

To: Chairman Owens and the Senate Judiciary Committee
From: Steve Howe, Johnson County District Attorney
Date: January 24, 2012

Re: **Testimony in support of SB 307**

Chairman Owens and Members of the Judiciary Committee:

Thank you for this opportunity to present testimony on SB307. My name is Steve Howe and I am the District Attorney in Johnson County, Kansas. I am here today testifying in support of SB 307 on behalf of the Kansas County and District Attorneys Association.

The Kansas Supreme Court recently reversed a first-degree felony murder conviction for failure to instruct on lesser included offenses of second-degree reckless murder, involuntary manslaughter, and vehicular homicide. In *State v. Berry*, 292 Kan. 493, Syl. ¶5, 254 P.3d 1276 (2011), the court ruled these were a lesser degrees of the same crime and applied K.S.A. 22-3414 as written to felony murder cases. The Berry court reversed years of well-settled precedent that had previously required lesser included homicide instructions in felony-murder cases only when evidence of the underlying felony was "weak, inconclusive, or conflicting." The Court stated this new rule will impact felony murder cases currently pending in district court and those currently on appeal.

The Supreme Court blamed its sudden change in the law on the Kansas Legislature. The Court abandoned the judicially-created felony-murder instruction rule and stated, "Lesser included offense jury instructions are governed by K.S.A. 22-3414(3). It directs that instructions must be given when there is some evidence that would reasonably justify a conviction of some lesser included crime." *State v. Berry*, 292 Kan. 493 at Syl. ¶ 2. The Court stated the legislative mandate in K.S.A. 22-3414 made no allowance for the Court's felony-murder instruction rule.

This ruling reflects the current attitude toward statutory interpretation of the Kansas Supreme Court, which stated in another case where the language of the statute did not mesh with the case law:

We recognize that the result we reach today is unlikely to be what the legislature would have intended to occur. However, "[n]o matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct." *State v. Horn*, 291 Kan. 1, 12, 238 P.3d 238 (2010).

The initial version of Senate Bill 307 attempts to restore the law as it existed prior to *Berry* by including this "weak or inconclusive" language. But, this "weak or inconclusive" language should be deleted from SB 307. It is confusing and gives trial courts little direction as to when to instruct on lessers.

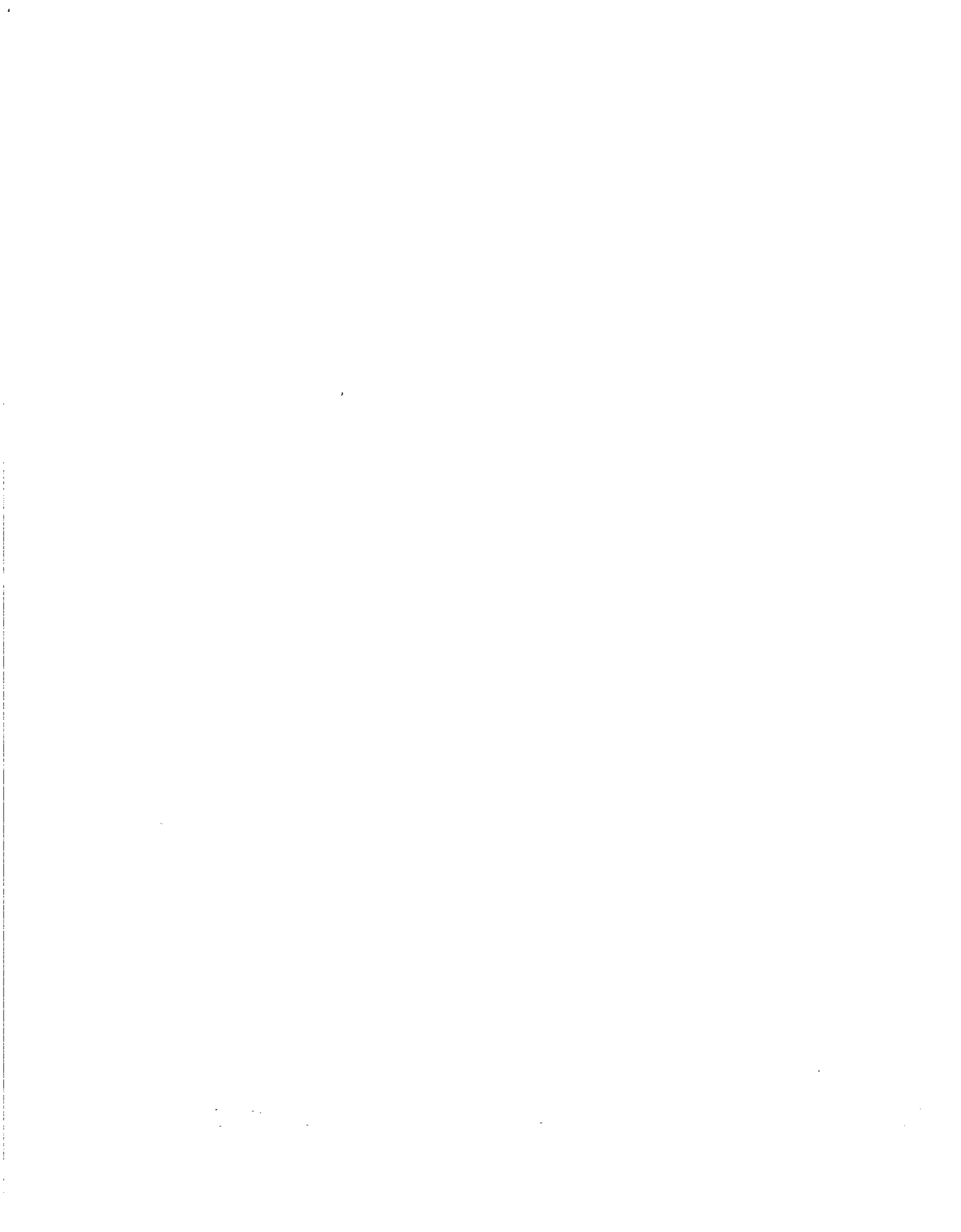
I am therefore proposing the following amendment to SB 307. SB 307 should simply state that there are no lesser homicides that should be instructed in felony murder cases. This is clearly reflected in the amendment to K.S.A. 21-5109, the statute that defines lesser included crimes.

Senate Bill 307 will clarify the law of lesser included offenses in felony murder cases. The KCDAA respectfully request the Senate Judiciary to support this amended version of SB 307.

Thank you for this opportunity and I will stand for any questions.

Sincerely,

Stephen M. Howe
Johnson County District Attorney



AN ACT concerning criminal procedure; relating to jury instructions; lesser included crimes; murder in the first degree; amending K.S.A. 2011 Supp. 21-5109 and K.S.A. 2011 Supp. 22-3414 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

1 Section 1. K.S.A. 2011 Supp. 21-5109 is hereby amended to read as follows:

2 (a) When the same conduct of a defendant may establish the commission of more than
3 one crime under the laws of this state, the defendant may be prosecuted for each of
4 such crimes. Each of such crimes may be alleged as a separate count in a single
5 complaint, information or indictment.

6 (b) Upon prosecution for a crime, the defendant may be convicted of either the crime
7 charged or a lesser included crime, but not both. A lesser included crime is:

8 (1) A lesser degree of the same crime, *except there are no lesser degrees of felony*
9 *murder as defined in K.S.A. 2011 Supp. 21-5102(a)(2);*

10 (2) a crime where all elements of the lesser crime are identical to some of the
11 elements of the crime charged;

12 (3) an attempt to commit the crime charged; or

13 (4) an attempt to commit a crime defined under paragraph (1) or (2).

14 (c) Whenever charges are filed against a person, accusing the person of a crime which
15 includes another crime of which the person has been convicted, the conviction of the
16 lesser included crime shall not bar prosecution or conviction of the crime charged if
17 the crime charged was not consummated at the time of conviction of the lesser
18 included crime, but the conviction of the lesser included crime shall be annulled upon
19 the filing of such charges. Evidence of the person's plea or any admission or
20 statement made by the person in connection therewith in any of the proceedings
21 which resulted in the person's conviction of the lesser included crime shall not be
22 admissible at the trial of the crime charged. If the person is convicted of the crime
23 charged, or of a lesser included crime, the person so convicted shall receive credit
24 against any prison sentence imposed or fine to be paid for the period of confinement
25 actually served or the amount of any fine actually paid under the sentence imposed
26 for the annulled conviction.

27 (d) Unless otherwise provided by law, when crimes differ only in that one is defined
28 to prohibit a designated kind of conduct generally and the other to prohibit a specific
29 instance of such conduct, the defendant:

30 (1) May not be convicted of the two crimes based upon the same conduct; and

31 (2) shall be sentenced according to the terms of the more specific crime.

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1 Section 2. K.S.A. 2011 Supp. 22-3414 is hereby amended to read as follows:

2 ~~(1)~~(a) The prosecuting attorney shall state the case and offer evidence in support of
3 the prosecution. The defendant may make an opening statement prior to the
4 prosecution's offer of evidence, or may make such statement and offer evidence in
5 support of such statement after the prosecution rests.

6 ~~(2)~~(b) The parties may then respectively offer rebutting testimony only, unless the
7 court, for good cause, permits them to offer evidence upon their original case.

8 ~~(3)~~(c) (1) At the close of the evidence or at such earlier time during the trial as the
9 judge reasonably directs, any party may file written requests that the court instruct the
10 jury on the law as set forth in the requests. The judge shall instruct the jury at the
11 close of the evidence before argument and the judge, in the judge's discretion, after
12 the opening statements, may instruct the jury on such matters as in the judge's opinion
13 will assist the jury in considering the evidence as it is presented.

14 (A) *Except as provided further*, in cases where there is some evidence which would
15 reasonably justify a conviction of some lesser included crime as provided in
16 subsection (b) of K.S.A. 2011 Supp. 21-5109, and amendments thereto, the judge
17 shall instruct the jury as to the crime charged and any such lesser included crime.

18 (B) *Except as provided further, the provisions of this subsection and of Section 1*
19 *shall be applied retroactively to any charge or conviction under subsection (b) of*
20 *K.S.A. 21-3401, prior to its repeal, in any legal challenge or proceeding that comes*
21 *before a district court or an appellate court. In cases where the charge was first*
22 *degree murder under subsection (b) of K.S.A. 21-3401, prior to its repeal, or under*
23 *subsection (a)(2) of K.S.A. 2011 Supp. 21-5402, and amendments thereto, the judge*
24 *instructed the jury on a lesser included crime and the defendant was convicted of a*
25 *lesser included crime in lieu of the crime charged between July 1, 2011, and July 1,*
26 *2012, the retroactivity provision of this subsection shall not be used as the basis for*
27 *setting aside, reversing or vacating such conviction.*

28 (2) The court shall pass upon the objections to the instructions and shall either give
29 each instruction as requested or proposed or refuse to do so, or give the requested
30 instruction with modification. All instructions given or requested must be filed as a
31 part of the record of the case.

32 (3) The court reporter shall record all objections to the instructions given or refused
33 by the court, together with modifications made, and the rulings of the court.

34 (4) No party may assign as error the giving or failure to give an instruction, including
35 a lesser included crime instruction, unless the party objects thereto before the jury
36 retires to consider its verdict stating distinctly the matter to which the party objects
37 and the grounds of the objection unless the instruction or the failure to give an
38 instruction is clearly erroneous.

39 Opportunity shall be given to make the objections out of the hearing of the jury.

1 (4) (d) When the jury has been instructed, unless the case is submitted to the jury on
2 either side or on both sides without argument, the prosecuting attorney may
3 commence and may conclude the argument. If there is more than one defendant, the
4 court shall determine their relative order in presentation of evidence and argument.
5 In arguing the case, comment may be made upon the law of the case as given in the
6 instructions, as well as upon the evidence.

7 Sec. 3. K.S.A. 2011 Supp. 22-3414 are hereby repealed.

8 Sec. 4. This act shall take effect and be in force upon publication in the statute book.
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