# Supreme Court of Florida

No. 66,855

STATE OF FLORIDA, Petitioner,

vs.

NICHOLAS VANCE FURR, Respondent.

[JULY 17, 1986]

PER CURIAM.

This cause is before us on a petition to review Furr v. State, 464 So. 2d 693 (Fla. 2d DCA 1985), in which the district court held (1) that second-degree depraved mind murder is a lesser included offense of first-degree felony murder and (2) that the respondent, Furr, cannot be convicted for first-degree felony murder and the underlying felony of armed robbery. We find that, while the holding on the first issue is consistent with our decision in Linehan v. State, 476 So. 2d 1262 (Fla. 1985), the district court's holding on the second issue directly conflicts with our decision in Enmund v. State, 476 So. 2d 165 (Fla. 1985). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Consistent with these recent decisions, we approve the decision of the district court with regard to the first Linehan issue and quash the decision with regard to the second Enmund issue. We remand this cause for further proceedings in accordance with Enmund.

It is so ordered.

McDONALD, C.J., and BOYD, OVERTON and EHRLICH, JJ., Concur on the first issue
SHAW, J., Concurs in part and dissents in part with an opinion on the first issue
ADKINS and BARKETT, JJ., Dissent on the first issue

McDONALD, C.J., and BOYD, EHRLICH and SHAW, JJ., Concur on the second issue
OVERTON, J., Concurs in part and dissents in part with an opinion on the second issue
ADKINS and BARKETT, JJ., Dissent on the second issue

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SHAW, J., concurring in part and dissenting in part.

I concur that convictions for both first-degree felony murder and the predicate felony are permissible.

I dissent from the holding that second-degree depraved-mind murder is a lesser included offense of first-degree felony murder. Each offense contains a statutory element not present in the other and thus each is a separate offense. Neither the state nor the defendant is entitled to a jury instruction on an offense which is not contained in the charging instrument and is not a lesser included offense. See § 775.021(4), Fla. Stat. (1983) and Linehan v. State, 476 So.2d 1262, 1266 (Fla. 1985)(Shaw, J., dissenting).

OVERTON, J., concurring in part, dissenting in part on second issue.

I agree with the Court's disposition of this cause on the first issue, but, for the reasons expressed in my dissent in Enmund v. State, 476 So. 2d 165 (Fla. 1985), I dissent from the disposition of the second issue in this cause.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Second District - Case No. 84-613

Jim Smith, Attorney General and Ann Garrison Paschall, Assistant Attorney General, Tampa, Florida,

for Petitioner

James Marion Moorman, Public Defender and John T. Kilcrease, Jr., Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Respondent