16 seems to me -- I don't understand the consistency of that  
17 position.

18 MR. MCLEESE: Second degree murder was not a  
19 lesser included offense because it requires an intent to  
20 kill. Now, Tyson and Enmund do not require at any phase  
21 of the proceedings a determination that the defendant  
22 intended to kill. What they require -- what they clearly  
23 require is that with respect to someone who is not the  
24 actual killer -- not this situation, by the way -- that  
25 there be some culpable state shown with respect to the

1 killing, and at least -- well, some culpable state --

2 QUESTION: So that if you're the actual killer  
3 under Edmund, the intent to kill need not be shown?

4 MR. MCLEESE: The lower courts have taken that  
5 view of Enmund. But the other problem with the reliance  
6 upon Enmund as affecting the Beck analysis is that this  
7 Court, in Cabana, made very clear that that's not a  
8 determination that is relevant to the State's power to  
9 define the elements of capital offenses. It is a  
10 determination that is relevant solely at the time of  
11 sentencing to determine whether or not a capital sentence  
12 can in fact be imposed.

13 And so it -- I don't -- I think it's --

14 QUESTION: Well, it still seems to me, then, the  
15 State is having it both ways.

16 MR. MCLEESE: Again, I don't believe so. There  
17 are many aspects of capital sentencing that may or may not  
18 be -- may arise in the sentencing proceedings that the  
19 State is not obliged to affirmatively establish at the  
20 time of the -- the trial.

21 And, again, it's important that, even on the  
22 broadest reading of Tyson and Enmund, there is no  
23 requirement of a showing of actual intent to kill as  
24 opposed to a far less demanding culpable state. So I  
25 don't think it's correct to say that there is anything

1 close to a direct tension, leaving aside the procedural  
2 differences between the Tyson/Enmund line of cases and the  
3 State's approach to the definition of felony murder or  
4 its -- of lesser grades of homicide.

5 But just to complete the thought about Nebraska  
6 law and why it may well be the case under Nebraska law  
7 that involuntary manslaughter is not a lesser included  
8 offense even under an elements test. In a case cited in  
9 Respondent's brief, the Al-Zubaidy case, which I think is  
10 reported at 559, Northwest 2d, the Nebraska Court of  
11 Appeals held that in fact there's no such thing as  
12 attempted involuntary manslaughter. And when it said  
13 that, it said because attempt carries with it the idea  
14 that you are intending to commit the offense in question.  
15 And involuntary manslaughter has a constituted feature of  
16 it that it is an unintentional killing.

17 And that mode of analysis, if applied here, I  
18 think would strongly suggest that in fact applying an  
19 elements test, that involuntary manslaughter is not a  
20 lesser included offense.

21 QUESTION: May I go back to Justice Kennedy's  
22 question for just a moment. Isn't it correct that the 100  
23 years of jurisprudence in Nebraska about felony murder not  
24 having any lesser included offenses all turns on the fact  
25 that there's no intent element even as comparable to that



1 in Tyson and Enmund?

2 MR. MCLEESE: Yes.

3 QUESTION: That's the missing element of all  
4 this?

5 MR. MCLEESE: Yes. Yes.

6 QUESTION: And if constitutionally there must be  
7 such -- some sort of intent in order to justify the death  
8 penalty, why is it such a stretch to say that we'll treat  
9 it as a lesser included offense in regard to what the  
10 total proof that the State must offer is?

11 MR. MCLEESE: This Court, in Cabana, made clear  
12 that that principle, that at least with people who are not  
13 the actual killers, there may be a requirement of culpable  
14 mental state, is not one that affects the power of the  
15 State to define the elements of the offense. It's purely  
16 a sentencing issue and therefore should not affect the  
17 Beck analysis.

18 QUESTION: Thank you, Mr. McLeese.

19 Ms. Hutchinson, we'll hear from you.

20 ORAL ARGUMENT OF PAULA HUTCHINSON

21 ON BEHALF OF THE RESPONDENT

22 MS. HUTCHINSON: Thank you, Mr. Chief Justice,  
23 and may it please the Court:

24 The one undeniable thing about this case is that  
25 the enhanced risk of an unwarranted conviction was created

1 when the prosecutor elected to charge in the information  
2 felony murder only and nothing else, putting the jury in  
3 the position of deciding whether to convict him, of its  
4 only choice, or to set him free.

5 QUESTION: Of course, a State can do that. I  
6 mean, you -- you -- you don't deny that a State can do  
7 that by simply establishing crimes that don't -- a capital  
8 crime that has no lesser included offense, however you  
9 want to define it -- by elements, by facts, whatever -- a  
10 State can do that, can't it?

11 MS. HUTCHINSON: No, Your Honor --

12 QUESTION: A State -- a State cannot set up its  
13 crimes in such a way that you have one capital crime which  
14 has no lesser included offense?

15 MS. HUTCHINSON: We would submit that's --  
16 that's exactly the case, Your Honor. And that's what  
17 Beck, together with Hopper and Spaziano, seem to say.

18 QUESTION: What -- what if the State were to say  
19 that intentional murder, committed by way of poisoning is  
20 a capital offense, and do -- do you say you would -- and  
21 they would have to give some lesser included offense in --  
22 in connection with that?

23 MS. HUTCHINSON: Well, only if the facts would  
24 support the giving of some lesser that's otherwise allowed  
25 under the law. And --

1 QUESTION: Well, supposing there was an offense  
2 called adulterating one's drink, and -- would you have to  
3 charge that if the evidence showed the person put  
4 strychnine in -- in the thing and the person -- the victim  
5 took it and was dead?

6 MS. HUTCHINSON: If the evidence would support  
7 the giving of something less than a capital crime --

8 QUESTION: Well, okay, but let's -- let's talk  
9 for a minute about what sort of evidence would support the  
10 ev -- the giving of something. Supposing that the  
11 evidence showed that the -- the defendant, in my case put  
12 poison in the -- in the -- in the cup, the victim --  
13 intended the victim drink the cup, the victim drank it and  
14 died. Now, would you say that a lesser included offense  
15 would -- would be given then, had to be given?

16 MS. HUTCHINSON: If all those elements could be  
17 proven from the facts and there is no rational theory to  
18 support something lesser, then it wouldn't be necessary to  
19 give a lesser. If there was some question as to any of  
20 the elements, if there were a statute that -- that -- that  
21 would have supported the giving of lesser, and there was  
22 at least some evidence, then Beck would say no, you may  
23 not charge him only with that.

24 QUESTION: Well, in this --

25 MS. HUTCHINSON: But if there's no evidence to

1 support that --

2 QUESTION: -- in -- supposing we take the facts  
3 of this case. Would -- would the State have been required  
4 to charge on simply assault, since they're obviously was a  
5 simple assault, even though the evidence showed that it  
6 went much further?

7 MS. HUTCHINSON: The State would not have been  
8 required to charge on simple assault, Your Honor. I think  
9 Schad makes clear that the defendant isn't entitled to  
10 have the jury select from a menu of -- of lessers. What  
11 Beck teaches is that if the evidence is clear that the  
12 defendant is guilty of some violent offense that some  
13 lesser offense that's otherwise allowable under State law  
14 be given.

15 QUESTION: Why does it have to be a violent  
16 offense?

17 MS. HUTCHINSON: Because Beck says it's so, Your  
18 Honor.

19 QUESTION: And why do you think Beck said that?

20 MS. HUTCHINSON: Because if it's something less  
21 than a violent offense, then that wouldn't address the  
22 issue that's at the heart of Beck. And that's whether  
23 there's a distortion in the factfinding process that --  
24 that causes the jury to say, well, he's -- he's obviously  
25 guilty of some serious crime, some serious violent crime;



1 we can't just let him walk out of the courtroom a free  
2 man. Which is what the jury was told in this case.  
3 And --

4 QUESTION: This -- no, I thought you were done.  
5 Go ahead.

6 MS. HUTCHINSON: Oh, no, Your Honor -- and if --  
7 if, as happened in the State of Nebraska, the State erects  
8 some artificial barrier to the giving of a lesser offense  
9 that would be supported by the facts, then Beck says that  
10 due process doesn't allow that.

11 QUESTION: Let me ask you a different kind of,  
12 sort of, rationality question. Assume for the sake of  
13 argument, as -- as some of our questions at least have  
14 suggested, that involuntary manslaughter, where the  
15 underlying act is -- is second degree sexual assault,  
16 would be a lesser included offense just as an analytical  
17 matter. Assume that to be the case.

18 The defense that -- that you've raised, as I  
19 understand it, is -- is an alternative defense of  
20 diminished capacity, or insanity, either -- either of  
21 which, as I understand it, would -- would be a complete  
22 defense under Nebraska law. Is there any lesser included  
23 offense -- and specifically, is -- if involuntary  
24 manslaughter is a lesser included offense, could a jury  
25 rationally, on your theory of defense, acquit a felony

1 murder and convict of -- of the involuntary manslaughter?

2 MS. HUTCHINSON: Your Honor, before I answer  
3 that, I really have to correct a few of the misperceptions  
4 created by the United States about Nebraska law. And one  
5 of them is that there's such a crime as involuntary  
6 manslaughter under Nebraska law. State v. Jones, which we  
7 cite in our brief, says that the terms "voluntary" and  
8 "involuntary manslaughter" have not been a part of  
9 Nebraska law for many, many years. Manslaughter is  
10 committed without regard to intent, either upon a sudden  
11 quarrel or during the commission of an unlawful act.  
12 There's no distinction between voluntary and involuntary  
13 manslaughter.

14 QUESTION: Okay. Well, strike the adjective,  
15 then, "involuntary." I take it there is a Nebraska  
16 offense of unintended killing in the course of committing  
17 an unlawful act, and that an unlawful act might be second  
18 degree sexual assault; is that correct?

19 MS. HUTCHINSON: Yes, Your Honor, killing  
20 without --

21 QUESTION: All right. Well, let's -- let's --  
22 I'm sorry.

23 MS. HUTCHINSON: -- killing without regard to  
24 intent in the course of committing an unlawful act, which  
25 Nebraska statutes say don't need to be specified -- second

1 degree sexual assault would be one. But --

2 QUESTION: Well, now --

3 QUESTION: Okay --

4 QUESTION: -- the defendant did not ask for an  
5 instruction on sexual assault as a lesser included  
6 offense, did he?

7 MS. HUTCHINSON: He didn't ask for an  
8 instruction on sexual assault as a lesser included  
9 offense. He asked for an instruction on manslaughter  
10 under either theory of manslaughter. And the unlawful act  
11 is not required to be specified under Nebraska law. The  
12 information can charge killing and slaying in the course  
13 of an unlawful act. And the information does not need to  
14 specify the unlawful act.

15 QUESTION: Okay. Going back to my question,  
16 could they -- on -- on the theory, as I understand it, the  
17 only theory of defense that was raised -- could a jury  
18 rationally have acquitted of the offense charged here  
19 and -- and then convicted of -- of manslaughter as you  
20 have just explained it to us?

21 MS. HUTCHINSON: They most certainly could have,  
22 Your Honor, and for several reasons. First of all, you  
23 mentioned the affirmative defenses that were advanced by  
24 the defendant. Well, since he raised the defense of  
25 insanity at the time the State was required to prove him

1 sane beyond a reasonable doubt -- but, more importantly,  
2 he argued to the jury -- and you find this in counsel's  
3 closing argument -- that there was insufficient evidence  
4 to find proof beyond a reasonable doubt that a first  
5 degree sexual assault or an attempt of that was committed.  
6 And --

7 QUESTION: So you're saying he didn't just rest  
8 on -- on the capacity/insanity defense, then?

9 MS. HUTCHINSON: That's correct, Your Honor.

10 QUESTION: Okay. Now, let me ask you, then, a  
11 different question. Would it have been rational for a  
12 jury to say he did not -- we find that he did not commit  
13 either first degree sexual assault that involves  
14 penetration or attempted first degree sexual assault, but  
15 we find that he did commit second degree sexual assault.  
16 Would that have rationally been possible?

17 MS. HUTCHINSON: It most certainly would have,  
18 Your Honor. In fact, that's an entirely plausible --

19 QUESTION: I guess what I'm getting at is the --  
20 is the -- is the possible inconsistency between saying  
21 there was no intent to commit the assault involving  
22 penetration, but there was an intent to commit second  
23 degree assault. Can -- is -- is second degree sexual  
24 assault capable of being committed not only without  
25 penetration, but without intent to commit penetration?



1 That's what I'm getting at.

2 MS. HUTCHINSON: Certainly it can, Your Honor.

3 And -- and --

4 QUESTION: Don't tell me --

5 MS. HUTCHINSON: -- first degree sexual assault  
6 and second degree sexual assault -- and second degree  
7 murder, for that matter -- all are general intent crimes.  
8 And it's entirely consistent with his defense and with the  
9 evidence in this case that, number one, there was scant  
10 physical evidence, if any -- there was only some  
11 circumstantial evidence -- that an actual first degree  
12 sexual assault occurred.

13 That leaves you with attempted first degree  
14 sexual assault, which is a specific intent crime. And the  
15 jury would have been required to find that he formed the  
16 intent to engage in behavior, which, under the  
17 circumstances he believed them to be, constituted a  
18 substantial step toward the committing of first degree  
19 sexual assault. Which is certainly a great deal more  
20 sophisticated level of intent than that required by a  
21 general intent crime.

22 So under the evidence and under his defense, he  
23 could have been found guilty of -- of manslaughter  
24 unlawful act, with a second degree sexual assault, and the  
25 jury could have found that while he didn't have the

1 sophisticated level of intent, based on his gross  
2 intoxication, to form the intent required to attempt, and  
3 because there was such little evidence of an actual first  
4 degree sexual assault, that it certainly would have been  
5 rational for the jury to have found him guilty of unlawful  
6 act manslaughter, with the unlawful act being second  
7 degree sexual assault.

8 QUESTION: Was this the reasoning of the Eighth  
9 Circuit in this case?

10 MS. HUTCHINSON: Your Honor, the -- yes, the  
11 Eighth Circuit --

12 QUESTION: I -- I -- I had thought it wasn't.  
13 Perhaps you could explain.

14 MS. HUTCHINSON: It's on page 60 of the JA. The  
15 Eighth Circuit, contrary to what the United States argued  
16 on brief, said the facts would have supported conviction  
17 either on second degree murder or on manslaughter.  
18 That's --

19 QUESTION: But was there any homing in on this  
20 unlawful act manslaughter? See, when I read the Eighth  
21 Circuit's decision, I thought that they were speaking of  
22 two intent crimes, like the sudden quarrel, and the second  
23 degree murder, both. And I thought that that -- that they  
24 were saying if there is anything that you can charge other  
25 than the capital, then you must. But I didn't see them

1 homing in at all on the unlawful act manslaughter.

2 MS. HUTCHINSON: No, they didn't discuss the  
3 specifics. What they made was a blanket statement, saying  
4 the facts would have supported conviction on either second  
5 degree murder or manslaughter. And it's true, as you  
6 said, Justice Ginsburg, that -- that the Eighth Circuit  
7 said that -- that if the facts would have warranted, then  
8 he should have been instructed on lessers. And that's  
9 certainly true under Nebraska law.

10 Nebraska has erected this artificial barrier to  
11 the giving of lesser offenses that's found nowhere else  
12 in -- in homicide law in Nebraska.

13 QUESTION: But my -- my question still is I  
14 didn't see it in the Eighth Circuit opinion. And I think  
15 Mr. McLeese told us it was never presented squarely to the  
16 Nebraska courts. This -- the difference between an intent  
17 to kill, which second degree murder would involve, and a  
18 crime, manslaughter, unintentional manslaughter, that  
19 doesn't involve any intent.

20 MS. HUTCHINSON: Your Honor, I briefed to the  
21 Eighth Circuit Court of Appeals a scenario whereby, under  
22 the -- the cognate evidence test, which was in effect at  
23 the time Mr. Reeves was tried, or under the statutory  
24 elements test that -- that Mr. Reeves could have been  
25 convicted of the very least, under the statutory elements

1 test, of manslaughter, unlawful act, with the unlawful act  
2 being a sexual assault. And those briefs, I assume, are  
3 part of the record.

4 QUESTION: Did you brief the same thing to the  
5 Supreme Court of Nebraska?

6 MS. HUTCHINSON: That was briefed to the Supreme  
7 Court of Nebraska, yes. It was -- the --

8 QUESTION: The distinction between the unlawful  
9 act and the intent crimes?

10 MS. HUTCHINSON: I don't recall, frankly,  
11 Mr. Chief Justice, whether the specifics of the -- the --  
12 the manslaughter, unlawful act were addressed. What --

13 QUESTION: I -- I wasn't so much asking -- you  
14 mean addressed in the briefs? Or do you mean addressed by  
15 the court?

16 MS. HUTCHINSON: No, addressed in the briefs.

17 QUESTION: Addressed in the briefs.

18 MS. HUTCHINSON: I don't recall whether they  
19 were specifically addressed in the briefs. But one thing  
20 I do know for certain -- that every stage of this case,  
21 from pretrial onward, the court was pressed that the jury  
22 should have been instructed, under Nebraska law and under  
23 Beck v. Alabama, on the lesser included offenses, the  
24 second degree murder and either theory of manslaughter.

25 The term "lesser included offense," Beck doesn't



1 seem to turn on the -- the semantics of -- of what  
2 constitutes a lesser included offense.

3 QUESTION: It's conceded that you could have  
4 asked for sexual assault as a lesser included offense, but  
5 you didn't ask for that?

6 MS. HUTCHINSON: We could have, but it wasn't  
7 necessary. When -- when defense counsel asked for an  
8 instruction on manslaughter, again, statute says -- it's  
9 29-1512, under Nebraska law -- that the unlawful act not  
10 be specified in the information. And so it was sufficient  
11 to argue that -- to request that a manslaughter  
12 instruction be given on either theory. And the State --

13 QUESTION: Well, it may not have to be specified  
14 in the information, but I presume you have to explain to  
15 the trial judge what the predicate is for your request for  
16 the instruction?

17 MS. HUTCHINSON: Well, Justice Souter, the State  
18 has never suggested that there's an inadequate basis,  
19 based on the requests that were made by counsel, in order  
20 to have been given an instruction like that. I think the  
21 court pressed with -- with -- with all deliberate zeal to  
22 get instructions on lesser offenses as were allowed under  
23 State law.

24 QUESTION: But there's nothing in the record, is  
25 there, that suggests the lawyer ever said to the judge,

1 "Judge, the reason I want a manslaughter instruction is  
2 because first degree murder makes it first degree if it's  
3 a first degree sexual offense. But maybe here there was a  
4 second degree sexual offense. And that's why, since if  
5 it's only in the second degree, it doesn't fall within the  
6 first degree murder statute. That's why I want the lesser  
7 included instruction."

8 I haven't found a word that suggests anything  
9 like that.

10 MS. HUTCHINSON: Defense counsel argued --

11 QUESTION: I thought he was making a different  
12 argument. I thought his argument was, look at the  
13 language of first degree, what the legislature has done is  
14 it has taken six crimes and say, if you commit any of  
15 those six crimes and somebody dies, that's first degree  
16 murder. Now, look at the language of the manslaughter  
17 statute. You might think that manslaughter is if somebody  
18 dies in any other crime -- any other than the six -- it's  
19 manslaughter. You might think that's the law in Nebraska.  
20 But the language of manslaughter covers those six crimes,  
21 too. And that's why I want the offense.

22 I mean, I do not know any other argument he  
23 could have been making.

24 MS. HUTCHINSON: Justice Breyer, the argument  
25 that he was making is that, under Nebraska law since

1 Statehood, the rule has been homicide is but one offense,  
2 the degree necessarily being for the jury. And when  
3 there's at least some evidence to warrant the giving of  
4 lesser offenses to first degree murder, that they shall be  
5 so instructed and that it's for the jury to determine  
6 which degree of homicide.

7 QUESTION: But you're speaking generally, and  
8 I'm trying to understand whether there is anything in the  
9 record which would say to the judge, "Judge, I want a  
10 manslaughter instruction because the evidence suggests  
11 that my client didn't commit first degree sexual assault."

12 MS. HUTCHINSON: There's -- there's nothing  
13 specific that I'm aware of.

14 QUESTION: All right. That's --

15 MS. HUTCHINSON: What's in the record, Justice  
16 Breyer, is, "I want a manslaughter instruction because he  
17 certainly could have been guilty of --"

18 QUESTION: So what is in Beck or in logic or  
19 anything else that says if man -- if Nebraska wants to say  
20 this, "People of Nebraska, if you commit one of six crimes  
21 and somebody dies, that's first degree murder; if you  
22 commit any other crime other than those six and somebody  
23 dies, that's manslaughter." Is there anything in the  
24 Constitution that would stop Nebraska from saying that?

25 I think the answer is no. And then my question

1 is, well, how is this any different?

2 MS. HUTCHINSON: Because the facts would have  
3 supported the giving of lessers. And it's clear from the  
4 evidence -- defense counsel argued to the jury that a  
5 penetration didn't occur and that it was because of his  
6 intoxication it was impossible to find that there was an  
7 attempt involved. But given the fact that the jury had  
8 sat through a 6-week trial, hearing the grizzly details of  
9 the crimes, after the defendant had stipulated to the fact  
10 that he caused these two homicides, it's -- it's certainly  
11 plausible that the jury was going to focus on anything  
12 but, do we set him free or do we examine the forensic  
13 evidence and say, well, the acid phosphatase level in the  
14 victim's genitalia might or might not have been consistent  
15 with intercourse, and there's nothing -- nothing to have  
16 said that a -- a penetration was effected as far as  
17 physical evidence.

18 Of course, they weren't talking like that. They  
19 were saying, we can't -- we can't let this man walk out of  
20 here. The jury was instructed prior to argument, among  
21 the last words the jury heard before it retired to  
22 deliberate was the prosecutor telling the jury, "If the  
23 State doesn't prove its case beyond a reasonable doubt,  
24 the State doesn't win and he walks out of this courtroom a  
25 free man." That's Beck, plain and simple.



1           That's what Beck says you can't do when there  
2 was evidence to support the giving of lessers. He could  
3 have been convicted of second degree murder, as General  
4 Stenberg conceded. The evidence certainly could have  
5 suggested that he effected an intentional killing.

6           There was scant evidence of -- of first degree  
7 sexual assault. But the jury --

8           QUESTION: How do you define -- how do you  
9 define, and under what body of law, lesser included  
10 offense? I mean, we've heard an argument from the United  
11 States that it can't mean anything the prosecutor might  
12 have charged. Do you agree with that, as far as that  
13 much? That it's -- it's not anything, given this episode  
14 that the prosecutor might have charged?

15          MS. HUTCHINSON: No. And, Justice Ginsburg,  
16 Beck makes clear -- and Schad certainly makes even more  
17 clear -- that that's not required, that we don't throw at  
18 the jury --

19          QUESTION: So what is -- what is a lesser  
20 included offense? It's not anything the prosecutor could  
21 have charged. So it's something less than that universe.  
22 So what is it?

23          MS. HUTCHINSON: Well, under Nebraska law,  
24 the -- the common law at the time that was in effect was  
25 the evidence rule. If the evidence would have supported

1 the giving of lessers, the -- the State has -- as the  
2 State put it, experimented, and it takes us, I believe, a  
3 couple of pages on brief, I think on pages 31 and 32, to  
4 recount the experiment with which lesser included offense  
5 test it's going to adopt. But for homicide, the rule in  
6 Nebraska always has been that we're not constrained by the  
7 semantics of lesser included offense doctrine. Homicide  
8 is one offense.

9 And that has been the rule in Nebraska -- it  
10 was -- sense -- prior to Statehood. In fact, it dates  
11 back to the 1794 statute that --

12 QUESTION: But we had a concession -- we had a  
13 concession from General Stenberg that sexual assault in  
14 this very case would have been a lesser included offense,  
15 but you didn't ask for it.

16 MS. HUTCHINSON: Again, Your Honor, it -- second  
17 degree sexual assault may not have been specifically  
18 requested. But the law in Nebraska that -- is that the  
19 unlawful act not be specified. The --

20 QUESTION: I'm not talking about unlawful act  
21 manslaughter. I'm talking about sexual assault pure and  
22 simple. The -- we have just been told that under Nebraska  
23 law, sexual assault -- not unintentional killing in the  
24 course of, but just sexual assault --

25 MS. HUTCHINSON: Yes.

1 QUESTION: -- would have been a lesser included  
2 offense.

3 MS. HUTCHINSON: First --

4 QUESTION: So that suggests that there are  
5 lesser included offenses --

6 MS. HUTCHINSON: Yes.

7 QUESTION: -- when the charge is felony murder.

8 MS. HUTCHINSON: Yes. First degree sexual  
9 assault would have been a lesser included offense of  
10 felony murder. And it's true that defense did not request  
11 that. The reason they didn't request that was because it  
12 would have been inconsistent with their defense that a  
13 first degree sexual assault never occurred. If the trial  
14 court felt strongly that this was one crime, uno actu, and  
15 that it was a felony murder, the killing being a first  
16 degree sexual assault, the rule in Nebraska is it's the  
17 judge's duty to instruct the jury on the law, whether  
18 requested to do so or not.

19 And the Nebraska Supreme Court routinely takes  
20 up on -- under the plain error doctrine, cases where the  
21 trial -- where the trial court did not properly instruct  
22 the jury as to the law of the case. And --

23 QUESTION: You mean that a defendant, even who  
24 doesn't want a lesser included offense, has to get that  
25 charge, even --

1 MS. HUTCHINSON: Absolutely.

2 QUESTION: -- even if he doesn't want it and the  
3 prosecutor doesn't want it?

4 MS. HUTCHINSON: Absolutely, Your Honor. In  
5 fact, there is a case that we cite, State v. Archibald,  
6 where precisely that happened. The defendant did not want  
7 a manslaughter instruction in her affirmative defense of  
8 self-defense. The trial court felt that her own testimony  
9 adduced sufficient evidence to charge the jury with  
10 manslaughter. She objected. The prosecution didn't  
11 request it. The court instructed the jury anyway  
12 because -- because the law of Nebraska is that the jury  
13 shall get any el -- or any degree of homicide upon which  
14 there's at least some evidence. And it's the trial  
15 court's duty to instruct the jury on the law of the case.

16 That was upheld by the Nebraska Supreme Court on  
17 appeal. So, again, the answer to your question is yes.

18 QUESTION: I thought the question was, well,  
19 what is a lesser included offense? A lesser included  
20 offense could be what Nebraska says it is, in which case  
21 you would lose, or it had some independent definition. If  
22 it has an independent definition, I thought it was -- and  
23 here is what I'm interested in your view on -- take an  
24 offense. It has, let's say, four elements, A, B, C, and  
25 D. That's the big offense. And if there is another



1 offense, such that it is lesser and you are guilty of it,  
2 with not four but three of those four, or two of the four,  
3 or one of the four, that's a lesser included offense.

4 Now, if that's what it is in principle, I'm not  
5 sure how that stacks up here. Because what we have here  
6 are two elements, A and B. And A and B is first degree.  
7 And A and B is also, under the language of the  
8 manslaughter statute, manslaughter. That's a very unusual  
9 situation. That's why I'm not certain what to do.

10 MS. HUTCHINSON: Well, I think I heard about  
11 three questions in there, Your Honor.

12 QUESTION: You see, there are two elements. The  
13 two elements are somebody is dead and there was a first  
14 degree sexual assault. In other words, one of the six big  
15 crimes. That's the definition of the big offense. The  
16 definition of the little offense is somebody is dead and  
17 there's a crime. All right? The same two.

18 Now, that's what's causing the problem in my  
19 mind. And -- and it's not what I think of as the normal  
20 lesser included offense. And -- and that's -- I'm not  
21 saying I have the answer. That's why I put the question.

22 MS. HUTCHINSON: I think I may have heard about  
23 three questions in there, Justice Breyer.

24 QUESTION: No, there's only one, which is it  
25 sounds as if there is a situation, where if you looked at

1 what Nebraska says, you lose. Okay. So we're not doing  
2 that, hypothetically. What we have is the big crime, two  
3 elements, a dead person and one of six big crimes. Now we  
4 look to what you call the lesser included offense. And,  
5 once again, two elements, a dead person and sufficient to  
6 find one of the six big crimes -- and a bunch of others,  
7 by the way. I'm saying that's what's --

8 MS. HUTCHINSON: And it's the "and a bunch of  
9 others" --

10 QUESTION: Well, the others -- fine, that was  
11 our little discussion about the non-first degree sexual  
12 assault. I'm prepared to say at the moment -- I'll look  
13 it up -- but none of that stuff ever got into this case.  
14 But I'll look it up. But --

15 MS. HUTCHINSON: Well, and again, it was  
16 sufficient under State law for the defense simply to  
17 request a manslaughter instruction. Under either theory,  
18 the evidence would have supported the giving of a  
19 manslaughter instruction. But, Justice Breyer, you began  
20 your question with the premise that if -- if a lesser  
21 included offense is only what the State says it is, we  
22 lose. If that were true, well, then as the Eighth Circuit  
23 panel said, Beck would have been decided differently. If  
24 State law is what it is, you lose.

25 QUESTION: Yeah, that's why I'm looking for the

1 answer.

2 MS. HUTCHINSON: So the question is, once a  
3 State has erected this artificial barrier by saying  
4 there's no lesser included offense, when our common sense  
5 tells us we can analyze the evidence or the elements,  
6 whichever -- whichever we choose to do -- and find that in  
7 fact there are, then we examine the universe of State law.  
8 And --

9 QUESTION: Had the State, in Beck, said that  
10 there was -- that -- had the State, in Beck, said that  
11 there was no lesser included offense, or had it said that  
12 there is a lesser included offense, but we don't care,  
13 we're not going to charge it?

14 MS. HUTCHINSON: That's what Beck said.

15 QUESTION: Okay.

16 MS. HUTCHINSON: But there's certainly no  
17 meaningful distinction between --

18 QUESTION: The latter. There's no meaningful  
19 distinction between -- between a State saying, for this  
20 crime there is no lesser included offense and a State  
21 saying there is one, but we're not going to allow it to be  
22 charged in a capital case? I think there's a big  
23 distinction between the two.

24 MS. HUTCHINSON: Well, if the State says there  
25 is none, when it's quite obvious there is one, and other

1 areas of Nebraska law require the giving of lessers  
2 without reliance upon lesser included offense analysis,  
3 there's no meaningful distinction. It's an artifice.

4 QUESTION: But when you say it's quite obvious  
5 that there is one, that depends on -- on how you define  
6 lesser included offense, whether that's a Federal -- a  
7 Federal concept -- and there are some -- some logical  
8 rules based upon the elements or upon what's proven at  
9 trial, or whether what's a lesser included offense depends  
10 on whatever the State says is a lesser included offense.  
11 That's a conceivable thing, isn't it?

12 MS. HUTCHINSON: Normally it is. But in  
13 Nebraska we have the additional issue of this statute that  
14 says homicide is but one offense. And in one case, State  
15 v. Vosler, they say we're not constrained by the  
16 traditional lesser included offense analysis when it comes  
17 to homicide because of 29-2027.

18 QUESTION: Yes, but we've already gotten over  
19 that, because the -- because the -- General Stenberg said  
20 sexual assault is a lesser included offense, so it's not a  
21 situation, as in Beck, where you could not charge any  
22 lesser included offense. The State there said, yes, it is  
23 a lesser included offense, but we have a statute that  
24 says, in murder cases, you don't -- the concept is off the  
25 books in murder cases. So there wasn't any quarrel about



1 whether it was a lesser included offense. Here that seems  
2 to be what this is all about, whether it is a lesser  
3 included offense.

4 MS. HUTCHINSON: Well, the -- the question in  
5 Beck, really, is the State allowed to erect some  
6 artificial barrier to the giving of lesser offenses when  
7 they otherwise would be allowable to State law? There's a  
8 subset of homicide that's capital murder and a subset of  
9 that that's felony murder. And -- and here we don't give  
10 lessers, but everywhere else we do.

11 Manslaughter, under the traditional statutory  
12 elements test, can be considered a -- a lesser included  
13 offense of second degree murder, but it's routinely given  
14 in homicide cases. The reason for that is 2027. The  
15 Nebraska Supreme Court has never explained why 2027  
16 doesn't apply in felony murder cases. And the statutory  
17 rules of construction are the same in Nebraska as  
18 elsewhere. Statutes are to be read in pari materia, and  
19 one not read so as to abrogate the other. And in fact  
20 the -- 2027 has been abrogated by this little wildcard in  
21 Nebraska law that says we don't instruct on lesser degrees  
22 of homicide when the offense charged is felony murder.

23 It's -- it's -- it's artificial and it's  
24 arbitrary. And it creates the --

25 QUESTION: Well, because we know -- we know that

1 the precise question before us has not been answered by  
2 the Nebraska Supreme Court, would it be appropriate to --  
3 to use their certification procedure to say this category,  
4 unintentional manslaughter, did you mean that you couldn't  
5 charge that, together with a felony, as a lesser included  
6 offense? Why shouldn't the Nebraska Supreme Court be the  
7 first one to answer that precise question?

8 MS. HUTCHINSON: There's no reason, Your Honor.  
9 But there's no reason not to use the State certification  
10 procedure. The answer to that has to be --

11 QUESTION: I think you've answered the question,  
12 Ms. Hutchinson. Thank you.

13 General Stenberg, you have 1 minute remaining.

14 REBUTTAL ARGUMENT OF DONALD B. STENBERG

15 ON BEHALF OF THE PETITIONER

16 GENERAL STENBERG: Thank you, Your Honor. I  
17 just have a couple of brief points.

18 The question here is not whether the Nebraska  
19 Supreme Court should be overruled on a question of State  
20 law. The question is where there are no lesser included  
21 homicide offenses under State law, does the Federal  
22 Constitution, nevertheless, require that the jury be  
23 instructed on lesser related offenses?

24 I'd like to clear up, very briefly, this  
25 question on the difference between first and second degree

1 sexual assault. The only difference is what the person is  
2 intending to do. In the case of first degree sexual  
3 assault, it's an intent for penetration. In the second --

4 CHIEF JUSTICE REHNQUIST: Thank -- thank you,  
5 General Stenberg.

6 GENERAL STENBERG: Thank you, Your Honor.

7 CHIEF JUSTICE REHNQUIST: The case is submitted.

8 (Whereupon, at 12:04 p.m., the case in the  
9 above-entitled matter was submitted.)  
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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

FRANK X. HOPKINS, WARDEN, Petitioner v. RANDOLPH K. REEVES, Respondents.  
CASE NO: 96-1693

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedirko-----

(REPORTER)